



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

**The Law as it Affects Older
Adults:
Moving the Project Forward**

**REPORT ON THE PRELIMINARY
CONSULTATION**

DECEMBER 2008

Available online at www.lco-cdo.org
Disponible en français
ISBN: 978-1-926661-01-8

ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario is a partnership among the Ministry of the Attorney General, Osgoode Hall Law School, the Law Deans of Ontario's law schools, the Law Foundation of Ontario, and the Law Society of Upper Canada. It is situated at Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. The LCO has committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

Law Commission of Ontario
Physical Resources Building
Suite 1093, 4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3

Tel: (416) 650-8406
Fax: (416) 650-8418
General E-mail: LawCommission@lco-cdo.org
www.lco-cdo.org

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PRINCIPLES FOR DEVELOPING A FRAMEWORK FOR THE LAW AFFECTING OLDER ADULTS.....	4
	A. Principles Adopted by the LCO	4
	B. Implementation of Principles	6
	C. Relations Between Generations.....	7
	D. Respect for Diversity	7
	E. Conclusions	10
III.	THE USE OF AGE AS A DECISION-MAKING CRITERION	11
	A. Use of Age as a Legal Category	11
	B. Rationales for Age-Based Distinctions	12
	C. Human Rights Frameworks and Age-Based Distinctions	14
	D. Conclusions	16
IV.	STEREOTYPING, NEGATIVE ASSUMPTIONS AND PATERNALISM TOWARDS OLDER ADULTS	18
	A. Negative and Paternalistic Attitudes Towards Older Persons.....	18
	B. Impact on the Law	18
	C. Conclusions	20
V.	ACCESS TO THE LAW	21
	A. Monitoring the Effective Implementation of the Law	21
	B. Barriers to Access	22
	C. Designing a More Accessible System	25
	D. Conclusions	27
VI.	OLDER ADULTS AND THEIR RELATIONSHIPS	28
	A. Recognizing Relationships of Importance to Older Adults.....	28
	B. Exceptional Demands Placed on Relationships of Care and Commitment	29
	C. Law and the Regulation of Relationships.....	31
VII.	LIVING ENVIRONMENTS	33
	A. Aging in Place.....	33
	B. Standard Setting: Promoting Security for Institutional Residents.....	33
	C. Promoting Dignity, Independence, Participation and Diversity	34
	D. Conclusions	36

VIII.	NEXT STEPS.....	37
IX.	LIST OF ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT.....	38
	ENDNOTES	39

I. INTRODUCTION

Although older adults make up a significant and growing proportion of the Canadian population, there has been relatively little attention paid to their relationship to the law. While pioneering work has been done by, for example, the Advocacy Centre for the Elderly and a number of individual elder law practitioners, specialized attention to the legal needs of older adults has been sparse. There has been little research on the barriers that older adults in Canada face in accessing the law and the justice system, and on how access might best be facilitated.

Consideration of the law as it affects older persons has often been restricted to issues which, on their face, clearly have a disproportionate impact on older persons, such as estates, health care, and end of life issues. Less often considered are laws which, while they have broad application, may have a different impact on older adults than they do on others, and which might be fairer or more effective if they took issues related to aging into account.

As well, elder law is sometimes treated as a collection of disparate issues, and it has been felt that this area of the law would benefit from a more holistic and principled approach.

The aging of the Canadian population, together with the advances made by organizations advocating for seniors' rights, have in recent years brought issues related to elder law more frequently to the forefront. The recent repeal of Ontario's mandatory retirement laws was the result of concerted advocacy by many organizations and individuals, and a recognition of the importance of ensuring that the law takes into account the rights, needs and circumstances of older adults.

This Project is based in part on a proposal by Professor David Freedman, a professor of Elder Law at Queen's University Law School.

It is the intent of this Project to develop a systematic framework for the law as it affects older adults. The focus of this Project is not on reform of any one specific issue related to older adults, although specific issues may be examined as examples. Rather, this Project aims to develop a coherent approach to this area of the law, which can be used as a template, or set of principles, in developing law reform proposals related to older adults, and in ensuring that new laws take into account the needs and circumstances of this group. Therefore, the aim of this project is not to develop specific recommendations in any one area of the law as it affects older adults, but rather to provide a basis on which any area of the law may be examined from an anti-ageist perspective.

In keeping with the Law Commission of Ontario's (LCO) holistic approach to law reform, this Project will consider laws in their context, taking into account how they are operationalized and implemented, and whether laws affecting older adults are achieving their purposes or are having unintended impacts on older adults.

Given the breadth of scope of this Project, it will be a multi-stage, multi-year endeavour. The Project therefore began with a Pre-Study, which aimed to delineate the scope of the Project and identify key themes, principles and issues for examination.

In May of 2008, the LCO launched this Pre-Study with a Consultation Paper on Shaping the Project. This Paper was posted on the LCO website and distributed to a wide range of academics and researchers, legal clinics, community organizations, and government bodies. The Consultation Paper provided a brief overview of themes and issues identified through its preliminary research, and requested feedback from stakeholders on the scope and design of the Project, including key issues and principles. The LCO received written submissions from 21 organizations, and held meetings with six organizations and individuals. The LCO wishes to extend its thanks to all those who participated in this consultation for their invaluable contributions. In particular, the LCO would like to thank the Ontario Seniors' Secretariat for the opportunity to obtain comments and feedback from its Community Liaison Committee. A full list of organizations contributing to this consultation may be found at the end of this Report.

This Consultation Report marks the end of this first stage of the Project. Given the volume of submissions received by the LCO, and the myriad topics and concerns identified, this Consultation Report does not attempt to report on or consider all of the issues identified. Rather, it sets out the results of the Pre-Study, and identifies next steps for the Project, including key themes, issues and principles and the LCO's research priorities.

The LCO has identified, through this process, five preliminary principles that may guide the law as it affects older adults: independence (autonomy), participation, security, dignity and respect for the diversity of older adults. The next challenge for this Project is to consider, research and analyze the scope, meaning and interaction of these five principles, and to determine how they may concretely apply to some of the pressing current issues in the law as it affects older adults.

The LCO will consider these principles through research and analysis on the following five questions:

1. What would an anti-ageist approach to the law look like?
2. When is it appropriate or effective to use age as a legal category?
3. What principles and approaches best promote access to the law for older adults?

The Law As It Affects Older Adults

4. How can the law appropriately recognize and support the relationships of older adults?
5. How can a principled framework for the law as it affects older adults be applied to ensure secure and dignified living environments for older persons?

These preliminary principles and questions will be further outlined in the remainder of this Report.

II. PRINCIPLES FOR DEVELOPING A FRAMEWORK FOR THE LAW AFFECTING OLDER ADULTS

A principled approach to this area of law can assist in guiding and educating policy makers and provide standards against which laws, policies and programs can be assessed. In the Consultation Paper on Shaping the Project, the LCO requested feedback on the principles that should underlie any approach to the law as it affects older adults, seeking to identify principles that can advance an anti-ageist approach to the law and provide a foundation for standards in this area.

A. Principles Adopted by the LCO

Based on the LCO's research, and on the comments that were received during the consultation, the LCO has adopted the following principles as the basis for its approach to the law as it affects older adults:

1. *Independence*: This applies in all spheres of life, including rights to meaningful opportunities to work, to age in place, to access education and training, and to make choices and do as much for oneself as possible. Given entrenched paternalism and stereotypes, the presumption of ability is essential to the independence of older persons. This principle also includes measures to enhance capacity for independence, including ensuring access to information, provision of programs and policies that support independence, and the provision of adequate supports for those who provide care for older persons.
2. *Participation*: This includes the opportunity to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Participation is enabled through inclusive design of laws, programs, policies and services. An important aspect of participation is the right of older adults to be meaningfully consulted on issues that affect them, whether at the individual or the group level.
3. *Security*: Some frameworks refer to this principle as one of "care". This principle includes the right to physical, financial, and social security, such as the right to be free from abuse or exploitation. It also includes the right to basic supports in terms of health, legal and social services.
4. *Dignity*: At its most basic level, this principle involves the right to be valued, respected and considered, to have both one's contributions and one's needs recognized, and to be treated as an individual. It includes a right to be treated equally and without discrimination, and a right to

privacy. It includes the recognition that all members of the human family are full persons, unique and irreplaceable, that all have inherent and equal worth, and capacity for growth and expression.

5. *Respect for Diversity*: Older adults are not a homogenous group, and their needs and circumstances may be affected by a wide range of factors. The LCO's analysis of the law as it affects older adults will respect the diversity of older adults, and take into account the impact of this diversity on their relationship with the law. The LCO's approach to, and understanding of diversity is further outlined below.

These principles must be read in the context of Canada's human rights framework, including both the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*,¹ and with a focus on substantive, rather than formal, equality.

These principles are supported by, and in part derive from, existing international and domestic policy frameworks regarding older adults. These documents provide a starting point in developing a set of guiding principles for a coherent approach to this area of the law. While they vary in lexicon, emphasis and nuance, there is general agreement between these documents on some foundational principles for a policy approach to older persons.

On the international front, the most notable frameworks relating to older adults are the United Nations 1991 *Principles for Older Persons*² and the World Health Organization's 2002 *Active Ageing: A Policy Framework*.³ Recently, the United Nations has adopted the *Convention on the Rights of Persons with Disabilities*,⁴ which is relevant to the situation of older persons in several respects. While Canada has not yet ratified this Convention, it is expected to do so. There are also a multitude of regional, issue-specific, or planning documents that identify relevant principles and perspectives.

Domestically, Canada produced a *National Framework on Aging* in 1999 for the International Year of Older Persons.⁵ Also of importance are the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code* and the Ontario Human Rights Commission's *Policy on Discrimination Against Older Persons Because of Age*.⁶

The principles adopted by the LCO were generally affirmed by organizations making submissions to the LCO's consultation. The Ontario Human Rights Commission stated:

Law reform needs to incorporate a clear affirmation of the notions of dignity, independence, participation, fairness and security as guiding principles central to any consideration of the issues related to older persons. These principles mirror the words of the Preamble to the *Ontario Human Rights Code* and reflect the intent of its human rights protections.

The British Columbia Law Institute indicated that:

The five NFA principles and the values reflected in the WHO framework provide a good basis for promoting the status and well-being of the older population. They would also be useful as standards for assessing the terms of new and existing laws and policies to avoid disproportionate adverse impacts on older persons and the unintended creation of barriers to their full participation as members of society.

B. Implementation of Principles

While there may be general agreement on some broad principles, this does not simplify the difficulties of implementing them in law and policy. How can, for example, the principle of independence be advanced in institutional settings – noting that some commentators believe that institutional settings are antithetical to the principles of dignity, independence and participation? What type of approaches will ensure access to the law? How can the decision-making capacities of persons with significant cognitive disabilities best be supported? If the LCO adopts a definition of the principle of security that includes a right to basic supports, what supports are included and in what circumstances, and how can this be implemented? The challenges are numerous.

The principles identified above are clearly interdependent. Dignity and independence, for example, cannot be achieved without security. Security is based on respect for the inherent worth and dignity of older persons. However, it is important to identify and carefully consider the potential conflicts among these principles. There are, for example, tensions throughout elder law between the principles of independence and security, or as some have phrased it, between autonomy and protection. The Advocacy Centre for the Elderly states:

It is the opinion of ACE that the overarching principle that should guide the law as it affects older adults is that seniors are people. They are presumed to be capable of making decisions and they have the right to make foolish decisions if they so choose. The government must be careful not to create laws, in its overzealousness to protect so-called vulnerable older adults, which actually limit their rights.

This tension may be inherent to this area of the law, arising from difficulties in addressing shifting levels of capacity and ability among some older adults as a result of aging process. Many of the ongoing policy debates in the area of elder law - for example, debates regarding the best approach to preventing and addressing elder abuse, or regulation of enduring powers of attorney and guardianship legislation, or the value of adult protection legislation – have at least some roots in this tension.

Tensions between the rights of older adults and those of other groups must also be acknowledged and addressed. These may raise difficult issues. For example,

there may a conflict between the rights of support workers to work in a smoke-free setting and be protected from the health-risks associated with second-hand smoke, and the rights older persons living in institutional settings to make choices about their activities in what is, after all, their homes. Rules requiring mandatory retirement for police officers, firefighters and other safety-sensitive positions may be understood as attempts to balance the rights to independence, dignity and participation of older persons against safety risks for the community.⁷

C. Relations Between Generations

Some policy frameworks refer to the notion of “intergenerational equity”;⁸ however, several organizations expressed concerns about this notion and its potential application to the law as it affects older adults. The notion of intergenerational equity has been expressed in a variety of forms. It has, for example, been conceptualized as part of an environmental sustainability framework, viewing the human community as a partnership across generations, with the current generation having a role as custodians of the earth for future generations. In a different approach, others have used this notion as a framework for analyzing the intergenerational effects of government expenditures and taxation decisions. Submissions to the LCO critiqued the notion that there exists an intergenerational struggle for access to scarce resources, in which the rights of older adults must be balanced against the competing interests of other generations. Some have suggested that it may be more helpful to focus on intergenerational solidarity, a term that has been used in a number of recent international documents,⁹ or on a lifecourse analysis of the impact of laws, policies and programs.

D. Respect for Diversity

Older adults are an enormously diverse group of people. The needs and circumstances of older adults may be affected by the following demographic factors:

- Age (the experiences and circumstances of a 60 year-old and a 90 year-old are likely to diverge in significant ways);
- Gender (including the experiences of transgendered older adults);
- Sexual orientation;
- Income;
- Education;
- Geographic residence (for example, the needs of older adults living in rural settings are likely to differ from those living in urban settings, and residents of Northern Ontario will face different challenges in accessing services than those in Southern Ontario);
- Family and marital status (older adults must be considered as both providers and recipients of care);

Report on the Preliminary Consultation: Moving the Project Forward

- Language (including the situations of francophone older adults, those for whom Sign Language is their first language, and newcomers whose first language is other than one of Canada's official languages);
- Immigration and citizenship status (keeping in mind that the experiences of recent immigrants will differ from those who immigrated during their youth);
- Racialization and ethnic origin;
- Aboriginal status; and
- Whether the person has a psychiatric, physical, intellectual, cognitive or sensory disability.

No doubt yet other aspects of diversity could be identified. To reduce older persons to their age alone and to assume older persons are all alike in their needs, experiences and outlooks may be considered a form of ageism. The Ontario Human Rights Commission points out in its submission that older adults identified with grounds protected under the *Human Rights Code* (such as race or ethnic origin, disability, or sexual orientation) are particularly vulnerable to discrimination and harassment. For example, assumptions about older persons and assumptions about persons for whom English is a second language may compound each other, so that elderly immigrants are treated with very low levels of patience and respect, "as if they are stupid".

It is beyond the scope of this document to give an exhaustive account of the impact of intersecting identities on the experiences of older adults. However, any approach to issues affecting older adults must take this into consideration.

There is a complex relationship between disability and aging, which is worth careful consideration. While aging is often associated with a decline in general health and the onset of activity limitations, a significant proportion of older adults report themselves to be in good or excellent health, and until age 75, almost all older adults are able to carry on the activities of daily life without assistance.¹⁰ However, older adults are vulnerable to a range of chronic conditions such as diabetes or high-blood pressure, are more likely to develop sensory or mobility-related disabilities, and the risk of developing dementia increases with age.¹¹ As well, there are a growing number of older persons who acquired their disability at birth or at an earlier age, and have lived with disabilities throughout their lives. People with intellectual disabilities, for example, are living longer than at any other point in history.¹² As part of the recognition of the diversity of older adults, it is essential to promote respect for both older persons who have developed disabilities as a result of the aging process and older persons who have aged with disabilities.

The Canadian Association for Community Living pointed to the importance of directly confronting, in any set of principles, the sources of diversity and exclusion:

CACL supports in general the sources and statements of principle identified in the Consultation Paper. However, we believe that the statements of principle need to more directly confront the issue of disability and diversity and stress equal respect and dignity regardless of the differences that come with age, and other differences across which exclusion and devaluation are often organized. Without a more explicit reference in the principles to grounds of exclusion that are often justified, unreasonably we believe, in law and policy, the LCO position could end up unintentionally reinforcing exclusionary thinking and philosophy.

Disability is only one characteristic that can result in older adults experiencing compounded or unique barriers to accessing the legal system or other services, and to enforcing their legal rights. DAWN – RAFH Canada provides an example in terms of women with disabilities:

It is important to note that women with disabilities (physical, mental, sensory, chronic illness) experience a much higher rate of abuse of all types than their non-disabled counterparts and more abuse than men who have disabilities. This is very important to keep in mind, as it is often very difficult for women with disabilities to even leave the abusive situation in which they find themselves, let alone take legal action against their abusers. Often, women's shelters or transition houses are not accessible to women with disabilities. Therefore, it would appear that it would be even more difficult for women with disabilities to access any legal help, especially if they could not find a safe haven first.

As well as attitudinal barriers, it is common for older adults who belong to other vulnerable groups to experience significant gaps in programs or policies. For example, older adults who are recent immigrants face unique legal barriers. The ten year residency requirement for receipt of Old Age Security and the Guaranteed Income Supplement significantly contributes to high levels of low income among older adults who are recent immigrants. As well, the effect of sponsorship agreements creates barriers to access to long-term care homes. Similarly, there is an overall dearth of programming for older LGBT adults.

Consideration of diversity must be integrated with a life course analysis. The discrimination and marginalization experienced by, for example, Aboriginal and racialized individuals, and persons who have lived with disabilities mean that they are more likely to be low-income as they enter older adulthood. Similarly, the experiences and life outcomes of men and women are likely to have been affected in a variety of ways by gendered division of caregiving roles.

Interestingly, organizations working with LGBT individuals and with racialized individuals both pointed out that members of these communities who are now older adults grew up and lived through eras of very significant oppression, and often adopted strategies of silence and invisibility in order to survive. As a result, as older adults they are less likely than other older adults to complain to

authorities regarding poor treatment or discrimination. As well, it may be harder for social service providers to reach out to these older adults. In other words, these individuals may have a magnified experience of the invisibility that often affects older adults.

Any approach to the law as it affects older adults must find a way to recognize and adequately address this diversity. Respect for the diversity of older adults may be considered an additional principle to the four identified above, or may alternatively be considered a factor or consideration to be taken into account whenever the law and aging is under discussion.

E. Conclusions

Based on research and the feedback from stakeholders, the LCO will adopt, for the purposes of further research and analysis, the principles of:

- independence,
- participation,
- security,
- dignity and
- respect for diversity.

The LCO will interpret these principles in light of Canada's human rights laws and commitments. The LCO will also consider the implications of intergenerational solidarity and a lifecourse analysis through its further research.

III. THE USE OF AGE AS A DECISION-MAKING CRITERION

Why treat people of different ages differently? This is one of the foundational questions for the area of law and aging, and was the focus of the Law Commission of Canada's project *Does Age Matter? Law and Relations Between Generations*.¹³ Why is age used as a category for apportioning benefits or imposing restrictions? Is this appropriate and/or effective? If so, under what circumstances? If universal laws and protections are insufficient for addressing older adults, why and in what circumstances? That is, under what conditions does age "make a difference", and under what circumstances *should* it?

A. Use of Age as a Legal Category

It is very common for older adults to be treated separately for the purposes of law and social policy. Age is a criterion for access to social programs like the federal Old Age Security benefits, Ontario's Guaranteed Annual Income System (GAINS),¹⁴ and Ontario's Drug Benefit Program, which pays for most of the cost of drugs that are listed in the Ontario drug benefit formulary.

On a lesser scale of significance, attainment of age 65 entitles Ontarians to access a range of government benefits, including reduced priced entry to the Ontario Agricultural Museum, reduced fares for public transportation and special provisions for sport fishing licenses.¹⁵

Following the abolition of mandatory retirement in Ontario on December 12, 2006,¹⁶ most employers have retained age 65 as the "normal retirement date" for their employees, and there is a complex web of age-based requirements and entitlements related to income security in old age.

Law and policy also frequently permit restrictions on entitlements or increased obligations based on age. When mandatory retirement was ended in Ontario in December 2006, employers were given discretion as to whether or not to provide health, insurance and dental benefits to employees aged 65 or older. An employer may choose to provide lesser or no benefits to employees who decide to continue working after age 65.¹⁷

Less formal distinctions based on age are also common in the private sector. It is not unusual, for example, to see businesses providing "seniors' discounts".

Sometimes laws and policies permit "age" to be taken into account in decision-making, without specifying a particular age. For example, the law generally permits age to be taken into account in actuarial calculations for insurance purposes. The *Employment Standards Act*, combined with Regulation 286/01,

permits employers to make age-based distinctions in the provision of pensions, life insurance and disability benefit plans when those distinctions are made on an actuarial basis.¹⁸ The use of age as an actuarial basis for insurance rates was upheld by the Supreme Court of Canada in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, although the Court cautioned that the use of characteristics such as age, sex and marital status raised human rights concerns, and directed the insurance industry to look for alternatives to the use of enumerated grounds in setting premiums.¹⁹

More frequently, a specific age is provided as a basis for action, most commonly age 65. The *Workplace Safety and Insurance Act, 1997*, for instance, uses age 65 as a turning-point date for the obligation to re-employ, compensation for loss of retirement income and payments for loss of earnings.²⁰ The Ontario Legal Clinic's Workers' Compensation Network and the Office of the Worker Advisor both pointed out that many older workers must continue to work past age 65 due to economic necessity, and that injured workers who can neither work nor qualify for compensation for lost earnings may find themselves in poverty.

Occasionally, other ages are used as turning points. For example, the *Courts of Justice Act* permits judges to remain in office until age 75, subject to annual approval after age 65 by the Chief Justice of the Ontario Court of Justice.²¹ Ontario's Senior Driver Renewal Program requires drivers aged 80 years and older to take part every two years in a group education session and to complete vision and knowledge tests.²²

B. Rationales for Age-Based Distinctions

Most frequently, age-based distinctions in law are related to the complex system of income security programs for older adults that includes private and public pension schemes, income supplement programs such as Ontario's GAINS, access to supplementary benefits, such as Ontario's Drug Benefit Program, and more or less successful attempts to integrate these with other income support-type programs, such as Workers Safety and Insurance benefits and social assistance programs.

Occasionally, the notion of "intergenerational equity" is raised as a rationale for age-based distinctions. For example, one of the rationales advanced for mandatory retirement was that it was necessary in order to facilitate the hiring and promotion of younger persons, and thereby ensure opportunity across generations (although the validity of this rationale for mandatory retirement has been critiqued).²³

Age is also often used as a stand-in for other characteristics, such as need or capacity. Programs that provide discounted costs for older adults, for example, are often based on the assumption that older adults have lower incomes than

other segments of society. The Ontario Senior Drivers' Renewal Program reflects concerns that age is correlated with declines in some capacities related to driving, and that older drivers therefore pose an increased risk on the road and require increased monitoring. The effectiveness of using age as a stand-in for other characteristics is questionable, however, as the situations and capacities of older adults of course vary widely. To the degree that age acts as a stand-in for other characteristics, such as need, vulnerability or capacity, it is worth considering whether this is an effective and appropriate approach, or whether it would be more effective to directly target persons with the characteristics that are of concern.

The use of a specific age as a cut-off for entitlement or restrictions on access provides the benefits of clarity, simplicity and certainty. On the other hand, it almost inevitably raises concerns about arbitrariness. It is unlikely, of course, that most individuals will undergo a sea-change upon the attainment of a specific chronological age: changes in need, capacity, or vulnerability are generally the result of a gradual process, rather than a sudden "all-or-nothing" alteration. Further, as the Ontario Bar Association points out in its submission, chronological age is not an accurate measure of age-related vulnerability, capacity or need, and the capabilities of older adults vary markedly. For example, the Ontario Legal Clinics Workers Compensation Network and the Ontario Worker Adviser point out that aged-based termination of significant benefits under Ontario's workers' compensation system ignore the diversity among older adults: many need to work past age 65 due to economic necessity, and older women and recent immigrants are particularly vulnerable because they have not had the opportunity to build up either private or public retirement benefits. The Senior Drivers' Renewal Program attempts to balance these various concerns by using a mix of age-based decision-making and individual assessment: unlike, for example, mandatory retirement programs that used age as a bright-line cutoff point, the Drivers' Renewal Program uses age as a point at which individuals are required to demonstrate their continued capacity.

The Ontario Human Rights Commission's *Policy on Discrimination Against Older Persons Because of Age* notes that age is a relative concept, and that the context should be taken into account.²⁴ It has also been noted that the human life span is a continuum, and that while for many purposes society describes the aging processes in terms of near water-tight compartments – adulthood begins at age 18, for example, and old age at 65 – this is essentially arbitrary and socially constructed.²⁵

All this raises the difficult question of defining what an "older adult" or "older age" is. Although the terms are often taken for granted, there is no consensus definition of who may be considered "old" or "senior", given the diversity of individual life paths and expanding life expectancy. The common use of essentially arbitrary markers of old age, such as retirement from the work force or the attainment of age 65, while providing clarity and simplicity, do not accord with

the realities of aging, or the important role of attitudes, social expectations and specific context in how aging is experienced.

It has also been pointed out that the use of age-based criteria may suggest that older adults are homogenous, obscuring the diversity among older adults, and thereby supporting ageist thinking.²⁶ Individual assessment of need or capacity has been proposed as a preferable alternative.²⁷

However, a number of consultees pointed out that age-based criteria can be very effective in addressing circumstances where older adults do face unique barriers or difficulties, often highlighting the success of age-based income support programs in addressing poverty among older adults. As an example of a situation where older adults may face special challenges that require a tailored response, Parkdale Community Legal Services raised the situation of older adults between the ages of 60 and 64 who have recourse to social assistance. This group of older adults may face significant age-related barriers in finding employment, and are more likely than younger persons to experience health and medical issues that impact on income and opportunities. Since the 1998 restructuring of social assistance which removed the “aged” category of assistance that previously existed under the *Family Benefits Act*, the social assistance system has failed to take the situation of these older persons into account, leading to considerable hardship. This submission noted that:

Although some age-based criteria may have discriminatory effects, the former Family Benefits “aged” category was one that benefited older adults and reflected the barriers that many of them face in finding employment... Although considered employable, people over the age of 60 face systemic hardship trying to find employment ... The impact of the low benefits provided by OW is exacerbated by health and mobility issues that many of our older clients face, which make accessing other available services, such as food banks, more difficult. As well, many of the natural health issues which affect people over the age of 60, but are not necessarily considered disabilities *per se*, require medication and pose further mobility and unemployment issues.

C. Human Rights Frameworks and Age-Based Distinctions

International and domestic frameworks respecting older adults have recognized that older adults may have needs and circumstances that differ from other segments of society, and therefore require different policies and programs. Documents such as the United Nations’ *Principles for Older Persons* and Canada’s *National Framework on Aging* implicitly recognize that a distinct policy lens is necessary to ensure appropriate and effective responses to the needs of older persons, whether as a redress to the effects of historical ageism and

marginalization of older persons, or to address the additional needs for care and support that may result from the aging process.

The Canadian *Charter of Rights and Freedoms* includes age as one of the enumerated grounds in section 15, which provides for equality before and under the law, and equal protection and benefit of the law without discrimination. That is, the *Charter* recognizes age as one of the grounds on which individuals may experience barriers to equality. Section 15 also permits the use of age as a factor in designing programs, activities or laws that are intended to ameliorate disadvantage among individuals or groups.

Ontario's *Human Rights Code* prohibits discrimination based on age. Until recently, the *Code* defined age as being 18 years or more and under 65 years for the purposes of employment protections. Amendments in 2006 removed the cap of age 65, so that any person aged 65 or older is protected against discrimination in the social areas of employment, housing, services, contracts and vocational associations.

The inclusion of "age" as a ground in the *Code* as well as in the *Charter* reflects an acknowledgement that age, including older age, is not infrequently the unjustified basis for decisions that have a significant impact on the lives of older adults. The Ontario Human Rights Commission's Report, *A Time for Action*, released on 2001, outlines myriad concerns with the ways in which age may be used to deny employment, housing, health care and key services to older persons. The identification of mandatory retirement as a violation of human rights principles played a significant role in the eventual decision of the Ontario government to amend the law to abolish mandatory retirement.

However, the Supreme Court of Canada explicitly recognized in *Law v. Canada (Minister of Employment and Immigration)* that not all distinctions related to age should be considered discriminatory. This case revolved around a pension scheme under which full benefits were paid to surviving spouses over the age of 45, partial benefits were paid to those between 35 and 45 and no benefits were available to surviving spouses under age 35. The Court found that, even though the claimant was disqualified on the basis of her age from receiving a survivor's pension when her spouse died, there was no *Charter* violation. Persons under age 45 have not historically been subjected to discrimination, younger persons do not face the barriers to long-term labour force participation that the benefit was designed to address, and the law did not stereotype, exclude, devalue or demean adults of the claimant's age.²⁸

The *Human Rights Code* does not forbid all age-based distinctions. It specifically exempts programs, policies or activities that provide preferential treatment for persons aged 65 and older from the definition of age discrimination.²⁹ The *Code* also permits age-based special programs designed to relieve hardship or economic disadvantage, or that is designed to assist individuals or groups to

attempt to achieve equal opportunity.³⁰ That is, under the *Code*, all age-based decisions and policies are not necessarily problematic: one must enquire into the basis and effects of such distinctions in order to determine their appropriateness. For example, such provisions may shield seniors' housing projects that aim to provide the community, supports and income security that enable older adults to age in place, or programs to provide older adults with reduced fees for public transportation. The *Charter* also permits the use of special programs to address disadvantage related to enumerated grounds.

D. Conclusions

The use of age-based criteria raises many difficult questions:

- If age-based criteria are to be used, how can older age be effectively defined? Can the clarity, simplicity and efficiency of using a specific age (e.g., age 65) as a cutoff outweigh the unavoidable arbitrariness of such criteria?
- Are there ways in which older adults do differ significantly from the rest of the population, such as to require specialized legal or policy approaches? To what extent is it reasonable, effective or appropriate to use age as a stand-in for other qualities, such as need, dependency, or vulnerability?
- To what extent can individual assessment form a reasonable alternative to age-based criteria? Are there other approaches that should be considered?

The LCO received many submissions urging the review of the use of age-based criteria. The Ontario Bar Association stated that:

The use of age-based criteria in laws and programs requires re-examination. Specific age-based criteria are most common in employment, pension, insurance and driving. A comprehensive, articulated social policy-framework should underlie these laws and programs, and be proactive in anticipating the life-cycles and age-specific requirements.

The Advocacy Centre for the Elderly recommended that the LCO examine age-based criteria in laws and programs to determine if they are discriminatory and examine whether individualized assessments are more appropriate.

Strong concerns were expressed regarding the following specific age-based distinctions:

- Legislation and regulations pertaining to driving licenses;
- Age-based restrictions in access to Workplace Safety and Insurance protections and benefits;
- Employment standards provisions permitting employers to provide lesser or no benefits to employees who continue to work past the age of 65;

The Law As It Affects Older Adults

- Insurance schemes that involve either greater charges or lesser benefits on the basis of age; and
- The failure to recognize the special circumstances of persons between the ages of 60 and 64 who are in receipt of social assistance.

IV. STEREOTYPING, NEGATIVE ASSUMPTIONS AND PATERNALISM TOWARDS OLDER ADULTS

A. Negative and Paternalistic Attitudes Towards Older Persons

Older adults are the subject of a range of negative stereotypes and assumptions, such as:³¹

- Older persons are inflexible, resistant to change and have difficulty learning new things;
- Older persons are chronically ill, dependent and no longer make a contribution to society;
- Older persons are a burden on their families and loved ones, as well as on society at large;
- Older persons are depressed, isolated and waiting to die;
- Older persons have declining capacity, are incapable of making responsible decisions and must be protected from themselves.

Stereotypes about declining abilities and capacities of older persons contribute to paternalistic attitudes towards this group.

Negative attitudes towards seniors do exist. We are treated as if we are invisible and our opinions don't matter as we are too old. Some seniors are slower in answering and cannot be rushed or they get upset then can't think. Younger people answer for us without giving us a chance to reply.

United Senior Citizens of Ontario

There is poor understanding of the predominance of ability and independence among older adults in the community. Society fails to give credit to ability or to value the contributions of this segment of our community. We need to make the same effort to eliminate age discrimination, as we have made to promote multiculturalism and to eliminate homophobia.

Ontario Bar Association

B. Impact on the Law

Stereotypes, negative assumptions and paternalistic attitudes have a significant impact on the lives of older adults. They may impact on access to opportunities and services on an individual basis. They may also subtly influence policies, programs and laws, which then reflect, enforce and reinforce these negative attitudes and assumptions.

The Law As It Affects Older Adults

Law reform needs to acknowledge the negative impacts of ageism – stereotypes and assumptions about age that lead to age-based discrimination and denial to older adults. Ageism can give rise to individual acts of discrimination, but can also have a broader impact on policies, programs and legislation that affect large sectors of society. Barriers faced by older persons are often “socially constructed”, that is, they are not a direct result of the aging process but rather the result of society’s response to aging. Examples of the impact of ageism can include the failure to respond to the needs of older persons and the failure to design systems and structures that are inclusive of older persons.

Ontario Human Rights Commission

Submissions to the LCO raised many examples of how ageism may operate through the law. In particular, the LCO’s attention was drawn to Ontario laws with respect to decision-making.³² Concerns were raised about current mechanisms for determining legal capacity, and that flaws in the system result in many older adults being denied control or participation regarding decisions about themselves of a highly personal nature.

The recent legislative reforms in British Columbia³³ and Manitoba,³⁴ and the provisions of the recently adopted United Nations *Convention on the Rights of Persons with Disabilities* (which Canada has not yet ratified) were pointed to as examples of approaches that respect the dignity, autonomy and participation of older persons by respecting the legal capacity of persons with intellectual and cognitive disabilities and providing opportunities for supported decision-making.

Despite legislative developments in other jurisdictions and the UN Convention, long-standing negative stereotypes persist about the intellectual, and therefore legal capacity of people with intellectual disabilities, and similarly about older persons who experience cognitive or intellectual decline of their former capacities. In both cases, these stereotypes, along with assumptions about what intellectual capacities should characterize those who maintain legal capacity, are profoundly discriminating and devaluing. Too often, these stereotypes find their way into the administration of justice and result in individuals with intellectual disabilities, and older persons who have cognitive difficulties, losing their personhood before the law. We believe that the issue of personal decision making for health, personal care and financial/property decisions is of the utmost importance to the work of the LCO in this project.

Canadian Association for Community Living

One aspect of ageism is the failure to take older adults into account, and to fail to see their capacities, their needs, their contributions, or their very existence. Older persons may, in this sense, become “invisible”. It is therefore important to critically consider, not only existing laws, but also gaps in the law, where it has failed to address issues of importance to older adults. The Canadian Association for the Fifty Plus pointed to the lack of support and legal rights for caregivers, lack of attention to affordable and accessible housing for older adults, and lack of recognition of grandparents’ rights as instances of the failure to recognize the

needs, contributions and circumstances of older adults. The British Columbia Law Institute pointed to the inadequacy of legal curbs on financial abuse of older adults.

As well, a neutral law may be administered in an ageist or paternalistic fashion. Negative attitudes or lack of information on the part of program providers or actors in the justice system may result in facially neutral or beneficial laws creating disadvantage or exclusion for older persons. For example, a number of submissions raised concerns regarding inadequate responses to elder abuse and the Advocacy Centre for the Elderly noted that the law respecting substitute decision-making is “repeatedly misapplied, usually in a paternalistic fashion”.

C. Conclusions

A key aspect of this Project is to identify how negative or paternalistic attitudes towards older persons may have shaped the development or implementation of the law. As such, further research will consider circumstances in which:

- there are paternalistic or stereotypical assumptions regarding older persons underlying the law;
- the law fails to adequately take older adults into account, rendering their needs, contributions and circumstances invisible; and
- the law is operated in an ageist or paternalistic fashion.

V. ACCESS TO THE LAW

Regardless of the appropriateness of laws as they are drafted, they will only have a positive effect on the lives of older adults to the degree that they can be effectively implemented. If effective mechanisms to ensure compliance with the law do not exist and older adults are not able to meaningfully access the law, the law will be essentially null.

Many concerns have been raised with respect to the ability of older adults to meaningfully access the law and to ensure that legal standards and protections are complied with.

A. Monitoring the Effective Implementation of the Law

A recurrent theme in the submissions was that of laws that are ineffectively enforced or administered. The Advocacy Centre for the Elderly called this the phenomenon of “Good Law, Bad Practice”.

ONA notes that section 2(4) of the *Nursing Homes Act* provides there is a deemed contract between the resident and the home to respect and promote the rights set out in the Bill of Rights, but there is no mechanism in the Act to enable the residents to enforce the rights in the deemed contract. These rights are too regularly ignored. The LCO should propose an effective mechanism for the enforcement of these rights.

Ontario Nurses Association

We are concerned not only that our current legislative framework is inadequate, but also that the processes and in the implementation of the laws, and both the laws and procedures are misapplied. A prime example is the *Substitute Decisions Act (SDA)*, which is intended to protect the vulnerable. However, it makes the appointment of substitute decision-makers and creation of powers of attorney an unsupervised process, while making the scrutiny of appointments and the abusive acts of these substitute decision makers complex, slow and expensive. As a result, powers of attorney are vulnerable to misuse and abuse, and justice delayed in the curtailing of abuse of these powers is almost certainly justice denied. These breaches of the spirit and intent of the law involve fundamental *Charter* rights.

Ontario Bar Association

In a similar vein, a number of submissions pointed to laws that are well-intentioned, but are so cumbersome or confusingly designed that they are very difficult to implement. Many pointed to the problematic status of Ontario’s laws regarding accessibility for persons with disabilities. Despite the protections of Ontario’s *Human Rights Code*, which mandates the right to equal access to

services and facilities for persons with disabilities (to the point of undue hardship), the specific requirements of the *Ontario Building Code*³⁵ regarding accessibility, and the new *Accessibility for Ontarians with Disabilities Act, 2005*,³⁶ buildings and systems continued to be designed, built and renovated in a way that creates and perpetuates barriers. Service providers are confused by the overlapping requirements of the three statutes, enforcement must for the most part take place through Ontario's overburdened human rights system, and progress towards accessibility is slow.

Particular concerns were raised as to how law can effectively provide resolution in the context of the highly personal issues and complex familial relationships that are often at stake in elder law. The Ontario Bar Association urged the LCO to consider:

Whether the real motivating issues of family conflict, personal financial needs are frequently obscured by the focus on "capacity" in the law and legal processes. The primary focus of these processes should be needs-based, addressing the social relationships of the person, how the people in those relationships are interacting with each other, and the best plan for that person and his or her finances or living arrangements.

B. Barriers to Access

Older adults may face a range of barriers to accessing and enforcing their legal rights, including physical, financial and attitudinal barriers.

Because many older adults are living on low or fixed incomes, the financial costs of accessing the law may be beyond their means:

The principal barrier to access to justice is the lack of availability of legal aid, especially in civil matters. Means tests for legal aid in the various jurisdictions typically exclude all but the very poorest, leaving a large segment of the population with modest incomes without access to affordable legal advice and representation. While this problem is not restricted to the elderly, the elderly are probably affected disproportionately due to their generally lower levels of annual income.

British Columbia Law Institute

It should be noted that many older adults are "house rich but cash poor": Legal Aid Ontario will often require individuals to put a lien against their house in order to receive legal assistance, but as many older adults worry that this could result in the loss of their homes, they hesitate to do so, and therefore may not have the means to afford legal advice or assistance.

Older adults are frequently unaware of their legal rights, the remedies available, and of avenues for support and assistance.

The Law As It Affects Older Adults

Though many laws do already exist, one of the main challenges is often lack of awareness of these and/or the lack of resources to back them up, an example being the availability of Rights Advisors to inform those who have been declared incapable of their rights, as well as the resources available to them. We therefore respectfully request that while considering changes in the law you also consider changes in policies and regulations which would ensure funding availability to support these changes.

Prevention of Senior Abuse Network – Simcoe County

This is particularly an issue for older immigrants who may have little knowledge of the infrastructure available to them, and do not know who to ask or where to go for assistance.

They have no community resources known to them. Sometimes their families do not want them to know where to go. Seniors may be extremely isolated and stuck providing household chores and childcare services for sponsoring families. They are thus deliberately denied information in order to keep them in a particular setting. The legal system, in tandem with voluntary organizations and outreach services or places of worship should develop services to ensure individuals who victimize seniors are castigated by the public, the news media and the courts.

Ontario Network for the Prevention of Elder Abuse

Lack of information and awareness is a significant issue, not only among older adults, but among those who provide services to this group. Many submissions pointed to the importance of better training and sensitization for actors in the justice system, not only on legal issues specific to older adults, but also related to the barriers, stereotypes and challenges faced by older adults. The Advocacy Centre for the Elderly noted that lawyers may fail to consult with the older person who is their client, instead obtaining instructions from friends or family members. As well, lawyers who are not familiar with elder law issues may provide incompetent representation because they do not understand the applicable law. The Ontario Bar Association noted that:

There exist Guidelines for practitioners assisting these individuals, but many of the Guidelines are out of date, the availability is not known to those who need them, and the Guidelines are not followed or provide inaccurate information.

Similar concerns were raised with respect to the police, judges, evaluators under the *Health Care Consent Act*³⁷ and other professionals providing services to older adults.

Even where older adults are able to access the law, in some cases there are no effective remedies to redress the wrong done.

An extra disincentive for older persons in seeking access to justice is the lack of monetary awards for successful cases. ACE generally does not

recommend that older adults commence lawsuits if they are seeking primarily financial compensation because very few types of damages options are available...The LCO may wish to consider different mechanisms, which are not based in litigation, to compensate older persons (e.g., creating regulations which address injuries in long-term care facilities).

Advocacy Centre for the Elderly

Some older adults face additional challenges in gaining access to the law. Older adults living in institutional settings may face unique challenges in accessing rights and remedies, given their isolation and dependence on the institutions where they live.

There are also special issues for the oldest of older adults – for example, those over age 80 – who cannot afford to wait for a remedy. In situations where a claim cannot be continued after death, the opposing party may adopt a strategy of delay in the hopes that they can outwait the victim.

The current legal system is too slow, too expensive and too onerous. Older adults need to use mechanisms that facilitate a fast remedy and closure.

Ontario Network for the Prevention of Elder Abuse

Another reason why older adults do not have access to the justice system is the amount of time it takes to resolve a court case. Many older adults choose not to initiate legal proceedings, even if their case appears to be meritorious, because it may take many years and there is the possibility that they may die before a resolution is reached. The LCO may wish to examine civil procedures and whether existing procedures may be changed to facilitate speedier resolution of matters.

Advocacy Centre for the Elderly

Lack of physical accessibility and attitudinal barriers may create additional barriers for older persons with disabilities in the justice system:

Their access to fairness in the justice system is systematically undermined by lack of protocols and accommodations at all stages of the administration of the criminal justice system; from the complaints and investigation process, to decisions to prosecute or not, to the standards and assumptions and stereotypes that often determine people with intellectual disabilities will not be able to give credible testimony.

Canadian Association for Community Living

The Fédération des aînés et des retraités francophones de l'Ontario highlighted the barriers to justice for older Franco-Ontarians:

Unacknowledged as a barrier is the lack of access to French-language services, which keeps French-speaking older adults from fully accessing the court system. Even though Ontario law states that this group of Ontarians, those who speak French, are entitled to legal services in their

mother tongue. Nowhere is it mentioned in your consultation paper that one of the barriers to the law for French-speakers... is the poor availability of services in French of a similar quality to those offered in English..³⁸

Older immigrants experience similar language-based challenges. The Ontario Network for the Prevention of Elder Abuse recommended that translation services should be readily available, as should papers in various languages. Literacy levels in public documents should be properly simplified so people can understand the legal system and where help is available.

C. Designing a More Accessible System

There are many suggestions for improving supports to older adults to ensure easier access to legal system, including expanded legal aid supports for older adults; better education, training and supports on issues related to older adults for actors in the justice system; improved accessibility and accommodation for disability-related needs; and education and outreach to all of the diverse communities that make up the older adult population.

For example, the Canadian Association for Community Living recommended a number of measures to improve access for older persons with disabilities, including the creation of legal mandates for the development of protocols, training for police and crown attorneys, and provision of supports to assist older persons in the justice system. As well, they recommended that government invest in expanding the capacity of community organizations to assist older persons in fair access.

In addition, many submissions recommended that the LCO consider, not just how older adults could be better supported to access current systems, but how alternative compliance and enforcement systems could be designed to ensure both easier access and better outcomes for older adults in relation to the law.

Consultees pointed to many problems with the current systems with which older adults must contend. For example, one consultee pointed to myriad concerns with British Columbia's "direct access" human rights system. This system provides individuals who believe their rights have been violated with access to a specialized administrative tribunal which is tasked with providing speedy and just decisions on human rights claims. While such systems are intended to improve access to the law for vulnerable groups, complex and sometimes rigid requirements and procedures, when paired with inadequate supports, can result in barriers and exclusion for older adults and other vulnerable groups.

Submissions recommended a wide range of potential approaches, including greater use of administrative law systems, alternative dispute resolution, proactive compliance mechanisms (such as audits), expanded and strengthened

provision for rights advice, and the creation of special advocates, such as ombudsmen.

For example, the Prevention of Senior Abuse Network – Simcoe County suggested a proactive, audit-based system for increasing transparency regarding the use of Powers of Attorney and reducing abuses. This system would require registration of Powers of Attorney that become activated due to a declaration of incapacity, and create an audit system to ensure adherence to the legal responsibilities associated with the Power of Attorney.

The Ontario Bar Association noted that mediation and arbitration are increasingly popular and an effective means of resolving disputes, and can provide speedier and more economical access to justice in many situations. As an example, the University of Windsor Law School's mediation service provides specialized services for older adults who have been the victims of financial abuse.

A number of organizations recommended that the LCO examine the desirability and feasibility of some type of independent advocacy office for older adults. This might be specific to particular systems or issues, or might be a general advocacy office devoted to the needs of older adults.

In many incidents seniors are intimidated by agencies and authorities and so therefore do not access resources or supports available to them. Legislating the availability of Senior Advocates would alleviate some of the anxiety and help them navigate through often complex and intimidating systems.

Prevention of Senior Abuse Network – Simcoe County

In order to secure and assert the rights of older adults, the system should establish a regulatory regime outside the civil service that will have its own director and devoted entirely to problems of elderly people. .. This regulator will ensure that the checks and balances are adequate and are effectively enforced in a manner that is timely and that the assets of older adults are protected. Often the legal system is reluctant to embark on cases in which the rights of older adults have been violated.

Ontario Network for the Prevention of Elder Abuse

OBA would urge the Law Commission of Ontario to consider ... Effective advocacy models for seniors that will balance the need for efficacy, accessibility, and reduced family polarization with protection of review rights and due process.

Ontario Bar Association

It was also suggested that the jurisdiction to investigate of the Ontario Ombudsman's Office be expanded to include municipalities, hospitals and long-term care facilities.³⁹

The Canadian Association for Community Living pointed to the importance of ensuring transparency and accountability for institutions that are making decisions of the utmost importance to vulnerable older Ontarians. The Consent and Capacity Board and the Office of the Public Guardian and Trustee, for example, make decisions related to legal capacity, or decisions respecting personal care, health care or finances where a person has been deemed to lack legal capacity. The Canadian Association for Community Living recommends that the structural imbalance of power in these institutions be redressed by the creation of a separate, independent advocacy function to intervene on the person's behalf where necessary in such situations.

D. Conclusions

As this Project progresses, the LCO will consider the following questions:

- To what degree do older adults currently have access to the law? Among older adults, who accesses the law and how?
- What barriers prevent older adults from effectively accessing the law?
- Are there systems or programs currently operating that model effective approaches to access to the law for older adults?

The LCO will consider cross-jurisdictional research, and the needs and experiences of diverse groups of older adults.

VI. OLDER ADULTS AND THEIR RELATIONSHIPS

It is a truism to note that our relationships are central to our wellbeing and that of our society: through our relationships of care and commitment we provide and receive financial, emotional and social support; pass on wisdom, skills and experience; and share values and goals. The law has a role to play in recognizing, regulating and supporting relationships. Family law, for example, provides mechanisms for formally recognizing the formation and dissolution of certain types of relationships, and regulates obligations to provide care and support. Employment standards laws require employers to provide leaves of absence to enable employees to address certain types of caregiving obligations. Health care consent laws specify who may give consent to treatment on behalf of a person who is incapable of making health care decisions.

Like all of us, older adults generally live in a web of interdependent relationships with spouses or partners, children, siblings, extended family, chosen family or friends. In some situations, the older adult may be primarily a provider of care; in other situations, they may be primarily a recipient of care; and in most cases, they will both give and receive care and support. Regardless, these relationships have a significant impact on the wellbeing of older adults.

A. Recognizing Relationships of Importance to Older Adults

A number of concerns have been raised regarding the way in which the law has recognized, regulated and supported the relationships of older adults.

As a starting point, the law does not always adequately recognize and respect the importance of relationships in the lives of older adults. The Advocacy Centre for the Elderly points out that there is currently no comprehensive legislation dealing with the issue of access to older adults, and that they regularly receive calls from individuals who are being denied access to a parent, spouse or friend because a caregiver or other individual is prohibiting access:

The capacity to decide what visitors or what contact an older person may wish to have is a capacity that may remain intact long after other types of capacity have been lost. A senior may continue to enjoy contact with relatives and acquaintances long after the senior has stopped being able to manage property, to make treatment decisions or to retain recent memory. The comfort derived from human contact is a very basic comfort which can have a large impact on an individual's quality of life. However, persons who are competent to decide who they want to visit may have trouble exercising this right. They may have mental or physical limitations, such as the inability to use a telephone or the inability to ambulate.

In the same vein, First Available Bed policies may result in the separation of the older adult from his or her spouse, family or friends.⁴⁰

Where the law has recognized the relationships of older adults, it has not always done so equally. For example, it was pointed out that ageist assumptions regarding older persons mean that they are typically regarded as recipients of care: situations where older adults are providers of care are typically under-recognized and under-supported. A number of consultees pointed to, for example, the frequent failure to recognize the important role that grandparents play in the lives of their grandchildren, sometimes as primary caregivers.⁴¹ Many submissions raised the difficulties faced by aging parents of persons whose disabilities necessitate significant care and support and pointed to the lack of recognition and support for these caregivers:

There are far too many examples of 70, 80 and 90 year olds in Canada being the primary and sole caregivers for their elderly sons and daughters or spouses with a disability. At the same time, there are far too many older adults with intellectual disabilities who, only because of lack of income and disability supports and community capacity to assist, have not made what society values as an essential transition to adulthood – moving from one's parental home to establish one's own home in the community.

Canadian Association for Community Living

As well, ageist assumptions that, for example, older persons are not sexual or are unable to make responsible decisions about their relationships may mean that older persons are prevented from pursuing or maintaining meaningful relationships, particularly in institutional settings.

Heterosexist or culturally based assumptions about the nature of the family may mean that significant relationships of care and support may not be recognized. The LCO heard that many older LGBT adults do not tell their birth families about their chosen family. Therefore, chosen family members may not be recognized when older LGBT become ill or lose capacity, and are often excluded. Chosen family members may not be permitted to visit patients in intensive care, to make health care decisions and or to receive information about any changes in the patient's condition. This can result in significant isolation for LGBT older adults who are ill.

B. Exceptional Demands Placed on Relationships of Care and Commitment

CACL believes that the law must begin to articulate the expectations of family caring relationships and the rights and responsibilities of family members to such relationships.

Canadian Association for Community Living

Many consultees expressed the view that the law inadequately supports those who provide care to family and friends.

Report on the Preliminary Consultation: Moving the Project Forward

We believe all governments in Canada have a responsibility to address this untenable reality. The first step ... is to distinguish family caring relationships from caregiving relationships that go beyond societal expectations of what family members generally owe each one another. We believe that the point at which family caring relationships cross this threshold – to be characterized primarily as caregiving relationships – that a right to support, for both family caregivers and receivers, is born.

Canadian Association for Community Living

This affects older adults both as providers and as recipients of care. The Ontario Human Rights Commission expressed concern regarding the impact of the lack of supports for eldercare on both older adults and those providing care for them:

As the Commission reported in *A Time for Action: Advancing Human Rights for Older Ontarians*, the lack of social supports for family members providing eldercare remains a significant and pressing issue. The Commission heard Of the growing and urgent need related to eldercare, which is largely provided in the community by family members. The lack of support for eldercare by government, employers and service providers has a significant impact on the quality of life of older Ontarians, as well as on those who are providing eldercare.⁴²

The Advocacy Centre for the Elderly argued that this is not actually an issue regarding relationships at all, but rather a matter of the failure of governments to put in place appropriate supports for home care and other scarce resources:

Eldercare is largely provided in the community by family members. Not only does it facilitate “aging in place” but it saves public resources. Regrettably, the services in place to support family caregivers are extremely limited, resulting in an “all or nothing” system where families feel they have no choice but to put their loved one into a long-term care facility.

The Canadian Association for Community Living notes that when relationships of caring and commitment are overextended by caregiving responsibilities, relationships can become compromised in ways that put at risk the carereceiver, the caregiver or careprovider and their family unit. The recipient of care is placed in a position of vulnerability and dependency, while the careprovider may experience significant and long-term financial, emotional and social disadvantage. The result may be family breakdown, inappropriate institutionalization of the older adult, or even violence and abuse.

In this regard, the Canadian Association for Community Living argued that law reform should recognize a set of principles for family caring relationships based on health and well-being, respectful interdependence, full and equal citizenship, self-determination, security and mutual recognition. This requires steps to ensure a right to supports as necessity for independence and inclusion in the community, reform of eligibility criteria and job protection to increase the

economic security of caregivers, and establishment of an “Office for Vulnerable Adults” to intervene where an older person is at risk in any environment.

C. Law and the Regulation of Relationships

The relationships of older adults are often complex, and may operate in a grey zone. It may be difficult to distinguish care from control, or cultural, social or gender norms from exploitive behaviours. For example, the LCO heard from members of the African Canadian community that while churches may be a vital and cherished source of emotional, social and other supports for older adults, at the same time, the dependency of older adults on these institutions may leave these individuals vulnerable to financial exploitation or other forms of manipulation.

Given the complexity of family dynamics, legal solutions may be inappropriate or ineffective. For example, the *Family Law Act* provides a venue for parents in need to compel their children to provide them with financial support.⁴³ This provision has been very rarely used; while it may make theoretical sense, given the realities of most parent-child relationships, in which parents are very reluctant to take legal action against their children, it is an impractical solution to the problems arising where adult children neglect their parents.

The British Columbia Law Institute points out that most of the legal issues surrounding the relationships of older persons arise in intensely personal and private contexts, such as physical, financial or emotional abuse, caregiving, or powers of attorney and personal planning. Therefore, difficulties lie in the way of monitoring and enforcement and this casts doubt on the efficacy of the legislative solutions that currently exist. The Ontario Bar Association expressed concerns regarding the operation of the law in the context of family conflict, noting, for example, that legislative drafters did not contemplate the manner in which substituted decision making laws might foster conflict, and the obstacles to access to the remedies:

When the *Substitute Decisions Act* and the *Health Care Consent Act, 1996* were passed into law, they did not anticipate the degree to which these laws would be applied in the context of “high conflict” families. A significant number of court applications now involve substitute decision making for incapable adults and pit family members against each other. The legislation was never intended to address conflicts of this degree and type and the current processes do not lend themselves to timely or appropriate resolutions.

Ontario Bar Association

D. Conclusions

The LCO will consider, in its further research and analysis, how the law can appropriately recognize and support the range of interdependent relationships that are essential to the wellbeing of older adults. There are complex issues with respect to the recognition, support and regulation of the relationships of older persons, including those related to the recognition and respect for the sexuality of older persons, the role of older adults as both providers and recipients of care, and the role of the law in managing and regulating complex family dynamics.

VII. LIVING ENVIRONMENTS

Contrary to stereotypes, most older adults continue to live in private dwellings. Only seven per cent of Canadians aged 65 or older live in institutional settings. The likelihood of living in such a setting increases with age: 32 per cent of Canadians over the age of 85 live in an institutional setting, and due to the longer life expectancy of women, these residents are disproportionately older women.⁴⁴

A. Aging in Place

It is a widely accepted principle that older adults should be empowered to “age in place”, and to receive needed services and supports in the communities where they live. In practice, older adults face many barriers that may lead to institutionalization, such as lack of accessible housing and services, and inadequate social supports. For example, regulations governing the allowable amount of care that Community Care Access Centres can approve have the effect of significantly limiting the availability of home care. Further, due to scarce resources, Community Care Access Centres may not be able to provide even mandated services.

We encourage the LCO to review the requirements for services to be provided by the Community Care Access Centres as mandated by the *Long Term Care Act*, the lack of regulations in respect to the criteria for access and eligibility to the various services, the funding agreements between the Local Health Integration Networks and Community Care Access Centres, whether these support the obligations of the Community Care Access Centre to provide the mandatory services as listed in the *Long Term Care Act* and to find out whether individuals are obtaining the full benefit of the law.

Advocacy Centre for the Elderly

B. Standard Setting: Promoting Security for Institutional Residents

Institutional living settings for older adults include care homes (commonly referred to as “retirement homes”) and long-term care facilities. Long term care facilities are the subject of special regulatory regimes, such as the *Nursing Homes Act*,⁴⁵ *Homes for the Aged and Rest Homes Act*⁴⁶ and the *Charitable Institutions Act*.⁴⁷ These statutes set out requirements for licensing, admissions, care plans, charges and fees, and inspections. Legislation has been passed that will, upon proclamation, repeal these statutes and replace them with a new *Long Term Care Homes Act, 2007*.⁴⁸ Living accommodation that falls within the scope of these Acts is exempted from the protections of the *Residential Tenancies Act, 2006*.⁴⁹

“Retirement homes” are not the subject of comparable specific, comprehensive legislation. They fall within the ambit of the general provisions of the *Residential Tenancies Act*. That Act also sets out some special provisions for “care homes”, including specific standards for tenancy agreements and termination of leases or “transfer out” of tenants in these facilities. Advocates have raised concerns regarding the lack of comprehensive regulation of the care home industry, and have identified significant issues related to improper evictions, use of restraints, failure to accommodate the disability-related needs of residents, and inadequate procedures for addressing complaints. In 2007, the Ontario Seniors Secretariat conducted public consultations on regulation of retirement homes. Based on the results of these consultations, the government committed to introduce consumer protection legislation that would set standards of care and service for retirement homes.⁵⁰ Legislation has not yet been introduced.

This lack of regulation is the cause of widespread concern, particularly as there is a perception that the private care system is rapidly expanding. Retirement homes may be operating as *de facto* long-term care homes, without the legislative requirements and protections available in those homes. For example, some retirement homes have created “locked-in units” to control the behaviours of the residents, raising concerns that very serious abuses of basic rights may be occurring without any protections or oversight.

Concerns have also been raised regarding substandard homes and the adequacy and transparency of the available mechanisms for monitoring and addressing substandard conditions.⁵¹ Given the vulnerability of those living in institutional settings, standards, protections and enforcement mechanisms are extremely important. Consultees pointed to numerous instances of insufficient standards, protections and enforcement mechanisms in long-term care homes. These include standards for staffing and resident care (such as concerns regarding the use of incontinence products) and protections against elder abuse in such settings.

C. Promoting Dignity, Independence, Participation and Diversity

Institutional living raises many complex challenges, and promoting the principles of dignity, independence, participation and respect for diversity in such settings requires special consideration. As an example, difficult issues arise with respect to the expression of sexuality in long-term care settings. Sexual expression is a normal part of a healthy life and most persons living in non-institutional settings are in a position to make their own choices with respect to their sexuality. However, in a group environment where many of the residents may have cognitive disabilities or may otherwise be vulnerable to abuse or exploitation, and where the institutional staff have a duty of care to prevent sexual abuse and sexual exploitation, it is challenging to both support normal sexuality and to

ensure that residents are protected from unwanted activities. Additional barriers may be experienced by LGBT older adults, who often still face stigma from care home staff or other residents, or attempts by members of their biological families to regulate their sexuality.

As well, conflicts arise between the rights of older adults in what is, after all, their home, and the rights of the workers providing their care. For example, people who are not living in an institutional setting generally have the choice as to whether to smoke; in an institutional setting this must be balanced against the rights of workers not to be exposed to second hand smoke.

A major issue in long-term care is “First Available Bed” policies.⁵² These are hospital policies that require patients to accept the “first available bed” in a long-term care facility. These not only significantly limit the choices available to older adults about the fundamental question of where they will live, but by placing older adults in settings far from family, friends and other supports systems, they also severely impact on the security, participation and independence of those affected. Older adults may find themselves in placements that are substandard, or that do not meet their needs. The Advocacy Centre for the Elderly takes the position that these policies are not consistent with the law, which places the emphasis on the person’s own choice or what is in their best interest.

The use of secure units and restraints raises profound questions related to basic rights. The Advocacy Centre for the Elderly points out that there is no legal authority for homes to restrain or detain residents, except under very narrow circumstances. In some cases, there are legitimate safety reasons for the detention of older adults who are, for example, mentally incapacitated and pose a risk to themselves. In other cases, detention is problematic. For example, some homes have policies preventing all residents from leaving without an escort. As there is no process for challenging detentions other than an application to the court, these can be difficult issues to resolve.

The LCO heard from a number of organizations about the importance of having residential options for older adults that recognize and support their diversity. For older adults, a lack of culturally appropriate services may leave them feeling lonely and isolated. Concerns were raised, for example, about a general lack of LGBT sensitivity training in the retirement home community. Services to diverse communities may be provided either through supports and sensitivity training at general purpose retirement or long-term care homes, or the creation of specialized settings to meet the needs of specific communities, such as the LGBT or African Canadian community. The Ontario Seniors Secretariat has very recently developed a toolkit for residential settings for seniors, *Diversity in Action*, providing guidance for retirement and long-term care homes on providing culturally appropriate and respectful services to older adults from diverse backgrounds.⁵³

D. Conclusions

The principle of “aging in place” is fundamental to any consideration of the living environments of older persons. As well, although only a minority of older adults lives in institutional settings, because these environments raise unique and complex issues, they must be given careful consideration in the development of any framework. Questions to be considered include:

- What supports, systems and laws are necessary to realize the principle of “aging in place”
- How can autonomy and participation in the larger community be facilitated in institutional settings?
- What systems and standards can best ensure the physical and emotional security of older adults living in institutional settings?
- How can one reconcile the rights of institutional residents in what is, after all, their home, with the rights of the workers who provide their care?
- How can appropriate services best be provided to older adults from diverse backgrounds?
- How can one design effective mechanisms for enforcing the rights of older adults where those residents are dependent for their care on the very persons or institutions that may have violated their rights?

VIII. NEXT STEPS

This Consultation Report marks the closing of the preliminary stage of this Project. The LCO will proceed with this Project on the basis of the principles and themes identified in this Report.

The LCO has now commenced the Research phase of this Project. The LCO released a Call for Research Papers in December 2008, and will be funding selected research projects related to these themes and principles. As well, the LCO will continue its internal research. Research papers will be made available on the LCO website as they are completed.

Based on this research, the LCO will release an Interim Report in the fall of 2009, setting out proposed directions and key issues, and soliciting feedback from stakeholders and the public. Drafting of the Interim Report will commence in the summer of 2009. This will be the basis for public consultations, prior to the release of a Final Report during the second half of 2010.

The LCO welcomes questions and comments with respect to this Project. Enquiries should be directed to:

**Lauren Bates
Staff Lawyer**

Law Commission of Ontario/Commission du droit de l'Ontario

**Physical Resources Building, Suite 1093
4700 Keele St., Toronto, ON M3J 1P3**

T: (416) 650-8406

F: (416) 736-5736

E-mail: LawCommission@lco-cdo.org

IX. LIST OF ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT

1. 519 Community Centre, Seniors' Program
2. Access Committee of Cobourg
3. Advocacy Centre for the Elderly (ACE)
4. African Canadian Legal Clinic (ACLC)
5. Association of Management, Administrative & Professional Crown Employees Ontario (AMAPCEO)
6. Canada's Association for the Fifty-Plus (CARP)
7. Canadian Association for Community Living (CACL)
8. Canadian Coalition for Seniors' Mental Health
9. Canadian Centre for Elder Law (CCEL)
10. Canadian Pensioners Concerned (CPC)
11. DAWN Canada
12. Fédération des aînés et des retraités francophones de l'Ontario (FAFO)
13. Professor Charmaine Spencer, Gerontology Research Centre, Simon Fraser University
14. L'union culturelle des Franco-Ontariennes
15. Metro Toronto Chinese and South Asian Legal Clinic (MTSALC)
16. Office of the Worker Advisor (Ministry of Labour)
17. Ontario Bar Association (OBA)
18. Ontario Human Rights Commission (OHRC)
19. Ontario Legal Clinics' Workers' Compensation Network
20. Ontario Network for the Prevention of Elder Abuse (ONPEA)
21. Ontario Nurses Association (ONA)
22. Ontario Seniors Secretariat
23. Parkdale Community Legal Clinic
24. Prevention of Senior Abuse Network (Simcoe County)
25. Retired Teachers of Ontario
26. United Senior Citizens of Ontario (USCO)

ENDNOTES

¹ R.S.O. 1990, c. H.19. The *Code* provides for equal treatment without discrimination on the basis of age. The Preamble to the *Code* promotes as public policy goals the recognition the dignity and worth of every person, the provision of equal rights and opportunities without discrimination, the creation of a climate of understanding and mutual respect, and ensuring that each person feels a part of the community and able to contribute fully to the development and well-being of the community.

² United Nations, *Principles for Older Persons*, G.A. Resolution 46/91. These principles were adopted in 1991, pursuant to the *International Plan of Action on Ageing*. The *Principles* recognize the contributions that older persons make to their societies, appreciate the diversity of older persons, and acknowledge the many stereotypes about aging and older persons. The Principles encourage governments, whenever possible, to incorporate into their national programs for older persons the five principles of independence, participation, care, self-fulfilment and dignity.

³ World Health Organization, *Active Ageing: A Policy Framework*, 2002. This framework emphasizes interdependence, intergenerational solidarity, participation, ability to realize potential, and adequate care and assistance.

⁴ United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106.

⁵ The *National Framework on Aging* (NFA) was developed by the Federal/Provincial/Territorial Ministers Responsible for Seniors, in conjunction with the community. The NFA recognizes three interdependent goals of promoting the well-being of older persons, recognizing their valuable contributions and eliminating ageism. The NFA adopts the five principles of dignity, independence, participation, fairness and security.

⁶ Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons Because of Age* (Toronto: 2007), available online at www.ohrc.on.ca/en/resources/Policies/agepolicyen.

⁷ Since the Ontario *Human Rights Code* was amended in 2006 to remove protections for most mandatory retirement provisions, mandatory retirement is permissible only where it can be shown to be a *bona fide* occupational requirement (BFOR). Some police and firefighter services have taken the position that mandatory retirement at fixed ages is a BFOR due to the safety sensitive nature of this work. The Ontario Human Rights Commission has taken the position that a BFOR for a mandatory retirement policy will be shown only where individualized assessment is impossible (in the sense that there is no appropriate method for carrying it out) or would cause undue hardship. See, Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons on the Basis of Age*, cited above at note 1, at section 4.5.

⁸ For example, the Canadian Policy Research Networks has adopted intergenerational equity as a lens for examining issues related to an aging society. See Nuala Kenny, *What's Fair? Ethical Decision-Making in an Aging Society*, (Canadian Policy Research Networks; Ottawa, 2004), available online at www.cprn.org/documents/29378.pdf.

⁹ See, for example, the United Nations' *World Youth Report, 2003, Young People in a Globalizing World*, available online at www.un.org/esa/socdev/unyin/wyr03.htm. See also the *Quebec Declaration of Intergenerational Solidarity* (Intergovernmental Agency for Francophone Communities: Quebec City, 1999), available online at www.aifa.ca.

¹⁰ Martin Turcotte and Grant Schellenberg, *Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2006) at 48.

¹¹ Turcotte and Schellenberg, cited above, at pp. 47-48.

¹² Submission from the Canadian Association for Community Living (July 2008), at p. 2

¹³ See the Law Commission of Canada's 2004 Discussion Paper, *Does Age Matter? Law and Relations Between Generations* (Law Commission of Canada: Ottawa, 2004). This project was not completed due to the de-funding of the Law Commission of Canada in 2006.

¹⁴ The Guaranteed Annual Income System provides a guaranteed minimum income to Ontario seniors, in conjunction with the federal Old Age Security pension and Guaranteed Income

Supplement, through monthly payments of up to \$83.00. See *Ontario Guaranteed Annual Income Act*, R.S.O. 1990, c.O.17, and for further information, see <http://www.rev.gov.on.ca/english/credit/gains/index.html>.

¹⁵ See *Ontario Agricultural Museum Act*, R.R.O. 1990, Reg. 866, s. 2; s. 2(4); *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, O. Reg. 664/98, s. 2.

¹⁶ Until 2006, the Ontario *Human Rights Code* did not prohibit age-related discrimination in the area of employment against persons aged 65 and older. Bill 211, the *Ending Mandatory Retirement Statute Amendment Act, 2005*, which came into effect December 12, 2006, amended the definition of “age” in the *Human Rights Code* and as a result, mandatory retirement now violates the *Code*, except where a *bona fide* occupational requirement can be shown, or for judges, masters or justices of the peace, who are the subject of a specific statutory exemption.

¹⁷ Section 25(2) of the Ontario *Human Rights Code* protects from challenges pension and benefit plans that comply with the *Employment Standards Act, 2000* and its accompanying regulations. O. Reg. 286/01, which regulates employment-related health, insurance and dental plans, regulates such plans only insofar as they apply to persons between the ages of 18 and 65, thereby permitting differential treatment of persons over age 65. The Ontario Human Rights Commission has expressed concerns regarding these provisions, and recommended legislative change.

¹⁸ *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 44(1); O. Reg. 286/01, ss. 4, 7, 8.

¹⁹ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

²⁰ *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, ss. 41, 43.

²¹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 47.

²² *Highway Traffic Act*, R.S.O. 1990, c. H.8, O. Reg. 340/94, s. 16(a).

²³ See, for example, the discussion in the Ontario Human Rights Commission’s *A Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001), at pages 35-36, available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL

²⁴ Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons Because of Age* (Toronto: 2007) at page 3, available online at <http://www.ohrc.on.ca/en/resources/Policies/agepolicyen>.

²⁵ Christie Ford, “Bright Lines: Status, Recognition and the Elusive Nature of Ageing”, (1996) 2 *Appeal* 4-7.

²⁶ Special Senate Committee on Aging, *First Interim Report: Embracing the Challenge of Aging* (Ottawa: Senate of Canada, March 2007), at 8 and following; Marie Beaulieu and Charmaine Spencer, *Older Adults’ Personal Relationships and the Law in Canada: Legal, Psycho-Social and Ethical Aspects* (Ottawa: Law Commission of Canada, 1999), at 21.

²⁷ See, for example, Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons because of Age*, Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (Toronto: 2007), section 4.5.

²⁸ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

²⁹ Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 15.

³⁰ Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 14.

³¹ For an interesting discussion of common ageist stereotypes relating to older persons, see the 1994 Curriculum Module on Ageism prepared by Professor Barry Robinson of the University of California at Berkeley, available online at <http://ist-socrates.berkeley.edu/~aging/ModuleAgeism.html>.

³² The main statutes at issue are the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, and the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Schedule A.

³³ *Representation Agreement Act*, RSBC 1996, c.405.

³⁴ *Vulnerable Persons Living With a Disability Act*, C.C.S.M. c.V90.

³⁵ *Ontario Building Code Act, 1992*, S.O. 1992, c. 23.

³⁶ S.O. 2005, c. 11.

³⁷ *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Schedule A.

³⁸ Original submission provided in French, as follows:

“Un obstacle qui n’est pas mentionné, c’est le manque d’accès à des services en français qui freine le recours aux tribunaux par les aînés francophones. Or la Loi de l’Ontario stipule que

cette catégorie de citoyens, les parlant français, ont le droit à des services juridiques dans leur langue. Nulle part il n'est fait mention dans votre document de consultation que l'un des obstacles à l'accès au système judiciaire pour la population de langue française ... est la faible disponibilité des services en français de qualité équivalente à ceux dispensés en anglais.”

³⁹ The Ombudsman of Ontario has launched a “Push for MUSH”, advocating for an expansion of its investigative powers to the Municipalities/Schools/Universities/Hospitals sector, which would thereby bring its powers more in line with those of Ombudsmen in other parts of Canada:

<http://www.ombudsman.on.ca/en/hot-topics/push-for-mush.aspx>.

⁴⁰ Hospitals frequently have adopted “First Available Bed” policies as a means of addressing shortages of beds and resources. Such policies may require patients who are awaiting placement in a long-term care home to accept the first bed available within their designated area, or may require patients to choose a placement from a short-list of homes that have short or no waiting lists. “First Available Bed” policies were raised frequently in submissions to the LCO as a serious concern for older adults.

⁴¹ For example, grandparents may have difficulty in maintaining access to their grandchildren following a marital breakdown, or if conflict arises between parents and grandparents. Other issues may arise when grandparents become either temporary or full-time caregivers for their grandchildren. In both situations, concerns have been raised regarding the lack of legal protections and supports. For an introduction to some of the issues, see Pamela Cross, *Grandmothers and the Law* (Ontario Women’s Justice Network: May 2005) and the report of the Nova Scotia Law Reform Commission on grandparent-grandchild access: *Final Report: Grandparent – Grandchild Access* (Nova Scotia Law Reform Commission: Halifax, May 2007), available online at www.lawreformns.ca/Downloads/GrandparentFinal.pdf.

⁴² Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (Toronto: 2006) at 12. Available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/famconsult. This concern was re-emphasized in the OHRC’s submission to this consultation.

⁴³ *Family Law Act*, R.S.O., 1990, c. F.3, s. 32. For a somewhat dated examination of these provisions see Wendy Bernt, “Lines of Dependence: The Rebirth of Parental Support Legislation in Canada”, (1996) 2 *Appeal* 52-57.

⁴⁴ Martin Turcotte and Grant Schellenberg, *Portrait of Seniors in Canada* cited above at note 10 at page 138.

⁴⁵ R.S.O. 1990, c. N.7.

⁴⁶ R.S.O. 1990, c. H.13.

⁴⁷ R.S.O. 1990, c. C.9.

⁴⁸ S.O. 2007, c. 8, s. 194.

⁴⁹ S.O. 2006, c. 17, s. 5.

⁵⁰ Ontario Seniors’ Secretariat, News Release, September 7, 2007.

⁵¹ In July 2008, the Ombudsman of Ontario has announced an investigation into the monitoring of standards at long-term care homes in Ontario and the effectiveness of the current system in ensuring that care homes meet government standards: <http://www.ombudsman.on.ca/en/media/press-releases/ombudsman-to-investigate-monitoring-of-long-term-care-facilities.aspx>

⁵² See note 40 above.

⁵³ Ontario Seniors Secretariat, *Diversity in Action: A Toolkit for Residential Settings for Seniors* (Government of Ontario: 2008), available online at www.culture.gov.on.ca/seniors/docs/DiversityInAction_ENG_Web.pdf.