

Practice concept

Protection of the elderly: a need for activism

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Abstract

The elderly are a marginalized group in society and South African law reflects this status. The law to protect elderly citizens from abuse is inadequate. This paper examines developments in the area of child protection and the resultant Child Care Act, which could provide a model for a similar programme of action to fight abuse against the elderly. United States' legislation on elder abuse is discussed as a guide for developing similar legislation for South Africa. Finally, a programme of activism is proposed to bring about the necessary changes in South African law.

Older citizens have a right to protection against abuse and other forms of mistreatment. Those who are physically and/or mentally frail rely on the state for protection. As it stands, the South African law is inadequate to secure even minimal protection for elderly victims of physical and mental abuse, neglect and exploitation. In the United States legislation to protect the elderly is far advanced and all-encompassing. In South Africa developments in the area of child protection have resulted in legislation to protect children. Drawing on lessons from these developments it is possible to design a programme of action with short-, medium- and long-term goals to bring about similar protection for the elderly.

Elder abuse

Elder abuse may be defined as the assault, neglect or exploitation of an older person. In most cases the abuse is ongoing and repetitive in nature and tends to occur between individuals within a relationship, but could take the form of an isolated occurrence, e.g. a single instance of financial exploitation. In some cases a caregiver may abuse an older person although abuse is not limited to such relationships; neighbours and individuals who live elsewhere may also abuse the person.

Three forms of abuse are specifically dealt with in this paper, namely physical and/or mental abuse, neglect and exploitation. These are not mutually exclusive categories

Physical and/or mental abuse. This form of abuse occurs either through injury to a person, or inaction that permits the person to be injured. Much of what is called physical abuse

is in the form of threats, with only occasional actual bodily assault. Physical abuse is therefore any conduct that results in mental distress or physical injury to a victim, and it can be active, in the sense of striking or attacking the victim, or passive, in the form of neglect such as deliberate withholding of medication, food and/or care.

Psychological abuse can range from simple name calling and shouting to protracted dehumanisation through repeated assault on a person's personality and ego. This form of abuse is generally used to coerce an elderly person into behaving in ways acceptable to the abuser, or to destroy his/her capacity to make life choices or to manage property. The most common form of psychological abuse are threats to place the person in an institution if he/she does not comply with the abuser's demands.

Neglect. Neglect refers to the wilful refusal or failure of a caregiver to provide services necessary to maintain an elderly person's physical and/or mental health.

Exploitation. Exploitation refers to forms of abuse such as improper or illegal use of an older individual's assets.

In general, studies of abuse (cf. Frolik & Kaplan, 1995: 400) indicate that neglect is the most common form of abuse followed by physical abuse. Together these two forms make up over half of the abuse of the elderly, with financial exploitation, emotional abuse and other forms making up the remainder.

Abuse can also be categorized as abuse by individuals acting in a personal capacity and abuse within an institution. Abuse outside of an institution is frequently perpetrated by malicious family members or neighbours. The abused person often puts up with the abuse or exploitation for fear of losing what benefits the abuser provides, or, in extreme cases, because the abuser prevents the victim from notifying anyone of the abuse or neglect.

Some abusers profit from their abuse, e.g. financially. Some abuse results from the pathological nature of the abuser.

Abuse is a form of control, and it is often difficult to determine what is abuse and what is control. A caregiver who snaps at an old person and threatens him/her with sanctions if he/she does not "behave" might be regarded as abusive, but in her defence the caregiver will claim that the old person is

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difficult, demanding and unappreciative, and that the caregiver's patience is being tested to the limit.

It is often difficult to distinguish between substandard care and abuse. On the other hand neglect can only occur if there is a duty of care that arises out of a legal relationship which is not met, e.g. the duty of support of children and parents. In other words, when children are dependent and incapable of support, parents have a legal duty to support them. The opposite is also true: when parents are no longer able to support themselves, South African law is quite clear that the obligation then rests upon the children to support the parent.

However, in practice the duty of support by a child to its parent is not as strenuously enforced as is the duty of support by a parent to its child. Whilst our law provides for a criminal sanction against a parent who fails to maintain his/her child, even though he/she has the means to do so, there is no corresponding statutory crime against a child with sufficient means to support his/her parents but who fails to do so.

Neglect in residential institutions is sometimes the result of individual acts by certain employees. Such acts include slapping or hitting a resident "to make him or her behave," and denying privileges or making threats of future harm "to keep residents in line." Employees of a facility may steal money or property from the residents, or insist on payment for care.

Causes of abuse and neglect

Whilst some abuse or neglect is simply diabolical, stemming from an individual's need to hurt or torment others, the large majority of cases of abuse occur as a result of caregivers breaking down under the strain of their responsibilities and turning their anger and frustration against their older charge (Frolik & Kaplan, 1995: 406). The financial and emotional pressures of caring for older individuals can be very burdensome. Caregivers of older incapacitated persons often lack adequate training or supervision, and may resort to abuse either out of anger or ignorance. These carers may be unaware of available social services and other sources of support.

Many caregivers are financially dependent upon the older person for whom they are caring. This is particularly true in South Africa where the high level of unemployment means that the only source of income for an entire household may be the social old-age pension received by an older member of the household. This dependency may contribute to a sense of anger and resentment in the dependents and carers, which is manifested in exploitation, physical abuse or neglect.

Abuse in institutions is often a result of poorly paid and inadequately trained staff, whose resentment is expressed by stealing and using force or threats to control residents.

Legal remedies

Criminal remedies

South African criminal law contains common law crimes that cover many of the wrongs committed against elderly people. In cases of physical abuse, for example, an offender could be charged with assault or assault with intent to do grievous bodily harm. In cases of mental abuse an offender might be charged with *crimen injuria*. In cases of financial exploitation an offender might be charged with fraud or theft, depending on the circumstances.

However, there appears to be no statutory crime for the penalisation of abuse committed in institutions. The Aged Person's Act provides that a person can be summonsed to appear before a magistrate if he (1) accommodates or cares for an elderly or debilitated person in a place other than a registered home for the aged, in circumstances or in a manner

likely to be injurious to his/her physical or mental wellbeing; and/or (2) presumably takes advantage of an aged or debilitated person by receiving excessive remuneration, by way of money or goods, for the accommodation or care of such person in a place other than a registered home for the aged. However, if these charges prove justified the person does not get convicted of a crime; he/she is simply suspended from operating another home for a period of up to ten years.

Our criminal law has not proved effective in this area; it was not possible to trace any decision of a person convicted of exploiting an elderly victim. This does not mean that such crimes do not occur, or that the culprits are not apprehended; only decisions of the Supreme Court are reported in the law reports – and tend only to be reported if the case is of public interest, or raises a novel point of law.

A possible reason for the ineffectiveness of the criminal law is that the most common wrong committed against elderly people is that of neglect, and there is no common law crime to cover this. Children are however protected against neglect by the Child Care Act which makes neglect of a child an offence, subject to the defence of incapacity to provide through inadequate means.

Section 50 of the Child Care Act provides that any parent or guardian of a child, or any person having the custody of a child who ill-treats that child or allows it to be ill-treated, or abandons that child, or any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

In addition, unlike in the Aged Person's Act (where the maximum penalty is R100 and/or three months imprisonment), the penalties for contravention of this section in the Child Care Act are relatively harsh: a maximum fine of R20 000 and/or five years imprisonment. The fact that there is no similar provision for the elderly can serve as a starting point for a campaign for their protection.

On the other hand, even if such a statutory obligation were to exist, it would be very difficult to enforce. Indeed if the law provided for a statutory crime of parent neglect by children who failed to support their parents although they could afford to do so, few parents would be willing to report their child to the police for failing to provide for them – and thereafter approach the Maintenance Court for an order for their child to pay a certain amount into court each month. This scenario could involve not only matters of pride and emotional trauma but also more practical problems such as the withdrawal, by angry and resentful children, of visiting opportunities to the complainant's grandchildren.

A second useful provision which is found in the Child Care Act and the Prevention of Family Violence Act is the statutory obligation to report child abuse or neglect. This obligation is extended to all professional persons who have cause to suspect, usually as a result of an examination of the victim, that the child is being abused or neglected. The Child Care Act, which imposes the duty to report on doctors, dentists, nurses and social workers, also protects a reporter from legal proceedings if the suspicion is unproven, as long as the report was made in good faith.

There are however problems in seeking criminal remedies. First, there is the problem of proof. A large number of the crimes committed against elderly people occur in private, i.e. in situations where there are no witnesses. It is very difficult, unless there is additional circumstantial evidence or physical evidence, for the State to prove a crime beyond a reasonable doubt in the absence of corroborating witnesses. Even in instances where there is corroborating evidence in the form of medical evidence, most medical evidence is "anonymous"

in the sense that it is proof that an attack did take place but does not identify the attacker. Therefore, in the usual course of events a conviction would only be likely if the victim was an excellent witness whereas the accused clearly lacked credibility. Given that many victims might not have good memories, or may be mentally impaired, the problems are apparent.

Second, in many cases an abused individual is reluctant to use the criminal justice system, particularly if the abuser is a family member or a caregiver. The publicity which might ensue, shame and emotional cost often prevent any steps being taken.

Third, persons who are abused frequently fear that if their abuser, who may be their caregiver, is prosecuted, they will lose this source of assistance and be forced to move to an institution, such as a nursing home.

Finally, there is the matter of whether the overloaded criminal justice system (and the overworked police force) can respond rapidly enough to cases of abuse. The time lapse between an initial complaint and an eventual trial may be long, and a victim's fear of retaliation by the abuser will remain present.

Many states in the United States have what is termed an Adult Protective Services Act, which are statutes designed to provide a comprehensive response to the abuse of older persons. These statutes define elder abuse, which definitions include physical and mental abuse, or cruelty, neglect and financial exploitation. Most statutes also provide that professionals (usually law-enforcement officers, doctors, nurses, other health-care professionals and social workers) are obligated, under threat of criminal sanction, to report suspected elder abuse. Some states have a detailed list of the professionals who are required to report cases of abuse, whereas others simply have a catch-all phrase requiring all persons who have knowledge or cause to believe that abuse has occurred, to report it.

All these statutes provide for an initial investigation upon receipt of a report of alleged abuse, usually by the Welfare Service or the Department of Health. After an investigation is completed, or if the elderly person requires assistance, most statutes permit the provision of a variety of services, e.g. health, social, psychological, medical and legal assistance.

Civil remedies

The civil law of delict, which provides for civil sanctions against wrongdoers, really only provides two remedies: damages, i.e. awards in money, and an interdict. Damages are not really a viable option as the abuser is often motivated by financial desire, which means that in many cases he/she does not possess assets in the first place.

What of the interdict restraining a person from abusing or harassing an elderly person? First, the elderly person might not wish to complain as the interdict will remove the abuser who may be the caregiver.

Second, the statute which specifically prevents intra-family abuse, i.e. the Prevention of Family Violence Act, provides for a simple and inexpensive means of obtaining an interdict against an abuser but does not cover elder abuse. It provides for reporting child abuse (Section 4) and for an interdict preventing spousal abuse (Section 2), and assumes that the applicant for an interdict must be "a party to a marriage." Although this definition is extended to include customary marriages and cohabiters, it does not include parents, siblings and relatives.

To be granted an interdict in terms of the common law an applicant must prove, on a balance of probabilities, three requirements:

- A real interest.
- Immediate or actual harm or danger.
- The absence of an alternative remedy.

Again, an application for an interdict would involve a victim having to testify, which would introduce the aforementioned problems of evidence, although the degree of proof needed is slightly less onerous, i.e. that the requirements must be proved on a balance of probabilities as opposed to beyond reasonable doubt, which is the standard required in the criminal courts.

The other possible civil law option is an application for a curator to be appointed to administer the estate and needs of an elderly person who is incapable of doing so unassisted. South African law provides that where, because of advanced age, mental frailty or physical incapacity, a person is incapable of managing his/her property, the Supreme Court may be approached to appoint a curator to such person's property.

This is a two-stage application. First, any person may apply for the appointment of an interim curator, who is known as a *curator ad litem*. The court will only make such an order if it is satisfied on the grounds of very detailed evidence that must be furnished under oath, setting out the elderly person's state of health, his/her financial position, and the reason for the incapacity. This evidence must be supported by the reports of two medical practitioners, the one being a psychiatrist who will report on the elderly person's mental condition and must confirm that he/she is incapable of managing his/her affairs.

The interim curator, or *curator ad litem* must then investigate and file a report with the court where he/she will set out the results of an investigation into the elderly person's capacity to manage his/her affairs, and further recommendations as to the suitability of the original applicant to manage the incapacitated person's affairs. If the court is satisfied, it will then appoint a *curator bonis*, or final curator, to manage the person's affairs. A high quality of evidence is needed, and the court will not grant such an order lightly.

This procedure has many disadvantages. First, application must be made to the Supreme Court which entails a very expensive and lengthy procedure. Second, the elderly person has very little say in the choice of *curator bonis*. Third, although in theory there are many safeguards, there is still the potential for abuse. Finally, in deciding the capacity of a person, a court will often impose the values of a middle-aged person, whereas it is recognized that elderly people have different needs and values.

However, there may be an option for some elderly people: the *curator bonis* may be appointed without the *curator ad litem* being initially appointed in instances where (1) the proposed ward (the elderly person) fully understands the nature of the application and consents to being placed under curatorship; and (2) the proposed curator is a fit and proper person to be appointed to handle the affairs of the elderly person. This at least enables an elderly person to appoint someone of his/her own choice who will at least remain accountable to him/her (e.g. an accountant or an attorney whom the elderly person knows and trusts). The problems of cost are still applicable, however.

The granting of a power of attorney (POA) is also a useful way in which an elderly person can nominate a person of his/her choice to manage all or part of an estate (the POA can specifically state the extent of the agent's powers). This is a relatively inexpensive option, as a General Power of Attorney form can be purchased from a stationery retail outlet. However, our law states that the POA is only valid whilst the resident is able to manage his/her affairs. In other words, one cannot delegate a capacity which one does not possess one-

self. Therefore when a person becomes incapacitated through ill health and/or advanced age, the POA becomes ineffective.

In the United States this problem has been solved through the provision of "durable power of attorney." This form of POA continues to be of force and effect even after the maker has lost his/her capacity to make legally-binding decisions. The proposed Euthanasia Act (which was drafted by the South African Law Commission) provides for a similar document where people can give a person power of attorney to end their lives (i.e. by turning off a life-support machine), even though the maker of the POA is unconscious and incapable of making that decision at the time. There is therefore precedent for such a document.

An ombudsman for the elderly?

The South African tradition of an ombudsman might not be appropriate for the monitoring of the evils associated with elder abuse and exploitation. An ombudsman is a person who is appointed to investigate public complaints about maladministration by State officials. Therefore, in cases where the abuse is carried out by a public official, e.g. pension fraud, or in an institution supported by public funds, e.g. a public hospital or a nursing home, the ombudsman could be effective. However, in instances where the abuse or exploitation is carried out by a relative, a friend or a neighbour of the elderly person, or in a private home (in other words by individuals in a private setting), the ombudsman's office is not empowered to investigate these offences.

Our constitution has made provision for the appointment of what is known as a Public Protector (PP) (the title "ombudsman" has unfortunate sexist connotations). The same restrictions apply: the PP is empowered to investigate public allegations of corruption and maladministration by government officials, or those holding public office, or those acting in a public capacity.

In the United States, elder societies form a powerful lobby group and there is extensive legislation to protect the elderly (Frolik & Barnes, 1992). To receive federal funds, i.e. funds from the central government, for the protection of vulnerable elderly persons, each state is required to establish and operate an office of a Long-Term Care Ombudsman. This person has an obligation to (i) identify, investigate and resolve complaints made by nursing-home residents, or complaints on their behalf; (ii) investigate actions or decisions that may adversely affect the health, safety, welfare or rights of the residents; (iii) investigate other providers of long-term care facilities, i.e. private homes; (iv) assist residents in protecting their health, safety and welfare, and inform them of their rights; (v) represent residents before government agencies; (vi) analyse, comment on and monitor the development and implementation of laws, regulations and policies that affect residents; and finally (vii) promote and assist citizen organizations that promote the rights of residents, and provide technical support for the development of resident and family councils.

In addition, the Long-Term Care Facilities and Home Health Agencies Act, which is a federal statute, i.e. applicable at national level, lays down a comprehensive list of the rights of nursing-home residents, in both public and privately-owned facilities. These rights extend over 30 pages and include access to all personal records that the home keeps on the resident; details of his/her health; the right to refuse medical treatment; the right to free medical aid; items and services available to the resident from the State for which the resident may not be charged; other services provided by the facility for which the resident will be charged and the applicable rates for these services; a description of the manner of

protecting personal funds and property of the resident; the right to privacy and confidentiality (e.g. the keeping of medical records); the right to voice grievances and have them taken to the highest level; the right to have access to any report that has been compiled by a government agency investigating the facility; the right to send and receive mail which must be unopened; the right to have access to any governmental agency and ombudsman; the right to have access to a telephone in a private place; and the right to self-administer drugs and treatment if declared safe by an independent physician.

Although the functions of the ombudsman and the provisions of the Long-Term Care Facilities and Home Health Agencies Act are aimed at protecting residents of institutions, provision is also made for the prevention of abuse in non-institutional settings in the Older Americans' Act of 1965, which provides for the appointment of a Commissioner on Aging who oversees and develops all programmes of assistance to the elderly and who reports directly to the President, as well as the Federal Council on the Aging. This council comprises 15 members and advises the President on all matters and policy concerning elderly citizens.

Box 1

Proposed programme of action to protect the elderly in South Africa

Short-term goals

Set up public education and awareness programmes. Encourage the media to publicize the campaign. Obtain a sponsor for the campaign.

Medium-term goals

Set up clinics at universities as joint ventures between the Faculty of Law and the School of Social Work, to offer counselling services to elderly persons. Set up mobile clinics to improve the accessibility of services. Obtain a sponsor.

Agitate to have the Aged Persons Act amended to include

- criminal neglect provisions along the lines of Section 50 of the Child Care Act;
- statutory reporting procedures along the lines of Section 42 of the Child Care Act; and
- provision for the creation of a durable power of attorney.

Agitate to have the provisions of the Prevention of Family Violence Act extended to include ascendants, i.e. parents and grandparents, and even cohabiters.

Apply pressure on the South African Police Services and the Attorney General for the establishment of an Elder Protection Unit, along the lines of the Child Protection Unit, staffed by specially trained officers.

Long-term goals

Agitate for the appointment of a Law Commission to draft an act along the lines of the Older Americans' Act.

Agitate for the establishment of an Office of the Ombudsman (or Public Protector) for the elderly.

Agitate for the transfer of curatorship proceedings from the Supreme Court to a special court, or alternatively to the Family Court (to be established) where final-year law students can represent elderly persons as *curator ad litem*.

In addition this act provides for the setting up and administration of a programme to be implemented at State level with respect to the prevention of abuse, neglect and exploitation of older individuals, which will ensure the co-ordination of welfare services and protective agencies in this regard; public education programmes; outreach programmes to prevent such abuse and exploitation; referral of such complaints to the relevant agencies; and a network to ensure the recording of such complaints including the identification of possible victims and known abusers (such information to be strictly confidential).

Another interesting innovation in the United States are the "sixty-plus" clinics set up by law schools (Frank, 1993), where law students are available to assist, advise and represent elderly persons in curatorship proceedings, and ultimately to be appointed as *curator ad litem* for an elderly person. This innovation has enabled proceedings to be far less expensive and more accessible. In South Africa it would first be necessary to have proceedings moved from the Supreme Court to a specialised court or tribunal, which will allow students to appear.

Based on the American experience and the legislation to protect children in our country, an action programme to develop measures to protect elderly South Africans from abuse and to develop legislation in this area is proposed and outlined in Box 1, according to short-, medium- and long-term goals.

Conclusion

South African law provides very little protection for elderly persons. There is a need for radical statutory innovation, along the lines of the extensive American model, to provide for the rights and needs of our older citizens. This will only happen if public demand for such statutory innovation and access of elderly persons to the law and legal mechanisms is dramati-

cally increased. Hence, public activism is needed to achieve these goals.

Acknowledgement

The idea for this paper arose as a result of a talk which I gave in Durban to a meeting of the local South African Gerontological Association. It is primarily a critical discussion of the existing law governing the care of the elderly in South Africa, and is not intended as an academic legal treatise but as a proposal for a programme of activism to secure legal protection for elderly citizens. Some of the ideas in the paper grew out of suggestions made by participants in the Durban meeting but I take sole responsibility for the content of the paper.

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