

Older Persons Act: Out with the old and in the with the older?¹

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1 INTRODUCTION

In 2001 the Ministerial Report on Abuse, Neglect and Ill-treatment of Older Persons ('Mothers and Fathers of the Nation: The Forgotten People'²) gave horrific accounts of older persons suffering neglect and abuse in residential care, in their communities and in their family homes. The long-awaited Older Persons Bill 68 of 2003 and the resultant Older Persons Act 13 of 2006 promised to provide the regulatory framework within which older persons would receive the care and protection they deserve.

The aim of this article is to trace the legislative and policy developments from the Aged Persons Act of 1967 up to the Older Persons Act 13 of 2006. The Older Persons Act is compared to the Aged Persons Act to determine whether the former truly can live up to its promise as all-inclusive legislation regulating the protection and care of older persons, or whether it has ended up being merely its predecessor cloaked in more politically correct terms. In particular, it will be argued that the lack of express enforcement mechanisms detracts from the significant advance in the protection of older persons created by the rights-based approach introduced by the Older Persons Act.

2 OLDER PERSONS AND THE RESPONSIBILITY TO CARE FOR THEM

According to the *White Paper for Social Welfare*,³ the state cannot accept sole responsibility for meeting basic socio-economic needs; civil society will have to meet some of the social service needs. Families are regarded as the basic unit of society that will be required to carry some of the responsibility of providing social support.⁴ Social welfare programmes are to be designed to enhance people's independence; therefore state assistance is to be reserved for those unable to support themselves and their dependants.⁵

1 Based on a paper delivered at the SLTSA Conference, hosted by UCT 3-6 July 2006.

2 Hereafter referred to as *Mothers and Fathers of the Nation Report*.

3 GN 1108 in GG 18166 of 8 August 1997 19.

4 White Paper (fn 3 above) 20.

5 White Paper (fn 3 above) 16.

This strategy was reaffirmed in the *White Paper for Social Welfare* as far as the State's duty to take care of older persons is concerned. It stated that every individual has the personal responsibility to provide for his or her own retirement and old age. Failing this, the family is viewed as the core of the support systems of the elderly. The state's only remaining role is therefore to provide for the needs of the disadvantaged, destitute and frail older persons who required 24-hour care and who do not have the financial resources to meet their own needs.⁶ Older persons who do not fall within these categories will be required to depend on their families for assistance and care.⁷

Assuming then that it is the family's responsibility to take care of older family members, should they not be able to rely on assistance from the state? Currently the only statutory assistance available to families caring for the elderly in the family home is the grant-in-aid paid to the older person in terms of the Social Assistance Act.⁸ A person eligible for the older person's grant, and who requires regular attendance by another person owing to his or her physical or mental condition, can receive the grant-in-aid in addition to the older person's grant.⁹ The grant-in-aid is therefore only a supplementary grant and is never paid on its own. If the state already provides care in an institution, or pays a subsidy for the older person's care and housing, a grant-in-aid is not payable.¹⁰ This arrangement aims to encourage older persons to stay in their homes as long as possible, but whether this object can be met through a grant that pays only a nominal amount¹¹ is open to discussion.

3 THE AGED PERSONS ACT¹²

The original aim of the Aged Persons Act was to protect aged¹³ white persons who were living in private boarding houses in unsatisfactory conditions. The main object was to provide for the establishment and registration of residential homes that would receive generous subsidies from government for offering safe accommodation and care for mainly white older persons.¹⁴ According to the *Mothers and Fathers of the Nation Report*, many organisations abused this arrangement and subsequently changed the use of the homes built with

⁶ White Paper (fn 3 above) 71.

⁷ A common law reciprocal duty to support each other exists between parents and children. Therefore children have a duty to support their parents. The parent's need and the child's ability to support are criteria that are taken into consideration: Van Zyl *Handbook of the South African law of maintenance* 2 ed (2005) 12.

⁸ Act 13 of 2004.

⁹ S 12 Social Assistance Act 13 of 2004.

¹⁰ Regulation 8(3) GNR 162 of 22 February 2005.

¹¹ At present the grant-in-aid is an additional R150 per month.

¹² Act 81 of 1967 (as amended by the Aged Persons Amendment Act 100 of 1998).

¹³ An aged person for the purposes of the Aged Persons Act was defined as a male of 65 years and older or a female of 60 years and older. The same definition for an 'older person' is used in the Social Assistance Act 13 of 2004 (s 10). The age differentiation in terms of which men and women qualify for the older person's grant led to a challenge in 2005 in the Pretoria High Court. The court was asked to amend the Social Assistance Act in order that the qualifying age for both men and women could be equalised at 60. The outcome of this case will also be of great significance for older persons seeking protection in terms of the Older Persons Act. See also Kruger "Come back when you are 65, Sir." *Discrimination in respect of access to social assistance for the elderly*, (2006) 10 *LDD* 70.

¹⁴ Draft response to Older Persons Bill by Joint Forum for Policy on Ageing (2005).

government loans or sold them.¹⁵ In addition, unregistered private boarding homes seemed to be on the increase once more¹⁶, indicating that the aims of the Aged Persons Act had not been achieved. Older persons from previously disadvantaged groups had even greater difficulty finding appropriate and affordable residential care.¹⁷

The need for homes for the aged¹⁸ to reflect broadly the race composition of South Africa was addressed by section 3C of the Act.¹⁹ Any person who unfairly discriminates directly or indirectly on illegal grounds against an applicant when determining eligibility for admission to a home was guilty of an offence.²⁰ Section 3C(4) afforded a person who is refused admission to a home for the aged the opportunity to query the reasons for such refusal.²¹

The Aged Persons Act stated the rules according to which homes for the aged were to be established and maintained. In particular, section 3 of the Act prohibited the operation of state-subsidised homes that have not been registered. It also regulated the registration of such homes. In old-age homes with more than 10 aged residents, an elected management committee monitored the management of the home.²²

Sections 6A to 6C of the Aged Persons Act provided for the protection of older persons against abuse. Section 6A obliged dentists, medical practitioners, social workers or other persons who examined, attended to or dealt with an older person to notify the Director-General of Social Development of suspected abuse or injuries.²³ Section 6C made provision for a national register

- 15 A condition of the loans, i.e. that 60% of the residents of homes built with the loans be social pensioners, was therefore disregarded: Executive Summary *Mothers and Fathers of the Nation Report*, paras 1.2 and 1.6.
- 16 Executive Summary *Mothers and Fathers of the Nation Report*, para 1.2.
- 17 See Malherbe 'Inter-generational solidarity and caring for the aged' in Olivier MP, Kalula E, Van Steenberg J, Jorens Y and Van Eeckhoutte W (eds) *The extension of social security protection in South Africa* (2001) 172-3 for the distinction between residential and domiciliary care. This distinction resurfaces in the Older Persons Act as the difference between residential care on the one hand and community-based care and support services on the other: see below at (pg66).
- 18 A home for the aged was defined in s 1 of the Aged Persons Act as 'any institution or other place of residence maintained mainly for the accommodation and care of aged or debilitated persons.' The Act distinguished between state-run homes and state-subsidised homes: s 2. Residents of state-run homes were the sole financial responsibility of the state and therefore did not qualify for any other assistance such as social grants for older persons. There are currently only seven state-run residential homes operating in South Africa: *National Report on the Status of Older Persons* (2002) 39. State-subsidised homes are usually funded by non-governmental organisations and are as a rule not established as profit-making concerns. The state has a measure of control over the management of state-subsidised homes in that it regulates the registration of such homes, as well as the management of the homes. S 3B of the Aged Persons Act provided for the monitoring of homes by management committees.
- 19 S 3C was inserted by the Aged Persons Amendment Act 100 of 1998.
- 20 S 3C(2).
- 21 S 3C(4) did not state the remedies available to an applicant who was refused admission and was not satisfied with the reasons given for the refusal, if a reason for refusal was not one of the prohibited grounds for discrimination referred to in s 3C(1).
- 22 The composition of the management committee had to be representative of the residents and staff of the home and the public in general: s 3B(2).
- 23 Although mention was made of 'any other person who ... deals with' an older person, the main emphasis of s 6A was on the obligation of persons dealing with older persons in their professional capacity to report suspected abuse. For this reason s 26 of the Older Persons Act is a vast improvement as it creates an obligation for 'any person' who suspects abuse of an older person, to report such suspected abuse.

of all notifications of suspected abuse and injuries in terms of section 6A. The abuse of older persons was made an offence by section 6B and any person who abused an older person was liable upon conviction to a fine or to imprisonment for a maximum period of five years, or both a fine and imprisonment. A person providing accommodation to an older person in circumstances likely to be injurious to the older person's physical or mental well-being could be issued with a summons to appear before a designated body appointed by the Minister of Social Development. On a finding that the allegations against the person were correct, the designated body could either prohibit the person from accommodating or caring for the older person in question or from accommodating or caring for any older person for a period not exceeding ten years to be determined by the designated body.²⁴ Although these provisions appeared to be adequate in preventing alleged or convicted abusers to continue caring for older persons, the incidences of abuse by caregivers reported in the *Mothers and Fathers of the Nation Report* seemed to reflect a different reality.

4 LIMITATIONS OF THE AGED PERSONS ACT

The provisions of the Aged Persons Act focused only on residential care with no mention being made of older persons staying at home or with families. In reality, the majority of South African older persons live in communities, with their families or alone.²⁵

Many of the old-age homes that were available were used and occupied largely by whites. Statutory protection that focused only on older persons in residential care consequently excluded older persons in population groups that by and large were unable to gain access to residential care, either because of lack of residential homes in their area or because they could not afford the available care.²⁶ Attempts to redress this racial disparity, as in section 3C of the Aged Persons Act, were therefore not sufficient.

The *Mothers and Fathers of the Nation Report* recorded a vast number of instances of abuse and neglect of older persons. It seems as if abuse of older persons was prevalent despite the measures to combat such abuse contained in the Aged Persons Act, partly because a great deal of the cases of abuse reported occurred in family homes or at pension pay-points, placing them outside the scope of protection provided by the Act. But, judging by the prevalence of abuse, neglect and ill-treatment in residential homes²⁷, the Aged Persons Act also seemed unable to protect residents of these homes. This

24 S 6 (10) as amended by the Aged Persons Amendment Act 100 of 1998. See Asher A and Olivier M 'Old Age' in Olivier MP, Smit N & Kalula E (eds) *Social security: A legal analysis* (2003) 257.

25 Submission by Action on Elder Abuse South Africa in the Report of the Portfolio Committee on Social Development on Public Hearings on the Older Persons Bill [B68B-2003].

26 According to the *Mothers and Fathers of the Nation Report*, there had been a lack of transformation in homes for the aged, with most homes still situated in white areas and having few black residents: Executive summary *Mothers and Fathers of the Nation Report*, par 1.11.

27 E.g. psychological abuse in the form of restricted contact between residents and their families, and theft of the residents' possessions: para 1.4 and 1.10 of the *Mothers and Fathers of the Nation Report*.

could be seen as a result of the limited sanctions against abuse in residential homes contained in the Act.²⁸

The Committee therefore recommended the enactment of comprehensive new legislation on the status of older persons.

5 OLDER PERSONS ACT: THE LEGISLATIVE PROCESS

The process to finalise the promised new comprehensive legislation on older persons has been lengthy, to say the least.

The first draft appeared in 2000, but many of the groundbreaking provisions of the draft were omitted from the tabled Older Persons Bill²⁹. The Older Persons Bill was amended by the National Council of Provinces (NCOP) to become B68B-2003.³⁰ Great dissatisfaction from various quarters ensued due to the fact that the watered down versions of the Bill did not reflect the admirable aim of the legislation, stated as being 'to deal effectively with the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of their status, rights, well-being, safety and security'. The Portfolio Committee on Social Development held public hearings on B68B-2003 in August 2005 and invited submissions by interested parties.³¹ The result of this process was B68D-2003 which is discussed in more detail below. Unfortunately the revised Bill was rejected by the NCOP.³² As a result the mediation process in terms of section 76³³ of the Constitution was initiated. The end result of this protracted process was the Older Persons Act 13 of 2006.

6 PROVISIONS OF THE OLDER PERSONS ACT

6.1 Rights-based approach

The main distinguishing factor between the Aged Persons Act and the Older Persons Act is the rights-based approach followed by the latter. The focus of the Older Persons Act is therefore on the realisation of older persons' constitutional rights rather than the regulation and monitoring of residential homes.

The South African Constitution³⁴ sets out the rights of all South Africans in its Bill of Rights, of which many provisions are applicable to older persons. Included among these are the following:

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- 28 Individuals who were convicted of abuse could be fined or imprisoned: s 6B. The Act lacked remedies against the owners and operators of homes where older persons were abused; the only available sanction was to stop subsidies and/or de-register the home: Executive summary *Mothers and Fathers of the Nation Report*, par 1.3.
- 29 B68-2003 of 13 August 2003.
- 30 In June 2005.
- 31 See Report of the Portfolio Committee on Social Development on Public hearings on the Older Persons Bill dated 9 September 2005.
- 32 According to the minutes of the Social Development Portfolio Committee, 14 June 2006, this specific version of the Bill had been rejected by the NCOP because two lines of a section of the Bill had been omitted due to a technicality: www.pmg.co.za.
- 33 The parliamentary process through which Bills that have an impact on provinces must go before they can be passed by Parliament and become law is prescribed by s 76 of the Constitution. The mediation process is outlined in s 76(1)(d)-(k).
- 34 Original Act 108 of 1996.

- Section 9 prohibits unfair discrimination against anyone on the basis of age.
- Older persons have the right to have their dignity respected and protected.³⁵
- Provision is made for the rights to bodily and psychological integrity³⁶ and to freedom from all forms of violence.³⁷
- Section 26 provides for the right of access to adequate housing.
- Everyone, including older persons, has the right to have access to food, water and social security.³⁸

The state must respect, protect, promote and fulfil the rights in the Bill of Rights.³⁹

The Older Persons Act aims to maintain and protect the rights of all older persons.⁴⁰ To ensure that the Act is in line with policy documents, more emphasis is placed on community care for older persons, thus departing from the previous focus on the regulation of residential care.⁴¹

The preamble to the Older Persons Act reiterates the need for existing laws on older persons to change 'in order to facilitate accessible, equitable and affordable services to older persons'. This is therefore in line with what was called for by policy documents such as the *Mothers and Fathers of the Nation Report* and the *National Report on the Status of Older Persons*.⁴²

Chapter 1 of the Older Persons Bill B68-2003 followed on from the preamble which stated that it was necessary to 'empower older persons to continue to live meaningfully and constructively in a society that recognises them as important sources of enrichment and expertise', and provided for the development and support of inter-sectoral⁴³ programmes for the development of older persons.

35 S 10.

36 S 12(2).

37 S 12(1)(c).

38 S 27.

39 S 7(2).

40 The objects of the Older Persons Act are stated in s 2 to be to—

- (a) maintain and promote the status, well-being, safety and security of older persons;
- (b) maintain and protect the rights of older persons;
- (c) shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;
- (d) regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and
- (e) combat the abuse of older persons.'

41 The question remains whether the provisions of the Act meet these objectives, as the majority of its provisions still focus on residential care.

42 Report to the Second World Assembly on Ageing, Madrid, Spain (April 2002).

43 S 2(1) Older Persons Bill allows for consultation between the Minister of Social Development and any other relevant Minister in the development of such programmes.

As ambitious as the idea of multi-sectoral programmes for the development of older persons might be, in the end and in versions B 68D-2003 to B68F-2003 of the Bill, Chapter 1⁴⁴ as it stood was rejected in its entirety. Many of the programmes for the development of older persons reappeared in the guiding principles for provision of services found in section 9 of the Act, but this appears to be a relegated position compared to the prominent position given to multi-sectoral programmes in the original Bill. Instead, the original Chapter 1 has been replaced by provisions that state the objects of the Act, reiterate the rights-based approach to providing for older persons⁴⁵ and stipulate the guidelines for future proceedings, actions and decisions concerning older persons. The emphasis of the Act thus changed from empowering older persons through multi-sectoral programmes to the protection of the rights of older persons.

The rights of older persons are to be the basis for all future proceedings, actions and decisions concerning older persons, as can be seen from section 5(2). The important guidelines in any such proceedings, actions and decisions are

- to respect, promote, protect and fulfil older persons' rights;
- the best interests of the older person concerned;
- to respect the older person's dignity;
- fair and equitable treatment of older persons; and
- the protection of older persons against unfair discrimination.

44 Chapter 1 of B68-2003 provided as follows:

'Programmes for development of older persons

2. (1) The Minister may, in consultation with any other relevant Minister—
 - (a) develop programmes contemplated in subsection (2) or cause such programmes to be developed; and
 - (b) support any person who runs programmes contemplated in subsection (2).
- (2) The programmes referred to in subsection (1) are programmes aimed at —
 - (a) the recognition of the social, cultural, economic and political contribution of older persons;
 - (b) the participation of older persons in decision-making processes at all levels;
 - (c) the access of older persons to information, education and training;
 - (d) the development of older persons in rural areas;
 - (e) the protection and promotion of the rights of older persons;
 - (f) the establishment of norms and standards for companies selling funeral policies and extending loans to older persons;
 - (g) the utilisation and management of existing facilities for older persons as multi-purpose community centres and the development of an integrated community care and support system;
 - (h) the provision of basic affordable accommodation for older persons;
 - (i) the provision of care and services to older persons in rural areas and in disadvantaged communities;
 - (j) the access of older persons to health, welfare and other care and support systems in order to enable older persons to maintain or regain their optimal level of physical, mental and emotional well-being and live with dignity in the community;
 - (k) the establishment of a national research plan and communication network on ageing;
 - (l) the creation of employment opportunities for older persons;
 - (m) the establishment of recreational opportunities for older persons;
 - (n) the exemption of older persons from the payment of property rates and taxes; and
 - (o) the availability and accessibility of free or subsidised public transport facilities for older persons.'

45 S 4.

Ultimately it is the inclusion of these guidelines that makes the Older Persons Act different from preceding legislation.

6.2 Securing an enabling and supportive environment for older persons

Chapter 2 of the Act aims to create an enabling and supportive environment for older persons. As a start, national norms and standards to determine service levels as well as monitoring systems will be applied to all services provided to older persons.⁴⁶ It was hoped that applying uniform standards nationally would ease the existing disparities in services and resources between provinces.

The inclusion of a provision such as section 7, which enumerates the instances where discrimination against older persons is prohibited, underscores the importance of respect for rights to create a supportive environment for older persons.⁴⁷ The difficulty with this provision does not lie in its laudable aims but in the text itself, which seems rather vague and presents interpretation problems. It states that:

Older persons enjoy the rights contemplated in section 9 of the Constitution of the Republic of South Africa and in particular may not be unfairly denied the right to—

- (a) participate in community life in any position appropriate to his or her interests and capabilities;
- (b) participate in inter-generational programmes;
- (c) establish and participate in structures and associations for older persons;
- (d) participate in activities that enhance his or her income-generating capacity;
- (e) live in an environment catering for his or her changing capacities; and
- (f) access opportunities that promote his or her optimal level of social, physical, mental and emotional well being.⁴⁸

Assuming that the abovementioned activities and programmes that older persons may not be denied access to actually exist, it is unclear whether this section merely provides protection to older persons as a group against discrimination on the ground of age or also extends protection to older individuals who may face discrimination on other prohibited grounds.

Section 7 must, however, be read in the context of the prohibition of discrimination in terms of section 9 of the Constitution, the relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act ('the Equality Act')⁴⁸ and the preamble to the Older Persons Act.⁴⁹

⁴⁶ S 6.

⁴⁷ Submission on Older Persons Bill by Joint Forum for Policy on Ageing (2005) 7.

⁴⁸ Act 4 of 2000.

⁴⁹ The preamble to the Older Persons Act requires the State to 'create an enabling environment in which the rights in the Bill of Rights must be respected, protected and fulfilled'.

Section 9 of the Constitution (the ‘equality clause’) states that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.⁵⁰ Section 9(3) prohibits unfair discrimination by the state ‘on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’. Section 9(4) prohibits individual discrimination against anyone on one or more grounds in terms of subsection (3)⁵¹. Section 9(5) states that discrimination on one or more of the grounds listed in subsection (3) is unfair unless the person involved or the state can show why the discrimination is fair.

In terms of section 9, discrimination against any older person on the grounds of age would be regarded as unfair discrimination unless the respondent can show that it is fair. Discrimination against any older person on other prohibited grounds such as race or gender will also be unfair discrimination unless the contrary is proven.⁵² Section 7 of the Older Persons Act thus gives effect to section 9 of the Constitution by listing specific instances of prohibited discrimination.

The Older Persons Act does not, however, provide any mechanisms to enforce the section 7 rights of older persons. It would therefore appear that the only remedies available to an older person who has been unfairly denied his or her section 7 rights are common law remedies such as an interdict or a declaratory order. It is submitted that due to the difficulties experienced in the enforcement of anti-discrimination law,⁵³ the common law remedies are not always suitable for the needs of older persons and that alternative remedies should be investigated.⁵⁴ One such alternative enforcement mechanism is access to the Equality Court in terms of the Equality Act.

50 S 9(1).

51 S 9(4) also requires that national legislation be enacted to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘the Equality Act’) is one such piece of legislation: see below at pg 62.

52 See the unfair discrimination jurisprudence of the Constitutional Court: in particular, *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

53 Albertyn C, Goldblatt B and Roederer C (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 16 explain the difficulties presented in the enforcement of anti-discrimination laws in other jurisdictions as follows:

‘Firstly, because discrimination claims often involve complicated statistical and sociological evidence (that is usually not in the hands of the complainant); secondly, because the courts are not necessarily accessible to disadvantaged groups; and thirdly, because individual remedies often do not address the underlying systemic causes of discrimination. An effective enforcement mechanism requires accessible institutions and procedures, combined with innovative and flexible remedies that can address individual victims as well as more systemic and societal problems of discrimination and inequality.’

It is suggested that the same difficulties present themselves in the South African context.

54 In particular, the costs and delays involved in High Court proceedings, e.g. the backlog for 2005 of 1 121 cases in the High Court (Legalbrief Today 7 August 2006 www.legalbrief.co.za) and a delay of up to two years to get cases on the roll in certain of its divisions (Justice and Constitutional Development Portfolio Committee ‘Case backlog reduction strategy and e-Scheduler: Briefing’ 30 January 2007 www.pmg.co.za) may discourage older persons from pursuing the common law remedies.

The Equality Act provides protection against unfair discrimination in general by the state or any other person and prohibits unfair discrimination by any person against any other person on the grounds of race, gender and disability in particular.⁵⁵ Particular instances of prohibited discrimination on the ground of race listed in section 7 of the Equality Act include

- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.⁵⁶

The rights protected by section 7 of the Older Persons Act correspond with the abovementioned instances of prohibition of unfair discrimination on the ground of race. The denial of access to opportunities, or failing to take steps to reasonably accommodate the needs of older persons, on the ground of race would therefore be a contravention of both section 7 of the Equality Act and section 7 of the Older Persons Act.

Similarly, there are some instances of prohibited discrimination on the grounds of gender and sex that correspond with the rights of older persons listed in section 7 of the Older Persons Act, such as the prohibition of

- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;...
- (g) limiting women's access to social services or benefits, such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.⁵⁶

Denying older persons access to opportunities, or failing to take steps to reasonably accommodate the needs of older persons, on the ground of gender would consequently be a contravention of both section 8 of the Equality Act and section 7 of the Older Persons Act.

The Equality Act further provides that, once it is *prima facie* established that discrimination on a prohibited ground (including age)⁵⁷ has occurred, the discrimination is deemed to be unfair unless the respondent can prove other-

55 Ss 6-9. Ss 10-12 also prohibit hate speech, harassment and the dissemination and publication of information that unfairly discriminates against any person.

56 S 8 Equality Act.

57 'Prohibited grounds' are defined in s 1 of the Equality Act as-

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground-
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).'

wise.⁵⁸ Section 14 of the Equality Act states three sets of factors that have to be taken into account in determining whether discrimination is unfair.⁵⁹

Any person may institute proceedings in terms of the Equality Act by notifying the clerk of an Equality Court⁶⁰ of their intention to do so. The matter is then referred to the presiding officer of the Equality Court to decide whether that court or an alternative forum would be appropriate for hearing the case.⁶¹ The factors that the presiding officer should take into account in making such a decision include the personal circumstances as well as the needs and wishes of the parties, particularly the complainant.⁶²

The Equality Act offers complainants who can prove that unfair discrimination has taken place a variety of remedies in addition to an interdict or declaratory order. Depending on the circumstances of the case, a court may make a settlement between the parties an order of court⁶³ or may order compensatory damages⁶⁴ or punitive damages payable to an appropriate body or organisation. It may also make an order

- that the specific opportunities and privileges that were unfairly denied be made available to the complainant;⁶⁵
- requiring implementation of special measures to address the unfair discrimination in question;⁶⁶
- requiring the reasonable accommodation of a group or class or persons by the respondent;⁶⁷

58 S 13.

59 These include:

- The context in which the discrimination occurred;
- A list of criteria in s 14(2), such as–
 - (a) Whether the discrimination impairs or is likely to impair human dignity;
 - (b) the impact or likely impact of the discrimination on the complainant;
 - (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a groups that suffers from such patterns of disadvantage;
 - (d) the nature and extent of the discrimination;
 - (e) whether the discrimination is systemic in nature;
 - (f) whether the discrimination has a legitimate purpose;
 - (g) whether and to what extent the discrimination achieves its purpose;
 - (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
 - (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to–
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.'
- Whether the discrimination constitutes reasonable and justifiable differentiation between persons 'according to objectively determinable criteria, intrinsic to the activity concerned': s 14(2)(c).

See Albertyn C, Goldblatt B and Roederer C (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (2001)* 26-49 for more on the enquiry into unfairness of discrimination.

60 Special courts within the High Court and designated Magistrates' Courts – s 16.

61 S 20(3).

62 S 20(4).

63 S 21(2)(c).

64 S 21(2)(d).

65 S 21(2)(g). This remedy will be of particular importance for older persons unfairly denied the right to participate in programmes and access opportunities.

66 S 21(2)(h). This provides older persons who have been unfairly denied the right to participate in programmes and access opportunities with a tailor-made remedy for their particular circumstances.

67 S 21(2)(i). This would be a suitable remedy if a whole group of older persons is excluded from programmes or from access to opportunities to promote their well-being.

- directing the respondent to undergo an audit of specific discriminatory policies or practices as determined by the court;⁶⁸
- ‘of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person’;⁶⁹
- directing the respondent to make regular progress reports to the court or a constitutional institution such as the Human Rights Commission on the implementation of the court order;⁷⁰
- directing that the case be handed over for the possible institution of criminal proceedings;⁷¹ and
- payment of any appropriate costs.⁷²

As was stated above, it would depend on the circumstances of each case which of these court orders would be the most suitable remedy where older persons can prove unfair discrimination.

Not only would the remedies in terms of the Equality Act be more suitable to the needs of older persons than the common law remedies, but the expeditious and informal processing of cases is one of the guiding principles in the adjudication of any proceedings instituted in terms of this Act.⁷³

Section 25 of the Equality Act establishes a link between that Act and the Older Persons Act by imposing a duty on the state to enact further legislation that seeks to promote equality.⁷⁴ Section 7 of the Older Persons Act can be regarded as such ‘further legislation’ promoting equality, thus giving effect to section 25 of the Equality Act. The Equality Act also lists unfair practices in certain sectors that are widespread and that need to be addressed.⁷⁵ The state is required to ensure that legislative and other measures are taken to address the listed unfair practices.⁷⁶ The aim of the illustrative list of unfair practices is to assist persons in interpreting their experiences of discrimination for the purpose of bringing a claim under the Equality Act.⁷⁷ Older persons receive particular attention in the list of unfair practices, as both ‘refusing to provide reasonable health services to the elderly’⁷⁸ and ‘failing to reasonably accommodate the special needs of the elderly’⁷⁹ are listed as unfair practices that need to be addressed. These two unfair practices correspond closely with the

68 S 21(2)(k). Such audit of policies or practices would protect other older persons against unfair discrimination similar to that faced by the complainant.

69 S 21(2)(l). In the context of the services provided to older persons court orders suspending or revoking the licence of the respondent constitute a valuable remedy as it could prevent service providers that unfairly discriminate against certain older persons from continuing to provide such a service. (Retirement facilities and community based services have to be registered to operate legally: ss 12, 13 and 18, Older Persons Act).

70 S 21(2)(m).

71 S 21(2)(n).

72 S 21(2)(o).

73 S 4(1)(a).

74 S 25(1)(c)(ii).

75 Schedule to Equality Act read with s 29.

76 S 29(2).

77 S 29.

78 Schedule, part 3(d), an example of discrimination in the health care services and benefits sector.

79 Schedule, para 4(d), an example of discrimination in the housing, accommodation, land and property sector.

section 7 rights of older persons to 'live in an environment catering for his or her changing capacities' and 'access opportunities that promote his or her optimal level of social, physical, mental and emotional well being'.⁸⁰

In summary, the Equality Act offers a variety of remedies, many of which are more suitable to the needs of older persons than, for example, the granting of an interdict, provides for a more informal procedure, and makes specific provision for addressing unfair discrimination against older persons. Therefore an older person (or another person acting on his or her behalf) who has been unfairly denied one of the section 7 Older Persons Act rights would be well advised to lay a complaint of unfair discrimination in the appropriate Equality Court.

6.3 Rights of older persons receiving community-based care and support services

One significant breakthrough which distinguishes the Older Persons Act from earlier versions of the Older Persons Bill⁸¹ is that the call for attention to areas of care for older persons other than residential care finally seems to be answered by Chapter 3, which provides for the regulation of community-based care and support services for older persons.⁸²

In addition to the general rights of older persons, section 10 specifies the rights of older persons receiving community based-care and support services, the most important being the right to reside at home for as long as possible.⁸³ In addition, older persons are afforded the rather more vague rights to 'pursue opportunities for the full development of [their] potential' and to 'benefit from family and community care' and protection 'in accordance with society's system of cultural values'. Although these rights are in line with prior policy statements that designate families and communities as the core support structures for older persons,⁸⁴ the *Fathers and Mothers of the Nation Report* gives such an indictment of the state of 'society's system of cultural values' toward older persons that this system could hardly be regarded as a benchmark for community-based care and services. While it is recognised that cultural diversity in community-based care and support services must be respected and promoted, this should never occur at the cost of the preservation of older persons' dignity.⁸⁵

80 S 7(e) and (f) of the Older Persons Act.

81 B68-2003 and B68B-2003.

82 Community-based programmes are categorised in s 11 as

- prevention and promotion programmes which aim to ensure that the older person can continue to live independently in his or her community; and
- home-based care under which a variety of services are provided to frail older persons in order that they can receive maximum care in the community.

83 S 10(a).

84 See above at (p 54).

85 See *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) for the balance that has to be struck between s 31 of the Bill of Rights (the right to enjoy one's own culture and practise one's own religion) and the core value of human dignity. See also *Prince v The President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231 (CC) on the justifiability of the limitation of cultural and religious rights.

All community-based care and support services have to be registered with the Department of Social Development. Rendering an unregistered community-based care and support service is a criminal offence.⁸⁶ This could therefore have the unintended consequence that, for example, a pastor giving spiritual support to an older person without the church or the pastor being registered might be guilty of an offence.⁸⁷

The Act requires that home-based caregivers must be properly trained and registered.⁸⁸ A code of conduct for home-based caregivers will also regulate this industry.⁸⁹

6.4 Rights of older persons in residential facilities

Respect for the rights of older persons in residential facilities is of the utmost importance in terms of the Older Persons Act. These rights are listed (in addition to the rights that older persons have in terms of the Bill of Rights⁹⁰ and their section 7 rights) as the right to

- (a) appoint a representative to act on his or her behalf;
- (b) have reasonable access to assistance and visitation;
- (c) keep and use personal possessions;
- (d) have access to basic care;
- (e) be informed about the financial status of the residential facility and changes in management;
- (f) participate in social, religious and community activities of his or her choice;
- (g) privacy;
- (h) his or her own physician if he or she can afford it; and
- (i) be given at least 30 days' notice of a proposed transfer or discharge.⁹¹

Neither section 16 nor any other section of the Older Persons Act provides any enforcement mechanisms specifically for the rights of older persons in residential facilities. Where the violation of section 16 rights also amounts to prohibited discrimination against older persons,⁹² the remedies available in the case of unfair discrimination will be available.⁹³ In addition, the Older Persons Act protects older persons against abuse and provides sufferers of

86 Ss 12 and 13.

87 Offering spiritual services is included amongst the objects of prevention and promotion programmes outlined in s 11(2).

88 S 14. All social workers and health care providers involved in home-based care for older persons must also be registered.

89 Section 14(3)(a). The effect of the code of conduct will only become clear once it is prescribed by the Minister. It is suggested that it should at least provide caregivers with guidelines on the rights of older persons, the most important provisions of the Act and their duties in terms of the Act and its regulations.

90 See above at p 58.

91 S 16; s 12 B68-2003.

92 For example, if the older person is denied the opportunity to participate in social, religious and community activities of his or her choice (s 16(f)) based on a prohibited ground such as race or gender.

93 See above at pp 60-66 for a discussion of s 7 of the Older Persons Act and the suggestions regarding remedies available to older persons who have been the victims of unfair discrimination.



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abuse with remedies.⁹⁴ Accordingly, provision is made for remedies for a violation of a section 16 right which also constitutes abuse of an older person.⁹⁵ In the author's opinion the lack of detailed provision of remedies for the remaining section 16 rights, i.e. those rights of older persons in residential facilities that are not related to prohibited discrimination or protection against abuse, detracts from the objects of the Act to maintain and promote the rights as well as the well-being, safety and security of older persons.⁹⁶

7 CONCLUSION

The Older Persons Act may have achieved its goal as far as facilitating accessible, equitable and affordable services to older persons is concerned. Unfortunately the focus is still too much on residential services in respect of the number of sections dedicated to residential services⁹⁷ and the detailed protection offered to residents of these facilities as compared with other older persons.

The state has made it clear that its duty to provide care applies only in the case of indigent and frail older persons who have no family to care for them. In its view, family members should form the core support structure in caring for older persons. Unfortunately many older persons live with family members who cannot cope with the financial burden of caring for an older person. In many cases the older person supports the family with his or her older person's grant. These families are not equipped to care for older family members, with the result that support from the community is vital in protecting older persons against neglect and in many cases, regrettably, abuse. Once again, community organisations cannot lend the support required without some assistance from the state. The sections of the Older Persons Act setting out how community-based care and support services for older persons are to be regulated in future are a noteworthy improvement on the Aged Persons Act. At last there seems to be a clear correlation between policies stating that communities and families should shoulder more of the responsibility of taking care of older persons and the legislation introducing and regulating community-based care and support services. More can be done, however, to bring provision for community-based care and support services on a par with residential services. The Older Persons Act provides for the regulation of residential facilities and broadening of the scope of financial assistance to community organisations to include community-based support programmes and

94 Chapter 5 of the Older Persons Act provides for the protection of older persons against abuse and neglect. These provisions exceed the protection afforded by ss 6 to 6D of the Aged Persons Act and can definitely be regarded as a positive development in the effort to protect older persons. See, in particular, s 27 for the process according to which a person suspected of abusing an older person can be removed from the home or place where the older person resides. Section 31 furthermore requires that a national register be kept of persons convicted of the abuse of an older person, in addition provides that a person whose name appears in such a register will be barred from operating or being employed by any residential facility.

95 Repeated violations of an older person's privacy would, for example, constitute both psychological abuse (as defined in s 30) and a violation of the older person's section 16 right to privacy.

96 S 2 (a) and (b).

97 Ss 16-23.



home-based care. The lack of enforcement mechanisms, however, detracts from the significant advance made by the inclusion of rights of older persons as residents of residential facilities and recipients of community-based or home-based care. Similarly, older persons seeking to enforce their equality rights in terms of section 7 of the Older Persons Act will have to seek their remedies beyond the Older Persons Act.

In conclusion, although the Older Persons Act as a whole compares favourably with its predecessor, there are still some unresolved questions, some of which could potentially be addressed in the still to be drafted regulations to the Act. More serious omissions, such as the lack of enforcement mechanisms for the various sets of rights conferred on older persons, may only be sufficiently remedied by legislative amendments.

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