



# ***The Older Persons Bill***

***Submission by the South African Human Rights Commission to  
the Portfolio Committee of Social Development, National  
Assembly Parliament, 23 August 2005***

# **INDEX**

<b>A</b>	<b>Introduction .....</b>	<b>3</b>
<b>B.</b>	<b>Positive changes that have affected the lives of the elderly since 1994 .....</b>	<b>9</b>
<b>C.</b>	<b>Challenges confronting the elderly .....</b>	<b>12</b>
<b>D.</b>	<b>The Older Persons Bill .....</b>	<b>17</b>
<b>E.</b>	<b>Definitions .....</b>	<b>20</b>
<b>F.</b>	<b>Chapter 1 – Programmes for the Development of Older Persons .....</b>	<b>34</b>
<b>G.</b>	<b>Chapter 2 – Ensuring an enabling and supportive environment for Older Persons .....</b>	<b>47</b>
<b>H.</b>	<b>Chapter 3 – Protection for Older Persons .....</b>	<b>58</b>
<b>I.</b>	<b>Final Comments .....</b>	<b>75</b>

## **A. Introduction**

The South African Human Rights Commission (SAHRC) has been actively monitoring the drafting of the Older Persons Bill. This has included liaising with the National Department for Social Development and participating in various meetings with organizations and other chapter 9 institutions who are interested in the Older Persons Bill. During 2003, it was anticipated that the Bill may be introduced into Parliament. In preparation for this, the Commission hosted a number of Workshops to elicit input and views from relevant role-players and the elderly on the Bill. At the beginning of 2005, the SAHRC continued with this process and hosted further workshops. Through a series of seven workshops, workshops were held with participants from all nine provinces in South Africa. In addition, the commission has a number of smaller sessions where specific aspects of the Bill have been intensively discussed. This report describes this process and presents the voices and views of those who participated in the workshops. This information has guided the SAHRC in commenting on the Bill.

### ***The Workshops***

Initially it was decided that the commission would host four provincial workshops. Later on it was decided to continue the workshops and that a workshop would be held in each province.

The four provinces that were initially chosen were: Limpopo; Eastern Cape; Kwa Zulu Natal; and, the Western Cape. The provinces were chosen for specific reasons, as set out below, to obtain a broad overview of the issues that confront the elderly in South Africa.

Limpopo and Eastern Cape are of significance as they have the highest populations of older persons living in their provinces. They are also the countries poorest provinces with large rural communities.

Kwa Zulu Natal is regarded as being at the epicenter of the HIV/AIDS pandemic. The province was therefore chosen to explore the impact of HIV/AIDS on the elderly and the extent to which the Bill addresses these realities. Although not specifically planned, the workshop in the Eastern Cape was characterized by spontaneous discussions on the impact of HIV/AIDS on the elderly.

The Western Cape was chosen due to it being a more affluent province that has a high concentration of organizations working with the elderly.

When it became clear, that there was still time available to host further provincial workshops, arrangements were made for the workshops to take place in the Free State and the Northern Cape. Finally, the series of workshops ended off with a super-workshop in Johannesburg. At this workshop, participants were invited

from Gauteng, North West and Mpumalanga (At the time of hosting the workshops, the commission did not yet have an office in Mpumalanga. The commission does not have a provincial office in the North West.). As news spread that such a workshop was to be hosted, the commission was requested to extend the invitation to Limpopo as well.

### **Dates on which Workshops were held**

The Workshops were held on the following dates at the following venues:

Limpopo, Polokwane	25 November 2003
Eastern Cape, Duncan Village, East London	27 November 2003
Kwa Zulu Natal, Durban	4 December 2003
Western Cape, Cape Town	5 December 2003
Free State, Phahameng Township, Botshabela	2 February 2005
Northern Cape, Upington	3 February 2005
Gauteng, Mpumalanga, North West & Limpopo, Johannesburg	9 February 2005

### **Workshop Design**

The Workshop was based on adult participation methods in which relevant information was provided to participants to guide them and elicit responses based on their experiences and knowledge.

The Workshop had 2 main aims. Firstly, to elicit responses from participants on the content of the proposed Bill in order to determine if the Bill addresses the needs and realities of the elderly. Secondly, to present the Bill in such a manner that participants would be encouraged and empowered to draft their own submissions and submit these to Parliament.

### **Workshop Programme**

- 1) Welcome and Introductions
- 2) How legislation is created
- 3) The Older Persons Bill – Background
- 4) Human Rights Framework, domestic and international law, human rights pegs for the Workshop
- 5) What issues are confronting the elderly in your province?
- 6) The Older Persons Bill
- 7) Does the Bill address the issues confronting the elderly in your province?
- 8) How can we participate in the legislative process
- 9) Way Forward & Closure

Judith Cohen, the Parliamentary Officer at the Commission, created the Workshop design. A pilot workshop was run in July 2002 in the Western Cape.

Commissioner Tom Manthata assisted with input and guidance in the preparation for the Workshops. Commissioner Manthata co-facilitated the workshops with Judith Cohen.

The National Department of Social Development sent senior representatives to some of the Workshops, these persons included: Ms Thuli Mahlangu, Director for Older Persons; Civil Legoda and Anita Samaad. These representatives' presence was important, as they were able to answer questions that were specifically directed at the Department during the course of the Workshops. They also ensured that representatives from the respective provincial social development departments attended the workshops. Their support and involvement in the process was most appreciated.

### **Attendance**

The Workshop was designed for a group of 25 participants who work with the elderly and have expertise and knowledge in dealing with issues that confront the elderly. Participants from rural areas were specifically targeted in order that the workshops outcome would not reflect an urban bias. All workshops were well attended. In total, the commission workshoped the Bill with approximately 300 persons throughout the country. This group represents a broad cross section of our diverse society in which the elderly are cared for in many different ways.

### **Overview of workshops**

#### **Limpopo**

In Limpopo there were 18 participants representing community organizations, social workers and persons who work with the elderly. Unfortunately, during the night before the Workshop there were massive thunderstorms in and around Polokwane rendering some rural roads impassable. This resulted in a number of rural participants from the deep rural areas being unable to attend the Workshop. Despite these difficulties representatives from the provincial social development department were present as well as participants from the following NGO's and organizations: Elim Hlanganunu Society for the Care of the Aged; Giyani Society for the Care of the Aged; Tsherane Multi Purpose Centre, Kulani Multi Purpose Centre; Age in Action; Lapa la Hunadi Old Age Club and Phafogang Luncheon Club.

#### **Eastern Cape**

In the Eastern Cape, the workshop organizers had to eventually close the doors of the venue and turn people away due to the overwhelming numbers of persons who presented themselves to participate in the workshop. The Workshop was held in a community hall in Duncan Village. News about the workshop spread in the surrounding township during the course of the morning. A steady stream of elderly persons, mostly women arrived to participate. Eventually, there were

approximately 80 participants and the venue and organizers could not cater for more persons.

Due to the high numbers of non-English speaking elderly attending the workshop, translators had to be provided. A number of provincial social workers that were present at the workshop assisted in facilitating small group discussions and reported back to the main plenary sessions. The elderly participants spoke overwhelmingly of the impact of HIV/AIDS on the elderly.

In addition to the community participants, there were a number of role-players who traveled from rural areas to attend the Workshop. The Workshop was delayed in starting whilst we waited for their arrival. These participants came from areas such as: Mount Fletcher, Mount Ayliff, Mount Frere, Lady Frere, Engcobo, Sterkspruit, Bisho, Umzimkulu and Butterworth.

There were also representatives from Age in Action, Grahamstown, Echo Foundation in Port Elizabeth, Berea Gardens and Gompo Welfare Society in Duncan Village. There were approximately 25 role-players who work directly with the elderly.

### **Kwa Zulu Natal**

In Kwa Zulu Natal, there were approximately 40 role-players who attended the workshop. This was another province in which the impact of HIV/AIDS dominated the inputs that were given. Participants included representatives from: Richards Bay Senior Citizens, Masisizane Pensioner Club, Umlazu Christian Care Society, Elonwabeni Home for the Frail Aged, Thembela Old Age Home, Thuthuka Day Care, Durban South Aged Federation, PADCA, Thanbanani Senior Citizens Club, and Beth Shalom Home for the Aged.

### **Western Cape**

In the Western Cape there were approximately 30 participants who attended the workshop. Rural participants attended from Malmesbury, Atlantis and Clanwilliam. There were a number of representatives from NGO's and organizations including: representatives from various old age homes; the Woodstock hospital; HEAL, Age in Action; Aged Care Network; NOAH; Parliamentary Catholic Office; Communicare; Cape Jewish Senior Association and Ikamva Labantu.

### **Free State**

In the Free State, approximately 30 participants attended the Workshop. The workshop was held at an old age home and community center in the township of Bothsbela. . A number of residents also attended the workshop and gave input from an older persons perspective. The Honorable, Winkie Direko, former premier of the Free State and now member of parliament who is a member of the Social Development Portfolio Committee in the National Assembly, attended

the Workshop. Age-in-Action; NGSS Free State and representatives from various older person club attended.

### **Northern Cape**

Approximately 25 participants attended the workshop. Most of the participants were from Upington and its surrounds. Representatives included, Thembelihle Service Centre, Lena Moliers Service Centre, ACVV Upington, Thabita Dienssentrum, Morningside Service Centre, Vlytige Bejaarde Dienssentrum and Oranjeweg Ouetehuis. There were also representatives from church organizations and the community. The issue of alcohol abuse and its impact on the elderly in the province dominated the workshop in all aspects. It was also apparent that the province given its geographic vastness has unique challenges in addressing the needs of the elderly.

### **Gauteng, Mpumalanga, North West and Limpopo.**

The final Workshop was held at the SAHRC's Head Office in Johannesburg. Arrangements were made for participants to travel from the provinces. Although a previous workshop had been held in Limpopo, upon hearing of the intended final workshop the commission was requested to extend the invitation to Limpopo participants again, particularly those who had been unable to attend the first workshop. The local SAHRC office in Polokwane arranged for transport to bring a delegation to the workshop. As preparations progressed for this workshop it became clear that there was enormous interest. At a final count there were almost 80 participants who had traveled lengthy distances to attend the workshop. One participant had left her home at 03h00 in the morning to attend the workshop. Due to the large numbers attending this workshop, the program design had to be altered and more plenary discussion sessions were held in which participants could engage in lively debates concerning issue that are raised by the Bill. There were representatives from a number of societies for the Care of the Aged, representatives from various municipalities, a traditional leaders, NGO's, older persons activists, church representatives and representatives from old age homes.

### **Brainstorming sessions**

In addition to the above workshops, the Parliamentary Unit, based in the commissions Western Cape office, has hosted a number of 2-hour Brainstorming Sessions to discuss particular aspects of the Bill. These have been small group discussions with role-players who intend making a submission and felt that they would benefit from obtaining additional input and debating a particular issue extensively. At some of the sessions, guest experts were invited to provide input. Approximately 8 – 15 participants attended these sessions.

- Comparison of s150 in Children's Bill with s18 of Older Persons Bill, 21September 2004

- “Lobbying Techniques for legislation – lessons from the Children’s Bill”, 29 September 2004
- “What aspects of abuse must be addressed in the Older Persons Bill - does the Domestic Violence Act cover all types of abuse?” 13 October 2004.
- “Mandatory Reporting of abuse and Registers”, 28 July 2005
- “Madrid & Chapter 1”, 4 August 2005
- “60/65-age distinction - is this discrimination? How do we infuse more of a community based approach into the Bill?, does the removal of ‘frail care’ from the Bill make a difference?” 11 August 2005

The commission has actively encouraged older persons organizations to become involved in the parliamentary process. On 21 January 2005, a workshop entitled, “Participate in Parliament” was held in Cape Town. Arising out of this, the Rights of Older Persons Working Group was established. The Parliamentary Unit of the commission coordinates the group. It acts as a facilitation mechanism to share information amongst role-players. The main activity has been to send out information to those role-players who have access to e-mail.



## ***B. Positive changes that have affected the lives of the elderly since 1994***

The provincial workshops all began on a positive note with participants reflecting on changes that had been implemented since 1994 to improve their quality of life. These changes that were identified have been clustered in different groups for the purposes of this report.

Since 1994, participants agreed that there has been considerable improvement in the quality of life for many older persons. However, the improvements highlighted below do not necessarily indicate that all older persons throughout the country enjoy these improvements. Thus, many of the positive changes that were listed by some participants were also listed as challenges by other participants later on in the workshops.

### **Pensions and grants**

- Pension equity amongst race groups. This has led to greater self-sufficiency amongst older persons.
- Pension payout points have improved
- Establishment of pension committees and forums
- Security provided at pension pay points
- Increase in the number of pension pay points. There has been an increase in pay points and also mobile pay points, which makes grants and pensions more accessible.
- Service providers arriving on time at pension pay points
- Water available at pension pay points
- Greater access to social security in rural areas
- The introduction of a choice of payment methods of pensions.
- Pensions are paid retrospectively from date of application
- In KZN, help desks have been established at pay points.
- More awareness about pensions, older persons are being made more aware of the state pension.
- Grants more easily accessible, can be collected at post offices and banks,
- In KZN, Appeals Board has been established for older persons whose grants have been cancelled or refused.
- Special childcare grant for grandparents taking care of HIV/AIDS orphans (caregivers allowance).
- It is now easier to obtain ID documents

### **Health**

- Free primary health care for the elderly since 1994
- Subsidized aids such as wheelchairs
- In the Free State, mobile clinics have increased access to health services
- There is more health education

- Health education has improved for the elderly

### **Services and service providers**

- In Limpopo, there has been an increase in the number of community based organizations who assist the elderly
- In the Free State, the Department of Social Development provides subsidies to luncheon clubs
- In the Eastern Cape, the number of service centers have increased and there are some in the rural areas
- In the Eastern Cape, older persons are included in development structures such as tourism
- HEAL, (halt elder abuse line), a toll free advice service has been established
- There has been increased monitoring by the media of abuse of older persons.
- In the Western Cape, there has been increased assistance and mobilization by CBO's and NGO's
- There has been increased cooperation between government departments to assist the elderly.
- There have been increased services in rural areas.
- In KZN, there has been the establishment of luncheon clubs in deep rural areas.
- There has been a general improvement in community-based care for the elderly.
- There was a general sense that government is becoming more proactive in addressing the concerns of the elderly
- Multi purpose community centers (MPCC's) have been established and activities at these centers contribute towards increasing skills amongst the elderly.
- There are more employment and skills development opportunities for the elderly.
- In Gauteng, there is more inter-racial interaction between organizations concerning issues concerning older persons.
- Traditional leaders have been given a more responsible role in caring for the needs of the elders in their area

### **Accommodation – Old age homes**

- Admittance to old age homes is no longer determined according to race

### **Other**

- New legislation has been drafted (e.g. amendments to the Aged Persons Act 1967). Further legislation is being drafted (e.g. Older Persons Bill).
- In Limpopo, there has been a decrease in witchcraft.

- In Limpopo, pensioners are paying less rates for municipal services in some municipalities.
- In the Free State, there is now greater access to clean water.
- In the Free State, there has been a noticeable reduction in crime. Older persons feel safer.
- Access to RDP housing has increased the opportunity for older persons to own their own homes.
- Knowledge of older persons rights have improved
- Women can now acquire ownership of property.
- Access to bank loans and other financial assistance has increased.

### **C. Challenges confronting the elderly**

After the discussion on positive changes that have occurred for the elderly, the Workshop moved to considering the challenges that still face the elderly. Although it was specifically pointed out to participants that they would have an opportunity to speak about abuse later on in the workshop, it was mentioned in a number of different manners during this session.

Some of the issues that were mentioned in the previous session as positive improvements were clearly still issues in some provinces; or alternatively, albeit there had been improvements, there was still a need for further improvement.

#### **Pensions**

- In Limpopo, there is a need for shelter from the elements at some pay points In the Eastern Cape; pay points were criticized due to a lack of water and toilet facilities.
- Some participants stated that the ALL PAY system was problematic, examples were provided of staff arriving late or running out of money to pay the older persons.
- There is financial abuse at pay points by burial scheme companies and operators. Older persons are induced into parting with pension money to scam operators of burial schemes. In the Eastern Cape it was echoed that the elderly are vulnerable targets who are subject to exploitation in the giving of loans. In KZN, it was stated that there are still long queues at some pension pay points.
- It became increasingly clear that older persons as recipients of old age pensions become targets of financial exploitation by an array of persons and schemes that wish to obtain access to their money. There are a number of perpetrators who abuse the elderly in order to gain access to their pensions (e.g. robbery, physical abuse in order to make the older person give the money over, exploitation by families, hawkers, loan sharks targeting the elderly as clients, charging them exorbitant interest rates and, corruption, abuse by officials.
- A shocking example of financial abuse was given in Limpopo. Hawkers sell false medicines to the elderly at pension pay out points. (E.g. Stasoft being sold in small bottles for R350 as an arthritis medicine). When this example was given at the Free State workshop, participants giggled and spoke of skin medicines that are sold in small tubs at their pension pay out points. This 'medicine' is in fact jeyes fluid. The issue of financial abuse at pension pay points was raised in all provinces.
- In the Eastern Cape, the ID's of some older persons are incorrect. An example was given of a lady who is not receiving her old age pension grant because the Department of Home Affairs tells her that there is another person living in another province with the same ID number who is

receiving a grant. It would appear that she is encountering some difficulties with lengthy time delays in getting this problem sorted out.

- The high levels of poverty and unemployment in the country results in some cases of entire families being dependent on the old age pension of one older person.

## **Health**

- Participants stated generally that there is a lack of health services for the frail elderly.
- There is a lack of geriatric health services. Geriatric care still needs improvements.
- Access to chronic medicines is not always available. Sometimes the elderly do not receive their medicines.
- District nurses are sometimes not available.
- In many provinces, it was raised that there is a general lack of sensitivity towards older persons and awareness of their needs. This is often seen in officials being abrupt, dismissive or irritated when dealing with older persons.
- There is a lack of services in some areas (e.g. clinics).
- Service at hospitals tends to be very slow and older persons often arrive very early and then have to sit for a number of hours before being attended to.

## **Accommodation and care**

- There is a lack of affordable housing for older persons. In the Eastern Cape we were told of older persons who were homeless and sleeping outside in the bushes.
- In rural areas there is a lack of tenure security for women. Tenure security in most instances resides in the man as the head of the household. Upon retirement or the death of the man, the older woman in some cases is told to leave the farm.
- Participants stated that there is a general lack of accommodation for the elderly.
- More step down and respite care facilities are needed.
- There are not enough day care facilities that can look after the elderly whilst family members go out and work.
- There are insufficient trained community home-based carers for older persons.
- There are not enough service centers for the elderly.
- There is a lack of frail care facilities, particularly in previously disadvantaged areas. Ngo's that provide frail care facilities and services are struggling financially and some are closing due to a lack of funding. Service organizations. There is a need for more subsidies for service

- organizations. It was pointed out that volunteers cannot volunteer forever - incentives are needed
- There is a shortage of all forms of community care in rural areas. Participants viewed this as a major challenge.
  - There is lack of old age homes for the elderly in rural areas.
  - There is a lack of subsidies for frail care of the elderly
  - Many private care facilities for older persons are not accessible to financially disadvantaged elderly.
  - Social workers are not sufficiently available, largely because there are just not enough of them for the volume of work.

### **The impact of HIV/AIDS on older persons**

The impact of HIV/AIDS on the elderly was raised in all provinces. In KZN and Eastern Cape it dominated the discussions. At the beginning of most workshops older persons referred to HIV/AIDS but spoke about it in round about ways. Only when the facilitator asked participants directly: "are you referring to HIV/AIDS; or, did the parents die due to HIV/AIDS?"; did participants acknowledge directly the impact of HIV/AIDS. Many participants were not comfortable to refer to HIV/AIDS directly and it took a lot of encouraging for participants to speak directly and openly about HIV/AIDS and the impact it is having on older person. What was clear however is that HIV/AIDS is having an enormous impact on the elderly and that it is an area that does not receive much attention compared to other aspects of the diseases impact. There was a strong call for training and support services for the elderly.

### *Caring for orphans*

- Many older persons care for their HIV/AIDS orphaned grandchildren. In many ways they do not feel sufficiently equipped to handle the situation. They find it difficult in a fast changing society to deal with the generation gap, comfort the children who have lost their parents, and, deal with their own grief of having lost a child and someone who may have cared and supported them in their later years.
- Older persons said that they needed training on how to care for children who are infected with HIV/AIDS.
- Caring for orphaned grandchildren places an enormous financial burden on the elderly. Often, the old age pension is the only source of income in these households. In the Eastern Cape we were told of instances where there were difficulties in accessing grants because grandparents did not have the children's birth certificates and parents' death certificates. Insensitive government officials accuse the grandparents of fraudulently applying for child support and foster grants in order to obtain additional income. Grandparents caring for their grandchildren spoke of the financial burden of paying school fees and purchasing school uniforms. The financial constraints of older persons do not allow them to purchase sufficient quantities of nutritious food.

- There are not opportunities for older persons to earn an income in order that they can cope with the additional financial burdens of caring for their HIV positive children and grandchildren who are orphaned. Older persons would like to supplement their incomes but stated that there are no opportunities to do so. Also, much of their time is spent caring for HIV/AIDS sufferers and their grandchildren.

#### *Caring for those dying of HIV/AIDS*

- Older persons do not feel that they have the skills to care for people infected with HIV/AIDS, especially when they are very ill and need a lot of nursing.
- Lack of medical facilities some areas and traveling to clinics can be difficult

#### *The burden of funeral expenses*

- Funeral expenses also constitute an enormous financial burden for the older person when they must bury a child and/or grandchild.

#### *A lack of awareness and training*

- Role-players were of the view that there is insufficient education about prevention of HIV/AIDS amongst older persons. This lack of education increases HIV infections in older persons.

#### *The emotional burden*

- Older persons lived through the difficult days of Apartheid. Now in the days of democracy and freedom many are confronted with the enormous burden of the impact of HIV/AIDS. There is an enormous emotional burden that older persons carry in dealing with the impact of HIV/AIDS on their families. In many communities there is stigmatization of the family where a member dies of AIDS. Dealing and coping with death leads to increased stress for the older person. There is a general lack of support for the position the elderly find themselves in.

#### **Other**

- Little respect is shown for older persons during their interactions with people who provide services e.g. at hospitals, in banks and on public transport - taxis.
- Older persons spoke of corruption and the impact it has on accessing services that are meant for the people. (e.g. Corruption by government officials in the delivery of RDP housing)
- Whilst access to information about government services has increased it was felt that in some areas the distribution is uneven.

- Access to transport was raised on a number of occasions. It was stated that public transport is not always affordable for older persons. Also, in some areas there is a lack of transport, especially in rural areas



## **D. The Older Persons Bill [B68-2003]**

The majority of the time at the workshops was spent considering and discussing the contents of the Older Persons Bill. Participants were taken through the Bill by the facilitator and given a brief introduction to its contents. The participants were then broken down into smaller groups and requested to consider key aspects of the Bill. The group topics were determined by the contents of the Bill. The groups looked at: the definitions section of the Bill; Chapter 1 – Programmes for Development of Older Persons; Chapter 2 - Ensuring and Enabling a Supportive Environment for Older Persons; and, Chapter 3 – Protection for Older Persons. The groups appointed rapporteurs who reported back to the main plenary session during which the participants made further input and comments from the other groups.

### **Older Persons legislation in South Africa**

The **Aged Persons Act, 1967** is the main piece of legislation that directly provides for older persons. This piece of legislation deal with the following matters:

- I. Protection and welfare of the aged
- II. Care of their interests
- III. Establishment and registration of institutions
- IV. Accommodation and care of the aged

It must be remembered that this law was drafted during the Apartheid era and that its' intention was to cater predominantly for the needs of white older persons. Approaches to ageing have changed dramatically since the 1960's. We now have a developmental approach to ageing in which it is supported that older persons should remain in the community for as long as possible. The Aged Persons Act reflects previous thinking in which placing older persons in old age homes was not questioned to the extent that it is questioned today. The Act is clearly centered on legislation that will control old age homes.

In 1994, as with so many other pieces of legislation on our statute books, amendments were made to the Act to remove its racially discriminatory provisions.

In 1998 the Act was further amendments by the Aged Persons Amendment Act. This Act introduced provisions that provided for:

- Representative management committees for homes for the aged
- Require reporting of abuse and regulation prevention of abuse

### **Background to the legislative drafting process of the Older Persons Bill**

“The process of policy and legislation development commenced during the **International Year of Older Persons (1999)**. A group of stakeholders agreed to

commemorate the International Year by developing programs that would make a difference in the lives of older persons. The programmes were to go beyond the International Year of Older Persons.

As part of the contribution to the International Year of Older Persons, stakeholders agreed on the development of legislation for older persons. Consequent to the agreement, a group of concerned individuals that included officials from National Departments, Provincial Departments, people from Non-Governmental Organisations, Faith-based Organisations, Community-based Organisations involved in the field of ageing as well as older persons themselves prepared a **Draft Policy and a Draft Bill** under the auspices of the national Department of Social Development. Numerous consultative processes took place at both national and provincial level with a variety of stakeholders.

A workshop intended for final consultation on the above-mentioned documents was cancelled when the issue of **elder abuse** was screened on an MNET programme in January 2001. The said broadcast led to the appointment of a **Ministerial Committee to investigate the Abuse, Neglect and Ill-treatment of older persons**. The Ministerial Committee came up with specific recommendations on their findings, which were incorporated, into the draft policy and legislative framework. A further delay in finalizing the legislation was experienced when the need to incorporate the international trends which were anticipated to be the outcome of the **Second World Assembly on Ageing which was held in Madrid (Spain)** was realized.

At the said Assembly global issues on Ageing were discussed, an international Plan of Action on Ageing was adopted and a political declaration was signed. It was felt that it would be proper to incorporate the international trends in the older persons legislation. Further consultative workshops and sessions then took place.

At the end of **July 2002** revised documents of both the **Draft Policy and Draft Bill on Older Persons** were finalized and taken into **consultative processes** with the provincial departments of social development, national government departments, the Portfolio Committee and the Select Committee (NCOP). The Older Persons Bill is more or less the result of these consultative processes.

After these processes a further draft was prepared and submitted to **Cabinet**. At a meeting of Cabinet the Ministers of Social Development, Justice, Finance and Health discussed the draft Bill and proposed amendments to it. On **23 July 2003**, after satisfactory consultations were conducted between the relevant Ministers, Cabinet approved that the Older Persons Bill be submitted to Parliament for consideration during the 2003 session of **Parliament**.

The draft Bill was then referred to the Office of the **Chief State Law Adviser** on **4 August 2003** for review and certification. The **explanatory memorandum** of the Bill was published in the Gazette of **13 August 2003** and arrangements were made for the translation of the Bill into Sesotho. During **October 2003** the State Law Adviser certified the Bill and submitted the Bill to **Parliament.**"<sup>1</sup>

The Bill was placed before the NCOP Select Committee on Social Services. On 3 August 2004 the Committee was briefed by the Department. The Committee worked steadily on the Bill. During this period, the Bill was referred to the provinces. In some provinces public hearings were held. There was also a costing exercise, which was done on the Bill. On 14 June 2005 the Final Negotiating Mandates were received from the provinces and the Bill was voted on and passed.

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<sup>1</sup> (Extract from Briefing to Committee on Social Development on the Older Persons Bill, 12 November 2003 by Department of Social Development)

## **E. Definitions**

The definitions are contained in Clause 1 of the Bill. Many of the definitions are new and they mark the difference between the Bill and the previous Aged Persons Act of 1967 and the Aged Persons Amendment Act 1998.

### **“Abuse”**

The definition of “abuse” as contained in [B68B-2003] version of the Bill states as follows:

“abuse” means a single or repeated act or lack of action that causes harm or distress to an older person, including physical, psychological, financial, material or sexual harm or neglect, and includes the violation of an older person’s rights enshrined in Chapter 2 of the Constitution.”

A word, which is defined in the definitions section of a Bill, is important within the context of its use in the Bill. In the Older Persons Bill, the word “abuse” is used in the following places:

- |                     |   |
|---------------------|---|
| Clause 1            | a definition of ‘abuse’ is provided   |
| Clause 8(3)(e)      | a resident’s committee must ensure that the manager of the facility monitors activities at the facility in order to deal speedily with any incidences of abuse of the residents and takes steps to report such incidents to the appropriate authority |
| Clause 11(1)(a)(ii) | the annual report of facilities must include compliance with prescribed measures to prevent and combat abuse of older persons   |
| Clause 13           | This section states that the act of abuse constitutes a crime.  |
| Clause 14           | The NCOP amended Bill provides broad grounds (‘abuses an older person’) for invoking the procedures in section 14 and 15.   |
| Clause 16(1)        | The suspicion of, or presence of, an abuse-related injury must be reported to the Director-General by any person.   |
| Clause 17           | This section provides that persons convicted of the abuse of an older person will have their names recorded in a register.  |

- Clause 18                    The NCOP amended Bill provides that an older person is a person who suffers from financial abuse amongst other grounds as set out therein.
- Clause 21(f)                Provides for regulations to be drafted that aim to combat abuse

Drawing from the above, the definition of 'abuse' in the Bill, must be:

- Understandable and determinable to a resident's committee and manager of a facility in order that they can identify abuse when it occurs in a facility.
- Facilities are expected to determine and take measures to combat abuse. They must therefore be able to clearly determine what it is that these measures must be aimed at.
- Police must accept criminal charges of abuse and must therefore know what constitutes the crime of abuse of older persons.
- Similarly, prosecutors and magistrates must be provided with a definition of abuse in order that the guilt of an accused may be determined.
- Any person who suspects that an older person has been abused or suffers from an abuse related injury must immediately notify the Director-General. Failure to comply with this requirement of the Bill is a criminal act, which could attract a sentence of imprisonment of five years and/or a fine. Therefore, the definition must be clearly understandable to the public at large.
- Persons who are convicted of abuse will have their names placed on a register. It must be clearly understood what this crime is.
- The Minister may make regulations to prevent, combat and deal with abuse of older persons. In order to draft these regulations it must be clear what constitutes abuse.

In summary therefore, the Bill's definition of abuse needs to be applicable in the criminal law context and the social welfare context.

### ***Some other definitions of abuse***

There is currently no accepted definition of abuse at an international level. Only some countries have adopted definitions of abuse in their legislation. The most generally accepted definition however that is used is the definition contained in the World Health Organizations' (WHO) Toronto Declaration on the Global Prevention of Elder Abuse of 17 November 2002

“Elder abuse is a single or repeated act, or lack of action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older persons” It can be of various forms: physical, psychological/emotional, sexual, financial or simply intentional or unintentional neglect.”

Another definition, which is widely used, is the one adopted by the British charity Action on Abuse of Older Persons, it states:

“(abuse is) ... a single or repeated act, or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.” Such an approach to the definition of abuse older persons has gained ground over the last 20 years<sup>2</sup>.

### **Criticism of the definition of “abuse” that is contained in the Bill**

The current definition is **too broad** and refers to all the rights contained in the Bill of Rights (chapter 2 of the Constitution). Whilst this definitions was attractive to participants at the commissions’ workshops, after further discussions in which the difficulties of enforcing and interpreting this definition were explored; it was agreed that **a clearer and more precise definition is needed**. Everyone does not know the contents of chapter 2 and therefore every time an older person or service provider suspects that abuse is occurring – he or she will first have to refer to the Bill of Rights. Also, the rights contained in our Bill of Rights are subject to interpretation. It could become very difficult in some instances to determine if an action amounts to a violation of a right.

It was agreed that the definition of abuse must set out clearly the nature and parameters as to what constitutes abuse. It was further stated that the legislation must be user friendly in the definitions that it uses.

### **Reasons for why we need a definition which is clearly understandable to everyone and not too broad**

1. A definition is needed to ensure that there is a consistent approach towards elder abuse.
2. If the definition is too broad it may lead to inadequate, inconsistent collection of data. This would make it difficult to develop policy decisions about abuse based on empirical data.

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<sup>2</sup> UN ESC, Report of the Secretary General, Commission for Social Development acting as the preparatory committee for the Second World Assembly on Ageing, “Abuse of Older Persons: recognizing and responding to abuse of older persons in a global context.”

3. A fragmented understanding of the phenomenon of abuse would result. This could downplay or overemphasize the extent of the problem

Abuse must occur within a **relationship where there is an expectation of trust** – this is the hallmark of the definition of abuse in many countries. It is the relationship in which there is an expectation of trust that makes abuse different from other common law and statutory crimes.

### **Submission**

- a. Remove the words: "... and includes the violation of an older person's rights enshrined in Chapter 2 of the Constitution..."
- b. Include the words: "...occurring within any relationship where there is an expectation of trust."

### **Proposed amended definition:**

"abuse" means a single or repeated act, or lack of action, occurring within any relationship where there is an expectation of trust that causes harm or distress to an older person, including physical, psychological, financial, material or sexual harm or neglect,."

### **"facility"**

"Facility"

- (a) means a building or other structure used for the purposes of providing accommodation, housing and community-based care and support services to older persons; and
- (b) includes a private residential home in which older persons are accommodated for reward and a shelter but does not include a luncheon club or a building or other structure in or on which home-based care is provided;"

Previously the definition only referred to private residential care where more than seven persons were accommodated for reward. The amendment by the NCOP, which removes this provision, is welcomed.

"Facility" is a new definition that has been added to the Bill. It replaces the definition of 'home for the aged', which appeared in the 1967 Aged Persons Act. It is a wider definition in that 'facility' also refers to community-based care and support services. This appears to be an attempt by the drafters of the Bill to infuse a community-orientated approach into the Bill. However, as will be demonstrated in the commentary of Chapter 2 of the Bill, later in this submission, the impact of this community-orientated definition of 'facility' leads in some

instances to illogical scenarios. In sum, the content of the Bill has not been brought in line with the definition of 'facility' that has been created.

#### **“home-based care”**

This definition is only used in Clause 6 of the Bill. Persons who provide home-based care must notify the Minister thereof and will also be entitled to apply for a subsidy.

Concerns were raised at the workshops that the definition excludes caregivers who are the spouse or family member of an older persons. It was argued that the term family member is vague and broad. Particularly in an African society such as ours where there are extended family ties and obligations to care for ones family members.

There were interesting and lengthy debates about the moral and legal obligations of children to care for their elderly parents. Some participants argued that this should be legislated into the Bill. Whilst family should care for their elderly it was also argued that the State should encourage this and where appropriate stipends should be made available to encourage this. It is very expensive for the State to maintain older persons in an old age home.

#### ***Submission***

- a) It needs to be seriously considered and debated whether home-based care should exclude family members. It may well be in the interests of the State in instances where people are not economically advantaged to provide some assistance in order that the older person remains with the family. By failing to assist the family, the State may well be placed in a situation where older persons are presented for care at old age homes.

#### **“Care – giver”**

In, **Limpopo**, this definition led to an interesting discussion about the training that home based carers receive. Participants were concerned about the standard of training and whether the carers were trained in all he necessary skills. The idea was put forward that training should be standardized, either through the department or thorough one of the SETA's. This would give some guarantee to the older persons that the person who visited them would provide service of a certain standard. The training should be accredited though a department. At the moment people are trained as home based careers but there is no training or training institutions that are recognized formally by government.

The current definition is too broad. Caregivers need to be standardized in terms of the quality and nature and scope of services that they provide.



### **Submission**

- b) The definition of “**care giver**” should be amended by including the word trained.
- c) The Minister should make regulations regarding caregivers. They should be registered with the Department in order to ensure that there is a minimum level of service and also to check if their names appear on the register.

### **“luncheon club”**

This definition was also extensively debated at Workshops. What was interesting was that around the country, luncheon clubs are very diverse in terms of membership and what it is that happens at these clubs. What did emerge was that:

- In some provinces luncheon clubs are regarded as being only for women
- In other provinces men also participate in luncheon clubs
- Many luncheon clubs are centered around activities and crafts
- Not all luncheon clubs provide meals
- Not all luncheon clubs charge a small charge for the meal
- Luncheon clubs provide an important social support structure to older persons and serve a variety of their needs.
- Some luncheon clubs are referred to as clubs, service clubs, service centers
- Some participants did not like the term luncheon club, they said that it was demeaning as it created the perception that older persons just get together to eat. These clubs play an important social support role for many older people. They are also places of knowledge and skills exchange. In fact, many older persons were keen that the activities at luncheon club meetings should be extended and that more activities be provided for them.

In **Limpopo** the definition of luncheon clubs led to interesting discussions. We explored what it is that luncheon clubs do. **They are more than just clubs that provide a meal to the elderly.** They have many other roles and functions, such as a forum to share skills, provide support and companionship, and a forum for skills development. The clubs in Limpopo are open to both men and women. The point was made that in terms of skills it appeared that more was available for women to do, such as sewing and knitting. This led to more women than men becoming members. The **definition** provided in the Bill is **too narrow**. The definition **does not reflect the reality on the ground**.

It was argued that the clubs should be supported and capacitated to make use of the many skills that men had learnt over the years and for these skills to be incorporated in the activities of the clubs. The clubs need to be radicalized for the inclusion of men.

Clubs in Limpopo are being connected to service centers. This enabled the Department to provide for more skills development. They are working with vegetable gardens and sewing. Government is giving support to the clubs. It was argued that the support and skills needs to be made wider and that there needs to be a greater diversity of skills.

In the **Eastern Cape** it was stated that the definition is inadequate in that luncheon clubs do not only provide meals but are a space where older persons can come together to interact, pray, support one another, and participate in activities in that assist with the moral, spiritual and physical growth of the elderly.

In **KZN** it was agreed that the definition must be broadened. Luncheon clubs provide for the psychological, physiological, spiritual, social, recreational and educational activities of the elderly. The definition should also provide a reference to community based care programmes

In the **Western Cape**, there are a number of luncheon clubs. Many of these operate in the townships around Cape Town. They appear to have a 'woman's only' membership. Some of the clubs are called 'girls' clubs'!

In the **Free State** it was pertinently pointed out that luncheon clubs are but one small part of community based services.

In the **Northern Cape** it was argued that there should be a broad definition for services delivered to the elderly. This would do away with the need for a definition of luncheon clubs.

In **Gauteng and Mpumalanga**, there was strong opposition to the use of the term luncheon club. In some respects it was viewed as disempowering of older person as it creates the perception that luncheon clubs are merely a place where the elderly get a free meal. There was a strong call that clubs be referred to as service centers or service organizations.

### ***Submission***

- a) Remove the word luncheon from the term 'luncheon club'
- b) Create a new definition for 'club'

Key elements of a club:

- It is a service which promotes the quality of life and general well being of an older person i.e. it is a form of care
- It promotes and maintains the independent functioning of older persons in a community – from definition of community-based care and support services

### **“older person”**

In all of the workshops, participants held the strong view that older persons should be defined as persons older than **60 years** and that there should be no age differential between women and men. It was felt that the present age differential between men and women is discriminatory.

When participants were introduced to arguments of substantive equality versus formal equality and a substantive equality argument was provided justifying the age differential in favour of women, participants were not easily persuaded.

*“Equality should not be confused with uniformity, in fact uniformity may be the enemy of equality. Equality means equal concern, and respect across difference. It does not presuppose the elimination or suppression of difference.”<sup>3</sup>*

In Limpopo, the group was skeptical of arguments that were made about equality and the impact of gender discrimination on women during their lives resulting in true equality being achieved by leveling the playing fields and providing women with pension at a younger age.

In exploring the impact of the age differential, it became clear in the Eastern Cape workshop that due to the desperate need for social security participants were overwhelmingly of the view that the net for social security should be widened and that more people should have access to a pension grant. Therefore, it was felt that pension should be made available to everyone who qualifies at the age of 60.

### ***The age differential in the Older Persons Bill***

The age differential with regard to the granting of social pensions is currently the subject of litigation in the Cape High Court as well as the Equality Court in Pretoria. When it comes to the case of pensions an argument can be made out that it is fair discrimination. This can be based on arguments and evidence that women due to the discrimination that they face in terms of opportunities within the workplace and the economy and the fact that they are absent from the workplace during child bearing and child rearing years that it is fair to make such a distinction and grant them a pension at an earlier age. However, it is unclear whether such an argument would stand up in a court and whether it can be backed up with the necessary statistics. Perhaps we should rather be considering a ‘social justice’ type argument based on the needs of our society. Given the high levels of poverty we should be increasing the social net as wide as possible.

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<sup>3</sup> National Coalition for Gay and Lesbian Equality and Ano. V the Minister of Justice and Ano. 1999 (1) SA 6 (CC)

The Older Persons Bill **does not deal with pensionable age** and therefore it is not an issue that we need to address here. What we must bear in mind is that in each instance where the age differential is used in the Bill an argument must be made out to justify it as fair or positive discrimination.

### **What does maintaining the age differential mean in terms of the Older Persons Bill?**

- a) The age differential affects when persons may become beneficiaries of the programmes set out in Clause 2.
- b) The age differential affects when older persons may become recipients of community-based care and services and be admitted to facilities for older persons.
- c) The rights stated in Clause 12 are only applicable to persons in terms of the age differential.
- d) The age differential is an element of the offence of abuse created in terms of Clause 13.
- e) The procedures concerning older persons in need of care and protection are also subject to the age differential.
- f) The mandatory reporting of abuse is subject to the age differential

What we do need to address is the impact of the age differential within the Older Persons Bill. We need to ask: Can this be justified in each and every case? How would a challenge to the age differential be justified?

Another argument against the age differential is that it will make the Act quite **impractical to implement**. For example, how will the department implement its subsidy policy, would it have to be satisfied of the ages of the beneficiaries of these subsidies.

Participants found it very difficult to accept that the age differential could in any way be justified when it came to the crime of elder abuse (created in Clause 13 of the Bill). What could possibly inform the decision that women aged 60 can be victims of abuse but that men can only be victims of abuse at age 65? Basic common sense appears to argue against such a possibility. If the age differential is an affirmative action measure then how do we justify the need for affirmative action when we legislate and create crimes?

It must be pointed out that by keeping the age differential in the Bill, the Department of Social Development is potentially **opening itself up to a plethora of litigation** in that older persons across the country could challenge the actions of the Department in all its dealings with older persons where the age differential has an impact.

The age differential first appeared in our law in the 1967 Aged Persons Act of 1967. This Act, then, dealt with the care of older persons and also pensions. At a

later stage pensions were removed from the Act. The age differential has remained.

Given the high cost of eliminating the age differential for pensions, government may wish to have consistency throughout legislation dealing with older persons and retain the age differential in the Older Persons Bill. Whilst this is acknowledged, it must be remembered that in each scenario in which the age differential is used it will have to be justified in terms of the constitution and pass the test of being fair discrimination. Therefore, it is not problematic for the age differential to be removed from the Older Person Bill. The pension issue is before the court and will be resolved in that forum.

Participants were of the view that even if it means that programmes are rolled out a bit slower because of the increased costs of including men between 60 and 65 that this is what they would choose. However, they were not of the view that the removing the age differential in this Bill would have enormous financial implications for the State.

It was also pointed out that the Department themselves appears to be **contradictory** in their approach to the age issue. In their recent Frail Care Draft Policy, older persons are not defined according to the age differential. Also, the costing exercise that was done on the Bill also did not include the age differential but rather included all older persons from age 60 and up.

There was one suggestion that perhaps some kind of discretion could be added to the Bill in order to minimize the impact of the age differential. The example was given of an older married couple where the woman is 61 and the man is 63. They need to be admitted to a facility. The women qualify and the man does not. Surely, exceptions could be made in such cases?

In a country where there is a constitutional value of human dignity and a commitment by government to the alleviation of poverty it is difficult to understand what argument could be made out to justify the age differential in the Older Persons Bill.

### **Submission**

- a) The age differential must be removed from the Older Persons Bill. An older person is a person who is over the age of 60 years.

### **“Manager” vs. “operator”**

The usages of these two definitions in the Bill appear to have become **confused**.

In terms of the 1967 Aged Persons Act a manager was defined as:

“...in relation to a home for the aged, means the person exercising control over such home”

In other words the manager was the person with overall control of the home. This use of the term manger appears to have become confused with the new term of operator that has been introduced in the Bill.

*The definitions in the Older Persons Bill*

“manger” means the person responsible for the day-to-day management of a facility

“Operator” means a person that operate a facility

It is clear that the term manager has a fundamentally different meaning in the Bill when compared to the Act. It is now the operator who is the person who has overall control of the facility.

It was argued and pointed out by participants that the responsibilities created for managers are not legally appropriate. It would be more correct to place all statutory legal duties on the operator of a facility. In order to understand this criticism it is important tot look at where the term is used in the Bill.

**Responsibilities and duties created in the Older Persons Bill for managers vs. operators:**

A “manager” is responsible for the following:

1. Section 8(3) A residents committee must ensure that the manager of the facility carries out the various responsibilities and duties listed therein.
2. Section 9(3) The manager must give reasons in writing for the refusal to admit an older person to a facility
3. Clause 10(2) The manager or ‘the person who has control over the place’ (this is the definition of manger from the 1967 Act) may request a certificate issued by the Director-General stating that the social worker is a social worker.
4. Clause 21(d) the Minister may make regulations concerning the books, accounts and registers that are kept by the mangers of facilities.
5. Clause 22(4) With regard to transitional arrangements, manager’s in terms of the 1967 Act will continue to receive subsidies for 12 months after the coming into operation of the Bill.

An “operator” is responsible for the following:

1. Clause 5(3) The operator of a facility who wishes to close down a facility for any reason, must take reasonable steps to ensure that on the closing down of such facility that the older persons concerned are accommodated in another registered facility or with persons, who in the opinion of a social worker, are fit and proper persons for accommodating the person or older persons.
2. Clause 7(2) The operator of a registered facility must, at all reasonable times, report to the Minister any circumstances, which may result in his or her inability to comply fully with any condition contemplated in section 5(3).
3. Clause 7(3) places obligations on an operator should he or she wish to close down the facility or if the registration of a facility is cancelled.
4. Clause 10(3) A compliance notice is issued to the operator of the facility.
5. Clause 11 deals with the Report to the Minister by operators of facilities.

### **Comment**

It is not legally tenable to give these duties to an employee (the manager) of an owner of a business (the operator). The responsibility must rest with the person who is ultimately in charge of the facility. The operator may delegate the responsibilities, however it must ultimately remain the responsibility of the operator to ensure that the statutory obligations created in the Bill are carried out.

The Bill is creating a potential conflict of interest for managers. For example, what must the manager do if the operator fails to provide the manager with the necessary resources or equipment in order to carry out the statutory obligations? More concerning is Clause 8 - how will a resident's committee ensure that a manager will carry out the duties contained therein. Surely, it is for the resident's committee to consult with the operator on these matters. Finally, the operator must provide the reasons for a failure to admit an older person to a facility. If, for example, the reasons amount to a violation of Clause 9(1), then this could attract criminal responsibility. The legal duty to provide these reasons ought to rest with the operator of the facility, as it is the operator who should take ultimate responsibility for managers and the decisions that they may take regarding admissions to the facility.

### **Submission**

- a) Remove the word "manager" from the Bill and replace it with the word "operator".
- b) All references to manager, except the reference in clause 22, are replaced with the word operator.

- c) The definition of manager be removed and Clause 22 (4) be reworded by stating that any manager, *as defined in the Aged Persons Act 1967, ....*
- d) Alternatively the definition of manager must be replaced with a definition that makes reference to the definition of manager contained in the 1967 Aged Persons Act.

## **Definitions that need to be added to the Bill**

### **“frail person”**

This definition was removed by the NCOP amendments.

The definition in the previous versions of the Bill stated”

“frail person’ means an older person whose physical or mental condition renders him or her in need of 24-hour continuous care”

The term “frail person” was used in a number of places in the previous versions of the bill. Each time the term frail was used, it was used after the term old person – it was used in the following places in the Bill:

1. Monitoring of registered facilities and places, Clause 10(1)(a), (b), (c) & 10(3)(b)
2. Procedure for bringing older persons who accommodates or cares for older person or frail person before magistrate, Clause 14(1)(a)(b) & 14(2)(3)(b)
3. Enquiry into accommodation or care of older or frail person, Clause 15(8) & 15(10)(a)(b)
4. Regulations, Clause 21(e)

Regarding the definition of frail person contained in previous versions of the Bill, participants differed on whether frail person would refer only to older persons. It is recognized that people can be frail but have not reached age 60 or 65 as the case may be. The question was posed: what legislation covers younger persons who are frail? Where do younger persons go and receive care if they are frail? It would appear that there is a possible gap in the delivery of services for these frail persons. However, the big question that needs to be answered is: Is the Older Persons Bill the place to deal with? Surely the Older Persons Bill must deal only with older persons. If there is a problem with the law and the delivery of services in respect of other groups of people, then this should be taken up and brought to the attention of government. Some participants were of the view that this is an issue for the disability sector to take up.



All participants argued strongly for the reinclusion of the word frail into the Bill. It was pointed out that:

- Frail persons are your most vulnerable older persons. They need specific recognition.
- Frail persons have very specific needs, which are different from older persons who are not frail.
- Highly skilled and trained staff are needed for frail care. The ratio of residents to staff is far higher.
- Frail care represents the end of the spectrum of the continuum of care, Just as all other forms of care ought to be mentioned in the Bill, so too must frail care.
- If frail care is not mentioned in the Bill then what will the Department connect its Frail Care policy to?
- Old age homes are increasingly becoming frail care homes

In summary:

1. The Bill needs to recognize frail older persons as a particularly vulnerable group.
2. The Bill needs to recognize that different care is needed for frail older persons.
3. The Bill needs to recognize that frail persons have different needs.

There is a **general need for more services for persons who need full time medical attention**. This issue was raised in many of the provinces. For example, the definition of “frail person” led to a lot of debate in **Limpopo**. It was noted that there are no hospices in the province and that there is a great need for them. On closer questioning it was said that this need is due to people needing full time care when they are dying of AIDS. From this position, the group was of the view that it is not only old people who are in need of 24-hour care. There is a wider need in the province. The issue of care for those who are dying of terminal illnesses and conditions needs to be addressed as a matter of urgency. The group could see some use in this Bill providing for frail care for older persons. However, they were insistent that the issue must be taken up at a broader level.

In KZN and the WC it was felt that **frail persons should not be defined by age but rather the physical and mental condition of the person**. The previous definition in an earlier draft of the Bill referred to a person, who was not a child. This definition was preferred as it was not as restrictive.

## **F. Chapter 1 – Programmes for Development of Older Persons**

### **Introduction**

Ageing and the rights of older persons is a fairly recent area of concern at an international human rights level. In 1982, a World Assembly on Ageing was held in Vienna. An International Plan of Action on Ageing was adopted at this Assembly, which has guided the course of thinking and action on ageing for the past 20 years. In 1991, the United Nations Principles for Older Persons set out human rights principles and guidance in the area of independence, participation, care, self-fulfillment and dignity. In 2002, the Madrid International Plan of Action on Ageing was adopted at the Second World Assembly on Ageing that was held in Madrid, Spain.

Part 2 of the Madrid Plan deals with Recommendations for action. It sets out three (3) **Priority Directions**. Each Priority Direction sets out a number of **issues** associated with the Priority Direction. Under each Issue - **Objectives** are set out.

Chapter I of the Bill lists the types of programmes that the Minister may develop. It lists fifteen (15) programmes. It also states that the Minister may support any person who runs the programmes contemplated in the chapter. This chapter gives effect to some of the provisions of the Madrid International Plan of Action on Ageing, 2002 (Madrid Plan). When discussing this chapter it is useful to understand which programmes reflect the Madrid Plan. Many of the programmes identified seek to give effect to the Plan of Action and are welcomed.

### **General**

1. Participants viewed the chapter as a wish list for future actions they would like to see government carrying out. There was concern that **the Bill does not provide for a central coordinating mechanism** that would be responsible for **overseeing and monitoring the implementation** of this chapter. It was feared, that without such a body, the matters listed in section 2(2) would not receive the necessary and prompt attention.

2. The clause is limited to the stated types of programmes. Should further programmes be identified in years to come, this would require amendments to the Act. It was suggested that wording be added to the Bill that would allow the Minister to identify further programmes that may not at this stage be listed in Clause 2(2). For example: Clause 2(2) could be altered to read:

“The programmes referred to in subsection (1) are programmes aimed at, **amongst others-** ....”

3. Participants were also keen that maybe the word in Clause 2(1) ought to read **must**. There was concern that unless the programmes were made peremptory that there would be too much scope given to the Minister to determine when and which programmes would be implemented.

4. Participants had a number of suggestions concerning particular programmes. These suggestions will be discussed below.

5. It was pointed out that the Madrid Plan speaks of Older Persons and Development NOT the development of older persons. These are 2 different issues completely. The title of the chapter should be amended to Programmes for older persons and development. As the title is currently worded it implies that older persons themselves need development – that was viewed as paternalistic.

### **Programmes for development of older persons**

#### ***Clause 2(2)(a) the recognition of the social, cultural, economic and political contribution of older persons;***

This programme is reflected very directly in the Madrid Plan<sup>4</sup>.

There was a suggestion that this programme should also refer to the religious contribution of older persons.

#### ***Clause2 (2)(b) the participation of older persons in decision –making processes at all levels***

This programme is also reflected very directly in the Madrid Plan<sup>5</sup>.

In general, it was recognized at the workshops that this is an important programme. In particular it is important that the needs of older persons are recognized at decision-making levels. Furthermore, older women who have traditionally been excluded in the past from decision-making processes should be included. This programme also gives effect to and promotes one of the Principles of Ageing

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<sup>4</sup> Madrid - Priority Direction 1: Older Persons and development:  
Issue 1:Active Participation in society and Development,  
Objective 1: Recognition of the social, cultural, economic and political contribution of older persons.

<sup>5</sup> Madrid - Priority Direction 1: Older Persons and development:  
Issue 1:Active Participation in society and Development,  
Objective 2: Participation of older persons in decision-making processes at all levels.

In the Eastern Cape, participants who were in positions of authority in old age homes were of the view that older persons in old age homes should not be included in the scope of this programme. They pointed out that there are legal implications for management decisions and therefore it is not always practicable to involve older persons. There were concerns that involvement in decision-making would give older persons powers to interfere with the management and running of facilities. In particular that this could interfere with legal obligations that an operator of a facility may have.

***Clause 2(2)(c) the access of older persons to information, education and training***

This programme is also reflected very directly in the Madrid Plan<sup>6</sup>:

Many participants at the workshops spoke keenly about the need for more Adult Basic education and training programmes for older persons, particularly in the rural areas. There was also a call for the ABET programmes to reflect the realities of older persons lives and for these programmes to be designed in a manner that would equip them with practical knowledge.

It was suggested that an intergenerational aspect be added to this programme. It is not only older persons who need information, etc. .... It is also their carers and family members.

Older persons need life skills training, particularly on issues concerning HIV/AIDS, parenting in the 21<sup>st</sup> century, dealing with the generation gap.

***Clause 2(2)(d) the development of older persons in rural and urban areas***

This programme is also reflected in the Madrid Plan<sup>7</sup>:

It was pointed out that Madrid speaks of Older Persons and Development **NOT** the development of older persons. These are 2 different issues completely. It was

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<sup>6</sup> Madrid - Priority Direction 1: Older Persons and development:  
Issue 4: Access to knowledge, education and training

The Objectives contained therein include – Equality of opportunity throughout life with respect to continuing education, training and retraining as well as vocational guidance and placement services (Objective 1 ); and full utilization of the potential and expertise of person of all ages, recognizing the benefits of increased experience with age (Objective 2).

<sup>7</sup> Madrid - Priority Direction 1: Older Persons and development:  
Issue 3: Rural Development, migration and urbanisation  
Objective 1: Improvement of living conditions and infrastructure in rural areas.  
Objective 2: Alleviation of marginalisation of older persons in rural areas.  
Objective 3: Integration of older migrants within their new communities

suggested that this programme should be about development AND Older persons.

Participants thought that this programme was very broad; it needs to be more specific. Participants stated that there is a need to develop systems to address the needs of older person especially in rural areas. It was viewed as a priority area.

In order to counteract the current broadness of this programme, specific reference to the improvement of living conditions and infrastructure in rural areas (Madrid Issue 3, Objective 1); the alleviation of the marginalisation of older persons in rural areas (Objective 2); and, the integration of older migrants within their new communities (objective 3) could be referred to.

***Clause 2(2)(e) the protection and promotion of the rights of older persons***

This clause does not specifically reflect any of the Recommendations of the Madrid Plan. However, the protection and promotion of rights is broad and could potentially encompass many of the Recommendations that are set out in the Madrid Plan.

Participants were pleased with the inclusion of this programme and regarded it as important.

***Clause 2(2)(f) the establishment of norms and standards for companies selling funeral policies and extending loans to older persons***

This is a very specific programme. It does not reflect any of the Programmes set out in the Madrid Plan. However, the programmes is clearly one which is needed in South Africa given the widespread reports of older persons being taken advantage of by some people who sell funeral policies and make loans . In fact, the enormity of the problem and the concern, which participants had about these two issues, is reflected in the fact that it was suggested that this programme should be **split in two**. There should be a programme concerning funeral policies and a separate programme concerning loans. Furthermore, the programme should be reworded in order that the clause does not only refer to companies. **Individuals also engage in these activities.**

In a number of provinces it was raised that persons attend at pension payout points to sell funeral policies to the elderly. There was a concern that not all of these persons selling funeral policies are legitimate. There is a need to regulate the sale of these policies. Older persons need to be protected from illegitimate sellers of policies at pension pay out points. It was noted, that at many pension pay out points the area is cordoned off in order that these illicit activities cannot take place. However, the funeral policy sellers merely set up shop further down the road or just outside the perimeter for the cordoned off area.

It was also reported that “loan sharks” take advantage of the elderly and **offer them loans without explaining all the implications** and how the interest works. Pensioners are seen as targets for the making of loans as the loan sharks know that they have a monthly income in the form of their pension grant. The elderly need to be educated and made aware of the potential dangers in taking loans.

Government intervention in this area was called for through the creation of norms and standards. It was strongly felt that there is a need for government to regulate these industries.

It was pointed out that the National Credit Bill, which is before Parliament, should deal with some of these issues.

***Clause 2(2)(g) the utilization and management of existing facilities for older persons as multi purpose community centers and the development of integrated community care and support system.***

Again, this programme is very specific and addresses the needs of South Africa. It does not reflect a specific programme that is set out in the Madrid Plan. Participants interpreted this programme as an attempt by government to redress the past in which resources were unevenly distributed according to race groups. It was recalled by participants that during apartheid few old age homes were built for black persons. In fact, in Limpopo there was not a single old age home for black people prior to 1994. The programme reflects an affirmative action measure whereby care systems for the elderly will cater for everyone. The programme must further be placed in the context that during the apartheid era it was vogue in many developed countries around the world to place your elderly in old age homes. This trend in the 21<sup>st</sup> century is being reversed. It is not recognized that older persons must remain active members of the communities for as long possible. It is therefore important to prioritize the delivery of care services within the community. Finally, many black participants informed the workshops that it is not part of the ‘black culture’ to place your elderly in an old age home and that rather, the elderly should remain with their families and their communities.

The programme was supported and welcomed by participants. It was argued that **the programme should not only be limited to existing facilities** but should also include the establishment of new facilities. Many existing facilities, particularly the ones that were built during Apartheid are based within white communities and are not located close to black communities. Also, there are not many facilities in the rural areas, particularly the deep rural areas. The geographical location of the existing facilities would pose access problems for older persons from all communities. For these reasons, it was suggested that the programme should also include the establishment of new facilities

There were also discussions by participants about multi purpose community centers (MPCC's). Participants were eager to understand what would happen at the MPCC's. (It was brought to our attention that MPCC's operate differently in different provinces. In some provinces they are run by GCIS and in other provinces the Department of Social Development coordinates them.)

Whilst recognizing the benefits of intergenerational programmes, it was agreed that there is a need to point out that older persons need their own spaces in which to conduct activities just for older persons. There is the danger that these spaces will be taken over by the youth if they are opened up.

***Clause 2(2)(h) the provision of basic affordable accommodation for older persons;***

This is also a specific South African programme and does not directly reflect one of the Madrid recommendations. Participants welcomed the programme. Information was shared about older persons who live in abusive situations because they are unable to find a place of their own to live; and of older persons struggling to make ends meet due to the high cost of living and accommodation. In the Eastern Cape information was shared about older persons who were homeless and were living in the bushes on the outskirts of the townships. Arising out of the latter information, participants suggested that the programme should be expanded and that the programme should also address **homelessness** amongst older persons.

There was a discussion about the ongoing perceived discrimination against older persons from entering old age homes. This is done through charging fees that some older persons cannot afford. Also, 'once off' entrance fees are charged. Often these fees are not spoken about. This ongoing discrimination that is still happening in some facilities was of concern to the group. It was felt that there is a need for regular inspection of facilities in order to ensure that there is no discrimination in admittance policies. Such cases of discrimination must be referred to the Equality Court. Also, it is a criminal offence in terms of the Bill. Rural areas in particular need to be monitored.

Affordable accommodation must also offer a continuum of care based on the needs of the older person.

We also discussed the affordable accommodation needs of grandparents who care for their orphaned by HIV/AIDS grandchildren. Many facilities will only admit older persons and will not allow them to bring their grandchildren with them. The question was posed, if there is this need, why can old age homes not create a wing where grandparents are given accommodation with their grandchildren.

**Clause 2 (2) (i) the provision of care and services to older persons in rural and urban areas and in disadvantaged communities;**

**and**

**Clause 2 (2)(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;**

Participants welcomed these programme. It was thought however that they were very broad. Participants were thus uncertain as to the potential scope of these programmes. Regarding health systems, participants stated that government should continuously seek to expand health services to the elderly. It was also suggested that this programme should also look into the provision of special discount health services.

The Madrid Plan gives some indication as to what may be intended in these programmes:

“Priority Direction II: Advancing health and well being into old age.

Issue 1 Health promotion and well being throughout life

Objective 1 Reduction of the cumulative effects of factors that increase the risk of disease and consequently potential dependence in older age

Objective 2 Development of policies to prevent ill health among older persons.

Objective 3 Access to food and adequate nutrition for all older persons

Issue 2 Universal and equal access to health care services

Objective 1 Elimination of social and economic inequalities based on age, gender or any other ground, including linguistic barriers, to ensure that older persons have universal and equal access to health care

Objective 2 Development and strengthening of primary health-care services to meet the needs of older person and promote their inclusion in the process

Objective 3 Development of a continuum of health care to meet the needs of older persons

Issue 3 Older Persons and HIV/Aids

Objective 1 Improvement in the assessment of the impact of HIV/AIDS on the health of older persons, both for those who are infected and those who are caregivers for infected and surviving family members

Objective 2 Provision of adequate information, training in care giving skills, treatment, medical care and social support to older persons living with HIV/AIDS and their caregivers

Objective 3 Enhancement and recognition of the contribution of older person to development in their role as caregivers for children with chronic diseases, including HIV/AIDS, as surrogate parents.

Issue 4: Training of care providers and health professionals

Objective 1 Provision of improved information and training for health professional and para-professionals on the needs of older persons

Issue 5 Mental health needs of older person



Objective 1: Development of comprehensive mental health-care services ranging from prevention to early intervention, the provision of treatment services and the management of mental health problems in older persons

Issue 6: Older persons and disabilities

Objective 1: Maintenance of maximum functional capacity throughout the life and course and promotion of the full participation of older persons with disabilities.”

***Clause 2(2)(k) the establishment of a national research plan and communication network on ageing***

This programme reflects the Madrid Plan suggestions on Implementation and Follow up<sup>8</sup>.

Participants supported the programme. It was recognized that in order to develop policy and make strategic decisions on which programmes should be implemented first that it would be important that these decisions are informed by research.

***Clause 2(2)(l) – the creation of employment opportunities for older persons***

This programme reflects one of the recommendations contained in the Madrid Plan<sup>9</sup>.

This specific programme led to a lot of lively debate and discussion amongst participants. It was pointed out that employment opportunities for older persons must be appropriate for the older person needs and abilities, in terms of age.

In the Eastern Cape there was a lengthy debate about whether older persons should work. It was strongly felt by older persons present that when they reach the age of retirement they should not have to work and that their families should care for them. Many participants felt that older persons should not work at all.

This debate was in strong contrast to the debate around age discrimination and moves at an international level and in many other countries to implement measures to counter age discrimination. In many instances, older persons are discriminated against on the basis of age and prevented from being employed due to the retirement age stipulated in labor laws. The *Madrid Declaration* states that with the growing older population, opportunities should be created to give older persons opportunities to work. There should be no forced retirement on the

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<sup>8</sup> Paragraph 119 “Other crucial elements of implementation (at a national level) include: effective organizations of older persons; education, training and research activities on ageing; and national data collection and analysis, such as the compilation of gender and age specific information for policy planning, monitoring and evaluation. ....”

<sup>9</sup> Madrid - Priority Direction 1: Older Persons and development:

Issue 2: Work and the ageing labor force

Objective 1: Employment Opportunities for all older persons who want to work.

basis of age. Work in old age should be negotiated with the employer and employee.

In the Northern Cape it was suggested that labor laws should be amended thereby removing the mandatory retirement age of 60 / 65 for older persons. It was argued that it is discriminatory to be able to enforce a mandatory retirement age. Many countries around the world are reconsidering retirement ages and are allowing older persons to continue working.

It was agreed that this issue is one for considerable debate. Some of the many issues discussed included:

- Some older persons have to work in order to obtain additional income, especially those looking after grandchildren
- In some cases, it is appropriate for older persons to retire as they can no longer perform their duties
- Some older persons at age 65 still have enormous energy and a lot to add to society and the work place
- Mandatory retirement ages are controversial
- Older persons constitute an important knowledge base
- Given high rates of unemployment older persons should be encouraged to retire and thereby create jobs for the younger generations
- By earning an income the older person may be excluded from getting a pension

Clearly, a programme is needed to explore this complicated issue!

***Section 2(2)(m) the establishment of recreational opportunities for older persons***

This is also a specifically South African programme. Due to the lack of services that have been provided in the past to older persons who live in communities, this programme is important.

***Clause 2(2)(n) The exemption of older persons from the payment of property rates and taxes;***

This programme is a specifically South African one. It was very well received! Participants regarded it as an important programme. It was pointed out though that this section would only provide benefit for older persons who own property.

***Clause 2(o) the availability and accessibility of free or subsidized public transport facilities for older persons***

This programme reflects one of the Recommendations from Madrid<sup>10</sup>.

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<sup>10</sup> Priority Direction III; Ensuring enabling and supportive environments

This program was supported. Many participants were of the view that public transport for the elderly should be free and subsidized. The commission was informed of the exploitation of older persons on pension paydays when some taxi operators charge higher fares to older persons who are traveling to collect their pensions.

It was suggested that this programme should also look at safe transport. Accessible transport must be interpreted broadly. This should include the inaccessibility of some busses and trains due to large steps, gaps and bus drivers pulling off before the elderly have sat down.

Bus drivers who transport dementia patients sometimes need awareness raising counseling in order that they are comfortable with their passengers and understand their behavior.

Finally, participants identified programmes, which they thought were needed in South Africa. These included:

### **Programmes that should be added to Clause 2(2)**

Participants also made a number of suggestions concerning additional programmes for the elderly, which in their view are needed. These included:

- 1) A Programme to support the creation of a National Forum for Older Persons.

“On 18 & 19 August 2005, 150 delegates from all over South Africa, representing the various groupings within our older persons sector, attended an Older Persons Convention.

The purpose of the Convention was to facilitate the establishment of an Older Persons Forum. To this end, the Convention, listened to the voices of older persons, academics giving input on the status of older persons in South Africa and foreign experts who advised and assisted through sharing with us the different models, which exist for such Forums around the World.

It was agreed during the course of the 2 days that an Older Persons Forum will be established. The Convention received assurances from both the Department of Social Development, as well as, the South African Human Rights Commission that they would assist in the initial establishment of the Forum.

To assist in this enormous task, a Steering Committee has been comprised. This Committee is representative of the Older Persons sector in South Africa. During the next 6 months, the Steering Committee is tasked with developing further the formation of the Forum.

The Forums status and responsibilities will be advisory to government, consultative, advocacy (which includes legislation, policy and funding); fostering growth of community organizations, promotion of rights of older persons, dissemination of information and awareness raising, encouraging twinning and mentorship to develop capacity. It is also anticipated that the Forum will have regular contact with the Minister of Social Development, Parliament and other relevant stakeholders.

The South African Human Rights Commission in fulfillment of its constitutional mandate to promote and protect human rights, including the rights of older persons will facilitate this process by hosting the Steering Committee for an initial period of six months. After this is anticipated that the Forum will operate as an independent body<sup>11</sup>.

- 2) HIV/AIDS and its impact on the elderly. The Madrid Plan has a number of recommendations in this area under Priority Direction II: Advancing health and well being into old age.

The scourge of HIV/AIDS and its impact on older persons in our country was startlingly apparent during the provincial workshops. In East London, the workshop was attended by a large number of grandmothers from the surrounding township. The impact of HIV/AIDS dominated all discussions on the Bill. Clearly more needs to be done to support and assist our elderly. They are the backbones of many communities, caring for those who are dying and taking on the responsibility of the children who are left orphaned.

Older persons need support. They need practical support in the form of ensuring that all possible avenues of social assistance are made available to them speedily, efficiently and in a caring manner.

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<sup>11</sup> Extract from Statement read out by Commissioner Manthata at the closing of the Older Persons Convention in Johannesburg, 19 August 2005.

They need education and training on how to care for those who are infected with AIDS. They need emotional support on how to deal with the devastating impact of the disease but also how to bring up their grandchildren and deal with the generation gap, which is increasing, at a rapid rate. Older persons need the support in order to be empowered to take on these burdens. Most importantly they want to be acknowledged and not to feel that they are being taken for granted. The Bill needs to provide for a programme to address these issues<sup>12</sup>.

- 3) Education and awareness on elder abuse
- 4) Programmes to address homelessness.
- 5) In KZN participants requested a programme that would include traditional leaders in matters concerning the elderly.
- 6) Adult Basic Education (ABET) programmes are needed.
- 7) Programmes that address intergenerational solidarity<sup>13</sup>

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<sup>12</sup> Extract from speech delivered at Older Persons Convention, Judith Cohen, Parliamentary Officer, SAHRC, 18 August 2005.

1) <sup>13</sup> (Madrid Plan: Issue 5: Objective 1 Strengthening of solidarity through equity and reciprocity between generations.

Paragraph 42 states: Solidarity between generations at all levels – in families, communities and nations – is fundamental for the achievement of a society for all ages. Solidarity is also a major prerequisite for social cohesion and a foundation of formal public welfare and informal care systems. Changing demographic, social and economic circumstances require the adjustment of pension, social security, health and long term care systems to sustain economic growth and development and to ensure adequate and effective income and maintenance and service provision.

Paragraph 43 states: At the family and community level, intergenerational ties can be valuable for everyone. Despite geographic mobility and other pressures of contemporary life that can keep people apart, the great majority of people in all cultures maintain close relations with their families throughout their lives. These relationships work in both directions, with older persons often providing significant contributions both financially and, crucially, in the education and care of grandchildren and other kin. All sectors of society, including governments, should aim to strengthen those ties. Nevertheless it is important to recognize that living with younger generations is not always the preferred or best option for older persons.

Paragraph 44 states: Objective 1: Strengthening of solidarity through equity and reciprocity between generations.”

Actions within this programme could include:

- public education to promote understanding of ageing;
- Reviewing existing policies to ensure that they consider the need to address the specific situation of the generation of people who have to care, simultaneously, for their parents, their own children and their grandchildren;
- initiate research on the advantages and disadvantages of different living arrangements for older persons, including familial co-residence and independent living in different cultures and settings. (paragraph 44)

8) The eradication of poverty.

9) Programmes that address dementia and Alzheimer's, both in terms of education and awareness but also in terms of services to sufferers and their families and careers.

10) More programmes to ensure an enabling and supportive environment for older persons.

## **G. Chapter 2 - Ensuring an Enabling and Supportive Environment for Older Persons**

### **Introduction**

According to figures from the National Department of Social Development, there are 31 845 older persons living in 461 old age homes across the country. There are approximately 3,7 million older persons above the age of 60 of which it is estimated that 3,2 million are vulnerable. These indicators clearly demonstrate that legislation that purports to ensure an enabling and supportive environment for older persons must focus on older persons who live in the community.

The Older Persons Bill must be understood within the context of the drafting of the Aged Persons Act in 1967 during the Apartheid years. The Aged Persons Act was drafted specifically to regulate homes for white older persons. "It was intended to address the exploitation and unjust treatment of aged persons in homes run for profit by ensuring that these were registered, that standards of care were laid down and inspections carried out to ensure standards were maintained. (Assembly debates 21 April 1967 – 4639)."<sup>14</sup> It is estimated that approximately 600 old age homes and 400 housing complexes were established for the white older persons from the mid sixties to the mid eighties. Approximately 58 000 older white persons lived in these facilities. In the same period, only 11 homes were established for approximately 1 200 black older persons<sup>15</sup>. These statistics demonstrate how the Aged Persons Act was drafted and intended for the benefit of the white community during Apartheid. Whilst subsequent amendments have been made to the Act in 1994 and 1998 – it is submitted that we still have a long path to travel in order to ensure that there is an equal distribution of services that benefits the poor and the marginalized in this country.

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<sup>14</sup> Mothers & Fathers of the Nation, Report on Abuse, Neglect and Ill Treatment of Older persons, Main Report, 2001, 6

<sup>15</sup> Ibid, 13

**Table1: Number of Old Age Homes, number of residents, number of service centers and Number of Older persons per province<sup>16</sup>**

Province	No. of old age homes	No. of residents	No. of Service Centers	No. of older persons, 60+ <sup>17</sup>	No. of Vulnerable Older Persons, 60+ <sup>18</sup>
Eastern Cape	54	3 643	54	644 338	560 510
Free State	38	717	78	214 947	186 982
Gauteng	99	9 403	120	628 127	546 408
Kwa Zulu Natal	54	2 362	73	744 065	647 262
Limpopo	8	893	50	461 342	401 321
Mpumalanga	19	1 228	50	227 167	197 612
North West	26	1 529	42	313 282	272 524
Northern Cape	27	1 216	19	72 146	62 759
Western Cape	136	10 854	168	400 720	348 587
<b>Total</b>	<b>461</b>	<b>31 845</b>	<b>654</b>	<b>3 707 144</b>	<b>3 223 965</b>

### Who cares for the elderly?

The Bill deals with the care for the elderly. It is thus important to explore and determine who cares for the elderly in our communities. Once these relevant role-players and services have been identified the Bill can be evaluated in order to ascertain whether it addresses the different forms of care that the elderly receive. In general, the elderly live in the community and care for themselves or are cared for by family members. Listed below are all the various caregivers and forms of care that were identified at the provincial workshops.

Older persons are cared for in their own homes, e.g.

- The elderly care for themselves
- Nuclear and extended family members, children, grandchildren, etc. ...
- Members of the community and especially neighbours

Older persons are cared for in their communities, e.g.

- Caregivers
- Home based caregivers
- Outreach programmes
- NGO's, CBO's and FBO's, such as daily emotional support and assisting with shopping
- Support groups for the aged.
- Luncheon clubs

<sup>16</sup> Figures taken from "V5 Final Report: Costing of the Older Persons Bill", April 2005, Department of Social Development, pp 16

<sup>17</sup> Ibid, p24, the 2005 guestimate figure has been used

<sup>18</sup> Ibid, p25. Vulnerable Older Persons are determined by their eligibility for Social Security Grants. According to Social Security Statistics, only 86,9% (2 863 221) of eligible older persons were receiving Social Security grants at the end of 2004. The 2005 guestimate figure has been used.



- ❑ Service Centers
- ❑ Day care centers
- ❑ Volunteer health workers
- ❑ Respite care
- ❑ Step down facilities
- ❑ Government departments, e.g. social welfare (social workers), health and housing
- ❑ Corporate, however this is limited, e.g. discounts, pension days, transport.

Older persons are cared for in residential facilities

- ❑ Old age homes.
- ❑ Frail care homes
- ❑ Private registered institutions
- ❑ Unregistered private homes

It was stated in a number of provinces that it is against the cultural value system of many communities, particularly black communities to place your elderly in old age homes. This approach is in keeping with international trends and developmental approaches to ageing which encourage that older persons remain in the community for as long as possible. The Bill needs to reflect these trends and the realities of the South African situation.

### **General Comment**

Throughout the country, the Bill was consistently criticized as being focused on old age homes and not reflecting sufficient attention being given to community forms of care. This is a valid criticism in that there are far more clauses dealing with facilities than there are clauses dealing with community care. Also, the Bills structure is reflective of the structure in the 1967 Aged Persons Act – the Bill therefore reflects a preoccupation with facilities.

One way of addressing this perception would be to reorganize the Bill. The Bill must reflect a **developmental approach** towards ageing in which the older person remains in the independent and in the community for as long as possible. This must be reflected in the **structuring of the Bill** in order that the provisions relating to non-residential care should be dealt with first and thereafter residential care as a last resort option after all other forms of care have been exhausted are reflected. The chapter should reflect the developmental continuum of care that older persons should have access to based on their needs. In terms of this approach, the clauses in this chapter would be rearranged in the following manner:

### ***Current ordering of clauses***

- Clause 3 Facilities and services to comply with national norms and standards
- Clause 4 Conditions of use, withdrawal and refunding of subsidies

- Clause 5 Prohibition on operation of unregistered facilities, and registration of such facilities
- Clause 6 Minister to be notified of provision of certain services
- Clause 7 Compliance with conditions for registration of facilities
- Clause 8 Establishment of resident's committees for facilities
- Clause 9 Admission to facilities
- Clause 10 Monitoring of registered facilities or places
- Clause 11 Report to Minister by managers of facilities.

***Proposed ordering of clauses***

***Part One: Services***

- Clause 3 Facilities and services to comply with national norms and standards
- Clause 6 Minister to be notified of provision of certain services

***Part Two: Facilities***

- Clause 5 Prohibition on operation of unregistered facilities, and registration of such facilities
- Clause 4 Conditions of use, withdrawal and refunding of subsidies
- Clause 7 Compliance with conditions for registration of facilities
- Clause 8 Establishment of resident's committees for facilities
- Clause 9 Admission to facilities
- Clause 10 Monitoring of registered facilities or places
- Clause 11 Report to Minister by managers of facilities.

**Clause 3 Facilities and services to comply with national norms and standards**

This is a new clause and was not contained in the Aged Persons Act. It introduces the establishment of national norms and standards for facilities and services provided for or subsidized by State monies. The Minister will prescribe these national norms and standards.

Participants at workshops welcomed this clause. However they were uncertain about the content of the norms and standards, which are relegated to Regulations (Clause 21), which the Minister will draft after the passing of the Bill. Whilst it was accepted that Regulations may be the correct place for these National norms and standards, older persons organizations would welcome an opportunity to participate further and give input into these norms and standards.

There was also a concern that the Bill does not provide any time lines for the drafting of these norms and standards. It was proposed that such a timeline should be included in the Bill. There have been a number of clause, as we will see below, that were introduced in terms of the Aged Persons Amendment Act of 1998 that have yet to be operationalised. Alternatively, if they have, this has not been adequately communicated to older persons organizations.

The clause demonstrates the drafters, possibly unintentional, slant towards providing for old age homes. The title of the clause and the wording of the clause refers throughout to 'facilities and services'. A more developmental approach would refer first to services and then to facilities. This would reflect the continuum of care, which older persons should have at their disposal.

In many provinces, older persons asked that there be norms and standards developed for home-based carers. They said that these carers arrive at their door and come into homes. It is difficult for them to determine if the person is a legitimate home-based carer or not. Also, they want assurances that the service they will receive will be of a particular quality.

There were also requests that home-based care be more formalized. Many were of the view that home-based carers should be paid some form of stipend by the State and that it should not be expected that these services be delivered for free.

### **Submissions**

- a) A further clause must be inserted providing that the Regulations for Norms and Standards must be drafted within one year of the coming into operation of the Act.
- b) Throughout the clause the phrase 'facilities and services' be changed to 'services and facilities'.

### **Clause 4 Conditions of use, withdrawal and refunding of subsidies**

This clause is similar to Section 2 of the Aged Persons Amendment Act 1998. The Bill introduces (by way of the NCOP amendments to the Bill) the concept of the keeping of a register of assets that are bought with state funds (clause 4(1)).

The introduction of the keeping of a register was welcomed. It was pointed out that in the some instances, services or old age homes close down. It is only fair that assets that are bought with state funds should be made available for the benefit of other state subsidized services or facilities.

It is now an offence to fail to comply with this clause - previously it was not. The penalty is a fine or imprisonment not exceeding one year, or both such fine and imprisonment.

### **Clause 5 Prohibition on operation of unregistered facilities, and registration of such facilities**

This clause is substantially similar to section 3 of the 1967 Aged Persons Act

Participants at the workshops generally welcomed the clause. There was some concern about the practical implementation of the clause and how facilities that are based in poor communities how they would access the process and communicate with the department. This though is a challenge for the implementation of the Bill when it becomes and Act.

### **Clause 6 Minister to be notified of provision of certain services**

Provision was made in the Aged Persons Act of 1967 for the payment of subsidies to clubs, service centers, and welfare organizations. Section 2 of the Aged Persons Amendment Act 1998 referred to *Conditions for subsidies to homes for the aged and certain other institutions*.

The new clause provides specifically that persons who manage a luncheon club and provide home-based care must notify the Minister. The clause further provides that such persons may apply for subsidies in the prescribed manner.

A concern from participants was that this clause is too narrow. Whilst the title of the clause refers to services, which is defined in the definitions section (“... any activity or programme designed to meet the needs of an older person’), services are then narrowed down to in the content of the clause to luncheon clubs and home based care.

In light of the discussions around the definition of a luncheon club (see definitions chapter of submission), many participants were concerned that their services or clubs would not be eligible for subsidies in terms of this section.

Similar concerns were raised as were raised with clause 2, namely that participants were afraid as to how user friendly the system of notification and application to receive a subsidy would be. Again the bias towards facilities was noted in that facilities must apply to the Minister in the prescribed manner whereas a person who manages a luncheon club must merely notify the Minister in writing. Again Clause 5 provides lengthy details on the application process for registration linked to the granting of subsidies. Similar provisions should be inserted for community services. The failure to do so creates the perception that more attention and importance is given by the State to old age homes. This may well not be the intention of the Department, however as the Bill currently stands, this is the perception of role-players out there.

### **Submissions**

- a) Clause 6 (1) should refer to the revised definition, as proposed earlier in the submission, and refer to clubs.
- b) Clause 6(1) should refer to services and community based care and support services.
- c) Clause 6(1) should state that a persons must notify, the Minister **in the prescribed manner...**”

- d) Additional sub-clauses, similar to the sub-clauses contained in clause 5 and 7 should be inserted with deal with the registration and granting of subsidies to services.
- e) The reference to accommodation in clause 6(2) is illogical as clause 6(1) only refers to luncheon clubs and home-based care. The word accommodation should be removed.

### **Clause 7 Compliance with conditions for registration of facilities**

This Clause in the Bill substantially reflects Section 3 (*Monitoring compliance with conditions for registration of homes for the aged*) of the Aged Persons Amendment Act 1998.

In terms of the Aged Persons Amendment Act 1998, the aged persons concerned and the National Minister had to be notified in writing of the decision to close down or transfer the home.

The new clause only refers to decisions to close down a facility and not to the transfer of a facility. In terms of Clause 5(6) of the Bill a person to whom a registration certificate has been issued may not transfer it to any other person. Thus the removal of the reference to transfer of a facility makes logical sense.

In terms of the *Rights of older persons* clause in the Bill (Clause 12) an older person is to be given at least 30 days' notice of a proposed transfer or discharge. In other words, the current Bill limits the amount of notice given to an older person from six months to one month.

In terms of the Bill, when a facility closes down, all assets bought with government funds must be handed over to the Department.

### **Clause 8 Establishment of resident's committees for facilities**

This clause in the Bill reflects with minor grammatical and language use changes, Section 3 of the Aged Persons Amendment Act 1998 (Establishment of management committees for homes for the aged).

This clause evoked much discussion throughout the country. Particularly persons who were involved in the running of old age homes stated that it was extremely problematic and difficult to comply with this clause. Firstly, how do the residents ensure for example that the facility provides opportunities for the training of staff (clause 3 (d)). If this training does not occur, then what powers and / or ability have the residents committee got to enforce compliance with this provision.

Also, it was pointed out that there is a trend towards old age homes becoming frail care centers, Many of these residents do not have the necessary energy or physical ability, due to frail health, to participate in such a residents' committee.

Participants also questioned why only residents in a facility with more than 10 persons should be included within the ambit of this provision. How was this number decided on?

The clause reflects again the subtle preoccupation with old age homes. Whilst the definition of facility refers to community based care and support services, it is clear that the use of the word resident in this clause refers only to old age homes or residential care.

It will be practically impossible and illogical for a community-based care and support service to establish a residents committee. These services may well have a transitory group of recipients. Also, it is not clear if the intention of drafter was to prescribe the duties given to the residents in clause 8(3) to recipients of community based care and support services.

### **Submission**

- a) This clause needs to be revisited. It must be determined whether the clause is intended to apply to residential care facilities only. If so, this ought to be stated.
- b) It also needs to be determined legally, whether the residents can in fact ensure that a manager carries out the functions set out in clause 8(3). It is doubtful that a committee can.
- c) An obligation should be created that older persons are entitled to be consulted on and participate in the decision-making processes concerning the matters contained in clause 8(3).
- d) A separate clause should be inserted that refers to how older persons will be consulted and included in the decision-making processes in community based care and support services.

### **Clause 9 Admission to facilities**

This section was introduced in the 1998 Amendments to the Aged Persons Act. In this Act, the provision **referred specifically to homes for the aged**. In terms of the Bill, the offence now attracts a lesser penalty. In terms of the 1998 Amendment Act the penalty for contravening this section was a fine or imprisonment not exceeding five years, or both such fine and imprisonment. The offence in the Bill has been reduced to a fine or imprisonment not exceeding one year, or both such fine and imprisonment.

In terms of the NCOP amendments to the Bill, reasons for refusal of admission to a facility must now be given in writing. This addition is welcomed.

Participants appreciated the clear need to eliminate discrimination against older persons who apply to be admitted to an old age home. Since the inclusion of this provision in the 1998 Amendment Act, the Equality Act (Promotion of Equality

and Elimination of Discrimination Act, 2002) has been promulgated. Thus in terms of the provisions contained in the Equality Act an older person who is discriminated against can also access the relief that can be sought through the Equality Courts, which have been established throughout the country. The Bill provides a further relief in that such discrimination can also be criminally prosecuted.

There was some concern from religious organizations that have private old age homes about clause 9(2). Some religious organizations in South Africa may be particular to certain race groups. This makes it difficult to comply with this sub-clause. The Commission has recently convened an Inquiry into voluntary associations. The outcome of this Inquiry should go some way in determining the extent of the applicability of this clause.

Other participants, including social workers from the Department, also raised the issue of the racial integration of services. It was pointed out, that whilst the communities in South Africa still largely reflect the Apartheid 'group areas' boundaries, services provided for older persons tend to cater for a specific race group. In order to give effect to this clause, there would have to be some very creative and innovative steps taken in order to ensure that recipients of services at each particular organization and home reflects broadly the race composition of South Africa.

Again, given that this clause is a replication to some extent of the 1998 Aged Persons Amendment Act, it is not clear if the intention of the legislator is to extend these provisions to community based care and support services for older persons. The use of the word admission in clause 9(1) indicates that the clause does in fact refer to old age homes. For the clause to refer to community based care and support services it would have to refer to recipients of these services.

### **Submission**

- a) This clause should refer specifically to residential care facilities. It is justifiable, in light of a particular history concerning old age homes, that affirmative action measures are created in legislation to address the imbalances of the past.
- b) If the intention is for this clause is to refer to community based care and support services then this should be stated clearly. A separate clause could be created to address discrimination in this context.
- c) A further clause referring to recipients of community based care and support services should be added to the Bill.
- d) The reference to manager in clause 9(3) should be changed to operator. As the failure to comply with this clause can attract criminal sanctions, it should be the person who is overall control of the old age home that gives the reasons in writing, These reasons may well become the subject of litigation and the decision on whether to prosecute criminally.

### **Clause 10 Monitoring of registered facilities or places**

This clause reflects with minor language changes Section 4 of the Aged Persons Amendment Act 1967. Wording and terminology has been changed e.g. a medical practitioner is now referred to as a professional health care provider.

Participants were enormously concerned that there are not enough social workers to carry out the duties that are created in this clause. This provision has been on our statute books since 1998 and it was doubted whether serious effect had been given to it. Older persons wanted assurances from the Department that there is the capacity and programmes in place in order to deliver on the obligations created in the Bill. Participants who attended the workshops were not aware of this procedure having being used much.

Monitoring of services and facilities for the elderly is very important. It needs to be ensured that levels of services are complied with and that the resources provided by the State are being correctly used. Also, monitoring is an important deterrent to stop abuse from occurring. Monitoring also allows for early preventive steps to be taken before problems become too large.

#### ***Submission***

- a) The title of the clause refers to facilities or places. This reflects the preoccupation in the Bill with old age homes. It would be more appropriate to **refer to facilities last**.
- b) The term places in the title should also be reconsidered. It should be changed **registered community based care and support services**.

### **Clause 11 Report to Minister by managers of facilities.**

This clause reflects, with minor language and terminology changes, section 7 of the Aged Persons Amendment Act 1967.

There was concern that the reporting requirements may overlap with the provisions contained in the Non-Profit Organizations Act, 1998. It was requested that here should not be duplication of reporting requirements.

Again, the Aged Persons Act of 1967 referred to reporting by old age homes. It did not refer to the broad spectrum of community services, which the Older Persons Bill now seeks to provide for. It is recognized that reporting is necessary for all recipients of state funds. Clause 4 also deals with reporting requirements in respect of subsidies.

#### ***Submissions***

- a) Clause 11 should be placed immediately after Clause 4. All, reporting requirements should be contained in one clause. The failure to do this may create confusion.



- b) Different reporting requirements should be determined for residential facilities versus community-based care and support services. This should be reflected in two different clauses.

## **H. Chapter 3 – Protection for Older Persons**

### **Introduction**

Older persons are a vulnerable group who are susceptible to abuse. This type of abuse has received growing attention both internationally and in South Africa. In fact the drafting of the Older Persons Bill was put on hold following the screening of a Carte Blanche programme in March 2000, which highlighted abuse, and ill treatment of older persons at a residential facility. In response to the public outcry which followed the screening of this programme, the then Minister Zola Skweyiya, of Welfare and Social Development established a Ministerial Committee on Abuse, Neglect and Ill-treatment of older persons which was chaired by Commissioner Tom Manthata of the South African Human Rights Commission. This Committee conducted public hearings in all provinces and presented their report, *“Mothers and Fathers of the Nation: The Forgotten People”*, to the Minister on 26 February 2001. The Report indicated that there are alarming high levels of abuse perpetrated against older persons. The Report was submitted to Cabinet and the recommendations were adopted.

### **Models of dealing with elder abuse**

#### *Domestic Violence model*

A domestic violence model approach to elder abuse would emphasize the need to provide safety to the victim. This is seen in the removal of either the perpetrator of the victim from the source of the violence. It also attaches criminal responsibility to the acts of violence. Whilst this model has the advantage of removing the source of the violence or the older person from the situation it often results in the older person having to find an alternative place of care. By failing to provide the alternative source of care the older person may not report the abuse for fear of being removed from his or her residence<sup>19</sup>. Many older persons find it very disruptive to be removed from their residence in order not to be exposed to abuse.

#### *Child abuse model*

The child abuse model of protection focuses on the ‘best interests of the child’ standard. In terms of this model systems and mechanisms are used to evaluate the risks and determine appropriate intervention. This child is not autonomous in deciding what intervention will take place. In the context of elder abuse this model can be problematic as the older person is an autonomous adult who is entitled to take decisions for her or himself.

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<sup>19</sup> Kinnear, P & Graycar, A, “Abuse of Older People: Crime of Family Dynamics?” Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice, No. 113,5, May 1999

### *Elder abuse*

There is no specific model that has been developed to deal with elder abuse. Rather, it is recognized that a combination of approaches and options are necessary. It is suggested a combination of responses, which draw on the different protection models, should be developed<sup>20</sup>. It is important to have prevention systems in place that include education and awareness about abuse and how to detect it. Intervention models are necessary where there is the need for intervention when the abuse has already occurred.

We need to ensure that Chapter 3 reflects an appropriate model of dealing with elder abuse in South Africa.

### **Types of abuse**

The Bills' second major focus is addressing abuse of the elderly. In order to lay the groundwork for the discussion on these contents of the Bill – participants were encouraged to share the types of abuse that the elderly suffer from in their communities. These were the types of abuse that were identified:

- Psychological
- Financial
- Sexual
- Physical
- Systemic abuse
- Emotional Neglect
- Institutional abuse
- Neglect
- Exploitation

Participants gave some examples of abuse, these included:

- There is a general intolerance of the needs and abilities of older persons.
- Participants complained of bad treatment by health officials who complain that older persons are slow and deal with them in an irritated and dismissive manner.
- In Limpopo, there are still some incidences in which older woman are burnt because they are accused of being witches.
- Abuse by each other (late onset)
- Older persons are victims of crime. A number of incidents of sexual abuse and rape were spoken of. In Mpumalanga a report was given of an 'older persons cleansing myth' in which it is believed that by having sex with an older person you will be cured of HOV/AIDS. This report was confirmed by other social workers present at the Workshop.

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<sup>20</sup>Kinnear, P & Graycar, A, "Abuse of Older People: Crime of Family Dynamics?" Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice, No. 113,5, May 1999

- In the Eastern Cape, the workshop was told of older persons who were homeless and were living in the bushes on the outskirts of the township.
- Older persons expressed a feeling of being taken for granted by society in looking after their grandchildren.
- Pension payout points were complained of a lot. Pay points provide a number of opportunities for criminals and unscrupulous people to target older persons and abuse them financially.
- In the Western Cape and Northern Cape, there were many incidences recounted of pensions being used to fund drug addictions and alcohol addictions. Stories were told of addicts dropping of older persons to collect their pensions, taking their pensions from them and then driving off - not caring how the older persons would get home again.
- The lack of affordable accommodation places elderly in vulnerable situations. Their financial inability to afford a place of their own results in many having to live in situations where they are abused. Some older persons live in situations where family members abuse them persons emotionally and financially
- Role-players stated where instances of abuse are uncovered, the Justice system is not user friendly towards the elderly. Many are too scared to testify in court. The stress of having to participate in a criminal trial prohibits some older persons from reporting abuse to the police.

### **General overview of the chapter**

There was a general concern that the chapter makes little provision for abuse that occurs in private homes and in the community. The chapter deals predominantly with abuse that occurs in institutions and provides mechanisms to address instances where such care is injurious to the older person or where the older person is taken advantage of (section 14 and 15).

The chapter prohibits abuse being committed against older persons (section 13) and makes such abuse a criminal offence. The chapter also places an obligation on persons who examine or deal with the elderly to notify the Director – General should they suspect that the older person is a victim of abuse. Failure to do so will constitute a criminal offence (section 16).

The chapter provides for the keeping of a register of abuse of older persons (section 17). Finally, the Chapter provides a mechanism to deal with older persons in need of care and protection (chapter 18).

The *Madrid Plan of Action on Ageing, 2002* calls on governments to enact legislation and strengthen legal efforts to eliminate elder abuse<sup>21</sup>. The Older

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<sup>21</sup> Priority Direction III: Ensuring enabling and supportive environments, Issue 3: Neglect, abuse and violence

Persons Bill thus goes some way in fulfilling the government commitment to respond to elder abuse.

**The Bill ought to reflect a community orientated approach to the care of the elderly and de-emphasize a facility-based approach.**

The perception is created again in this chapter that the Bill is written with the interests of older persons living in facilities being the Bills' main priority. This perception is created by the first clause of the chapter (clause 12) addressing the rights of older persons in facilities.

The ordering of the clauses in the Bill should reflect the progressive developmental approach of protecting older persons in the community and provide protection mechanisms in the different forms of care which they may encounter during their ageing process. In other words the Bill should provide protection for persons in the community, thereafter for persons living in private

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Par 107 "Neglect, abuse and violence against older persons takes many forms – physical, psychological, emotional, financial – and occurs in every social, economic, ethnic and geographic sphere. The process of ageing brings with it declining ability to heal, so that older victims of abuse may never fully recover physically or emotionally from trauma. The impact of trauma may be worsened because shame and fear cause reluctance to seek help. Communities must work together to prevent abuse, consumer fraud and crimes against older persons. Professionals need to recognize the risk of potential neglect abuse or violence by formal and informal caregivers both in the home and in community and institutional settings.

Par 110. Objective 1: Elimination of all forms of neglect, abuse and violence of older persons

Actions

(c0) Enact legislation and strengthen legal efforts to eliminate elder abuse

(e) Encourage cooperation between Government and civil society, including non-governmental organizations, in addressing elder abuse, by inter alia, developing community initiatives;

(g) Encourage further research into the causes, nature, extent, seriousness and consequences of all forms of violence against older women and men and widely disseminate findings of research and studies.

Par. 111 Objective 2: Creation of support services to address elder abuse

Actions

(a) Establish services for victims of abuse and rehabilitation arrangements for abusers

(b) Encourage health and social service professionals as well as the general public to report suspected elder abuse

(c) Encourage health and social service professionals to inform older persons suspected of suffering abuse of the protection and support that can be offered

(d) Include handling of elder abuse in the training of the caring professions

(e) Establish information programmes to educate older persons about consumer fraud.

residences and participating in community based care programs and finally, protections should be provided for older persons who live in institutions.

### **Submission**

This could be achieved if the sections were placed in the following chronological order:

1. Section 16 Notification of abuse of older person
2. Section 18 Older Persons in need of care and protection
3. Section 14 Procedure for bringing person who accommodates or cares for older or frail person before magistrate
4. Section 15 Enquiry into accommodation or care of older or frail person
5. Section 13 Prohibition of abuse of older persons.
6. Section 17 Keeping of register of abuse of older persons
7. Section 12 Rights of older persons in facilities

### **Elder abuse and the law**

In discussing elder abuse, it must be remembered that there are a number of other laws and remedies that are available to older persons who are abused. For example, the Domestic Violence Act covers a broad range of protection for older persons who live with family members. There is also the criminal law through which perpetrators of elder abuse can be dealt with.

### **Section 12 Rights of older persons in facilities**

This is a new clause, which is not contained, in the current Aged Persons Act. To the extent that it spells out the rights of older persons it must be welcomed. The insertion of the words by the NCOP in clause 12 “... notwithstanding the rights he or she has in terms of the Bill of Rights or any other rights he or she may have...” is also welcomed. There is no harm in restating rights and reiterating that persons enjoy rights in terms of other instruments of law.

It is clear that the rights identified in clause 12 refer to older persons who live in residential facilities. The clause refers to transfer, discharge, keeping and suing personal possessions, reasonable access to visitation, etc. ... . Clearly, it is illogical that these rights could refer to older persons who are recipients of community-based services as are included in the definition of facility.

Some participants argued that the rights to privacy should be more specific. The Clause should state that residents have the right to privacy with regards to accommodations, medical treatment, written and telephone communications, visits and meetings of family and/ or resident groups.

It was also argued that the right to dignity should be included.

There was considerable discussion about Clause 12(i) and how it interfaces with laws on eviction. A transfer or discharge can amount to an eviction. In this case whilst, the Bill makes provision that 30 days notice must be given, it must be remembered that should the older person fail to vacate the residential facility, then the laws regulating eviction would have to be adhered to.

### **Submission**

- a) The clause needs to state clearly in its heading that these rights are conferred upon persons residing in facilities.
- b) The right to dignity should be included.
- c) The right to privacy should be expanded.
- d) Clause 12(b) is worded clumsily. The word visitation is not the correct word to be used in this context. The clause should read: "... the right to receive visitors. ...."
- e) The right to have reasonable access to assistance should be a separate right.

### **Section 13 – Prohibition of abuse of older persons**

The 1998 Amendments to the Aged Persons Act prohibits abuse perpetrated against older persons and provides for the same penalties as are set out in the Bill. Participants were not generally aware that abuse of an older person currently amounts to a statutory offence.

#### *Penalties may not be severe enough*

This section was discussed with section 20 of the Bill that provides the penalties that can be imposed by a court when a person is found guilty of abusing an older person in terms of section 13. Section 20 provides that a person who is found guilty of an offence in terms of section 13 is liable to a fine or to imprisonment for a period not exceeding five years, or both a fine and such imprisonment.

#### *Penalties may not be appropriate for the offender*

In the Western Cape there were concerns that the penalties do not provide for the rehabilitation of the person. It was argued that persons who abuse the elderly should be rehabilitated, as very often the abuser is someone close to or known to the older person. There was a feeling that these people should be rehabilitated and that in appropriate instances the offender should be educated about older abuse and provided with support and options to alleviate the situation in which older abuse occurs.

In Limpopo and Eastern Cape, it was thought that for some forms of abuse the penalties provided were too lenient. In certain instances it would be preferable for the criminal law in respect of certain offences to be applied e.g. murder and rape.

These concerns raise the issue in which instances the criminal offence created in terms of section 13 will be used. Clearly, forms of abuse that constitute other forms of criminal conduct such as assault should be prosecuted as such in terms of the common law. The issue is further complicated by the broad definition of abuse. This further complicates the determination as to what actions may constitute an offence in terms of this section.

In terms of section 22, the Bill is binding on the State except in so far as criminal liability is concerned. Therefore section 13 cannot be used against the State. By implication therefore those rights that are directly enforceable only against the State are not part of the definition of abuse.

*Ensuring that prosecutions in terms of section 13 are successful*

It was raised in a number of provinces that older persons as vulnerable group ought to be provided with similar protections when they testify in a court of law. For example, older persons should be allowed to testify *in camera* during a trial. This is a matter for the Department of Justice to consider when it is faced with a prosecution in terms of section 13 of the Bill.

**Submission**

- a) The definition of abuse must be revised in order that it is clear what forms of conduct amount to abuse in terms of this clause.

**Section 14 Procedure for bringing person who accommodates or cares for older or frail person before magistrate and**

**Section 15 Enquiry into accommodation or care of older or frail person**

These provisions are replicated from the 1967 Aged Persons Act. The provisions have not been widely used. Throughout the country we did not find any role-players who could recount an incident where these procedures had been used. It is therefore of concern that provisions that have been on our statute books for so long and have proven not to be popular mechanisms are being continued.

Participants acknowledged that the procedures created in these clauses would be useful if they were implemented properly. They wanted commitments that would be adequate resources assigned to these procedures. Furthermore, training of officials needs to take place. Finally there needs to be education and awareness amongst health officials and the general public that these procedures do exist.

The clauses need to set out in detail who must do what, where the responsibilities lie and that if these responsibilities are not carried out that the official will be subject to a disciplinary inquiry.



### *The process is too adversarial*

The process created in terms of these clauses is adversarial in manner. This is not always suitable for the situation where the family cares for the elderly and abuse is occurring. A family mediation intervention strategy may be more suitable where training and support could be given to family members.

### *The process is too reliant on social workers*

There was concern that there are not enough social workers that have the time to make the necessary statements called for in the clauses.

### **Submission**

- b) Whilst it is supported that these provisions remain in the Bill, Parliament is requested to make serious inquiries with the Departments of Social Development and Justice on the current use of these provisions, determine why they are not being used and thereby ascertain if further clauses are necessary to address these deficiencies.
- c) The Bill should provide for alternatives to such a formal procedure. The Bill should provide for education and awareness raising about abuse.
- d) The Bill should include provisions that provide for mediation with offenders, particularly family offenders where the abuse is not of a severe nature.
- e) Preventive measures against abuse need to be provided for in the Bill.
- f) There are no timeframes in the Bill for the handling of abuse cases – this is important – this would compel government officials to take action. We should look at the Domestic violence legislation in this regard.

### **Section 16 – Notification of abuse of older persons – Mandatory reporting requirements**

The 1998 amendments to the Aged Persons Act 1967 included provisions on the Notification of abuse of aged persons. The provisions in the Bill are substantially similar with a few small differences.

The 1998 Amendment Act specifically identifies registered dentists, medical practitioners, social workers or any other person who examines, attends to or deals with an aged person as being subject to mandatory reporting requirements. Furthermore, the Director- General had to issue a warrant for the removal of the aged person to a hospital or such other place as the Director General may determine and “...shall arrange that the aged person receive the necessary medical treatment...”. The Bill provides that the Director General shall ...“arrange for the removal of the person concerned to a hospital in case of injury or to such other place as the Director- General may determine...”.

Both the 1998 Amendment Act and the Bill make provision for no liability on the part of the reporter when the report is made in good faith.

Both make provision for criminal sanctions (imprisonment for five years, or a fine, or both imprisonment and a fine) where there is a failure to report.

In sum, the Older Persons Bill reflects the 1998 Amendment Act. It provides for:

- Mandatory reporting of abuse of older persons;
- Places a statutory mandatory obligation on the State to remove the older person to a hospital or other appropriate place;
- Provides for no liability for reporting where this is done in good faith; and,
- Provides for criminal sanctions where there is a failure to report.

The important difference however, is that these mandatory reporting requirements in terms of the Bill are now applicable to *any person* and are no longer limited to dentists, medical practitioners, social workers or "...any other person who examines, attends to or deals with an older person...".

### ***Mandatory reporting of elder abuse***

The mandatory reporting of elder abuse is the subject of considerable debate throughout the world. There are many arguments that can be made for and against statutory mandatory reporting requirements. Mandatory reporting is most often seen within the context of the care of children. This reporting of child abuse cases is considered necessary in that: children are vulnerable due to their age; may not have the necessary mental capacity or ability due to their immaturity to take decisions about their well-being; may not be in a position to care for themselves and are usually dependent on the person who is perpetrating the abuse<sup>22</sup>. However, there are important differences and considerations that need to be taken into account when considering mandatory reporting requirements in respect of abuse perpetrated against older persons.

### ***Arguments against mandatory reporting***

- Older persons are competent adults and ought to have the capacity and free will to determine whether they wish to report the abuse. Mandatory reporting violates older persons autonomy.
- Mandatory reporting requires substantial resources being made available by the State in order to be effective.
- Not enough is known to justify such an intrusive response. Insufficient research has been conducted to ascertain the effectiveness of mandatory reporting.<sup>23</sup>
- It may lead to unwarranted and premature reporting.
- It may lead to a decline in people seeking help as it overrides confidentiality. There is a potential breach in confidentiality between the older persons and the person in who she or he divulges the information to.

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<sup>22</sup> Canadian Network for the Prevention of Elder Abuse 9 see [http://www.cnpea.ca/mandatory\\_reporting.htm](http://www.cnpea.ca/mandatory_reporting.htm)

<sup>23</sup> Kinnear, P & Graycar, A, "Abuse of Older People: Crime of Family Dynamics?" Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice, No. 113,4, May 1999

- There could be unwarranted vindictive reporting.

*Arguments in favour of mandatory reporting*

- It acts as a deterrent against abuse.
- Mandatory reporting creates a duty on government to investigate cases of abuse and to provide suitable interventions and assistance.
- Mandatory reporting facilitates early intervention and thereby reduces the amount of harm to the older person.
- Few objections are raised against mandatory reporting in child abuse cases.<sup>24</sup>
- Older persons are vulnerable and in need of such special protection.
- Legal protection is needed for the person who reports in order that they can do so without fear of reprisal or incurring liability.
- Reporting enforces what is morally correct. All citizens have a social responsibility to ensure the well being of others.
- It removes the responsibility associated with and eliminates uncertainty whether to report or not with choice in reporting.<sup>25</sup>

Alternative responses include the development of protocols and guidelines that emphasize a multi-sectoral approach

*Mandatory reporting – what approach do other countries take?*

In **Canada**, mandatory reporting legislation is provided for at a provincial level. The different provinces have adopted varied options with some provinces choosing mandatory reporting requirements whilst other provinces have opted for voluntary reporting. Nova Scotia and Newfoundland have general mandatory reporting requirements in their law of suspected abuse or neglect of an older person. Newfoundland's law refers specifically to neglect, self-neglect and possibly physical abuse. Nova Scotia's law refers to physical and psychological abuse and does not refer to financial abuse. Manitoba's law has mandatory reporting requirement for helping professionals and other identified key persons who interact with older persons, In Prince Edward Island, New Brunswick and British Columbia there is voluntary reporting of specifically identified forms of abuse and neglect. In the remaining provinces and territories in Canada the law is silent<sup>26</sup>.

Government reports and researchers in **Australia** have opposed mandatory reporting as it impinges on older persons autonomy and demands the provisions of a wide range of services from the state in cases of intervention. Rather, it has been recommended that resources should be directed towards prevention

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<sup>24</sup> Nova Scotia Health, Adult Protection Act, Discussion Paper, September 2004, 12

<sup>25</sup> Saunders, L, "Elder Abuse", Presentation to School of Nursing and Midwifery, Flinders University, November 2004

<sup>26</sup> Canadian Network for the Prevention of Elder Abuse 9 see [http://www.cnpea.ca/mandatory\\_reporting.htm](http://www.cnpea.ca/mandatory_reporting.htm)

programs, research and education and the provision of funds for alternative places of care when abuse is detected<sup>27</sup>.

In **New Zealand** there is no statutory duty to report elder abuse and neglect. Rather, services and resources are focused on prevention of abuse<sup>28</sup>

In the **United States**, 42 out of 50 states have mandatory reporting requirements. In many of these states, the mandatory reporting in most states is required only of health professionals. The legislation varies and different types of abuse are identified as being subject to these mandatory-reporting requirements<sup>29</sup>

### **What types of abuse do we want reported?**

The current definition of abuse is so wide and the responsibility is placed on everyone that the Director-General could be inundated with reports of abuse.

The current definitions of abuse in the Bill are very wide. This could result in an immense amount of obligated reporting by professionals and the general public who come in contact with older persons. The Bill further provides for criminal sanctions in instances where a person is aware of abuse and fails to report it.

Abuse and neglect should be reported. It should be mandatory for service professional and health professionals. This could include police, clergy, physicians, nurses, social workers, psychologists, teachers, occupational therapists, physiotherapists, paramedics, facility staff, community based workers, registered staff of NPO's working with the elderly.

### **Comments at the Workshops**

The reporting of abuse was generally supported; the concern is with the implementation of the Bill.

In general, participants were of the view that we should support the reporting of abuse, it is the right thing to do, it is morally correct; individuals in society must take responsibility for detecting and reporting crime and abuse

- In cases of dementia it is very important to have mandatory reporting, these older persons cannot report abuse themselves.

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<sup>27</sup> Australian Society for Geriatric Medicine, Position Statement No.1., Elder Abuse, Revised 2003. <http://www.asgm.org.au/documents/Revision-ElderAbuse-5-9-03.pdf>

<sup>28</sup> Office for senior citizens, Ministry of Social Development, Chapter 7 Protecting Older People's Rights and interests, NZ, <http://www.osc.govt.nz/about/briefing-incoming-minister/chapter7.html>  
<http://www.osc.govt.nz/about/briefing-incoming-minister/chapter7.html>

<sup>29</sup> Stiles, M,M, Koren, C & Walsh, K "Identifying Elder Abuse in the Primary Care Setting," Clinical Geriatrics, Vol.10, Issue 7, 2002.  
<http://www.hmpcommunications.com/cg/displayArticle.cfm?articleID=cgac532>

- Some older persons do not have the ability to protect rights and need protection
- Abuse is extensive and wide in South Africa; we therefore need strong proactive measures.
- We should promote a caring State in the spirit of *Ubuntu*
- Other legislation such as Domestic Violence legislation creates reporting duties, why can we not have reporting for older persons.

There were also practical concerns from participants about the implementation of the Bill

- Particular concerns were raised in relation to rural areas
- The current capacity of the Department to implement these provisions of the Bill.
  - Old age homes that take abuse seriously and report it to the Department do not even receive acknowledgement of their letters and reports. There appears no current ability on the side of the Department to do anything in abuse cases.
- There is an apparent lack of cooperation from other departments, such as justice, in ensuring for example that prosecutions take place.
- We should not reject the clause because there are concerns about implementation and the capacity of the Department
- There are Regulations that were promulgated in 2000 concerning the Reporting of abuse. However, experiences indicated that there is confusion amongst Department officials as to whether it has been promulgated and whether the Regulations are operative.

Participants also said that we need a variety of services and a choice of interventions depending on the nature of the case of abuse. In some instances training or education of the abuser may relieve the situation. In other instances, abuse may be due to the lack of support the carer received. In these cases of abuse, it may be beneficial to restore the relationship between the older person and the abuser and to provide support through counseling, respite care services etc. .... to the carer. Not all cases of abuse should result in criminal prosecution.

The Minister is entitled in terms of Section 21 of the Bill – Regulations – to make regulations regarding measures to prevent, combat and deal with the abuse of older persons. These provisions are welcomed.

### **Submission**

- a) Clause 16(2) the words “*where appropriate*” should be added.
  - a. Not all cases of abuse warrant the removal of the older person to a hospital.
  - b. This is expensive,
  - c. Very onerous on the State and

- d. Highly disruptive and further upsetting to older persons in some cases.
- b) Clause 16(2), hospitals should not be the only permissible destination for older persons who are removed from the abusive situation.
  - The Bill should state the other options i.e.
    - i. . Safe houses,
    - ii. Shelters,
    - iii. Old age homes,
    - iv. Step down facilities etc. ...
- c) There is a need for education and awareness on the issue of elder abuse.
  - a. It was felt that there is a greater need for public education and awareness programs.
  - b. An abuse programme has been omitted in Chapter 1 of the Bill. The Madrid Declaration supports government taking positive steps to address abuse. We should ask for such a program to be included in Chapter 1.

### **Section 17 – Keeping of register of abuse of older persons**

The 1998 Amendment Act introduced the keeping of a register of persons convicted of abusing an older person. This was subject to Regulations being drafted (section 6B Aged Persons Amendment Act 100/98) in order to implement this section. Role-players were not sure whether these Regulations had been drafted. If they had, they had not been communicated to role-players on the ground.

### **Registers around the world**

Offender registers raise a lot of debate. They have been proposed and implemented in some countries in respect of sex offenders and child abuse offenders. In line with these developments, elder abuse registers are also being developed. There are many arguments for and against the keeping of these registers that are put forward.

#### *Arguments against the keeping of a register*

- ❑ Drives offenders underground.
- ❑ Encourages vigilantism.
- ❑ Provides a false sense of security, only convicted offenders appear on the register and not all perpetrators are identified and criminally convicted.
- ❑ The register is not always easily accessible to the public and those who need to have access to it.
- ❑ Only persons convicted of abuse of an older persons, presumably in terms of the Bill is placed on the list (this would be in line with the current wording of the Bill). Therefore if the person is convicted of a common law crime, e.g. assault, that person will not appear on the register.
- ❑ It is unclear how long a persons name will appear on the register and if there is a process to remove an offenders name.

- ❑ Offenders have been punished and paid their debt to society, this is an ongoing and additional punishment as it denied the offender potential work opportunities. This is a punishment that has not been imposed by a court of law.
- ❑ The register needs to be constantly maintained and the information constantly updated, e.g. change in addresses. This requires resources from the State.

#### *Arguments for the keeping of a register*

- ❑ Offenders pose a high risk of re-offending and therefore it is wise to keep a list of who they are and where they are.
- ❑ It is in governments' interest to protect the public from offenders.
- ❑ Privacy interests of the offender are of less importance than the safety and security of the community.
- ❑ Such information will assist in keeping the community safe.
- ❑ It acts as a deterrent to the offenders to commit further crimes

#### **Comments from the Provincial workshops**

During the workshops, there was general support for the keeping of a register. It was viewed as an important reference check when employing a person to work with the aged. However, participants were concerned that the register would be confined to only those persons convicted in terms of the offence of abuse created in the Bill. It was felt that this may exclude some perpetrators who were convicted of abusing an older person because the prosecution chose to use a common law or alternative statutory provision to convict the person.

In Limpopo, the issue of formally registering people who work with the elderly was raised. It was argued that caregivers should be formally registered. Part of the registration would be to establish whether a person was a fit and proper person and whether they had a criminal record. If so, the nature of the offence should be considered and in appropriate instances the person should be excluded from being a caregiver. It was suggested that all persons who are employed to work with the aged should be subjected to a check in order to ensure that they do not have a criminal record that reflects acts of abuse committed against the elderly.

#### *Participants had a number of very practical concerns about the Register*

How accessible the register would be, who would keep it and where would it be kept? – were some questions that were raised. **Accessibility** was linked to how **effective** the register would be in serving its purpose of ensuring that persons who are convicted of an offence of older abuse would not be placed in a position where they could abuse the elderly again. Questions were asked such as: Should there be controlled access? Or should there be partial access?

1. There were many concerns about the possible false sense of security that a register could give. It was recognized that many older person are in vulnerable disempowered positions and that when they become victims of older abuse they may report the incidents. It was also mentioned that older person are vulnerable and should receive special protection in court, such as the holding of in camera hearing, in order to ensure that they testify without hindrance or fear.
2. It was also argued that a positive obligation should be placed on a person who has a criminal record of older abuse to disclose this when seeking employment – this could be included by making it an offence not to disclose that you have been convicted of a crime against older persons when you apply for employment with older persons.
3. The register must be a national register as people move from province to province.
4. There were calls that it should be made available electronically.

#### *The role of the Department of Justice*

Participants called on the Department of Justice needs to assist and carry out its tasks and functions if this clause of the Bill is going to be successful. Older persons find it difficult to go to court

- a) The Department needs to pursue cases of abuse more actively and ensure successful prosecution. Many older persons do not pursue charges because they are pressurized to withdraw the charges by family members and friends.
- b) Many older persons are terrified about the possibility of having to testify in court. There should be provisions whereby cases of abuse can be held in camera.

#### *The lack of a community approach results in the community not being protected by the Bill*

Section 17(2) refers to facility – this demonstrates the focus of the Bill on facilities and the insufficient orientation of the Bill on community and rural services.

#### *Registers are a complex human rights issue*

Participants appreciated the complexity of a register in terms of the different human rights involved. A register potentially violates the employment rights of the offender, is this a justifiable punishment? How do we circumvent privacy rights of the perpetrator? It was agreed that the infringement of a perpetrators rights if their names are placed on a register may well be justified in terms of the limitations clause in the constitution, given the extensiveness of abuse and the need to protect our older person.

#### **Submissions**

- a) Section 17(2) is **too narrow**, the word facility should be replaced with residential facilities and any community based care and support service. Persons convicted of abuse should not be allowed to work in community based and especially home-based care services. Residential facilities



provide care to 1% of our elderly; therefore the register will only protect these 1% of older persons – in terms of the current legislation. The community needs protection from abusers.

- a) It is proposed that the register must include the names of offenders who are convicted of offences in which the victim is an older person. In this manner, it will ensure that more offenders' names will be placed on the register. It is possible that offenders will not be prosecuted in terms of the Older Persons Bill but rather in terms of other common law or statutory criminal offences. The Older Persons Bill carries a maximum penalty for a conviction of 5 years and a fine and it is therefore, more serious offences such as murder, rape, assault would be prosecuted in terms of the common and statutory law.
- b) More clarity is needed in the Bill on the Register. This needs to be spelt out more clearly in the Bill. Some of these issues include:
  - a. We need to consider what is the purpose of the Register?
  - b. How will it be used?
  - c. What information should be recorded on it?
  - d. Who will compile it?
  - e. Who will have access to it?
  - f. How long will a perpetrators name be on the register, it cannot be on forever surely?
  - g. How will perpetrators be rehabilitated?
  - h. What about persons who abuse the elderly and are convicted of more serious crimes (e.g. rape), in terms of the present legislation their names would not appear on the register as the charge would not be abuse in terms of the Bill but rather common law rape.
- c) Clause 16 should compel the D-G to initiate criminal avenues of redress when reports of abuse are received.

### **Section 18 - Older Persons in needs of care and protection**

This is a new clause in the Bill and was welcomed by participants. The clause provides relief mechanisms to older persons who are in need of care and protection. The clause will come into use when primary prevention mechanisms have failed. It is therefore important that the Bill addresses primary prevention care services for the elderly. Section 18 must not be seen in isolation but viewed as a component of a holistic system that addresses early prevention services, mechanisms that build sustainable communities and services that addresses the root causes of vulnerability.

#### *The section places too much responsibility on social workers*

It is trite that there are too few social workers in South Africa and that they are currently stretched in terms of the amount of work that it is expected of them. Section 18 creates further work for social workers. The ability of social workers to cope with this additional workload will determine whether the section will be used and adequately implemented in order to achieve its objectives.

Section 18(3) provides that the Director-General or social workers must investigate reports that are received in terms of section 18(1) and section 18(2). The purpose of the investigation is to substantiate the report that was received. In other words the social worker must verify and confirm the truth of the report in order to determine that the older person is indeed in need of care and protection. It is suggested that there are a myriad of suitable persons who could be trained and could work under the guidance of a social worker in compiling such a report. These persons/organizations include: victim empowerment groups, members of faith based organizations, traditional leaders, volunteers, respected community members, and advice office workers.

*The section fails to give older persons a voice*

The section does not provide for older persons themselves to report incidences of abuse of which they are the victims. It is important that older persons are recognized, encouraged and empowered to have their own voice and where possible to report abuse that they suffer themselves.

*The section fails to provide for an intersectoral approach*

Section 18 clearly calls for an intersectoral approach in the manner in which an older person in need of care and protection shall be dealt with. In order for the Director-General to take such steps to ensure that adequate provision for basic needs and protection of older persons is met an intersectoral approach and collaboration will be necessary. It is difficult to contemplate how without an intersectoral approach the Minister will be able to prescribe all the necessary steps that will ensure the provision of basic needs and protection, many of which will fall into the prerogatives of other government departments. Section 18 highlights the need for the inclusion within the act of a, intersectoral inter departmental and inter organizational coordinating structure that will ensure the holistic and adequate implementation and realization of the Bills stated objectives and duties that it imposes.

## **Submissions**

- a) Section 18(3) should be amended as follows: “The Director-General, social workers, **or investigator recognized by the Department and working under the supervision of a social worker**, to whom a report has been made must investigate the matter.”
- b) Section 18(2) could be amended as follows: Any person, **including an older person**, other than a person in subsection (1) who is of the opinion that an older person, **or himself or herself**, is in need of care and protection may report such opinion to a social worker.

## **I. Final Comments**

### **Chapter 4 – General & Supplementary Provisions**

The provisions of Chapter 4 were discussed in relation to specific clauses in the Bill. Thus this report reflects, where appropriate, some of the discussions around Regulations and penalties.

### **The need for an intersectoral interdepartmental approach**

In order for this Bill to work effectively, there will be a need to coordinate the delivery of services to older persons. Many of the programmes that are mentioned in Chapter 1 of the Bill cannot be implemented by the Department of Social Development on its' own. The protection mechanisms that are discussed in Chapter 3 involve coordination between the Departments of Social Development and Justice. As has already been mentioned these protection mechanisms have been on our statute books since 1967 yet there is little evidence that they have been used much. There is thus a need for a coordinated approach to the implementation of the Act.

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