



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

The Law As It Affects Older Adults

Consultation Paper: Shaping the Project

MAY 2008

Disponible en français
ISBN: 978-0-9809738-2-2

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I. INTRODUCTION

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. Its purpose 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.

Pursuant to this mandate, the LCO has initiated a project on the law as it affects older adults.¹ This is a multi-year project that is intended to develop a new approach to this area of the law, essentially providing a framework for analyzing and understanding the impact of the law on older persons. Given the breadth of this project, the LCO is first conducting a preliminary consultation to assist in determining its scope and content. This Paper is intended to provide a focus for discussion and to solicit input for this preliminary consultation.

There are many areas of the law that on their face have particular impacts on older adults, including estate, pension and benefit, and health laws. There are also areas of the law that, while neutral on their face, may be fairer or more effective if they take age into account. As well, there are many specific legal issues affecting older adults that would benefit from research and review. The LCO is of the view that the development of a comprehensive analytical framework for the law as it affects older adults will help to ensure that the needs, circumstances and experiences of older adults are appropriately addressed.

This Paper provides a brief overview of themes and issues that may form part of the scope of the LCO's project on the law affecting older adults. The themes and issues are multi-dimensional and interconnected, and each can only be briefly touched upon within this Paper. This overview is not intended to be exhaustive or exclusive: the LCO welcomes, and indeed expects, that stakeholders will identify further issues, themes and approaches. Nor is it the intent of this document to explore all of the dimensions of any of the issues identified, or to develop positions and recommendations, but rather to highlight some issues that could be considered in more depth in the LCO's project.

This Paper has been distributed to stakeholders for comment, as well as posted on the LCO website. Based on the LCO's independent research, including the responses to this Paper, the LCO will adopt a set of guiding principles, and will identify themes and specific issues that will be addressed by this Project.

II. BACKGROUND²

As has been widely noted, Canada's population, along with that of many other nations, is aging significantly. The number of Canadians over the age of 65 is expected to increase from 4.2 million in 2005 to 9.8 million in 2036, and their share of the population will almost double, from 13.2 per cent to 24.5 per cent. This massive demographic shift will naturally tend to bring issues affecting older adults to the forefront.

Although the terms are often taken for granted, there is no consensus definition of who may be considered "old" or "senior", particularly given the diversity of individual life paths and expanding life expectancy. Some have adopted a relative, contextual approach to a definition, which addresses the important role of attitudes, social expectations and specific context in the experience of aging.³ Another common approach, often adopted for its simplicity and practicality, is to select a specific age as a marker. The most commonly used age is 65, since this age is frequently used as a criterion for accessing various social programs.

Whatever definition one ultimately adopts, it is essential to recognize that there is great diversity among older adults. The experience of aging will differ significantly depending on one's health, gender, income and education level, ethnicity or place of origin, place of residence and multiple other factors.

To begin with, the category of "older adult" is itself very broad. The perspectives, experiences and needs of a 63 year-old will likely differ significantly from those of a 90 year-old. Recognizing this, older persons are often divided into three broad categories reflecting an intersection of age and health: the "young old", who are often healthy and reasonably affluent; the "middle old", who may be beginning to develop health problems and have less money and resources; and the "frail old", who are very elderly and have unique needs.⁴

Life expectancy differs between the sexes: although these differences are beginning to narrow, it remains the case today that most older adults are female, and that the predominance of women increases as age increases. Although a cohort of older women may as individuals be characterized as "well-off" economically, the general picture is that low-income is more prevalent among older women than among older men, due to longer life expectancy, lower participation in the paid labour force, and lower wages in paid employment when of working age (increasing the likelihood that a given individual will have no pension or an inadequate pension or inadequate income from other forms of savings). This is particularly true for unattached⁵ older women.

A significant portion of the population over age 65 is made up of immigrants. In 2001, 28.6 per cent of the population aged 65-75 was born outside of Canada, compared to 21.3 per cent of the population aged 25-54. A substantial majority of these immigrant seniors arrived in Canada when they were young, and almost

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one-third of them live in Toronto. When looking at the small group of older adults who immigrated to Canada relatively recently, they are much less likely to speak either English or French, are predominantly “members of visible minorities” (as defined by the federal *Employment Equity Act*), tend to be in poorer health, and are more likely to require assistance with the activities of daily living. The share of the older adult population made up of “members of visible minorities” is relatively small (7.2 per cent in 2001), but growing. These numbers point to the importance of taking into account language and culture, as well as the unique experiences of newcomers and racialized Canadians, in considering the experience of aging.

Because Canada’s Aboriginal population is relatively young, older Aboriginal persons make up only one per cent of Canada’s population. Members of this group are more likely than younger Aboriginal persons to live on a reserve, although the majority of older Aboriginal persons live in urban centres. Older Aboriginal persons have significantly lower life expectancies than non-Aboriginal persons, as well as lower income levels, and they report poorer levels of health.

Over the last 30 years, the proportion of older adults who are low income has declined markedly, due largely to the maturation of the Canada/Quebec Pension Plan. Canada now has one of the lowest rates of low income for older persons among industrialized countries, with 6.8 per cent of older adults falling below the Low Income Cutoff after taxes. However, as noted above, rates of low-income may be considerably higher for particular groups of older adults, such as women and Aboriginal persons. Virtually all older adults receive at least some of their income from government transfers, such as CPP/QPP, Old Age Security, or the Guaranteed Income Supplement, and in 1999, these government transfers made up the majority of the income of two-thirds of senior families.⁶ As a result, the requirements, benefits and administration of these programs have an overwhelming impact on the wellbeing of older persons. Private pension plans make up the major source of income for about 20 per cent of older persons.⁷ However, as private pension plan coverage of the paid labour force is declining,⁸ the importance of private pension plans to the income of older persons is likely to decrease.

An important trend among older persons is an increased tendency towards labour force participation. Since the mid-1990s, there has been a trend towards increased labour force participation among persons over the age of 65 for both men and women. In 2004, approximately one-quarter of men aged 65 to 69 were in the labour force; the figure for women of the same age was 11 per cent. Higher levels of education are associated with an increased likelihood of continued labour force participation after age 65.

While aging is often associated with a decline in general health and the onset of activity limitations, a significant proportion of older adults (37 per cent) report themselves to be in good or excellent health. However, older adults are more

vulnerable to a range of chronic conditions, including arthritis, high blood pressure, vision-related problems, diabetes and dementia⁹. Attention must also be paid to the unique experiences of persons who have disabilities as they age.

Based on 2003 data, it appears that until age 75, almost all older persons are able to carry on the activities of daily living without assistance. After age 75, one in ten of those living in a private household required some assistance with personal care, and one-quarter required some assistance with housework. Activity limitations tend to increase with age, with 47 per cent of persons aged 85 and older experiencing some form of mobility limitation. Most older persons are in good mental health: levels of psychological distress tend to decline with age, although they begin to increase again after age 75.

Question 1: What aspects of diversity should any approach to the law affecting older persons take into account?

III. NATIONAL AND INTERNATIONAL POLICY FRAMEWORKS

Several national and international organizations have adopted principles and frameworks to guide policies and programs for older adults. These are not specifically related to the law, and tend to be broad and general in approach, but point to underlying tensions, themes and concerns that a legal framework may address.

In 1991, in pursuance of the *International Plan of Action on Ageing*,¹⁰ the United Nations adopted its *Principles for Older Persons*.¹¹ In order to allow for applicability across a wide range of cultures and circumstances, these *Principles* are broad and general in scope. 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:

1. independence (including opportunities to work and access education, and an adequate standard of living),
2. participation (including integration in society, and opportunities to shape policies and serve the community),
3. care (including access to health and institutional care, and to legal and social services, as well as respect for human rights and freedoms)
4. self-fulfilment (including access to educational, cultural, spiritual and recreational resources) and
5. dignity (including the right to fair treatment and to be free of exploitation or abuse).

Canada's *National Framework on Aging* (NFA) adopts principles that are similar, but not identical. The NFA was developed by the Federal/Provincial/Territorial Ministers Responsible for Seniors, in consultation with the community. The NFA provides a voluntary framework for policy planners, decision-makers and other stakeholders in designing and reviewing policies and programs for older Canadians. The NFA recognizes three interdependent goals of promoting the well-being of older persons, recognizing their valuable contributions and eliminating ageism. The NFA promotes the five principles of:

1. dignity (including respect for the contributions, accomplishments, aspirations, rights and privacy of older persons),
2. independence (including the ability to control one's own life and make one's own choices, and having access to a support system that enables freedom of choice and self-determination),
3. participation (including taking part in the community, being consulted, having a meaningful role, and participating in available programs and services),
4. fairness (including having the real needs of older persons considered equally to those of other Canadians, freedom from discrimination, and being treated in a way that maximizes inclusion) and
5. security (including access to an adequate income, a safe and supportive living environment, family and friends, and appropriate supports).

The World Health Organization has adopted for its work an *Active Ageing Policy Framework*. This framework emphasizes both interdependence and intergenerational solidarity, and aims to ensure that

people can realize their potential for physical, social and mental well-being throughout the life course, and to participate in society according to their needs, desires and capacities, while providing them with adequate protection, security, and care when they require assistance.¹²

Question 2: What principles and goals should guide the law as it affects older persons?

IV. STEREOTYPES, AGEISM, PATERNALISM AND THE LAW

Although ageism¹³ has received relatively little public attention, it has a significant impact on the lives of older adults, both in terms of negative attitudes that older persons may face on an individual basis, and as a result of the influence that ageism may have on policies, programs and laws. Laws, like government policies and programs, may be subtly influenced by ageism, and may reflect unwarranted stereotypes, attitudes and assumptions about older adults. As well, a neutral law may be administered in an ageist or paternalistic fashion.

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

- 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.

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”.

As an example, concerns about stereotypes and ageism have been raised in discussions regarding the legal frameworks surrounding decision-making by older adults.¹⁴ As individuals age, they become more vulnerable to diseases and health conditions that may affect their ability to make informed decisions regarding their medical treatment, personal care, living arrangements and finances. This reality must be balanced against the fact that most older adults do not experience a diminishment in their decision-making abilities, that even where there is some decline, capacity is rarely an all or nothing proposition and that great care must be taken to ensure that decisions about capacity are not tainted by ageism, paternalism, or stereotypes. The protection of the older person must be weighed against the importance of maintaining his or her independence, autonomy and dignity, and the laws governing capacity and decision-making must maintain a delicate balance. It is therefore not surprising that this area of the law has been the subject of extensive research and discussion.¹⁵

Approaches have varied between Canadian jurisdictions. In Ontario, the main statutes are the *Health Care Consent Act, 1996*,¹⁶ which sets out procedures and requirements for consent to medical treatment, admission to care facilities, and personal assistance services, and the *Substitute Decisions Act, 1992*,¹⁷ which deals with procedures for making decisions about property or personal care where an individual no longer has capacity to do so. These laws were passed as part of a wider movement towards reform across Canada, which placed a new emphasis on procedural fairness, improved procedures for assessing capacity, and enhanced protections for the autonomy and self-determination of persons with disabilities.

Interestingly, the new United Nations *Convention on the Rights of Persons with Disabilities*, which Canada has signed but not yet ratified, includes specific provisions with respect to capacity and decision-making for persons with

disabilities.¹⁸ It remains to be seen whether these provisions of the *Convention* will influence Canadian laws on capacity and decision-making.

Question 3: Do negative attitudes or stereotypes about the characteristics, capacities or contributions of older adults affect the law or the administration of the law? Does the law adequately take into account the needs and experiences of older persons? Are there specific issues or areas of the law that are of concern?

V. AGE AS A DECISION-MAKING CRITERION

Age is often used as a criterion in legislation, as well as public policies and programs. For example, upon attainment of age 65, Ontarians are eligible for the Ontario Drug Benefit Program, which pays for most of the cost of drugs that are listed in the Ontario drug benefit formulary. Many pension plans maintain age 65 as the "normal retirement date" for the commencement of retirement benefits. On a less formal basis, many organizations offer "seniors' discounts" or similar programs based on age criteria.

The Supreme Court of Canada has ruled that age-based distinctions do not necessarily undermine equality rights.¹⁹ Although the Ontario *Human Rights Code* prohibits discrimination based on age, section 15 expressly permits preferential treatment of persons aged 65 or older. As well, section 14 permits organizations to create special programs to relieve disadvantage or hardship for groups that have experienced disadvantage, including older persons.²⁰

Age criteria may be used to either confer benefits, or to deny them. 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 65.²¹

While the use of age-based criteria is a long standing practice, its effectiveness has been questioned.²² Age has frequently been used as a stand-in for ability, dependency or need. However, the situations and capacities of older adults will, of course, vary widely. It has been suggested that the use of age-based criteria may suggest that older adults are homogenous, and thereby support ageist thinking.²³ Individual assessment of need or capacity has been proposed as a preferable alternative.²⁴

In the case of mandatory retirement, while a single standard retirement date had the benefit of clarity, simplicity and certainty, it did not reflect the very wide range of life experiences, capacities and needs of older adults. Mandatory retirement

policies may now only be imposed in Ontario in those rare circumstances where individualized assessment is impossible (in the sense that there is no appropriate method for carrying it out) or would cause undue hardship.²⁵

There has been recurrent debate as to whether age should be a trigger for additional driver's license requirements. Ontario's Senior Driver Renewal Program requires drivers aged 80 years and over to take part every two years in a group education session and to complete vision and knowledge tests. Based on individual assessment, some drivers may also be asked to take a road test to have their in-car skills assessed. Some have suggested that older drivers should be required to take a regular road test, while others have argued that age by itself is not an appropriate indicator of driving skills, and that either all drivers should be regularly re-tested, or that re-testing should be based on specific functional indicators.²⁶

Another aspect of the discussion of the use of age as a criterion is the notion of "intergenerational equity" – the concept that there should be justice between generations, in terms of treatment and relationships. For example, in the context of the recent debate in Ontario about ending mandatory retirement, some commentators argued that mandatory retirement was necessary to make room for younger workers, and thereby transfer resources between the generations.

Question 4: Should the use of age-based criteria in laws and programs affecting older adults be re-examined? Are there specific age-based criteria that warrant the attention of the LCO?

VI. PARTICIPATION AND ACCESS

A common theme in principles and frameworks related to older persons is the fundamental importance of participation: the right to have one's voice heard, and to continue to contribute to and share in the life of the community. Legal frameworks may be an essential support in ensuring the right to participate.

A. Access to the Legal System

Some commentators have identified concerns regarding low levels of usage of the justice system by older adults. For example, discussions regarding the low reporting rate for elder abuse at times point to systemic barriers faced by older persons when accessing the justice system.²⁷

The Advocacy Centre for the Elderly has for over 20 years done pioneering work in ensuring that the legal system addresses the needs and experiences of older adults, and the British Columbia Law Institute has created a division devoted to the law and older persons, the Canadian Centre for Elder Law Studies. Recently,

the Canadian Bar Association has formed an Elder Law Section in order to promote education, advocacy and professional communication on elder law issues. However, overall there has been relatively little focus in Canada on identifying and overcoming barriers to access to justice for older adults.²⁸

Older adults may experience a variety of barriers in accessing the legal system and enforcing their rights. Older adults may be unaware of their legal rights, particularly when it comes to such issues as financial exploitation by family members, or their rights as residents of retirement or long-term care homes.²⁹ They may experience physical barriers in attempting to access the legal system, for example, because of a lack of accessible transportation or services. An older adult who is living in an institutional setting may experience unique issues if he or she wishes to raise concerns regarding their treatment in that setting, as the care home staff may be their main link to external resources. Older adults are frequently on fixed incomes, and so may experience financial barriers. Finally, older persons may experience attitudinal barriers: police or lawyers may not take their concerns seriously or may have negative attitudes towards older adults.

B. Accessibility of Services and Facilities

As older persons are more likely to develop mobility or sensory disabilities as they age, accessible services are essential to maintaining the independence and autonomy of older persons. A lack of accessible housing options or of accessible transportation, health care and public services not only seriously impacts on the quality of life of older persons, but may be a factor in their early institutionalization. Accessibility in Ontario is currently governed by three overlapping, and sometimes competing statutes: the *Ontario Building Code* (OBC),³⁰ the *Ontario Human Rights Code*,³¹ and the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA).³² The OBC sets specific minimum accessibility standards for the built environment, and is enforced by municipal building inspectors. The AODA, a relatively new statute, creates a proactive mechanism for developing accessibility standards for specific industries, economic sectors, or classes of persons or organizations, with the goal of ensuring full accessibility by January 1, 2025. AODA standards are currently being developed in a wide range of areas, including employment, customer services, transportation and the built environment. The *Ontario Human Rights Code* does not set specific standards, but prohibits discrimination on the basis of disability in the areas of employment, housing, services and facilities. Organizations have a duty to ensure accessibility up to the point of undue hardship, a high standard. The Ontario Human Rights Commission develops principles and policies under the *Code* on specific accessibility issues. The *Code* has primacy over both the AODA and the OBC.³³

No formal mechanism exists for coordinating these three pieces of legislation. In practice, the approaches to accessibility under each of these legislative frameworks often differ considerably, and the Ontario Human Rights Commission

has frequently highlighted concerns with both the OBC and the AODA.³⁴ Service providers may therefore be required to meet three separate standards on any one accessibility issue; however, individuals may file complaints about a lack of accessible services only under the *Ontario Human Rights Code*.

Question 5: Do current legal frameworks adequately support access and participation for older adults? What are the key barriers to access to justice for older adults?

VII. RELATIONSHIPS

As with all of us, the wellbeing of older adults is strongly related to the quality of their relationships with their families, friends and social network. Much of the research and public discussion relating to the relationships of older adults has focussed on situations of dependence and vulnerability, such as elder care and elder abuse. These are important issues, but they are not the only aspects of the relationships of older adults. It is incorrect to assume that all, or even most, older adults are ill, dependent and vulnerable. Older adults give as well as receive care, and make significant contributions to their relationships.

A. Elder Care

Discussions of Canada's aging demographic frequently point to the implications for elder care. As noted earlier, while younger seniors for the most part need no assistance with the activities of daily living, the need for assistance increases with age, particularly where chronic health conditions develop. Most elder care is provided by family members,³⁵ so that the aging of the populace, together with hospital re-structuring and inadequate home care services, places increasing pressure on families. This is especially true for the so-called "sandwich generation", which has simultaneous responsibility for both childcare and elder care.³⁶ The stresses of caregiving fall disproportionately on women, as elder care, like most informal caregiving, is significantly gendered. Shortfalls in social supports and legislative protections for caregivers have frequently been pointed out. For example, while the enactment of family medical leave entitlements was a welcome development, the available leave is of short duration (8 weeks), and is only available where a doctor has identified a significant risk of death within six months.³⁷ This means that workers who are caring for family members with health conditions that are chronic, but not life-threatening, have no statutorily protected leave available to them.

The Ontario Human Rights Commission has recently completed a major project examining the impact of caregiving relationships on the life decisions and opportunities of caregivers, outlining applicable human rights protections, and

pointing to directions for reform.³⁸ On a national level, the Canadian Centre for Elder Law Studies is currently examining the legal frameworks governing leave, accommodation and other entitlements available to employees and other working people who are also engaged in providing care for family members.³⁹

The British Columbia Law Institute has recently examined the provisions of the British Columbia *Family Relations Act* that may require adult children to provide financial support to their parents under certain conditions, and recommended their repeal.⁴⁰ There are parallel parental support provisions in Ontario's *Family Law Act*.⁴¹

B. Elder Abuse

The World Health Organization defines elder abuse as “a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.” Elder abuse may take the form of emotional, physical, or financial abuse, sexual mistreatment, or neglect. As elder abuse is largely a hidden problem, it is difficult to obtain accurate figures regarding its prevalence in Canada. In 1999, about seven per cent of older adults reported experiencing some form of elder abuse over the previous five years, with emotional abuse being the most frequently reported type of abuse.⁴²

Under the federal *Criminal Code*, an act of physical, emotional or financial abuse may constitute a criminal offence.⁴³ It is also an offence for a person responsible for an older person to fail to provide the necessities of life. The province of Ontario has adopted a “Resident Bill of Rights” for persons living in long-term care facilities, which includes the right to be treated with dignity and individuality, and to be free from mental or physical abuse, together with a mandatory duty to report abuse occurring in institutions.⁴⁴ As well, the *Substitute Decisions Act, 1992* enables the Office of the Public Guardian and Trustee to intervene in cases where persons who are incapable of personal care or of managing property are at serious risk of adverse consequences due to abuse or neglect.⁴⁵

Questions have been raised about the effectiveness of the current legislative framework for dealing with elder abuse. These mechanisms are rarely used, and may be ineffective for dealing with the most common forms of elder abuse, such as emotional and financial abuse. Further, older persons may not be aware of the available protections, or may experience barriers to accessing them.⁴⁶

C. Older Adults as Caregivers

Older adults are frequently caregivers as well as care recipients, although this fact often receives less attention. In fact, up until age 75, older adults are more likely to report having helped others, than having received help.⁴⁷ While older adults over age 75 were more likely to have received than to have provided help

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with errands or transportation, they were more likely to have provided rather than received coaching, teaching, advice or emotional support. Older adults themselves provide a considerable amount of elder care to their spouses, neighbours and friends,⁴⁸ although relatively little attention has been paid to the particular characteristics and needs of this group of elder care providers.

Many older adults have a valued role as grandparents, although again, the legal aspects of this relationship have received relatively little attention.⁴⁹ Difficulties in maintaining the grandparent-grandchild relationship may arise when family relationships are re-arranged following a marital breakdown, or if conflict arises between parents and grandparents.⁵⁰ There have been a number of cases across Canada considering the circumstances under which a grandparent may be entitled to an order for access to a grandchild. Some of the caselaw emphasizes the importance of parental autonomy in making decisions about who their children will associate with and under what circumstances, while other cases emphasize the value of the grandparent-grandchild relationship. Other issues may arise when grandparents become either the temporary or permanent full-time caregivers for their grandchildren. Approximately 20,000 Ontario children are currently being cared for by their grandparents. Close to half of these caregivers are single grandmothers, and approximately one-third of these families are living in poverty. These grandparents have raised concerns regarding the lack of social supports and legal protections for their unique circumstances.⁵¹

There are a growing number of older adults caring for adult sons and daughters who have disabilities. As they age, these parents may find it increasingly difficult to provide the care that their children need. As well, they may struggle to develop appropriate plans and supports for their sons and daughters against the day when they are no longer able to provide the necessary care. Complex estate planning issues therefore arise.⁵²

Finally, unique family law issues may arise where older adults enter into spousal relationships, or experience relationship breakdown.⁵³ For example, older adults are more likely to have been previously married, or to have acquired significant assets, and may therefore be more inclined to seek pre-nuptial, spousal, or co-habitation agreements. As well, upon marriage breakdown, there will be special considerations relating to spousal support after retirement, or after the death of the payor.

Question 6: What are the key legal issues with respect to the relationships of older adults? Are there aspects of the relationships of older adults that have not been adequately addressed by current legal frameworks?

VIII. SECURE AND DIGNIFIED LIVING ENVIRONMENTS

Central to any discussion of the living arrangements of older adults is the principle of “aging in place”. This is the principle that older persons should not have to move from their homes in order to access the support services necessary to their changing needs. Key barriers to aging in place include lack of accessible housing, transportation and community resources. Furthermore, for many older adults, their house is their major asset, and they may find themselves “house-rich but cash poor”. For this reason, some older adults turn to the controversial expedient of “reverse mortgages”, which allow older adults to borrow against the value of their house, without making loan payments until the title is transferred and the loan comes due.⁵⁴

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.⁵⁵

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*,⁵⁶ *Homes for the Aged and Rest Homes Act*⁵⁷ and the *Charitable Institutions Act*.⁵⁸ 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*.⁵⁹ Living accommodation that falls within the scope of these Acts is exempted from the protections of the *Residential Tenancies Act, 2006*.⁶⁰

“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.⁶¹ Legislation has not yet been introduced.

Question 7: What are the key legal issues related to the living environments of older adults?

Question 8: Are there themes or issues other than those identified in this Paper that the LCO should examine as part of this project?

IX. SUMMARY OF CONSULTATION QUESTIONS

The LCO invites your comments on the issues raised by this Paper. In particular, the LCO would like to hear from you on the following questions:

1. What aspects of diversity should any approach to the law affecting older persons take into account?
2. What principles and goals should guide the law as it affects older persons?
3. Do negative attitudes or stereotypes about the characteristics, capacities or contributions of older adults affect the law or the administration of the law? Does the law adequately take into account the needs and experiences of older persons? Are there specific issues or areas of the law that are of concern?
4. Should the use of age-based criteria in laws and programs affecting older adults be re-examined? Are there specific age-based criteria that warrant the attention of the LCO?
5. Do current legal frameworks adequately support access and participation for older adults? What are the key barriers to access to justice for older adults?
6. What are the key legal issues with respect to the relationships of older adults? Are there aspects of the relationships of older adults that have not been adequately addressed by current legal frameworks?
7. What are the key legal issues related to the living environments of older adults?
8. Are there themes or issues other than those identified in this Paper that the LCO should examine as part of this project?

X. HOW TO PARTICIPATE

The LCO invites your comments on the issues raised in this Consultation Paper. Your comments will be considered as the LCO develops the scope and content of its project on the law as it affects older adults.

Submissions must be received by **Monday, July 7, 2008**.

You can mail, fax, or e-mail your comments to:

**Law Commission of Ontario
“Older Adults Pre-Study”
Computer Methods Building, Suite 201, 4850 Keele Street,
Toronto, ON, Canada, M3J 1P3**

Fax: (416) 650-8418

E-mail: olderadults@lco-cdo.org

If you have questions regarding this consultation, please call **(416) 650-8406** or use the e-mail address above.

XI. ENDNOTES

¹ A variety of terms are used to describe the category of persons who fall within the ambit of this project, including “seniors”, “elders”, “older adults”, or “third agers”. For the purposes of this Paper, the terms “older person” or “older adult” will be used, while recognizing that the most appropriate usage is a source of continuing discussion.

² Figures in this section are based on Martin Turcotte and Grant Schellenberg, *Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2006), unless otherwise noted.

³ For a helpful discussion of the issues, see Christie Ford, “Bright Lines: Status, Recognition and the Elusive Nature of Ageing” (1996) 2 *Appeal* 4-7. The Ontario Human Rights Commission has adopted this approach in addressing the issue of age discrimination: Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (Toronto: 2007) at section 2.2.

⁴ This approach was adopted by the Special Senate Committee on Aging. See Special Senate Committee on Aging, *First Interim Report: Embracing the Challenge of Aging* (Ottawa: Senate of Canada, March 2007), at 11.

⁵ The term “unattached” includes women who were never married, widowed, or divorced. While one might anticipate differences in the financial status of each of these groups (for example, widows are likely to have access to survivor benefits, which may increase their financial security), Statistics Canada does not separately analyze the income levels of each of these subgroups.

⁶ Cara Williams, “Finances in the Golden Years”, *Perspectives* (Ottawa: Statistics Canada, November 2003).

⁷ Cara Williams, see above.

⁸ Richard Shillington, *Research Paper: Occupational Pension Plan Coverage in Ontario* (Toronto: Expert Commission on Pensions, 2007)

⁹ Only a small proportion of the population of older adults has Alzheimer’s disease or another form of dementia: according to the 2003 Canadian Community Health Survey, only two per cent of Canadians aged 65 and older had dementia. However, dementia has a particularly significant impact on older persons for two reasons: first, the prevalence increases markedly with age, so that approximately one-third of persons aged 85 or older has some form of dementia; and secondly, because older persons with dementia are at significantly increased risk of dependency and institutionalization (see Helen Trottier et al, “Living at Home or in an Institution: What Makes the Difference for Seniors?”, *Health Reports* (Spring 2000, vol. 11, no. 4)).

¹⁰ The *International Plan of Action on Ageing* was adopted by the first World Assembly on Ageing in Vienna in 1982, and endorsed by the United Nations General Assembly later that year (Res. 37/51). It was the first international instrument on aging, and guided thinking and the formulation of policies and programs on aging.

¹¹ United Nations, *Principles for Older Persons*, G.A. Resolution 46/91.

¹² World Health Organization, *Active Ageing: A Policy Framework*, 2002.

¹³ Ageism may be defined as any attitude, action or an institutional structure which subordinates a person or a group because of age, or any assignment of roles in society purely on the basis of age. Most often in our society, ageism reflects a prejudice against older persons, a negative bias toward the aging. As such, ageism is broader than stereotyping, although stereotyping may lead to and support ageism.

¹⁴ See, for example, the discussion in 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), pp.34-35.

¹⁵ In the mid-1990s, the Nova Scotia Law Reform Commission completed projects on Adult Guardianship (1993), Living Wills (1994), Adult Guardianship and Personal Health Care Directives (1995), and Enduring Powers of Attorney (1999). In the late 1990s, the Manitoba Law Reform Commission completed projects on Assessments of Competence and Adult Protection and Elder Abuse. Recently, the Manitoba Law Reform Commission worked together with the Alberta Law Reform Institute and the Saskatchewan Law Reform Commission on Enduring Powers of Attorney (2003). The British Columbia Law Institute completed a project on Adult

Guardianship in 2006, and in 2002 the Alberta Law Reform Institute completed a project on Non-Resident Trustees under the Dependent Adults Act.

¹⁶ S.O. 1996, c. 2, Schedule A.

¹⁷ S.O. 1992, c. 30.

¹⁸ United Nations *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106.

¹⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The Court held that the denial of Canada Pension Plan survivor benefits to a 30 year-old woman without dependents, based on her age, did not discriminate on the basis of age, as the age-based distinction in question was not based on stereotypes, and did not violate human dignity.

²⁰ Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, ss. 14, 15.

²¹ 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.

²² For a thorough and thoughtful discussion of the use of age as a category, see Law Commission of Canada, *Does Age Matter? Law and Relationships Between Generations* (Ottawa: Law Commission of Canada, 2004).

²³ Special Senate Committee on Aging, see note 4, at 8 and following; Beaulieu and Spencer, see note 14, at 21.

²⁴ See, for example, Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons because of Age*, see note 3, section 4.5.

²⁵ Ontario Human Rights Commission, see note 3, at section 5.3.

²⁶ See for example Wayne J. Millar, "Older Drivers – A Complex Public Health Issue" *Health Reports* (Ottawa: Statistics Canada, Autumn 1999); Deborah Laliberte Rudman et al, "Holding On and Letting Go: The Perspective of Pre-Seniors and Seniors on Driving Self-Regulation in Later Life" *Canadian Journal on Aging* 25(1): 65-76 (2006); H. Tuokko and F. Hunter, *Using "Age" as a Fitness to Drive Criterion for Older Adults* (Ottawa: Law Commission of Canada, 2002).

²⁷ See, for example, Donald Poirier and Norma Poirier, *Why is it so Difficult to Combat Elder Abuse and in Particular, Financial Exploitation of the Elderly?* (Ottawa: Law Commission of Canada, 1999); Canadian Network on the Prevention of Elder Abuse, *Canadian Laws on Abuse and Neglect* (Ottawa: 2007).

²⁸ There has been some work done in other jurisdictions. In the United States, groundbreaking work was done almost thirty years ago by the American Bar Association's Commission on the Legal Problems of the Elderly. In Australia, the National Research Institute on Gerontology and Geriatric Medicine undertook a project on "Law and Old People in Australia" in 1983.

²⁹ It should be noted that over the years, a number of organizations across Canada, such as Canadian Pensioners Concerned, the Public Legal Education Association of Saskatchewan, the University of Ottawa Legal Aid Society, and others have published plain language guides to the law for older persons, in order to address this barrier.

³⁰ Ontario *Building Code Act, 1992*, S.O. 1992, c. 23.

³¹ R.S.O. 1990, c. H.19.

³² S.O. 2005, c. 11.

³³ Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 47(2).

³⁴ See, for example, the Ontario Human Rights Commission's *Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code* (March 2002); *Moving Towards Barrier-Free Services: Final Report on the Restaurant Accessibility Initiative* (July 2006); *Submission of the Ontario Human Rights Commission to the Transportation Standards Review Committee Concerning the Initial Proposed Transportation Accessibility Standard* (August 2007), all available online at www.ohrc.on.ca.

³⁵ Sylvie Lafrenière et al., "Dependent Seniors at Home – Formal and Informal Help", *Health Reports* (Ottawa: Statistics Canada, August 2003).

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³⁶ Cara Williams, "The Sandwich Generation", *Canadian Social Trends* (Ottawa: Statistics Canada, Summer 2005). The actual numbers of Canadians providing both elder care and childcare are relatively small – about 712,000 in 2002. However, the stresses on this group may be considerable, with significant numbers reporting lost income, reductions in work hours, and impacts on their health and social life.

³⁷ *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 49.1.

³⁸ Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (Toronto: 2007), and Ontario Human Rights Commission, *Policy and Guidelines on Discrimination on the Basis of Family Status* (Toronto: 2007).

³⁹ For further information see www.ccels.ca.

⁴⁰ British Columbia Law Institute, *Report on the Parental Support Obligation in Section 90 of the Family Relations Act* (Vancouver: March, 2007).

⁴¹ *Family Law Act*, R.S.O. 1990, c. F.3, s. 32.

⁴² Statistics Canada, *General Social Survey* (Ottawa: 1999).

⁴³ For example, offences under the *Criminal Code* include intimidation, uttering threats, harassing phone calls, theft, fraud, criminal breach of trust, conversion by a trustee, and assault.

⁴⁴ This Bill of Rights is inserted in the three statutes that currently govern long-term care homes in Ontario: the *Nursing Homes Act*, R.S.O., 1990, c. N.7, the *Charitable Institutions Act*, R.S.O. 1990, c.C.9, and the *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13.

⁴⁵ *Substitute Decisions Act 1992*, S.O. 1992, c. 30, ss. 27, 62.

⁴⁶ See discussion under Access to the Legal System.

⁴⁷ Turcotte and Schellenberg, see note 2, at 157.

⁴⁸ Susan Stobert and Kelly Cranswick, "Looking After Seniors: Who Does What for Whom?" *Canadian Social Trends* (Ottawa: Statistics Canada, Autumn 2004).

⁴⁹ This issue has recently been considered by the Nova Scotia Law Reform Commission. See *Final Report: Grandparent-Grandchild Access* (April 2007).

⁵⁰ Pamela Cross, *Grandmothers and the Law* (Ontario Women's Justice Network, May 2005).

⁵¹ Ontario Human Rights Commission, *The Cost of Caring*, see note 38.

⁵² Yude M. Henteleff, "Trusts and Planning for Children with Disabilities", *Elder Law: Issues for an Aging Population* (Winnipeg: Law Society of Manitoba, November 2003).

⁵³ For an overview, see Jennifer A. Cooper, "Family Law Concerns for Elder Clients", *Elder Law: Issues for an Aging Population* (Winnipeg: Law Society of Manitoba, November 2003)

⁵⁴ The legal framework for reverse mortgages has been the subject of research and recommendations by the Canadian Centre for Elder Law Studies. See *Report on Reverse Mortgages* (Vancouver: Canadian Centre for Elder Law Studies, February 2006).

⁵⁵ Turcotte and Schellenberg, see note 2 at 138.

⁵⁶ R.S.O. 1990, c. N.7.

⁵⁷ R.S.O. 1990, c. H.13.

⁵⁸ R.S.O. 1990, c. C.9.

⁵⁹ S.O. 2007, c. 8, s. 194.

⁶⁰ S.O. 2006, c. 17, s. 5.

⁶¹ Ontario Seniors' Secretariat, News Release, September 7, 2007.