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LRC

Legal Resources Centre

Your Ref:

Our Ref: S. Samuel/LRC Land Programme

31 March 2022

Office of the United Nations High Commissioner for Human Rights
Special Procedures Branch
Palais Des Nations
1211 Geneve 10,
Switzerland
Per email: ohchr-olderpersons@un.org

Dear Sirs/Madam

Submissions by the Legal Resources Centre (South Africa) to the call for contributions on older persons and the right to housing – 2022 GA report

The Independent Expert on the enjoyment of all human rights by older persons, Dr. Claudia Mahler

About the Legal Resources Centre

1. The Legal Resources Centre (LRC) is a public interest, non-profit law clinic in South Africa founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.

2. The LRC welcomes the opportunity to contribute to discourse on the right to adequate housing of older persons.

Input on questions

*What are the **local and national legal, policy and institutional frameworks** protecting and promoting the right to adequate housing of older persons? Please identify both existing or planned legal frameworks such as constitutional provisions, laws, regulations, or decrees.*

3. This section does not address housing for older persons in private care facilities but addresses the access to adequate housing for older persons who are not property owners and/or who require care.
4. The Older Persons Act 13 of 2006, defines an older person as a person who is 60 years or older. Population estimates indicate that the proportion of older persons have grown to 9.1% in 2020.¹ Despite this significant class of the South African population, access to adequate housing for this group, despite Section 26(1) of the Constitution of South Africa, 1996 (“Constitution”) that enshrines the right to access to adequate housing. Section 26(2), moreover, places obligations on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
5. Chapter 4 of the Older Persons Act provides for residential facilities for older persons. Section 1 defined residential facilities as “a building or structure used primarily for the purposes of providing accommodation and of providing 24-hour service to older persons”. The rights set out under Chapter 4 are given effect to through the Department of Social Development’s older persons’ residential facilities.
6. A person aged 60 or older may apply to live in a 24-hour care or an older persons’ residential facility should they meet the following requirements: (i) in need of full-time attendance; (ii) are 60 years or older; (iii) are destitute; and (iv) are receiving an old-age grant or pension fund.² The costs associated with living in a 24-hour care facility is subject to a means test.

¹ STATSSA “Protecting South Africa’s elderly” (9 July 2020), available at: [http://www.statssa.gov.za/?p=13445#:~:text=Statistics%20South%20Africa%20\(Stats%20SA,are%20aged%2060%20and%20over](http://www.statssa.gov.za/?p=13445#:~:text=Statistics%20South%20Africa%20(Stats%20SA,are%20aged%2060%20and%20over).

² South African Government “Apply for admission to older persons’ residential facilities”, available at: <https://www.gov.za/services/retirement-and-old-age/admission-older-persons-residential-facilities>.

7. If an older person does not meet the above requirement to move into 24-hour care or an older persons' residential facility, it is still possible for them to benefit from social housing in certain instances.
8. The Social Housing Act 16 of 2008 provides for social rental housing to low and medium income households.³ In order to qualify, applicants must (i) earn a monthly income in the range as approved by the National Department of Human Settlements; (ii) lawfully reside in South Africa (as a citizen of the Republic of South Africa or in possession of a permanent residence permit); (iii) be legally competent to contract i.e. over 18 years of age; (iv) not have previously benefited from government housing assistance directly or indirectly through a spouse; and (v) must not have not owned fixed residential property.⁴
9. The issue that arises in this context, is that Social Housing Institutions (SHIs) do not have a consistent approach in respect of the cut-off age for beneficiaries. For example, some SHIs provide senior accommodation to individuals between 50 and 65, while others explicitly exclude pensioners and other persons older than 60 unless they occupy a unit with someone else who is younger.⁵
10. Beyond the Older Persons and Social Housing Acts, the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) requires that courts give special consideration to the rights of older persons when considering whether to grant an eviction order.⁶

*What are the **existing local and national action plans, development plans and support programmes** for advancing the right to adequate housing for older persons? If available, please specify the budget allocated for their implementations.*

11. The housing development budget for the 2022/2023 financial year is R28.8 billion.⁷ Although reference is made to social housing spending, the budget does not explain the

³ S 1 of the Social Housing Act 16 of 2008.

⁴ Social Housing Code.

⁵ Communicare "Application form for senior accommodation", available at: https://communicare.co.za/wp-content/uploads/2020/05/Application-for-Senior-Complexes_Incl-DeclMay-2020final.pdf; Povicom, "FAQ", available at: <http://www.povicom.co.za/faqs/>.

⁶ S 4(6) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998

⁷ National Treasury "2022 Budget Review" (2022), available at: <http://www.treasury.gov.za/documents/national%20budget/2022/review/FullBR.pdf>. Table 5.2. Social wage

allocation on housing for older persons. This is contrasted with the specific provision for a student housing infrastructure programme for student housing in higher education.⁸

12. The social development budget for the 2022/2023 financial year is R364.4 billion, of which R92.1 billion will be spent on old-age grants, the highest allocation of all social welfare grants.⁹ In April 2022, the old-age grant will increase from R1,890 to R1,980 per month, with a second increase to R1,990 per month in October. For persons older than 75, the grant will increase from R1,910 to R2,000 in April, and then to R2,010 in October.¹⁰ The information on old-age grants is relevant because it informs how much disposable income is available to older persons to access adequate housing.

*How are **older persons involved and participating** in the development of action plans, policies or legislation related to housing?*

13. Established in 2005, the South African Older Persons Forum (“SAOPF”) seeks to “promote the rights and dignity of older persons, consult and advise government, comment on legislation and policy, foster the growth of community organizations, disseminate information, raise public awareness, [and] interact with the Minister of Social Development, Parliament and other relevant stakeholders”.¹¹ The SAOPF is an example of an institution that facilitates participation of older persons in developing action plans, and influencing policies or legislation related to housing.
14. Beyond organisations like the SAOPF, individuals or groups may request that a Member of Parliament pose a question to the relevant government department regarding issues relating to access to adequate housing for older persons. The Minister of the relevant departments responds to questions on a weekly basis, with answers published on the Parliament’s website. Moreover, individuals or groups are invited to comment on policies and legislation related to all issues, including housing. A potential drawback here is that these processes often require individuals to attach themselves to groups who have the resources and technological know-how to make their concerns or ideas known.

⁸ 148.

⁹ Table 5.7. Social protection expenditure.

¹⁰ L Human “Finance Minister announces 2022 social grant increases” *GroundUp* (23 February 2022), available at: [https://www.groundup.org.za/article/finance-minister-announces-2022-social-grant-increases/#:~:text=The%20Old%20Age%20Grant%20will,\)%20\(a%205.2%25%20increase\)](https://www.groundup.org.za/article/finance-minister-announces-2022-social-grant-increases/#:~:text=The%20Old%20Age%20Grant%20will,)%20(a%205.2%25%20increase)).

¹¹ SAOPF “About Us” (2022), available at: <https://saopf.org.za/about/>.

*What **challenges, barriers and forms of discrimination** are faced by older persons in fulfilling their right to adequate housing? Please also include any existing legislation, policy or practice. Please also state how it impact older persons' enjoyment of other human rights.*

Existing legislation supporting the right to adequate housing

15. Section 26 of the Constitution, which guarantees the right to access to adequate housing should also be considered in the context of Section 9, which prohibits unfair discrimination, whether direct or indirect, based on age. The Constitution as the supreme law of the land,¹² requires that legislation and policies comply with its provisions. The right to access to adequate housing extends beyond the mere provision of a structure made of bricks and mortar and intersects intrinsically with the right to public participation, equality, human dignity, and access to information, amongst others.¹³
16. The Older Persons Act, as discussed above in relation to local and national legal, policy and institutional frameworks protecting and promoting the right to adequate housing of older persons, was enacted to protect and promote the rights, safety, and security of older persons. Chapter 4 is dedicated to the provision of residential facilities for older persons. Although provision for a residential facility is made, the Act has promoted the shift from institutional facilities to community-based care.
17. The Social Assistance Act 13 of 2004 provides grants for different categories of persons. The older persons grant is available to women aged 60 and older, and men aged 65 older over, provided they are eligible for social assistance. The purpose of the grant is to enable them to afford their basic needs.

Existing policies supporting the right to adequate housing

18. The Policy for Older Persons was adopted in 2005 after South Africa's adoption of the Madrid International Plan of Action on Aging in 2002.¹⁴ The purpose of the Policy on Older Persons is to:

¹² S 2 of the Constitution.

¹³ Government of the Republic of South Africa and Others v Grootboom and Others; 2000 (11) BCLR 1169 (CC). See also: SAHRC "Access to Adequate Housing", available at: <https://www.sahrc.org.za/index.php/focus-areas/access-to-justice-adequate-housing/access-to-adequate-housing>

¹⁴ South African Policy for Older Persons (2005), available at: https://www.westerncape.gov.za/assets/departments/social-development/south_african_policy_for_older_persons_2005.pdf. See also: WHO "Assessing the

“[F]acilitate services that are accessible, equitable and affordable to older persons and that conform to prescribed norms and standards. Such services should empower older persons to continue to live meaningful lives in a society that recognizes them as important sources of enrichment, expertise, and community support”.¹⁵

19. The Older Persons Charter was drafted after collaboration between South Africa’s Department of Social Development and the South African Older Persons Forum. The charter seeks to recognize the contributions of older persons in society whilst simultaneously emphasizing the rights of older persons to all rights enshrined in the Constitution.¹⁶

20. Beyond the Policy for Older Persons and the Older Persons Charter, each municipality, guided by the National Framework for Municipal Indigent Policies, are compelled to publish indigent policies each year. The Municipal Indigent Policy is intended to guide the national initiative to improve the lives of indigents and to improve access to Free Basic services.¹⁷ This support is provided to persons who meet the requirements set by the policy. Persons who qualify for this support will be granted indigent status and may get a discount on water, sewerage, electricity, waste collection and property rates. Older persons may therefore also apply for this grant, provided they meet the requirements. Since the COVID-19 pandemic started, the application processes for these rates rebates have been adjusted for indigent, the disabled and pensioners, especially those severely affected by COVID-19. The adjustment allows the abovementioned persons to qualify for indigent status within a shorter timeframe. The disadvantage of the indigent support is that persons must apply for renewal annually.

Key challenges relating to the housing needs of older persons

21. Residential care facilities:

Impact of COVID-19 on Older People in the African Region: A study conducted for the World Health Organisation African Regional Office” (2022).

¹⁵ South African Policy for Older Persons (2005).

¹⁶ SAHRC “Investigative hearing into systemic complaints relating to the treatment of older persons” (2015), available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Investigative%20hearing%20report.pdf>.

¹⁷ DPG “National Framework for Municipal Indigent Policies” (2012), available at: https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf

21.1. In 2010, an audit of state-funded residential facilities intended to identify the extent and quality of services provided revealed that most residential care facilities do not comply with the provisions of the Older Persons Act, and that those existing facilities require significant financial investment. It was, moreover, revealed that non-profit organisations (NPOs) who manage residential care facilities and are dependent on the state for funding complain of inadequate funding or a failure on the part of the government to pay subsidies that have already been allocated. It was also reported that maintenance issues and abuse of residents is often overlooked, and that many older persons were unaware of their rights.¹⁸

21.2. In 2017, the Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High-Level Panel Report) noted that residential facilities for older persons was largely (79%) available in metropolitan formal areas or small urban formal areas, with only 5% of these facilities being available in informal settlements and 16% in rural areas. The High-Level Panel Report further identified the costs related to residential care facilities as a barrier to protecting the rights of older persons. Many older persons cannot afford the fees and exhaust their pensions, rely on their family to contribute and others simply cannot afford to live in these residential facilities. Additionally, it was reported that 1% of older African people were living in institutional care, in comparison to 5% of older white people and access for black people were impeded by the high costs and the lack of such facilities in rural areas (as many elderly black people live in rural areas).¹⁹

22. *South Africa's National Housing Program Backlog:*

22.1. South Africa's national housing backlog is estimated to be 2.6 million undelivered homes. Informal settlements as well as transit camps (or Temporary Relocation Areas) are commonplace in South Africa. Although these problems affect all those people in these housing models, the elderly are affected. Although in the local government does in some instances make provision for basic services, it rarely meets the standard as set in the National Housing Code. Residents of Informal

¹⁸ SAHRC "Investigative hearing into systemic complaints relating to the treatment of older persons" (2015).

¹⁹ K Motlanthe "Report Of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change" (2017), https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

Settlements and transit camps often must resort to unlawful electricity connections with many families sharing 1 water pipe.

22.2. In informal settlements and transit camps alike, many residents have applied for state subsidized housing without any acknowledgement or relief provided by government. The conditions and facilities available in informal settlements and transit camps are wholly insufficient and often unsafe for older persons.²⁰

23. *Social Housing Institutions (Rental housing)*

23.1. As mentioned above, social housing institutions provide rental housing to low-income households, broadly defined as someone who earns between ZAR 1500 and ZAR 15 000.²¹

23.2. One of the main issues with social housing is that the housing agency that implements the plan/ scheme is usually a non-profit company which obtains accreditation from the Social Housing Regulatory Authority and will therefore often increase rental in line with the amended monetary thresholds to finance its functioning. Beyond the issues that were discussed above in relation to many older people being excluded from social housing, those that remain in social housing may no longer be able to afford their rent.

24. *General issues outlined by the High-Level Panel Report:*

24.1. The High-Level Panel Report identified several challenges related to the housing of older persons. There is an unrealistic emphasis on institutional care for older persons among the white population, with the cost associated thereto being high – making it unaffordable to the rest of the population. This is further exacerbated by racial and geographic (urban-rural) disparities in respect of provision of services for older people, especially in respect of institutional care and service centres, as well as a lack of affordable housing in developing and underdeveloped communities.²²

²⁰ Q Saal "Silence on far-Reaching changes in Housing Delivery during SONA" *GroundUp* (17 February 2022), <https://www.groundup.org.za/article/ramaphosa-silent-on-far-reaching-changes-in-housing-delivery-during-sona/>.

²¹ Western Cape Government "Social Housing", <https://www.westerncape.gov.za/service/social-housing#05>

²² High-Level Panel Report 364-365.

*How do **other factors** (i.e., gender, sex, race, ethnicity, indigenous identity, disability, sexual orientation, gender identity, religion, social status, place of origin and immigration status) intersect and impact the enjoyment of older persons' right to adequate housing?*

25. Race:

25.1. South African society still suffers from the remnants of a system characterised by racial discrimination, which perpetuates continuing inequality among the various racial groups when it comes to accessing resources.

25.2. The fact that Black persons were not allowed to own land (other than in specified 'self-governing bantustans') during apartheid has culminated in the situation today where most Black persons still cannot afford land. Against this backdrop, race becomes integral when evaluating older persons right to access to adequate housing.²³

26. HIV/AIDS and gender

26.1. HIV/AIDS has had a significant impact on older women in South Africa. This is as a result of older women becoming the primary caregivers to the dependents of their children who have died from the disease.

26.2. Moreover, older women who rely on an old age grant will have to use that income to house, feed and educate their grandchildren. Older women have no other option but to bear this burden and often render care under conditions of extreme deprivation. Thus, although they may receive an old age grant, this money may not be enough as it is stretched not only to meet their needs, but also to meet the needs of their other family members/ dependents.²⁴

*What impact has had **the COVID-19 pandemic** on older persons' right to adequate housing in your country (e.g., has the pandemic caused any policy shift away from institutions and*

²³ A Lombard and E Kruger "Older Persons: the case of South Africa" (2009) 34 *Ageing International* 119-135.

²⁴ SAHRC "Investigative hearing into systemic complaints relating to the treatment of older persons" (2015).

more emphasis on community supports)? What measures have been taken to minimize its impact?

27. The impact of COVID-19 on older persons have arguably been the most severe on older persons since globally, the fatality rate amongst older persons is currently five times the global average.²⁵ In South Africa the effects of the pandemic have not left the elderly unscathed.
28. The Social Assistance Act provides for a near universal pension scheme. The grant amount for pensioners between 60 and 74 years old is currently ZAR 1890 (128,10 USD) and for those who are older than 75 years the pension is ZAR 1910 (129,45 USD). In addition, the Government rolled out the COVID-19 Social Relief in Distress Grant which was available to all persons with no access to other funds. This theoretically included elderly persons who were not receiving a social assistance grant but found themselves in need. The COVID-19 Social Relief in Distress Grant was set at ZAR 350 (23,72 USD).
29. South Africa's response to the pandemic in respect of older persons focused mainly on the provision of healthcare, maintaining essential health services and infection prevention and control.²⁶
30. Regarding policy shifts in access to housing, South Africa's Minister of the Department of Human Settlement, Water and Sanitation has announced the Ministry's intended policy shifts about the National Housing Program. Instead of providing beneficiaries with homes the ministry now intends to provide so-called "serviced sites" to qualifying beneficiaries.
31. Serviced sites refer to a surveyed plot of land that has water and electricity connected to it. The Ministry therefore intends to pass the responsibility of building homes to individuals who have access to serviced sites. Fortunately, the Ministry has noted that

²⁵ P E Oamen and E O Ekhatior "The Impact of COVID-19 on the Socio-Economic Rights of Older Persons in Africa: The Urgency of Operationalising the Protocol on the Right of Older Persons" (2021) 21 *African Human Rights Law Journal*.

²⁶ WHO "Assessing the Impact of COVID-19 on Older People in the African Region: A study conducted for the World Health Organisation African Regional Office" (2022).

the following beneficiaries shall be excluded from this scheme: the elderly, war veterans and disabled people. These categories shall be provided with fully built homes.²⁷

32. Despite this, the drawback remains that the provision of housing in terms of the National Housing Program is slow, and many elderly and disabled people have waited for decades for their homes to be delivered.²⁸

*What **alternative housing strategies for older persons**, other than care homes and state institutions, exist in your country? What policies/ programmes are in place to enable older persons to live independently in their communities as they age? Please provide detailed information.*

33. Beyond the housing programmes discussed above, there are no policies and programmes that enable older persons to live independently in their communities.

34. The Social Assistance Act, which enables older persons to receive government grants does, however, go some way to assist older persons to live independently. Importantly, South Africa was the first African country to introduce a social grant for older persons, displaying that this is a feasible and affordable policy for a middle-income country. The older persons grant is the largest in terms of monetary costs, and the second-largest social grant in terms of beneficiaries (3.9 million).²⁹

*What are the **new and sustainable housing strategies** for older persons considering the current concerns of the impacts of climate change?*

35. South Africa has made strides in addressing significant issues in housing, including a severe shortage of housing stock and the poor quality of living conditions through a national housing programme which extended various types of subsidies to low-income households.

²⁷ Q Saal "Silence on far-Reaching changes in Housing Delivery during SONA" *GroundUp* (17 February 2022).

²⁸ MA Gontsana "Lengthy Housing Needs Register waiting list keeping some Khayelitsha disabled and elderly residents out in the cold" (2 September 2021) *GroundUp*, <https://www.dailymaverick.co.za/article/2021-09-02-lengthy-housing-needs-register-waiting-list-keeping-some-khayelitsha-disabled-and-elderly-residents-out-in-the-cold/>.

²⁹ TJ Shekhampu and W Grobler "The expenditure patterns of households receiving the state's old-age pension (SOAP) grant in Kwakwatsi township" (2011) *Journal for Transdisciplinary Research in Southern Africa* 41 43.

36. South Africa faces challenges in implementing sustainable housing strategies. The state has been burdened with the demand of housing and struggles to meet that demand. Thus, the focus seems to be less on new and sustainable housing strategies and more on meeting ongoing demands.

*How does **the State fulfil its obligations** to ensure older persons' access justice, and to obtain remedies and reparations, when their right to adequate housing have been violated?*

37. Section 34 of the Constitution provides that “[a]nyone has the right to have any dispute resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent impartial tribunal or forum”. Legislation such as the PIE protects vulnerable groups such as older persons against unlawful eviction from their home without an order of court.

38. Section 26 read with Section 34 means that the State is constitutionally bound to respect, protect, promote, and fulfil the right to access to adequate housing. Where there is a failure to do so, the judiciary may intervene to ensure that relevant state departments fulfil their obligation by taking measures within their available resources, to achieve the right to housing. For example, in *Mazibuko and Others v City of Johannesburg and Others*, the Constitutional Court held that “policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved”.³⁰

*What are the **lessons learned** from advocacy, legal, and policy actions undertaken to combat ageism and to access of adequate and affordable housing by older persons?*

39. On a legal and policy level, there have been learnings from the implementation of the Older Persons Act. The The Value Planning Company (Pty) Ltd, the company hired by the Department of Social Development to assist with an implementation strategy for the Act advised, as part of their work, that a governmental coordinating body ought to be set up support the interests of older persons. Such a body would be inter-departmental and focus on the execution and evaluation of laws relevant to this group. This recommendation is part of a wider claim that legislation alone is not enough to effectively protect older persons in the country.³¹

³⁰ 2010 (3) BCLR 239 (CC) para 40.

³¹ J Adkins “Advancing the socio-economic rights of older persons in South Africa” (2011) 12 *Economic and Social Rights Review* 1 17.

40. Another learning taken from the legal framework pertaining to older persons is that, regardless of the actual protection framework, sufficient funding needs to be allocated in governmental budgets for the purposes of the elderly.³² Without adequate funding, the Department and dependant non-governmental entities will not be able to effectively implement the provisions of the Act.
41. In terms of advocacy, a major takeaway is that there is very limited awareness of ageism and the rights of older persons. Part of a 2009 study commissioned by the Department revealed that 73% of staff working in service centres for older persons were not aware of the Older Persons Act.³³ While it is expected that awareness of this area of legislation has increased in the time since 2009, many believe that a nationwide awareness campaign is still necessary.

Data:

- a. *Does your country collect data on older persons' living conditions in your country? If yes, please provide any available and disaggregated figures and statistics (e.g., number of older persons: in institutions, living alone, living with family, or living in urban and rural areas).*
42. The South African government collects data on older persons through the national statistics agency, Statistics South Africa (Stats SA). While a population census is due to be released later in 2022, the most recently available census containing population-wide data was conducted in 2011. Census 2011 includes disaggregated figures and statistics for older persons' living conditions.³⁴
43. In total there were 4,1 million persons aged 60 years and older, this equates to roughly 8% of the population falling into the 'older persons' category.³⁵ This figure is expected to

³² 18.

³³ Department of Social Development "The status of older persons in South Africa: a national study on the needs and access to services of older persons" (2009), available at <http://hdl.handle.net/10210/421867>.

³⁴ STATSSA "Census 2011: Profile of older persons in South Africa" (2011), available at <https://www.statssa.gov.za/publications/Report-03-01-60/Report-03-01-602011.pdf>.

³⁵ STATSSA "Census 2011, iv.

reach almost 7 million by 2030. Within this group, 50,6% live in extended households, 25,5% live in nuclear households, and 20,2% live in single-member households.³⁶

44. The same data also shows that provinces with a higher number of urban areas have a greater proportion of elderly persons living alone and in nuclear households. Conversely, provinces with a higher number of rural areas have a higher proportion that live in extended households.³⁷

b. Is data on older persons broken-down into groups of different ages over 65 years to plan and address each specific age group's needs in terms of housing?

45. Data on older persons is broken down into different age categories. Specifically for living conditions, Census 2011 provides a breakdown of age increments of five years from 60 to 85+ across the different forms of living arrangement.³⁸

Conclusion

46. We trust that you will find this submission useful. Should you have any comments or questions, please do not hesitate to contact Sharita Samuel at sharita@lrc.org.za and/or Anneline Turpin at anneline@lrc.org.za

Yours sincerely

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³⁶ STATSSA "Census 2011,74.

³⁷ STATSSA "Census 2011,76.

³⁸ STATSSA "Census 2011,78.