



**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

**OLDER PERSONS AMENDMENT
BILL**

**For submission to the Department of
Social Development**

June 2017



SOUTH AFRICAN HUMAN RIGHTS COMMISSION
OLDER PERSONS AMENDMENT BILL

For submission to the Department of Social Development

June 2017

1. Introduction

The South African Human Rights Commission (SAHRC / Commission) welcomes the opportunity to make submissions to the Department of Social Development (Department) on the Older Persons Amendment Bill. The SAHRC has a strong and particular interest in the protection of older persons and their rights, with a dedicated portfolio within the institution which addresses this category of vulnerable persons.

The Older Persons Amendment Bill has as its stated objective, the addition of new definitions, the addition of new provisions relating to the monitoring and evaluation of all services to older persons and for the removal of older persons to a temporary safe care without a court order, to strengthen the existing implementation and compliance measures, to effect textual amendments for greater clarity and to provide for matters connected therewith.

2. The mandate of the South African Human Rights Commission

2.1 Constitutional and Statutory Mandate

The SAHRC is a constitutionally created independent state institution. It is mandated by section 184 of the Constitution of the Republic of South Africa which states,

184. (1) The South African Human Rights Commission must-

- (a) promote, respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

In September 2014, the new South African Human Rights Commission Act 40 of 2013 came into effect, Section 13 of the Act expands on the powers and functions of the Commission. Accordingly, section 13(1)(a)(i) provides,

- (a) The Commission is competent and is obliged to-
 - (i) Make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights;

Section 13(1)(b)(v) further states,

- (b) The Commission-
 - (v) Must review government policies relating to human rights and may make recommendations.

It is in terms of these powers that the Commission hereby presents the following comments.

3. SAHRC Concerns with the Amendment Bill

3.1 Clause 1 (a)

Clause 1 (a) of the Amendment Bill proposes the following,

'assisted living facility' means a residential care facility used for provision of affordable, safe and accessible accommodation with access to nursing care and support services to older persons that are partially independent, with or without assistive devices, and who need some form of supervision and assistance regarding their daily living activities.'

The SAHRC is unclear what is meant by the “partially dependent” as opposed to independent” older persons. Using terminology in this manner could result in the term having different interpretations.

Furthermore, the SAHRC notes that the term ‘affordable’ is vague and may be difficult to measure. This is exacerbated by the fact that within a specific facility, levels of affordability may differ and some residents may consider the fees affordable whereas others may not.

The SAHRC therefore recommends the following in respect of the definition of ‘assisted living facility’:

- i. That the term ‘affordable’ is deleted;
- ii. The amendment of the term, ‘partially independent’ to ‘progressively frail’;
- iii. The term ‘daily living activities’ is amended to the recognised term ‘activities of daily living’.
- iv. The clause includes reference to the fact that an assisted living facility should be registered with the Department of Social Development.

3.1.2 Clause 1 (b)

The proposed amended definition of “care”, to the Older Persons Act of 2006, reads as follows:

‘care’ means physical, psychological, social and includes but not limited to spiritual, nursing, first-aid care or material assistance to an older person, and [includes] services aimed at promoting and maintaining the comfort, quality of life and general well-being of an older person.”

The SAHRC recommends that material assistance should be defined in terms of human rights of older persons’. These would include the rights to adequate food, water, shelter, clothing and healthcare through the provision of income, as well as access to financial support or other income-generating opportunities to ‘promote and maintain’ their comfort and autonomy.

3.1.3 Clause 1 (c)

On the definition of care giver, the Commission recommends that caregivers must be registered with the Department of Social Development’ and must be under the supervision and training of a registered nurse.

3.1.4 Clause 1 (h)

The definition of manager needs to be more clearly understood in the light of existing practices in the field of service delivery to older persons, specifically with the inclusion in the Act of private residential facilities (retirement centres). The term manager may not be a single

person. Some organisations make use of outside managing agencies or may have an administrative manager and for care services a care manager. Also, in terms of the discretion in Retired Persons Act, 1988, a developer and or a management association have the right to cede and assign certain management duties.

The SAHRC therefore recommends that the Department consider amending the proposed definition to read as follows,

'Manager' means a person or a management agency depending on the specific residential care facility responsible for the day-to-day management of such facility or similar facility, an institution or any programme for the rendering of services to older persons'.

3.1.5 Clause 1 (l)

The Commission welcomes that the age of an older person should be uniform: 60 years for both men and women.

3.1.6 Clause 1 (k)

The clause proposes inserting the definition of 'private residential facility' as a residential care facility registered in terms of the Housing Development Schemes for Retired Persons Act, 1988. The proposed definition will therefore be read in accordance with the definition recorded in the Retired Persons Act. The SAHRC is concerned by this definition as the Act does not make provision for the registration of any facility.

On the other hand, Frail Care Centres in the retirement villages are registered in terms of the Aged Persons Act 81 of 1967. Furthermore, private residential care facilities are registered in terms of the Older Persons Act 13 of 2006, though these facilities do not receive funding from the Department of Social Development.

The SAHRC therefore recommends that the definitions be harmonised for consistency, clarity and to ensure regulatory protection of the scheme of 'private residential facility'. The SAHRC proposes the following definition in the alternate:

a residential care facility, not receiving funding from Government, that functions according to the Housing Development Schemes for Retired Persons Act, 1988 and/or is registered in terms of the Older Persons Act, 13 of 2006.

The SAHRC further points out that the definition of home based care in terms of in terms of the Older Persons Act, 13 of 2006 needs to be amended in the light of the inclusion of private

residential facilities under the amendment, which as it reads excludes home based care in a residential facility.

3.1.7 Clause 1 (l)

The definition of 'rehabilitation' while comprehensive is not exhaustive. The Commission recommends the addition of the phrase 'including but not limited to' in the suggested definition.

3.1.8 Clause 1 (o)

“Temporary safe care” means, in relation to older person, a shelter or any other place where an older person can be accommodated for as long as it is safe for him or her to remain there.

The SAHRC points out to the Department that the *Report of the Second World Assembly on Ageing: Madrid, 8-12 April 2002*, stresses the importance for older persons to be involved in the choice of where they may live. Drawing on this report, the SAHRC therefore recommends that the Department consider, under the definition of temporary safe care, that an older person can be accommodated for as long as it is safe for him or her to remain there, and where possible give consent for such accommodation.

3.2 Clause 25A

This clause proposes that

“a social worker or health care worker in the employ of the State or a police official must with the consent of an older person or duly authorised person in the event the older person is incapable of providing such consent, remove such older person and place that older person in a temporary safe care without a court order, if there are reasonable grounds for believing that the older person is in need of care and protection as contemplated for in section 25 (5) of the Act; and needs immediate emergency protection; and that the delay in obtaining a court order for the removal of an older person to temporary safe care may jeopardise the safety and well-being of the older person;” and that the removal of the older person from his or her home or unsafe environment is the best way to secure the safety and well-being of that older person.”

The Commission welcomes the requirement in the Amendment Bill for consent to be obtained. However, the Commission recommends that in the absence of a court order and the inability of an older person to provide consent, the duly authorised person must be provided with sufficient access to information for the authorised person to make an informed decision.

Such information must also be balanced against the right to privacy of the older person and the personal information of the older person must be protected in accordance with the Protection of Personal Information Act 4 of 2013.

The Commission also encourages a comprehensive definition of 'a duly authorised person' to avoid ambiguity in who can consent on behalf of an older person.

3.3 General comments

The Commission recommends the re-addition of the deleted section 14 (4), of the current Older Persons Act 2006 which states, 'Any person who contravenes or fails to comply with any provision of this section is guilty of an offence.' Anyone entrusted with the care of older persons must face consequences for fraudulent qualifications, maladministration, improper conduct of care, as well as negligence of care for older persons

4. Conclusion

Through the Commission's extensive monitoring, research and investigations into the rights of older persons, it is acutely aware of the vast challenges facing this vulnerable group of persons. The Commission is therefore available to further engage with the Department to share its insights and further recommendations.

END