



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

The Law as it Affects Older Adults: Developing an Anti-Ageist Approach

INTERIM REPORT

JUNE 2011

Available online at www.lco-cdo.org

Disponible en français

ISBN: 978-1-926661-29-2

ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Ontario law deans. It is situated at York University, officially housed at Osgoode Hall Law School.

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 is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is 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
276 York Lanes, York University
4700 Keele Street
Toronto, Ontario, Canada

Tel: 416.650.8406
TTY: 1.877.650.8082
Fax: 416.650.8418
Email: LawCommission@lco-cdo.org
M3J 1P3
Website: www.lco-cdo.org

The following individuals contributed to this project:

LCO Staff

Lauren Bates, Staff Lawyer (Head of Project)

Student Researchers

Sara Abraham (University of Toronto Law School)
Jennifer Barrigar (University of Ottawa Law School)
Jason Burns (University of Windsor)
Heather Cameron (Queen's University Law School)
Denise Cooney (University of Toronto Law School)
Feruza Djamalova (University of Toronto Law School)
Safina Lalani (Osgoode Hall Law School)
Jael Marques de Souza (Queen's University)
Christopher Missiuna (Queen's University)
Allan Mohammed (Osgoode Hall Law School)
Sahra Panjwani (Osgoode Hall Law School)
Jeremy Patrick (Osgoode Hall Law School)

Members of the Project Advisory Group

Dr. Jane Barratt, International Federation on Ageing
Christina Bisanz, Ontario Long Term Care Association
Professor Brenda Elias, Lakehead University
Elizabeth Esteves/Katharine Mortimer, Ontario Seniors Secretariat
Professor David Freedman, Queen's University Faculty of Law
Margaret Hawthorn/Mary Hynes, Ontario Older Women's Network
Krista James, Canadian Centre for Elder Law
Professor Gerda Kaegi, Ryerson University
Teri Kay, Ontario Network for the Prevention of Elder Abuse
Professor Nina Kohn, Syracuse University College of Law
Penny MacCourt, Canadian Association on Gerontology
Dr. Lynn McDonald, Institute for Life Course & Aging
Kathryn Pilkington, Ontario Association of Non-Profit Housing and Services for Seniors
Craig Vanderzee, Ontario Bar Association
Judith Wahl, Advocacy Centre for the Elderly

Members of the Board of Governors

Larry Banack, Chair
Christopher D. Brett, Law Society of Upper Canada
Nathalie Des Rosiers, Member-at-large
Stephan Goudge, Judiciary
Neena Gupta, Member-at-large
Ian Holloway, Ontario Law Schools
Frank Iacobucci, Law Foundation of Ontario
Murray Segal, Ministry of the Attorney General
Lorne Sossin, Osgoode Hall Law School
Patricia Hughes, *ex officio* and Executive Director of the LCO

Members of the Research Advisory Board

Patricia Hughes, Law Commission of Ontario
Jeffrey Berryman, University of Windsor, Faculty of Law
Tony Duggan, University of Toronto, Faculty of Law
Markus Gehring, University of Ottawa, Faculty of Civil Law
Kai Hildebrandt, University of Windsor, Department of Communication Studies
Ben Hovius, University of Western Ontario, Faculty of Law
Lesley Jacobs, York University, Faculty of Liberal Arts & Professional Studies
Erik Knutsen, Queen's University, Faculty of Law
James Leal, Law Society of Upper Canada
Roxanne Mykitiuk, York University, Osgoode Hall Law School
Anne Marie Predko, Ministry of the Attorney General
Anthony Vanduzer, University of Ottawa, Faculty of Common Law
Janice Vauthier, Ontario Bar Association

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	9
A. BACKGROUND	9
1. The LCO's Project on the Law as it Affects Older Adults	9
2. Shaping the Project: The Process.....	10
3. The Primary Goal: Developing an Anti-Ageist Approach to the Law	12
4. This Interim Report and Next Steps.....	12
B. APPROACHES TO DEVELOPING A FRAMEWORK FOR THE LAW AS IT AFFECTS OLDER PERSONS	13
1. The LCO's Mandate and Access to Justice	14
2. Building on What Has Been Done	14
3. A Holistic and Contextual Approach	16
4. A Principles-Based Approach	18
5. Including the Perspective of Older Adults	19
6. Providing a Starting Point	19
C. SOME COMMENTS ON TERMINOLOGY	20
II. TAKING THE CIRCUMSTANCES OF OLDER ADULTS INTO ACCOUNT	23
A. TAKING OLDER ADULTS INTO ACCOUNT.....	23
B. WHO IS AN "OLDER ADULT"? APPROACHES AND DEFINITIONS.....	24
1. Age as a Category.....	25
2. Approaches to a Definition	27
3. The LCO's Approach	29
C. UNDERSTANDING THE CIRCUMSTANCES OF OLDER ADULTS	30
1. Older Adults in Canada and Ontario – An Overview	31
2. Intersecting Identities: Age and Compounded Disadvantage	46
D. "VULNERABILITY", INEQUALITY, RISK AND OLDER ADULTS.....	56
1. Is "Vulnerability" a Useful Concept for the Law as it Affects Older Adults?	57
2. Applying an Equality Analysis to Older Adults	59
3. Older Adults and Heightened Risk	60
4. Responding to Risk and Inequality Among Older Adults	63
E. IMPLICATIONS: DEVELOPING A CONTEXTUAL APPROACH TO THE LAW AS IT AFFECTS OLDER ADULTS	64
III. ADDRESSING AGEISM: DEVELOPING A PRINCIPLED APPROACH.....	71
A. UNDERSTANDING AGEISM	71
1. The Concept of Ageism	72
2. Stereotypes and Negative Attitudes Regarding Aging and Older Adults	73
3. Valuing Older Adults	76
4. Manifestations of Ageism	81
5. Theoretical Approaches to Understanding Ageism and the Law	84
B. DEVELOPING PRINCIPLES FOR AN ANTI-AGEIST APPROACH	87

1.	The Value of Principles in an Anti-Ageist Approach	87
2.	Sources for Anti-Ageist Principles	88
3.	Equality as an Underlying Value for the Framework	94
4.	Principles Adopted by the LCO	96
5.	Applying the Principles	111
6.	The Challenge of Application	118
7.	Constraints on the Application of the Principles	119
C.	CONCLUSIONS: DEVELOPING A PRINCIPLED APPROACH TO THE LAW AS IT AFFECTS OLDER ADULTS	120
IV.	IDENTIFYING AGEISM AND PATERNALISM IN THE OPERATION OF THE LAW	123
A.	THE CHARTER AND HUMAN RIGHTS LAW	124
B.	LAWS TARGETING OLDER ADULTS	128
1.	The Legal Framework for Age-Based Distinctions	129
2.	Current Ontario Laws Using Older Age-Based Distinctions	132
3.	Using Age as a Proxy	137
4.	Assessing the Use of Age-Based Laws	140
C.	LAWS OF GENERAL APPLICATION – LAWS THAT AFFECT MAINLY OLDER ADULTS	145
D.	LAWS THAT AFFECT A DISPROPORTIONATE NUMBER OF OLDER ADULTS	150
E.	LAWS OF GENERAL APPLICATION – AFFECTING OLDER ADULTS DIFFERENTLY	154
F.	WHERE LAW IS SILENT	157
G.	IDENTIFYING AGEISM AND PATERNALISM IN THE LAW	162
1.	Stereotypes and Negative Attitudes in the Law or its Implementation	162
2.	Failure to Take Older Adults into Account	163
3.	Ignoring or Subordinating the Needs of Older Adults	163
V.	ENSURING ACCESS TO THE LAW FOR OLDER ADULTS	165
A.	OLDER ADULTS AND ACCESS TO THE LAW	166
B.	ASSESSING THE ACCESS MECHANISMS AVAILABLE TO OLDER ADULTS	168
1.	Selected Key Mechanisms for Accessing the Law	169
2.	Systemic Barriers	176
C.	STRATEGIES FOR ENHANCING ACCESS TO THE LAW FOR OLDER ADULTS	190
1.	Combating Ageism and Paternalism	190
2.	Empowering Older Adults	191
3.	Designing Mechanisms that Take Older Adults into Account	192
4.	Use of Mechanisms Focused on Older Adults	193
5.	Alternative Dispute Resolution Mechanisms	197
6.	Advocacy Mechanisms	205
7.	Oversight and Monitoring Mechanisms	209
VI.	DEVELOPING A FRAMEWORK FOR AN ANTI-AGEIST APPROACH TO THE LAW ...	211
A.	INTRODUCTION	211
B.	RELATING THE ELEMENTS OF THE FRAMEWORK	212
1.	Relationships Within Elements	212

2.	The Interaction Between Principles and Lived Experience.....	213
3.	Applying the Principles and Circumstances to the Legal Framework.....	213
C.	REQUIREMENTS FOR AN EVALUATIVE FRAMEWORK	214
D.	SOME COMMENTS ON THE FRAMEWORK	215
VII.	APPLYING THE FRAMEWORK: THE LAW AND ACCESS TO HOME CARE	219
A.	BACKGROUND	219
B.	ONTARIO’S LEGAL FRAMEWORK FOR HOME CARE	221
1.	Background	221
2.	Service Delivery Structure.....	223
3.	Eligibility Criteria for Home Care Services	223
4.	Service Provision	224
5.	Oversight of Agencies	225
6.	Complaint Mechanisms and Enforcement	225
C.	EVALUATING THE LEGAL FRAMEWORK FOR HOMECARE IN ONTARIO.....	226
1.	Who is Affected by the Law?	227
2.	How Are Older Adults Affected? The Substance of the Law	228
3.	How Are Older Adults Affected? The Implementation of the Law.....	231
4.	Monitoring and Evaluation of the Law	238
D.	CONCLUSION	240
VIII.	NEXT STEPS	241
	ENDNOTES	242

EXECUTIVE SUMMARY

I. Introduction

In 2008, the Law Commission of Ontario's (LCO) Board of Governors approved a multi-year project to develop a coherent framework for the law as it affects older persons. The aim of this project is not to recommend specific reforms to particular laws affecting older persons, although certainly law reform is needed in many areas, but to articulate a set of principles and questions, rooted in the lived experiences of older adults, that may form the basis of a coherent analytical framework for this large, diverse and complex area of the law. The ultimate aim of this project is to build on work that has already been done to develop a sound basis for evaluating current laws and policies and developing new ones, to ensure that they respect the rights and circumstances of older persons.

The LCO's approach to this project has been shaped by the following considerations:

1. That access to justice requires looking beyond the clarity, efficiency and effectiveness of the law to considering normative issues.
2. The importance of incorporating and, where possible, synthesizing, recent important domestic and international initiatives in the area of law and aging.
3. The need to understand the social, economic and medical contexts in which older adults encounter and experience the law to enable law-makers and policy-makers to take them into account in designing and implementing laws and policies that may affect older persons.
4. The benefits of a framework based on a set of principles, which can provide guidance while remaining flexible and applicable in changing circumstances.
5. The centrality of the experiences and perspectives of older adults to the framework and its application.
6. That the evolving nature of aging and of elder law requires the framework to be designed as a strong foundation for further research, analysis and debate.

This Interim Report is based on consultation and extensive research undertaken by the LCO, and is intended to form the basis for further consultation prior to the completion of the Final Report.

II. Taking the Circumstances of Older Adults into Account

The starting point of an anti-ageist approach to the law is to recognize the existence of older adults as a group who may in some respects have different needs and experiences than younger persons, whether due to the accumulated effects of their life courses, social structures, or marginalization and stereotyping of older persons, and to take those particular needs and circumstances into account when designing laws, policies and programs.

The use of age as a way of categorizing people is so common a practice as to be almost unnoticeable. While the use of age categories risks reinforcing ageist thinking, it is at the same time indispensable in identifying and describing institutionalized ageism and in attempting to remedy its effects.

Law commonly uses age, at both the younger and older ends of the spectrum, as a category on the basis of which distinctions may be made. Older age is often used as a requirement for access to particular benefits, or as a marker for the addition of responsibilities or requirements, or as the basis on which particular activities or benefits are restricted. If one accepts the necessity of using age as a category for some purposes, that leaves still the difficult question of how to define membership in the category of “older age”. The LCO includes in the scope of this project all those who have been identified as “old” or “older” through legal and policy frameworks, through social attitudes and perceptions, or through self-identification.

Understanding the circumstances of older adults can be challenging for a number of reasons. Older adults make up a large segment of the population of Ontario and Canada: therefore, it can be difficult to form meaningful generalizations about their circumstances and experiences. As a result of ongoing demographic shifts, changing social attitudes and rapidly evolving legal and policy landscapes, the circumstances of older adults are constantly changing. What is true now about the experiences of older adults may not be true five years from now and may not have been true five years ago. As well, the lives and circumstances of older adults are profoundly shaped, not only by current laws and policies, but also by those that were in effect when they were children, young adults and middle-aged.

Education and literacy levels, labour force participation, income security, living environments, relationships and caring networks, and participation in the community are all relevant factors, as are characteristics such as sexual orientation, racialization or ethnicity, Aboriginal identity, place of residence, socio-economic status, citizenship status or other factors. Gender is particularly important, since most older adults are women, and the life courses of women differs in a number of key respects from those of men. The intersection of age with impairment, activity limitations and disability also raises important and complex issues.

Older adults have often been considered “vulnerable” as a group, and this vulnerability has been used to justify significant levels of interference with older adults’ autonomy. It is inaccurate to assume that all older adults are frail, dependent and therefore in need of protection and equally problematic to assume that the only or the most appropriate response to vulnerability is to restrict the autonomy of the older adults in question, a common form of paternalism affecting older adults.

However, it is also a mistake to assume that all older adults are privileged, affluent and capable. In some cases, older adults are disadvantaged because of life experiences; for others, aging itself may result in risk and hardship. For those older adults who experience or who are at greater risk of disadvantage and negative outcomes than others, a higher level of attention or protection from law or policy-makers may be essential.

Risk must also be understood in a broader social context. An older adult’s family and other relationships, living arrangements, income sources and levels, access to supports and the law itself may either increase or decrease levels of risk and inequality, depending on their quality and extent. Therefore, while laws, programs and policies must recognize the capacities and individuality of older adults, this recognition must be balanced by the provision of additional supports for those older adults who are particularly disadvantaged or at risk in order to ensure that the law promotes dignity, autonomy, participation and security for all older adults.

III. Addressing Ageism: Developing a Principled Approach

For the purposes of this Report, ageism is a systematic way of thinking about aging and older persons that sees aging as a negative process and older adults as separate and different from other members of society, attributing to them a set of negative characteristics. Ageism includes the tendency to structure laws and social institutions in a way that assumes that everyone is young. Ageism may be manifested in negative treatment of and discrimination against older persons, social exclusion of older adults and the tendency to ignore their existence, and paternalistic approaches that control older adults and remove autonomy under the guise of protecting their best interests.

Ageism has its roots in a set of pervasive stereotypes and negative attitudes towards older adults, several of which are explored in the Interim Report (for example, that older adults form a homogenous group, are burdens on society, and are resistant to change).

Ageism commonly manifests as paternalism, the tendency to remove decision-making opportunities for older persons under the guise of protecting their “best interests”. It also manifests as invisibility, such that older adults are systematically excluded from the social and public spheres.

In order to counteract negative stereotypes and assumptions about older adults, reaffirm the status of older persons as equal members of society and bearers of both rights and responsibilities, and also encourage the government to take positive steps to secure the wellbeing of older adults, the LCO's framework centres on a set of principles for the law as it affects older adults.

Each of the principles contributes to an overarching goal of promoting substantive equality for older adults. There is no hierarchy among the principles, and the principles must be understood in relationship with each other. Although identified separately, the principles may reinforce each other or may be in tension with one another as they apply to concrete situations. The Report explains the following principles in details:

- 1. Respect for Dignity and Worth** (the right to be valued, respected and considered);
- 2. Promotion of Independence and Autonomy** (the right to make choices and do as much for oneself as possible, with provision of supports if needed);
- 3. Enhancement of Participation and Inclusion** (the opportunity to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs and to be consulted on issues that affect one);
- 4. Recognition of the Importance of Security** (including physical, psychological, financial and social security, the right to be free from abuse or exploitation, and the right to access to basic supports in terms of health, legal and social services);
- 5. Recognition of Diversity and Individuality** (that older adults may also experience discrimination based on their gender, racialization, Aboriginal immigration or citizenship status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities);
- 6. Understanding Membership in the Broader Community** (that older adults are part of a broader community in which they have reciprocal rights and obligations).

IV. Identifying Ageism and Paternalism in the Operation of the Law

The term "law" as it is used in this project refers not only to statutes, but also to regulations, to the policies through which they are applied, and to the strategies through which statutory provisions, regulations and policies are implemented and experienced by older adults.

The current legal landscape as it affects older adults is complex, but may be generally categorized as follows:

- 1. The Charter and Human Rights Laws:** While the principles adopted for this framework have roots in the Charter and the Code and aim to reflect the values underlying these fundamental documents, the analysis under this framework is not intended to replace reviews for Code or Charter compliance.

2. **Age-Based Laws:** In the case of most uses of age-based criteria, age serves as a proxy for some other quality, such as low-income, withdrawal from the workforce, health or ability limitations, or lack of legal capacity.
3. **Laws Mainly Affecting Older Adults:** There are also a number of laws that, while they do not employ age-based criteria, mainly affect older adults, operate in ways similar to age-based programs, and are often thought of as such. Laws regulating long-term care homes are one such example.
4. **Laws of General Application:** Some laws, while affecting individuals across a range of ages, affect a substantial portion of older adults. For example, a significant proportion of those affected by laws regarding legal capacity and decision-making are older adults. Laws of this type require policy-makers to find means to balance the needs and circumstances of older adults against the potentially different needs of other groups affected by the same law. In understanding the law as it affects older adults, it is also important to consider laws of general application which do not affect *more* older adults as a group, but may impact on older adults *differently* than on other groups.
5. **Where Law is Silent:** Law may fail to take into account the needs and experiences of older adults, and may therefore fail to address issues of pressing importance to this group. As a result, older adults may be left without adequate direction to make decisions on important issues, or without adequate supports or protections.

An examination of laws affecting older adults reveals that ageism and paternalism may operate through the law in a variety of ways.

1. **Stereotypes and Negative Attitudes:** Stereotypes and negative attitudes may manifest in either the substance or the implementation of the law, either explicitly or implicitly, sometimes through the implementation of the law and sometimes through the assumptions and attitudes of those who are charged with putting the law into practice.
2. **Failure to Take Older Adults into Account:** Laws may, in either their substance or their implementation, fail to consider the particular experiences of older adults, or may base their approach on assumptions rather than on current research and consultation with older adults.
3. **Subordinating the Needs of Older Adults:** In some cases, legislators, policy-makers, service providers and professionals, when faced with competing priorities for time, attention and resources, may choose to subordinate or to ignore the needs of older adults.

V. Ensuring Access to the Law for Older Adults

A key concern in the law as it affects older adults is the “implementation gap”, wherein laws which on their face are neutral or positive with respect to older adults are in practice unproductive or negative in their effects, due to inadequate implementation

and poor enforcement. One important aspect of the implementation gap is access to the law for older adults, meaning the existence (or lack thereof) of effective mechanisms for accessing and enforcing existing laws.

Although concerns regarding access to the law are not limited to older adults, fixed incomes and withdrawal from the workforce, lower than average literacy and educational levels, the onset of health and activity limitations as age advances, and limitations in life expectancy all may limit access for older adults. Some significant portions of the older adult population also have their experiences shaped by cognitive disabilities, living environments that reduce their autonomy and community inclusion, and the consequences of physical, financial or other forms of dependency.

Older adults may be affected by the legal issues facing the population in general, but older adults are more likely to encounter issues resulting from withdrawal from the workforce or needs related to impairments or disabilities. They are therefore more likely to be users or potential users of government programs and services than younger adults. Because issues related to the receipt of government programs and services will often involve general policies and procedures rather than individual interactions and decisions, the legal issues that older adults face may often be extremely complex and may require systemic remedies.

As well, the importance of issues like elder abuse, powers of attorney, estate planning and informal caregiving to older adults mean that when older adults encounter the law, it will very frequently be in the context of their domestic lives and their personal relationships. This has implications for how older adults may access the law, and what outcomes they may seek from it. For example, they may be less willing to explore adversarial mechanisms for resolving issues.

A review of key access mechanism available to older adults reveals a number of systemic barriers to access to the law for older adults, including:

1. Ageist or paternalistic attitudes on the part of those implementing the law;
2. Inadequate training and information on the requirements of the law for those charged with implementing it;
3. Lack of adequate oversight mechanisms for key legal rights and protections;
4. Lack of appropriate mechanisms for recourse where rights have been violated;
5. Lack of meaningful remedies where rights appear to have been violated;
6. Over-reliance on complaint-based systems for redressing individual or systemic issues;
7. Failure to recognize and accommodate the needs of older adults in the set-up and delivery of access mechanisms; and
8. Adversarial systems that may jeopardize on-going relationships of central importance to the well-being of the older adult whose rights have been violated.

Measures to ensure access to the law for older adults include:

1. Anti-ageist training for those interpreting or implementing laws and policies;
2. Training on the relevant needs and circumstances of older adults;
3. Adequate training on the law and its implications for those implementing it;
4. Adequate resources for effective implementation of the law;
5. Monitoring mechanisms to ensure the law is operating as intended;
6. Ensuring that access and enforcement mechanisms take the needs and circumstances of older adults into account;
7. Empowering older adult;
8. Addressing systemic issues; and
9. Alternatives to adversarial systems.

VI. Developing a Framework for an Anti-Ageist Approach to the Law

Based on the previous Chapters, the final Framework must be based on the following elements:

1. a basic account of key elements of the experiences of older adults that may shape the ways in which older adults encounter and experience the law, importantly including considerations regarding the diversity and individuality of older adults;
2. an understanding of the concepts of ageism and paternalism, and how these may operate in or through laws and policies;
3. a set of principles for the law as it affects older adults, as a means of articulating what the goals of the law as it affects older adults should be;
4. a description of the multiple ways in which laws may affect older adults; and
5. an analysis of the various barriers that older adults may face in accessing the law, together with some proposed strategies for addressing these barriers.

To be effective, the Framework must be:

1. holistic, bringing together the various elements into a unified and coherent whole;
2. flexible enough to apply across the broad range of contexts in which older adults encounter the law;
3. reflective of the diversity of experience and identify among older adults;
4. specific and practical, in order to provide meaningful guidance in the development and review of laws and policies; and
5. useable, with accessible structure, layout and language.

A Draft Framework for an Anti-Ageist Approach to the Law is set out in Appendix A of this Interim Report.

VII. Applying the Framework: The Example of the Law Regarding Home Care Supports

This Chapter illustrates the application of the Framework through considering a current issue in the law as it affects older adults: the law relating to access to home care supports. The intent of this illustration is not to provide a comprehensive description of this area of the law or to propose specific reform initiatives, but rather to reflect on this area of the law in light of the anti-ageist principles and considerations that have been identified in this Interim Report.

A review of the law through the lens of the Draft Framework indicates that the overall written purpose and principles of the law are in harmony with anti-ageist principles. Implementation concerns include the lack of clarity in eligibility criteria, difficulty in accessing information about services and rights, uneven service delivery across the province, and problematic complaints mechanisms.

VIII. Next Steps

The LCO invites comments on the Interim Report or the Draft Framework. The consultation period will run until **Friday, November 18th, 2011**. The LCO welcomes written submissions. We will also be developing in-person consultations, to take place in the late summer and early fall of 2011.

Based on the results of the consultations and further research as necessary, the LCO will develop and release a Final Report and Framework in the spring of 2012.

I. INTRODUCTION

A. Background

1. *The LCO's Project on the Law as it Affects Older Adults*

This project is based in part on a proposal received by the LCO soon after its inception from Professor David Freedman, a professor of Elder Law at Queen's University Law School.

Demographic changes have in recent years drawn increased attention to the needs and circumstances of older adults. With the aging of Canada's population, the importance of developing sound legal and public policy approaches to issues affecting older Canadians will continue to grow.

Despite pioneering work done by organizations such as the Advocacy Centre for the Elderly (ACE) and the Canadian Centre for Elder Law (CCEL), relatively little attention has as yet been paid to the overall relationship of older Canadians with the law. While substantial and important work has been done on specific elder law issues, such as consent and capacity laws, mandatory retirement and elder abuse, there is generally a dearth of Canadian research on how older adults access the law and the barriers they face in doing so, and on how the law as whole might be made more effective, fair and accessible for older adults. As well, research and policy development related to older adults and the law has focused on laws that explicitly or obviously disproportionately affect older adults, such as age-based drivers' license requirements or legal issues regarding long-term care, while less attention has been paid to how laws affecting the general populace may also have a differential impact on older persons. This is therefore an area of the law that would benefit from a more holistic and principled approach.

As the Federal/Provincial/Territorial Committee for Seniors pointed out in their *Seniors' Policy Handbook*:

Applying a seniors' policy lens can help to ensure that:

- the needs and values of seniors are respected
- the contributions of seniors in all aspects of life are acknowledged
- the diversity of the seniors' population is taken into consideration
- activities that affect seniors are approached in a holistic manner that considers linkages and interactions with other policies and programs

- the cumulative impact of change and the implications for seniors have been thoroughly considered
- the concerns and issues of today's seniors and of coming generations of seniors are considered.¹

Based on the proposal and the LCO's internal research, the Board of Governors approved a multi-year project to develop a coherent framework for the law as it affects older persons. The aim of the LCO's project on the law as it affects older adults is not to recommend specific reforms to particular laws affecting older persons, although certainly law reform is needed in many areas. Rather, the purpose of the project is to articulate a set of principles and considerations that may form the basis of a coherent analytical framework for this large, diverse and complex area of the law. Given the barriers that older adults face in accessing justice, the principles and considerations adopted should not only systematize this area of the law, but also make it fairer, more accessible and more effective. The ultimate aim of this project is to build on work that has already been done to develop a sound basis for evaluating current laws and policies and developing new ones, to ensure that they respect the rights and circumstances of older persons.

This project is closely related to the LCO's similar project on the law as it affects persons with disabilities.² A significant minority of older persons live with disabilities, whether because they have aged with disabilities or because they have developed disabilities as they aged. As well, there is a rich literature in the area of critical disability studies and the law, some facets of which can inform the development of an anti-ageist approach to the law, as can equality theory more generally. Therefore, while there are many areas where the two projects diverge, they have been developed in tandem and have shed light on each other during that process.

2. *Shaping the Project: The Process*

Given the breadth and complexity of the issues raised by this project, it was planned as a multi-year, multi-stage project.

Older adults are an extremely diverse group, ranging widely in histories, identities and circumstances. Every law that affects the general populace will affect older adults, sometimes in ways that are similar to how it affects others but often differently, and, importantly, often in very different ways for various groups of older adults. The area of

“elder law” itself – that area of law dealing specifically or disproportionately with older adults – is extremely complex. As just one example, the law relating to capacity and substitute decision-making has itself been the subject of numerous law reform endeavours and voluminous reports.

Recognizing the challenges inherent in this project, the LCO therefore commenced its work with a “Pre-Study” process, aimed at identifying themes, issues and approaches for the overall project. In May of 2008, the LCO launched the Pre-Study with a *Consultation Paper on Shaping the Project*.³ 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 reported on the results of this Pre-Study and its initial research in a *Paper* issued in December 2008.⁴ In this *Paper*, the LCO adopted five preliminary principles: independence and autonomy; dignity and respect; participation and inclusion; security; and respect for diversity. It also identified several thematic areas for focus, including ageism and the law, the relationships of older adults and the living environments of older adults. This input shaped the considerable research undertaken by the LCO for this project.

In January 2009, the LCO issued a Call for Research Papers on these themes, in order to supplement its own research and to gather diverse perspectives on key issues. Through this Call for Papers, the LCO funded three research papers: one from ACE on access to the law and congregate living; a second by Margaret Hall on developing of an anti-ageist approach to the law in the context of elder abuse and substitute decision-making frameworks; and a third by Charmaine Spencer on ageism and age discrimination in health and housing law. These papers are available on the LCO’s website at www.lco-cdo.org/older-adults-call-for-papers.

In the fall of 2010, the LCO co-hosted the 2010 Canadian Conference on Elder Law, in partnership with the CCEL (affiliated with the British Columbia Law Institute) and ACE. The Conference brought together a wide range of academics and experts, professionals, service providers, and community and advocacy organizations to consider the themes of ageism and the law, law reform and older adults, and access to justice for older adults.

Approximately 100 presenters and speakers shared their research and ideas, and the Conference resulted in a significant number of new papers, which are available on the LCO website.

To guide its work, the LCO has formed an Advisory Group which provides advice on outreach and on approaches to the substantive issues at stake in the process. A full list of Advisory Group members may be found in the front matter of this Interim Report. The LCO would like to extend its sincere thanks to the members of the Advisory Group for their invaluable assistance in the development of this Project to date, and their dedication amidst their many commitments.

3. *The Primary Goal: Developing an Anti-Ageist Approach to the Law*

The concept of “ageism” is relatively recent, generally being traced back to the work of Dr. Robert Butler beginning in the late 1970s. There has been growing recognition of the role of negative attitudes and stereotypes in shaping the experiences and treatment of older persons, and the importance of addressing these attitudes and stereotypes in order to ensure fairness and equality for older persons.

In keeping with developments in areas such as disability and the law, and gender and the law, some have begun to conceptualize ageism, not only in terms of individual attitudes, but also in terms of structures, systems and institutions. Ageism may be reflected in the issues the law does or does not address, in the assumptions that are embedded in the law and the structures that are designed to implement the laws.

Given the mandate of the LCO to address the relevance, effectiveness and accessibility of the law, considerations of how ageism may operate in and through the law are central to the LCO’s development of a framework for the law as it affects older persons, and are dealt with in detail in Chapter III of this Interim Report.

4. *This Interim Report and Next Steps*

This Interim Report is the product of the LCO’s extensive research and consultation as outlined above, and marks a significant milestone in this project.

It outlines in detail the key components of the LCO's proposed anti-ageist approach to the law. These include:

- the circumstances and characteristics of older adults to consider for purposes of inclusive design and targeted programs;
- approaches to identifying and addressing negative stereotypes and attitudes about older persons in the law;
- principles for an anti-ageist approach;
- an analysis of the ways in which the law affects older adults; and
- strategies for enhancing access to the law for older adults.

These components are synthesized into a proposed evaluative framework for an anti-ageist approach to the law. Finally, an example of the application of this analytical framework is set out with respect to the Ontario law regarding access to home care supports.

In order to provide context and nuance to the analysis and the proposed framework, we have included throughout detailed examples of particular issues from the law as it affects older adults, whether as illustrating common barriers in the law or best practices for an anti-ageist approach to the law. The examples are selected from issues that were identified through our Pre-Study as being of particularly urgent concern to older adults.

This Interim Report has been widely disseminated for feedback, as well as posted on the LCO website at www.lco-cdo.org. Based on the responses, the LCO will prepare a Final Report for the approval of the LCO Board of Governors.

The LCO encourages all interested persons or organizations to share their comments and suggestions for the improvement of the LCO's analysis and proposed framework. The LCO requests that all feedback be forwarded to us by end of day on **Friday, November 18, 2011**. Further information on how to participate in the consultation process for this next phase of this project may be found in the final section of this Interim Report, "Next Steps".

B. Approaches to Developing a Framework for the Law as it Affects Older Persons

In developing its proposed framework for the law as it affects older persons, the LCO has employed a number of approaches as starting points.

1. *The LCO's Mandate and Access to Justice*

The LCO's mandate is, in part, to recommend law reform measures to enhance the relevance, effectiveness and accessibility of the law, and to improve the administration of justice through clarification and simplification of the law; in short, to increase access to justice.

In developing a framework for the law as it affects older adults, the LCO must therefore consider issues not only of consistency, clarity and efficiency, but also such questions as:

- Does the law address the issues of importance to older adults? Does it do so in ways that are meaningful?
- Does the law effectively address the needs and circumstances of older adults? What principles and approaches can best ensure that the law is effective in addressing the needs and circumstances of older adults? Where the law is ineffective, do the shortfalls result from the design of the law, or from its implementation?
- What do "access to the law" and "access to justice" mean for older adults? What barriers do older adults experience in accessing the law? What are best practices for promoting access to the law for older adults?

2. *Building on What Has Been Done*

In recent years, there have been several important initiatives relevant to the law as it affects older adults. The LCO has aimed to incorporate and, where possible, synthesize the insights and frameworks employed by these initiatives as a foundation for this project. In particular, the LCO's project has been shaped by the following initiatives:

1. The National Framework on Aging (NFA)⁵ and Policy Development Guide: The NFA was developed jointly by the Federal/Provincial/Territorial Ministers Responsible for Seniors in 1998, and supplemented by the *Policy Development Guide* released in 2009. It adopted as its vision "Canada, a society for all ages, promotes the well-being and contributions of older people in all aspects of life", and identified five inter-related principles of dignity, independence, participation, fairness and security.

2. International Principles for Older Persons⁶ (IPOP): The 1991 IPOP, together with the *Madrid International Plan of Action on Ageing (MIPAA)*⁷, are the most important international documents related to older persons. The IPOP provide a broad and general framework of principles, applicable across a wide range of cultures and circumstances, which can guide states in their policy and program development.
3. The Senate Special Committee Report on Aging:⁸ The Committee released its Final Report in the spring of 2009. The Committee reviewed public programs and services for seniors, identified the gaps that exist in meeting their needs, and examined the implications for service delivery in the future as the population ages. In developing its Report, the Committee consulted widely and across the country with both older adults and organizations that work with or for them.
4. Ontario Human Rights Commission Project on Human Rights and Older Persons: In 1999, in order to honour the International Year of Older Persons, the OHRC launched a project on human rights and older persons. Based on its research and public consultations, the OHRC developed a consultation report and recommendations, *A Time for Action*,⁹ and a *Policy on Discrimination Against Older Persons because of Age*,¹⁰ which set out an analytical framework for understanding ageism and age-based discrimination against older persons in the human rights context.
5. The Advocacy Centre for the Elderly (ACE): ACE, operating since 1984, was the first legal clinic in Canada with a specific mandate and expertise in legal issues of the older population. It provides both individual and group client advice and representation, as well as conducting public education and law reform activities. In so doing, ACE is guided by the overarching principle that “seniors are people” – they are presumed to be capable of making decisions for themselves and have the right to make foolish decisions if they so choose. ACE has also focused attention on the phenomenon of “good law/bad practice” and widespread non-compliance with or paternalistic application of laws meant to protect the rights of older adults.
6. The Canadian Centre for Elder Law (CCEL): CCEL, established in 2003, is an offshoot of the British Columbia Law Institute, British Columbia’s law reform agency. It is a national, non-profit centre focused on exploring the legal issues of particular legal interest to older Canadians, and has conducted research and law

reform projects on a variety of issues, including viatical settlements, adult guardianship laws, reverse mortgages and predatory lending.

7. Ontario Public Service Inclusion Lens: The OPS *Inclusion Lens* is a comprehensive analytical tool developed by the OPS Diversity Office to assist OPS staff in considering various dimensions of diversity in developing, implementing or reviewing policies, programs or services. Seventeen dimensions of diversity are identified in this tool, including (both younger and older) age, disability, gender and socio-economic status.

As well, many of Canada's law reform agencies have undertaken important projects on various issues affecting older adults. This includes the Law Commission of Canada's project on Law and the Relations Between Generations; the Nova Scotia Law Reform Commission's projects on Grandparents' Rights and on Seniors' Only Housing; the Western Conference of Law Reform Agencies project on enduring powers of attorneys; and several others.¹¹

In particular, the work of the Federal/Provincial/Territorial Ministers responsible for Seniors in developing first the *National Framework on Aging* and recently the *Seniors Policy Lens* provides a strong foundation for the development of a consistent, principled approach to the public policy issues surrounding older age, and the OPS *Inclusion Lens* provides an example of how diversity-related considerations may be translated into practice.

This project builds on this work to examine in-depth and in a holistic manner the particular issues surrounding the law and older adults, and the implications for the design and implementation of laws and policies of both general and specific application.

3. *A Holistic and Contextual Approach*

As the LCO's *Strategic Plan* outlines, the LCO, like many other contemporary law reform bodies, undertakes both relatively narrow, focused and technical projects as well as large, socially oriented projects that require multi/interdisciplinary approaches and broad consultation and collaboration. This project falls into the second category.

In understanding the experiences of older persons with the law, the LCO has considered not only relevant legal research, but also social science, medical and policy research.

The LCO has sought to understand the social, economic and medical contexts in which older adults encounter and experience the law, and to find approaches which will enable law-makers and policy-makers to take these circumstances into account in designing and implementing laws and policies that may affect older persons.

This includes consideration of a life-course approach to the experiences of older adults. The health, wellbeing and economic and social security of older adults will inevitably be significantly shaped by their experiences as children, youth and adults. For example, the World Health Organization has pointed out that policy on health and aging should be shaped by the recognition that the origins of risk for chronic conditions such as diabetes and heart disease begin in early childhood and are shaped and modified by factors across the life span, such as socio-economic status. Thus, the risks of non-communicable disease should be addressed throughout the life-course, in order to enhance opportunities for health and active aging.¹² The NFA recommends that policy developers consistently give consideration to the cumulative impacts on later life of policies and programs targeted at earlier life stages.¹³ This Project recognizes that the adoption of a life-course approach to aging can enhance understanding of the experiences and circumstances of older adults and support the development of more effective policy approaches, and will apply a life-course analysis to law and policy related to aging as appropriate. For example, the Keynote Speaker at the 2010 Canadian Conference on Elder Law, Mr. Justice Murray Sinclair, Chair of the Truth and Reconciliation, highlighted how the early experiences of Aboriginal older adults with residential schools and the historic relationship of Aboriginal Canadians with the law continues to shape how Aboriginal older adults relate to law and government.

It is important to recognize that the life-course will vary based on a range of factors, such as gender, education, racialization, place of birth, sexual orientation and the presence of a disability. For example, women and men on average continue to have different patterns of labour force participation, with women's labour force participation being significantly shaped by their greater carriage of caregiving responsibilities. This has significant implications for old age, affecting the retirement patterns, income security and social networks of men and women. Public policy must take into account these differing life-course patterns.

The adoption of a life-course analysis supports the recognition of the diversity of older persons. Because of the impact of varying life-courses, diversity among individuals tends to increase, rather than decrease with age. Older adults are not a homogenous group, and understanding their experiences with the law requires a nuanced

understanding of the impact that differences in economic status, geographic place of residence, early education opportunities, work experience, age, gender, racialization and multiple other factors play in their experience of law.

4. A Principles-Based Approach

The LCO is building on the foundation established by the NFA and the IPOP, as well as the work done in developing the *Seniors Mental Health Policy Lens* and the *Prevention of Elder Abuse Policy and Program Lens* in basing its approach to the law as it affects older adults on a set of principles. Principles can provide a normative framework for the law and identify the goals which laws and policies ought to seek to achieve with respect to older persons. A framework that is based on principles can provide guidance while remaining flexible and applicable in changing circumstances.

Identification of these principles, while important, is a starting point rather than an end point. The difficult task remaining is to develop a nuanced understanding of what these principles could and should mean in the context of the lives of older adults, and providing a practical guide to their implementation in a legal setting.

In certain situations, the principles themselves may be in tension and it may therefore be necessary to determine how those tensions might be resolved. This presents a challenge in the implementation of a principles-based approach, but has the benefit of providing a means of articulating and analyzing the complexities inherent in the law as it affects older adults.

Finally, as part of a principles-based approach, one must recognize that even where one would aspire to implement all the principles to the fullest extent possible, there may be other constraints that might limit the ability of law and policy makers to do so. These constraints may include policy priorities or funding limitations among others. That is, it may be necessary to take a progressive implementation approach to the full realization of the principles. A progressive implementation approach involves concrete, deliberate and targeted steps implemented within a relatively short period of time, with a view to ultimately meeting the goal of full implementation of the principles. At the same time, recognition of the principles allows us to identify the distance still to go to reach the ultimate goal of anti-ageist law.

5. Including the Perspective of Older Adults

While principles provide an essential normative element for a framework, any work on issues related to older adults must nonetheless be grounded in the lived experiences and circumstances of older adults themselves. Principles which do not reflect and respect the circumstances and experiences of older adults will lead to ineffective programs, policies and laws. Therefore, an emphasis on the experiences and perspectives of older adults will be central to the framework itself, including the application of the framework to development of particular areas of the law.

Reflecting this, the LCO is committed to consulting directly with older adults in developing the final framework, and ensuring that the voices and perspectives of older adults are reflected in the outcome of this project.

6. Providing a Starting Point

Elder law itself is a relatively new field. Although in the United States work on these issues pre-dated attention in Canada and the *Older Americans' Act* of 1965 drew attention to issues of nutrition, socialization and housing for older persons, it was not until 1979 that the American Bar Association established its Commission on the Legal Problems of the Elderly, and it was not until the mid-1980s that the National Academy of Elder Law Attorneys was formed.¹⁴

In Canada, there are very few elder law courses taught in Canadian law schools and the legal academic literature is relatively sparse. Specialized legal practitioners are rare. Until recently, ACE was the only legal clinic in Canada with a mandate focused on the needs and experiences of older persons.

However, this is changing. The voices of older adults are increasingly heard in society at large, and more attention is being paid to the experiences of older adults with the law. Concerted advocacy by older persons led to the repeal of laws permitting mandatory retirement in Ontario and British Columbia, and highlighted the importance of laws taking into account the needs, rights and circumstances of older adults. A new specialized clinic for older persons has very recently been opened in British Columbia, and there are projects across Canada aimed at making the law more accessible to older adults. CCEL has brought a concentrated law-reform focus to the needs of older adults.

This is therefore very much an evolving area of the law. The LCO recognizes that this project cannot provide the final word in this area; rather, it aims to provide a solid foundation for further research, analysis and debate.

C. Some Comments on Terminology

There is no generally accepted term used to refer to persons who are “older”. Terms in common usage include “seniors”, “elders”, and “older adults”. The terms “Third and Fourth Agers” are also in use, although more rarely.¹⁵

The term “seniors” is widely used, and is perhaps the most common term in general parlance. It is frequently used in government, particularly in association with age-specific government programs such as pensions and income-supports. As such, it is often associated with a chronological approach to aging and used to identify those who have passed the legal threshold for qualifying for important programs such as Old Age Security and the Canada Pension Plan. For these reasons, Statistics Canada uses the term specifically to refer to persons age 65 and older.¹⁶

The terms “elders” or “the elderly” are somewhat less commonly used, partly because of the potential confusion between the use of the term to refer to older persons as a general group and the use of “elders” to refer to Aboriginal Elders, and partly because the term “elderly” has connotations of frailty and dependence that may reinforce stereotypes.

The terms “older adults” and “older persons” have become increasingly popular, particularly in the international and the human rights spheres. They emphasize the relative nature of aging and avoid the negative connotations associated with some other terms.

For the purposes of this Interim Report, the term “elder” will be used only to refer to those persons within the Aboriginal community who fulfil the particular cultural and community role associated with Elders. The term “seniors” will be used where a reference to chronological aging is important, i.e., where the issue is qualification for a particular program or benefit that includes a specific older age (usually age 65) requirement. For other purposes, the LCO will use the terms “older person” or “older adult”.

Depending on how it is defined, “old age” can embrace a very considerable span of time, covering thirty years or more. Over such a lengthy span of time, the circumstances of any individual are likely to change appreciably, such that the term obscures significant variance in circumstances. Therefore, older adults are frequently broken down into subgroups – the “young old” aged 65 to 74, the “middle old”, aged 75 to 84, and the “old old” or “frail old” aged 85 and older – on the basis that there are significant differences in health, participation, income, living arrangements and other key indicators among these three groups.¹⁷ Some have raised concerns that, while the use of these subgroupings aims to reduce stereotypes about older adults, the terms retain the problem of obscuring the great individual diversity in the aging process, and may only succeed in pushing ageist stereotypes and attitudes further back, onto the “frail old” sub-group¹⁸; therefore, this is not a practice that the LCO will adopt.

II. TAKING THE CIRCUMSTANCES OF OLDER ADULTS INTO ACCOUNT

A. Taking Older Adults into Account

The starting point of an anti-ageist approach to the law is to recognize the existence of older adults as a group who may in some respects have different needs and experiences than younger persons, whether due to the accumulated effects of their life-courses, social structures, or marginalization and stereotyping of older persons. With this recognition, as part of respecting older adults as valued citizens, one must take those particular needs and circumstances into account when designing laws, policies and programs.

As is discussed at some length in Chapter III of this Interim Report, there are a number of widely held stereotypes regarding older adults. If legislation or policy is based on stereotypes, it is likely to have negative effects on this population. In order to avoid this, it is important to consult directly with older adults themselves, and hear their experiences and perspectives. As well, recourse should be made to recent research regarding older adults, so that law, policies and practices are based on evidence rather than assumptions.

A difficulty in designing laws or policies that acknowledge the needs and circumstances of older adults is that older adults are an extremely diverse group. “Older age” spans several decades, and older persons as a group incorporate all of the diversity of the population at large in terms of racialization and ethnicity, sexual orientation, health and disability, education and socio-economic status, citizenship and immigration status, marital and family status, and other characteristics. Contrary to attitudes that see age itself as overwhelming all other forms of diversity to create a homogenous group of older persons, differences tend to be magnified rather than minimized over the life-course. Therefore, one must consider older adults, not as a single group, but as a broad category that contains many groups within it that may share commonalities around some experiences, but may also diverge in many ways.

The following sections of this Chapter outline some basic elements of the experiences of older adults. It is clearly not intended to be exhaustive: this would be beyond the range of possibility for any but the most voluminous document. Rather, it is intended to

suggest some factors with respect to older adults that should be taken into account when designing laws or policies.

Further, this discussion of the experiences and circumstances of older adults focuses on those aspects that may impact older adults' relationship with the law. Chapters IV and V of this Interim Report outline some key aspects of *how* older adults interact with the law, including some laws that older adults are particularly likely to interact with and the ways in which they may access law and the legal system. For example, older adults are likely to encounter the law in the context of ongoing relationships, whether with family members or with key institutions, like long-term care homes. As another example, the law is likely to be relevant at key transition-points in the lives of older adults – from paid employment to retirement and access to income security programs, for example, or from living in their homes in the community to some form of supported or congregate living. This Chapter's brief consideration of the circumstances of older adults is intended to assist in understanding that legal and policy context.

It should be noted that while there may be some aspects of the lives of older adults that are closely tied to biological aspects of aging and can therefore be assumed to be reasonably constant, none of the characteristics outlined below is carved in stone. The circumstances of older adults are shaped by their life experiences, and given the rapid social changes over the last century, those who are entering into older adulthood now will have had very different life experiences from those who are currently in their 80s and 90s with respect to opportunities for education, employment options and patterns, gender roles and many other factors. Further, the lives of older adults are very much shaped by current social structures and realities, and these are also in flux. Options regarding living environments and home care; the availability of informal care due to changing family structures; the impact of the current economic climate on pensions, savings and investments – these are just a few examples of how constraints and opportunities for older adults are constantly changing. Law reform must be based on current research as well as look ahead to potential trends for the future.

B. Who Is An “Older Adult”? Approaches and Definitions

As a threshold issue, there is considerable debate over definitions in this area. Should age be used as a category at all? What is meant by “old (or older) age”? Who should be considered an “older adult”?

1. Age as a Category

The use of age as a way of categorizing people is so common a practice as to be almost unnoticeable. Our ages mark expected stations on our life-course – times when we are expected to receive an education, to be part of the labour force, to establish a family, to retire. Youth and age are often associated in the popular imagination with particular qualities; for example, youth with energy, curiosity and exploration, and age with wisdom and perspective.

Law also commonly uses age, at both the older and younger ends of the spectrum, as a category on the basis of which distinctions may be made. Older age is often a requirement for accessing particular benefits such as pensions or income supports, or a marker for additional responsibilities such as seniors' drivers testing, or the basis on which particular activities or benefits are restricted, as with mandatory retirement or employment benefits.

With growing attention to social policy issues related to older adults, and to barriers and negative attitudes faced by older adults, there has been a move to re-examine the use of age as a category: a notable example is the Law Commission of Canada's project, *Does Age Matter? Law and Relations Between Generations*.¹⁹ There has been a growing recognition that age distinctions, like distinctions based on race, sex, sexual orientation or disability, are not always based on need and can be hurtful, undermine the dignity of older persons and have significant negative impact on older persons. The Ontario Human Rights Commission (OHRC) has noted that:

Age discrimination is not seen as something that is as serious as other forms of discrimination, despite the fact that it can have the same economic, social and psychological impact as any other form of discrimination.²⁰

Indeed, as is discussed in Chapter IV of this Report, some decisions of the Supreme Court of Canada suggest that age-based distinctions may be viewed in law differently (and less critically) than distinctions based on other enumerated grounds, such as disability or sex.²¹

Age-based distinctions may be based on ageist stereotypes about the abilities, worth and contributions of older persons. They may also themselves reinforce ageist thinking: it has been pointed out that the use of categories is unavoidably homogenizing and can foster tensions between social groups.²² The use of age as a category over-emphasizes

the importance of chronological age in determining a person's likes and dislikes, abilities and limitations, hopes and fears, and tends to blur the perception of older adults as unique individuals. The Law Commission of Canada pointed out that:

The categorization of people into age groups for the purpose of awarding benefits or imposing restrictions has a number of disadvantages. Categories lead to comparisons and encourage people to emphasize differences between age groups; this can lead to stereotypes and incorrect assumptions. Categorization can also fail to recognize similarities between age groups and differences within age groups.²³

The focus on making distinctions and counting people “in” or “out” based on certain characteristics may detract from the principle of “inclusive design”. That is, instead of focusing on characteristics assumed to be associated with age and aging, one might more productively focus on how to design programs and policies to include the needs and circumstances of all, regardless of age or abilities.²⁴ This does not or should not mean ignoring differences, including those based on age or abilities; rather, it requires us to recognize variation as part of the human condition and to embrace that variation to the degree possible in our plans and designs.

A number of alternatives to the use of age as a category have been proposed, including focusing on key transition points (such as withdrawal from the labour force or relocation into a long-term care setting), using generational criteria, or using self-identification.²⁵ Of course, these alternatives may not all be appropriate for all purposes - it is, for example, hard to imagine an income support program based on self-identification - and may frequently be more complex and expensive to implement than age-based categories.

However, while use of age categories risks reinforcing ageist thinking, it is at the same time indispensable in identifying and describing institutionalized ageism. Without the use of age as a marker in social science research, we would not, for example, be able to identify and attempt to redress age-based disparities in income, access to opportunities or provision of services. Ageism cannot be combated without measuring differences across the lifespan. Given that this Project aims to develop an anti-ageist approach to the law, the Project must consider what is meant by older age, at least for the purposes of this Project.

This does not mean, however, that age is always appropriately used as a category. The use of explicitly age-based categories in law and policy will be considered at some length in Chapter IV of this Interim Report.

2. *Approaches to a Definition*

If one accepts the necessity of using age as a category for some purposes, that leaves still the difficult question of how to define membership in that category. If “old” and “young” or at least “older” and “younger” are useful distinctions to make, how ought one to make them? Again, there is no consensus on this question.

It has been pointed out that the labels of “young” and “old” are by their nature relative and elude rigid compartmentalization:

In the context of youth and aging, the slippery and socially constructed nature of our categories becomes especially clear. The human life span is a continuum. Yet for many purposes, society describes the aging process in a series of near water-tight compartments: federally defined childhood ends and adulthood begins at exactly 18 years of age, and adulthood gives way to old age at 65. There may be defensible physical, psychological or developmental reasons for setting these general boundaries. More importantly, they are socially, legally and politically meaningful.... But there is an element of arbitrariness in our line drawing.... [T]he aging process is both an individual and a gradual one: we will not all be equally situated physically, mentally or even financially when we reach 65. Nor will we wake up old one morning, simply because we have received our first pension cheque.²⁶

There are three commonly adopted approaches to defining “old age” or “older age”: chronological, socially constructed, and self-identification.

The Chronological Approach

Despite the relative nature of age and aging, it is still extremely common to find definitions that are based on a particular chronological age, although the precise age adopted may vary. For example, on the international stage, the World Health Organization has adopted age 60 as its transition point into “old age”. In Ontario, “senior’s discounts” and other privately-based seniors’ programs may be based on a range of ages, including 55, 60, and 65. In Canada, the age of 65 has often been used as a marker for access to many benefits and programs because for many years it has been closely associated with the major life transition of withdrawal from the labour force, a life transition which results in significant changes in income levels and sources, activities, expectations and social status.

Changes in labour force patterns and the removal of protections for mandatory retirement requirements in most of Canada have weakened the association between age 65 and withdrawal from the workforce, a trend that is likely to continue. As well, improvements in health and life expectancy mean that age 65 is not now generally viewed as a particularly advanced age.

Still, the common association of age 65 with a transition to the status of a “senior” and its value as a clear, easily measured and understood marker means that age 65 continues to be commonly used as a marker of “old age” by many laws and social institutions. For these reasons, Statistics Canada used age 65 as its marker in drawing a statistical portrait of Canada’s senior population.²⁷

Social Identity and Public Perception

Despite its clarity and simplicity, the use of a single chronological point in order to mark transition into old age has significant drawbacks since individuals age at different paces, both biologically and socially. As a result, some have adopted more comparative and relativistic approaches to “older age” and “older adults” that recognize the social dimensions of aging. The OHRC, in its *Policy on Discrimination Against Older People Because of Age*, adopted the following definition:

The term “older” is not meant to denote “old age” or stigmatise persons in any way. Rather it is simply being used as a relative concept, meaning older than those who are less likely to face the particular types of discrimination being discussed.

It is important to remember that the concept of who is an “older” person may be a contextual one. For example, while older workers are generally those over age 45, if the average age in a workplace is 25, a 37 year old job applicant may be turned away because of a perception that she is unable to fit in with the workplace culture. Therefore in some situations, for example where the allegation pertains to negative attitudes and stereotypes about aging, it may be necessary to think not in terms of absolute, but rather relative age. In other contexts, actual age may be relevant, for example, where a person’s age is used to determine eligibility for a program or service.²⁸

The two approaches are not necessarily inconsistent or irreconcilable, as the most appropriate approach for the purpose of combating negative attitudes towards older persons and ageist discrimination may be different from the one most appropriate for describing the demographic characteristics of Canadians. However, they do point to

two different aspects of the social identity associated with aging. One aspect, associated with chronological age, is based in a bureaucratically managed identity, and generally serves as a convenient administrative proxy for more complex assessments of program eligibility. Our birthdates are frequently used by government to determine responsibilities and entitlements. Another aspect of aging is conveyed by the physical appearance of the body and the presentation of self in various social settings and is thus not particularly tied to a particular age or date.²⁹

Self-Identification

In its recent *Final Report*, the Senate Special Committee on Aging, in recognition of the diversity among older persons, avoided adopting any definition of “old age” or “older adult” at all, allowing readers to self-identify with respect to their potential status as older persons:

In the end, we leave it to the reader to define what they mean by seniors. There are as many ways to age as there are individuals aging. Some 60-year-olds may associate strongly with the term seniors. They may have a positive view of being a senior or elder. The term may be imbued with a sense of the wisdom which one acquires through life experience, or with well-deserved retirement from paid work.

Others may react strongly against the label “senior” and the meaning which is currently ascribed to it.

So we will use the terms “seniors” and “older persons” loosely and give full licence to the reader to determine whether or not these categories apply to them.³⁰

3. *The LCO’s Approach*

The focus of this Project is on how the law relates to older persons. The experience of aging is a complex interaction between biological changes (that will vary across individual experiences), the effects of the life-course, the constraints and opportunities offered by social structures, and the diverse identities of older adults. Given this complexity, and the multiplicity of the ways in which the law relates to age, it would be impossible for this Project to adopt a single definition of what is meant by an “older adult”.

In some cases, the law uses chronological age as a criterion for access to benefits, imposition of requirements, or denial of opportunities; in such situations, the bureaucratic aspects of age identity become central. In situations where those designing or administering the law may be influenced by age-related stereotypes or negative attitudes, a more comparative approach based on perceived social identity and the effect of ageist ideas is more appropriate. Self-identification may be helpful in reflecting the ways in which culture, individual experiences and social expectations affect the aging process.

In some areas of law and aging, multiple dimensions of aging may be at play. If we consider the interaction of the law with a resident of a long-term care home, factors at play may include the health-related declines that for some accompany the experience of aging; the presence or absence of social supports such as informal caregivers and advocates, or formal home and health-care supports; the attitudes of family and friends, as well as of long-term care staff towards older persons; and the hopes and expectations of older persons themselves about their rights, their living environments and the quality of their lives. To add even greater complexity, one might consider the potential effects of gender or placement in a particular age-cohort: for example, for older women, social expectations, access to education, caregiving roles, and labour force segmentation will have profoundly shaped the financial and social resources which they bring to the experience of congregate living.

This Project includes in its scope all those who have been identified as “old” or “older”, whether through legal and policy frameworks, social attitudes and perceptions, or self-identification.

C. Understanding the Circumstances of Older Adults

This section provides a brief outline of some key aspects of the lives of older adults as a foundation for understanding when and how older adults’ needs and circumstances, and thereby their relationships with the law, may differ from those of younger persons. Given the confines of space and the diversity among older adults, this is not intended to provide an exhaustive description; rather, it is intended to point towards some key considerations that are particularly relevant to the relationship of older adults with the law.

Further, it is important to remember that as a result of ongoing demographic shifts, changing social attitudes and rapidly evolving legal and policy landscapes, the circumstances of older adults are constantly changing. At the same time that the move away from legislated mandatory retirement may open up new opportunities for economic security for some older adults, rapid economic change may undermine the security of those who have already withdrawn from the workforce. Recent reforms in Ontario to the laws governing both long-term care homes and the retirement homes sector may lead to profound change in the living environments of older adults. What is true now may not be true five years from now.

As well, the lives and circumstances of older adults are profoundly shaped, not only by current laws and policies, but by those in effect when they were children, young adults and middle-aged. For example, the literacy levels of those who are now older are the results of public policy decisions and socio-economic conditions that were in place decades ago. The challenges that now exist in ensuring that those who are now in their 80s have access to the information they need about their rights and responsibilities have their sources in long-past decisions by governments, families and individuals.

This has two implications for any evaluations of law and policy with respect to older adults. First, any laws and policies developed to address the circumstances of those who are currently older must be rooted in a solid understanding of how the life-courses of older adults have shaped their experiences and current needs. Secondly, to understand how laws and policies may affect older adults, it is important to consider how current laws and policies are shaping the lives of those who will someday be older adults. How might our laws and policies shape the older age of those who are now children, youth, or middle-aged?

1. *Older Adults in Canada and Ontario – An Overview*

Demographic Trends

It is by now hardly novel to state that the population of Ontario and of Canada in general is aging and will continue to do so as a result of the combined effect of low fertility rates, longer life expectancies, and the effects of the baby boom generation. In 1981, persons over age 65 made up 9.6 per cent of Canada's population. In 2005, that figure was 13.1 per cent. It is projected that by 2036, persons over aged 65 will make up approximately one-quarter of Canada's population.³¹ The share of the population over

age 65 is actually slightly lower in Ontario than the national average, at approximately 12.8 per cent in 2005.³² Regardless of the proportion of the population that falls within the category of “older”, it would be important to give consideration to the needs of older persons in the design of laws; the expansion of this demographic makes the need more pressing.

Education and Literacy Levels

Education levels are important to take into consideration in understanding the circumstances of older adults, not only because they influence how information may be accessed, but because they have a significant relationship with other key aspects of the lives of older adults. Higher levels of education are associated with, for example, better health and reduced likelihood being low-income or socially isolated.

Overall, education levels are lower among older adults than among the general population; however, this is changing. The widening of access to higher education beginning in the 1960s has resulted over the past 20 years in significant shifts in the levels of educational attainment among older adults. The share of older adults with less than high school education has been steadily shrinking, while the share of those with some postsecondary education has been increasing. This is true for both men and women, and given current levels of educational attainment, this shift will continue. Currently, just under half of men aged 65 and older have less than a high school education, while less than 10 per cent have a university degree. A study conducted in 2003 found that over 80 per cent of Canadians over the age of 65 had prose literacy levels considered below the desired threshold for coping well in a complex knowledge society, as compared to roughly 40 per cent of those aged 16 to 45, and approximately 45 per cent of those aged 46 to 55. There were similar levels of low numeracy. Again, the literacy and numeracy levels of older adults are likely to increase in the future, based on current educational trends.³³

Information and computer technology has become increasingly important as a means of communicating and accessing information. Among seniors, home access to personal computers and to the internet has been steadily increasing, although rates of home access are still much lower than for younger age groups. Senior men are more likely than senior women to use the internet or e-mail, and higher levels of education are associated with a greater propensity to use information or computer technology. Seniors tend to be much less comfortable than younger users with installing or

upgrading computer software, but most feel that their computer skills meet their current needs.³⁴

Labour Force Participation

Approximately one-quarter of Canada's labour force participants are age 50 or older. While labour force participation does decline with age, in 2004 there were just under 300,000 Canadians aged 65 or older in the labour force.³⁵

Labour force participation by older persons has been in flux over the past 30 years. While rates of participation for older men fell between the mid-70s and mid-90s, between 1996 and 2004, the rates of participation for older men increased steadily and significantly, both for those aged 55 to 65 and those aged 65 and older.³⁶ While labour force participation rates for older women continue to be significantly lower than those for men, they have been steadily increasing since the 1970s. In 2004, the participation rate for women aged 55 to 64 was 49 per cent, and for women age 65 and older, it was 11 per cent.³⁷ For both men and women, those with a university education are more likely to remain in the labour force as they age: this is particularly true for those aged 65 and older.

With changes in occupational structures, such as the rise in non-standard work and the decline in the number of workers covered by registered pension plans,³⁸ surveys indicate that the proportion of Canadians who wish to work past age 65 or as long as their health enables them to work have continued to grow: in 2003, 26 per cent of those contacted by a Decima poll expressed this view.³⁹

A significant and stable proportion of older workers are engaged in part-time work. Over one-third of working men over the age of 65 work part-time hours, while about ten per cent of those between the age of 55 and 64 do so. For women over age 65 in the labour force, almost two-thirds are engaged in part-time work, while about one-third of those between the ages of 55 and 64 are.⁴⁰ Overall, older persons are considerably more likely than younger ones to be engaged in part-time work. They are also more likely to be temporarily employed or self-employed. The Report of the Expert Panel on Older Workers stated that,

A large proportion of older workers have non-standard forms of employment. These types of work arrangements can afford older individuals a significant degree of flexibility in their lives. Older workers can better manage the balance between work

and family, and retired workers can re-enter the labour force, participate at a level they choose, supplement their retirement income and be involved in meaningful work.

Yet the growth in part-time employment could also reflect lack of full-time work opportunities and part-time or other non-standard jobs may not always be the first choice of older workers... While non-standard employment offers older workers the opportunity for increased choice and flexibility in how they participate in the labour market, many wish to contribute and be productive through full-time employment.⁴¹

While older workers generally fare well in the work force, some older workers are vulnerable. Among unemployed older workers, a high proportion of those aged 55 to 64 lose their jobs involuntarily, and once unemployed, older workers tend to stay unemployed longer than average. The incidence of long-term unemployment tends to increase with age.⁴²

There are a number of other challenges facing some older workers. For example, they may be concentrated in declining industries; they may have difficulty accessing training and education; and they can face high costs of adjusting when they experience a job loss (for example, the costs of relocation).⁴³

Older workers may also face a range of negative attitudes from employers or potential employers that may make it more difficult for them to find or retain work. In its report on its consultations on discrimination against older persons because of age, the OHRC reported that:

The input received on workplace age discrimination served to confirm the problems identified in the Commission's Discussion Paper. In particular, many reported that stereotypes and negative attitudes towards older workers (starting as early as age 45) are commonplace in the workplace. This includes assumptions that older workers are less ambitious and hardworking, less dynamic and unable to learn new things. People reported being denied training opportunities and opportunities for advancement and being terminated because of age. Others recounted the difficulties they had in finding employment due to their age...Many people agreed that older workers bear the brunt of workplace reorganization and downsizing.⁴⁴

Income Security

In terms of income security, the financial situation of Canadian seniors has improved significantly over the past 25 years, with their average before-tax income increasing by close to 25 per cent over that time frame, and rates of low-income dropping

significantly, regardless of what measure of low-income is adopted. This is true for all groups of older adults, whether male or female, or single or married.⁴⁵ However, disparities remain when groups of older adults are compared, and some have benefited more than others from the increase in income.

In 2003, the rate of low-income among seniors was 15 per cent, if measured based on the Low Income Cutoff before taxes, or approximately seven per cent, if measured based on the Low Income Cutoff after taxes.⁴⁶ Unattached seniors were much more likely to be low-income than married couples. The highest rate of low income, if using the Low Income Cutoff before taxes, is that among unattached women at just under 19 per cent. Because of the impact of historic gender roles, many senior women are dependent on their spouses for income security, and widowhood may result in a slide into low-income.⁴⁷ The rate of low-income among older adults is now lower in Canada than in most other industrialized countries, including Sweden, the United States, and Britain.⁴⁸

The wealth of seniors has also increased over the past 25 years. In 1999, the median wealth of a family headed by a person aged 65 or older was \$126,000. Approximately three-quarters of older adults aged 65 to 74 reside in their own homes and most of these own their homes mortgage-free. Rates of home ownership decline for those aged 75 and older.⁴⁹

A key factor in the increase in incomes for seniors has been the maturation of the Canada Pension Plan and the creation of various income support programs for older adults. CPP/QPP payments now make up approximately 20 per cent of the income of older adults. As well, over 95 per cent of seniors receive income from Old Age Security, Guaranteed Income Supplement or Spouses Allowance. Seniors have also benefited significantly from improvements in private pension plan coverage in the post-war years. In 2003, close to 70 per cent of men aged 65 and older, and just over half of all women were in receipt of income from a private pension plan.⁵⁰

However, as noted above, membership in registered pension plans is declining, indicating that in future, older adults may be less financially secure.⁵¹ Further, not all seniors have access to these benefits. Immigrant seniors, for example, cannot access Old Age Security until they have been resident in Canada for 10 years, a policy that has been identified as having a significant impact on the financial and psychological security of immigrant seniors.⁵²

Statistics Canada figures from 2008 indicate that recent economic upheavals in Canada may be having a significant effect on the income security of seniors, who may be heavily reliant on income from investments. Between 2007 and 2008, the number of seniors living below the after-tax Low Income Cutoff increased by 18 per cent – the most substantial increase for any age group.⁵³

The Living Environments of Older Adults

As with all of us, the living environments of older adults significantly shape their overall well-being. A living environment is not just a physical residence, but a network of supports and relationships, and it exists as part of a larger community. In considering the effects of a particular living environment on older adults, one must consider not only the attributes of the physical dwelling, but how well it provides the older adult with security, access to necessary supports and services, and the opportunity to remain engaged with and part of the larger community.

Not all older adults require specialized supports in order to retain their physical, psychological and emotional security, exercise their autonomy and live full lives, but for those who do, the opportunities that are presented by their environment to access informal or formal supports are crucial to their well-being. The quality of a living environment therefore cannot be assessed in isolation from issues surrounding the availability of supports.

Due to the health and activity limitations that are associated with aging for many older adults, transportation options and the physical accessibility of the community are crucial.

The key principle that has been enunciated for the living environments of older adults is that of aging in place. This reflects the expressed preferences of older adults. According to a recent survey, almost 80 per cent of Canadians surveyed believed that aging at home offers a better quality of life, citing greater comfort, independence and the opportunity to be closer to family. The older the survey respondents, the more strongly they expressed their preference to remain at home as they age.⁵⁴ Aging in place is also considered a more cost-effective approach to aging, since long-term care in an institutional setting is expensive to provide.⁵⁵ The principle of aging in place has been incorporated into all of the key Canadian policy documents related to older adults, including the *National Framework on Aging* (NFA), the OHRC's report on human rights and older persons entitled *A Time for Action*, and the *Final Report* of the Special Senate

Committee on Aging. However, in reality aging in place may often be more of an ideal than a lived practice. Not infrequently, older adults are compelled to change their living environments in order to obtain supports, find affordable housing or locate an accessible environment.⁵⁶

The living environments of older adults are diverse. Some key aspects of the living environments of older adults are briefly highlighted below.

Geography and Aging: Overall, Canada is increasingly urban. In 2001, almost two-thirds of Canadians lived in large urban centres. At that time, approximately 70 per cent of those over age 65 lived in an urban centre with at least 50,000 inhabitants. About 23 per cent of Canada's seniors live in rural areas. Most of these seniors, however, are living in rural areas that are fairly closely integrated with a nearby metropolitan area.⁵⁷

Older adults who live in northern, rural or remote communities face special challenges. For example, lack of transportation may create significant difficulties for those older persons who are no longer able to drive, as many of these communities have no public transportation, and necessary services may not be located nearby. Older adults may become isolated, and their physical, mental and emotional well-being may be put at risk.⁵⁸

Older Adults in Privately Owned Homes: The vast majority of older adults live in private households – about 93 per cent of those age 65 and older do so.⁵⁹ In most cases, older adults own their own homes rather than renting, and live in houses rather than rental apartments. As noted above, the preference of the vast majority of older adults is to continue to live in their own homes as they age; however, they may face a number of challenges to doing so.

- Most homes do not have the accessibility features necessary for those who develop significant mobility disabilities. There are some programs through the Canada Mortgage and Housing Corporation that address this on a limited basis.⁶⁰
- Although older adults are disproportionately home owners compared to younger Canadians, because most live on a fixed income they may be “house rich but cash poor” and face financial barriers to remaining in their homes. The cost of major home repairs or significant property tax increases may make their homes unaffordable. For this reason, older adults may look to financial instruments such as reverse mortgages to meet their financial needs.⁶¹

- Further, home care supports are often expensive or difficult to access. The *Home Care and Community Services Act, 1994* sets out a framework for the delivery of in-home services in Ontario.⁶² As is described in greater length in Chapter VII of this Interim Report, while the Act provides for community support services, home-making services and personal support services, in practice the requirements for eligibility for such services are not transparent, and access is dependent on funding envelopes.⁶³ Lack of access to formal or informal supports for activities of daily living such as shopping, cleaning or cooking may make it impossible for older adults to remain at home. The Special Senate Committee on Aging suggested that the government develop a national home care program, as well as provide better supports to informal caregivers, such as respite care or expanded compassionate care benefits.⁶⁴

Older Adults and Rental Housing: In 2006, just over one-fifth of individuals between the ages of 65 and 74 were renters, as were 28 per cent of those aged 75 and older. Some older adults have been renters most or all of their lives. For former home-owners, widowhood is frequently the impetus behind a transition from home ownership to rental housing.

Older adults living in rental housing may face difficulties and barriers due to minimum income requirements. As well, landlords may be reluctant to rent to older persons for fear that they will become disabled – and therefore a “burden” – in the future. Where older adults do need accommodations that require modifications to their unit or the apartment building, landlords may be reluctant to undertake the expense and may try to encourage the tenant to leave.⁶⁵

Over half of renters between the ages of 65 and 74 and close to two-thirds of those aged 75 and over experience housing affordability problems. Older adults who rent are typically less financially well-off than other older adults, and are typically widows who live alone. Older adults represent one-quarter of the applicants for social housing in Ontario.⁶⁶

Social housing is an important program for many vulnerable citizens, including older adults. Social housing in Ontario is delivered through a complex network of services and providers. Social housing providers include private, cooperative and municipal non-profit corporations, as well as local housing corporations. Funding may come from the federal, provincial or municipal governments. Social housing may take the form of affordable housing units, non-profit housing, co-operative housing with rent-geared-to-

income, and supportive housing that provides personal support and homemaking services for the frail elderly and persons with various types of disabilities in a community residential setting.⁶⁷

Provisions for seniors' social housing are generally found under municipal by-laws and policies. Many municipalities make provision for specialized social housing for low-income seniors. For example, the City of Kingston has eight social housing projects that house either "seniors" only, or a combination of older adults and persons with disabilities. Kingston has a "cascading" admissions policy for its seniors housing: persons aged 65 and older are prioritized on its waiting list, followed by those aged 60 and older, and then those aged 55 and older.⁶⁸ The City of Toronto operates over 19,000 seniors-only social housing units (including those which are rent-geared-to-income and market rents in non-profit, municipal or cooperative housing).⁶⁹ The City of Toronto has established aged 59 as the minimum age to qualify for housing. Peel Region has 32 buildings dedicated to housing for persons aged 65 and older, whether rent-geared to income, market rent or subsidized housing.⁷⁰

"Retirement Residences": An increasing number of older Ontarians live in "retirement residences", or "care homes" as they are termed under the *Residential Tenancies Act*. It is estimated that there are over 700 homes providing services to approximately 40,000 older Ontarians.⁷¹ The services and supports provided by retirement homes range widely. These homes may be very large or very small. Some offer only minimal assistive services while others essentially operate as private long-term care facilities.⁷² Concerns have been expressed that the retirement home sector is evolving towards a private sector parallel to long-term care homes, rather than providing a much-needed "middle option" in a spectrum of supports for older persons.⁷³

Until recently, retirement homes in Ontario have been regulated mainly through the *Residential Tenancies Act* (RTA). The RTA by and large requires retirement homes to meet the same standards as other types of residential tenancies, but with some significant exceptions with regard to information for tenants, rent increases and evictions.⁷⁴ The lack of a legislated framework regulating the care portion of retirement home living has been the source of considerable concern and criticism, particularly given the shortage of long-term care spaces in Ontario and the fact that in some cases retirement homes are operating as "bootleg long-term care homes" with locked-in wards servicing high-need patients.⁷⁵

In 2010, the government of Ontario introduced the *Retirement Homes Act, 2010*,⁷⁶ which sets out certain minimum standards for the care and safety of residents, and includes a Resident's Bill of Rights. The statute regulates the retirement homes industry through a third-party regulatory model. The Retirement Homes Regulatory Authority is given the authority to issue or refuse licenses to retirement homes, or to impose conditions on licenses that are issued. The Authority has the power to appoint inspectors to ensure that licensees meet the requirements of the Act, and can receive and review complaints regarding contraventions of the Act by licensees. The Authority also has the power to make orders under the Act. While the government may appoint members of the board of directors of the Authority, the government may not appoint a **majority** of the members of the board. The majority of the directors shall be elected by the other members of the board.

Long Term Care: As noted above, the vast majority of older adults – 93 per cent – live in private households. Only seven per cent live in congregate settings such as nursing homes or hospitals. The likelihood of institutional living increases with age: approximately one-third of those over age 85 do so. Women aged 85 and older are significantly more likely than men aged 85 and older to live in an institutional setting. This is most likely because, as is noted below, gender differences in life expectancy together with the tendency for women to marry men who are older than themselves mean that women are more likely to outlive their spouses and to find themselves alone.⁷⁷

A number of groups have expressed concerns about the lack of appropriate long-term care services for their specific needs. For example, the cultural, linguistic or religious needs of older persons may not be adequately met through existing facilities. LGBT older adults may find themselves forced back into the closet through the lack of appropriate services and facilities. Deaf Canadians have raised the lack of TTY systems and lack of visual alarms in bedrooms and bathrooms in some long-term care homes, as placing the safety of Deaf older adults at risk and excluding them in their own living spaces. The Alzheimer's Society has raised concerns about the lack of specific treatments and services for persons with Alzheimer's Disease or related conditions. This is particularly problematic given that persons with dementia make up a very significant proportion of those living in long-term care facilities.⁷⁸

ACE has consistently raised a number of grave systemic issues facing older persons in long-term care, including "first available bed" policies that may place older adults in inadequate or inappropriate facilities; improper admission contracts; questionable

policies on detention and use of restraints; and a lack of accessible and effective complaints procedures, which may leave older adults vulnerable to abuse and mistreatment in their homes.⁷⁹

The regulation of the long-term care sector in Ontario is currently in transition. As of July 1, 2010, the *Long Term Care Homes Act, 2007* (LTCHA)⁸⁰ came into effect, replacing three statutes that previously regulated the sector in a patchwork fashion. The LTCHA provides a comprehensive scheme, covering licensing and funding of long-term care homes, admission of residents, standards for appropriate service provision, qualifications for staff, provision of information to residents, resident and family councils, the prevention of abuse and neglect, and complaints, inspections and enforcement. As the LTCHA is so new, it will take some time to evaluate its effectiveness in ensuring that long-term care homes provide safe, dignified and comfortable homes for their residents.

Family, Relationships and Caring

Older adults are no different from other human beings: their relationships are central to their lives, and the extent and quality of their relationships will significantly influence their overall quality of life.

Inadequate relationship support is associated not only with an increase in mortality, morbidity and psychological distress but a decrease in overall general health and well being. Disruption of personal ties, loneliness and conflictual interactions are major sources of stress, while supportive social connections and intimate relations are vital sources of emotional strength.⁸¹

Social interaction has a positive effect on both physical and mental health. Several studies have found that people with weak social ties are at greater risk of death, even when age, physical limitations and illness, and socio-economic status are taken into account.⁸² Older adults, like others, report that loneliness, isolation and the loss of loved ones have a major negative effect on quality of life.⁸³ The Alzheimer's Society reports that social interaction may have a protective effect against the disease, while the Canadian Coalition for Seniors' Mental Health has stated that:

Social support networks are particularly important for seniors as social isolation is known to be linked to depression and loss of autonomy. Community or institutional

based programs that provide social support to seniors help to ensure maintenance of mental health.⁸⁴

Older adults who are not socially connected are less likely to hear about available supports and services, and so are less likely to benefit from them.

Some older adults are more likely than others to experience social exclusion: these include those who live in low-income, those who are newcomers, those with disabilities, women, and those who are the oldest of the old. The Senate Special Committee on Ageing recommended that the federal government invest in research on the social networks of older adults, and that it support organizations that provide social supports for older adults.⁸⁵

Relationships and Living Arrangements: As individuals age, the likelihood that they will be living alone increases. This is particularly true for women. Just over one-fifth of older adults age 65 to 74 were living alone in 2001, while just over one-third of those aged 85 and older were living alone. Because of differences in life expectancy between men and women, and the tendency for men to marry younger women, the patterns differ between the sexes. For example, only 18 per cent of men aged 75 to 84 were living alone in 2001, while this was true for 43 per cent of women in this age group.⁸⁶

In general, the most common living arrangement for older adults is living with a spouse, although the frequency varies by gender and declines with age. Among men aged 85 and older, this was the most common living arrangement – 38 per cent of these men were living with a spouse – while it was the least frequent living arrangement for women of the same age, including only seven per cent of these women.⁸⁷ The numbers of older adults who have never married or who are divorced is increasing. For example, in 1981, only four per cent of women age 55 to 64 were divorced, but by 2001, this had increased to 11 per cent. This points to some potentially significant changes in the living arrangements of older adults in future years.

Most older adults have children: in 2001, fewer than 10 per cent of all those age 65 to 74 had no children. The average number of children for older adults is decreasing, however, as fertility rates decline. A significant proportion of older adults live with their children or grandchildren: just over 17 per cent in 2001. About four per cent of Canadians live in multi-generational households.⁸⁸

Older adults, like younger Canadians, generally report having friends, including close friends. However, the likelihood of having no close friends, or no friends at all, increases with age. For example, of older adults age 75 and older, 18 per cent reported having no close friends, compared to five per cent of those age 25 to 54. This may be partly because older adults are more likely to lose their friends to death, but it may also be attributed to the fact that older adults are less likely than younger ones to have opportunities to meet any new friends. For example, those aged 75 and older are the most likely of any age group to say that they have not met any new people in the last month (82 per cent).⁸⁹ However, older adults are more likely than younger ones to see or speak regularly to relatives (other than spouses and children) and to know and have relationships with their neighbours.⁹⁰

Caregiving and Supports: Where older adults become frail or disabled, their relationships with family and friends can make a significant difference to their ability to remain active, to continue to live in their home communities, and to their fundamental health and well-being. For example, through continuing powers of attorney under the *Substitute Decisions Act*, older adults may identify people that they trust to act as substitute decision-makers for them on issues related to property or personal care, should they lose legal capacity. Similarly, under the *Health Care Consent Act*, family members may be charged with making medical decisions for older adults who are unable to make those decisions for themselves. The way in which these fundamental powers are exercised will profoundly shape the lives and well-being of those affected. In these ways, the relationships of older adults will affect their ability to participate and be included, their ability to maintain independence and autonomy, and their basic security.

While older adults are often pictured as heavily dependent on loved ones for help with day-to-day tasks, statistics paint a more nuanced picture. Statistics Canada has noted that “Seniors are not the only, and maybe not even the principal, recipients of social support in society.”⁹¹ Older adults in general are not more likely than younger persons to receive help from someone not living with them with domestic work, transportation or running errands, and are *less* likely than younger adults to receive emotional support, coaching or practical advice. However, not surprisingly, those older adults who live alone are more likely to receive help with domestic work, transportation and errand running needs.

Not surprisingly, older adults are more likely than younger ones to be receiving help (from any source) because of a long-term health problem. This is particularly notable for those over the age of 85: only 16 per cent of those aged 65 to 74 are receiving help

because of a long-term health problem, while 60 per cent of those over 85 receive help for this reason. Older women are more likely than older men to require such help, particularly if they live alone. About three-quarters of those receiving help because of a long-term health problem receive it, at least in part, from informal sources. As individuals age, they are more likely to receive some or all of their help from formal sources: approximately 60 per cent of those aged 85 and older receive part or all of their help from formal sources.⁹²

As populations age, one of the greatest challenges in health policy is to strike a balance among support for self-care (people looking after themselves), informal support (care from family members and friends) and formal care (health and social services). Formal care includes both primary health care (delivered mostly at the community level) and institutional care (either in hospitals or nursing homes). While it is clear that most of the care individuals need is provided by themselves or their informal caregivers, most countries allot their financial resources inversely, i.e., the greatest share of expenditure is on institutional care.⁹³

Many individuals and organizations have expressed concerns about shortfalls in supports for informal caregivers. In both *A Time for Action*, its report on human rights and older adults, and in *The Cost of Caring*, its report on human rights and family caregivers, the OHRC has indicated concern with the impact on older persons and their families of a lack of supports for informal caregiving. The OHRC has recommended that government provide enhanced supports for older adults and those who are providing them with informal care.⁹⁴ The recent report of the Senate Special Committee on Aging also made several recommendations for government action on this issue.⁹⁵

It is often overlooked that older adults make significant contributions to their communities through the care they provide in their relationships with family and friends, whether it be as primary caregivers for ill or disabled family members, the familial supports they provide as grandparents, or the wisdom, advice and experience they share with those with whom they are close. A significant proportion of older adults provide help and care to others. For older adults under the age of 75, more report providing help to others than receiving such help. Younger older adults are more likely than those over age 75 to provide help with such things as domestic work, home maintenance or outdoor work (about a quarter of those age 65 to 74 report providing such assistance to someone not living with them), and to help with child care (22 per cent of those age 65 to 74). While those over age 75 were more likely to receive help with domestic work, errands and transportation than to provide it, they were more likely to provide emotional support, and teaching and coaching.⁹⁶ The United Nations,

through the *Madrid International Plan of Action on Ageing*, has urged greater recognition, respect and support for the contributions older adults make through their caring roles.⁹⁷

Domestic violence: Family violence makes up approximately one-third of the incidents of violent victimization of older adults. Older women are considerably more likely than older men to be the victims of family violence. Of older persons who were the victim of a violent incident in 2003, 40 per cent of older women were victimized by a family member, as compared to 20 per cent of older men. In family violence, most often the accused were male adult children (33 percent) and spouses (30 per cent). Another 15 per cent were male members of the extended family. Most family related assaults took place at home, between people who were sharing a residence.

Participation in the Community

Older adults under the age of 75 are just as likely as younger adults to be a member of a voluntary organization or association (at a participation rate of just over half), and to participate in group activities at least once a week. The likelihood of participation was slightly lower for those over age 75. Older adults are more likely than younger persons to be involved in religious-affiliated organizations, or in fraternal organizations and service clubs. However, older adults are less likely than younger adults to be members of or participants in sports and recreation organizations. Younger persons are also more likely to participate in school, neighbourhood, civic or community organizations. Likelihood of participating in organizations increases with education levels.⁹⁸

About 45 per cent of all Canadians did some volunteer work during 2004. Older adults are slightly less likely to volunteer (39 per cent of those aged 65 to 74 volunteered in 2004), but when they do, they tend to contribute more hours. For example, volunteers age 65 to 74 contributed 250 hours on average in 2004, approximately 100 more hours than those contributed by adults age 25 to 54. The most significant barrier to volunteering for older adults was health or physical limitations: over 70 per cent of those aged 75 and older gave this as their reason for not volunteering.⁹⁹

Older adults are more likely to vote, at all levels of government, than other age groups. In 2003, close to 90 per cent of adults age 65 and older reported voting in the federal election, as compared to 70 per cent of 25 to 54 year olds. They are significantly more likely to be regular voters than younger adults. They are, however, less likely than younger adults to sign a petition, boycott or choose a product for ethical reasons, or to

participate in a demonstration or march.¹⁰⁰ This may reflect changes associated with life stages, or it may reflect generational differences in modes of political participation.

2. *Intersecting Identities: Age and Compounded Disadvantage*

In keeping with the recognition that older adults are not a homogenous group, it is important to give thoughtful consideration to the ways in which the experience of aging may differ depending on an individual's gender, sexual orientation, racialization, Aboriginal identity, health impairment or disability, place of residence, socio-economic status, citizenship or immigration status, or other factors. This section is intended to provide a starting point for consideration of the practical effect of these different identities and life histories on the needs and circumstances of older adults.

Gender and Aging

Most older adults are women, and the older the age group examined, the truer this is. In 2005, while women made up 52 per cent of those between the ages of 65 and 69, they made up 75 per cent of those aged 90 and older.¹⁰¹ Although there is some expectation that the size of this discrepancy will decline as differences in life expectancies between men and women narrow, for now aging is, to a significant degree, a “women’s issue”. As one scholar has argued,

It is thus imperative that scholars examine and expose the legal framework defining the personal, health and income security of their oldest citizens in light of the reality that most elderly persons, as well as those who care for them, are women. Reform of elder law and policy must take account of this reality and assure that such “reform” does not exacerbate existing discrimination against and injustice towards women.¹⁰²

Older men and women differ on a wide range of measurements. Both because of longer life expectancies, and because women tend to marry older men, women are more likely than men to be widowed. This has a number of implications for income (particularly since women who are now older were less likely to participate in the labour force and therefore to have their own pensions and control their own money than younger women now are),¹⁰³ for caregiving (women, as they age, are less likely to have a spouse to provide for their care needs) and for living arrangements (such that older women are more likely than men to reside in congregate settings). Older women are also likely to have lower levels of educational attainment than their male contemporaries (another factor that will differ for younger generations). Since education levels have a close

relationship with a number of indicators of wellbeing, such as health and social isolation, this is significant.¹⁰⁴

While older persons in general are the subject of negative portrayals in the media, this is often particularly problematic for women. The United Nations *Madrid International Plan of Action on Ageing* notes that:

Women are particularly affected by misleading and negative stereotypes: instead of being portrayed in ways that reflect their contributions, strengths, resourcefulness and humanity, they are often depicted as weak and dependent. This reinforces exclusionary practices at the local and national levels.¹⁰⁵

Because of these realities, policy frameworks on aging often recommend that legislators and policy developers pay specific attention to the ways in which gender influences the experiences and circumstances of older persons.¹⁰⁶

Immigration and Older Adults

A very significant proportion of older adults are immigrants. In 2001, over one-quarter of persons aged 65 to 84 were immigrants. Most, however, arrived in Canada when they were young, and have lived in Canada for decades. Less than ten per cent of immigrant older adults in 2001 had arrived in Canada within the previous ten years. In any given year, persons aged over 65 make up between two and four per cent of immigrants and refugees arriving in Canada.¹⁰⁷ The number of recent immigrant seniors is therefore small. However, this is a group whose needs are important to take into account, as their circumstances are likely to be significantly more precarious than those of older adult immigrants who have had a lengthy residence in Canada. They will have less access to income support programs, may be dependent on their relatives to maintain their legal status in the country, may not know an official language, and are less likely to have significant social networks on which they can rely.¹⁰⁸

The changes in Canada's immigration patterns mean that immigrant seniors who are long-time residents of Canada are mostly likely to have come from Western Europe (54 per cent, in 2001). Older adults whose birth place was other than Canada or Western Europe are still a small minority of the total population of older adults.¹⁰⁹

Language

Almost all older adults can speak one of Canada's official languages. In 2001, only 4.5 per cent of older adults could speak neither English nor French. However, 13.5 per cent of those between the ages of 65 and 74 used a non-official language at home.¹¹⁰

There are approximately 160,000 francophone seniors in Ontario, out of a total Franco-Ontarian population of 576,000.¹¹¹ The Franco-Ontarian population is therefore somewhat older than the Ontario population as a whole. The proportion of seniors who are Francophones is higher in Northeastern and Eastern Ontario, as with the Francophone population as a whole.

Francophones aged 65 and older tend to have a higher rate of language retention (assessed on the basis of the language spoken at home for persons whose mother tongue is French), although language retention is decreasing among seniors, as among the population of Francophones as a whole.¹¹²

Francophones experience particular barriers in accessing government services, despite the guarantees of the *French Language Services Act*. The LCO was informed that:

l'un des obstacles à l'accès au système judiciaire pour la population de langue française (576 000 personnes de langue première français en Ontario) et en particulier pour les aînés (environ 160 000) est la faible disponibilité des services en français de qualité équivalente à ceux dispensés en anglais. La Loi stipule que les francophones ont le droit de se faire servir en français dans le domaine de la Justice, mais malgré les efforts indéniables du Ministère du Procureur général de l'Ontario en ce sens (Institut linguistique par exemple, progrès au sein de la Police provinciale de l'Ontario), il y a beaucoup de travail à faire, et peut-être des outils « créatifs » à développer pour atteindre l'objectif de parité de services.¹¹³

Racialized Older Adults

There is relatively little information available regarding older adults who are racialized. Ethno-gerontology, which studies the influence of race, ethnicity, national origin and culture on individual and population aging, is a relatively new field of study.¹¹⁴ Racialized persons make up an increasing share of the older adult population. Between 1981 and 2001, the share of older adults who were "visible minorities" within the definition of the federal *Employment Equity Act* increased from two per cent to seven per cent. The largest share of this group were Chinese Canadians (39 per cent), followed by just over

20 per cent who were South Asian Canadians, and 13 per cent African Canadians.¹¹⁵ The majority of these older adults live in large urban areas, which has some significant implications for the experience of aging.

Racialized older adults are more likely than non-racialized older adults to experience low income, particularly if they are female, with 25 per cent of older racialized women falling below the low-income cutoff, according to Statistics Canada figures.¹¹⁶

In its public consultation on human rights and older persons, the OHRC heard concerns regarding the manner in which service providers currently address the needs of various groups of older adults in terms of respecting the cultural and religious needs of some older persons. The OHRC indicated that service providers in all sectors must respect the identity and dignity of all persons and be sensitive to the diverse needs of older persons based on culture, religion, race or ethnicity.¹¹⁷

In initial consultation meetings regarding this project, the LCO heard that persons from some racialized communities may experience discrimination or racism in the receipt of services, and that the experience of discrimination over the life-course may make some groups of racialized older adults more hesitant to demand their rights or to seek help.¹¹⁸

Aboriginal People

Due to higher fertility and birth rates, the Aboriginal population in Canada is younger than the non-aboriginal population. In 2006, Aboriginal older adults made up five per cent of the Aboriginal population, or just fewer than 60,000 people. This may not, however, include all persons identifying as Aboriginal within urban areas. It is well-documented that Aboriginal peoples in general have lower health statuses, socio-economic status and literacy rates than the general Canadian population, as well as shorter life spans. The majority of First Nations and Inuit older adults have experienced unhealthy living conditions and poorer health for most of their lives, as compared to non-Aboriginal Canadians. Aboriginal peoples suffer from higher rates of chronic diseases such as diabetes, asthma and heart disease.¹¹⁹

It is important to note that among Aboriginal individuals, older adults form the highest proportion of those who know and speak their Aboriginal language. Aboriginal older adults who speak an Aboriginal language fluently or well are the most likely to consider both spirituality and traditional culture important. As a result, Aboriginal older adults

may constitute the most important link in sharing knowledge of traditions and language with younger generations.¹²⁰

Many Aboriginal older adults will have been significantly affected by residential schools experiences. Over 40 per cent of First Nations adults over the age of 60 and close to half of those aged 50 to 59 attended residential schools. It has been noted that, as a result of the residential schools experience, Aboriginal older adults are particularly at risk for low self-esteem and increased dependence resulting from devaluation of their cultures and loss of traditional ways of life. Residential school survivors may experience long-term physical, psychological and emotional effects of their experiences.¹²¹

Sexual Orientation and Gender Identity

There is a dearth of information about lesbian, gay, bisexual, transgendered, and transsexual (LGBT) older adults. The lives of LGBT older adults have been shaped by high historical levels of stigma, discrimination and marginalization, and many LGBT older adults will never have felt safe to publicly disclose their sexual orientation. As well, ageism within the LGBT community means that most organizations, programs and space have been geared towards younger persons. LGBT older adults are therefore largely invisible both in the older adult community and in the LGBT community, and may have significant difficulty in accessing safe and appropriate supports and services.¹²²

Health, Activity Limitations and Disability

For most individuals, aging is associated with a decline in general health, and the onset of various types of activity limitations. However, it is important not to exaggerate the extent of health limitations among older adults. While self-perceived health declines with age, 37 per cent of persons aged 65 years and older considered themselves in very good or excellent health in 2003, as compared to 63 per cent of those aged 25 to 54.¹²³

The life expectancy at birth for a Canadian born in 2003 was 80 years. Most of that life expectancy is likely to be spent in good health. In 2001, a 65 year old man could expect another 12.7 years of life in good health; the figure for females was 14.4 years.

Some chronic conditions disproportionately affect older adults. Arthritis or rheumatism is the most common of these conditions, affecting just over half of those aged 75 and older. Forty per cent of those over age 65 report living with high blood pressure. As well, older adults are particularly affected by eye-related problems, such as cataracts and

glaucoma. In 2003, about 70 per cent of persons over age 65 had some type of vision-related problem, but only 4 per cent had an uncorrected problem (a figure rising to 8 per cent for those over age 80). Alzheimer's disease and other forms of dementia are relatively rare at any age, but the risk increases significantly with age, so that approximately two per cent of all those aged 65 and older have been diagnosed with one of these conditions, again with incidence highest among the oldest of the old.¹²⁴

Although older adults are more likely to have activity limitations than younger persons, most older adults do not have activity limitations. In 2003, one in ten older adults aged 75 and older and living in a private household required help with personal care (such as washing, dressing and eating), as compared to one in one hundred adults aged 25-54. About one-quarter of older adults aged 75 and older required some assistance with housework. Mobility limitations become particularly prevalent for the oldest of the old, with close to half of all those aged 85 and older unable to walk or requiring mechanical or human assistance to get around, as compared to less than 10 per cent of those aged 65 to 74.¹²⁵

Contrary to stereotypes, most older adults are in good mental health and have a positive psychological outlook. Levels of psychological distress are highest for those aged 25 to 64, and lowest for those aged 65-74, with those aged 55-64 and 75 and older scoring similarly. The relationship between age and measures of perceptions of well-being is similar, with older adults having higher levels of self-perceived well-being than those aged 25 to 54.¹²⁶

As is discussed at greater length elsewhere in this Interim Report, because there is a correlation between increasing age, declining health and increased risk of impairment, age is sometimes used as a proxy for health and impairment. Age is considerably easier to measure than health or impairment. As is discussed at length in another of the LCO's publications, defining disability is complex and controversial, and often requires extensive adjudication mechanisms.¹²⁷ This makes the use of age as a proxy appealing, but the very brief overview above of the complex relationship among aging, health and impairment indicates how problematic such a use can be, particularly when it operates to reinforce inaccurate stereotypes and perceptions of older persons as non-contributing burdens on society.

Interestingly, despite the correlations among aging, health and impairment described above, and the parallels between ageism and ableism, there has been relatively little attention paid to the relationship between age and disability outside of the health care

field. Disability advocates rarely focus on the experiences of old people with disabilities, while anti-ageist organizations often fail to address the experience of disability in this group. There is a paucity of academic writing theorizing the intersection of age and disability.

It is important to acknowledge the two ways in which age and disability may intersect. Some persons are born with disabilities, or acquire them during adulthood and age with their disabilities. Others live without disabilities throughout childhood, youth and much of their adulthood, and acquire disabilities only as they enter old age. Members of these two groups will often have profoundly different life experiences, and will therefore experience their impairments quite differently. A person who is born non-hearing and who becomes part of the cultural Deaf community will have his or her social, educational and employment experiences significantly shaped by that fact. A person who is born hearing and acquires a hearing impairment in old age may have the same degree of hearing loss as a culturally Deaf person, but will have been shaped by a different life experience that has affected social networks, self conceptions, and, frequently, access to education and employment. These two hypothetical individuals with similar impairments will require different types of services and supports in old age. The differences are highlighted by the identifying terminology distinguishing between the Deaf, deafened, or hard of hearing.

Older persons may also be affected, not by the experience of disability *per se*, but by the perception that they will inevitably *become* disabled, and therefore will become a burden, or will be requesting expensive or administratively onerous accommodations or services.¹²⁸ The definition of disability in the Ontario *Human Rights Code* encompasses current disabilities, past disabilities and perceived disabilities, but does not explicitly address anticipated disabilities. However, in the *Mercier* case, the Supreme Court of Canada considered a situation where a person with a slight curvature of the spine, which caused no current impairment, was refused employment because the employer anticipated that, in the future, disability could or would result. The Court ruled that these facts fell within human rights protections for disability, stating that,

[A] multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap”. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.¹²⁹

There are similarities in the ways in which older persons and persons with disabilities are situated in society, particularly as both groups are largely excluded from the labour market, and therefore experience structural dependency and are not considered “adults”.¹³⁰ Both groups, being associated with impaired bodies and incapacity, evoke fear of vulnerability and death, and therefore are subject to social distancing. Persons with disabilities and older persons frequently experience social and locational segregation, living in specialized residential institutions, an experience that some have characterized as a kind of “social death”.¹³¹

However, there are some significant differences between the perceptions of younger persons with disabilities and those who acquire disabilities in old age. While impairment at birth or in youth is commonly characterized as aberrant, impairment and activity limitations in old age are commonly understood as “normal”, even a defining characteristic of this stage of life. As a result, older persons with impairments are often not viewed as “disabled” in the same way that younger persons with similar impairments are. Older persons may not be perceived as disabled unless they are unable to engage in the activities that a “normal” older person could. The onset of impairment, along with withdrawal from the workforce, may be the most important social markers of transition to “old age”. Impairment in old age may therefore not have the same disruptive impact on identity that it has at earlier life stages.¹³²

Considerable advances have been made in both the disability and the older people’s movements in recent decades. Interestingly, however, older persons are under-represented in the disability movement, especially considering the broad experience and impact of disability on older persons, and persons with disabilities have also been marginalized in some new ways of thinking about old age. As one author notes,

There is, then, a sense in which the political strategy of the [disability] movement has sought to distance disability debates from negative associations with old age and dependency by emphasizing adult-centred values and issues. Similarly, older people’s movements and movements for the Third Age have advocated ‘active ageing’ as a way to distance their claims from the negative imagery of disability and dependency.

In this way, the strategy of both older people’s movements and disabled people’s movements has been to articulate claims for recognition of adult status and citizenship by distancing their struggles from negative associations with the other. These parallel claims may well be benefiting those at the margins of inclusion (i.e., younger disabled people and older adults in their fifties and sixties) by allowing them to liberate

themselves from the imagery of frailty, dependence and burden so often attached to very old people with significant impairments.¹³³

These strategies, however, run the risk of further marginalizing a very disadvantaged group: persons of advanced old age with significant impairments.

The LCO, in conducting its project on the law as it affects disabilities, will employ an anti-ageist lens, and in conducting this project, will similarly bring an anti-ableist approach to bear in considering the experiences of older adults.

Intersecting Identities and Compounded Disadvantage

In keeping with the recognition that older adults are not a homogeneous group, and will have different circumstances, resources, life experiences and intersecting identities, it is important to acknowledge that some older adults are more likely to face disadvantage than others, or may experience disadvantage in different ways.

Older adults who have, throughout their life-course, been marginalized due to other aspects of their identity, carry the effects of that marginalization through into old age. For example, racialized or Aboriginal older adults who have faced direct and systemic discrimination in the labour force will, as a result, enter old age with lower savings, without private pension benefits, and with reduced Canada Pension Plan entitlements. Similarly, in the past, higher education was considered less important or less appropriate for women than for men. In old age, this may affect not only financial security, but may also affect the ability of women to effectively access information about their rights, act upon that information, and to enforce these rights.

The effects of lifelong marginalization may impact in subtle ways. Older lesbians, gays and bisexuals, for example, are more likely to have remained “closeted” as a survival strategy. This has a multitude of effects on the relationships of LGBT older adults. As well, the adoption of a survival strategy of silence and invisibility can compound the effect of the invisibility often imposed on older adults by ageism, with the result that the needs, and even the very existence, of LGBT seniors may go unrecognized. For example, there is a dearth of appropriate programming for LGBT seniors.¹³⁴

Multiple identities may result in uniquely compounded disadvantage. Women with disabilities experience a much higher rate of abuse of all types than either non-disabled women or men with disabilities; however, women with disabilities may have fewer

options than others for leaving abusive situations, for example, because women's shelters and transition houses are often not accessible.¹³⁵ Sponsorship requirements for older immigrants may create power imbalances within family dynamics that can result in abuse and exploitation, which is compounded by the fact that language and cultural barriers may make it especially difficult for these older adults to report or escape abuse.¹³⁶

Persons with some disabilities may experience some biological effects of aging at a different rate, or experience greater risk of developing additional disabilities. For example, persons with Down's Syndrome are at a significantly higher risk of developing dementia symptoms associated with Alzheimer's' Disease. As well, persons with intellectual disabilities who have lived with their parents throughout their lives may, as they themselves reach the threshold of old age and their parents reach advanced old age or die, find themselves suddenly separated from their lifelong support systems and thrown into substantial insecurity in terms of their supports and living arrangements.¹³⁷

Disadvantage may manifest *differently* rather than *disproportionately* in some circumstances. Elder abuse may take culturally specific forms, for example.¹³⁸ Older gay men may be particularly vulnerable to financial abuse or physical assault by younger sexual partners.¹³⁹

Similar outcomes may have a different effect on individuals depending on identity and life-course. The principle of "ageing in place" recognizes the importance to all older adults of maintaining their place in their home communities. However, the principle will have different meaning or impact for some communities. For a person who has lived with a disability for many years and has built up a community support network, the disruption of that network through a move away from the community may have a profound effect. For an immigrant senior who faces language barriers and has distinct cultural values, the move from independent living into a long-term care setting may be particularly disruptive. For a First Nations senior who has lived all of his or her life in their First Nations community, the impact of being required, due to lack of appropriate supports, to move away from his or her community in old age, will be unique. Aboriginal communities that have a special and unique role and value for their elders also experience a reciprocal impact from losing their elders in this way. As well, for Aboriginal persons who lived through residential schools during their youth, re-institutionalization in old age may hold a special trauma.¹⁴⁰

D. “Vulnerability”, Inequality, Risk and Older Adults

As is discussed at more length in Chapter IV of this Interim Report, older age has often been used as a proxy, both in law and in policy, for other qualities – often forms of disadvantage - such as low-income or impairment and disability. This tendency to use age as a proxy for certain types of disadvantage is connected to a fairly widely-held perception of older adults as being, as a group, in some way “vulnerable”, at heightened risk of a variety of negative outcomes, including low-income, abuse and exploitation or discrimination.

The brief review in this Chapter of the circumstances of older adults reveals the complex relationship of age with many forms of disadvantage: “older adults”, however one defines them, are an extremely diverse group with a wide range of resources, capacities and outlooks. Not all older adults are poor, ill, disabled or otherwise disadvantaged.

With this recognition, there has been something of a move away from the simple use of age as a marker for disadvantage. Instead, there have been efforts to identify sub-groups within the broader umbrella of “older adults” who are “frail” or “vulnerable”, and therefore in need of additional attention and protection through law and policy.

Certainly, at least some older adults are at risk of significantly negative outcomes. To fail to acknowledge and address these heightened risks would be to exacerbate this disadvantage and to further marginalize these older adults.

There is an unstated social expectation and responsibility to live up to that ideal [of “successful aging”], with those who do not or cannot being blamed for their failure.

Ageism is also the perpetuation of the belief that individuals *by themselves* can achieve this “successful aging”, or that by individual effort and sufficient willpower they can undo all the social inequities that have led up to their later years or the inequities that arise in later life.¹⁴¹

[emphasis in the original]

As the material in this Chapter indicates, some older adults enter this stage of life with inadequate resources, financial or otherwise, to meet the challenges of aging. Some aspects of aging, such as the heightened likelihood of ill-health and disability and the inability to recoup financial losses, create greater risks of disadvantage for older adults. There are indeed some older adults who experience more negative outcomes, and have greater needs for supports and resources, than either younger persons or other older

adults. Laws of general application that do not take into account the ways in which some older adults experience higher risks of negative outcomes may make it more difficult for older adults to access and enforce their rights. The challenge is to accurately identify who these older adults are, and to develop conceptual approaches to these needs that will not replicate the problems that became apparent when older adults as a whole were considered “frail” and “vulnerable”.

1. *Is “Vulnerability” a Useful Concept for the Law as it Affects Older Adults?*

As was briefly noted above, the concept of “vulnerability” has frequently been used to describe those older adults who are in need of heightened supports or protections.

This concept has a freighted status in the law as it affects older adults, with ongoing debates about whether older adults, or some portion of older adults, should be considered as “vulnerable”. Given the recurrent policy tensions in the area of elder law between promoting the autonomy of older adults and protecting their safety and security, the concept of vulnerability has broad implications for this field.

The Merriam-Webster Dictionary defines “vulnerable” as “(1) Capable of being wounded; susceptible to wounds (2) open to attack”. A person who is “vulnerable” is therefore at higher risk for some kind of injury or harm. The concept of vulnerability may suggest some kind of heightened obligation on the part of others to prevent or address potential harms, or some entitlement to additional protections.

Reflecting assumptions about the weakness, frailty and dependence of older adults, the popular imagination, as well as the law, has often associated older age *in general* with “vulnerability”. Adult protection laws are a good example of this.¹⁴² The particular vulnerability of older adults to low income was the motivation for the creation of the largely successful set of income security programs that address older adults.

The concept of “vulnerability” and its association with old age is contentious. Assumptions that **all** older adults are vulnerable seem to draw on and perpetuate stereotypes of older adults that are belied by the many active, healthy and engaged older adults. This concern is strengthened by the tendency of discussions regarding older adults and vulnerability to focus on the area of legal capacity and decision-making, to the point where vulnerability and the lack of legal decisional capacity are frequently

used as interchangeable concepts. The concept of vulnerability as applied to older adults tends to take on a pejorative aspect, rather than being seen as part of the human condition in general. There is a risk that vulnerability may be seen as *inherent* to the status of being an older person, rather than something that has roots in the life-courses and environments of some older persons.

Furthermore, the association of older adults with vulnerability can be used to justify heavy-handed and paternalistic intervention in the lives of these individuals. As one author states:

Resistance to the idea of vulnerability as key to a conceptually coherent category of “law and aging” is strong, and rooted in the idea that vulnerability = weakness and resistance to the presumption that age = loss of capacity. The fear is that legal theory focusing on personal vulnerability increases *social* vulnerability, the more significant source of harm, to the extent that it reinforces ageist presumptions of weakness and incapacity. Legal protection for the truly incapable, of whatever age, exists; and beyond that, older adults should be treated in law and otherwise like any other adult persons.¹⁴³

Legal scholar Martha Fineman has suggested a reconceptualization of vulnerability, detached from specific subgroups (such as older adults or children), that is focused on vulnerability as at the heart of the human condition, a state that “arises from our embodiment, which carries with it the imminent or ever present possibility of harm, injury and misfortune.”¹⁴⁴ In this approach, vulnerability has institutional as well as individual aspects, and suggests a relationship of responsibility between the state and the individual:

While all human beings stand in a position of constant vulnerability, we are individually positioned differently. We have different forms of embodiment, and also are differently situated within webs of economic and institutional relationships. As a result, our vulnerabilities range in magnitude and potential at the individual level. Vulnerability, therefore, is both universal and particular; it is experienced uniquely by each of us. Important in regard to this particularity point is the fact that our individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command. While society cannot eradicate our vulnerability, it can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures. Therefore, a vulnerability analysis must consider both individual position and institutional relationships.¹⁴⁵

While a shift in focus to state and institutional roles in addressing vulnerability may be helpful, it is important to acknowledge that state and institutional responses to perceived vulnerability on the part of older adults have in some cases been paternalistic, coercive and counterproductive. It has been argued that in some cases, such as mandatory reporting requirements for elder abuse, legal responses to vulnerability may exacerbate rather than reduce risk.¹⁴⁶ The legal reaction to the label of vulnerability may be a cause of valid concern, and it is important to question whether the response of the law to vulnerability has been appropriate, and the degree to which paternalistic or coercive responses are indeed necessary or desirable.

The employment of an anti-ageist approach to the law, and the application of appropriate principles in designing laws, policies and programs for older adults may assist in preventing inappropriate or heavy-handed responses to vulnerability, but that leaves open the question of whether the concept of vulnerability remains a valid and useful one for the law as it affects older adults, despite the fact that inappropriate responses to vulnerability have been employed in the past, or whether new concepts and approaches are necessary. A consideration of equality-rights analysis and concepts of risk can add to our analysis.

2. *Applying an Equality Analysis to Older Adults*

Another approach to thinking about the ways and situations in which older adults may need additional attention or protection in law and policy is through the lens of an equality rights analysis.

Constitutional and human rights guarantees of equality and non-discrimination for older adults and for other individuals and groups who may be marginalized or disadvantaged are discussed at some length in Chapter IV of this Interim Report. The point here is not so much to undertake a legal analysis as to underscore the fact that, as a society, we have recognized equality and non-discrimination as central values, as well as the reality that we not infrequently fall short of these values.

It is difficult to define what we mean by “equality”, as is evidenced by the very complex jurisprudence under section 15 of the *Charter*. What is clear is that “equality” does not equal sameness: it is not a matter of “treating likes alike”. People are different, and those differences can matter. Part of ensuring equality is recognizing, and taking into account, the actual circumstances and characteristics of affected individuals and groups.

Inequality may result from attributing and acting on differences where none exist (due to stereotyping, for example), but it may also result from ignoring or devaluing differences.¹⁴⁷

The discussion earlier in this Chapter points to some of the ways in which some older adults may differ from some other groups, such as the greater likelihood (increasing as age advances) of living in congregate settings, of living with certain types of impairments and disabilities, or of withdrawing from the paid workforce and living on a fixed income. Such differences, if unrecognized, may situate these older adults differently with respect to the law, and make it more difficult for them to access or benefit from the law.

An equality rights analysis has the benefit of being a positive approach, in that it focuses on the ultimate purpose of interventions that target older adults or some older adults: increasing equality. That is, it concentrates attention on moving towards a positive outcome, rather than simply aiming to minimize a negative. Such a focus positions older adults as rights-bearers, rather than passive and fragile subjects of others' interventions. In contrast to concepts of vulnerability, it does not have an inherent tendency to privilege concerns about the security of older adults over the preservation of independence and autonomy.

3. *Older Adults and Heightened Risk*

A flexible alternative to the use of “vulnerability” as a label to identify older adults who need additional supports or protections is to focus on indicators of heightened risk.

Unlike the concept of vulnerability, the notion of heightened risk readily accommodates the recognition that the status of an individual will vary from situation to situation and over time: risk is a matter of degree and not an “all or nothing” state. As well, the concept of heightened risk focuses attention not only on the attributes of the individual but also on factors in an individual's immediate or broader environment. That is, the concept of heightened risk accommodates a recognition of the societal factors that may lead to negative outcomes, and reduces the stigma for individuals who are identified in this way.¹⁴⁸ That is, all humans live with risk to some degree, and risk may be increased or decreased by the quality of the resources or assets available. Some older adults may have lesser or greater degrees of risk of negative outcomes than others: the task is to determine the factors or supports that will increase or decrease risk. This approach recognizes the diversity of the older adult population, avoids applying categories in a

stigmatizing way as indicating qualities specific and inherent to older adults, and may assist in ensuring that programs and initiatives are targeted to those who are most in need.

To identify sources of heightened risk for older adults is, however, by no means a simple endeavour. There may be a tendency to think of risk as associated with individual choices or conditions: for example, an individual who chooses to live on his or her own despite increasing levels of disability may be at greater risk of injury, or an individual who develops dementia may be at heightened risk for financial abuse.

While there are individual elements to risk, risk must also be seen in its broader social context. An individual's family and other relationships, living environments, or income sources and levels may either increase or decrease risk levels, depending on their quality and extent. To continue the example from the previous paragraph, while the development of health and activity limitations or disabilities may pose additional risks of negative outcomes for older adults, those risks are as much a result of societal failures to plan for, and include, persons with disabilities, as they are of the actual impairments. For example:

Living environments: The living environments of older adults may either increase or decrease their vulnerability, depending on their quality or on the supports available in them. Environments which are socially isolating, reduce autonomy, or do not provide basic physical or emotional security will increase risks for older adults. Independent and congregate living environments may either increase or decrease vulnerability, depending on their quality or appropriateness. However, it should be noted that there are unique risks associated with congregate environments in that such living environments, while providing important supports for older adults in need, may also reduce independence and control and may have the effect of socially isolating their residents. Residents of institutions will experience greater barriers than other older adults in making complaints regarding their circumstances and this is particularly true for those who live in locked-in wards.¹⁴⁹

Family and Relationships: As was highlighted earlier, strong social relationship supports will increase the emotional, mental and physical well-being of older adults. Being able to contribute, practically or emotionally to the well-being of their loved ones allows older adults to continue to be, and to feel part of, their communities. Reciprocally, strong relationships can help maintain the ability of older adults to continue to live in the community and maintain independence and autonomy. They can also help to ensure

that the rights of older adults are respected, whether they are living in the community or in congregate settings. Conversely, social isolation has an impact on health and well-being; it may also make older adults more vulnerable to abuse or exploitation. As individuals age, family members and friends may die or become less accessible. As well, negative societal attitudes towards older persons may make it more difficult to make new social bonds.

Socio-economic status: Older adults who are financially secure will be more able to purchase necessary supports to maintain their health, participation and security, and to ensure that their rights are respected than will older adults who are not financially secure. Those older adults who are low-income, and have lower education and literacy levels may have fewer resources available to meet the challenges of aging, and may have more difficulty finding and accessing information and supports to address their needs.

These individual and societal factors will of course have shaped the life-courses of older adults: in some cases, heightened risk in old age may be a materialization of decisions and disadvantages experienced across childhood, youth and middle age. For example, as discussed earlier, persons who have experienced the effects of racism, sexism or other forms of discrimination throughout their lives are likely to enter old age with lower levels of literacy and education and less income security, placing them at a disadvantage in encountering the challenges of aging.

The law may increase or decrease the levels of risk for older adults. For example, the legal regimes for continuing powers of attorney, or for safeguarding the security of those who live in congregate environments can either ensure that the rights of older adults are safeguarded, or leave them vulnerable to abuse or mistreatment. Laws of general application that do not take into account the needs of older adults may make it more difficult for older adults to uphold their rights.

Societal attitudes may also affect levels of risk. In this sense, it may be reasonable to suggest that older adults as whole have sources of risk distinct from other groups. While many older adults are healthy, economically secure, enjoy strong networks of social support, and are fully engaged in their communities, they are still vulnerable to the effects of ageism. The effects of discrimination, negative attitudes and social exclusion may result in greater risks for older adults. For example, as is discussed earlier in this Chapter, older adults may find it harder to locate and maintain employment due to age discrimination, leaving them at greater risk of income insecurity. This may be

particularly true for those older adults who are racialized, new immigrants, LGBT or otherwise face unique attitudinal barriers. The biological changes often associated with aging, may result in a greater sense of physical vulnerability as bodies age and become more frail, as well as a greater risk of social isolation as family, friends and spouses age and die. These changes may leave older adults feeling less secure. It is important to acknowledge this, while also acknowledging that some older adults will experience this more than others, and that this common type of disadvantage is not sufficient to justify paternalistic intrusions into the lives of older adults in general.

Risks may combine or be compounded. For example, older women who are widowed may face higher levels of risk due to the combination of diminished financial security and gender-based stereotypes and disadvantages, particularly as they age and other social supports diminish.

A focus on “risk” or “heightened risk” therefore can give us a flexible way of understanding the dynamic contexts in which older adults live, and taking into account situational aspects of disadvantage for older adults. It does not position disadvantage as inherent to a particular older adult, but focuses attention on a range of factors, both internal and external, that may contribute to negative outcomes.

While the concepts of (in)equality and risk bring different perspectives to the experiences of older adults, they are linked. To develop laws, programs and policies that aim to identify and ameliorate inequality, it will be necessary to identify those who are at greater risk of disadvantage and negative outcomes.

4. *Responding to Risk and Inequality Among Older Adults*

Given the history of policy responses to older adults who are perceived as frail or incapable, caution must be applied in designing legal responses to inequality or heightened risk. The application of a set of principles that give due weight to the importance of autonomy, dignity and participation and inclusion, and do not focus solely on security, may assist in pointing towards responses which promote the equality and well-being of older adults, rather than further marginalizing them.

In tailoring responses to risk, it is important to carefully consider exactly what harms or negative outcomes individuals are at risk for. What is the negative outcome which may materialize? Most often we think of physical, emotional, sexual or financial abuse, but

there may be other types of outcomes – such as poverty and homelessness, social isolation and exclusion, discrimination or crime. There are also degrees of harm, and responses should be tailored to the level of harm that may materialize.

In her reconceptualization of vulnerability, Fineman posits that the role of governments in addressing vulnerability is not to achieve invulnerability - an impossible task - but to increase *resilience*, which she defines as “having some means with which to address and confront misfortune”:

[I]nstitutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability. Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence. Cumulatively these assets provide individuals with resilience in the face of our shared vulnerability.¹⁵⁰

She suggests that these assets or resources may take five forms: physical, human, social, ecological or environmental, and existential. This focus on increasing resilience, through the provision of resources, provides an alternative to one of the more common responses to risk among older adults – increasing control over and decreasing choices for older adults.

E. Implications: Developing a Contextual Approach to the Law as it Affects Older Adults

An anti-ageist approach to the law must begin with an understanding of and respect for the needs and circumstances of older adults. Margaret Hall has suggested that one way in which ageism may manifest in the law is the failure to “respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults generally are situated differently from younger people and have different needs”.¹⁵¹ This is as true for the implementation of the law as it is for the substance.

This is not as simple as it sounds. The tendency among some to view older persons as a homogenous “other”, characterized mainly by frailty, dependence and proximity to death does a gross disservice to the complexity of the experience of aging and the richness of life experiences and perspectives among older persons. Law and policy frameworks that take as a starting point the idea of a standardized experience of aging will inevitably result in the over- or under-inclusion of many older adults who diverge

from the imagined norm, and potentially result in injustice. This poses a significant challenge for those attempting to develop policies and programs for older persons.

As well, as is discussed further in the following Chapter, when making generalizations about older adults, one must take great care that they are not tainted by stereotypes or negative assumptions about older persons. Laws and policies must be based on research and evidence, rather than assumptions. Demographic forces and societal trends mean that the nature of the older adult population is continually changing, and what is true of many older adults today may be true of only a small minority tomorrow.

This Chapter has provided a brief overview of some of the contexts and characteristics of older adults. These may affect the interaction of older adults as a group, with the law. When developing, implementing and evaluating laws, those responsible should consider how these contexts and characteristics may affect how the laws impact and are accessed. Some examples of potential effects are included below. These are not meant to be comprehensive, but to provide examples of how law and policy-makers may begin to analyze the potential effects of their initiatives on older adults.

While laws, programs and policies must recognize the capacities and individuality of older adults, this must be balanced by the provision of additional supports for those older adults who are particularly disadvantaged or at risk, in order to ensure that the law promotes dignity, autonomy, participation and security for all older adults. Different strategies may be required to ensure the autonomy and security of, for example, a 60 year old who is financially secure, healthy, and happily married, and for an 85 year old widow who has a mobility impairment and a diagnosis of dementia, whose children live several hours away, and who resides in a long-term care home.

Life expectancy: While to note that older adults are likely to have less time remaining to them than younger adults is to state the obvious; nonetheless, the potential shortness of the time remaining to an older adult impacts, for example, on the effectiveness of implementation and enforcement mechanisms.

The timeliness of legal redress is an important component of access to justice for everyone. Slow processes can discourage justice seekers, or can make remedies ineffective by the time they are obtained. For older adults of advanced age, however, timeliness may take on particularly urgency, as finite life spans may mean that redress that can only be acquired through lengthy procedures is essentially meaningless.¹⁵² Of

course, the older a person is, the greater the concern: the issue is less acute for an individual in his or her 60s than it is for someone in his or her 80s or 90s.

Literacy and education levels: While levels of literacy and education among older adults will rise over time due to recent trends in education, the fact that at the current time older adults tend to have lower levels of literacy and education than younger Canadians has a significant impact on how many older adults access information and therefore on their ability to understand and enforce their rights. This problem is exacerbated by shifts in how information about legal rights is provided:

Increasingly in many parts of Canada, public information on the law and government information about services and entitlements has been shifting from people sources to virtual sources such as the internet. The Special Senate Committee on Aging notes that a reliance on web-based information assumes a basic level of literacy and people's ability to access the internet. Many older adults, particularly older women, do not have access to or cannot use the internet.¹⁵³

This means that older men and women may be less aware of their legal rights, and have more difficulty accessing information about those rights. The legal system in general is increasingly complex:

Stakeholders and members of the public universally found Ontario's legal system to be too expensive and too complicated for the vast majority of people. There is growing inequality between wealthy litigants and poorer litigants. The system is seen as intimidating to the average user and as catering to Ontario's elite. Participants commented that the legal process was overly complex and that such complexity led to unnecessary and harmful delays.¹⁵⁴

It is worth noting as well that many of the laws that particularly affect older adults, such as those related to capacity, consent and substitute decision-making, are extremely complex, even in the best of circumstances. For example, ACE's practitioner's manual on long-term care and retirement homes runs to over 600 pages, while Toronto's Rent-Geared-to-Income Guide explaining the law for staff and directors of cooperative and non-profit housing, is over 200 pages. Lack of knowledge about their rights may form a substantial barrier to access to the law for older adults.¹⁵⁵

Labour Force Participation: While this may change in the future, it is currently the case that most older adults have withdrawn from employment and are reliant on fixed incomes from pensions or government programs for their livelihood. As a result, most

older adults have limited capacity to deal with significant unanticipated expenditures, which could tip them into spending the rest of their lifetimes in poverty or financial difficulties. This means that for many older adults, spending the considerable sums required to undertake litigation is not a feasible response to difficulties in accessing their legal rights. This difficulty is exacerbated by the low levels of availability of Legal Aid.

Summit participants agreed that Legal Aid is under-funded and not able to fulfill properly its mandate of ensuring that all Ontarians have equal and meaningful access to the justice system.

Legal aid is unavailable to many lower and middle income applicants because of strict qualifying standards. It is almost wholly unavailable in civil matters. As well, Legal Aid pays lawyers at rates substantially below rates in private practice. As a result, fewer lawyers can take Legal Aid cases. Litigants who do qualify for Legal Aid, particularly in rural areas, are experiencing difficulty in finding a lawyer who will act.¹⁵⁶

Income Security: While low-income is not currently widespread among older adults, some groups of older adults, such as unattached older women, are disproportionately low-income. As well, current trends in terms of pensions and retirement savings indicate that low-income may once again become more common among older adults. This means, for example, that costs associated with accessing legal rights and remedies could operate as a barrier to some significant groups of older adults.

Living Environments: While the great majority of older adults live in private dwellings, they are significantly more likely than other adults to live in congregate settings, such as long-term care homes. This is particularly true for women of advanced age. This has important implications for how older adults access information, receive services and benefits, and enforce their rights.

Persons living in congregate settings, and particularly long-term care homes, may face substantial barriers to accessing justice. The Advocacy Centre for the Elderly (ACE) has stated that:

The power imbalance between older adults and staff or health care providers in congregate settings is one of the most significant factors contributing to an environment where older people are reluctant to complain and seek justice. Residents are “captives” of the home in which they live: that is, they cannot do without the help that is provided, have little or no say about who provides that

care, and cannot leave and go elsewhere if they are unhappy with the care they receive. We heard from residents at our focus groups that they do not complain due to fear of retribution by staff members and concerns about evictions. Also, residents expressed a reluctance to “make a fuss” or “cause trouble”. Some residents feared they would be “evicted” from the retirement home or long-term care home if they did not comply with the “rules”.¹⁵⁷

As well, persons aged 65 and older are disproportionately likely to live in rural or remote areas,¹⁵⁸ and may face particular access issues as a result. As noted earlier, transportation may become a major issue for older adults who are unable to drive, and do not have access to public transportation due to their place of residence. The lack of legal and government services in these areas exacerbates these issues.¹⁵⁹

Family, Relationships and Caring: Some older adults are reliant on others for their wellbeing due to health and disability issues, financial dependency, or familial dynamics. As a result, older adults may be reluctant to complain about financial, emotional, physical or sexual abuse by family members or caregivers (formal or informal) on whom they are dependent for maintaining some level of independence and wellbeing.¹⁶⁰ For example, for an older adult who has continued to live in the community with supports, should a complaint result in the withdrawal of existing support systems, no other option may be available but to move into an institutional setting, something to which they may be adamantly opposed.

Health, Activity Limitations and Disability: With advancing age, older adults are increasingly likely to develop physical or sensory disabilities. As well, many Canadians will have aged with disabilities and require barrier-free services. This means that buildings and services must be designed for accessibility. For example, materials posted on websites should be accessible to screen readers, levels of ambient noise adjusted for those who are hard-of-hearing, and physical barriers removed for those who are using wheelchairs, walkers, scooters or other mobility devices.

Along these lines, the physical accessibility of law-related institutions becomes increasingly important, as inaccessible law offices, government services, administrative tribunals and courthouses will make it impossible for many older adults to access their legal rights.¹⁶¹

Older adults also face disproportionate transportation-related barriers: with age, older adults become less likely to drive, and public transportation services may be non-

existent (in rural and remote communities) or physically inaccessible.¹⁶² Older adults may therefore have difficulty in travelling to access justice-related services.

As well, ill-health may undermine the stamina required to undertake lengthy or onerous legal procedures.

While most older adults have no significant cognitive deficits, adults may age with intellectual or developmental disabilities. There is also a risk of developing cognitive disabilities, such as dementia, with age. Such disabilities may affect memory or decision-making skills, which may have a significant impact on the ability of these older adults to understand and to access rights and benefits.

Persons who have aged with mental or intellectual disabilities, or who have developed cognitive disabilities with age, will experience a range of barriers to access to the law, from a lack of plain language publications about the law to problems with Ontario's capacity and guardianship regimes. One example is the lack of provision for litigation guardians at administrative tribunals:

There is no provision to appoint a legal case worker or litigation guardian to act on behalf of a tenant who is mentally incapable of filing an application and pursuing a remedy at the [Landlord Tenant] Board. This interferes with the ability of tenants with mental illnesses to enforce their rights, including defending themselves against eviction. Tenants may not properly recollect events, understand the legal process, remember to attend at hearings or retain legal representation until after an eviction order has been enforced.¹⁶³

ARCH, the specialty legal clinic for disability-related issues, has undertaken a project on the capacity of parties before administrative tribunals and has released an extensive report with recommendations for law reform on this issue.¹⁶⁴

Intersecting Identities: Age is, of course, just one aspect of the identity of an older person, and often is not experienced as the most important aspect of a person's identity. Each person's experience of aging will also be affected by their gender, ethnicity or racialization, Aboriginal status, sexual orientation, socio-economic status, marital and family status, geographic location and other factors. Individuals who have experienced marginalization or disadvantage throughout their lives due to gender, racialization, sexual orientation, Aboriginal status or other factors may find that aging compounds that disadvantage or changes how they experience it. Older adults from marginalized groups are more likely to find themselves disadvantaged in their old age –

for example, living in low-income or otherwise lacking access to supports and resources. It is therefore important for policy makers and legislators to take into account these other aspects of aging.

III. ADDRESSING AGEISM: DEVELOPING A PRINCIPLED APPROACH

At an early stage in this project, the LCO determined that its approach to the law as it affects older adults would be rooted in a set of principles, building on the foundations created by the *International Principles for Older Persons* (IPOP) and the *National Framework on Aging* (NFA). Although there are challenges in defining and grounding principles, a principles-based approach can provide a set of norms against which to evaluate existing or potential laws policies and programs.

Based on the results of the preliminary consultation, the LCO decided that the principles should have their roots in an anti-ageist approach to the law. That is, the norms which are identified through the principles should proactively address negative attitudes and approaches to older adults as they are manifested in the law. Through the preliminary consultation, the LCO identified five guiding principles for the law as it affects older adults.

In keeping with this approach, this chapter of the Report outlines some key features of ageism, and the values on which an anti-ageist approach to the law should be based. The second part of this Chapter builds on this foundation to analyze and define anti-ageist principles for the law as it affects older adults, and to briefly consider some implications for their application.

A. Understanding Ageism

Any systemic framework for the law as it affects older adults must incorporate an understanding of the barriers that older adults face, both in the law and in society at large, and must develop an approach that addresses those barriers and that is based on a positive understanding of and respect for older adults.

The concept of ageism provides a starting point for understanding how older persons may be marginalized, excluded or disadvantaged in the development or application of the law.

1. *The Concept of Ageism*

The concept of ageism developed relatively recently. Robert Butler, an American, pioneered an influential approach to the issue in the late 1960s. He defined ageism as:

[a] process of systematic stereotyping or discrimination against people because they are old, just as racism and sexism accomplish with skin colour and gender. Ageism allows the younger generation to see older persons as different than themselves; thus they subtly cease to identify with their elders as human beings.¹⁶⁵

Butler pointed out that ageism manifests in a variety of forms, including stereotyping, negative attitudes, discriminatory behaviours, avoidance and social exclusion. Ageism may derive from ignorance – the lack of contact between younger and older persons – or from a profound fear of aging and death. It may also serve a rational purpose, in justifying preferential treatment of younger persons and excluding older persons from a share of societal resources.¹⁶⁶

Ageism may also manifest as systemic disadvantage and exclusion of older persons in societal institutions. The Ontario Human Rights Commission (OHRC) has defined ageism as “a socially constructed way of thinking about older persons based on negative stereotypes about aging as well as a tendency to structure society as though everyone is young.”¹⁶⁷

There have been considerable efforts, both in Canada and internationally, to identify and address ageism and age discrimination. The United Nations declared 1999 the International Year of Older Persons, and there are now a plethora of international documents focused on inculcating respect for and addressing the needs of older persons. Advocacy organizations like the Canadian Association for the Fifty Plus (CARP) vigorously represent the views and needs of their constituencies, while Ontario’s Advocacy Centre for the Elderly (ACE) has been a major force in promoting law reform relating to older persons. In 2000, the OHRC undertook a high-profile endeavour to raise respect and awareness about the human rights of older persons and to advocate for reforms in law and policy. The Senate Special Committee on Aging has recently completed a multi-year project on older persons in Canada. Change is underway, and attitudes towards older persons continue to evolve.

However, ageism and age discrimination are still frequently treated less seriously than other forms of prejudice and discrimination. It has been noted that:

It is the case ... that age discrimination tends not to attract the moral outrage as do many other forms of discrimination. This may reflect in part the fact that we all can expect to be older, but we will not all be members of the other groups involving prohibited grounds for discrimination. Furthermore, age discrimination is often justified in the minds of some in that it involves more opportunities for others, such as jobs and promotion opportunities if, for example, mandatory retirement prevails.¹⁶⁸

The OHRC has stated that it “is very concerned that ageism and age discrimination do not appear to invoke the same sense of moral outrage and condemnation as other forms of unequal treatment.”¹⁶⁹

Ageism has its basis in a set of pervasive stereotypes and negative attitudes towards older persons.

2. *Stereotypes and Negative Attitudes Regarding Aging and Older Adults*

Negative attitudes towards aging and older persons are not inevitable. Some societies value their elders highly as sources of wisdom, knowledge and experience. The *Madrid International Plan of Action on Ageing* (MIPAA) points out that, “Recognition of the authority, wisdom, dignity and restraint that comes with a lifetime of experience has been a normal feature of the respect accorded to the old throughout history.”¹⁷⁰

However, many have pointed to the lack of positive images of aging in our own society.¹⁷¹ The Special Senate Committee on Aging stated that:

It is difficult talk about aging in a positive way in a society which fights aging so vigorously. We are assailed with advertising which promises eternal youth. Changing this view will take a concerted effort.¹⁷²

The MIPAA, the OHRC and the Special Senate Committee on Aging have all recommended government initiatives to promote positive images of aging.¹⁷³

Some have identified the roots of negative attitudes and stereotypes in the significant age segmentation of our society, in which young, middle-aged and older persons occupy

separate social and functional spheres. Associated with this is age segregation, where older persons are separated from the mainstream institutionally, culturally and spatially. Some academics have described old age as “a separate country”. The result is an “us and them” separation between older and younger persons.

[A] key weapon against stereotypes and prejudices is intergroup contact, which allows individuals the opportunity to challenge homogenized categories and see beyond stigmatized characteristics to other relevant qualities of persons in a pivotal category. In our view, arenas that facilitate ongoing interaction, familiarity and personal knowledge across age categories are hard to come by. Institutional arrangements that segregate older and younger persons from each other, and from other age groups, restrict opportunities for individuals to form stable cross-age relationships.¹⁷⁴

Others have pointed to the development of what some have termed a “youth cult” that associates youth with the future and new technology.¹⁷⁵ The Special Senate Committee on Aging noted in its *Final Report* that ours is a youth oriented society. Growing older is viewed as “something to be denied, avoided at all costs, and kept hidden”.¹⁷⁶

As well, there are commonly negative, even catastrophic, perceptions of the demographic reality of an aging society. An apocalyptic view of demographic trends and an assumption of intergenerational conflict for scarce resources is a common theme in media, fuelling fears about the sustainability of public programs such as medicare and the Canada Pension Plan.¹⁷⁷ Older persons are viewed as burdens, not only on individual family members, but on society as whole. They therefore become targets for resentment. The MIPAA notes that “older persons are disproportionately portrayed as a drain on the economy, with their escalating need for health and support services.”¹⁷⁸ ACE notes that stereotypes about older adults as sickly, and the belief that this group is responsible for increases in health care costs, may support policies to reduce social programs for care, and may send the message that older adults are not entitled to services.¹⁷⁹

Older persons may internalize negative images of aging, which may lead to self-imposed limits on their activities. They may give up their independence or refrain from participating in society in conformance to expectations about what is “appropriate” for persons their age.¹⁸⁰ The Expert Panel on Older Workers noted that one of the barriers that older workers may experience in seeking re-employment is lack of self-esteem or self confidence: older workers may perceive that employers will not see value in them, saying “Who would want to hire me? I’m too old”.¹⁸¹ Internalized ageism may result in

older adults accepting the negative valuation placed on older persons, and rejecting any association with “old people”.¹⁸²

There is a constellation of commonly found stereotypes and negative attitudes regarding older persons. The most commonly expressed are that:

- Older adults are homogeneous and age is the defining characteristic of older adults;
- Old age is a time of looking backwards, and older adults are resistant to change and unwilling to learn new things;
- Old age is a time of inevitable decline, and older adults are mentally or physically frail and incapable;
- Older adults have nothing further to contribute, and are simply waiting for death; and
- Older adults are burdens, dependent on others and passive recipients of services.

While these are stated in very strong forms, they exist, of course, in various shades and degrees, and may co-exist with other, more positive images and attitudes towards older persons. It is also important to keep in mind that all older adults will not be subject to ageist attitudes and stereotypes to the same degree, so that those with greater economic power, or who live within communities where they have greater social capital may experience less ageism than other more vulnerable older adults.¹⁸³

As was highlighted in the previous Chapter, in considering stereotypes regarding older persons, it is important to take into account how these may be exacerbated or compounded for persons who are identified by other sources of disadvantage, such as gender, sexual orientation, disability, racialization or Aboriginal identity, citizenship or low-income. For example, stereotypes regarding the declining capacities of older adults may be exacerbated for older immigrants for whom English is a second language, who may be treated with very low levels of patience. Older women are particularly impacted by negative attitudes about the attractiveness of older persons, and often assigned very low status. Older adults who have faced discrimination throughout their lives, such as LGBT or racialized older adults, and who have coped by trying to blend in and not be noticed, may be especially affected by the tendency to overlook older adults and their needs: the combination of their reluctance to complain and the tendency to ignore their needs may result in their complete invisibility to service providers and policy makers.

The end result of these negative attitudes and stereotypes is the conclusion that older persons are worth less than other people, and are less deserving of respect, consideration and attention. An anti-ageist approach to the law must begin by replacing these stereotypes and negative attitudes with more accurate (and more positive) ideas about the realities of aging and of older adults.

3. *Valuing Older Adults*

Stereotypes and negative attitudes regarding older adults are generally based on inaccurate ideas regarding older adults, as well as on a failure to appreciate our common humanity. Rather than stereotypes, the law as it affects older adults should be based on a positive set of ideas and values.

Older Adults as Diverse Individuals

As is clear from the brief outline of the circumstances of older adults in Chapter II of this Interim Report, older adults are an extremely diverse group, despite the societal tendency to view them, for many purposes, as a homogenous category. The Special Senate Committee on Aging, contemplating the diversity among older adults, commented as follows:

What is the common thread weaving through the lives of such diverse people? As a starting point, they are united by being in an age category which defines them as seniors. This categorization plays a large part in defining the roles they are expected to play in society. Too often, the categorization of “senior” overtly or subtly limits the horizons of the possible. This is ageism.¹⁸⁴

The tendency to put an older person’s age first and foremost, and the corresponding inability to see older persons as individuals with widely varying life experiences, characters, likes and dislikes, hopes and fears, abilities and limitations, is perhaps the basis for all forms of ageism. Academics have pointed out that categories, such as those based on age, are unavoidably homogenizing and foster tensions between social groups. As one writer describes it, “The prejudiced person exaggerates the extent to which members of the same group are similar to one another, and at the same time chooses to view people belonging to different groups as being very different”.¹⁸⁵ This leads to a perception that all older adults are the same and their older age is the most important of their attributes. The resultant assumptions and stereotypes may vary, from the image of all older adults as “wise elders” to, on the other end of the spectrum, images of older

persons as uniformly frail, depressed and out-of-touch with contemporary society. This frame of mind is most easily identified in the use of age-based categories in the law, an issue discussed at length in Chapter IV of this Report.

Recognition of the diversity of older adults is therefore central to combating ageist attitudes and ideas.

Older Adults as Capable of Growth, Change and Learning

The stereotype of older persons as living in the past, resistant to change and unwilling to learn new things surfaces most frequently in the employment context. The Expert Panel on Older Workers noted that employer attitudes may create significant barriers for older workers, in that employers may perceive older workers as less adaptable, less learning-oriented or less amenable to adopting and using new technologies.¹⁸⁶

The Supreme Court of Canada decision in *Stoffman v. Vancouver General Hospital* reflected some of these stereotypes about older workers. In considering the Hospital's policy requiring physicians to retire at age 65, the Court commented that:

[The Hospital] cannot be said to have acted unreasonably in concluding that the retirement, as a matter of course, of those who had reached the age of 65 would ensure the departure from staff of those who would generally be less able to contribute to the hospital's sophisticated practice.¹⁸⁷

The OHRC has pointed out that these kinds of assumptions are simply stereotypes:

These ideas about older workers are simply myths that are not borne out by evidence. In fact, there is significant evidence that older workers:

- are highly-productive, offering considerable on-the-job experience;
- do as well or better than younger workers on creativity, flexibility, information processing, accident rates, absenteeism and turnover;
- can learn as well as younger workers with appropriate training methods and environments; and
- do not fear change but rather fear discrimination.¹⁸⁸

The OHRC goes on to note that as aging is an individual experience, it is wiser to evaluate people individually, rather than on their chronological age. Generalizations about ability based on aging are likely to lead to error.

Challenging Assumptions About Health and Ability Among Older Adults

Despite the fact that health and ability vary widely among older adults, and that most older adults are in fact in good mental and physical health, older adults are often assumed to be frail or incapable, whether physically or mentally. Social science researchers point to the prevalence of “elderspeak” in which older adults, regardless of levels of health and ability, are spoken to in a manner similar to that used with small children, and the widespread phenomenon of “overhelping” older adults who are quite capable of caring for themselves, as two instances of this type of ageist thinking.¹⁸⁹

The assumption that older adults are necessarily limited in their health and abilities can lead to under-treatment for actual illnesses or health care needs. Health care providers may take the approach that “this is what can be expected at your age”, or that “nothing can be done”. Mental health issues among older adults may go untreated because depression and cognitive decline are considered to be a natural part of the aging process.¹⁹⁰

Similar issues have arisen in the context of the provision of legal services. Lawyers are not immune from the effect of stereotypes regarding older persons and these may shape the ways in which legal advice and representation is provided. Whether through law school courses or otherwise, there is a dearth of training or education for lawyers on serving older clients.¹⁹¹ The Ontario Bar Association (OBA) notes that there are Guidelines for practitioners serving older clients, but many of the guidelines are out of date, their availability is not known to those who need them and they are often not followed.¹⁹² For example, ACE has received complaints about lawyers failing to consult with their (capable) older clients, and instead seeking instruction from the older adult’s friend or family member.¹⁹³ The OBA recommended that the LCO consider whether there should be a minimum level of training in age-related issues in professional curricula and the promulgation of guidelines within each health and legal profession to address age-related rights and services.

A study reviewing American guardianship, will and trust decisions found that, with surprising frequency, advanced age was treated as synonymous with cognitive decline and the need for guardianship. In a number of decisions, advanced age was the only reason given for the imposition of guardianship or was one of the factors considered in determining undue influence in will and trust cases. The researcher also pointed to these attitudes as a reason for the underutilization of limited guardianship provisions:

advocates assumed it would be a waste of time and effort to craft limited guardianship agreements since it was assumed that the client's condition would inevitably deteriorate and require further action.¹⁹⁴ Similarly, the OBA, in its submission to the LCO's preliminary consultation, highlighted concerns regarding Ontario's capacity and guardianship regime as examples of ageism in the law. The OBA pointed, for example, to concerns about the extent to which stereotyping, as well as a lack of education and training among health professionals, contributes to a misunderstanding as to the definition of capacity.¹⁹⁵

In emphasizing the capabilities of older adults, it is important not to stigmatize or fail to consider those older adults who are living with disabilities or health deficits. Here, concerns regarding ageism must also incorporate an anti-ableist approach. The existence of impairments or disabilities among some older adults should not relegate these individuals to lower levels of respect and consideration, lead to blanket assumptions about what they can or cannot do, nor obscure their rights to have their autonomy, dignity and individuality recognized. Negative attitudes towards older persons on the basis of assumptions about their health and abilities are also ableist attitudes, and must be recognized and addressed as such.

For this reason, some have expressed concerns about emerging stereotypes and social pressures regarding "good" and "bad" aging, in which a "good" older age is healthy, self-reliant and active, as opposed to a "bad" older age characterized by sickness, dependency and premature death.

The biggest problem with stereotypes of good and bad old age is that they marginalize the most vulnerable older adults, those with the fewest personal and economic resources, who are particularly likely to be unattached, female, in precarious health, and to have limited support networks. Stereotypes of good and bad may further devalue and segregate these more vulnerable older adults, reinforcing the social, economic, and cultural differences between those who do and those who do not "age well".¹⁹⁶

Valuing the Contributions of Older Adults

Related to the belief that old age is inevitably associated with incapacity and decline is the attitude that older persons have nothing further to contribute, and that they do not, in fact, make any worthwhile contributions – they are simply waiting for death.

The obvious example, of course, is the exclusion of older persons from the market place, either formally, such as through mandatory retirement policies and the laws that upheld them, or informally, through age-based discrimination by employers. Consultees to the OHRC's public consultations on human rights and older Ontarians told the OHRC that they experienced mandatory retirement as a profound devaluation of their capacities and contributions. As one consultee expressed it, "Did you ever feel like an old pair of worn out shoes? Well, that can happen. You feel rejected and no longer of any value in your workplace or your community". Another stated that "My new subsidized income, along with my feeling of professional uselessness, has shown me one thing, the reality of how society views and treats the aging".¹⁹⁷

While older adults can and do make valued contributions in the workplace, it is also important not to focus on economic productivity as the sole source of human contribution or value. Humans contribute to their societies in many other ways, such as volunteering in the community, providing care for loved ones, giving emotional support to friends and families, and the provision of advice and mentoring based on wisdom and accumulated experience. According to Statistics Canada, a significant portion of older adults help others, and they do so in a variety of ways, whether it is helping persons living outside their home with domestic work, home maintenance or outdoor work, providing childcare to family members, teaching and giving practical advice, or giving emotional support.¹⁹⁸

Even the non-economic contributions of older adults are often devalued, however. An example is a British Columbia case where a 77-year-old woman died due to the negligence of a nursing aide. The court declined to award damages to her children for loss of care and companionship on the basis that "their mother had long since ceased to be a companion for she had been physically, mentally and emotionally incapacitated for a considerable time before her death".¹⁹⁹

Older Adults as Active Participants in Their Own Lives and Communities

Older adults are often conceived of as dependents, and as passive recipients of services. As noted above, discussions of Canada's aging demographics frequently characterize this trend as a crisis and a burden, focusing on concerns regarding the costs of increased health care and social service entitlements. During its public consultations on human rights and older persons, the OHRC heard that older adults are frequently characterized as non-contributing members of society, and their need for services as depleting scarce public resources. For example, in the health care sector older persons are frequently

referred to as “bed blockers”, and their legitimate need for health care services treated as the cause of the shortage of emergency room resources.²⁰⁰

As a result of this mindset, the social and economic contributions made by older adults often go unrecognized. For example, discussions of caregiving needs often focus on older persons solely as recipients of care and consider how the “sandwich generation” can be better supported to provide eldercare. This is certainly a need and is an important issue. However, the role of older persons in providing care for others – whether for their aging spouses, for their adult sons and daughters with disabilities, or as primary caregivers for their grandchildren receives considerably less attention and discussion. Supports are inadequate for all caregivers; however, older caregivers are particularly invisible in these discussions. For example, despite the importance of the relationships between grandparents and grandchildren, grandparents may find themselves in a precarious situation and without legal status regarding access to their grandchildren upon the breakdown of the parent’s marriage.²⁰¹ Similarly, 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.²⁰² As CARP points out:

The current funding programs for grandparents present inequity between funding for those who raise grandchildren in poverty and the funding paid to foster parents. For example, under the *Ontario Works Act* Temporary Care Allowance, grandparents are currently eligible for \$231 of funding a month, while foster parents are paid \$900 a month by Children’s Aid Societies. There are federal and provincial clawbacks to pensions, benefits and services that are assessed on increased income due to custody funding. The money is not “a paycheque” but rather support for the children, which otherwise comes from limited retirement income.²⁰³

4. *Manifestations of Ageism*

Negative attitudes towards older adults may be manifested in a variety of ways. The most commonly identified are invisibility and paternalism.

Invisibility

Some social scientists have put forward the theory that ageism has its source in the natural human fear of our own deaths and physical frailty. Older persons are direct reminders of our own mortality. As one writer puts it,

[A]geism exists precisely because elderly people represent our future in which death is certain, physical deterioration probable, and the loss of current self-worth-enhancing characteristics a distinct possibility.²⁰⁴

In a society that places great value on attractiveness, mental agility, competence, strength and quickness, the association of older persons with decline leads to distancing from and negative attitudes towards older persons.

Because older people tend to be associated with death, younger persons may adopt ageist attitudes and behaviors to distance themselves from older people. This may include blaming the older person for their state (e.g., external indicators of aging). Doing this may allow the younger person to deny the reality that they too will eventually become part of that outgroup.²⁰⁵

One of the most common forms of discrimination against older adults is social exclusion. Age discrimination and, in the past, mandatory retirement policies, have led to the exclusion of older adults from the workplace. Frequently, older adults are hived off into separate living spaces. Professionals like health care workers or lawyers are unlikely to choose to specialize in working with older persons: although geriatrics is a recognized medical specialty, there is an ongoing shortage of qualified professionals, and in Canada, elder law is a fledgling area. Service providers tend to spend less time with and overlook the needs of older persons. In this way, older persons become in many ways invisible.²⁰⁶

This exclusion has wide-ranging consequences for older adults. As one article has argued in the context of disability rights, invisibility can have a dramatic impact on the ability to access and enjoy civil and political rights, and on social policy:

To sum up, the relative or absolute invisibility of persons with disabilities has meant that the legal structures created to advance private freedom (protection against the abuse of power) and public freedom (participation in the mainstream) have either not been applied or have been applied with less rigour in the case of persons with disabilities.

This has produced a category of person who, while being dependent on the public sphere for survival, lacks access to or influence over public policy. Such persons are denied full admission to public power and full control over their individual destiny. They remain outside the mainstream of society. This lack of presence – or invisibility – serves to reinforce stereotypical assumption about persons with disabilities. It encourages a lack of respect for people with disabilities as rights holders on an equal footing with others.²⁰⁷

The authors go on to suggest that the human rights movement be conceptualized as a “visibility project”. While the issues for older adults and for persons with disabilities diverge in many ways, this perception about the effects of invisibility on the ability to fully participate in the community and to claim rights is equally applicable to older adults, particularly for those who have withdrawn from the workforce, have significant health or ability limitations, or are living in congregate settings where they are often physically as well as psychologically removed from the mainstream.

Paternalism

Philosopher Gerald Dworkin defines paternalism as follows:

When [rules, policies and actions] are justified solely on the grounds that the person affected would be better off, or would be less harmed, as a result of the rule, policy, etc., and the person in question would prefer not to be treated this way, we have an instance of paternalism.²⁰⁸

The concept of paternalism raises questions about individual autonomy and its limits, respect for personhood, and the tradeoffs between regard for the welfare of others and regard for their right to choose for themselves. Some may consider paternalism necessary or justified where the persons in question have limitations in their rationality and questions are raised about their ability to exercise their autonomy.

As it applies to older persons, paternalism may often manifest in the removal of decision-making opportunities for older persons under the guise of protecting their “best interests”. Older persons may be assumed to be less capable of exercising their autonomy, and in greater need of protection.

Paternalism towards older persons as a group is therefore based on the stereotype of older persons as vulnerable, incompetent and declining.

This type of paternalism is linked to what some call “compassionate ageism”. This type of ageism takes the form of trying to protect older persons from harm and to improve their lives. Regardless of its motivations, this kind of ageism, like any other, damages older persons by removing their opportunities for self-determination and undermining their dignity.²⁰⁹

The prevalence of paternalistic views towards older persons is the reason why older adults and their advocates generally place independence and autonomy at the centre of any approach to law and policy relating to older persons. ACE states that:

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.²¹⁰

5. *Theoretical Approaches to Understanding Ageism and the Law*

Reflecting the relatively recent emergence of the field of elder law and of the concept of ageism, little work has been done until recently to develop a cohesive theoretical approach to elder law, let alone to ageism and the law.²¹¹ However, there exist a number of approaches developed in other areas that may be valuable in grounding an approach to ageism and the law. This is not meant as a comprehensive review of all possible theoretical approaches that might apply to older adults and the law, but to identify some potentially useful approaches that are compatible with the starting points identified by the LCO.

Social Models: The experience of aging is popularly viewed mainly as an inevitable biological process, and the challenges that older persons face, such as social isolation and exclusion, difficulty accessing employment or services, or the necessity of leaving one’s home to access supports, are seen as the unfortunate but unavoidable effects of this biological process. This perspective tends to obscure the effects that the social environment has on the experience of aging and older age. The use of the social model, influential in feminist, anti-racist, disability rights and other movements, can provide a broader perspective from which to understand the experiences of older persons.²¹²

While the experience of older age has some roots in the biological aspects of aging, it is also profoundly shaped by the social environments in which aging takes place – the

attitudes which we hold towards aging and older persons, the social supports that are or are not available to older persons and their families, the physical environments in which older persons work, live, and access services, etc. The barriers that older persons face in employment, in living environments, and in participation in their communities arise as much from their environments as from the physical and mental changes that may arise during the aging process. In this light, problems associated with aging are societal problems, and not just individual ones.

Citizenship: The concept of “citizenship” offers another way of thinking about meaningful participation and inclusion in the broader community. In this context, citizenship may be defined in various ways, but generally moves towards a vision of full participation and inclusion in the broader community.

Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is bestowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspirations can be directed.²¹³

The *Charter*, particularly in its equality rights provisions, has profoundly shaped Canadian notions of citizenship, although the diversification of Canadian society complicates these notions.²¹⁴ Michael J. Prince, in employing a citizenship discourse to advance policy reform related to disability rights, articulates five dimensions of citizenship: citizenship, legal and equality rights, democratic and political rights, fiscal and social entitlements, and economic integration.²¹⁵

Rights-Based Approaches: Discussions of elder law in Canada have largely focused on older adults as consumers of health care services and as recipients of care. This has promoted a vision of older adults as passive dependents and consumers rather than as rights-bearers, and advocacy efforts have focused more often on improvements to service provision than on empowering older adults and securing rights. It has been suggested that current efforts at reform might be strengthened by a greater focus on elder rights as civil or human rights. Such an approach has the potential to change attitudes towards older adults, promote active engagement among this group, and embrace the right to informed choice.²¹⁶

Universalism: Universal (or inclusive) design is the development of environments, products and policies to “be usable by all people, to the greatest extent possible,

without the need for adaptation or specialized design. The intent of universal design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost.”²¹⁷ Universal design is intended to benefit people of all ages and abilities.

The universalism model, mainly explored in the context of the disability rights movement, posits that all people exist along a continuum of abilities and that people’s abilities will vary along this continuum throughout their lives.²¹⁸ This acknowledgement of the near universality of impairment highlights the way in which the line between disability and non-disability is socially and politically constructed.²¹⁹ This approach demands a widening of the range of what is considered “normal” in the context of human abilities, with the result being that more flexibility and adaptation is required in social, political and physical structures.²²⁰ To put this principle into action, inclusive design with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.²²¹ It has been argued that this approach, with its focus on inclusive design and “normalization” of differences, has the potential to spur the systemic reform for the law as it affects older adults, and to promote optimal independence and participation in all areas of society, including employment, housing and health care.²²²

There are, of course, limits to the ability of universalism and inclusive design to remove or prevent barriers. In some cases, individual accommodation will be required in order to ensure equal access to a building, information or a program.²²³ There are also situations where competing needs make it challenging to identify inclusive design solutions. As a simple example, curb cuts, which improve access for persons with mobility disabilities and families pushing strollers, increases difficulties for persons with low vision who require a demarcation of the end of the sidewalk.

Multi-dimensional analysis: Given the predominance of women among older adults, the LCO recognizes the importance of employing a gender-based analysis of law and aging.²²⁴ The intersection of disability with old age makes it essential to bring an anti-ableist approach to this area of law. As well, recognizing the diversity of older adults, the LCO will also employ anti-racist and anti-heterosexist approaches.

B. Developing Principles for an Anti-Ageist Approach

1. *The Value of Principles in an Anti-Ageist Approach*

Given the pervasiveness of stereotypes and negative attitudes regarding older adults and their negative impact on this group, the MIPAA recommends that states should:

Develop and promote a policy framework in which there is an individual and collective responsibility to recognize the past and present contributions of older persons, seeking to counteract perceived biases and myths and, consequently, to treat older persons with respect and gratitude, dignity and sensitivity.²²⁵

In its 2008 submission to the LCO, CARP pointed out that all principles must be considered and interpreted in light of the larger goal of developing an anti-ageist approach to the law:

We strongly endorse all the principles outlined by the Commission. While slightly different, they do not differ in substance. The important issue is what goal the principles serve. The common thread through all the stated principles is anti-ageism. The principles embraced in law should be conducive to people living active, independent and purposeful lives as they age without having to face legal and social barriers as they age.

In developing its policy framework, the LCO will therefore adopt a principles-based approach grounded in a set of principles that can be applied to counteract negative stereotypes and assumptions; reaffirm the status of older persons as equal citizens and bearers of both rights and responsibilities; and that encourages the government to take positive steps to secure the well-being of older adults.

Such an approach builds on the work already done at the domestic and international level, through policy documents such as the *National Framework on Aging* (NFA) and the United Nations *International Principles for Older Persons* (IPOP). As a foundation for an approach to the law, a principles-based approach is grounded in the *Charter of Rights and Freedoms* and human rights law.

Based on the preceding section of this Chapter, in identifying and interpreting principles for the law as it affects older adults, consideration must be given to how the principles can promote valuing the worth, contributions, abilities, diversity and participation of older adults.

Building on the analysis in Chapter II, it is the LCO's view that a framework of principles must be flexible enough to take into account the evolving circumstances of older adults themselves, and be interpreted in such a way as to incorporate the voices and experiences of older adults themselves.

2. Sources for Anti-Ageist Principles

The LCO has reviewed existing international and domestic policy and legal frameworks to identify key principles and how they have been interpreted in various settings. This section provides a brief introduction to the most important of these source documents.

It is important to note that while most of these sources are not legally binding on Canadians, they were created through extensive research and consultation with older adults and the organizations that represent them, and so have significant persuasive value.

International Documents

In addition to numerous international instruments setting out broadly based rights and principles, such as the *International Covenant on Social, Economic and Cultural Rights*²²⁶ and the *International Covenant on Civil and Political Rights*,²²⁷ there are a significant number of international documents devoted specifically to the rights and needs of older persons. A *Draft Resolution on a Declaration of Old Age Rights* was developed as early as 1948. Beginning in the 1980s, there has been considerable work done to develop and implement an international plan of action on aging, with a first plan developed through the first World Assembly on Ageing²²⁸ in Vienna in 1982, and a second plan put forward through the second World Assembly on Ageing in Madrid in 2002. There have been numerous General Assembly Resolutions related to the implementation of these action plans, and a variety of other documents developed in support. The most relevant of these international documents are described below.

United Nations International Principles for Older Persons (1991)

Perhaps the most important of the international documents related to older persons, are the United Nations IPOP²²⁹. These were adopted in 1991, pursuant to the United Nations *International Plan of Action on Ageing*.²³⁰ These IPOP do not have the same

status as a Convention: they are not ratified by states and do not impose obligations. However, the IPOP provide a broad and general framework of principles that are applicable across a wide range of cultures and circumstances, and that can guide states in their policy and program development.

The IPOP are based on the recognition of:

- The contribution of older persons to their societies;
- The fundamental worth and dignity of all persons, as articulated in the various human rights documents of the United Nations;
- The diversity of older persons, which requires a variety of policy responses;
- The unwarranted stereotypes regarding their capacities and abilities to which older persons are subject; and
- The strains on family life which may arise on those providing care to frail older persons.

The IPOP adopt and elaborate on five principles: independence, participation, care, self-fulfillment and dignity.

Madrid International Plan of Action on Ageing (2002)

The *Madrid International Plan of Action on Ageing* (MIPAA)²³¹ arose from the Second World Assembly on Ageing, a follow-up and re-evaluation of the outcomes of the 1982 Assembly in Vienna. MIPAA calls for changes for attitudes, policies and practices in all sectors so that the potential of an aging society may be achieved. It identifies a number of central themes, including:

- The full realization of all human rights and fundamental freedoms of older persons;
- The achievement of secure aging, which involves eradication of poverty in old age;
- Empowerment of older persons to fully and effectively participate in the economic, social and political lives of their societies;
- Provision of opportunities for individual development, self-fulfillment and wellness throughout life, including in later life;
- Ensuring the enjoyment of economic, social, cultural, civil and political rights;
- Recognition of the crucial importance of families and intergenerational interdependence; and

- Provision of health care, support and social protection for older persons.

MIPAA emphasizes the importance of mainstreaming aging into policy and program agendas, and linking aging to frameworks for social and economic development and human rights. Three priority directions are identified: ensuring the older persons are full participants in the development process and share in its benefits; advancing health and well-being into old age; and ensuring enabling and supportive environments.

World Health Organization Active Ageing Policy Framework (2002)

The World Health Organization (WHO) developed its policy framework on active aging as its contribution to the 2002 Madrid International Assembly on Ageing, at which MIPAA was developed. Through this framework, the WHO adopted a vision of “active ageing”, which it defined as “the process of optimizing opportunities for health, participation and security in order to enhance quality of life as people age”. The WHO states that:

Active ageing ... allows people to 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.²³²

The WHO framework shifts away from a needs-based approach, which assumes that older persons are passive targets, to a rights-based approach that recognizes the rights of people to equality of opportunity and treatment in all aspects of life as they grow older.

It also adopts a life-course perspective on aging, recognizing that older people are not one homogeneous group, and that individual diversity tends to increase with age.

International Federation on Ageing’s Declaration of the Rights and Responsibilities of Older Persons (1990)

The International Federation on Ageing (IFA) is a non-government organization with a membership base of NGOs, the corporate sector, academia, government and individuals. Its mission is to serve as a point of connection and information exchange on issues related to aging, to collaborate in research and to develop policy knowledge on issues with global implications.

The IFA has developed a *Declaration of the Rights and Responsibilities of Older Persons* which adopts five key rights for older persons: independence, participation, care, self-fulfillment and dignity.

The *Charter of Rights and Freedoms* and Human Rights Laws

The specific provisions of the *Charter* and the Ontario *Human Rights Code* that are particularly relevant to the law as it affects older adults are discussed at some length in Chapter IV of this Interim Report, which focuses on the different ways in which laws may affect older adults.

As well as their specific legal import, the *Charter* and the *Code* are important expressions of values and principles which may help to shape an approach to the law as it affects older adults. The discussion in this section focuses on the *Charter* and the *Code* as sources of potential principles for the law as it affects older adults, leaving other issues for later discussion.

The Canadian Charter of Rights and Freedoms

The *Charter* rights most important to the identification of principles for the law as it affects older adults are those set out in sections 7 and 15.

Section 15(1) of the *Charter* provides for equality before and under the law, and for equal protection of the law without discrimination on the basis of a number of enumerated grounds, including age. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those experiencing disadvantage due to their age. In interpreting section 15 and the right to equality, the Supreme Court has given central place to the principle of dignity.²³³ The principle of dignity means that the affected individual or group feels self-respect and self-worth, and is concerned with physical and psychological integrity and empowerment.²³⁴

Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and

interference with physical freedom. Liberty includes the right to an irreducible sphere of personal autonomy regarding matters that “can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”²³⁵ Within that sphere, individual choices must be free from state interference. Security of the person has been interpreted by the Supreme Court of Canada as including an individual’s “psychological integrity”²³⁶ where the interference is sufficiently serious.

The Ontario Human Rights Code

The purpose of the Ontario *Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.²³⁷

The *Code* prohibits discrimination on the basis of age, as well as of sex, sexual orientation, disability, family and marital status, race, ethnicity, place of origin, and several other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of age, older persons have the right to accommodation up to the point of undue hardship for needs associated with their older age. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.²³⁸

The OHRC has broad powers to advance the purposes of the *Code* as expressed in the Preamble. These powers include the ability to develop statements of policy, interpreting the provisions of the *Code*. The OHRC has developed a *Policy on Discrimination against Older Persons because of Age*,²³⁹ which was released in 2002 and updated in 2007. The *Policy* outlines a principled framework for the understanding and application of human rights protections related to older age. Based on its research and public consultation, the OHRC adopted the principles of the NFA as part of its policy framework. It harmonized these with the fundamental human rights principles of dignity, participation and inclusion, and individualization. The *Policy* emphasized an anti-ageist approach to

human rights, and adopted an intersectional approach to the diversity among older adults.

Domestic Policy Frameworks

National Framework on Aging (1998) and Seniors' Policy Handbook

The *National Framework on Aging* (NFA)²⁴⁰ was released in 1998, and updated in 2009 through the *Seniors' Policy Handbook*.²⁴¹ It was a joint product of the Federal/Provincial/Territorial Ministers Responsible for Seniors (with the exception of Quebec, which supported the Vision and Principles, but which intended to assume full responsibility for the entire range of activities relating to health and social services). This voluntary framework was intended to assist governments in responding to the needs of seniors. It was based on extensive public consultation. At the core of the NFA is this vision: "Canada, a society for all ages, promotes the well-being and contributions of older people in all aspects of life". The NFA adopted five interrelated principles with which to guide actions to achieve the Vision: dignity, independence, participation, fairness and security.

Senate Special Committee Report on Aging (2009)

In 2006, the Canadian Senate struck a Special Senate Committee on Aging. The mandate of the Committee was to review a wide range of issues, with the purpose of determining whether Canada is providing the right programs and services at the right time to the individuals who need them. The Committee reviewed public programs and services for older adults, identified gaps, and examined the service delivery implications of an aging population. The Committee released its final report in the spring of 2009.²⁴² In addition to making numerous specific recommendations with respect to policy and program options and implementation, the Committee emphasized the importance of the following: recognizing the place of older adults as active and engaged citizens; affording older adults the opportunity age in place; placing as much importance on adding life to years as on adding years to life; and recognizing the aging population as an opportunity for Canada.

Reports on Specific Issues

There are, of course, a plethora of reports and policy initiatives addressing specific issues related to older adults. Particularly interesting for the purposes of this Project is

the *Seniors Mental Health Policy Lens* that was developed for the B.C. Psychogeriatric Association.²⁴³ The *Lens* is intended to guide analyses of current and planned policies and programs from a seniors' mental health perspective. It is designed to identify ageist biases in policy that may result in negative impacts on the mental health of older adults, and to foster a social, rather than biomedical, model of care. It is based on older adults' perspectives and values about their mental health. The *Lens* identifies 10 factors to consider when developing or evaluating policies relating to the mental health of older adults, including process factors (such as whether the program or policy was developed in a collaborative and participatory fashion), diversity, recognition of the multiple determinants of health, accessibility, promotion of participation and relationships, independence, security, dignity, fairness, and a life-course analysis.

This *Lens* was adapted to create the *Prevention of Elder Abuse Policy and Program Lens*,²⁴⁴ which was developed by the Prevention of Elder Abuse Working Group in partnership with the Ontario Seniors' Secretariat and the Elder Health Coalition. The intent of the *Lens* is to strengthen the capacity of government, non-government organizations and service providers to prevent, detect and respond to elder abuse. The *Lens* adopts eight guiding principles:²⁴⁵ collaboration between the full range of stakeholders and persons affected by any policies, programs or practices that are developed or implemented; consideration of the specific needs of marginalized/vulnerable subgroups among older adults; accessibility; social inclusiveness; independence and self-determination; respect and dignity; fairness and equity; and security, meaning the reduction of the susceptibility of older adults to risk, danger, doubt, anxiety and fear.

3. *Equality as an Underlying Value for the Framework*

Equality is identified as a value or a principle in some of the documents discussed above. In particular, equality and non-discrimination are central to the *Charter* and to the *Human Rights Code*.

Rather than identifying equality as a discrete principle, the LCO has concluded that substantive equality is more appropriately described as "an underlying value" or a goal that observance of the principles will advance and that should influence the interpretation of the principles.

The interpretation of the concept of equality is subject to on-going debate and discussion and the case law relating to equality continues to evolve.

“Equality” is often linked with “non-discrimination” and in certain respects they are intended to achieve similar results. Anti-discrimination theory has become intertwined with the notion of equality, and as a result even the broader “equality” tends to carry with it the notion that particular groups (and not necessarily others) have been treated unequally and deserve to be treated equally. There is a major difference between the two, however. “Non-discrimination” requires a comparison with others who do not share distinctive characteristics with a person denied a benefit or opportunity, for example. There is an implicit assumption that the way the comparator group is treated or the opportunities available to the comparator group is the standard to meet. Both the claimant and the comparator group might be treated “badly”, but nonetheless equally and without discrimination, even though the way they are treated is at a low standard. Accordingly, governments required to extend benefits to a group previously excluded because the exclusion constitutes discrimination can decide not to provide the benefit rather than extend it.

Following Supreme Court of Canada jurisprudence, the LCO’s approach to the concept of equality is substantive, rather than formal. The Supreme Court of Canada, in a recent case dealing with age-based criteria, stated that

Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.²⁴⁶

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in society. It incorporates but is not limited to non-discrimination, meaning that no distinctions are imposed upon disadvantaged persons that, in purpose or effect, withhold or restrict access to opportunities, benefits or protection from the law, or

impose burdens, obligations, or disadvantages that are not imposed on others. It also means, however, that older persons are not defined by their age, but are recognized as members of society who are able to make contributions and have obligations, as do other members. Substantive equality is about intangible concepts such as dignity and worth, but also about concrete opportunities to participate, have needs taken into account and have society and its structures and organizations develop in a way that does not treat older persons as outside mainstream society.

4. *Principles Adopted by the LCO*

Based on its research and the Preliminary Consultation, in its January 2009 Paper on this project the LCO adopted the following five principles for its framework for the law as it affects older adults, each of which is considered in some detail below:

1. Respect for dignity and worth;
2. Promotion of independence and autonomy;
3. Enhancement of participation and inclusion;
4. Recognition of the importance of security; and
5. Recognition of diversity and individuality.

In addition, based on additional research and comment, the LCO has identified a sixth principle of understanding membership in the broader community. The six principles of independence and autonomy, dignity and worth, participation and inclusion, security, and diversity and individuality are dealt with separately below. However, to some degree, the separation of these principles is artificial. To a significant degree, the principles are inter-related, in the sense that, for example, independence is often considered a component of dignity. Further, the principles are interdependent: for example, independence is predicated on a minimal level of security, and older adults who do not have sufficient autonomy to be able to make their own choices and to advocate for themselves are at risk of losing their security.

Respect for Dignity and Worth

Dignity is identified as a key principle for older persons in several source documents, including the United Nations IPOP, the NFA, and the IFA *Declaration*. It is also at the core of values incorporated into the *Human Rights Code* and the *Charter*. The Preamble of the *Code* states that its purpose is to “recognize the inherent dignity and worth of every person”.²⁴⁷ In *Miron v. Trudel* the Supreme Court stated that the purpose of section 15

of the *Charter* is “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance”.²⁴⁸ Despite the centrality of the notion of dignity, an examination of the sources reveals multiple approaches to this principle.

The United Nations IPOP identify two key aspects to the principle of dignity

1. the ability to live in security and free from exploitation and abuse, and
2. fair treatment regardless of age, disability, ethnicity, gender, race or other status.

The NFA takes a different approach, identifying as core aspects of dignity the right to be treated with respect as a worthy human being and accepted as one is, regardless of one’s status, and the right to be appreciated for one’s contributions.

The OHRC has adopted a very broad definition of dignity, which bears some resemblance to that of the NFA:

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well ...²⁴⁹

The Canadian Association of Community Living, in its 2008 submission to the LCO, forcefully argued for the approach to dignity adopted by the NFA and the OHRC, in which dignity is associated with the very nature of humanity, and is inherent, inalienable, and equal for all humans regardless of their status:

All members of the human family are full persons. Our human essence cannot be reduced to words, labels, categories, definitions or genetic patterns. Every person is unique. No one can be replaced or copied. All persons are ineffable.

- All persons are entitled to respect. Respect requires recognition of and concern for the dignity of every person. Dignity is fragile. It must be protected from all harm.
- All persons have inherent dignity. Dignity belongs to us just because we exist. It is not something we earn or receive.
- All persons have inalienable dignity. Dignity cannot rightfully be ignored, diminished or taken away.
- All persons have equal dignity. Dignity does not depend upon physical,

intellectual or other characteristics. Neither does it depend upon the opinions that other people have about these characteristics.

- All persons have inherent and equal worth. Our value as persons is neither earned nor accumulated. It is unrelated to health status or any genetic or other personal characteristic.
- All persons have inherent capacity for growth and expression. Every person has the right to be nourished physically, intellectually, socially, emotionally and spiritually.
- All persons are entitled to equal access and opportunity. Equality demands protection from all forms of discrimination or harm, and access to the supports necessary to enable equal participation.

This notion of dignity, ascribing a unique moral worth to human beings by virtue of their simple humanity is an old one, and is often raised as a contrast to an approach to dignity that is founded on the capacity for rationality and autonomy (as is discussed in the following section on the principle of independence and autonomy).

The notion of dignity as connected to independence and autonomy appears in human rights policy as the principle of the “dignity of risk”. This notion of “dignity of risk” has developed in the context of disability rights, and asserts that persons with disabilities have some right to choose to assume risks in order to maximize their opportunities and options.

People who are not diagnosed have the “right” to make risky and potentially self-defeating choices without intervention from authorities, clinicians or service providers wishing to protect them from the consequences of their choices. The concept of the dignity of risk acknowledges the fact that accompanying every endeavour is the element of risk and that every opportunity for growth carries with it the potential for failure. All people learn through a process of trial and error. We learn through taking risks and trying new things and we often learn as much from our mistakes as we do from our successes. When people living with a mental illness are denied the dignity of risk, they are being denied the opportunity to learn and recover.²⁵⁰

The concept of “dignity of risk” has had some application as a principle of disability law. The OHRC *Policy and Guidelines on Disability and the Duty to Accommodate* asserts that in some cases, where making an accommodation to permit a person with a disability to participate will result in some risks to the safety of that person, the person with a disability may have a right to assume that risk in the pursuit of equality.²⁵¹ For example, the Ontario Human Rights Tribunal, in *Turnbull v. Famous Players Inc.*, upheld the right

of persons who use wheelchairs to assume the risks to their safety (for example, in case of fire) associated with attending movies in a non-accessible building, so long as they were fully informed regarding those risks.²⁵²

As noted above, the principle of dignity plays a considerable role in the interpretation of the equality rights provision of the *Charter*, reaching its highwater mark in the decision of the Supreme Court in *Law v. Canada*,²⁵³ where the Court gave a central place to dignity in the equality rights analysis – an approach since modified in *R. v. Kapp*.²⁵⁴ Importantly, the *Law v. Canada* case dealt with an age-based distinction under the Canada Pension Plan, in which survivor benefits were denied to able-bodied surviving spouses under the age of 35 who were without dependent children. The Court found that while these provisions did create differential treatment, they did not violate human dignity, and therefore were not discriminatory.

While autonomy and independence are essential to an anti-ageist approach to the law as it affects older adults, the LCO will consider autonomy and independence as a separate principle, rather than subsuming them into the principle of dignity and respect. To conflate the two risks making respect for the dignity of older persons contingent on their ability to exercise their independence, thereby potentially eroding respect for some older adults. The focus of the LCO's approach to dignity will be on the inherent worth of older adults, and respect for the range of contributions that they make. Thus conceived, the principle addresses ageist notions of older adults as burdens and old age as a time of decline.

The LCO adopts the following definition of the principle of dignity and respect:

This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family are full persons, unique and irreplaceable, with capacity for growth and expression. It therefore includes 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.

Promotion of Independence and Autonomy

The principle of independence and autonomy is widely accepted as a foundation for policy related to older adults. It is adopted by the NFA, the United Nations IPOP, and the IFA's *Declaration of Rights and Responsibilities of Older Persons*. The World Health

Organization's *Active Ageing Policy Framework* emphasizes that "Maintaining autonomy and independence as one grows older is a key goal for both individuals and policy makers".²⁵⁵

The centrality of independence and autonomy to policy frameworks relating to aging is a response to the persistent paternalism towards older persons, and the stereotypes and assumptions associated with aging. The view that older persons are incapable of managing their own affairs and of contributing to society, that they are naturally dependent on others for care and support, that they must be protected in their own "best interests" – these attitudes, and the social structures that are based on them, have created significant barriers to the ability of older persons to remain engaged in the labour force, to make choices about their own living arrangements and health decisions, and to have their contributions recognized. The principle of independence and autonomy is therefore central to any anti-ageist approach to law and policy.

The content of this principle, however, differs somewhat depending on the context in which it is used. For example, the NFA defines independence as:

Being in control of one's life, being able to do as much for oneself as possible and making one's own choices e.g., decisions on daily matters; being responsible, to the extent possible and practical, for things that affect one; having freedom to make decisions about how one will live one's life; enjoying access to a support system that enables freedom of choice and self-determination.

On the other hand, the United Nations IPOP focus on functional indicators of independence: access to adequate food, water, shelter and clothing; opportunity to work or generate income; ability to participate in decisions about withdrawal from the workforce; access to appropriate training and education programs; and ability to reside in their homes in the community as long as possible.

These two approaches to a definition of independence point to two key facets to this principle. These are reflected in the distinction that the World Health Organization makes between the terms "independence" and "autonomy". The World Health Organization defines these the two terms as follows:²⁵⁶

Autonomy is the perceived ability to control, cope with and make personal decisions about how one lives on a day-to-day basis, according to one's own rules and preferences.

Independence is commonly understood as the ability to perform functions related to daily living – i.e., the capacity of living independently in the community with no and/or little help from others.

The first aspect – the aspect that the WHO refers to as autonomy- is the notion that individuals have the right to make choices about their own lives. This notion is sometimes tied, in a line of thought which may be traced back to Kant, to the nature of human dignity. Rationality and autonomy, in this approach, are the basis for a capacity-oriented, individualist “dignity as self-possession”.²⁵⁷

The *Charter* provides some recognition and protection for individual autonomy. Section 7 of the *Charter* protects the “life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. There has been some division of opinion on the scope of ‘liberty’ under the *Charter*, with some advancing the position that liberty includes only freedom from physical restraint by the state, and others advancing the notion that liberty includes the right to make fundamental personal decisions without state interference.²⁵⁸ The latter view was adopted by the majority of the Supreme Court in *Blencoe v. British Columbia*, in which the Court included the “right to make fundamental personal choices free of state interference” in section 7.²⁵⁹ In *R. v. Clay*, in which the Supreme Court rejected a challenge from a recreational marijuana smoker, the Court stated that:

[T]he liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can properly be characterized as fundamentally or inherently personal.²⁶⁰

It is not clear, however, the degree to which this *Charter* right to personal autonomy extends outside the administration of justice.²⁶¹

The second facet of the principle – that of independence - relates to the kind of life that may be led – to the ability, not only to *choose* for oneself, but to *do* for oneself. This may mean, for example, the opportunity to earn one’s own living, or to live on one’s own in the community. In this sense, the principle of independence is closely related to the principle of security, since, for example, without basic economic security, one may not be able to aspire to live in an independent fashion.

The two facets are of course, closely allied, as both rely on notions of control over one’s own destiny. The IFA balances both approaches in its interpretation of the principle of independence in its *Declaration*. For example, in the area of employment, the principle

of independence requires both the right “to work and to pursue other income-generating opportunities *with no barriers based on age*” and the right to “retire and participate in determining when and at what pace withdrawal from the labor force takes place.” In terms of education, the principle of independence includes the right to “access educational and training programs to enhance literacy, facilitate employment and permit informed planning and decision-making.” That is, access to education is important in its own right as part of the ability to *live as one chooses*, but also important insofar as it enhances the ability to *make choices*.

The NFA approach to independence touches upon an interesting point: in some cases, independence can only, or can best be achieved with support from others. For example, persons whose cognitive functioning has diminished due to age-related diseases such as Alzheimers’ may lose the capacity to independently make some types of decisions. However, advocates of supported decision-making frameworks point out that, with decision-making supports, these persons may continue to exercise their autonomy. Similarly, persons with mobility or sensory disabilities may find it increasingly difficult to age at home and in their communities as they begin to require assistance with household tasks or personal care. However, the provision of assistive services may enable these persons to continue to live on their own in their communities.

The LCO approach to this principle will include both the concept of independence and that of autonomy, as well as the recognition that independence and autonomy are realized in a social context, and their exercise may require support from, or benefit from others.

The LCO adopts the following definition of the principle of independence and autonomy, noting that it applies to all spheres of life, including rights to meaningful opportunities to work, to age in place, to access education and training:

This principle recognizes the importance for older persons of the ability to both make choices and do as much for oneself as possible. It also recognizes the necessity for measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports so that older adults are able to exercise agency. Given entrenched paternalism and stereotypes about older persons, the presumption of ability is essential to the realization of this principle.

Enhancement of Participation and Inclusion

The principle of participation and inclusion responds to the pervasive exclusion of older adults, and has several elements.

The first element, identified in the IPOP, the NFA, and the IFA *Declaration* is the right of older adults to be consulted on issues that affect their well-being. In their 2008 submission to the LCO, Canadian Pensioners' Concerned stated:

We support the principles cited in the United Nations *Principles for Older Persons* (1991), the Canadian National Framework on Ageing, and the goals set out by the World Health Organization in its *Active Ageing Policy Framework*. However, we have a particular concern that, despite these excellent principles and goals, older persons are rarely engaged in planning public policies or programs or changes to the law.

The MIPAA sets out three actions that are necessary to the fulfillment of this element of the principle of participation:²⁶²

- Taking into account the needs of older persons in decision-making at all levels;
- Encouraging the development of organizations of older persons to represent older persons in decision-making; and
- Taking measures to enable the full and equal participation of older persons, particularly older women, in decision-making at all levels.

This list highlights that this element of the principle of participation has a political component, insofar as it seeks to encourage the active participation of older persons in advocacy organizations and in government decision-making processes.

A second element is the right to be included in the mainstream of society and to have society's policies, programs and structures designed in a way that takes into account and includes the needs and experiences of older persons. This element finds a strong basis in human rights laws. The OHRC's *Policy* defines ageism as:

The Commission has defined "ageism" to mean, in part, "a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons". Ageism occurs when planning and design choices do not reflect the circumstances of all age groups to the greatest extent possible. The Supreme Court of Canada has recently made it clear that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then to try to accommodate those

who do not fit this assumption. Rather, the age diversity that exists in society should be reflected in the design stages so that physical, attitudinal and systemic barriers are not created.²⁶³

The Supreme Court has made the principle of inclusion by design a central aspect of its approach to human rights laws.²⁶⁴

A third element of participation is the right to continue to contribute to society, whether through paid employment, volunteer work or in other capacities, and to share knowledge, skills, values and life experiences with younger generations. Contributions are not limited to those that may be made through the labour force: the WHO's *Active Ageing Policy Framework* explicitly notes that older adults who have retired from work or who are ill or living with a disability can remain active contributors in many ways. The right to contribute is central to the approaches of both the United Nations *Principles* and the IFA's *Declaration*. MIPAA states that:

A society for all ages encompasses the goal of providing older persons with the opportunity to continue contributing to society. To work towards this goal, it is necessary to remove whatever excludes or discriminates against them. The social and economic contribution of older persons reaches beyond their economic activities. They often play crucial roles in families and in the community. They make many valuable contributions that are not measured in economic terms: care for family members, productive subsistence work, household maintenance and voluntary activities in the community. Moreover, these roles contribute to the preparation of the future labour force. All these contributions, including those made through unpaid work in all sectors by persons of all ages, particularly women, should be recognized.²⁶⁵

MIPAA's statement highlights that this element of participation is dependent for its realization on the second element described above: the removal of barriers to older persons and the development of an inclusively designed society.

The fourth and final element of the principle of participation is the right to be active in all elements of community life. The WHO, in its *Active Ageing* policy framework, notes that:

The word "active" refers to continuing participation in social, economic, cultural, spiritual affairs, not just the ability to be physically active or to participate in the labour force.

MIPAA recommends that governments take steps to “provide opportunities, programmes and support to encourage older persons to participate or continue to participate in cultural, economic, political, social life and lifelong learning”.²⁶⁶ This aspect of participation includes the right to continue to participate in the workforce, to access education and to be involved in community activities.

One facet of this commitment to the inclusion of older persons in the community is the widely endorsed concept of “aging in place”, the idea that older persons should not need to move from their homes in order to access necessary support services in response to changing needs. Aging in place was one of the core concerns identified in the Senate Committee Report on Aging.²⁶⁷

All of these elements of the principle of participation are premised on a fundamental recognition: that older persons have worth and that they have something valuable to contribute to their families, their communities and their society. That is, the principle of participation is profoundly connected to the principle of dignity and respect. The Senate Committee on Aging took as a starting point for its work on aging the recognition that the aging of society should be viewed not as a burden, but as an opportunity, and that older persons make many and valuable contributions to Canadian society.

The LCO has adopted the following definition of the principle of participation and inclusion:

This principle promotes 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, as well as efforts to enhance the participation of those older adults who have experienced especial marginalization. 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.

Recognition of the Importance of Security

What the LCO refers to here as the principle of security has, in some documents been referred to as a principle of “care”. The LCO prefers the term security, as a principle of “care” may connote a passive reception of services and a notion of older adults as frail and dependent. The principle of security must be interpreted and implemented in a way that does not abrogate the other principles of dignity and worth, independence and

autonomy, and participation and inclusion. In its submission, ACE stated that the principle of security should:

[Address] possible vulnerabilities of older adults, whether short-term or long-term, without discounting the principles of dignity, independence and participation. The LCO is discouraged from recommending a framework based on the notion of vulnerability and a perception that older adults lack capacity and need protection.

The notion of security is central to the WHO's *Active Ageing Policy Framework*. The WHO emphasizes that social and economic environments of older adults are key determinants of active ageing. The presence or absence of social supports, violence and abuse, education and literacy, income, social security and opportunities to work will have a significant influence on the ability of older adults to remain active, engaged members of their communities.²⁶⁸ That is, security is essential to the achievement and maintenance of the other principles of dignity, inclusion and independence.

The principle of security (or care) is acknowledged in all key policy documents: MIPAA, the NFA, and the IPOP. There is, however, little consensus on the breadth of the principle of security.

International documents generally take a broad approach to security, including in it a range of socio-economic elements. The IPOP include, as part of the principle of care, rights of older persons to:

- Access to health care to help them maintain or regain their optimum level of well-being;
- Access to social and legal services to enhance their capacity for autonomy and to provide protection and care; and
- Access to appropriate levels of institutional care, and to enjoy the full level of their human rights and freedoms while in such facilities.

MIPAA sets out a wide range of objectives related to the economic, physical and social security of older adults. For example, it sets as objectives the reduction of poverty among older adults, the promotion of programs to ensure income security and social protection/social security, and universal access to health care services.

As one of its key policy proposals, the WHO recommended that governments:

Ensure the protection, safety and dignity of older people by addressing the social, financial and physical security rights and needs of people as they age.²⁶⁹

This requires policy attention to such areas as social security, consumer protection, elder abuse, shelter and social justice.

Domestically, the principle of security has been given a more restrictive interpretation. The NFA defines security as:

Having adequate income as one ages and having access to a safe and supportive living environment e.g., financial security to meet daily needs; physical security (including living conditions, sense of protection from crime, etc.); access to family and friends; sense of close personal and social bonds; and support.

This approach to security notably omits reference to access to health, legal or social services. ACE notes that:

The notion of security in the *National Framework on Aging* is a good concept that resembles care in the *Principles for Older Persons*. Unlike the United Nations document, there is no entitlement to services which ensure security of the person, such as health care, institutional care or specialized care. The principle of security could be strengthened if it was expanded to include access to legal and social services, as well as legal definitions of program eligibility for health care and community based long-term care services, such that a person who meets eligibility criteria is entitled to fully participate in the program regardless of scarce resources.

While section 7 of the *Charter* provides protection for “security of the person”, it is far from clear whether this extends to the provision of basic necessities. The Supreme Court of Canada considered this question in the case of *Gosselin v. Quebec (Attorney General)*,²⁷⁰ but did not finally determine it. While the Court did not make such a finding in this case, it left the door open for future arguments that section 7 might be the basis of an affirmative right to basic subsistence. The Chief Justice, writing for the majority, stated that:

The question therefore is not whether s. 7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.²⁷¹

In *Nova Scotia (Workers' Compensation Board) v. Martin*, a case under section 15 of the *Charter*, the Supreme Court stated that in section 15 cases involving economic interests, economic disadvantage or deprivation may be related to a loss of human dignity.²⁷² However, the Court has also been clear, most recently in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* that legislatures are under no obligation to create benefits (though neither are they restricted from doing so). They may target programs to be funded on the basis of their policy decisions, so long as the resulting benefits are not delivered in a discriminatory fashion.²⁷³

The LCO adopts the following definition of the principle of security:

This principle recognizes the importance of physical, psychological, financial, and social security, including the right to be free from abuse or exploitation, and the right to access to basic supports in terms of health, legal and social services in order to promote the achievement and maintenance of the principles of dignity and worth, independence and autonomy, and participation and inclusion.

Diversity and Individuality

As noted earlier, the diversity among the Canadian population as a whole is mirrored in the population of older adults. Older adults will differ depending on their age, gender, sexual orientation, language, income, education, area of geographic residence, family and marital status, language, immigration and citizenship status, racialization and ethnic origin, Aboriginal identity, status with respect to health and disability, and other factors. To assume that older adults are a homogenous group, and reduce their diversity of needs, experiences, identities and outlooks to a single status based on age is itself a form of ageism. To emphasize that older adults are first and foremost individuals, and that in many, if not most, circumstances, their age is not the most important aspect of their identities is key to combating stereotyping, paternalism and ageism. MIPAA emphasizes that one of the most important actions that governments can take to combat ageism so to “encourage the media to move beyond portrayal of stereotypes and to illuminate the diversity of humankind”.²⁷⁴

The OHRC adopted individualization as a key principle in its *Policy on Discrimination Against Older People because of Age*, noting that “In the past, many standards, factors, requirements and qualifications that discriminate on the basis of age have been justified on the basis of presumed characteristics associated with aging.”²⁷⁵

The WHO's *Active Ageing Policy Framework* recognizes the principle of diversity as part of its adoption of a life-course perspective on aging, stating that:

A life course perspective on ageing recognizes that older people are not one homogeneous group and that individual diversity tends to increase with age.

That is, an application of the principle of diversity must incorporate a life-course approach to understanding issues associated with aging.

Another aspect of the principle of diversity is the recognition that the intersections between various aspects of identity may produce unique forms of marginalization, discrimination and exclusion. International documents recognize the importance of bringing gender, cultural, and disability lens to policies and programs related to ageing. The OHRC's *Policy* notes that:

The experience of age discrimination may differ based on other components of a person's identity. For example, certain groups of older persons may experience unique barriers as a result of the intersection of age with gender, disability, sexual orientation, race, ethnicity, religion, culture and language... This understanding of the complexity of how people experience age discrimination means that, where appropriate to the circumstances of the alleged discrimination, all relevant grounds must be considered along with age... It may be necessary to examine any stereotypes as well as the historical, social and political context associated with the particular combination of grounds. In some cases persons may be put at a 'double disadvantage' as a result of age combined with other grounds of discrimination.²⁷⁶

The LCO has adopted the following definition of the principle of diversity and individuality:

This principle recognizes that older adults are individuals first. They are not a homogenous group, and their needs and circumstances may be affected by a wide range of factors. Older adults may also experience discrimination or exclusion based on their gender, racialization, Aboriginal immigration or citizenship status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, and the law must take into account the impact of this diversity.

Membership in the Broader Community

As the previous section makes clear, older adults, like all of us, have many identities, roles, ties, networks and communities, of which their membership in a particular generation or age-grouping is only one, but not necessarily a defining, characteristic, and from their perspective usually not the most central.

Older adults are members of the broader community, with which they have a wide range of ties, as well as reciprocal rights and obligations. The well-being of older adults – as citizens, as parents and grandparents, as employees and volunteers, as taxpayers and recipients of services – is connected, and to some extent, reflective of the wellbeing of the broader society. The reverse is, of course, true as well. Older adults, and the law as it affects older adults, cannot be considered as separate from the population *per se*.

Employing a life-course approach adds another dimension, in that the laws and policies and environments shaping the life of children, young adults and those now in middle-age shape the nature and experience of growing into older.²⁷⁷ An age-friendly society takes into account the well-being and resources available to individuals of all ages.

The vision of the NFA of “Canada, a society for all ages ...” highlights the importance of considering the needs and experiences of older adults in the broader context of ensuring that society is inclusive for all ages.

The emerging international concept of “intergenerational solidarity” presents another way of understanding and addressing the connections between generations.²⁷⁸ The concept of intergenerational solidarity has been described in this way:

Solidarity between the young, the active and the elderly must not be approached solely from a financial perspective, but must be viewed in a wider way, encompassing the promotion of mutual cooperation and exchange between the generations. It must encourage a better mutual understanding of the needs and expectation of other age groups and explore new forms of coexistence. The way in which our society is organised must be reviewed completely in order to rebuild the social fabric and the links between and within the different generations so that all can find the place that suits them where they can flourish and make their contribution to the general well-being as best they can.²⁷⁹

The LCO proposes this definition of the principle of membership in the broader community:

This principle recognizes that older adults are part of a broader community with which they have reciprocal rights and obligations. People of generations past, present and future are bound together, and it is the responsibility of all to promote mutual cooperation and understanding between generations and to work towards a society that is inclusive for all ages.

5. *Applying the Principles*

Relationships Between Principles

As these brief discussions of the principles indicate, the principles cannot be neatly separated from each other, and are interrelated in complex ways. 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, there may also be tensions between the principles. There are a number of scenarios in which tensions between principles might arise in the context of older persons. In some cases, two principles may be in tension in relation to the same older adult. For example, an older woman could be living in unsafe and unsanitary conditions in her own home but would like to remain there rather than be moved. Here the principle of autonomy – the woman’s right to choose where to live, may come into tension with the principle of dignity – her inherent worth to have the minimum standards for her existence to be met. There may also be instances where principles may be in tension in relation to two different persons or groups of older persons. Although not insurmountable to resolve, it is important that we develop a framework for resolving such tensions when they do in fact arise.

In assessing tensions between principles, it is essential to be sensitive to the contexts in which those tensions arise.²⁸⁰ What specific rights or outcomes are at issue in that particular situation? Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles? That is, the tensions must be examined in a nuanced and holistic manner.

As well, an examination of tensions, particularly between the principles of security and of independence and autonomy, should be sensitive to the larger social context in which such tensions may arise. In the example cited above of an older woman who wishes to remain in her home despite the unsafe and sanitary conditions there, one of the factors at play may be the policy decisions that continue to result in a lack of adequate home care supports for older adults. In such a case, the real issue may not be a tension between autonomy and security, but the impact on both principles of the limited available appropriate resources to maximize both. That is, we should not be too quick to reduce a challenge or difficulty to an instance of tensions between the principles.

One potential pathway to resolving tensions that arise between principles is to create a hierarchy among the principles in order to determine which principle should prevail in the event of a tension with another principle. One advantage of such an approach is that it is predictable, as well as simple, to apply. However, the mechanical nature of such an approach ignores the complexity of the issues where such tensions arise.²⁸¹ It also ignores the interrelatedness of the principles. To elevate the principle of dignity, for example, above all other principles ignores the potential that restrictions in the fulfillment of other principles, such as autonomy or participation, might contribute to an overall lessening of respect for the dignity of older persons. Hierarchical approaches have generally been rejected in the area of rights for this reason: for example, the preamble of the *Convention on the Rights of Persons with Disabilities* reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”.

The concepts of “reconciling” or “balancing”, which have been explored in the context of competing rights, might be useful to consider in this context.²⁸² Reconciliation is an approach that attempts to give proper recognition of both principles to the greatest degree possible.²⁸³ Balancing, may involve the weighing of one principle against the other. Using a balancing approach may have the disadvantage of creating the impression that the principles are actually competing and need to be considered hierarchically.²⁸⁴

As a first step in addressing tensions that may arise between principles, it may be helpful to recollect that the principles themselves have been developed as a means of responding to the marginalization, exclusion and oppression of older persons. That is, in considering how to resolve tensions between principles, one might consider the particular types of barriers that the principles were intended to address, and how any

specific approach to resolving the tensions might impact on the achievement of the broader goals of an anti-ageist approach to the law.²⁸⁵

CASE EXAMPLE: TENSIONS BETWEEN AUTONOMY AND SECURITY

Mandatory Reporting and Adult Protection Laws

One example of the ways in which ageism may manifest in law may be found in considering mandatory reporting and adult protection laws.

Some provinces have put in place comprehensive adult protection legislation. This legislation aims to address the risk of abuse and neglect for older adults, and creates institutional structures to address instances of abuse and neglect. It generally covers physical, sexual, emotional and financial abuse, as well as self-neglect.

To achieve this objective, this type of legislation provides for intervention by third parties. The primary objective of adult protection legislation is to connect individuals with necessary social and medical services. Examples include Manitoba's Vulnerable Persons Living With a Mental Disability Act,²⁸⁶ Newfoundland's Neglected Adults Welfare Act,²⁸⁷ and Nova Scotia's Adult Protection Act.²⁸⁸

The application of adult protection legislation varies. Newfoundland's Neglected Adults Welfare Act,²⁸⁹ applies to adults who: 1) are incapable of properly caring for themselves because of "physical or mental infirmity"; 2) are not suitable to be in a suitable treatment facility under mental health laws; 3) are not receiving "proper care and attention" and 4) refuse, delay or are unable to make provision for proper care and attention. Nova Scotia's Adult Protection Act²⁹⁰ similarly applies to victims of abuse or neglect (or self-neglect) who are incapable of protecting or caring for themselves due to physical disability or "mental infirmity". That is, the scope of the legislation is not necessarily limited to those who are legally incapable of making decisions for themselves: physical disability or lesser levels of mental disability may also provide a justification for unwanted intervention. Manitoba's Vulnerable Persons Act is rather different in approach, in that it restricts its focus to persons with intellectual disabilities who are in need of assistance to meet basic needs with regards to personal care or financial management.²⁹¹

Adult protection legislation focuses on protection from abuse and exploitation by granting broad powers to an agency to intervene. The Manitoba Law Commission notes that in these statutes “The focus thus shifts from competence and legal disability to vulnerability and agency intervention, removal of the victim from the home, and case planning.”²⁹²

All three statutes require mandatory reporting of abuse or neglect of an adult who falls within the protective scope of the legislation.²⁹³ Agencies have investigative powers, and may have broad remedial powers to, for example, remove the older adult or some other person from the home, place the older adult under agency supervision, require a person to provide financial support to the older adult, or do anything else that the designated authority considers appropriate.

One key difference between the Manitoba legislation and that of Newfoundland and Nova Scotia beyond the more restrictive scope, is the emphasis in the Vulnerable Person’s Act on maintaining and supporting, wherever possible, the ability of the vulnerable person to be involved in decisions that affect him- or herself. The preamble to the Act sets out a presumption of capacity to make decisions and a recognition that vulnerable persons should be encouraged to make their own decisions and that they should have the support and assistance to do so to the degree possible, and this emphasis is reflected throughout the Act.

Adult protection legislation has been, and remains controversial.

ACE has always opposed adult protection legislation of the type in place in Nova Scotia, on the basis that such legislation: (a) limits the Charter values of liberty and security of the person without providing the same substantive rights and procedural safeguards that would be found in alternative criminal justice and mental health legal procedures; and (b) marginalizes already disadvantaged adults, often without providing anything constructive in the way of rights or resources that might assist them in overcoming neglect and abuse.²⁹⁴

A key element in the negative response to mandatory reporting legislation in the Atlantic provinces, is the very broad scope of that legislation, which permits unilateral and potentially heavy-handed intervention in the lives of older adults, who, in other contexts, would be considered quite capable of making their own decisions. There are obviously some adults who, due to the nature of their disabilities, are not able to speak or act for themselves or to make decisions to protect their own safety and security, and who may need others to assist them to take action or to simply take action for them. The scope of

the legislation in Nova Scotia and Newfoundland, however, goes far beyond this, and in doing so, permits paternalistic decision-making, potentially influenced by ageist stereotypes or attitudes.

In considering responses to elder abuse, it is worthwhile to consider the views of older adults themselves, and the reasons that capable older adults may have for not reporting elder abuse.²⁹⁵ They may, for example, be unaware of their rights and of their legal avenues for securing them. They may fear that the authorities would not take them seriously, or would not provide them with assistance. They may have been intimidated by their abusers, or prevented from contacting others. This may be particularly the case for older immigrants, who may face serious immigration consequences if their relationship with their sponsor is undermined. Older adults may also be reluctant to report their children if they are abusive, for fear of seeing them subjected to criminal penalties that will have life-long impact and destroy the relationship.

Circumstances involving the abuser as being someone in a position of trust also have a negative impact on report rates. A relationship with the abuser can discourage an elderly person to report abuse because many seniors perceive legal intervention as too severe. Some individuals indicated a preference for less formal or community-based response, similar to a restorative justice approach to elder abuse. Restorative justice appealed to group participants because of the belief it could provide an opportunity for victims to speak with their abusers, for the abusers to receive education about appropriate and acceptable behaviours, and present a way to repair the harm without family or loved ones facing serious legal repercussion.²⁹⁶

Where older adults are dependent on their abusers for caregiving supports, they may fear that prosecution of their abusers will leave them without the supports they need to continue to live in their homes or communities. They may also fear that interventions may be made under the law that will reduce their independence.

In considering these reasons, some conclusions become apparent.

First, because of the complex roots of elder abuse, legislation can, in any case, provide only a partial response (although a vital one) to the problem of elder abuse.

[T]he [Manitoba Law Reform] Commission is of the view that legislation per se cannot be a complete answer to social problems. No legal regime can anticipate all eventualities in an area as diffuse and complex as adult protection, where problems take multiple forms and are deeply insinuated into social and familial

*relationships. Attempts to do so have created, in the Commission's view, blunt and intrusive legal instruments. The extreme protectionism at the heart of such statutes is at odds with the value placed in Canadian society on self-determination.*²⁹⁷

In some cases, older adults are vulnerable to abuse because a lack of social supports places them in a position of dependency with respect to their abusers. Addressing the abuse may worsen other aspects of their situation. The older adults in these situations must weigh a trade-off between their security from abuse and other values and goals. In such cases, older adults, so long as they are capable, are in the best situation to weigh what is the best for them, or at least have the right to make their own decision as to what will maximize their security, dignity, autonomy, and participation. Mandatory intervention in the lives of older adults who are capable of unassisted decision-making may not in fact lead to better outcomes for those older adults. Further, the optimum response is not necessarily to make choices on behalf of the older person, but rather, to ensure that older adults have the supports and services they require to avoid becoming dependent on their family caregivers and to make choices for themselves.

Manitoba's Vulnerable Persons Act in part addresses these concerns regarding the impact on autonomy by including in its preamble a number of principles, including a presumption of capacity, a recognition that vulnerable persons should be encouraged to make their own decisions, and a recognition that assistance with decision-making that is provided to vulnerable persons should be provided in a manner which "respects the privacy and dignity of the person and should be the least restrictive and least intrusive form of assistance that is appropriate in the circumstances". In addition, Manitoba Family Services has adopted a number of principles with respect to the protection of vulnerable persons, including that:

- the vulnerable person has the right to refuse protection services, where he or she understands why such services are offered and appreciates the danger or reasonably foreseeable consequences of his or her refusal;*
- the vulnerable person's wishes, beliefs or values are to be considered so the vulnerable person's independence and self-determination can be maintained, and where these are not known or may endanger the vulnerable person, his or her best interests should be considered; and*
- protective action should be the least restrictive and least intrusive to ensure reasonable safety and security under the circumstances and to maintain the vulnerable person's independence, privacy and dignity.*²⁹⁸

Greater training and education to ensure that authorities are able to respond appropriately and sensitively to older adults in situations of abuse, and to make sure that older adults are aware of their rights and how to access them, would reduce barriers to addressing elder abuse. Public education that emphasizes valuing elders and addressing ageist attitudes may reduce some of the root causes of elder abuse.

While intended to enhance the security of older adults, broad adult protection schemes are paternalistic in approach and may unduly compromise the autonomy of older adults when put into place.

While comprehensive adult protection regimes may give agencies a necessary “foot in the door” in cases of suspected or actual adult abuse or neglect, such regimes would appear to compromise individual autonomy and due process rights, which rights may not be recognized until long after an adult and his or her intimates have experienced significant loss of liberty and legal repercussions. It is this compromise of rights that is the most serious failing of comprehensive adult protection regimes.²⁹⁹

It is tempting to analyze the tensions regarding mandatory reporting and adult protection laws as a straight-forward instance of tension between autonomy and security for older adults, but it is important to resist a simplistic analysis. Mandatory reporting laws, while intended to enhance the security of older adults, may in fact compromise their security by leading older adults at risk to isolate themselves or by exposing them to excessive intervention in their “best interests”. Further, legislation may not be the best avenue for enhancing the security of older persons, at least not as an isolated strategy. A holistic approach which considers the social contexts of the issue may yield solutions which may both respect the autonomy of the older adult and enhance security.

There are situations where older adults may genuinely be unable to act to protect themselves because the nature of their disability renders them unable to understand their options or the potential consequences of their choices. Mandatory reporting and intervention may be necessary in such situations. However, it may still be possible to recognize the autonomy of such older adults, albeit to a more limited extent. This can be done for example, by offering supports and resources prior to resorting to unwanted intervention or by ensuring opportunities to voice concerns even where they may not be determinative in a decision. In this way, to the degree that such legislation can be seen as a balancing between principles of security and of autonomy, the Manitoba approach to adult protection and mandatory reporting, with its restriction of scope to those whose

decision-making abilities are affected by disability and its recognition of the importance of maintaining autonomy where possible, appears to strike a better balance between the two.

6. The Challenge of Application

As important as it is to identify principles for the law as it affects older adults, these principles, without more, are an insufficient basis for an evaluation framework for this area of the law. They must be first paired with a close attention to the lived experiences of older adults as this will ground the principles. Principles which do not incorporate and reflect the lives of older persons will lead to ineffective programs, policies and laws. Attention to the lived experiences of older adults, as outlined in the previous chapter, can provide a context for application of principles.

As well, in order for principles and considerations to provide sufficient practical guidance, a deeper understanding of their practical implications must be developed in the particular context of the law as it affects older adults. How might the principles apply in a context where the abilities and understanding of individuals may be shifting or fluctuating due to illnesses or impairments related to the aging process? How can the principles be applied in a way that meaningfully reflects the great diversity in characteristics and circumstances of older adults? What might principles such as autonomy or participation or security mean in specific settings such as long-term care homes?

The principles and considerations may apply differently depending on the type of law involved. For example, it is easier to identify and analyze potential issues arising in laws that directly target persons with older adults than with laws of general application. Law and policy-makers may have more difficulty determining whether and how older persons may be differentially affected when developing general laws. Often, problems arise in implementation rather than the substance of these general laws, making issues even harder to identify and address. As well, challenges may arise in reconciling general needs or constraints with the particular needs of older persons.

A framework must take into account the different ways in which various types of laws will shape the lives of older persons, and how the practical implications of the principles

and considerations will vary as a result. This will be considered further in the next Chapter of this Report.

7. *Constraints on the Application of the Principles*

Finally, as part of a principles-based approach, one must recognize that even where one would aspire to implement all the principles to the fullest extent possible, there may be other constraints that might limit the ability of law and policy makers to do so. These constraints may include policy priorities or funding limitations among others. That is, it may be necessary to take a progressive realization approach to the full implementation of the principles. A progressive realization approach involves concrete, deliberate and targeted steps implemented within a relatively short period of time with a view to ultimately meeting the goal of full implementation of the principles.

One approach to the progressive realization of the principles may be to draw upon the international framework for application of “respect, protect, fulfill”. In the realm of international human rights law, this framework is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:³⁰⁰

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights. For example, States must not exclude older persons from access to employment or education on the basis of their age.
2. The obligation to protect – States parties must prevent violations of these rights by state actors and third parties. For example, States must require private employers to refrain from discriminating against older persons in employment because of age.
3. The obligation to fulfil – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights. For example, States might create special programs to provide supports for older workers who face particular barriers to re-employment after layoffs.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects older adults. As part of progressive realization of the principles, government might first take steps to ensure that no laws interfere with the principles (respect). As a further step, laws might be passed to prevent interference with the

principles (protect). As a final step, laws might be passed to actively promote the realization of the rights.

There may also be situations where the realization of the principles for older persons may have an impact on the rights of other individuals or groups. During public discussions of the rights of older persons, it is almost inevitable that concerns are expressed about the impact of respecting the rights of older persons on other age groups. The debate regarding mandatory retirement is a case in point, with concerns repeatedly raised that the elimination of protections for mandatory retirement policies would have a negative effect on the employment opportunities of younger persons.³⁰¹ In this view, 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.

One must be cautious about assuming the widespread existence of such conflicts. As with any set of rights, there may be circumstances where respecting and promoting the needs and rights of older adults may have a clear and direct effect on the rights of others. Where such is the case, the competing needs, interests and rights must be clearly articulated and transparently addressed. However, perceptions of such competition or conflicts may be rooted in negative assumptions about the worth and contributions of older adults, and based on stereotypes of older adults as burdensome, passive dependents rather than on objective research and analysis.

Further, as the principle of membership in the broader community emphasizes, an analysis of the impact of laws, policies and programs that employs a life-course approach and understands older adults as part of their larger communities, it can illuminate the common interests that bind the generations. In a discussion of laws and policies, a rapid recourse to the discourse of intergenerational struggle may obscure as much as it illuminates.

C. Conclusions: Developing a Principled Approach to the Law as it Affects Older Adults

Principles can provide a set of norms to counteract tendencies towards ageism in the development, substance and implementation of laws that affect older adults. Principles for the law as it affects older adults should aim to promote the worth, participation, individuality and diversity, and contributions of older adults. From this anti-ageist

perspective, the LCO has reviewed and analyzed key international and domestic sources for principles, and has identified six core principles for the law as it affects older adults, with substantive equality as a core value underlying all of the principles.

The key challenge with a principles-based approach to the law is to develop definitions and interpretations of the principles that are sufficiently detailed, nuanced and grounded to provide practical guidance to legislators and policies makers. Account must also be taken of the inevitable tensions between principles and the constraints on application.

The next Chapter of this Report will begin to tackle these challenges with an examination and analysis of the law as it affects older adults, and the ways in which ageism may manifest in the law.

IV. IDENTIFYING AGEISM AND PATERNALISM IN THE OPERATION OF THE LAW

Having identified principles for the law as it affects older adults together with a set of considerations relating to the needs and circumstances of older adults that should be taken into account by law and policy-makers, the next step in developing a framework is to consider how the principles and considerations might effectively be applied to the law. That is, for the principles and considerations to provide effective guidance to law and policy-makers, they must take into account the actual context of the law as it affects older adults. This points the way to a deeper understanding of the issues to be addressed by an anti-ageist approach to the law.

This chapter considers the different ways in which laws may affect older adults and proposes some ways in which ageism and paternalism in the law may be identified.

It should be noted here that the LCO is using the term “law” broadly as including not only statutes but regulations, but also as including the policies and programs through which those statutes and regulations are implemented, and examples of what private actors might need to do to make the law effective. That is, the law includes not only statutes as they are written, but also as they are experienced in the lives of older adults. Given the feedback that the LCO received early in this project, that the *practice* of the law was as much, or even more of, an issue for older adults as the provisions of the statutes, this approach is necessary to ensure that the outcome of this project will be meaningful and effective.

A consideration of the application of a principles-based framework for the law as it affects older adults must be based on a clear understanding of the many ways in which the law may shape the lives of older adults. There is a very wide range of laws that impacts on older adults. Consideration of how the law affects older adults has generally focused on laws that explicitly and directly address this group, whether through age-based criteria, or by targeting issues that overwhelmingly affect older adults (such as, for example, long-term care). However, it is equally important to consider the less obvious ways in which law may shape the experiences of older adults. For the purposes of analysis, this Interim Report breaks laws down into four categories:

- laws which use age-based criteria to specifically address concerns particular to older adults,

- laws of general application which nonetheless apply mainly or disproportionately to older adults,
- laws of general application that affect significant groups of older adults, and
- laws of general application which may have a different effect on older adults (or some group of older adults) than on the remainder of the population.

Each of these types of laws is considered separately below. In addition, some consideration is given to issues that may arise where law is silent.

All types of laws must operate within the framework of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*. This section therefore commences with a brief overview of the provisions of the *Charter* and *Code* in terms of their relevance to laws and policies affecting older adults.

A. The Charter and Human Rights Law

Chapter III of this Interim Report briefly considered some key provisions of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code* as important sources of principles for a framework for the law as it affects older adults.

The *Charter* provides for civil and political rights, legal rights, language rights, expressive rights and equality rights. These rights are limited by section 1, which allows for such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Equality rights under section 15 explicitly recognize equality before and under the law, and equal protection of the law without discrimination on the basis of age, among other enumerated grounds. Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and interference with physical freedom.

The purpose of the *Ontario Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.³⁰² The *Code* prohibits discrimination on the basis of age,

as well as of sex, sexual orientation, disability, family and marital status, race, ethnicity, place of origin, and several other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of age, older persons have the right to accommodation up to the point of undue hardship for needs associated with their older age. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts.

The *Charter* is, of course, fundamental law, applying to any body exercising statutory authority or pursuant to governmental objectives. Section 52 gives the *Charter* overriding effect, such that any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. To the extent that the government acts under common law or prerogative powers, the *Charter* also applies to such government actions. Section 47(2) of the *Code*, the “primacy clause” states that where a provision of an Act or regulation appears to require or authorize conduct that would contravene the *Code*, the *Code* prevails unless the Act or regulation specifically states otherwise. The *Charter* and the *Code* therefore have a unique status in relation to other laws that affect older adults.

The provisions of both the *Code* and the *Charter* recognize that older adults, as individuals or as a group, may experience marginalization or discrimination because of their age. Through the *Charter* and the *Code* older adults may challenge barriers to their equality, so that these documents share the potential to transform laws, policies and norms related to older age.

As is discussed at more length later, section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the disadvantaged condition of individuals or groups, including those experiencing disadvantage due to their age. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.³⁰³ The *Code* also includes some specific provisions related to age. It specifically exempts programs, policies or activities that provide preferential treatment for persons aged 65 and older from the definition of age discrimination.³⁰⁴

The *Charter* has only infrequently been applied to issues related to older adults, and has not proved to be an agent of change for this population in the way that it has for the disability or lesbian and gay communities, for example. *Charter* cases have most frequently dealt with explicit age-based criteria, leaving aside more subtle or indirect inequalities or barriers that older adults may experience.

In a trio of cases in the early 1990s, the Supreme Court of Canada considered the constitutionality of mandatory retirement policies. In *McKinney v. University of Guelph*,³⁰⁵ the Court considered the (now removed) upper age limit of 65 in the protections of the Ontario *Human Rights Code*, which operated to prevent challenges to mandatory retirement policies. The Court found that, while the upper age limit was *prima facie* discriminatory, contrary to section 15 of the *Charter*, the provision was a reasonable limit on the right, and therefore saved by section 1. In concluding that the restriction on the rights of older persons was reasonable, the Court considered that the rule was intended to generally benefit workers, and was part of a complex scheme of pension and other employment rights.

Interestingly, in this case La Forest J., speaking for the majority, commented that age, as a ground of discrimination, differed from other enumerated grounds under section 15, in that “[t]here is a general relationship between advancing age and declining ability”.³⁰⁶ Similarly, in the companion case of *Stoffman v. Vancouver General Hospital*, which dealt with the revocation of hospital privileges for doctors at age 65, the majority commented on the importance of balancing the concerns of younger and older doctors.³⁰⁷ The decisions in these cases seem to indicate that the ground of age is viewed differently than other grounds.

Indeed, it might be argued that the decisions in these instances were subtly influenced by ageist assumptions. For example, the Supreme Court of Canada decision in the *McKinney* case was in part based on the finding that older adults are less intellectually capable than younger ones:

It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd.*, *supra*, at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards; see the reasons of Gray J., *supra*, at pp. 76-77, and of the Court of Appeal, *supra*, at pp. 145-46. To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred.³⁰⁸

Similarly, in the companion mandatory retirement case of *Stoffman*, the decision stated that:

In my view, the Board was amply justified, given the current climate of budgetary restraint pervasive in the public sector, in concluding that its ability to bring new doctors on staff depended on the timely retirement of some of those already there. Moreover, it cannot be said to have acted unreasonably in concluding that the retirement, as a matter of course, of those who had reached the age of 65 would ensure the departure from staff of those who would generally be less able to contribute to the hospital's sophisticated practice. It must be stressed that the policy of applying Regulation 5.04 without exception, save in those "special cases where the physician had something unique to offer the hospital", was an attempt by the Board to recognize that the assumption of declining capabilities in those 65 and over would not always hold true. Although it operated with regard to the hospital's requirements rather than with regard to each individual doctor's health and capabilities, this was probably necessary given the overriding objective of making staff positions available to doctors recently trained in the latest theories and methods.³⁰⁹

However, in a later decision, the Supreme Court of Canada struck down provisions in the *Unemployment Insurance Act* preventing persons over the age of 65 from receiving insurance benefits and restricting them to a minimal lump sum benefit. While noting concerns that older persons might receive a double return of both pension and unemployment benefits, the Court noted that it was doubtful that the objective of fitting the Act within the government's legislative scheme for social programs could in itself be sufficiently important to justify the infringement of a *Charter* rights.³¹⁰

Some of the most important and controversial Supreme Court of Canada decisions under section 15 of the *Charter* have involved age-based distinctions, although not older adults. *Law v. Canada* involved a clear age-based distinction: restrictions on survivor benefits for widows and widowers under the age of 45. Despite the clear distinction based on an enumerated ground, the Court found no substantive discrimination, as the distinction was not based on stereotypes, and persons under age 45 were not a disadvantaged group.³¹¹

Gosselin v. Quebec (Attorney General) challenged the provisions of Quebec's social welfare scheme that provided lower social assistance rates for persons under age 30 who did not participate in education or work programs. Following *Law*, the Court found that young adults as a class were not especially vulnerable or disadvantaged, and that

the program, far from being based on stereotypes, responded to the actual needs and circumstances of younger persons.³¹²

Most recently, in *Withler v. Canada*, the Supreme Court dismissed a section 15 challenge to federal pension provisions that reduced supplementary death benefits to widows based on the age of their husbands at the time of death. While the provisions obviously constituted a distinction based on an enumerated ground, the Court determined that these provisions were, overall, effective in meeting the actual needs of the claimants and in ensuring that retiree benefits were meaningful, and therefore found that section 15 was not violated.³¹³

Like the *Charter*, the human rights system has not been a major venue for raising issues relating to age and inequality. Human rights complaints (now applications) related to age discrimination have in the past made up only a small percentage of the total.³¹⁴ A review of decisions by the Human Rights Tribunal indicates that most complaints of age discrimination have related to employment discrimination.

The Ontario Human Rights Commission (OHRC) has in the past made use of its broad powers under section 29 of the *Code* to address ageism and age discrimination through public consultations, comments on government laws and policies, development of policy statements and public education campaigns.³¹⁵

B. Laws Targeting Older Adults

As discussed in Chapter II, age is commonly used as a category and to mark transitions in the life-course. This includes the use of age as a legal category. Although less common than they once were, there are still numerous age-based distinctions found in Ontario law and policy, based on both younger and older ages. An LCO review of Ontario statutes and regulations located approximately 50 statutes and regulations that incorporate explicit distinctions based on older age.

Laws that employ age-based distinctions raise complex issues of law and policy, and so are dealt with below at some length.

1. The Legal Framework for Age-Based Distinctions

The use of age-based distinctions in law and policy is of course subject to the requirements of the *Charter* and the *Code*. These laws provide a framework in which to consider the appropriateness of current age-based distinctions. Both section 15 of the *Charter* and the provisions of the *Code* protect the equality and anti-discrimination rights of older persons, and thereby recognize that age-based distinctions may undermine equality and human dignity. As noted above, section 15(1) has been used to strike down some age-based distinctions, such as the provisions of the *Unemployment Insurance Act* prohibiting persons aged 65 and older from collecting benefits and restricting them to a minimal lump sum benefit.³¹⁶ Similarly, the provisions of human rights statutes have been used to successfully challenge age-based criteria, such as restrictions on access by older persons to visual aids under the Ontario Assistive Devices Program.³¹⁷

However, the caselaw under both the *Charter* and the *Code* makes it clear that not every distinction will violate equality rights.

In its decision in *Andrews*, the Supreme Court of Canada underlined that the mere fact that a law classifies individuals based on a prohibited ground does not in itself amount to a violation of section 15(1). Legislative classifications are necessary for governance in a modern society, and section 15 was not intended to eliminate all distinctions in the law – only those that are discriminatory.³¹⁸ As is clear from the brief discussion above, age-based distinctions challenged under section 15(1) have frequently been upheld by the Supreme Court of Canada.

In *A.C. v. Manitoba*, a recent decision of the Supreme Court of Canada dealing with age-based distinctions related to younger age, the Court emphasized that “age-based distinctions are a common and necessary way of ordering our society” and that while such distinctions have an element of arbitrariness, this alone will not invalidate them, so long as the age chosen is “reasonably related to the legislative goal”.³¹⁹ In the Court’s most recent decision relating to age-based distinctions, *Withler v. Canada (Attorney General)* (briefly highlighted above), the Court stated that

In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having

regard to the circumstances of the persons impacted and the objects of the scheme.³²⁰

That is, the use of age as a basis for distinctions is not necessarily – or even presumptively – troubling, making the analysis of age-based distinctions a somewhat different exercise than the analysis of distinctions based on other grounds such as gender, race or sexual orientation.

Similarly, the *Code* permits age to be used to make distinctions in employment, services or housing where age is a *bona fide* requirement. For example, under section 24(1) (b) of the *Code*, an employer may discriminate for reasons of age or certain other grounds if the ground in question is a reasonable and *bona fide* qualification because of the nature of the employment.

In its decision in *Meiorin*,³²¹ the Supreme Court of Canada set out three requirements that must be met for a policy, program or standard that has a differential impact on a protected group to be found a *bona fide* requirement: the respondent must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the function being performed,
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship. This sets a high standard, particularly since the standard for establishing undue hardship itself is a high one. In establishing the existence of a *bona fide* requirement, the respondent must, for example, demonstrate that it has investigated alternative non-discriminatory or less discriminatory approaches, considered whether it is possible to have differing standards that reflect group or individual differences and capabilities, and that the standard is properly designed to ensure that the desired qualification is met without placing undue burdens on those to whom it applies.

It is the policy of the OHRC that age-based qualifications or requirements will only be justified where individual assessment would result in undue hardship.

Those seeking to justify age based policies must show that individualized assessment as a form of accommodation is impossible, i.e. there is no method to do so, or that it represents an undue hardship. The onus is on those seeking to justify a discriminatory standard to show they have provided individualized assessment and accommodation that recognizes the ‘unique capabilities’ of every individual, unless to do so would cause undue hardship. Specifically, rather than judging individuals against presumed group characteristics, individualized assessment or testing to determine whether a person has the necessary aptitude or qualifications should be used, subject to the undue hardship standard.³²²

Both the *Charter* and the *Code* protect the use of legislative and policy distinctions that are intended to address disadvantage among individuals or groups. Section 15(2) of the *Charter* specifically permits the use of enumerated grounds (including age) as the basis of distinctions in government law and policy, when such distinctions are included in programs, activities or laws that are intended to ameliorate disadvantage among individuals or groups. In the recent decision of the Supreme Court in *R. v. Kapp*,³²³ the Supreme Court stated that section 15(1) and 15(2) work together to promote the vision of substantive equality that underlies the section as whole: while the focus of section 15(1) is on preventing the government from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice, or imposing disadvantage on the basis of stereotyping, section 15(2) preserves the right of governments to proactively combat discrimination by developing programs aimed at helping disadvantaged groups to improve their situation.

Section 14 of the *Code* provides a shield for special programs. Policies or programs based on identified grounds do not violate the *Code*’s anti-discrimination provisions, so long as they:

- Relieve hardship or disadvantage;
- Help disadvantaged persons or groups to achieve equality; and
- Contribute to eliminating the infringement of rights under the *Code*.³²⁴

These provisions permit employers, housing providers and service providers to develop programs and policies that specifically target older adults, so long as a link can be demonstrated between the objectives of the program or policy and specific disadvantages or inequalities experienced by older persons.³²⁵ The *Code* also specifically

exempts programs, policies or activities that provide preferential treatment for persons aged 65 and older from the definition of age discrimination.³²⁶ This provision operates to protect policies and practices that provide preferences in favour of older adults aged 65 and older that do not meet the higher standard required for special programs under section 14. For example, section 15 shields from human rights scrutiny the common retail practice of providing “seniors’ discounts”.

2. Current Ontario Laws Using Older Age-Based Distinctions

The Ontario laws currently relying on distinctions based on older age can be classified into three general categories: those related to employment and income security; health, ability and capacity; and special programs and preferential treatment.

Employment and Income Security

The vast majority of legal distinctions based on older age relate to the complex web of programs and policies associated with withdrawal from the workforce and maintenance of income security for older adults once they are assumed to have left the labour force.

Until 2006, Ontario law permitted employers to maintain mandatory retirement programs for employees aged 65 and older without a requirement to justify such programs as a *bona fide* occupational requirement.³²⁷ Currently in Ontario, unless an employer can demonstrate that mandatory retirement at a particular age is a *bona fide* occupational requirement, such programs will be considered discriminatory on the basis of age.³²⁸ A recent decision of the Human Rights Tribunal of Ontario which upheld mandatory retirement at age 60 for firefighters provides a sense of the circumstances under which a mandatory retirement policy may be considered a *bona fide* requirement.³²⁹

Despite the end of mandatory retirement as a widespread practice, the assumption that age 65 remains a marker for withdrawal from the workforce remains common in the law. For example:

- Some statutes continue to maintain age 65 as the normal (although now in most cases not mandatory) retirement date for pension purposes.³³⁰ Under the Ontario *Income Tax Act*, pension tax credits assume age 65 for pension benefits.³³¹

- Regulations under the *Employment Standards Act* permit employers to provide employees aged 65 or older with lesser or no benefits as compared with younger employees,³³² presumably on the assumption that these older employees no longer have the same need for benefits that younger ones do.
- As is discussed at more length below, at the time when the provisions of the *Human Rights Code* protecting mandatory retirement policies were removed, the *Workplace Safety and Insurance Act* (WSIA) was amended to shield from challenge the older age-based distinctions in that statute and the regulations, policies and decisions under it.³³³
- The Ontario Works social assistance program requires those receiving benefits to seek employment, volunteer or retraining opportunities. However, the *Ontario Works Act* specifically exempts recipients aged 65 or older from these participation requirements.³³⁴ That is, the Ontario Works program assumes that persons aged 65 and older, unlike younger persons, will not rejoin the workforce, and does not require these individuals to make efforts towards doing so.

Ontario also provides some specially targeted benefits and income security programs for older persons once they reach age 65, presumably on the basis that withdrawal from the workforce increases the economic vulnerability of persons in this age group. For example:

- The Ontario *Income Tax Act* provides for special property, income and sales tax credits for “seniors” who have reached at least age 65 by December 31st of the previous year.³³⁵ Some municipalities make special provisions to discount property tax increases for older persons.³³⁶
- The Guaranteed Annual Income Supplement (GAINS) provides a small income supplement for persons aged 65 and older who meet the requirements for the federal Old Age Security supplement and meet residency requirements.³³⁷
- The Ontario Drug Benefit Program, which covers most of the cost of prescription drugs listed in the Ontario Drug Benefit Formulary, is automatically available to all Ontarians once they reach age 65, although some co-payments are required.³³⁸

Health, Disability and Capacity

As was noted in Chapter II of this Report, it is widely assumed that advancing age is associated with declines in health and certain types of capacities and abilities, and an increase in disability. A number of age-based distinctions in Ontario law reflect the assumption that health, abilities and capacity may decline with age. Because the

evidence regarding the decline in health and capacities with age is complex, these types of assumptions may be a problematic basis for public policy.

In some cases, this assumption results in the provision of greater or more easily accessible benefits for older persons. For example:

- The *Health Insurance Act* provides a reduced fee for optometry services for persons aged 65 or older.³³⁹
- Persons over aged 65 who are applying for home nursing or personal care services must show that they have “a sustained or periodic impairment” that creates an inability to “carry out the activities of normal living that are necessary to maintain independence, health and well-being”, a different and arguably lower standard than that applied to younger persons, who must demonstrate “a physical disability or deteriorating mental condition that a physician confirms is not expected to improve”.³⁴⁰
- The *Ontario Works Act* provides a special diet allowance for persons over age 65.³⁴¹

Occasionally, assumptions about declining health, ability and capacity are the basis for laws restricting the activities of older persons or requiring them to take extra steps to demonstrate ability and capacity. A perennially controversial example is the Ontario Seniors Drivers’ License Renewal Program. In Ontario, persons with Class G driving licenses must undergo an exam every two years once they reach the age of 80. Generally, this process involves a written test and a vision test, as well as a group education session. These drivers may also be required to take a road test if, for example, they have acquired demerit points on their driving record over the previous two years, or the counselor leading their driver education session finds that the senior driver has trouble understanding the tests or following the group discussion. As well, drivers aged 70 and older who have an accident may be required to undergo a written, driving and/or medical/visual exam.³⁴²

Special Programs and Preferential Treatment

A number of Ontario laws and policies provide special benefits or protections for older persons and may fall within the ambit of section 15(2) of the *Charter* or of the special program or preferential treatment provisions of the *Code*.

Some of these laws deal with relatively trivial issues and could be characterized as minor preferential treatment. Examples might be the reduced entry charges for persons aged 65 and older under the *Ontario Agricultural Museum Act*³⁴³ or the provisions under the *Fish and Wildlife Conservation Act* allowing persons aged 65 who have a valid birth certificate to engage in sport fishing without obtaining a sport fishing license.³⁴⁴

There are also legislative distinctions in favour of older persons that are substantial, and may be better characterized as special programs rather than as preferential treatment. Often these are linked to low income or economic vulnerability, or to declining health: the GAINS benefit for low-income seniors³⁴⁵ or the special diet allowance provided under the *Ontario Works Act* for persons aged 65 and older are examples.³⁴⁶

A widespread and significant example of services specially tailored to the needs of older adults is “seniors housing” aimed at low-income or frail older adults. Social housing, which targets many vulnerable groups, older adults among them, is delivered through a complex network of services and providers. Social housing providers include private, cooperative, and municipal non-profit corporations, as well as local housing corporations. Funding may come from the federal, provincial or municipal governments. Social housing may take the form of affordable housing units, non-profit housing, co-operative housing with rent-geared-to-income, and supportive housing that provides personal support and homemaking services for the frail elderly and persons with various types of disabilities in a community residential setting.³⁴⁷

Provisions for seniors’ housing are generally found under municipal by-laws and policies. Many municipalities make provision for specialized social housing for low-income seniors. For example, the City of Kingston has eight social housing projects that house either “seniors” only, or a combination of older adults and persons with disabilities. Kingston has a “cascading” admissions policy for its seniors housing: persons aged 65 and older are prioritized on its waiting list, followed by those aged 60 and older, and then those aged 55 and older.³⁴⁸ The City of Toronto operates over 19,000 seniors-only social housing units (including those which are rent-geared-to-income and market rents in non-profit, municipal or cooperative housing).³⁴⁹ The City of Toronto has established aged 59 as the minimum age to qualify for such housing. Peel Region has 32 buildings dedicated to housing for persons aged 65 and older, whether rent-geared to income, market rent, or subsidized housing.³⁵⁰

Seniors housing brings to the fore the complex issues highlighted in the section on “Vulnerability, Inequality, Risk and Older Adults” in Chapter II of this Report. To what

degree are low-income older adults disadvantaged or at heightened risk of negative outcomes, and therefore entitled to special protections such as seniors housing? Are low-income older adults more disadvantaged or at risk than other low-income individuals, and if so, how or why? How do we determine whether and when some or all older adults are entitled to special protections?

The OHRC in *A Time for Action*, its Consultation Report on human rights and older Ontarians, reported significant concerns regarding the availability of accessible and affordable housing for older persons, and of special needs housing.³⁵¹ In its *Policy on Discrimination Against Older People Because of Age*, the OHRC stated that:

It is the Commission's view that older persons benefit from the support, community, and income security offered by seniors' housing projects. As well, the concept of "aging in place" has been recognized by the Commission as a central consideration so that in some cases it may be appropriate to offer 'seniors' housing' to those under the age of 65 who may have special needs that will remain as they age. Therefore, the Commission would encourage housing aimed at older persons, including those less than 65 years of age, which will foster the objectives of the *Code*.³⁵²

The Law Reform Commission of Nova Scotia has recently completed a project on seniors'-only housing. In its December 2010 Discussion Paper, the Commission reaches the conclusion that a blanket statutory exemption for seniors' housing is not desirable:

While such an exemption would facilitate seniors-only age limits, and the benefits that may spring from them, we are not persuaded that such benefits are more significant than the interests of those who would be excluded from housing that is otherwise suitable for them... The *Nova Scotia Human Rights Act* already permits seniors-only age limits where they are shown to be necessary to ensure the protection of seniors' distinctive interests, or to ameliorate seniors' particular disadvantage. The current legislative context does not appear to dissuade proponents of housing developments.³⁵³

The debate over this issue highlights the complexity and difficulty of the issues surrounding special programs for older adults. At the core of the debate is the question as to whether the use of age as a criteria is actually addressing needs and concerns unique to older adults, or is using age as a proxy for other, less easy to measure qualities.

3. *Using Age as a Proxy*

This review of Ontario's age-based legislative distinctions reveals that in most cases, age is being used as a proxy for low-income, withdrawal from the workforce, for some form of capacity, ability or health limitation, or for some form of vulnerability related to these other qualities.

This raises some concerns. In some cases, the use of age as a proxy is merely the employment of ageist stereotypes and assumptions. For example, the use of age as a marker for the ability to adapt within a workplace, or to bring "cutting-edge" or creative new ideas to a job is really nothing more than a fairly blatant form of age-based discrimination: evidence does not support the assumption that older persons are less able than younger adults to learn or adapt, or to be creative.³⁵⁴ Where unsupported assumptions are at play, the use of age-based criteria may be merely a form of age-based stereotyping. It is therefore essential that when age is being used as a proxy it is based on a careful review of the current available research on the circumstances and needs of older adults, as well as consultation with older adults themselves.

It is also important that this evidentiary base be regularly reviewed and re-evaluated. For example, the assumption that older persons will withdraw from the workforce at age 65 once had a fairly solid basis, but changing demographics and labour market patterns indicate that it is substantially less true now than it once was, and that engagement of older persons in the labour force is likely to continue to increase. In 1996, 15 per cent of Canadians wished to continue to work past age 65, or for as long as their health would permit them; in 2003, this figure was 26 per cent.³⁵⁵ Similarly, healthy life expectancies for Canadians have been increasing: old assumptions about the abilities and capacities of older persons may be incorrect.

As well, whenever one uses age as a proxy for other attributes, one is inevitably ignoring the diversity and individuality of older adults. Age is *not* identical with ability or capacity, or with preparedness to withdraw from the workforce: whatever the level of correlation between age and the attribute targeted by the program in question, there will inevitably be situations where the use of age as a proxy results in either under-inclusion or over-inclusion. This may result in significant injustice for some.

Of course, the decision to use age as a proxy for some other attribute is not necessarily or not simply always the result of stereotypical assumptions. There may be a meaningful degree of correlation between age and some types of abilities or circumstances. For

example, in *Espey v. City of London*, the Human Rights Tribunal of Ontario found that the relationship between advancing age and the risk of on-the-job cardiac events for firefighters was sufficient to justify the city's mandatory retirement policy.³⁵⁶ Because age is simple and straightforward to measure, the use of age can be a very efficient way of allocating benefits, resources or requirements. This becomes of particular importance where extensive and complex social programs are being administered. For example, the identification and measurement of disability is difficult, controversial and complicated, and may itself raise human rights issues.³⁵⁷ Often, substantial adjudication mechanisms must be developed to determine whether a person meets disability-based program requirements. These mechanisms can pose substantial hardships, not only for governments administering programs, but also for individuals attempting to prove that they meet the program requirements.³⁵⁸ The use of age as a criterion avoids these difficulties.

The Supreme Court of Canada considered the human rights implications of the use of protected grounds as proxies in the case of *Zurich Insurance Co. v. Ontario (Human Rights Commission)*.³⁵⁹ This case dealt with the practice of insurance companies of using age, sex and marital status as proxies for assessing risk levels for drivers, and thereby for setting rates for insurance premiums.

The Court acknowledged that the use of protected grounds such as age, sex and marital status for making determinations was a *prima facie* violation of human rights principles:

Human rights values cannot be over-ridden by business expediency alone. To allow "statistically supportable" discrimination would undermine the intent of human rights legislation which attempts to protect individuals from collective fault. To allow discrimination simply on the basis of statistical averages would only serve to perpetuate traditional stereotypes with all of their invidious prejudices. Society has decided not to hold the individual responsible for the sins of his or her "group" and the courts must seek to further rather than restrict this decision.³⁶⁰

Given the violation of human rights principles resulting from the use of age, marital status and sex as a basis for making distinctions in the provision of insurance, the Court determined that this insurance scheme could only be upheld if it was demonstrated that there was no alternative which was practicable in all the circumstances. The Court found that there was no practical alternative available *at that time*, and therefore upheld the practice. The Court stated, however, that:

The insurance industry must be allowed time to determine whether it can restructure its classification system in a manner that will eliminate discrimination based on enumerated group characteristics and still reflect the disparate risks of different classes of drivers. It would therefore be inappropriate for this Court to find a particular practice to be unreasonable when no reasonable alternative exists. While the situation as it existed in 1983 did not provide a reasonable alternative to setting premiums based on age, sex and marital status, the situation today and in the future may be quite different. The insurance industry must strive to avoid setting premiums based on enumerated grounds.³⁶¹

That is, there is a high standard set for demonstrating that the use of age-based distinctions is permissible. Such distinctions are permissible only where other alternatives are not reasonably available. If the same case was brought again before the Court, the result might now be different.

In general, what alternatives exist to the use of age-based distinctions as a proxy for other characteristics?

One may, of course, attempt to directly measure the characteristic in question, whether it be ability or economic vulnerability or withdrawal from the workforce. Where the correlation between age and the characteristic in question is high, this may decrease efficiency and increase costs, although it will increase accuracy. As well, where disability is at issue, one must take into account that abilities and circumstances also vary among individuals with disabilities, and that individualized testing is generally considered preferable to the use of bio-medical categories as determining factors. That is, the concept of disability itself may be a proxy for other characteristics.

A variant on the individualized testing approach is to use individual testing beginning at a certain age. For example, most senior drivers' license programs in Canada provide for individualized assessment beginning at a specific age. A modified version of this was endorsed by the Ontario Superior Court in *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*. A requirement for justices of the peace to retire at age 70 was held to violate section 15 of the *Charter*. In order to address concerns regarding security of tenure, rather than striking down mandatory retirement altogether, justices of the peace, like provincial court judges, were permitted to remain in office after age 65, subject to an annual review by the Chief Justice, with mandatory retirement postponed to age 75.³⁶²

A third option is to create a rebuttable presumption: age is used as a category, but older persons are provided with the opportunity to demonstrate that they should not fall within the rule. This was the suggestion of the Human Rights Tribunal in *Espey*: that mandatory retirement for firefighters at age 60 should stand because of the risk of on-the-job cardiac events, but that a process or mechanism could be developed for individuals to demonstrate that their risk was no higher than that for younger persons and that the rule should therefore be waived for them.³⁶³

4. Assessing the Use of Age-Based Laws

It has frequently been pointed out that age-based distinctions risk undermining the dignity of older adults by suggesting that their age makes them somehow different and lesser. As Wilson J. stated in her dissent in *McKinney*, the *Code* protection for mandatory retirement provisions

discriminates because it does not distinguish between those who are and those who are not able to work. In this way, the section operates to perpetuate the stereotype of older persons as unproductive, inefficient, and lacking in competence. By denying protection to these workers the *Code* has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.³⁶⁴

Age-based distinctions have been used to restrict the participation and contribution of older persons. By their nature, age-based distinctions reinforce the notion that older adults are a homogenous group, obscuring their diversity and individuality. Inevitably, the use of age-based distinctions undermines the principle of diversity and individuality.

On the other hand, some age-based distinctions have been of considerable benefit to older persons. The use of age-based income-support programs have significantly contributed to the reduction of poverty among older adults, for example.

When assessing age-based distinctions in law or policy, one must begin by considering the assumptions on which such distinctions are based. Are they based on current, reliable, research on the characteristics, needs and circumstances of older adults? Or are they based on assumptions that have their basis in ageist attitudes and stereotypes about the abilities, contributions and worth of older adults? Do they take into account, to the extent possible, the individuality and diversity of older adults?

It is also important to consider the purpose of such distinctions. Do they aim to promote the independence and autonomy, dignity, participation and inclusion, and security of older persons? Age-based income support programs, for example, aim to increase the economic security of older persons, and may thereby also promote their independence and participation.

In some cases, like mandatory retirement or drivers' license testing, part of the purpose of the age-based distinction may be to protect the opportunities or the health and safety of others, whether younger workers, or others who are using the roadways. In addition to considering whether the identified risks are indeed borne out by the evidence, it is important to ensure that the rights of older persons are not lightly dismissed or subordinated to those of others, and that the impact of restrictions on older adults are fully taken into account and considered.

The purpose of an age-based policy or program may not, however, be borne out in implementation. Mandatory retirement, for example, is often conceived of in the context of pension planning, as a means of assuring the economic security of older adults, and providing a dignified exit from the labour force. No doubt, for many older adults, mandatory retirement programs operated in this way. But for older adults who were in some way disadvantaged – women or immigrants who had interrupted work histories, vulnerable workers without access to pension plans or the opportunity to build up assets for retirement – mandatory retirement had the effect of reducing their economic options and opportunities and of further diminishing their economic security. As well, employers who assumed that older workers would leave the workforce at age 65 may not have continued to invest in those employees – to offer coaching, opportunities for training and enrichment, or considered them for advancement, thereby undermining the ability of aging workers to continue to contribute meaningfully to their workplaces.

Given the risks to dignity and individuality associated with age-based policies, one must also consider whether there are alternatives, such as individual assessment or inclusive design, which would achieve the same objectives but have a lesser impact on the dignity, security, independence, participation and individuality of older adults. Where individual assessment is not possible, other alternatives that would reduce the impact of age-based distinctions, such as the creation of a rebuttable presumption, should be considered.

CASE EXAMPLE: AGE-BASED DISTINCTIONS IN THE LAWS

Age-Based Restrictions under the *Workplace Safety and Insurance Act*

One of the Ontario statutes that retains older age-based restrictions on benefits is the Workplace Safety and Insurance Act (WSIA). Ontario's workers' compensation system was originally envisioned as a compromise between the needs of employers and employees: injured workers were entitled to legislated no-fault benefits, speedily administered, related to their earning power and paid for as long as the disability lasted. In return, employers were protected from lawsuits by workers and funded the system on a collective liability basis through which their annual rates were easily incorporated into the cost of production and passed on to customers in the price of goods. This is often referred to as the "historic compromise".³⁶⁵

At the time when the provisions of the Human Rights Code protecting mandatory retirement policies and other employment-based distinctions aimed at persons age 65 or older were removed, the WSIA was amended to protect the age distinctions in that statute and the regulations, policies and decisions under it.³⁶⁶ There are five provisions limiting or terminating rights for older workers.³⁶⁷ For the purposes of this discussion, the focus will be on the following two provisions terminating benefits for older workers:

- 1. While the WSIA places a limited duty on employers to re-employ injured workers, this duty ends at the point when a worker reaches age 65. Under the WSIA, workers who have more than one year's service and who have lost time from work due to a compensable injury in a workplace with 20 or more employees are entitled to return to their old job or a comparable one. If the injured worker is not able to perform the essential duties of their old job but can do other work, the employer is obligated to offer suitable work if it is available. In either case, the employer is obligated provide disability-related accommodations to enable the employee to perform the work, to the point of undue hardship. In all cases, the employer's obligation continues for a maximum of 2 years, or one year after the injured worker is able to return to their pre-injury work.³⁶⁸ However, the re-employment obligation also ends when a worker reaches age 65, so that workers who are injured between age 63 and 65 receive a reduced re-employment opportunity, and those injured after age 65 receive no re-employment opportunities at all.*

2. The WSIA places age 65 limits on loss of earnings benefits. Workers who experience an income loss due to a work related accident are entitled to loss of earnings benefits until the day on which the worker reaches age 65 years of age, if the worker was less than 63 years of age at the time of the injury; or two years after the date of the injury if the worker was 63 years or older at the time of the injury.³⁶⁹

These provisions ignore the importance to older persons of having the choice to continue to participate in the workforce. This has been recognized, notably, in the United Nations' Principles for Older Persons (IPOP), which includes, as elements of the principle of independence, the opportunity to work or to have access to other income-generating opportunities and to participate in determining when and at what pace withdrawal from the labour force takes place.³⁷⁰ The Madrid International Plan of Action on Ageing (MIPAA) emphasizes that "Older persons should be enabled to continue with income generating work for as long as they want and for as long as they are able to do so productively."³⁷¹

Age-based rules regarding workforce participation, such as the limitation on the duty to re-employ, make age a central, overriding factor in assessing the needs and abilities of workers, ignoring the diversity of experiences and circumstances among older workers. Women, of course, will often have different labour market experiences than men. The caregiving responsibilities that women disproportionately take on may lead to interruptions in their workplace participation or to reduced participation. As well, women are more likely to be found in low-paid or precarious work. As a result, women have more difficulty in developing pensions or other resources for retirement. New Canadians may have a shorter period of employment in Canada upon which to build up assets for retirement and they, along with racialized persons and persons with disabilities, also tend to have more restricted access to the labour market, lower incomes and greater unemployment during their working lives.³⁷² Overall, Canadian's lifecycles and labour force patterns have shifted dramatically since the 1970s, and are now much more varied and complex.³⁷³

It has been argued that these age-based distinctions on the ability of older workers to continue in the workforce and to continue to equally access workplace protections and benefits undermine the fundamental dignity and worth of older adults. In its submission to the Standing Committee on the Ending Mandatory Retirement Statute Amendment

Act, the OHRC stated that:

*The provisions of Bill 211 respecting benefits and workers' compensation are a form of age discrimination. They send a message that older workers are essentially of lesser worth and value than their younger co-workers, and reinforce negative and ageist stereotypes and assumptions about the abilities and contributions of older workers. They fail to recognize the contribution of older employees to their workplaces, or the importance of work to older workers. These provisions are offensive to dignity, and the Commission believes that they will be vulnerable to challenge under the Charter.*³⁷⁴

One of the key reasons advanced for the use of these age-based distinctions in employment is that they are frequently seen as part of a complex web of benefits and trade-offs that as a whole promote the security and dignity of older persons by allowing an orderly withdrawal from the labour force and the provision of basic income protections. Indeed, the overlapping structure of federal and provincial income-support structures for older persons, including the Canadian Pension Plan and Old Age Security are generally seen as having successfully reduced the incidence of poverty among older persons.

This understanding has shaped key Supreme Court decisions regarding age-based distinctions in the areas of employment and income supports. The Supreme Court in McKinney noted that the acceptance of age 65 as the "normal" age for retirement had profound implications for the organization of the workplace – the structuring of pension plans, for fairness and security in the workplace, and the provision of workplace opportunities, such that mandatory retirement "has become part of the very fabric of the organization of the labour market in this country".³⁷⁵ In a recent decision, the Supreme Court of Canada upheld the provisions of a pension that required mandatory retirement as part of the plan, noting that the provisions were an attempt to balance concerns regarding age discrimination with the importance of ensuring the financial protection of employees under genuine pension plans.³⁷⁶ The Human Rights Tribunal in the Espey decision made a similar point, noting that the mandatory retirement provisions in question were part of a collective agreement that had been shaped as a trade-off to maximize a number of goals important to the parties.³⁷⁷

On the other hand, the Supreme Court of Canada, in striking down restrictions on unemployment insurance benefits for persons aged 65 and older, noted that was doubtful that the objective of fitting the provisions of the Unemployment Insurance Act within the government's legislative scheme for social programs, could in itself be sufficiently important to justify the infringement of a Charter rights.³⁷⁸

The view that these common age-based distinctions are part of a broader package that is overall favourable to older adults has been challenged. It has been pointed out that there have been very significant shifts in demographics, in the labour market, in occupational conditions, and in life cycles since the mid-1960s, when current laws, policies, institutions and assumptions regarding withdrawal from the workforce were developed. Given the aging population, increasing diversity in life cycles, and the shift towards service work and non-standard jobs (and the subsequent decline in the number of workers who have access to employer-sponsored pension plans), older workers are increasingly economically vulnerable, uncertain about the future, and unable to afford retirement.³⁷⁹ The assumption of a single standard age for withdrawal from the workforce is increasingly tenuous.³⁸⁰ The use of age 65 as the sole marker for the end of protections and benefits under the WSIA is therefore problematic.

Other jurisdictions have taken different approaches, without jeopardizing the financial stability of the regime. For example, in British Columbia, although the “normal” age for the end of worker’s compensation protections remains age 65, workers can individually present their particular circumstances. Where the Board is satisfied that the worker would have retired later than 65 years of age, or more than 2 years after the injury, the legislation allows the Board to pay workers’ compensation benefits up to the date the worker would retire.³⁸¹

C. Laws of General Application – Laws that Affect Mainly Older Adults

Some laws do not explicitly reference age, but mainly impact on older adults. Such laws may operate almost like age-based programs and are often thought of as such because the vast majority of those affected are older adults. However, there are no age-based criteria at play – it is only that the law in question deals with an issue that disproportionately affects older adults.

In these types of laws, the issues regarding the law as it affects older adults are raised most clearly and directly. Are stereotypes or negative attitudes regarding older adults affecting the design or implementation of the law? Does the law promote the principles of dignity, autonomy, participation, security and respect for diversity? Does the law adequately take into account the circumstances of older adults? Is the wellbeing of older adults treated as of equal importance to that of other citizens?

One of the clearest examples of this is the law regulating long-term care homes. The criteria for admission as a long-stay resident in a long-term care home is set out in the regulations under the *Long-Term Care Homes Act, 2007*:

A placement co-ordinator shall determine a person to be eligible for long-term care home admission as a long-stay resident only if,

- (a) the person is at least 18 years old;
- (b) the person is an insured person under the *Health Insurance Act*;
- (c) the person,
 - (i) requires that nursing care be available on site 24 hours a day,
 - (ii) requires, at frequent intervals throughout the day, assistance with activities of daily living, or
 - (iii) requires, at frequent intervals throughout the day, on-site supervision or on-site monitoring to ensure his or her safety or well-being;
- (d) the publicly-funded community-based services available to the person and the other caregiving, support or companionship arrangements available to the person are not sufficient, in any combination, to meet the person's requirements; and
- (e) the person's care requirements can be met in a long-term care home.³⁸²

Beyond the requirement that the person seeking admission be an adult, the criteria are not age-based. In fact, some younger persons with complex and significant medical needs live in long-term care facilities. However, the vast majority of the residents are older adults.³⁸³

Persons living in long-term care homes are more vulnerable than many other Ontarians. They have significant medical or disability-related needs that require the extensive nursing supports available in such settings, and these needs can leave them dependent on or vulnerable to those who provide them with care. While long-term care homes provide vital supports not available to their residents in the community, the trade-off is that their residents are living in institutional settings, removed from the broader community and the supports, community and social roles available there. To manage the needs of some residents whose disability-related behaviors put themselves or others at risk, long-term care homes have considerable powers over residents, including the use of restraints and placement of residents in locked-in wards. Good long-term care homes are vital to the dignity and security of older adults; poorly operated long-term care homes place their residents at significant risk and undermine security, dignity, autonomy, inclusion and respect for individuality and diversity.

Ontario law regulating long-term care homes has just undergone major reforms with the *Long Term Care Homes Act, 2007*, most of the provisions of which came into force July 1, 2010, and it will take some time to assess the extent to which the new law addresses concerns identified under the predecessor legislation.

In some cases, all that is necessary to ensure that the law meets the needs of older adults is to ensure that it does not itself violate the rights of older adults. In other cases, positive steps are necessary to ensure that individuals, service providers, employers or others do not violate the rights of older adults. In some cases, it may be necessary for the government to take steps to ensure that the minimum needs of older adults for physical, mental or financial security are met. Most laws that mainly address older adults fall into this category.

Because older adults are disproportionately likely to have withdrawn from the workforce and to be dependent on a fixed income, and to have or to develop various impairments or disabilities, older adults are more likely than members of other age groups to be reliant on government supports or protections to meet their basic needs. This may include income support programs, like Ontario's GAINS program, or services such as health care, home care or long-term care homes.

As such, older adults not infrequently encounter the effects of resource limitations in programs intended to provide benefits. Programs that are intended to provide basic supports for the vulnerable may be in effect rationed by tight eligibility criteria or long waiting lists, and may therefore not achieve their intended impact. The effects on the dignity, autonomy, inclusion and security of older adults may be significant.

CASE EXAMPLE: LAWS AFFECTING MAINLY OLDER ADULTS

First Available Bed Policies

A consistently raised concern in the area of elder law in Ontario is "First Available Bed" policies, policies which have been implemented by hospitals and Community Care Access Centres (CCACs) to manage the transition of older adults from hospital care to placement in a long-term care home.

Placement in a long-term care home in Ontario is regulated by the Long-Term Care Homes Act (LTCHA) and its regulations. The law places responsibility for placement in a long-term care home with the local CCAC placement coordinator, so that the individual in

question or their substitute decision-maker must make an application through the placement coordinator. Where application is being made with respect to a person who is currently hospitalized, the hospital discharge planner or other hospital staff may work to facilitate the application.

Under the regulations to the LTCHA, an individual seeking long-term care may select up to five long-term care homes to apply to (in crisis situations, more may be selected).³⁸⁴ An individual's choice of a long-term care home is regulated by the Health Care Consent Act (HCCA), which requires that the person or their substitute decision-maker apply for the homes of their choice, and that valid consent is required prior to placing a person on a waiting list for a long-term care home. Section 46 of the LTCHA defines the elements of a valid consent as including that it relate to the admission, that it be informed, that it be given voluntarily, and that it not be obtained through misrepresentation or fraud. Section 46 further sets out the information that individuals are entitled to prior to giving a consent, including what the admission entails, the expected advantages and disadvantages of the admission, alternatives to the admission, and the likely consequences of not being admitted. The HCCA sets out requirements where a substitute decision-maker is involved, the fundamental principle being that the admission must be in accordance with the prior capable wishes of the individual involved, or where these are not known, the best interests of the individual. Under the HCCA, the best interests of the individual include:

- (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;*
- (b) any wishes expressed by the incapable person with respect to admission to a care facility that are not required to be followed under paragraph 1 of subsection (1); and*
- (c) the following factors:*
 - 1. Whether admission to the care facility is likely to,*
 - i. improve the quality of the incapable person's life,*
 - ii. prevent the quality of the incapable person's life from deteriorating, or*
 - iii. reduce the extent to which, or the rate at which, the quality of the incapable person's life is likely to deteriorate.³⁸⁵*
 - 2. Whether the quality of the incapable person's life is likely to improve, remain the same or deteriorate without admission to the care facility.*
 - 3. Whether the benefit the incapable person is expected to obtain from admission to the care facility outweighs the risk of negative consequences to him or her.*
 - 4. Whether a course of action that is less restrictive than admission to the care facility is available and is appropriate in the circumstances.*

The legislation, in total, sets out a framework that is based on the autonomy and security of the older person. It does not prioritize as a consideration the needs of the hospital or long-term care systems.

In practice, however, consent to placement in a long-term care home is constrained by a range of policies and practices that arise from the shortage of hospital and long-term care beds in the province of Ontario: hospitals are overcrowded, and waiting lists for long-term care are long. To manage the difficulties of the resource shortage, administrators have developed and implemented a range of policies, frequently referred to as “First Available Bed” policies, which arguably violate both the letter and the spirit of the legislative framework. The issue of First Available Bed policies has been raised in the provincial legislature. The Advocacy Centre for the Elderly (ACE) notes that in 2010 alone, the clinic received over 160 requests for assistance related to discharge from hospital and admission to long-term care homes:

Most hospitals in Ontario have discharge policies with which they require patients to comply when moving from hospital into another care setting. The policy may require that the patient or their substitute decision-maker select a certain number of “short list” long-term care homes from a list provided by the hospital or CCAC; or may require the patient to accept a “suitable bed” as determined by the hospital, which may not be in one of the homes chosen by the patient or their substitute decision-maker. Usually, the person is told that if they do not comply with the policy, they will be charged the “daily rate”. This is the rate charged for an acute care bed for someone who does not have OHIP or other insurance. Although there is no specific number, this rate may range from \$500 to \$1,500 or more per day.³⁸⁶

Patients may be offered other options to accepting the first available bed, such as returning home to wait for their home of choice, or moving to a retirement home to await their home of choice.

While recognizing the pressures under which the health-care and long-term care systems operate, one cannot ignore the negative effects on older adults of First Available Bed policies. Beds which are deemed “acceptable” from the perspective of administrators may be far from such from the perspective of the individual involved, whether because of the extent or quality of the care available in the placement, or because it is at a distance that completely removes the older adult from families and community support systems. In some cases, long-term care homes may have beds available because of the low quality of services provided, and individuals may be coerced into accepting placements in homes

with poor records in terms of respecting the dignity, autonomy and security of their residents.

D. Laws That Affect a Disproportionate Number of Older Adults

In other cases, while older adults do not make up the majority of those affected by a particular law and the law has an impact across age groups, a substantial portion of older adults are affected by that law.

The extent or nature of the disproportionate impact may vary among groups of older adults. For example, laws regarding financial exploitation will have particular significance for older adults as a whole, as financial abuse is the most common type of abuse of older adults. They may be especially significant, however, for Aboriginal older adults, many of whom are residential school survivors, and who may be targets of financial abuse due to their receipt of settlement monies.³⁸⁷

As laws of general application are likely to be age-neutral on their face, it is essential to examine whether or how laws addressing large numbers of older adults may, in design or implementation be shaped by ageist attitudes or assumptions. Not uncommonly, the consequences of ageist attitudes may play out in the day-to-day context in which service providers, legal professionals and decision-makers address the rights and needs of older adults. Regardless of how well-designed a law or program is, ageist or paternalistic attitudes on the part of those charged with implementing the law or program will make it ineffective for older adults. If, for example, competent older adults attempting to exercise their rights to make choices for themselves are undermined by health care providers who think that older adults should defer to others, the laws regarding consent and capacity will be ineffective. ACE has provided examples in long-term care settings of competent older adults being prevented from leaving their residences, even for short periods of time, unless they are accompanied by family members or family members have provided consent. There have also been instances of care providers discussing care issues with the resident's family instead of the competent resident.³⁸⁸ The influence of this type of ageism is hard to make visible as it happens in small, everyday decisions and interactions and is not overt, and so may not be recognized even by those who are carrying it out.

Margaret Hall provided an example in her paper for the LCO on developing an anti-ageist approach to the law:

The system or scheme created by Ontario's substitute decision making legislation is non-ageist, and does a good job of protecting the individual's rights; balancing the individual's rights to autonomy in decision making with the individual's rights to physical dignity and integrity, not to be subjected to prolonged suffering or denied treatment. The implementation of that legislation is, however, problematic; rights that cannot be effectively exercised are rights "in the air" (as opposed to rights on the ground). Older adults who become engaged with substitute decision making, under either the *Substitute Decisions Act* or the *Health Care Consent Act*, will be in a vulnerable situation; entrenched ageist attitudes and stereotypes among professionals implementing the legislation will increase that vulnerability and the likelihood that autonomy will not be respected. The frequently high-conflict family context in which the legislation is implemented also increases the likelihood that substitute decision making will not occur in accordance with the guidelines set out in the legislation, but reflect conflicts and the interests of family members... [P]rofessionals and (possibly particularly) institutional staff may tend to make decisions that primarily meet institutional interests, in the absence of a strong counter-weight. These tendencies do not connote "badness" or selfishness, but reflect the coincidence of basic human tendencies to prefer decisions in one's own interests, where they can be plausibly justified, with the ageist social attitudes that provide that justification.³⁸⁹

Recognizing that older adults may have different needs and circumstances from other populations, one of the challenges in laws that affect disproportionate numbers of older adults is to balance the particular needs of older adults with those of others who are affected by the law.

CASE EXAMPLE: BALANCING NEEDS ACROSS GROUPS

Capacity and Guardianship Laws

Laws regarding legal capacity, consent and decision-making provide a good example of laws that have this type of disproportionate impact on older adults, and the challenges of designing laws and programs in these circumstances. While there is surprisingly little in the way of empirical research into the relationship between older adults and Ontario's legal capacity and decision-making framework,³⁹⁰ what information is available does indicate that these systems have a disproportionate impact on older adults. For example, information obtained from the Ontario Public Guardian and Trustee (OPGT) for the fiscal

year 1996/1997 indicated that just over half of those individuals who were under personal or property guardianship through the OPGT were aged 65 or older, and 57 per cent of that group was over the age of 75. Approximately 60 per cent of those individuals over age 65 were female, and over 90 per cent were living in an institutionalized setting.³⁹¹ The typical case for emergency guardianship involved an older woman who lived alone, had dysfunctional family relationships, and had experienced neglect or misuse of money or of a power of attorney.³⁹² Advocates for older adults have identified capacity and guardianship laws as having a very significant impact on the rights of older persons, and as a key locus for law reform efforts.³⁹³

This disproportionate effect on older adults is largely due to the incidence of dementia among older adults. Dementia is a disease of aging which is also a significant cause of loss of legal capacity, and has its most significant impact on the very old.³⁹⁴ As the population continues to age over the next 30 years, issues related to consent, capacity and decision-making are likely to become more pressing. The Alzheimer's Society of Canada recently released a report estimating that the prevalence of dementia will more than double over the next 30 years, to a projected 2.8 per cent of Canada's population.³⁹⁵

However, capacity and guardianship laws are not age-specific, or disability-specific. The laws apply equally to persons with developmental disabilities at any point in their lives, to persons with psychiatric disabilities, and to persons who develop cognitive disabilities such as Alzheimer's Disease as they age. An assessment of the impact of these laws is therefore complex. The life experiences of a person with a psychiatric disability will be very different from those of a person with dementia or a developmental disability. Equally, the experiences and needs of a young person with a developmental disability may be different from those of the same person in old age. One must bring both an anti-ableist and an anti-ageist analysis to this area of the law.

As well, one must keep in mind that different types of disabilities will affect legal capacity differently. For example, persons with cognitive disabilities such as Alzheimer's Disease will vary in their capacities over time, and will often vary in their abilities from day to day, which may present special challenges.

In bringing an age-based analysis to these laws, it is important to take into account how capacity and decision-making laws may impact differently across various groups of older adults, and consider the circumstances, both of those older adults who have acquired a

disability at birth or early in life and are living into old age, and those who have acquired a disability later in life.

Older adults who have developed cognitive disabilities late in life are more likely to have gathered some significant financial assets, if only a house. These assets may prove a temptation to financial abuse or exploitation. On the other hand, those who have lived with a disability since their younger years are more likely to have experienced poverty and marginalization throughout their lives, and to lack the financial resources necessary to obtain adequate supports as they age.

As well, the development of cognitive disabilities later in life may subject older adults and their families to difficult and often confusing role reversals, as adult children find themselves called upon to provide support and assistance to the parents who once were responsible for guiding and providing for them, and old family dynamics take on new forms. On the other hand, those who have lived with disabilities throughout their lives may lose what have been central lifelong support systems as their parents and siblings age and die.

It is also important to keep in mind that older adults as a whole are subject to stereotypes about their frailty, incapacity and need for protection. Older adults who are capable within Ontario's laws may nonetheless be treated as if they are incapable, because of assumptions about the abilities of older adults in general,³⁹⁶ and for those who have an intellectual, psychiatric or cognitive disability, the effect of that disability may be exacerbated or exaggerated due to its intersection with these general stereotypes about the incapacity of older adults.

Therefore, while older adults with cognitive disabilities will share concerns and experiences with others who find themselves subject to Ontario's capacity and guardianship regime, there will also some concerns and experiences that will be unique.

These differences in needs, life experiences and perspectives between those affected by capacity and guardianship laws raise challenges for law reform. It may be impossible for a single approach to adequately address the range of views and needs. It has been suggested that the differences in approaches may be a barrier to law reform in some cases.³⁹⁷ While dialogue across differences may promote greater understanding and identify greater common ground, it is unlikely to do away with all of these differences. The perspectives and circumstances of older adults must be respected, as must those of persons with intellectual or psycho-social disabilities.

Given the diversity among older adults, and among the range of persons with disabilities affected by these laws, it may be helpful to consider whether there is any single approach to this area of law that optimizes this balance, or whether the diversity among those affected indicates a need for flexibility and options in the legislative structure. That is, inclusive design may point one towards accommodating the needs of various groups by providing alternatives and offering choice.

For example, compared to other Canadian jurisdictions, Ontario law offers few alternatives to older adults (and others) in terms of decision-making options where legal capacity is affected by a disability. Supported decision-making, for example, may not be the preferred option for some or many older adults, due to their particular financial or relationship circumstances. However, that does not mean that this might not be the preferred option for some older adults or younger persons with disabilities, and that they should not have the option to use these types of decision-making supports upon incapacity. A greater menu of options, as with Alberta's new legislation,³⁹⁸ may offer greater opportunity to meet the diverse needs of persons whose decisional capacity is limited or declining, as well as supporting autonomy and self-determination.

E. Laws of General Application – Affecting Older Adults Differently

In some cases, laws of general application may not affect *more* older adults as a group, but may impact *differently* on older adults as compared to others. In considering the impact of laws that appear on their face not to have any particular relationship to older adults, it is important to give thought to how the circumstances and experiences of older adults, or of some older adults, may differ from those who are younger, and whether that will have an effect on how older adults are affected by that law. For example, caselaw regarding damages awards create a barrier for older adults who are seeking justice: as most older adults are no longer working, they cannot claim damages for loss of income, and courts have narrowly interpreted damages for loss of companionship.³⁹⁹

Laws may differentially impact on some older adults, or only a smaller subgroup, such as low-income older adults, or older adults with disabilities. Sometimes the extent or nature of the differential impact will vary among groups of older adults: for example, elder abuse may take different forms among some racialized communities, or among LGBT older adults.⁴⁰⁰

In other words, laws that do not recognize the ways in which older adults may differ from other groups, and provide rules, rights and benefits as if those differences do not exist, may provide *formal* equality for older adults, but will fail to achieve *substantive* equality.

Margaret Hall, in her paper on developing an anti-ageist approach to the law, notes in the context of elder abuse and guardianship laws that:

The great majority of the legislation discussed in this paper is facially “age neutral.” Both subject areas will disproportionately impact older adults. Ensuring substantive equality in these areas means, therefore, recognising how “age neutrality” may play out in real life situations involving older adults in vulnerable situations: where capacity is in question and where others must make decisions on the person’s behalf, and where a person is suffering from abuse or exploitation or where abuse and exploitation is suspected. In these situations, pervasive social and individual-level ageist attitudes will interact with personal vulnerability in a way that makes ostensibly available “age-neutral” rights difficult to assert. Legislation that allows “space” for patronising and ageist approaches (as where incapacity is defined broadly and substitute decision making guidelines are not specific) effectively invites those attitudes in these contexts.⁴⁰¹

The effect of laws of general application on older adults may be shaped by ageist assumptions on the part of those interpreting and applying those laws. Ageist stereotypes may not be explicit, but may take the form of subtle assumptions about the worth or contributions of older persons. For example, the case of *McDonell Estates v. Royal Arch Masonic Homes Society* involved an action for damages against a long-term care home by the family of an older woman who died as a result of caregiver negligence. As the plaintiffs had not suffered any pecuniary loss as a result of their mother’s death, the damages sought were for loss of care and companionship. The Court rejected the plaintiff’s claim for loss of companionship consequent upon the death of their mother:

I have said these plaintiffs claim damages only for the loss of the companionship of their mother, not the loss of her love and guidance. With respect, I find the claim is without merit. Sadly their mother had long ceased to be a companion for she had been physically, mentally and emotionally incapacitated for a considerable time before her death. The plaintiffs had established lives and families separate and apart from their mother. I suspect they anticipated that following three disabling strokes, her death at any time was a distinct possibility. It is understandable that they suffered grief and sorrow over the loss of their mother and the cause of it.⁴⁰²

CASE EXAMPLE: LAWS AFFECTING OLDER ADULTS DIFFERENTLY

Revocation of Wills Upon Marriage

One example of a law that impacts differently on older adults than on younger ones is the automatic revocation of wills upon marriage.

Under the law, a marriage where one of the individuals did not have the capacity to consent is void ab initio. The law in this area is not settled, and different lines of cases suggest different understandings of the capacity required to enter into a valid marriage. One line of cases suggests that marriage is a distinct kind of contract, for which the parties must have an understanding of the basis nature of marriage and its consequences. It is not clear whether this required understanding stretches beyond the emotional bond and responsibilities of marriage to include an understanding of its financial, estate and property consequences.⁴⁰³

The capacity required to make a will differs from the capacity required to marry: to make a will, an individual must have “a sound disposing mind, which means the individual must understand the nature and effect of making the will; the extent of his or her property; and appreciate the moral claims of close family members to his or her property.”⁴⁰⁴

Under the Succession Law Reform Act (SLRA), a valid will is revoked when an individual’s marital status changes.⁴⁰⁵ The law reflects that marriage is a significant life change, which should prompt an individual to reconsider his or her affairs, including testamentary dispositions.

It is important to note that if an individual dies without a valid will, the estate will be distributed according to the provisions of the Family Law Act and the SLRA. Essentially, if an individual dies without issue, the spouse is entitled to the property absolutely, whereas if there are issue, the estate is divided between the spouse and children. Parents, nephews and nieces, and siblings will only receive part of the estate if there is no surviving issue or spouse.⁴⁰⁶ Under the Family Law Act, a spouse may choose to receive entitlements under the SLRA, or to receive a division of net family property under the family law statute.⁴⁰⁷

This web of laws related to capacity, marriage and wills has a particular effect on older adults. Because testamentary capacity requires a relatively sophisticated understanding of the consequences of making a will, while capacity to marry sets a lower standard, it is quite possible that an individual will have the capacity to marry, but not to make a will. And because marriage revokes previous wills, such individuals are left without the ability to make choices regarding the disposition of their estates, and their estates will necessarily be apportioned according to the rules of the SLRA and the Family Law Act.

Older adults are more likely than the general population to be affected by conditions like dementia that affect their testamentary capacity but may not affect their capacity to marry. They are also more likely to have complex family arrangements, including children from previous marriages, and thus complex obligations and wills as well as complex family dynamics. As divorce and re-marriage become increasingly common, these issues will continue to grow.

The automatic revocation of wills has also been identified as particularly problematic in the context of “predatory marriages”, in which a younger individual allegedly marries an older one in order to receive a share of the individual’s estate after death.⁴⁰⁸

The law as it stands therefore, fails to adequately recognize and address the particular circumstances surrounding the marriages and wills of older persons.

F. Where Law is Silent

In some cases, law negatively affects older adults, not by what it does, but by what it fails to do. Law may fail to take into account the needs and experiences of older adults, and may therefore fail to address issues of pressing importance to this group. As a result, older adults may be left without adequate direction to make decisions on important issues, or without adequate supports or protections.

There are numerous examples of this problem. There is, for example, a lack of legal guidance around access to older adults. Where older adults have physical or mental impairments that restrain their ability to independently maintain their relationships, those individuals who provide care or support to these older adults may use their position to control access to that person. For example, a child living with his or her aging parent may be able to effectively cut off access to other siblings or to friends of that parent. Powers of attorney for property or personal care may be misused to attempt to control access to the older adult. There is no legislation directly dealing with these

issues. In this vacuum, the SDA may be used as a mechanism whereby family members continue or attempt to resolve long-standing relationship issues revolving around the older adult.⁴⁰⁹

CASE EXAMPLE: WHERE LAW IS SILENT

Long-Term Care Homes and the Sexuality Of Older Adults

One of the most prevalent stereotypes about older persons is that they lack the interest and/or the capacity to be sexually active. Indeed, attitudes may extend beyond the assumption that older adults are not interested in being sexually active to the belief that they should not be interested in being sexually active. This is further complicated by notions of older adults as dependents, akin to children, who must be protected in their best interests.⁴¹⁰ However, research indicates that sexuality can remain meaningful and important to older people, and that older adults can and do participate in sexual activity throughout their lives.⁴¹¹

In terms of anti-ageist principles, the sexuality of older adults may be linked to their autonomy (their right to make choices regarding their private lives), as well as their dignity (their right to be considered as full individuals, regardless of their age). Because some older adults are vulnerable (for example, due to a physical or intellectual disability) and experience a heightened risk of sexual abuse, the principle of security is also at play. As with many areas of the law as it affects older adults, there is a tension between the autonomy of older adults and their right to take risks and make bad choices, and the security of older adults, including their physical, emotional and mental well-being.

Physical health and disability may create barriers to sexual activity for older adults, as may loss of a partner. Often, a key barrier is institutionalization of older adults. There may be a variety of barriers to sexual expression in congregate settings.

- *Most older adults in long-term care facilities are housed in ward rooms, rather than private or semi-private rooms, and so older adults may lack the privacy necessary for sexual activity. Some LTC homes have set aside private rooms that residents may use for sexual activities. However, use of these rooms may be restricted.*

- *Institutional staff may defer to family members, who may object to sexual activities on the part of their resident family members. Adult children, for example, may be profoundly discomforted by a parent's sexual activity outside of their marriage.*
- *Nursing school curricula and on-site training for staff deal only minimally with issues of sexual rights, sexual health, and capacity and consent. Staff may therefore be uncomfortable with sexual expression on the part of older persons, and view it as something to be discouraged or repressed.⁴¹²*
- *For older adults who are LGBT, negative attitudes on the part of staff or other residents or concerns about homophobia may inhibit not only sexual expression, but even acknowledgement of their sexual identities, essentially forcing some of these older adults into the closet.⁴¹³*
- *The development of physical disabilities may create difficulties for sexual expression unless assistance is provided, but staff may be uncomfortable about providing assistance with sexual expression.⁴¹⁴*

These challenges are exacerbated by the fact that a significant portion of older adults who are living in long-term care settings have some degree of dementia, which may in some (not all) cases affect the capacity of that individual to consent to sexual activity.

The law provides little specific guidance on these complex issues. The new LTCHA has as a guiding principle that "a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met."⁴¹⁵ This principle recognizes the importance of meeting the needs of residents in a holistic manner, and could be read in a way that includes a recognition of the importance of sexuality to meeting the psychological and other needs of older adults.

Section 3 of the Act, the "Resident's Bill of Rights", recognizes a range of rights relevant to the expression of sexuality, including the right to form friendships and relationships, to have his or her lifestyle and choices respected, to meet privately with his or her spouse or another person in a room that assures privacy, and to share a room with another resident according to their mutual wishes if appropriate accommodation is possible.

The LTCHA also places the responsibility on the operators of long-term care homes to protect residents from abuse, including sexual abuse and neglect, and to create policies regarding the prevention and the response to abuse.⁴¹⁶

The LTCHA does not provide, however, any further guidance on how these various rights and principles, all important, are to be implemented in practice. The issues are challenging, as they raise not only practical difficulties (including the necessity of combating the subtle effects of ageist attitudes among staff and family members), but also the necessity of balancing the promotion of autonomy of older adults with respect to their sexuality with the necessity of protecting the security of those older adults who are not consenting or not able to consent to sexual activity.

Some of the issues around sexual expression in long-term care homes are relatively straight forward in law, and require “only” better implementation through policies and training. For example, it is clear that the adult children of legally capable older adults should not be able to interfere with the sexual choices of their parents, no matter how uncomfortable those choices may make them, and that the staff of long-term care homes should not assist adult children in attempting to interfere with those choices. This does not mean that the issues are simple to resolve, but only that the substance of the law is not the cause of the difficulty.⁴¹⁷

Where the legal capacity to consent is unclear, however, the issues become much more difficult. Capacity for decision-making is not a blanket issue: it will vary according to the specific type of decision to be made. The capacity to make decisions about property will be different from the capacity to make decisions about whether one should be admitted to a long-term care home, or from the capacity to decide on which friends or acquaintances the older adult wishes to see. The capacity to consent to sexual activity therefore must be separately determined; however, the law is quite unclear on the test for that capacity. Nor is the process or the responsibility for determining capacity to consent to sexual activity anywhere clarified. As the SDA does not deal with the issue of decision-making related to sexual activity, it does not appear that a substitute decision-maker can consent to sexual activity on behalf of an incapable older adult.

In the absence of any clear test or standard, long-term care homes may default to paternalistic responses to sexual expression, in order to ensure that they meet their obligation to prevent sexual abuse. As a result, older adults who live in long-term care homes may be denied legitimate sexual expression.

As has been stated:

Sexual expression is a normal part of a healthy life. People that live in long-term care homes should be able to engage in “normal” living which includes the right to sexual expression. What is the legal framework related to sexuality that will ensure that those persons who can consent to engage in intimate sexual relationships are provided with privacy and the appropriate supports? Conversely, what is the legal framework for those persons who cannot consent in order to protect them from sexual exploitation and abuse?⁴¹⁸

In summary, the law as it relates to the sexuality of older adults living in institutional settings operates indirectly. There is little in the way of current caselaw or statute law that relates specifically to this issue, although the new Long Term Care Act, 2007 creates a legal framework that offers the opportunity for a positive approach. Currently, the law is framed mainly through the lens of elder abuse laws and policies. The overriding concern in institutional settings with respect to the sexuality of older adults is to prevent sexual abuse of older adults in institutional settings. This is exacerbated by the lack of clear legal standards regarding capacity, consent and sexuality among older adults. The lack of clarity leaves staff with little guidance, and in the attempt to minimize the risk of sexual abuse staff may unnecessarily intervene to prevent behaviour which is not, in fact, abusive. Therefore, the lack of guidance and clarity in the current state of the law appears to indirectly operate to constrain the expression of sexuality by capable older adults.

This is compounded by negative attitudes and lack of understanding regarding the sexuality of older persons on the part of institutional staff and family members. There is a failure to recognize that older persons, like younger ones, are sexual beings and to respect that older adults have a right to express their sexuality as part of their right to live a full human life. Respect for this right would require greater attention to the privacy of older adults, as well as greater efforts to provide training and education for staff on related issues.

As well, the paternalistic attitudes on the part of institutional staff and family members that operate to ill effect in many areas related to the rights of older adults are active here also, as staff and family members may act to prevent older adults from making “bad decisions” or to subordinate the needs of older adults to the wishes and needs of their family members.

G. Identifying Ageism and Paternalism in the Law

Given the above, how can we identify ageism and paternalism in the substance and implementation of the law as it affects older adults?

1. *Stereotypes and Negative Attitudes in the Law or its Implementation*

Stereotypes and paternalistic or negative attitudes towards older adults may be present in the substance or the implementation of the law, either explicitly or implicitly.

Stereotypes and problematic attitudes may be easiest to identify when examining laws that specifically target older adults (i.e., that employ age-based distinctions), or that are mainly targeted towards older adults. For example, assumptions about the capacity of older adults to actively participate in the workplace or attitudes about the value of their doing so may be apparent in some of the laws restricting the access of older adults to employment protections or benefits. Similarly, paternalistic attitudes may underlie mandatory reporting and adult protection laws. A review of the purposes of such laws in light of the principles of dignity, autonomy, participation, security and diversity can reveal the operation of ageist attitudes in the formation of the law.

Analysis of the substance of laws of general application which differently affect older adults, or affect some portion of older adults, is less likely to reveal the operation of ageist assumptions, except insofar as the impact on older adults may not have been considered during the development process. Rather, ageist assumptions may affect the implementation of the law, for example, through the stereotypes and attitudes of those charged with putting the law into practice. Presumptions about the incapacity and dependency of older adults may, for example, shape how the laws around capacity and consent are implemented by service providers, legal and health care professionals and decision-makers.

Margaret Hall suggests that when evaluating laws, in addition to considering whether a particular statute or regulation explicitly or implicitly includes or refers to ageist stereotypes and/or paternalistic attitudes, we should also ask whether there are “sufficient mechanisms provided for by the legislation to prevent or protect against the legislation being implemented in an ageist manner, including the acting out of individual ageism”,⁴¹⁹ something particularly important when considering laws not directly

targeted at older adults. Returning to the international rights framework of “respect, protect, fulfil” referenced in Chapter III of this Interim Report, this suggests that laws, rather than simply taking a neutral stance in terms of ageism, should actively recognize the existence of ageism and paternalism and include proactive measures to prevent or address it.

As is discussed further in the following Chapter, this might take various forms, such as providing education and training for service providers and professionals on ageing and ageism, providing strong complaint and advocacy mechanisms to ensure that older adults can make their concerns heard, or proactively monitoring and reviewing the implementation of law to make certain that the law is fulfilling its intended purpose and is being implemented in harmony with that purpose.

2. *Failure to Take Older Adults into Account*

Laws may, in either their substance or their implementation, fail to take into account the real needs of older adults. Laws that employ age-based criteria may, for example, be based on assumptions about the needs, circumstances and abilities of older adults that are true for some fail to recognize the diversity of older adults. As the example of the revocation of wills demonstrates, laws of general application may be designed or developed in a manner that does not take into account that older adults, or some significant group of older adults, may differ from the general population in meaningful ways. As another example, income eligibility criteria for programs may be designed in a way that does not take into account the fact that most older adults are on fixed incomes, and have no means of recouping any financial losses.

This points to the importance, both of increasing awareness and understanding about ageing and older adults among policy-makers and legislators, and of enhancing the opportunities for older adults to be involved in the design of laws and policies that may affect them.

3. *Ignoring or Subordinating the Needs of Older Adults*

Legislators, policy-makers, service providers and professionals face many competing priorities for time, attention and resources. This is a reality that is faced by all, not only older adults.

As was highlighted in Chapter III, it is also true that in some circumstances, the needs or rights of older adults may be perceived to compete with those of other groups. Laws regarding mandatory retirement and seniors' driver's license programs have been framed in this way. For example, the notion that older workers are "taking jobs" from younger ones continues to be raised by some, although it is not generally accepted among academics.⁴²⁰ A more complex issue is the ongoing debate regarding reform to capacity and consent laws: the issue is of considerable importance to both the disability and older adult communities, but there is significant variance between the two communities in terms of principles and priorities for reform.

As a starting point, it should be clear that the needs and circumstances of older adults should be considered to be of equal value and priority as those of other age groups. Negative attitudes towards older adults as dependents who have no further contributions to make to society may influence the willingness to provide adequate resources to ensure that laws are properly implemented and that older adults are able to live at basic levels of economic, physical and emotional security, or to address the issues that are of pressing concern to older adults.

V. ENSURING ACCESS TO THE LAW FOR OLDER ADULTS

As is apparent from the discussion in Chapter IV, equal attention must be paid to both the substance of laws and how they are implemented. Laws which on their face are neutral or even positive with respect to older adults, may be in practice ineffective or negative due to inadequate implementation and poor enforcement. This is the problem that the Advocacy Centre for the Elderly (ACE) has referred to “good law, bad practice”.

In a number of areas of law, the law is good but the practice is bad. Therefore, law reform *per se* would not be necessary, but research on why the law is not being followed could be very useful since it has a negative impact on older adults and their rights. Good laws should not be changed merely because there is resistance to comply.⁴²¹

The *Report of the United Nations Expert Group Meeting on the Rights of Older Adults* specifically urges governments to “close the gap between law and the implementation of the law”.⁴²²

One aspect of the implementation gap is access to justice (or the lack thereof) for older adults. While the importance of access to justice is widely discussed, there is considerable divergence of opinion as to what “access to justice” means and what would be required to ensure it.⁴²³ It is beyond the scope of this document to consider these debates in depth; however, as a starting point for considering the issues in this section, it is essential to clarify some terms as they are used here.

In its broadest sense, the term “access to justice” can incorporate concepts of social justice, and involve considerations of substantive outcomes and the achievement of justice for vulnerable groups. In that sense, this Project as a whole aims to increase access to justice for older adults.

More narrowly, the term “access to justice” may be used to refer to access to the legal system as one mechanism for ensuring that the law as written is effective as intended. Unless the law is actually implemented and enforced, and is a living reality, it has little meaning for those whom it was intended to benefit. The term “access to the law”, as it is used in this Report, refers to the ability of individuals to effectively access the intended benefits of the law.

This concept of access to the law is clearly closely related to the issue of “good law/bad practice”, as referenced above. Lack of effective mechanisms for accessing and enforcing existing laws may be one of the reasons for this phenomenon.

Clearly, one element of access to the law is access to the legal system, which includes the ability to acquire information about one’s legal rights, to obtain competent legal advice and representation as required, and to access existing legal dispute resolution mechanisms. However, access to the law can be ensured in many other ways; for example, through advocacy organizations such as ombuds’ offices, or administrative complaint systems or through proactive monitoring and auditing structures. Some mechanisms for facilitating access to the law are discussed in this Chapter.

A. Older Adults and Access to the Law

As is described in Chapter II of this Report, older adults are an extremely diverse group, ranging widely in income, education, health status and place of residence, among other factors. The nature and level of concerns related to access to the law will therefore vary widely among older adults. For example, a married couple in their early 60s, in good health and with solid retirement savings and access to pension benefits, will have considerably fewer challenges in accessing the law than a widow who was recently sponsored to come to Canada in order to help care for her grandchildren, who is not entitled to government supports such as OAS, who does not have connections and supports in the community, and who does not have strong English language skills.

Of course, concerns regarding access to the law are not confined to older adults. Many disadvantaged groups find their access to the law limited in a variety of ways. Immigrants may experience linguistic barriers in accessing the law, while those with low or moderate incomes will face financial barriers. Discrimination and the effects of historical disadvantage may marginalize racialized, Aboriginal or LGBT individuals, as well as others. As discussed at length in the LCO’s project on the law as it affects persons with disabilities, physical or other barriers may reduce access for persons with disabilities. As many older adults are also immigrants, low-income, racialized, Aboriginal, LGBT, persons with disabilities or members of other marginalized groups, they will face disadvantages as members of these groups, which in some circumstances are compounded by their age.

There are also some circumstances that are particularly prevalent among older adults that may limit access to the law for this group. These circumstances were discussed at some length in Chapter II of this Interim Report and include fixed incomes and withdrawal from the workforce, lower than average literacy and educational levels, the onset of health and activity limitations with the advancement of age, and limitations in life expectancy. Some significant portions of the older adult population also have their experiences shaped by cognitive disabilities, living environments that reduce their autonomy and community inclusion, and the consequences of physical, financial or other forms of dependency.

Any discussion about access to the law and older persons must be placed in the context of the larger and ongoing discussion regarding the accessibility of Ontario's legal system, issues also examined in the LCO's projects on entry to the family law system and on vulnerable workers and precarious work.⁴²⁴ Concerns have been raised from many quarters regarding the accessibility of the legal system, and in recent years numerous initiatives and reports have been undertaken to address the problem. As summarized by the Ontario Bar Association's Report, *Getting it Right*:

Ontario's legal system is in critical need of reform. A lack of resources in terms of judicial appointments, court facilities, justice and community support services and the under-funding of Legal Aid have combined with other challenges to create significant barriers to justice for Ontarians.

We need change: just as a health care system is there to deliver health care, Ontario's justice system is there to deliver justice. If we think health care is expensive, try disease. There comes a point in a patient's deterioration that bandages just won't work anymore. Ontario's justice system is at that stage now.⁴²⁵

Older adults may of course deal with the full range of legal issues that affect individuals in general. However, as was noted in previous chapters, due to their circumstances there are some issues which older adults are more likely to encounter. For example, because older adults tend to have withdrawn from the workforce and are also disproportionately likely to have needs related to impairments or disabilities, they are more likely to be users or potential users of government programs and services. They are therefore more likely to be affected by the laws related to the provision of certain government programs, such as health care, income security, long-term care homes, and home care supports. Because issues related to the receipt of government programs and services will often involve general policies and procedures rather than individual

interactions and decisions, the legal issues that older adults face may often be extremely complex and may require systemic remedies.

As well, the importance of issues like elder abuse, powers of attorney, estate planning and informal caregiving to older adults, means that when older adults encounter the law, it will very frequently be in the context of their domestic lives and their personal relationships. This has implications for how older adults may access the law, and what outcomes they may seek from it. For example, they may be less willing to explore adversarial mechanisms for resolving issues.

Charmaine Spencer has noted some of the implications of these dynamics for access to justice for older adults:

[T]he legal process often pits an individual against someone with whom they have an ongoing relationship - a landlord or home care agency – so that many people who face real and serious barriers are reluctant to file complaints. This means that they will often wait until they have already suffered substantial harm before trying to deal with it. Formal and informal advocates can face significant challenges when acting for older adults and advocating for them in systems on which they are dependent or will need. There is the ever-pressing need to address ‘conflict’ while recognizing the reality that the older client must continue to use the service of the service provider with whom they are having conflict.⁴²⁶

B. Assessing the Access Mechanisms Available to Older Adults

Taking the above considerations into account, how well do currently available mechanisms for accessing and enforcing the law serve the older adult population?

Given that older adults, as part of the general populace, are affected by all laws of general application, and therefore have access to all of the complaint and enforcement mechanisms available to the general populace, there are a wide variety of mechanisms available and regularly used by older adults in accessing the law. It is well beyond the scope of this discussion to outline in detail all mechanisms available to older adults for accessing and enforcing the law. Rather, the focus will be on outlining some of the most important mechanisms currently available, given the types of issues most commonly encountered by older adults. This overview, albeit cursory, allows for some assessment of the characteristics and potential of various types of mechanisms in enhancing access to the law for older adults.

1. Selected Key Mechanisms for Accessing the Law

Civil Litigation

Often rights accorded to older adults must be enforced through civil actions. A notable example of this is the “Resident’s Bill of Rights” which was initially found in the *Nursing Homes Act*,⁴²⁷ and in an amended and expanded version is in the new *Long Term Care Homes Act, 2007*.⁴²⁸ The “Resident’s Bill of Rights” includes the right to be treated with courtesy and respect; to be properly sheltered, fed, clothed, groomed and cared for; to be afforded privacy in treatment and in caring for personal needs; to keep and display personal possessions in one’s room; to be informed about procedures when being considered for restraints; to communicate in private and to receive visitors; and many others. Under both the (now superseded) *Nursing Homes Act* and the *Long Term Care Homes Act*, these rights are the subject of a deemed contract between the resident and the licensee. Enforcement of these rights would therefore take the form of an action against the licensees for breach of contract.

Civil litigation is a challenging route for enforcement of rights. It is often a slow and time-consuming process. It is also a costly one, dependant as it is on access to a lawyer, and therefore out of reach for low-income Ontarians, excepting the minority who can access Legal Aid funding. The adversarial nature of the process may make it unsuitable for resolving some types of issues. For example, in the case of rights under the Resident’s Bill of Rights, the power imbalance between care home residents and licensees makes an action for breach of contract an unhelpful means of pursuing such basic rights.⁴²⁹ Finally, individual actions are unlikely to provide an adequate remedy where systemic or widespread violations of rights are at issue.

Criminal Justice System

The *Criminal Code* is the primary vehicle for addressing elder abuse in Ontario. While the *Code* does not deal specifically with elder abuse, its general provisions cover most of the issues of concern. Relevant provisions include those addressing theft, assault, sexual assault, false imprisonment, failure to provide the necessities of life to a dependent, fraud, misappropriation of funds by a person in a position of trust and theft by power of attorney. The sentencing provisions of the *Code* provide that evidence that the offence was motivated by bias, hate or prejudice based on age shall be deemed an aggravating factor, as well as abuse of a position of trust or authority in relation to the victim.⁴³⁰

However, many have noted that the criminal justice system, while important in addressing elder abuse, has significant limitations, and cannot provide a comprehensive response to the issue.⁴³¹ The complex relationship dynamics underlying some forms of elder abuse, together with the effects of shame and fear of retaliation, may make the victims of such abuse reluctant to disclose it or to see family members face criminal penalties.⁴³² Delays in the administration of justice can mean that victims of abuse may be dead or incapable by the time the case goes to trial. For example, in *R. v. Khelawon*, the manager of a retirement home was accused of assaulting five residents; however, by the time the matter reached trial, four of the victims had died and the remaining victim was no longer competent to testify. The Supreme Court of Canada ruled that the videotaped statements made by the victims after the assaults were inadmissible as being unreliable, and as a result, the accused was acquitted.⁴³³

Administrative Tribunals

Administrative tribunals are an important mechanism for enforcing rights related to many areas of day-to-day life for older Ontarians.

For example, rights under the Ontario *Human Rights Code* to freedom from discrimination on the basis of age in the areas of housing, services, employment, contracts and professional associations are enforced by filing an application with the Human Rights Tribunal of Ontario (HRTO). The protections of the *Residential Tenancies Act* with respect to rental housing and retirement homes are accessed through application to the Landlord Tenant Board (LTB). The Consent and Capacity Board (CCB) hears challenges to findings of incapacity with respect to treatment, property, personal health information and admission to long-term care.

Administrative tribunals are meant to provide dispute resolution forums that are expert in their specific area, and provide relatively inexpensive, speedy and flexible procedures. In this way, they are intended to increase the accessibility of the law.

Accessibility is the underlying rationale for both the “Dicean” and “post-Dicean” – the legal and the administrative – aspects of administrative tribunals. To be accessible therefore, administrative tribunals must provide a service that attracts those that wish to avail themselves of its jurisdiction. Since the time and expense required to resolve a dispute may inhibit parties ... who are seeking the assistance of a workplace regime, disputes must be resolved quickly and inexpensively.⁴³⁴

Tribunals such as the HRTO and the LTB include provisions for alternative dispute resolution processes, such as mediation. These tribunals have powers of inquiry, as well as broader discretion with respect to the rules of evidence.

Tribunals are, however, subject to some of the same criticisms as the civil justice system. In practice, tribunal procedures can be complex, and given the importance of the rights at stake, many applicants feel disadvantaged without legal representation. A review of the website of the LTB reveals ten separate forms for tenant applications, each of which is accompanied by instructions of 10 to 20 pages in length, and many of which have filing fees attached. In recognition of the complexities of the human rights application process, a Human Rights Legal Support Centre has been created which provides supports to some applicants to the HRTO.

As well, tribunals, like the civil justice system, are subject to delays and backlogs. As an example, Ontario's human rights system was recently reformed, in part in response to persistent concerns regarding the slow processing of human rights complaints.

Administrative Complaint Mechanisms

Access to the law may also be provided through administrative complaint mechanisms. The complaint mechanisms under the *Consumer Protection Act* provide one example. As older adults are frequently the target of consumer fraud, consumer protection is of particular concern to this group. While victims of violations of the *Consumer Protection Act* may pursue a civil action, they also have the option of registering a complaint with the Ministry of Small Business and Consumer Protection. The Ministry has the power to make inquiries, gather information and work towards the resolution of disputes and complaints of any matter that comes to its attention with respect to consumer protection. The Ministry's investigative powers are broad, and include powers to obtain warrants and to conduct site inspections. The Ministry has the power not only to address individual complaints but to audit and control systemic practices.⁴³⁵

Similarly, the Ministry of Health and Long Term Care operates the ACTION line as a means for residents of long-term care homes to report concerns about the care and services that they receive. An operator assesses the urgency of the matter and may refer the information to a compliance advisor to complete an investigation. The monitoring system for long-term care homes, including the ACTION line, was the subject of an investigation by the Ombudsman Ontario, which concluded in December 2010. The Ombudsman noted a number of issues with the ACTION line complaints process,

which the Ministry is working to address. The Ombudsman noted that the investigation process is not particularly rigorous:

To begin with the first contact most individuals have with the Ministry is with a call centre which is not equipped to provide any detailed information regarding long-term care issues. Some complainants as well as Ministry compliance staff expressed concerns about the accuracy of information provided by Infoline/Action Line staff to individuals calling to report resident care concerns. We also learned that the Ministry routinely refers individuals back to the home that is the subject of the complaint. Many complainants have expressed fear about complaining directly to a home because of the risk of reprisal against them or their loved ones. Some of those who complained to our office noted that as a result of making a complaint to a specific long-term care home they were threatened with being banned from the home and in one case a lawsuit was threatened.⁴³⁶

The Ombudsman also noted problems with delays, cursory investigations, and a lack of transparency and accountability regarding the results of the investigations.

Statutory Investigative Agencies

In some case, specialized bodies have statutory investigative powers. For example, the Office of the Public Guardian and Trustee (OPGT) has a statutory duty to investigate any allegations that a mentally incapable adult is suffering or is at risk of suffering serious financial or personal harm. It has taken the position, however, that it will undertake such investigations only where no other alternative is available. The OPGT may, where the results of an investigation warrant, request a court to grant it temporary guardianship.⁴³⁷ The OPGT's investigative powers include a right of entry to facilities or controlled-access residences, a right to meet in private with the allegedly incapable person and a right of access to relevant records.⁴³⁸

ACE has raised concerns regarding the OPGT's narrow approach to its investigative powers, reporting that it often receives calls from friends, family members and health practitioners who have contacted the OPGT with concerns regarding the well-being of an older adult and who have been told that an investigation will not be completed.⁴³⁹

On the other hand, the Canadian Association for Community Living has raised concerns that there are not sufficient checks and balances on the OPGT's exercise of its statutory

powers:

Our Association is concerned that the exercise of authorities under the OPGT and the Consent and Capacity Review Board are without adequate checks and balances. We say this in full recognition that there are individuals who work in both of these systems, which undertake their work with great sensitivity and care to the needs of their clients and those who come before them. We recognize the necessity of such authorities. We believe they have an important place in a system to help manage and support personal decision making for older adults. But in the absence of other elements of a system that independently address adult protection issues, provide independent advocacy, and provide support in the exercise of legal capacity, these Offices can do harm. We believe that some actions of the OPGT can be, and have been, extremely harmful to the integrity of persons and families.⁴⁴⁰

Advocacy Institutions

There are also a number of institutions dedicated to advocating on behalf of groups including older adults.

The Ontario Human Rights Commission (OHRC) has a mandate to undertake research and public inquiries, develop policies and conduct programs of public education in order to advance the purposes of the Ontario *Human Rights Code*, which include the prevention and redress of discrimination on the basis of older age. While the OHRC no longer receives and investigates individual complaints, it does have the power to initiate and intervene in applications at the HRTO.⁴⁴¹ As noted earlier, it has exercised its broad advocacy powers to advance the rights of older Ontarians through public education, advocacy and policy development,⁴⁴² a notable example being the involvement of the OHRC in the successful campaign to amend the *Code* with respect to mandatory retirement.⁴⁴³

There have been, however, relatively few human rights complaints (now applications) related to age discrimination, and most have been related to employment discrimination.⁴⁴⁴ Human rights mechanisms have not at this point proved to be an effective method for challenging the systemic disadvantages faced by older adults in terms of institutional care, provision of caregiving supports, access to health care services, and housing.

The Ombudsman of Ontario has a mandate to receive and investigate complaints from individuals regarding the provision of services by the provincial government and its

organizations. While the Ombudsman cannot issue orders, it can issue reports and recommendations. In recent years, the Ombudsman has used its powers to conduct many high-profile systemic investigations on issues which affect large numbers of people. The Ombudsman does not have the power to investigate issues related to the extended public sector, including municipalities, hospitals, and long-term care homes, all institutions of particular importance to older adults, and has been advocating for the extension of its mandate to cover this important sector.⁴⁴⁵ Because its mandate includes government services, the Ombudsman's mandate has, however, included the power to conduct a systemic investigation into the Ministry of Health and Long-Term Care's oversight of the long-term care home sector, as outlined above.⁴⁴⁶

Among the most important of advocacy institutions available to older adults is Legal Aid Ontario. The mandate of Legal Aid Ontario is to provide access to justice for low-income individuals.⁴⁴⁷ Legal Aid Ontario provides low-income individuals with access to legal services through a variety of mechanisms, including legal aid certificates, duty counsel, advice lawyers, and legal clinics. Clinic services include ACE, Canada's first legal clinic devoted to the needs of older persons, and still one of only two such clinics in the country. ACE provides not only legal advice and representation to qualifying older adults, but also public legal education and law reform on behalf of older adults in general.⁴⁴⁸

The major criticism of Ontario's legal aid system is its very limited scope. The income thresholds for eligibility for its services are very low. For example, a family of four with an annual income of anything over \$31,000 may not qualify.⁴⁴⁹ Many people who are living on low or fixed incomes will not qualify for legal aid, despite being unable to afford to pay for legal services out of their own pockets. Further, even those who qualify may be asked, if they are homeowners, to put a lien on their house in order to receive assistance, something which many older adults are understandably hesitant to do lest they lose their homes. Finally, Legal Aid covers only a limited number of subject areas: certificates are not provided, for example on civil matters such as violations of consent and claims against long-term care homes.⁴⁵⁰

Mandatory Disclosure and Rights Advice

There are a number of situations where, under Ontario law, individuals must be informed of their rights by a rights advisor. The entitlement to rights advice is triggered when there is a substantial change in the status of the individual, such as where a patient in a psychiatric facility has his or her status changed from voluntary to

involuntary, or where a physician decides that a patient is incapable to manage property. The rights advisor cannot be a person involved in the direct clinical care of the person to whom the rights advice is given. The rights advisor must explain the significance of the change in legal status for the individual, and if requested to do so, must assist that person to apply for a hearing to challenge the decision. Failure to provide appropriate rights advice can invalidate a finding of incapacity.⁴⁵¹

Rights advice is not mandated for persons found to be incapable outside of a psychiatric facility; however, there is an entitlement to rights information, which is provided by health care professionals.⁴⁵² The requirements for rights information are laid out by Guidelines of the relevant health care professions, so that failure to provide appropriate rights information can be the source of a complaint to the governing body of the profession. For example, the Policy Statement on *Consent to Medical Treatment* for the College of Physicians and Surgeons of Ontario requires the physician to:

- inform the incapable patient that a substitute decision-maker will assist the patient in understanding the proposed treatment and will be responsible for making the final decision;
- involve the incapable patient, to the extent possible, in discussions with the substitute decision-maker;
- if the patient disagrees with the need for a substitute decision-maker, or disagrees with the involvement of the present substitute, advise the patient of his or her options, including finding another substitute of the same or more senior rank, and/or applying to the Consent and Capacity Board for a review of the finding of incapacity; and
- reasonably assist the patient if he or she expresses a wish to exercise the options outlined above.⁴⁵³

Self-Regulation

In some cases, institutional sectors or service providers have developed mechanisms for self-regulation. For example, professions such as the medical, nursing and legal professions are self-regulating and have created mechanisms for receiving and resolving complaints. With respect to complaints regarding regulated health professions, ACE notes that,

It is ACE's experience that the complaints process is lengthy and, if legal counsel is retained, expensive. Some of our clients opt not to make a complaint because it will take too long to address a problem that needs to be addressed immediately.⁴⁵⁴

Internal Institutional Mechanisms

Legislation may also mandate internal institution mechanisms for identifying and resolving issues. For example, under the new *Long Term Care Homes Act*, each home must have a Residents' Council, with the power to advise residents on their rights and obligations; review certain documentation related to the home; mediate and attempt to resolve disputes between residents and the home; and report any concerns and recommendations to the Minister (such Councils are voluntary under current legislation). The *Long Term Care Homes Act* also permits the creation Family Councils, which will have powers similar to those of the Residents' Councils. As the *Long Term Care Homes Act* is new, and those Councils in existence have developed on a voluntary basis, it is difficult to assess the how effective these Councils will be in identifying and addressing issues.⁴⁵⁵

Some hospitals, long term care homes and retirement homes employ patient advocates whose function is to assist patients or residents. These advocates are not mandated by law. ACE has commented on these patient advocates as follows:

One must be wary of this type of advocate because their objectivity may be compromised as they are paid by the institution itself. Furthermore, many of these advocates would appear to have no power and are there merely to placate those who complain when problems arise. Although these advocates can be a source of support and assistance, where there are real difficulties involving serious conflicts with the institution, it is unlikely that they will be able to advocate as strongly as most people would like, or as strongly as an advocate who is not connected with the institution due to a potential conflict of interest.⁴⁵⁶

2. Systemic Barriers

A review of the above suggests some themes and common gaps or problems in the mechanisms available to provide older adults with effective access to the laws intended to protect or benefit them.

Ageist and Paternalist Attitudes and Access to the Law

The potential impact of ageism in the development and application of laws was considered throughout Chapter IV. Ageism and paternalism may, of course, also shape the experience of older adults in attempting to access the law.

For example, ageist and paternalistic attitudes have been identified as a key cause of elder abuse (as well as themselves a form of abuse), whether in private settings or government institutions.⁴⁵⁷ Lack of respect and sensitivity by police officers may create a barrier to older adults reporting abuse:

[N]early half of the seniors who reported a negative interaction with the police recall experiencing some form of mistreatment, specifically lack of respect, compassion, or understanding from the responding officer. Seniors need to feel appreciated, understood, and reassured that their problems are important and that they are doing the right thing by reporting.⁴⁵⁸

It has been suggested that subtle ageism among health care providers may limit access to health care for older adults; for example, there is a tendency to treat mental illness in older persons as less worthy of intervention than when it manifests in younger persons, and to misdiagnose depression among older adults as dementia.⁴⁵⁹ A more systemic form of ageism in health care can be identified in the problematic practice of physicians who manage their caseloads by screening out patients with chronic or complex medical issues, many of whom are older.⁴⁶⁰

Negative, paternalistic attitudes and stereotypes about older persons may combine with negative attitudes related to gender, race, sexual orientation, disability or other aspects of identity to create particular stereotypes and barriers. The World Health Organization, for example, has recommended that elder abuse and responses to it be considered in the context of gender and socio-economic status, as these factors underpin almost all contexts of elder abuse.⁴⁶¹

Inadequate Training and Information

Given the complexity of many areas of elder law, it is perhaps not surprising that those charged with implementing these laws have often received inadequate training and information. Service providers, government officials and even lawyers may act on misunderstandings of the law or may provide older adults with incorrect information about the law.

Ageism can also be manifested when individuals and organizations do not take the time to understand and accurately represent the law to those to whom they provide the service. Older adults' dignity, personal integrity, and health care rights are fundamentally affected by that inaction. It has been pointed out for example that

patients often receive misinformation from health care providers or sometimes from government forms on health care consent, advance care planning, etc. In some cases, as previously noted, tools such as advance care directives which are intended to be instruments to aid personal autonomy, become misused and in effect circumvent communication with the older person.⁴⁶²

For example, only a small number of lawyers in Ontario have developed expertise in the legal issues that mainly impact on older adults, such as regulation of congregate settings, public and private home care, guardianship applications, health care consents and elder abuse. Lawyers who are not familiar with the relevant subject area may provide incompetent representation.⁴⁶³

Similarly, health care custodians may misunderstand and misapply the requirements of the *Personal Health Information and Privacy Act, 2004*, which sets out a framework for collecting, using and disclosing personal health information, which may result in undue barriers for individuals attempting to access or protect their health care information.⁴⁶⁴

Professionals and service providers may also require training and education on issues affecting older adults. For example, in order to meet their responsibilities, professionals and service providers may require training on how to identify and respond to signs that an older person may have a disability that affects their legal capacity to make decisions, or that an older person may be experiencing some form of elder abuse.

As a result, one of the premier recommendations in ACE's research on access to the law for older adults in congregate settings is education for both service providers and older adults. ACE suggested that education has the potential to help close the gap between good law and bad practice, by putting residents in a position to exercise their rights and force good practice.⁴⁶⁵

Lack of Oversight

At times, there is a lack of clear rights and protections for older adults, which leaves them vulnerable to abuse or mistreatment.

Over the years, concerns have been expressed regarding the oversight regime for retirement homes in Ontario. Retirement homes are defined by the new *Retirement*

Homes Act, 2010 as

a residential complex or the part of a residential complex,
(a) that is occupied primarily by persons who are 65 years of age or older,
(b) that is occupied or intended to be occupied by at least the prescribed number of persons who are not related to the operator of the home, and
(c) where the operator of the home makes at least two care services available, directly or indirectly, to the residents ...⁴⁶⁶

Retirement homes operate across a range of services and models. Some are very small; others are large and institutional. Services may include meals, assistance with the activities of daily living, recreational and social programming, housecleaning and laundry, personal emergency response services and nursing care. With significant pressures on the availability of long-term care and home care services in Ontario, retirement homes are essential part of the landscape for older adults who need supports. Retirement homes may offer many of the same services as long-term care homes, including services for high-needs patients and locked wards, making adequate oversight and protections essential.⁴⁶⁷

Until recently, the retirement home industry essentially operated on a “consumer choice” model. There was no provincial licensing or granting of approval to operate, no government funding, and no oversight of the services provided, except through the industry association’s complaints line. The *Residential Tenancies Act* includes some requirements for providing potential residents with contractual information (the Care Home Information Package, or CHIP).⁴⁶⁸

Very considerable concerns were raised regarding the lack of effective protections for residential retirement homes, particularly as a significant portion of the residents of these homes may be considered vulnerable.⁴⁶⁹ It has been noted that a consumer choice model is not well suited to this particular market:

- [F]or the market to operate effectively, certain conditions must be met
- Consumers must have an adequate supply of products or services to choose from;
 - They must be capable of exercising choice (that is, they must have decision making capacity and be free from coercion or undue influence) and
 - They must have recourse when things go wrong.
 - These criteria are noticeably absent in retirement homes and similar types of supportive housing in Canada.⁴⁷⁰

Ontario has very recently introduced a new regulatory model for retirement homes, one which is still transitioning into effect. The *Retirement Homes Act* sets out a set of standards for retirement homes, including a Bill of Rights; requirements for provision of information to residents, their families and the public; the establishment of Resident Councils; development of plans of care; requirements for staff hiring and training; prevention of abuse and neglect; and restrictions on the use of restraints and locked-in wards. A regulatory authority is created, which has the authority to issue or refuse licenses to retirement homes, appoint inspectors to ensure that the minimum standards and any conditions placed on licenses are met, and to receive and review complaints regarding licensees. While the government may appoint members of the Board of Directors of the Authority, it may not appoint a majority of the members. Concerns have been expressed that the Authority is likely to be industry-dominated, and therefore be unable to provide effective oversight for this industry. The effectiveness of this form of regulatory structure in ensuring dignity and security for older adults, many of whom may be vulnerable in some fashion, remains to be seen.

CASE EXAMPLE: MONITORING MECHANISMS

Continuing Powers Of Attorney

As was highlighted earlier in this Interim Report, where individuals are assessed to be legally incapable of making decisions on particular issues, the law as expressed in the Health Care Consent Act (HCCA) and the Substitute Decisions Act (SDA) provides a mechanism for decision-making on behalf of the individual in question.

These laws affect persons with cognitive, psycho-social, intellectual and developmental disabilities. As older adults are disproportionately likely to develop certain forms of cognitive disabilities such as dementia, these laws are of significant importance to older adults. For the purposes of this case example, the discussion will focus on the provisions of the SDA.

The SDA sets out definitions of capacity for decisions related to property and personal care, and affirms a presumption of capacity.⁴⁷¹ The SDA also sets out mechanisms for assessing capacity. A finding of incapacity may be challenged by application to the Consent and Capacity Board (CCB). The CCB⁴⁷² has the power to hold hearings under the HCCA, the SDA, the Mental Health Act, and the Personal Health Information Protection Act. Appeals from decisions of the CCB are to the Ontario Superior Court of Justice.⁴⁷³ The CCB is governed by the Statutory Powers Procedures Act. Parties may be

represented by legal counsel, and where the CCB finds it appropriate, it may order the Office of the Public Guardian and Trustee (OPGT) to appoint counsel to act on behalf of the person whose capability is in issue.⁴⁷⁴

The consequences of a decision that a person lacks legal capacity to make decisions about property or personal care are significant. At this point, under Ontario law, the power to make decisions for the incapable person becomes vested in a substitute decision-maker (SDM). In other words, the person has lost the authority to make decisions, often major ones, about his or her life.

Under the SDA, an SDM may be appointed in a number of ways. The now-incapable person may have, when capable, completed a continuing power of attorney within the requirements of the SDA, appointing an attorney in case of incapability for property decisions, personal care decisions, or both. The power of attorney becomes effective when a finding of incapacity is made.

Under the SDA, if there is no valid continuing power of attorney relevant to the property or personal care decision(s) that must be made, a guardian may be appointed by the court, upon application by “any person”.⁴⁷⁵ The Court may not appoint a guardian if the need for decisions to be made may be met by an alternative course of action that does not require a finding of incapability and is less restrictive of the person’s decision-making rights.⁴⁷⁶

The OPGT may be appointed as a statutory guardian of property or personal care. As well, the OPGT, which has a statutory duty to investigate allegations that a person is incapable of managing their personal care or property and that serious adverse effects are occurring or may occur as a result, may bring an application that results in its appointment as a temporary guardian.⁴⁷⁷

The SDA requires guardians and attorneys for property to act as fiduciaries and to consider the impact of decisions on the person’s comfort or well-being. As well, the SDM for property must explain his or her role to the person, encourage the person to participate to the best of his or her abilities in decisions, foster regular contact between the person and his or her family and friends, and consult with others who are close to the person.⁴⁷⁸ Guardians and attorneys for personal care must take into account when making decisions the wishes and instructions of the person while capable, as well as the values and beliefs that the person held while capable and the person’s current wishes if they can be determined. The guardian must also strive to foster the person’s

*independence and to choose the least restrictive and intrusive course of action that is available and appropriate.*⁴⁷⁹

Given the broad powers associated with continuing powers of attorney, the risk and consequences of abuse are substantial. As the Alberta Law Reform Institute has noted:

*The downside of an EPA [Enduring Power of Attorney] is that it turns over control of some or all of a donor's property and affairs to another individual, the attorney, whom the donor, because of their mental incapacity or infirmity, cannot effectively supervise. It is possible for an attorney to abuse these powers by using the donor's assets for purposes other than the donor's benefit. For example, an attorney may apply a donor's assets for a purpose beneficial to the attorney rather than for a purpose beneficial to the donor, or an attorney may simply steal the donor's property. Or an attorney who will benefit from the donor's estate may refuse to use the donor's money for the proper care of the donor.*⁴⁸⁰

*The SDA includes some minimum safeguards to protect older adults lacking in legal capacity from abuse by those appointed as guardian or holding a continuing power of attorney for property or personal care. Donors of powers of attorney must be aware of the possibility that the attorney could misuse his or her powers.*⁴⁸¹ *Guardians for property are obliged to explain their powers and duties to the person in question, and to regularly consult with the person's family and friends and those providing personal care.*⁴⁸² *They are required to keep accounts for all transactions concerning the property.*⁴⁸³ *Similar requirements are set out for guardians for personal care, including a duty to keep records of decisions made on behalf of the incapable person.*⁴⁸⁴

*Concerns have been expressed that these protections are inadequate.*⁴⁸⁵ *There is no mechanism for monitoring the use of continuing powers of attorney, beyond complaints by the donor or by family and friends, and in such cases, challenges to the exercise of the power of attorney must take place through the courts, a costly, complex and time-consuming mechanism. Although estimates of its prevalence vary, financial abuse is the most commonly self-reported form of elder abuse, and misuse of powers of attorney makes up a significant portion of this type of elder abuse.*⁴⁸⁶ *Financial abuse via power of attorney can have a devastating impact, not only on the financial security of older adults, but also on their emotional and psychological well-being. The Ontario Bar Association has commented that:*

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 of appointments and the abusive acts of the substitute decision-makers inaccessible, 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.⁴⁸⁷

The United Nations Convention on the Rights of Persons with Disabilities affirms the importance of providing sufficient monitoring and safeguards related to legal capacity for persons with disabilities. Art. 12 (4) requires that:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.⁴⁸⁸

The drive for efficiency and clarity among service providers may lead to a tendency to extend SDM powers beyond their legal limits or to ignore the requirements of the law. For example, ACE has noted that,

Many long-term care homes routinely fail to obtain consent to treatment at all. Other homes attempt to obtain 'blanket' consents at the time of admission which purportedly apply to all treatments that might be prescribed during the course of their stay. This is not legal as it in no way meets the requirements of 'informed' consent as defined by the Health Care Consent Act. In some homes, treatment will be started, and some time thereafter a staff member will contact the substitute decision-maker to 'advise' them that the resident is now taking the medication, leaving no option open for 'consent'.⁴⁸⁹

Redress for abuse of SDM powers must be sought through the courts. This type of adversarial setting may be inappropriate for complex familial issues, and may in fact

exacerbate conflict rather than resolve it. As the OBA has stated,

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 appropriate resolutions.⁴⁹⁰

As well, these court-based processes are often, in practice, inaccessible.

One of the topics which ACE receives the most question is powers of attorney, particularly the issue of abuse. While the framework of the Substitute Decisions Act provides mechanisms for individuals to challenge a “rogue” attorney who is not fulfilling their functions or who is taking advantage of the grantor, it is not very accessible as it is court-based. For example, an individual can apply to the court for a passing of accounts or seek guardianship of property and/or the person for an incapable person but the costs are prohibitive.⁴⁹¹

As was noted earlier in this Chapter, concerns have also been raised about the lack of checks and balances for the powers vested in the OPGT and the CCB. The OPGT, for example, has in certain situations extraordinary powers to make decisions regarding personal care, health and finances, which may only be challenged through expensive, time-consuming litigation which may be beyond the resources of concerned family members.⁴⁹²

Therefore, OBA has raised concerns that legislation which is intended to protect the vulnerable does not do so in fact:

A prime example is the Substitute Decisions Act which is intended to protect the vulnerable. However, it makes the appointment of substitute decision makers and the creation of powers of attorney an unsupervised process, while making the scrutiny of appointments and the abusive acts of the substitute decision-makers inaccessible, 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.⁴⁹³

Therefore, mechanisms for greater monitoring of SDMs have been recommended. As an example, the Western Conference of Law Reform Agencies, in its recent Final Report on

*its project, Enduring Powers of Attorney: Areas for Reform, set out a number of recommendations for preventing inadvertent or intentional misuse of powers of attorney, by ensuring greater transparency and scrutiny. For example, these recommendations included provisions requiring attorneys, upon commencing responsibilities for a legally incapable person, to issue a formal notice in which he or she formally acknowledges and accepts a specified list of duties as an attorney, and provisions enabling persons concerned about misuse to report concerns to a designated public official who will have discretion to investigate.*⁴⁹⁴

Development of protections against abuse of powers of attorney again involves a careful balance between protecting the security of vulnerable older adults, and upholding the autonomy and self-determination of those creating powers of attorney:

*Some have argued that more complex power of attorney legislation including duties and limited powers, and protections such as registration intended to minimize power of attorney abuse, infringe donor autonomy and privacy, making court appointed guardianship, a more invasive and controlling process, more likely. On the other hand, it has also been suggested that greater oversight, including registration, allows for a more relaxed approach to capacity for creating a power of attorney, and so increases accessibility.*⁴⁹⁵

*Finally, some of the concerns regarding the operation of consent and capacity laws point to the lack of monitoring and oversight in general. Overall, there is a lack of data that could be used to properly evaluate whether Ontario's capacity and decision-making laws are operating as intended, or operating in a way that negatively affects the rights of persons with disabilities and older persons. It is impossible, for example, to determine even the most basic starting points for analysis, such as, how many older persons in the province of Ontario have been found to be legally incapable and how many continuing powers of attorney for property or personal care are in effect, let alone the degree to which those acting as SDMs understand their roles, or the extent of abuse and exploitation of substitute decision-making powers.*⁴⁹⁶ *Without such monitoring and oversight of the implementation of the law, it is difficult to determine whether the principles of an anti-ageist approach to the law are being respected, or to determine appropriate priorities for reform. This, in itself, tends to undermine the dignity, autonomy, participation, security and respect for diversity of older adults.*

Lack of Appropriate Mechanisms for Recourse

In some cases, there is no effective method of recourse for a violation of rights. As discussed above, the Residents' Bill of Rights for residents of long-term care homes is one example: where the only redress for a violation of rights is a civil action for breach of contract against the institution where one lives and on which one is dependent for services, the potential for redress is illusory.

Similarly, as is discussed at length in Chapter VII of this Report, while there is a review process for the decisions of Community Care Access Centres (CCACs), which are responsible for managing access to home care supports, older adults are often ill-informed about this right and how to access it. While a termination of services can be appealed from a CCAC to the Health Services Appeal and Review Board, there is no appeal mechanism related to the quality of services provided. Community Legal Education Ontario suggests that one method of recourse may be to sue the CCAC for breach of contract. However, since Legal Aid does not cover these types of issues, this is not likely an effective avenue for redress for a person dependent on publicly funded home care. Effectively, this means these rights are, for the most part, "paper rights" only.⁴⁹⁷

Complaint-Based Systems

The majority of systems in place to ensure the effective application of the law to older adults require the aggrieved individual to individually take action to raise and resolve the issue, whether through commencing litigation before a court or administrative tribunal, or filing a complaint through a government process, third party system, or internal complaint process.

Complaint-based systems leave decisions about action to the initiative of older adults. This may be understood as respecting the autonomy of older adults. In some circumstances, however, complaint-based systems may be problematic, particularly where older adults are vulnerable or marginalized due to disability, low-income, immigration status, or other issues. Where older adults are dependent on others for ongoing care or supports, whether the others are family members or service providers, the negative consequences of filing a complaint against these individuals or institutions may be seen to outweigh any potential positive outcomes. As well, complaint systems may involve expenses, bureaucratic obstacles, or delays beyond the capacity of vulnerable older adults to absorb. As is discussed later in this Chapter, for this reason

there has been recent interest in the possibilities associated with less adversarial means of resolving conflict, such as mediation.

Where services are targeted to vulnerable older adults, as with, for example, long-term care or home care services, systems that rely entirely on older adults to identify issues and pursue remedies may fall short of addressing needs. As well, where systemic problems are at issue, individual complaint systems are unlikely to, by themselves, spur the changes that are needed to make a more effective system.

Complaints-based systems are common in many areas of the law, and so the issues raised here are not necessarily, or not all unique to older adults. The limitations of complaints-based systems are also an issue in the LCO's project on *Vulnerable Workers and Precarious Work*,⁴⁹⁸ as well as, of course, in the project on *The Law as it Affects Persons with Disabilities*.

Failure to Recognize and Accommodate the Needs of Older Adults

As noted above, while older adults are an extremely diverse population, they are disproportionately likely to live with a disability or chronic health condition, to have lower levels of literacy and numeracy, to live on a fixed income, to rely on the assistance of others to manage the activities of daily living and maintain their independence, to live in a congregate setting, and to have a relatively short life-expectancy.

Mechanisms for implementing and enforcing laws that affect older adults may not take these circumstances into account, and may therefore create barriers. As an obvious example, while efforts are being made to increase the physical accessibility of the justice system,⁴⁹⁹ much remains to be done. The costs of accessing justice are a significant issue for many older adults, as they are for many other groups. The LTB, for example, charges an application fee and has the power to award costs against an applicant, which may be a disincentive to pursue one's rights.⁵⁰⁰ As a further example, it has been pointed out that although public legal education has made important contributions to making the law more understandable and more accessible for many, it is still geared to the functionally literate person, which leaves many older adults at a disadvantage: older adults continue to point to the lack of plain language information on legal rights as a serious barrier. Further,

Increasingly in many parts of Canada, public information on the law and government information about services and entitlements has been shifting from people sources to

virtual sources such as the Internet. The Special Senate Committee on Aging notes that a reliance on web-based information assumes a basic level of literacy and people's ability to access the internet.⁵⁰¹ Many older adults, particularly older women, do not have access to or cannot use the Internet. In 2007, about one third (33.8%) of all men aged 65 and over and less than one quarter (23.1%) of all women aged 65 and over in Canada accessed the Internet at home and only about 1% of seniors used computers in public places like libraries.⁵⁰² Internet use still is largely limited to higher income seniors and those with higher education.⁵⁰³

A recent example of failure to acknowledge and accommodate the particular needs of older adults occurred in the context of bylaw enforcement in the City of Toronto. The neighbour of an older resident with dementia asked the City to cut down a mature tree on her property. An order for the removal of the tree was issued by a Property Standards Officer and the tree was ultimately cut down, at considerable expense to the property owner. An investigation by the City Ombudsman found that the City lacked proper policies or processes for accommodating the needs of individuals with diminished legal capacity, resulting in unfairness to this individual. The City was aware of the resident's dementia and diminished capacity, but did not take steps to ensure that the resident, through her substitute decision-maker, was fully informed about the issue and had appropriate opportunities to respond and have concerns addressed. The Ombudsman commented that:

Public service is most accessible to those who can navigate the established processes. It favours those with education and those who can meet the bureaucracy on its own terms. In this case, the resident is marginalized and is representative of many others in similar situations. In fact, many residents with dementia do not have a family member readily available to advocate on their behalf. The absence of policy or an established process to accommodate persons with dementia or diminished capacity is a gap MLS must address. At a systemic level, its absence creates an adverse impact on what is already a vulnerable group. A process to fairly serve the needs of those with dementia is especially urgent as the population ages. It is time to address this gap... The City cannot hope to be accessible, equitable or age friendly to residents with dementia unless it has ensured that barriers to this population have also been identified and removed.⁵⁰⁴

The challenges in ensuring mechanisms for access to the law take into account the needs of older adults will differ depending on the type of law in question. Where laws are age-based or mainly affect older adults, systems may be specifically designed to meet the needs of older adults. Where older adults make up a smaller proportion of those affected by a law, legislators and policy-makers must consider whether universal

design approaches will be sufficient, or if some older-adult specific procedures or supports are necessary in order to ensure meaningful access for older adults.⁵⁰⁵

Adversarial Systems

Many of the issues of most concern to older adults – for example, capacity and guardianship applications; elder abuse; and services in long-term care homes, retirement homes and home care – often involve ongoing, sometimes complex relationships on which older adults are dependent for their well-being. This raises difficulties for implementation, monitoring and enforcement.⁵⁰⁶

Older adults may be reluctant to use adversarial systems in these circumstances. For example, older adults who are subjected to abuse may be very reluctant to see their abuser prosecuted through the criminal law system, despite their desire for the abuse to end.⁵⁰⁷

As well, in such circumstances, adversarial systems may exacerbate rather than resolve issues. For example, the Ontario Bar Association has pointed out that substituted decision-making laws have become, to a significant degree, a venue for familial disputes, and may foster conflict rather than resolving issues.⁵⁰⁸

Inadequate Remedies

Even where older adults pursue enforcement of their rights, the remedies available may be inadequate to provide real redress to older adults, or, where the violation of rights was caused by a systemic issue, to spur meaningful change. For example, because there are very few damages options available to older adults, civil litigation may not be an effective means of obtaining redress. Not only does this potentially perpetuate injustices, it creates a disincentive for older adults to attempt to enforce their rights, and thereby may prevent problems from coming to light.

The previously highlighted case of *Royal Arch Masonic Homes* involved the death of a 77-year-old female resident of a long-term care home, following a fall that resulted from the negligence of a care aide. The three adult children of the victim sought redress from the long-term care home. The Court determined that the only damages that the long-term care home was obliged to pay were the funeral and burial costs. There was no

economic loss resulting from the death of the victim, and the Court declined to award costs for loss of care and companionship, due to the victim's age and her various physical and mental disabilities.⁵⁰⁹ It has been pointed out that such a judgment essentially permits caregivers to harm older adults with impunity.⁵¹⁰

C. Strategies for Enhancing Access to the Law for Older Adults

It should perhaps be unnecessary to emphasize that a right without an effective mechanism for redress is not really a right at all; it is merely a statement of aspirations. A first principle for ensuring access to the law for older persons is surely to make certain that legal rights and protections for older adults are accompanied by clear and effective mechanisms for accessing those rights and protections.

The above review of barriers to access to the law for older persons suggests the following as key strategies for designing effective mechanisms for older adults.

1. *Combating Ageism and Paternalism*

Those working in the field of elder law have repeatedly emphasized the importance of developing and implementing strategies for combating ageism and paternalism, both in the populace at large and among those charged with designing and implementing laws and policies that affect older adults. Unless ageist and paternalistic attitudes are addressed, they will inevitably taint the application of the law, regardless of how well it is designed. Thus, the United Nations, the OHRC, and most recently the Senate Special Committee on Aging, to name just a few bodies, have made recommendations for anti-ageist education and training.⁵¹¹ Anti-ageist education and training is fundamental to ensuring respect and dignity for older persons.

Public education is, for example, central to the Ontario government's 2002 Strategy to Combat Elder Abuse. This includes coordination of community services, training for front-line staff, and public education to raise awareness. Public education initiatives include 53 community response networks, and a province-wide Seniors' Safety toll-free line that provides information and support in over 150 languages. The Ontario Network for the Prevention of Elder Abuse has developed a Core Curriculum and Resource Guide to educate workers about elder abuse and interactions with older adults, online e-

training modules on financial and emotional elder abuse, a variety of training materials and a number of Public Service Announcements.⁵¹²

ACE has this to say about the type of education and training that service providers should receive:

The most important principle that needs to be conveyed to all stakeholders is that seniors are people. Older adults are presumed to be capable of making decisions and they have the right to make foolish decisions, just as people living outside a congregate setting do. ACE is of the opinion that many staff members and some families do not understand that older adults are allowed to take risks or make foolish decisions. Educational resources need to emphasize that residents' rights are a two-way street: not only do they recognize the independent and autonomy of residents, but they protect staff from liability.⁵¹³

Anti-ageist training and education must address, not only negative attitudes, but the tendency to forget the existence of older persons and to fail to take into account their needs and circumstances:

The needs of all citizens, including older persons, must be taken into account up-front so that physical, attitudinal and systemic barriers are not created. Assuming that everyone is young and able-bodied and designing programs and facilities on that basis is a form of ageism that must be addressed in our society. The Commission heard that some levels of government are now undertaking gender-based analysis. Similarly, government should consider the impact of laws, policies and programs on all age groups.⁵¹⁴

2. *Empowering Older Adults*

As noted above, older adults frequently lack information about their rights or about the benefits and services that they are entitled to. Given the complexity of many areas of the law that disproportionately affect older adults, this is perhaps not surprising. However, it is problematic. Older adults who are not aware of their rights are not able to assert and claim those rights, with the consequence that the law may become ineffective.

Lack of awareness of legal rights and mechanisms for redress undermines the autonomy and independence of older adults. Without knowledge of their rights and recourse,

older adults lack the ability to make meaningful choices about how they will live their lives and take responsibility for the things that affect them.

Provision of accurate, accessible information about legal rights and how to enforce them is therefore essential to ensuring access to the law for older adults.

3. *Designing Mechanisms that Take Older Adults into Account*

Mechanisms for access to the law must be designed in a way that takes older adults into account, regardless of whether or not the law in question is specifically targeted to older persons. As the Ontario Human Rights Commission has stated in its *Policy on Discrimination Against Older People Because of Age*:

The Commission has defined “ageism” to mean, in part, “a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.” Ageism occurs when planning and design choices do not reflect the circumstances of all age groups to the greatest extent possible.

The Supreme Court of Canada has recently made it clear that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then to try to accommodate those who do not fit this assumption. Rather, the age diversity that exists in society should be reflected in the design stages so that physical, attitudinal and systemic barriers are not created.

As a corollary to the notion that barriers should be prevented at the design stage through inclusive design, where systems and structures already exist, organizations should be aware of the possibility of systemic barriers and actively seek to identify and remove them.⁵¹⁵

This means that mechanisms should take into account, for example:

- The financial demands imposed on those seeking justice, both in the context of low-income, and for those who are living on fixed incomes;
- Accessibility for persons with physical, mental, cognitive and sensory disabilities, and for those with health limitations;
- How information and assistance may be provided to those whose literacy or numeracy or comfort with technology is limited;

- Whether dispute resolution and remedies can be provided within time limits that are meaningful for older persons;
- Providing meaningful access for persons who are living in congregate settings;
- How meaningful access can be provided for older adults who are vulnerable due to gender roles, linguistic or cultural barriers, immigration status, sexual orientation, dependency relationships, or other issues.

As was discussed in Chapter III, in some cases the needs of older adults can be taken into account through inclusive design. Inclusive design approaches are appealing for law reform because the benefits may be widely applicable beyond older adults, and such initiatives may thereby garner widespread support rather than resentment. For example, policies or programs that address physical accessibility issues will also benefit persons with disabilities and frequently families with young children. Communication strategies that reach beyond the internet and focus on plain language will improve outreach in many communities, not just among older adults. As well, they reduce the focus on older age as a binary concept opposed to youth.

However, there are limitations to the inclusive design approach. Older adults may have needs that are sufficiently unique that they are not easily accommodated within an inclusive design approach. Or, in some cases, the needs of older adults may conflict with those of others. In such cases, it may be most appropriate to design policies or programs that are specifically tailored to older adults, as outlined below.

4. *Use of Mechanisms Focused on Older Adults*

It is relatively rare to find mechanisms for access to the law that focus specifically on the needs of older adults. For example, while mechanisms related to long-term care homes will mainly impact on older adults, who form the vast majority of residents of long-term care homes, they also extend protection to the minority of residents who are younger adults with significant disabilities and complex medical needs.

Most frequently, access to the law mechanisms specifically directed to the needs of older adults are focused on elder abuse.

For example, many police forces in Ontario have units specializing in elder abuse, and the majority of police services have a coordinator specializing in elder abuse to act as a

resource and community liaison. The Ottawa Police Service has an Elder Abuse Section, launched in January 2005. Its mandate is to investigate all allegations of abuse that fall within its definition of elder abuse, and to educate front-line workers and the general community about elder abuse. Similar programs have been developed in other parts of Canada and in other common-law jurisdictions such as Australia and the United States.⁵¹⁶ In the United States, the Administration on Aging administers the Prevention of Elder Abuse, Neglect and Exploitation Program, which provides federal leadership in strengthening elder justice strategic planning and direction for programs, activities and research related to elder abuse awareness and prevention. The Administration on Aging also operates the National Centre on Elder Abuse, as a national resource centre on the issue.⁵¹⁷

There are some general mechanisms, however. Ontario's ACE, discussed above, is a notable example, providing legal advice and representation to older adults, as well as general advocacy and law reform activities, and serving as a centre for the development of knowledge and expertise in the area of the law and older adults.

The Canadian Centre for Elder Law Studies is affiliated with the British Columbia Law Institute. It is a national, non-profit body dedicated to studying legal issues that have a particular impact on older persons. As well as conducting its own legal research and law reform projects, it facilitates study and discussion of elder law issues through such venues as an annual Canadian conference on elder law, and hosting the World Study Group on elder law issues.

The Australian government has funded the National Aged Care Advocacy Program, which aims to promote the rights of people receiving Australian Government-funded aged care services through community-based organizations that provide older adults with information about rights and assistance with exercising those rights. These centres also work with the aged care industry to encourage the development of policies and practices that protect consumers. Those living in an Australian government-funded place in an aged-care home have access to free, confidential and independent advocacy services. Australia also has an Aged Care Complaints Investigation Scheme, which can look into complaints by older persons regarding any aspect of their care, and can require service providers, where appropriate, to take remedial action. Concerns regarding Aged Care Complaints Investigation Schemes may be examined by an independent Aged Care Commissioner.⁵¹⁸

As is discussed at greater length below, Wales has recently established a statutory, independent Older People's Commissioner. This is a watchdog agency, carrying out promotion, consultation, review, advocacy, education and investigative functions. The Commissioner can review and make recommendations about the adequacy and effectiveness of law for the protection of vulnerable older people and ask the Assembly Government to consider making changes where necessary. The Commissioner can also provide guidance on best practices to regulated service providers and review their policies and programs to ensure adequate safeguards for the rights of older persons. The Commissioner has the power to undertake investigations where there are systemic concerns at issue and the issue is not likely to be addressed in other ways.⁵¹⁹

As discussed at some length in Chapter IV of this Report, the use of older age-based programs and policies raises complex issues. It is important not to overemphasize the idea of older persons as a homogenous group. Not all older adults are disadvantaged or at-risk, and these older adults may share the experience of barriers and challenges with other vulnerable groups. Age, by itself, does not make older adults different or lesser. Programs based on an assumption of vulnerability among all older adults may lead to paternalism and undermine the autonomy and independence of older adults.

At the same time, there are certainly subgroups of older adults who are disadvantaged or at-risk and whose circumstances require particular attention and accommodation. There may be circumstances where programs particularly targeting older adults are the most effective way to ensure the security and dignity of older adults. The programs developed by many police services focused on elder abuse, and which focus on recognizing the unique needs and circumstances of older adults who experience abuse and the particular barriers they may face in asserting their rights, likely fall within this category.

Therefore, taking into account the general issues raised in the discussion of age-based criteria in Chapter IV, advocacy or enforcement programs targeted to older persons must be individually assessed, to ensure that the use of age as a criteria for eligibility is the most effective means of addressing the needs or vulnerabilities that are targeted; that the program is based on current research rather than stereotypes; and that the program effectively addresses the needs identified.

CASE EXAMPLE: MECHANISMS FOCUSED ON OLDER ADULTS

Elder Abuse and Police Services

As highlighted earlier in this Chapter, older adults may face a range of barriers to reporting elder abuse. The complex relationship dynamics underlying some forms of elder abuse, together with the effects of shame and fear of retaliation, may make some older adults reluctant to disclose the abuse, or to see the perpetrators face criminal penalties. As a recent report on barriers to reporting summarized:

Greatest are fears of retaliation, followed by loss of residency, increased vulnerability, and isolation, especially when there is daily contact with the abuser. Ultimately, there is a fear that the situation will get worse after reporting abuse.... Circumstances involving the abuser as being someone in a position of trust also have a negative impact on report rates. A relationship with an abuser can discourage an elderly person to report abuse because many seniors perceive the legal intervention as too severe.⁵²⁰

There may be additional barriers for some older adults related to culture, language, or remote location.

Older adults may also fear that they will not be believed or treated respectfully by professionals in the justice system, including police officers.

In order to address these kinds of barriers, several police forces in Canada have developed specialized elder abuse units or services. The Vancouver Police, for example, in September 2007 launched an Elder Abuse Unit, modeled on and connected to its Domestic Violence Unit. In Ontario, there are Seniors' Units in a number of cities, including Hamilton, Thunder Bay, Waterloo and Ottawa, and many other police services have specialized Elder Abuse Coordinators, who act as a resource and community liaison.

Hamilton's Crimes Against Seniors Unit (CASU) was the first specialized unit of its kind in Ontario, formed in March 2004. It consists of two Detectives who work from the Hamilton Police's Victims of Crime Branch, supported by the three Seniors' Support Officers who work in each of the three Divisions.

The Seniors' Support Officers have three key roles: developing and delivering education programs related to the safety and security of older adults; assisting in investigations of abuse and neglect of older adults; and co-operating with community services and other

agencies to address issues related to the quality of life of older adults. These Seniors' Support Officers are the initial point of contact for older adults.

CASU is responsible for the investigation of crimes against persons who are 60 years of age or older, and who are victimized primarily because of their age. The investigations of CASU have included physical, psychological and financial abuse, neglect and self-neglect, and coroner's investigations. The work of the Unit is dominated by investigations of financial abuse, which include frauds, scams and thefts, and theft by power of attorney. CASU has successfully investigated a number of high profile cases, including those of a son who used his power of attorney to obtain and gambled away the OAS and CPP payments of his disabled mother, an administrator of a retirement home who defrauded several residents, as well as her employer, of over a million dollars, a home care worker who stole from her client, and an unlicensed contractor who scammed numerous residents for roofing repairs that were never performed.

The work of the CASU requires detailed knowledge of laws that police officers are not usually required to become familiar with, including the Consumer Protection Act, the Substitute Decisions Act and Health Care Consent Act, the Trustee Act and the Succession Law Reform Act, and the law governing long-term care homes, and so involves the development of specialized skills and knowledge.

The Unit works closely with various community agencies and services to ensure that all reported cases of assault, financial exploitation and neglect are properly investigated. The Unit has developed partnerships with the Community Care Access Centres, the Office of the Public Guardian and Trustee, the Alzheimers' Society, local hospitals and financial institutions, the Canada Revenue Agency and the Ministry of Small Business and Consumer Services, among others.

5. Alternative Dispute Resolution Mechanisms

As noted earlier in this Chapter, there has been considerable interest expressed in the potential of alternative dispute resolution mechanisms such as mediation to benefit older adults in attempting to resolve issues arising in the context of ongoing relationships.

However, concerns have also been noted about the imposition of mandatory mediation on older adults in some contexts. For example, under Ontario's *Residential Tenancies*

Act, care home residents who are facing eviction due to changing care needs must attend mandatory mediation, where the parties may contract out of their rights under the *Act*.⁵²¹ While the provision may have been intended to benefit retirement home residents by mandating a less formal, adversarial and time-consuming process, given the power imbalances between the retirement home operator and the resident who is facing eviction, who may have significant health limitations, who may not be represented and who may not be fully informed of his or her rights, concerns have been expressed about the effect of this provision on older adults.⁵²²

One form of alternative dispute resolution is elder mediation. Elder mediation is a voluntary, non-adversarial dispute resolution process where one party to the dispute is an older adult. The process is specifically designed in order to facilitate the dynamics of older adults' conflicts, and to generate solutions which respect both the parties' ongoing relationship, and protect the older adult's interests. Elder mediators typically have knowledge of ageing and the ageing process, and are so ideally situated to create processes which enhance older adults' capacity to deal with conflict.⁵²³

Certain elder mediation programs mediate the diverse range of disputes which older adults face.⁵²⁴ Other elder mediation programs specialize in certain disputes which older adults face more often than the general population. For example, some elder mediation programs mediate conflicts in caregiving arrangements.⁵²⁵

Despite its potential, resolving conflicts through elder mediation can create risks for older adults. Older adults are often dependent upon the other party to the conflict, which will distort the power dynamic between the parties. If left unaddressed, the imbalance of power may mean that the older adult is not able to freely express his or her opinions, and that consent to any agreement may not be freely given.⁵²⁶ Older adults are also more likely to have age-related illnesses which affect their ability to participate meaningfully in the discussions which directly affect them.⁵²⁷ An elder mediation's potential to create resolutions which respect the older adult's autonomy and safety will then depend upon the elder mediator's training, skills and judgment throughout the process to ensure the older adult's free and meaningful participation.

Preliminary experiences with elder mediation show this process has tremendous potential to increase access to justice for older adults, and to increase communities' capacities to deal with conflicts involving older adults. When successfully established in a community, elder mediation programs provide a physically and emotionally accessible alternative for those older adults who face barriers in existing institutionalized dispute

resolution processes. Preliminary experiences with the process have shown outcomes which enable older adults to recognize and respond to conflict, and generate solutions which maximize older adults' dignity, independence and autonomy.⁵²⁸

In Ontario, there are currently very few elder mediation services, and little research exists on these programs' operation. Further research is necessary in order to assess the feasibility of introducing elder mediation programs across the province. Priorities for future research could include developing research methodology for evaluating existing elder mediation programs and encouraging the dissemination of information amongst agencies, and supporting pilot projects in specific contexts where older adults often encounter conflict and face particular barriers in enforcing their legal rights, such as in caregiving arrangements, responses to elder abuse, and applications under the *Substitute Decisions Act*.⁵²⁹

CASE EXAMPLE: ELDER MEDIATION

Waterloo's Restorative Justice Approach to Elder Abuse

Restorative justice is a philosophy which responds to what society labels a "crime." The philosophy emphasizes repairing the harm done to a victim and the community, in contrast to the criminal justice system's emphasis on prosecuting and punishing offenders. A restorative justice approach to resolving conflict is distinct from many elder mediation programs discussed, as it identifies the parties to a dispute as victim and offender, rather than as disputants. The parties come to the table already having acknowledged their roles in the dispute in this way, and this relational orientation shapes the goals and results of the process. Further, restorative justice shares greater similarities with transformative mediation than facilitative mediation, as the emphasis is on empowering the parties to move past their patterns of conflict rather than on reaching a resolution.

One example of the operationalization of the restorative justice philosophy as a response to elder abuse was developed in Waterloo, Ontario. Though restorative justice is different than elder mediation programs, it shares with these other programs an emphasis on increasing older adults' ability to recognize and resolve conflict.

The Waterloo program has existed in two different forms: first as a dedicated "circle" process, and now as a holistic team-based conflict management approach to responding to elder abuse and increasing older adults' capacity to deal with conflict.

Restorative Justice Circles

The program first operationalized the restorative justice philosophy in the form of “circles.” These “circles” were led by a trained facilitator, who brought together the people directly or indirectly affected by the conflict, discussed the issues and attempted to resolve the conflict. The program was led by a partnership between Community Care Access Centre of Waterloo, the Waterloo Regional Police Service, the Kitchener-Waterloo Multicultural Centre, White Owl (an association of urban Aboriginal persons), the Network: Interaction for Conflict Resolution, and Community Justice Initiatives of Waterloo.⁵³⁰

The restorative justice circles were offered at no cost to the parties to the dispute. In these cases, however, costs were likely not the most significant barrier that older adults faced to resolving the conflict, as if an older adult were to press criminal charges, the legal costs would be minimal. The emotional and relational costs would in contrast be significant.

In order to minimize barriers arising from the lack of familiarity with justice processes and legal rights among older adults, the restorative justice program undertook a specific educational program. This educational program went into the community in order to directly build relationships with older adults, and to give them the tools necessary to recognize the signs of elder abuse, and to encourage them to report this abuse. The program also did outreach with stakeholders who worked with older adults in order to educate them in the signs of abuse and to give them the resources necessary to encourage older adults to report the abuse.⁵³¹

Further, the program had broad community support, both from its partners and other organizations. The program was therefore ideally suited to inform older adults about this possible dispute resolution mechanism.

The restorative justice program recognized that ageism is one of the key barriers that older adults face in reporting elder abuse. The program adopted a restorative justice approach over any other, as they believed it particularly suited to employing an anti-ageist approach to conflict resolution. The program was designed in order to respond sensitively to age-related challenges, and the process was designed as physically accessible. These processes would facilitate older adults’ ability to come forward and share their experiences.

Because of its strong community ties, the program also had the potential to encourage anti-ageist perspectives in the mainstream justice system. The program worked with law enforcement officials, court staff, and Crown prosecutors, and this work had the potential to increase these stakeholders' capacity to respond to ageing more appropriately.

The program also worked with Crown prosecutors in some cases where charges had already been laid. The prosecution would refer these to restorative justice circles, with the possibility of charges being dropped if the process was successful.⁵³²

The program's process was designed in light of the reality that often the parties in elder abuse have a relationship of care and dependence, and that the older adult has an interest in continuing this relationship.⁵³³ Accordingly, the process shifted the emphasis from blame and punishment to one of responsibility and rehabilitation. The program also emphasized that the process would not result in punishing the offender, or removing him or her from the community. This decreased the fear that the process would destroy the relationship underlying the conflict.

The restorative justice circles addressed an older adults' conception of a dispute as private by making the process confidential. Unless charges had also been laid, the process would take place outside of the public scrutiny of the Court system. However, the program's evaluation identified a key weakness as being a low referral rate, and attributed this to the fact that the issues were too sensitive and private for older adults to come forward. This suggests that in spite of the private and less rigid structure of the circles, older adults may still be reluctant to introduce outside scrutiny into their personal conflicts.⁵³⁴

The circles emphasized healing and transforming relationships rather than punishment, and so the solutions were typically more consistent with older adults' desires than the criminal justice systems. The circles provided an opportunity for the older adult to regain a sense of control that would be impossible in the criminal justice system, where victims often play only minor roles. The older adult was involved in all steps of the circle, including identifying the underlying issues and identifying the relevant parties to the dispute. Further, the older adult had the opportunity to speak his or her experiences in the way of his or her choice.

Given that the process was more consistent with some older adults' conceptions of conflict, it was likely able to increase their willingness to resolve their conflicts in this way. The program did however considerably emphasize the complicated pre-circle process, and the evaluation found that this may have been an overly lengthy process. The evaluation recommended a simpler process, such as mediation.⁵³⁵

The circle leaders were trained volunteers, who organized a pre-circle case development process, and then facilitated the circle itself. The mediators were trained in the restorative justice philosophy which would inform their practice. They also received training in the dynamics of elder abuse and how to monitor safety, and how to address older adults' specific needs. Volunteers received ongoing education in case review, development, family dynamics and substance abuse.⁵³⁶ The mediators were able to draw on training and knowledge from the variety of community groups who organized and supported the initiative. As they had access and connections with these groups, the mediators had the skills necessary to recognize their own shortcomings and refer older adults to appropriate agencies.

At intake, whether the risk of imminent harm had been addressed was one of the key criteria for intake. If there were imminent danger, the conflict was referred to other agencies as restorative justice was inappropriate. Since mediators had access to a broad range of community supports, they were able to recognize cases which required immediate intervention, and refer these cases to more appropriate service providers.

The program's facilitators received training in ageing, and the circles were designed to be accessible to individuals who may have faced accessibility barriers. Despite this training, one of the program's shortcomings was a difficulty in completing circles. Many of the cases involved older adults with diminished mental capacity, and who had difficulty understanding the process and what was happening.⁵³⁷ In cases such as this, the program recognized the limits of enhancing individuals' ability to participate in the process, and that the circles were no longer appropriate. Though this recognition decreased the number of settlements reached, this may be less of a weakness than a recognition of the program's limitations.

Abusive relationships often have remarkably distorted power dynamics, where one party uses his or her power in an abusive way. Given this dynamic, power imbalances were always a particular challenge in the circle process. To address these, the mediators conducted pre-mediation sessions to identify all of the issues and began the process of recognition and healing prior to the circle. This context was important to restoring the

balance as between the parties. Further, the process itself was physically structured in a circle shape so as to promote the idea of equality and balance as between the parties. The program also worked to equalize power imbalances by allowing all members of the circle to bring their “supporters,” such as friends or personal care workers.

As the entire program was designed to respond to elder abuse, conflicts were not turned away because they involved situations of prior abuse. However, as already noted, if the risk of imminent harm persisted, other agencies were notified in order to address this risk. Situations where charges had been laid were also considered appropriate for restorative justice, with agreement from the Crown. In these cases, if a satisfactory agreement could be reached, there was the possibility that charges would be dropped. Restorative justice was also appropriate in cases where a criminal trial had already occurred, as the process could help with healing. The program also accepted what would be civil disputes.

The projects’ evaluation identified its greatest strengths as its educational component, and its strong network of community partners. These aspects contributed to an attitudinal shift towards elder abuse in the Waterloo community. This attitudinal shift in turn enhanced the community’s ability to respond to elder abuse, and created dispute resolution options for older adults which would maximize communication and healing.

Participants to the program consistently reported that the process served the victim’s and the perpetrator’s needs. There was however concern that the process did not sufficiently acknowledge the injustice done to the victims.⁵³⁸

The program’s greatest weakness was its lack of referrals. As noted above, the program evaluators hypothesized that the reason for this was because these issues were too sensitive and personal. Through educational and outreach efforts, and building trust with stakeholders, the program could increase individuals’ capacity to deal with and respond to elder abuse, and to diminish the stigma attached to elder abuse. There is also however the possibility that no amount of education could encourage some individuals to resolve these conflicts in this conflict resolution process.

Elder Abuse Response Team

As the restorative justice program’s funding was running out, the program’s supporters reformulated their initial philosophy in an Elder Abuse Response Team (EART). The goal of this initiative was to translate the program’s successes into a more sustainable form,

which would be able to reach more individuals. The program retained the principles of restorative justice; however, its operations shifted from the circle process to a more comprehensive conflict management strategy.

Currently, the program's response after the intake stage is very flexible, and does not necessarily lead to a single conflict resolution process, as was the case in the circle process. The appropriate team members will meet with the older person wherever they feel most comfortable, and with whomever they believe should also be present. From there, the staff will determine the best way of resolving the conflict. Because of its broad community support, the team can draw on a variety of available resources to help address and resolve the conflict. Only a handful of cases have ultimately been referred to the criminal justice system, suggesting that the conflicts are most productively managed in an alternative way.⁵³⁹

The EART is very similar to the earlier restorative justice circles' approach to increasing access to justice. Noted below are some differences in how program design affects the program's ability to increase access to justice for older adults.

The program's earlier educational and outreach activities are ongoing, and part of the EART's ongoing mandate is to mobilize community support and capacity to deal with elder abuse.⁵⁴⁰ There was no problem of lack of referrals in the new EART, and these came from fourteen different sources, suggesting the program's strong ties in the community.⁵⁴¹ By continuing to work with so many different community agencies, the program has the potential to increase the individual's familiarity with his or her legal rights, and to empower individuals to recognize when they have been the victims of a wrong.

As already noted, contacting the EART does not automatically launch criminal proceedings, or now even a restorative justice circle. In this way, the older adult will not be deterred from seeking resources and information, out of a fear that this will threaten the ongoing relationship at the centre of the dispute. Contacting the EART does not automatically lead to a circle, but rather, to providing the older adult with information about his or her options, and support to pursue those options. This not only enhances the individual's ability to him or herself manage conflict, but also gives the individual the ability to control the degree of third party intervention in the resolution.

Since the EART is not an elder mediation service per se, but rather a team which responds to conflict as the particular situation requires, it is difficult to determine

whether it faces the same challenges as an “elder mediation” proper service. Its focus is on conflict management and responsiveness rather than a more rigid “mediation” program.

This program’s success has depended on community partnerships. These partnerships mean that outreach efforts will be more effective and increase the community’s own capacity for recognizing and dealing with conflicts involving older adults. Further, this multi-agency approach increases the ways and manners in which the community can support older adults in their conflicts.

The EART’s success as compared to the restorative justice circle’s approach can also be attributed to its flexibility. Whereas the restorative justice circles led automatically to a specific conflict resolution mechanism, the EART created a range of possibilities, and recognized that the circle may not always be the most appropriate means of resolving the conflict. Rather, the most appropriate means depended on the conflict and the older adult. For some this may in fact mean a circle, for others, a consultation in the individual’s home, for others a referral to another agency or group. This flexible mandate recognizes that each conflict is individual, presents different challenges, and therefore requires a different resolution process.

The flexibility of this dispute resolution service may hold particular potential in rural areas. In rural areas, it may be difficult to create dedicated “elder mediation” services, and so a more flexible approach may be necessary. Police services and community agencies may already have the tools in place to offer mediation as part of their services, and would require only a model and additional resources. The EART may be such a model.

6. Advocacy Mechanisms

Advocacy mechanisms can provide an effective supplement to complaint-based enforcement mechanisms. Advocacy has been defined as “an activity which involves taking up the case of an individual or group of individuals as speaking on their behalf to ensure that their rights are respected and their needs are met.”⁵⁴² Advocacy may be individual or systemic; instructed or non-instructed; legal or social. Individual models of advocacy include, for example, Ontario’s Psychiatric Patient Advocacy Office. Systemic advocacy includes some aspects of the Ombudsman function, or potentially some aspects of the mandate of the reformed OHRC. Individual and systemic advocacy

perform different functions in promoting the protection of rights, and both can make significant contributions to effective access to the law for older adults.

The 1987 *Report of the Review of Advocacy for Vulnerable Adults* concluded that:

The concept of ‘vulnerability’ can create a need for advocacy as the vulnerable are often dependent on others which will leave them susceptible to abuse, neglect or abandonment.⁵⁴³

Vulnerable adults, in this 1987 Report, included those whose physical, emotional or cognitive impairments made them dependent on others for care, impaired their ability to communicate, led to stigma and undervaluation by others, or resulted in institutionalization. The 1987 Report concluded that advocacy services, properly designed, could promote respect for the rights and dignity of vulnerable adults; ensure that rights are understood, recognized and protected; assist vulnerable adults to achieve self-determination; enhance autonomy and independence; and protect vulnerable adults from financial, physical and psychological abuse.⁵⁴⁴

The Ontario Bar Association, in its submission to the LCO, highlighted the potential of advocacy systems to benefit older persons, so long as they appropriately balance needs for efficacy and accessibility with protection of review rights and due process.⁵⁴⁵

In ACE’s focus groups with residents of long-term care homes and their families, a consistent theme was the need for third-party advocacy:

ACE consistently heard that some form of third-party advocacy where advocates went directly to homes to meet with residents would be beneficial. Many residents stated that they were afraid to voice their concerns for fear of retribution or being labeled a troublemaker. A number of residents complained that their concerns were ignored until a family member became involved. Several family members explained that they were only able to notice and prevent problems if they were at the home on a daily or regular basis.⁵⁴⁶

As is highlighted in the Case Example below, ACE has recommended advocacy for long-term care residents, both on an individual and a systemic basis, through the establishment of a Health Care Commission, and the expansion of the jurisdiction of the Ontario Ombudsman’s Office.⁵⁴⁷

CASE EXAMPLE: ADVOCACY MECHANISMS

Older People's Commissioner for Wales

Wales recently established the world's first statutory, independent Older People's Commissioner. The establishing legislation was passed in 2006,⁵⁴⁸ and the first Commissioner was appointed in the spring of 2008.

The Advisory Group established to consider the development of such a Commissioner commented that, given the very wide range of services available to older adults in Wales, a Commissioner for Older People could play an important role by:

ensuring that, across these many service, older people's interests and rights are taken into account. Through monitoring and representation he or she will seek to influence improvement and tailoring of services so that older people suffer no disadvantage in terms of access, delivery or outcomes compared to the rest of the population. He or she will be able to take on an 'umpire' role if, as a last resort, an older person is unable to find a public agency which is willing to lead on finding a solution to his or her problem with a service.⁵⁴⁹

The vision of the Older People's Commissioner has been expressed broadly, as follows:

We want to see a Wales in which respect for the rights and dignity of older people is a practical reality in all areas of life, where age discrimination is a thing of the past and where a positive view of ageing and of older people prevails.⁵⁵⁰

The Commission has an expansive mandate. The legislation empowers the Commission to:

- a) promote awareness of the interests of older people in Wales and of the need to safeguard those interests;*
- b) promote the provision of opportunities for, and the elimination of discrimination against, older people in Wales;*
- c) encourage best practice in the treatment of older people in Wales;*
- d) keep under review the adequacy and effectiveness of law affecting the interests of older people in Wales.*

*The Commissioner may also consider, and make representations to the Assembly about, any matter relating to the interests of older people in Wales.*⁵⁵¹

It should be noted that the involvement of the Commissioner in individual cases is limited to cases of general relevance – even if there is no other body that can deal with the case. That is, this is a body whose mandate is entirely focused on systemic, rather than individual advocacy.

The Commission has powers of entry and interviewing as part of its powers of review, as well as powers to require the provision of information. The Commissioner has the power to issue reports and recommendations, and to require written responses to its recommendations. It does not, however, have the power to enforce compliance with its recommendations; in this way, it functions like an Ombudsmans' office.

*To date, the Commissioner has:*⁵⁵²

- a) undertaken an inquiry into the treatment of older people in hospitals, resulting in a major report that calls for “fundamental change” to ensure that older adults are treated with dignity and respect in these settings; hospitals have a fixed period of time to respond in writing to recommendations for change set out in that report;*
- b) held public consultations to shape recommendations to the Law Commission of England and Wales' project on reform of the law related to Adult Social Care;*
- c) established an information service where older adults, together with referral and dispute intervention services;*
- d) developed Policy Position papers on a number of issues, including elder abuse and the Attendance Allowance benefit; and*
- e) developed a partnership with government departments administering pension entitlements to encourage and assist older adults in claiming their entitlements.*

*The establishment of similar bodies has been considered in several jurisdictions, including Scotland and Australia.*⁵⁵³

In its Research Paper for the LCO on Congregate Living and the Law as it Affects Older Adults, ACE expressed reservations about the use of such age-specific advocacy

agencies:

ACE does not support the creation of a specialized Seniors' Advocate. While some jurisdictions, such as Wales and Australia, have limited their services to older adults, we do not believe this is the correct approach. We discourage a framework based on the perception that older adults lack capacity and need protection. Simply stated, older adults are people. ACE believes that all people navigating the health care system could benefit from the services of an advocate, regardless of age. We want to move away from ageist stereotyping towards a rights-based approach. Moreover, as there is no generally accepted definition of an older person, younger individuals residing in long-term care homes or in hospital would be precluded from obtaining assistance from a Seniors' Advocate.⁵⁵⁴

In the view of ACE, while advocacy mechanisms are desirable, older adults living in congregate settings would be better served by the establishment of a Health Care Commission as an independent office of the Legislature which would be responsible for the oversight of health care advocates working in hospitals, long-term care and retirement homes. Based on the information provided by individual advocates, this Health Care Commission could undertake systemic as well as individual advocacy.⁵⁵⁵ While such a Health Care Commission would be of significant benefit to older adults, its mandate would be inclusive of all ages, and be defined by issues rather than age.

7. Oversight and Monitoring Mechanisms

Implementation and enforcement systems affecting vulnerable older adults would benefit from the consistent use of mechanisms to ensure accountability, transparency, and effectiveness. Because there is a lack of monitoring and oversight for many enforcement systems disproportionately affecting older adults, it is impossible to know the extent to which older adults have effective access to those laws, or are subject to abuses and violations of their rights.

Public reporting requirements can be effective in inducing institutions to comply with the law, as well as making it easier to identify problems and abuses without the necessity for individual complaints. For example, ACE notes with respect to public reporting requirements for long-term care homes that:

The available information is not up-to-date or organized in a manner which is easy to understand. It also provides insufficient details about the actual infractions as it merely states which general criteria or standard was unmet.

Posting the actual inspection report (minus any identifying information about residents or staff) would be beneficial for several reasons. First, it would be an impetus for homes to improve as the public would have greater access to detailed information and be less inclined to choose homes with a higher number of complaints and unmet standards. Second, it would benefit some homes by showing that their infractions were administrative in nature and not reflective of poor resident care. The Ministry should look to other countries (e.g., Wales and Australia) which post significantly more comprehensive reports as examples.⁵⁵⁶

Oversight mechanisms can also include, of course, direct government oversight through licensing or audit mechanisms. The new retirement homes regulatory mechanism, as described earlier in this Chapter, includes a licensing requirement.

VI. DEVELOPING A FRAMEWORK FOR AN ANTI-AGEIST APPROACH TO THE LAW

A. Introduction

The goal of this project is to develop a practical evaluative framework that will be of assistance to legislators, policy-makers, advocates, service providers and private actors in:

- understanding how laws and policies may affect older adults,
- evaluating the effect of existing laws and policies, and
- designing and implementing laws and policies that take into account the realities of the experiences and circumstances of older adults, and promote positive outcomes for these members of society.

The Framework will be the culmination of this project, and is intended to be usable as a standalone document, with the Final Report accompanying it as a resource for those seeking further information or illustration.

This project has proceeded in tandem with a sister project to produce a framework for the law as it affects persons with disabilities. There are similarities and differences between the law as it affects older adults and the law as it affects persons with disabilities; therefore, the two final documents, while similar in many ways, will also have a number of differences both in approach and substance.

The previous five Chapters have set out what the LCO believes to be the core analytical elements for an evaluative framework for the law as it affects older adults, including:

- a basic account of key elements of the experiences of older adults that may shape the ways in which older adults encounter and experience the law, importantly including considerations regarding the diversity and individuality of older adults;
- an understanding of the concepts of ageism and paternalism, and how these may operate in or through laws and policies;
- a set of principles for the law as it affects older adults, as a means of articulating what the goals of the law as it affects older adults should be;

- a description of the multiple ways in which laws may affect older adults; and
- an analysis of the various barriers that older adults may face in accessing the law, together with some proposed strategies for addressing these barriers.

As a further step, these analytical elements must be organized into a practical evaluative framework that is concise, coherent and relatively simple to use. A Draft Framework has been developed and is attached to this Report as **Appendix A**. This Chapter briefly considers some of the key issues associated with the development of the Framework.

B. Relating the Elements of the Framework

One of the key challenges in developing the Framework is to bring together the various elements outlined in Chapters I – V into a clear, consistent whole. For this, an understanding of the relationships between the various elements of the Framework is necessary.

1. *Relationships Within Elements*

As was discussed in Chapter III, the principles for the law as it affects older adults are interdependent and must be understood in relationship to each other. Older adults are unlikely to achieve security if they are not able to express concerns and to act to protect themselves from exploitation, abuse or negative outcomes. For example, an older person who is heavily dependent on a formal or informal caregiver to meet his or her basic needs will have difficulty in acting to protect her or himself from abuse. In this way, the principles of security and of autonomy and independence are linked. As another example, negative depictions of older adults as needy, dependent, frail and non-contributing may not only undermine the principle of dignity, but may also lead to paternalistic perceptions that older adults are incapable of making decisions for themselves and thereby to policies that undermine their autonomy.

Similarly, there are complex inter-relationships between the various aspects of the circumstances of older adults. Certainly, lack of income security will have wide-ranging effects on the living environments that older adults have access to, on their ability to participate in the community and on their overall health and wellbeing. The strength, or lack thereof, of the relationships of older adults with family and friends will affect their ability to live independently in the community, as well as their level of health and wellbeing.

2. *The Interaction Between Principles and Lived Experience*

The principles and the experiences of older adults are interdependent and must inform and illuminate each other.

It is the way in which older adults experience different aspects of life (law, education, employment, volunteer work, politics and “ordinary” everyday life) that is the impetus for developing the Framework. An analysis of the experiences of older adults may reveal where and how the law (and private action) has failed in conception or in implementation; it may also show where law and private practices have been successful. These experiences evidence where “society” – its structures, its organizations, its decision-makers, its priorities – has failed, where it is making progress and where it is trying to make advances. The experiences therefore point to the need for – and potentially the content of – the principles.

As well, the experiences and circumstances of older adults provide the context for application and reveal how, through application, the principles are being interpreted. Our understanding of the principles must be grounded in the context of the experiences of older adults.

The principles can also be evaluated after a period of time to see whether they have been applied and if applied, whether they have been effective. As the circumstances of older adults change or are better understood, an analysis of those experiences may demonstrate that the principles may need to evolve.

Thus in certain respects, the relationship between the experiences and the principles is a symbiotic one: each affects the other and each is capable of uncovering the truths about the other. To what extent are the principles responsive to the experiences and can they maintain currency with changes in the experiences? To what extent do we get a better understanding of the experiences through the lens of the principles and what challenges to responding to different experiences do the principles reveal?

3. *Applying the Principles and Circumstances to the Legal Framework*

The principles and circumstances must be understood within the particular context of the current legal landscape for older adults.

This landscape includes a range of laws that specifically target either older adults or the needs disproportionately experienced by older adults, such as requirements for drivers licenses for seniors, age-based income support programs, consent and capacity laws and laws regulating congregate living environments. These laws require attention to specific issues, such as the use of age as a category, ensuring access to justice for those whose living environments place them outside of the mainstream, and the impact of cognitive disabilities on interactions with the law.

Importantly, applying the principles and circumstances to the legal landscape also requires attention to the many laws of general application that affect older adults differently, and in which the impact on older adults may not have been taken into account in design or implementation. This requires attention to how older adults and their circumstances may be made visible in the process of developing laws and policies, and in their implementation.

It also requires attention to understanding and remedying the “implementation gap”, where good laws result in bad practice, and policies that are neutral or even positive on their face result in negative outcomes for older adults.

C. Requirements for an Evaluative Framework

Any framework designed to guide the law as it affects older adults must have certain characteristics.

First, given the complex inter-relationships between the principles themselves, and between the principles and the lived experiences of older adults, it must be **holistic**. Rather than dealing separately with each of the principles, or segregating the principles from the circumstances of older adults, the framework must bring the elements together, so that the principles are meaningfully grounded in the circumstances of older adults and in the current legal landscape.

Secondly, given the breadth of the experiences of older adults and the many different ways in which they must interact with the law, it must be broad flexible enough to **apply across contexts**. It must have the capacity to address the experiences of older adults with the law in their sexuality, employment, living environments, family relationships, financial affairs and other areas. It must be capable of meaningful application both to

laws directly targeted to older adults, and to those of general application that affect older adults differently or disproportionately.

Thirdly, it must reflect the **diversity of experience and identity** among older adults. As older adults reflect the diversity of the population as a whole, this means that the framework must be able to encompass different ethnic and cultural identities, divergences in the experiences of men and women, differences in ability and impairment, and diversity in sexual orientation, citizenship status, family relationships and in age itself. As with the population at large, older adults may identify with a number of different communities at the same time. This diversity means that the law may affect older adults in different, complex and sometimes inconsistent ways.

Fourthly, it must be sufficiently **specific and practical** to provide meaningful guidelines for the development of law and government policy, and to help develop processes to be implemented by the private sector to make the law effective. It must assist users in concretely understanding the implications of the principles for the development and evaluation of laws, policies and practices.

Finally, it must be **useable**. Its structure, layout and language must be sufficiently simple and clear to encourage its easy use as a practical tool. Reference to the more comprehensive Report for further information and guidance must be made straightforward and simple.

D. Some Comments on the Framework

As was noted above, a complete version of the draft framework, including an explanation of the elements of the framework as well as the evaluative material, may be found in **Appendix A** of this Interim Report.

It is important to note, given the complexity and diversity of the law as it affects older adults, the practical constraints that law and policy-makers operate within, and the constantly evolving nature of aging and our understanding of it, the aim of the framework is not to necessarily offer definitive answers to all of the difficult questions that arise in crafting law and policy affecting older adults; rather, the aim is to assist law

and policy-makers in ensuring that:

- a principled and consistent approach is taken,
- the relevant considerations regarding the experiences and needs of older adults are taken into account, and that
- potential sources of ageism and paternalism in the law are identified so that they may be addressed.

The foundation of the framework is a series of open-ended questions, which are intended to ensure that the users have considered the key issues arising from the particular law, policy or practice, and have applied the principles and considerations in their analysis. As with the principles themselves, the questions apply to process and substance. The questions must be broad enough to apply to different contexts, but concrete enough to permit the application of the principles to particular contexts, as required, with only minor modification. There are questions that apply to all stages of law and policy making and those that are relevant for a particular stage. Although the questions are listed for each stage, it may be necessary to ask the same questions as the process continues.

For ease of use, the questions are broken down into six sections:

1. **Taking into older adults into account** in considering the potential effects of laws and policies.
2. **Learning about the law or policy** which examines how we learn whether and how older adults are affected by a proposed or existing law or policy.
3. **Identifying the older adults who may be affected** by the law or policy.
4. **Evaluating how older adults are affected by the wording of the law or policy**, including questions that consider whether the strategies selected for addressing the general purpose of the law or policy are consistent with the principles, and take into account the circumstances of older persons.
5. **Understanding how older adults are affected by the manner in which the law or policy is implemented**, which asks questions that will assist in evaluating whether in practice the law or policy is having the intended effect and is having a positive or negative effect on the lives of older adults.
6. **Monitoring and evaluating** the law or policy, once implemented. Monitoring and evaluation of laws and policies naturally connects to reviews of laws and policies, leading back to the first section and pointing to the need for regular reassessment of laws and policies.

This ordering of the evaluative questions is intended to provide a logical structure for analysis of laws and policies. However, to some degree, any division is artificial: process cannot be neatly divorced from substance, nor purpose from implementation. There is inevitably some degree of overlap between sections.

It is also important to note that, given the wide range of laws and policies that may affect older adults, not all sections or questions will be equally relevant to all laws or policies.

The LCO will be consulting with a broad range of stakeholders, including older adults themselves, on the Draft Framework, and will incorporate the feedback received into a Final Framework, accompanying the Final Report on the project.

VII. APPLYING THE FRAMEWORK: THE LAW AND ACCESS TO HOME CARE

This Chapter will illustrate the application of the Framework through consideration of a current issue in the law as it affects older adults: the law regarding access to home care supports.

The intent of this illustration is not to provide a comprehensive description of this area of the law or to propose specific reform initiatives. Rather, the aim is to reflect on this area of law in light of the anti-ageist principles and considerations that have been identified in this Interim Report, and where possible, to discover some concerns and general directions for reform that arise from the application of these principles and considerations, with the intent to provide some foundation for further research and reform initiatives.

The law with respect to home care also raises concerns for younger persons with disabilities, and could be considered through the lens of the LCO's sister project on the law as it affects persons with disabilities, but this Chapter will focus on the experiences of older persons.

This area was chosen because although it is vital to the well-being of many older adults and is a recurrent topic of public discussion and policy concern, the law in this area is under-examined. It is an area of the law that connects in a fundamental way to many of the anti-ageist principles that have been identified. It also illustrates a number of the key themes in this area of the law, including the "implementation gap".

A. Background

As is discussed in Chapter II of this Interim Report, most older adults express a strong preference to "age in place" – to remain in their homes and communities for as long as possible. Aging in place has also been identified as a policy priority for governments, partly because it provides better outcomes for older adults, and partly because it can help to support the overall sustainability of the health care system.⁵⁵⁷

Because overall health may decline with age and older adults may experience various types of ability limitations, older adults may need supports of various kinds in order to

age in place. This may include supports with domestic tasks, such as shopping, errand-running or cleaning, or with personal care tasks such as bathing. It may also include health-related supports, such as occupational therapy. Most frequently such supports are provided by family and friends, whether it be spouses, children, neighbours or others. Some older adults, however, do not have family or friends who are located nearby, or have the health or ability to provide these supports. In other cases, the supports needed by the older adult may be beyond what can be provided informally. In such cases, formal home care supports are necessary.

Home care services are, of course, closely connected to hospital care and long-term care services. Strong home care services can reduce the pressures on both hospital services and long-term care, by allowing older adults and others who use these services to return to, and/or remain in their homes with appropriate supports, rather than by accessing the higher intensity services provided through hospitals and long-term care. Conversely, resource strains in long-term care or hospital care can create challenges for the home care system as high-need individuals are unable to obtain the intensive supports they require, and are reliant on home care supports while waiting for higher levels of care.

Policies and programs regarding formal home care supports are also closely linked to those related to informal care. Most elder care is provided in the community by family and friends. As demographic patterns change, older adults may have less access to informal supports, whether because families are spread out across the country (or around the world), because families are becoming smaller and more complex, because changes in labour force patterns have created new time pressures, or because informal caregivers are themselves aging and consequently less able to provide care. At the same time, lack of formal home care supports may create intense pressure on informal care providers. Where insufficient supports are provided, informal networks may collapse under the strain, resulting in institutionalization for the older person.⁵⁵⁸ As the Advocacy Centre for the Elderly (ACE) has noted,

Elder care 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 longterm care facility.⁵⁵⁹

Home care supports are of course valuable to others besides older adults. Persons who have experienced acute illness may need home care supports to assist their recovery upon discharge from hospital. Persons with disabilities who are not yet “older” may

benefit from a range of personal, domestic and professional services provided in the home.

Therefore, governments, including the government of Ontario, have invested in various types of home care supports for older adults. Ontario's Auditor General has noted,

The Ministry has recognized the dual benefit of enhancing home care services. Having people receive care in their homes whenever possible not only means better quality of life for the patient, it is also far more cost effective than housing a patient in a hospital, long-term-care facility, or other institutional setting to receive care. One CCAC we spoke to informed us that, for instance, personal support services can enable individuals who have moderate risks/needs to continue living independently in their homes. Not having these services could lead to deterioration in a client's condition that could result in hospitalization or institutionalization.⁵⁶⁰

In Ontario, home care supports are regulated by the *Home Care and Community Services Act, 1994*, (HCCSA)⁵⁶¹ and provided through a network of Community Care Access Centres (CCACs) situated across the province.

As changing demographics and limited resources place increasing pressures on home care services, significant concerns about access to home care have begun to surface. Lack of access to adequate home care may leave older adults in unsafe, undignified conditions, and place unbearable strains upon family care providers, as well as result in avoidable admissions to hospital or long-term care. Commentators have raised concerns about patchwork services, lack of transparency regarding the services provided, confusing eligibility criteria, and inadequate complaints and enforcement mechanisms. While there has been some significant attention to home care in recent years, very little of that attention has focused on the legal aspects of the issues. This section examines Ontario law regarding access to home care supports through the lens of the LCO's draft Framework.

B. Ontario's Legal Framework for Home Care

1. Background

The stated purposes of the HCCSA include ensuring that "a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist", providing "support and relief to relatives,

friends, neighbours and others who provide care for a person at home”, promoting “equitable access to community services through the application of consistent eligibility criteria and uniform rules and procedures”, and integrating community services with other types of services, including those provided by hospitals and long-term care homes.⁵⁶²

The HCCSA regulates the provision of:⁵⁶³

1. **Community support services**, such as meals, transportation, caregiver support, home maintenance and recreational services;
2. **Homemaking services**, such as housecleaning, laundry, shopping, banking, meal preparation and childcare;
3. **Personal support services**, including assistance with or training for personal hygiene activities or routine personal activities of living; and
4. **Professional services**, including nursing, occupational therapy, physiotherapy, social work, dietetics and similar services.

The HCCSA includes a Bill of Rights for those receiving home care services. This includes rights to:⁵⁶⁴

- be dealt with in a courteous and respectful manner, and to be free of any type of abuse;
- be dealt with in a way that respects autonomy, dignity and privacy;
- be dealt with in a way that respects individuality, and is sensitive to needs related to ethnicity, language, culture, spirituality or family;
- receive information about the community services he or she is receiving; the laws, rules and policies affecting the operation of the service provider; and the procedures for initiating a complaint;
- participate in the assessment of his or her needs and in the development of a plan of service;
- give or refuse consent to the provision of any service;
- raise concerns or recommend changes in connection with the services provided or policies and decisions that affect his or her services; and
- have records kept confidential.

2. *Service Delivery Structure*

The HCCSA gives the Minister of Health and Long-Term Care (MOHLTC) considerable latitude in terms of the provision of services: services may be provided directly by the government; the government may pay others to provide community services, whether through grants and contributions, or financial assistance for operating expenditures or capital expenditures; or the government may make agreements with others for the provision of services.⁵⁶⁵ The Minister has the power to approve agencies to provide services and to approve premises for the provision of services, and may impose terms and conditions for approval.⁵⁶⁶

The Community Care Access Centres (CCACs), which are approved agencies under section 5 of the HCCSA, were created in 1996, replacing regional home care and placement services that had been criticized as fragmented and inequitable.⁵⁶⁷ Originally 42 in number, in 2006 they were consolidated into 14 organizations in order to align them with the Local Health Integration Networks (LHINs).⁵⁶⁸ Each CCAC is now accountable to one of the LHINs and every LHIN is accountable to the Ministry.⁵⁶⁹ The CCACs assess potential clients for service eligibility, approve clients for home care and determine the allocation of available funds.⁵⁷⁰ The CCACs do not themselves provide services. In theory, non-profit and for-profit organizations may compete to provide services by bidding for contracts through a Request for Proposals. In practice, the competitive process has been suspended on a number of occasions.⁵⁷¹

3. *Eligibility Criteria for Home Care Services*

Some requirements for eligibility for services are set out in Regulation 386/99. The requirements do not set out who *is* eligible for services, but only who is *not* eligible. For example, homemaking services may *not* be provided unless the individual in question:

- is insured under the *Health Insurance Act*,
- is eligible for *both* personal support services and homemaking services,
- **either** receives personal support and homemaking services from an informal caregiver who requires assistance in order to continue providing all of the required care **or** requires constant supervision as a result of a cognitive impairment or acquired brain injury and the person's caregiver requires assistance with homemaking services,
- will receive the services in a place with the necessary physical features, and

- there is no significant risk of serious physical harm to the person providing the homemaking services, or if there is such a risk, steps can be taken to reduce it so it is no longer significant.⁵⁷²

There is relatively little caselaw interpreting the eligibility criteria under the HCCSA. In one case, however, the Appeal Board held that the criteria must be interpreted in light of the purposes of the HCCSA, including the purposes of promoting “equitable access to community services through the application of consistent eligibility criteria and uniform rules and procedures” and “the effective and efficient management of human, financial and other resources involved in the delivery of community service”.⁵⁷³

The Regulation sets out maximum amounts of services. For example, the maximum amount of combined personal support and homemaking services is 120 hours in the first 30 days of service, and 90 hours in any subsequent 30 day period. Some exceptions are provided, such as for those who are in the last stages of life, for persons who are waitlisted for long-term care or other extraordinary situations.⁵⁷⁴

In practice, eligibility is determined by CCAC representatives. Since there is no legislatively required standard for assessing eligibility beyond the provisions of the Regulation setting out who is *not* eligible for services, the CCACs have developed a Contact Assessment Tool which constitutes a standard means of assessing client eligibility and is to be applied across all 14 CCACs.⁵⁷⁵

4. Service Provision

When an individual applies for services, the agency must conduct an assessment of the individual’s requirements, determine eligibility and create a written plan of care for each individual receiving services. The plan of service must be regularly reviewed to adapt to changing circumstances, and the individual must have an opportunity to participate fully in the development, evaluation and review of the plan of service. The plan of service must take into account the person’s preferences, including those based on ethnic, spiritual, linguistic, familial and cultural factors.⁵⁷⁶

Services outlined in the plan of service must be provided within a reasonable time frame, and if services are not immediately available, the individual must be waitlisted.⁵⁷⁷

Service providers must post in their premises a copy of the Bill of Rights and of any service accountability agreement entered into.⁵⁷⁸ As well, each agency must provide to its clients or their substitute decision-maker a written notice outlining:

- their rights under the Bill of Rights,
- the agency's complaint procedures,
- information regarding privacy and confidentiality issues, and
- (if applicable) information about service accountability agreements entered into by the agency.⁵⁷⁹

Agencies must also develop and implement plans for preventing, recognizing and addressing abuse of persons who receive services, as well as a quality management system.⁵⁸⁰ The HCCSA sets out requirements for the protection of the privacy and confidentiality of client information.⁵⁸¹

5. Oversight of Agencies

The Minister may appoint program supervisors, who may conduct inspections of community service providers (with a warrant where necessary) and who have power to copy and remove records.⁵⁸²

The Minister may revoke or suspend approvals of agencies, premises or multi-service agency designations where the Minister believes on reasonable grounds that there has been a contravention of the terms and conditions imposed by the Minister, of the Act or regulations, or breach of an agreement.⁵⁸³ The Minister may also “takeover” an agency, removing and replacing some or all of the directors or directly taking control of, operating or managing the agency or some part of it.⁵⁸⁴

6. Complaint Mechanisms and Enforcement

The “Bill of Rights” provisions of the Act are a deemed contract between the service provider and the person receiving the service, so that the service recipient could, in theory, bring an action for breach of contract in order to enforce those rights, although the practicality of this is highly questionable.⁵⁸⁵

Agencies approved to provide services (i.e., CCACs) are required to establish a process for receiving and reviewing complaints regarding:⁵⁸⁶

1. Decisions about eligibility for services,
2. Decisions to exclude a particular service from an individual's plan of service,
3. Decisions about the amount of service to be included in an individual's plan of service,
4. Decisions to terminate the provision of services to an individual,
5. The quality of service provided to an individual, and
6. Violations of the provisions of the Bill of Rights

The agency must review and respond to all complaints regarding service quality or the Bill of Rights within 60 days. For all other types of complaints, the agency must give a written notice of its decision on the complaint within 60 days. These decisions may be appealed to the Health Services Appeal and Review Board. The Appeal Board is then required to begin a hearing into the complaint within 30 days. The Appeal Board may affirm the decision, rescind it and return the matter for a fresh decision, or rescind it and substitute its own decision for that of the agency. The decisions of the Appeal Board are not appealable.⁵⁸⁷

Recently, clients of home care services have also been provided with the option of contacting the Long-Term Care Action Line (LTCAL) to receive information and assistance with issues regarding the services they receive.

C. Evaluating the Legal Framework for Homecare in Ontario

The following evaluation of the HCCSA is based on the questions set out in the Draft Framework (Appendix A) of this Interim Report. As not all questions from the framework are applicable to this particular area of law, not all are addressed. The results are therefore presented in a narrative format, rather than question by question.

The evaluation is based on a review of the legislation, caselaw, government documents and relevant social science research. It has not been the subject of public consultation or original research. As noted at the opening of this Chapter, it is not intended as a fulsome review of this area of the law. Rather, it is a preliminary evaluation that points to areas of concern and issues for further examination.

As well, because this is not an area that has been subject to intensive scrutiny, there are a number of areas where information is lacking, and further research is required to make a thorough assessment of the impact of the law on older adults. Should a thorough evaluation of the HCCSA be undertaken, further research on the implementation and effects of the law would be beneficial, and consultation with service providers, older adults and the groups that represent or advocate for older adults would be necessary to provide a more thorough evaluation of how this area of the law may affect older adults.

1. *Who is Affected by the Law?*

The law regarding home care supports is one of general application. It does not explicitly target older adults or contain age-based criteria. However, it does disproportionately affect older adults.

According to the Ontario Association of Community Care Access Centres (OACCAC), in the most recent fiscal year CCACs provided coordinated access to health care and support services to over 600,000 Ontarians, including:⁵⁸⁸

- 200,000 patients discharged from hospital,
- 150,000 older adults living in the community,
- 50,000 children who needed supports to live at home and attend school, and
- 23,000 individuals requiring end-of-life care at home.

The website of the Ontario Home Care Association indicates that since 2006, individuals aged 65 or older have made up well over half of those receiving CCAC services. Approximately two-thirds of the services provided were personal support and homemaking services, with nursing services and occupational therapy in distant second and third places.⁵⁸⁹

It therefore appears that the majority of those affected by this law are older adults, although there are also substantial numbers of persons with disabilities and individuals with acute illnesses affected. Given the type of services regulated by this law, those older adults affected will, in most cases, be those who have either acute or chronic health conditions and require supports in order to maintain their independence, dignity, security, and ability to participate and be included. That is, for older adults the law often applies at the intersection of aging and disability.

Although no statistics were publicly available, given the demographics of aging, it is likely that the preponderance of older adults affected by these laws are older women. It is also likely that those older adults who do not have strong informal support networks – those who are socially isolated – will have greater need for, and be more dependent on the services provided through the HCCSA. Since those who are able to privately purchase home care services or home care insurance will be less affected by any shortfalls in the design or implementation of the law, the law may also disproportionately affect those older adults who are living in low-income.

There were no statistics publicly available regarding the linguistic, ethnic, religious or other makeup of the client base for home care services.

Indirectly, informal caregivers are also affected by this law, as the adequacy of available formal home care supports for their loved ones will significantly affect their psychological, emotional and financial well-being.

2. *How Are Older Adults Affected? The Substance of the Law*

General Purpose and Context

The HCCSA, and policy and practice in implementing it, are profoundly connected to the realization of the principles for older adults. For older adults who are ill, frail or living with a disability, the ability to access adequate supports, whether to maintain their health or to carry out essential life activities such as grooming and self care or basic domestic tasks, is central to their ability to maintain their physical, emotional and social security, as well as their independence and autonomy. Society's value and respect for older adults is demonstrated by the degree to which it ensures that older adults who are frail, ill or disabled are able to maintain minimum levels of security, independence and autonomy. Certainly the self-respect of older adults may be affected if they do not have the means to maintain basic personal and domestic cleanliness, or if they are not treated appropriately in the provision of services such as bathing.⁵⁹⁰

The provision of adequate services in the community also affects the ability of older adults to meaningfully continue in their valued roles, whether as spouses, parents, grandparents, friends or neighbours; as volunteers or employees; or as active citizens involved in their communities.

The way in which services are provided is as important to the realization of the principles as the fact of their provision. Disrespectful or abusive services can undermine the security, dignity and independence of older adults. Services which are inflexible, impersonal or not respectful of the diversity of older adults may undermine the principle of diversity and individuality.

As was briefly noted above, a lack of adequate supports may mean that informal caregivers for older persons may face significant strains in providing sufficient care and attention to their aging loved ones, maintaining participation in the labour force and meeting all of their other obligations. That is, the security and participation of informal caregivers may also be affected by a lack of adequate appropriate supports for older adults in need.

Eligibility Criteria

As was noted above, the legal eligibility criteria for home care services are not age-based. They take into account functional as well as practical criteria. As they are negative criteria (in the sense that they set out who is *not* eligible rather than who *is* eligible) they leave considerable room for discretion on the part of the CCACs. The criteria used by the CCACs are not readily publicly available, and given the lack of transparency, older adults may have difficulty in planning for their future needs and in asserting their rights. Compounding this issue, in 2010 the Auditor General reported that due to varying resource availability across the CCACs, different criteria applied in different areas of the province:

Ministry policy requires CCACs to administer programs in a consistent manner to ensure fair and equitable access for all consumers no matter where they live in the province. Due to funding constraints, one of the three CCACs we visited had prioritized its services so that only those individuals assessed as high-risk or above would be eligible for personal support services, such as bathing, changing clothes, and assistance with toileting. Clients assessed as moderate risk were deemed not eligible for funded services as a necessary cost-containment measure to achieve a balanced budget. However, we noted at the other two CCACs we visited that clients assessed as moderate risk were provided with personal support services or placed on a waitlist to receive them.⁵⁹¹

This raises concerns that older adults who require home care services may not consistently receive them, this then jeopardizing their security, dignity, participation and

independence. As well, the difficulties that older adults face in obtaining meaningful information about their rights and options within the home care system undermine their ability to make meaningful choices, and therefore their autonomy.

Approach Selected for Achieving the Purposes of the Legislation

The purposes of the HCCSA, as well as the provisions of the “Bill of Rights”, are well-aligned with the principles for older adults. The purposes of the Act, for example, include the recognition of “the importance of a person’s needs and preferences, including preferences based on ethnic, spiritual, linguistic, familial and cultural factors”. The Bill of Rights explicitly recognizes the rights of older adults to be treated in a manner that “respects the person’s dignity and privacy and that promotes the person’s autonomy”, and to be dealt with “in a courteous and respectful manner and to be free from mental, physical and financial abuse by the service provider”, as well as rights to have the confidentiality of their information respected, and to raise concerns or recommend changes in connection with community services provided. There are no stereotypes or negative attitudes towards older adults embedded in the legislation. The intent of the law is to promote positive outcomes for older adults (and others) and to remove barriers by providing supports.

The legislation includes a number of mechanisms to provide older adults (and all clients) with information to make meaningful choices (and thereby to enhance autonomy), including posting requirements and obligations to provide information directly to clients or potential clients. It includes measures to prevent abuse of clients by service providers, and thus safeguard security and dignity.

The key concern with the approach selected is that it provides wide discretion to the agencies (CCACs) and to the service providers themselves in terms of eligibility criteria, levels of service provided, quality management programs, complaints processes, and provision of information, without also providing sufficiently strong mechanisms for transparency and accountability. A shortage of resources together with uneven distribution of those resources makes the problem more acute. The Auditor General has noted that the CCACs vary widely in terms of eligibility criteria, waitlist policies, level of services provided and monitoring of the quality of care provided. For example, the Auditor General found that

The absence of standard service guidelines has resulted in each CCAC developing its own guidelines for frequency and duration of services. As a result, guidelines

varied in the time allocated for each task and the frequency of service visits recommended. This means that the level of service offered may vary from one CCAC to another.⁵⁹²

Therefore, despite the laudable principles and purposes underpinning the legislation, it is difficult to determine whether or not those principles are actually being achieved, or to take remedial action if they are not.

Disadvantaged Older Adults

As noted above, since the law targets older adults in need of supports in order to live in security, dignity and independence, all of the older adults affected by this law are, to some degree, disadvantaged, although the degree of the disadvantage will vary depending on the level of impairment or disablement experienced, the level of informal supports available to that person, and the ability of the individual to understand the system and advocate within it. This means that extra measures are required in order to ensure that these older adults are able to fully access the benefits of the legislation and to achieve the principles.

For example, it is particularly important that the law ensure that these older adults have adequate access to clear and accessible information about their rights and responsibilities. As well, the processes for voicing concerns and enforcing rights must take into account the circumstances of older adults, including the impact of health limitations or disability, low-income, lower levels of education and literacy, and the ways in which traditional gender roles may affect resources and options for older persons. Older adults who live with these barriers will have difficulty in accessing complex, time-consuming or adversarial systems without supports, and thus will be less able to assert and protect their dignity, security, participation, autonomy and individuality.

3. *How Are Older Adults Affected? The Implementation of the Law*

As is noted above, the HCCSA sets out strong, positive principles and identifies purposes that are in harmony with the LCO's anti-ageist principles and potentially very beneficial for older adults. Concerns regarding home care often derive from the implementation of the law – particularly since the law provides considerable discretion to the CCACs and the service providing agencies as to how they implement the law.

Resources

A significant aspect of the challenges faced in providing adequate and appropriate home care supports lies in the resource constraints faced by those responsible for allocating and providing services.

With changing demographics, shifting health care needs and expectations, and the fiscal effects of the recent economic downturn, the full spectrum of health care services is under pressure. The home care system faces multiple pressing priorities, particularly because acute care and long-term care are also under pressure, and has limited resources for meeting these priorities. For example, in 2008 the Ontario government announced that reduction of emergency room wait times was a top health care priority.

One of the key strategies for achieving that priority was to reduce the number of patients waiting in hospital for alternate levels of care (ALC) such as long-term care. The CCACs play a key role in that strategy, including through enhanced targeted support for those in the community at highest risk of hospital admission, and the “Home First” strategy, which focuses on bringing hospital patients who require long-term care (or other ALC) to wait at home for that care, rather than in a hospital setting.⁵⁹³

The OACCAC has identified concerns with the level and structure of funding for home care services:

In spite of this [increasing pressure on CCAC services], the 2010 Annual Report of the Auditor General of Ontario confirmed that CCACs have received a relatively small proportion (approximately \$45 million) of the government’s multi-year \$1.1 billion Aging at Home Strategy. Much of the funding provided to CCACs has been one-time funding to introduce new initiatives or address short-term pressures. In order to sustain the results CCACs have been able to achieve, stable, predictable long-term funding is needed that recognizes the role CCACs have played in reducing wait time pressures on other parts of the health care system, principally hospitals and long-term care homes.⁵⁹⁴

In addition to funding levels, there are challenges associated with the structure of funding. The OACCAC has pointed out that predictable funding, announced in a timely manner, is essential to sustaining effective services:

Annual budgets in CCACs range from 38\$ million to 235\$ million and to ask organizations of this size and complexity to balance their considerable budgets in a

single fiscal year, when funding announcements can take place as late as six months into the year, is like landing a 747 on a postage stamp. The impact can range from unnecessary reductions in service when funding reductions are anticipated to the inability to use funding increases or in-year funding targeted to serve more clients. Clients bear the impact.⁵⁹⁵

Research by the Institute for Clinical Evaluative Sciences indicates that there is some significant unmet need for home care supports. According to a 2010 report, the average wait time for home care services following application was seven days for short-stay clients and nine days for long-stay clients. These wait times varied considerably across the CCACs, however with wait times for long-stay clients reaching a high of almost 17 days in one region, compared to a low of 7.4 days in another. Unmet care needs were higher for those aged 75 and older (approximately six per cent reported unmet needs) as compared to those aged 65 to 75, for women as opposed to men (five per cent compared to three per cent), those living alone as opposed to those living with others (six per cent compared to four per cent) and among those in the lowest income bracket (eight per cent) as opposed to those in the highest income bracket (none).⁵⁹⁶

Those needing services may be waitlisted, and in some regions may not be considered eligible even to be waitlisted. Policies vary across CCAC locations with regard to whom they will place on a waiting list. While certain CCACs place all eligible clients on a waiting list, certain CCACs are unable to accommodate all clients and must be selective in which applicants they place on the list. As a result, certain CCACs are only able to place those clients assessed as high risk or higher on a waiting list. Typically, low or moderate risk clients will instead be referred to other community organizations.⁵⁹⁷

A recent series in the Toronto Star highlighted the stories of a number of older adults and their informal care providers struggling with inadequate services. For example, a number of older adults with dementia reported being turned away when requesting home care; a woman who cares for her husband, who suffers from Parkinson's Disease, was refused home care after she broke her back; financially strained children were forced to beg for more hours due to a CCAC policy whereby a client's hours are eventually cut if her situation does not deteriorate. CCAC employees report feeling strained as they cannot provide all of the care that is needed with the resources they are given. They are forced to make decisions they do not want to make, as no policy choices can remedy the lack of funding under which their agency operates.⁵⁹⁸

That is, although the substance of the law respects and promotes anti-ageist principles, the lack of resources for adequate implementation of the law creates significant challenges for their realization.

Communication and Education

There is little information publicly available regarding training and education for service delivery staff. While the CCACs no doubt consider the qualifications of staff in contracting with various service providers and as part of their quality management programs, the HCCSA and regulations do not set out any minimum requirements for staff qualifications or for ongoing training and education.

In terms of information provided to the public about home care services, the main venues for information appear to be the websites of the LHINs and CCACs, and telephone information services. Not all CCACs list their telephone numbers on their home page: in some cases, recourse must be made to the Ministry of Health website. Calls to telephone services were often re-directed to the websites. That is, information is mainly available through the internet and in a print format.

A review of the home care information provided through the websites of the 14 LHINs and CCACs revealed significant variance in the extent and format of information. Some CCACs provide video presentations on their services and options, although most rely exclusively on print information. The majority of information is presented in pdf files, which may pose barriers to persons with visual disabilities who are reliant on screen readers. Some CCACs provide documents in large print formats, though many do not. Some, though not all, regions provide information in French as well as English; information in other languages is not accessible. Some CCACs provide detailed information about service providers in their region, while others do not.

Access and Enforcement Mechanisms

Several issues have been raised concerning the adequacy of the complaints mechanisms under the HCCSA, including the complexity of the system, lack of access to a neutral third party, lack of access to information about complaints processes, and the lack of transparency and accountability in the complaints processes.

Complexity: As was described earlier, there are different complaint options for different types of issues.

- “Bill of Rights” issues may be the subject of a complaint to the agency, or may be treated as a breach of contract between the individual and the service provider.
- Issues regarding service levels or eligibility must be brought to the attention of the agency. The agency must respond in writing, and decisions may be appealed to HSARB.
- Service quality issues must be brought to the attention of the agency. The agency need not provide responses in writing, and there are no rights of appeal to HSARB. are dealt with differently than other issues: responses need not be in writing, and there is no access to an impartial outside party (HSARB).
- For any issue, concerns may now be brought to the attention of the LTCAL.

The complaints process is therefore complex, with different alternatives for different issues, and may be confusing for an older person trying to determine his or her options and the possible outcomes. And because the HCCSA has no specific requirements regarding such complaints processes, they vary between agencies, making it harder to clients to navigate the system.

Practicability of options provided: As was noted earlier, when a client finds that a provision under the Bill of Rights has been violated, he or she may also have recourse to civil courts by initiating an action for breach of contract. Even without an explicit contract, there is an implied agreement between service providing agencies and the CCAC and clients receiving home care.⁵⁹⁹ While in theory, recourse to civil courts grants older adults an avenue outside of the administrative system, in reality, such recourse is not accessible to most of the older adults receiving home care from CCACs. Both the limited resources of Legal Aid Ontario and the lack of lawyers practicing elder law in Ontario pose a problem for older adults who might otherwise choose to pursue their case in court. In addition, the limited financial means of many of the older adults who rely on provincially-funded home care may prevent those considering the option of pursuing lengthy and expensive court proceedings from doing so. Older adults who can afford civil litigation may decide to invest their resources in purchasing home care services out of pocket rather than to invest resources, time and energy into the uncertain process of civil litigation.⁶⁰⁰

Lack of recourse to a neutral third party: Complaints about quality of care or about decisions regarding eligibility or service levels can be made to the service providing

agency. As such, the Act only provides a mechanism whereby older adults can complain about the services they are receiving to the providing agencies themselves. Decisions of the agencies regarding complaints about eligibility or service levels can be appealed to HSARB; however, this is not true for responses to complaints regarding quality of care, so that for these complaints there is at no stage any recourse to a true third-party. In other words, for service level and eligibility issues, the first level of recourse is to complain to those responsible for providing that care, and for those who have received poor quality care, this is the only option

Some home care recipients report not using the complaint mechanisms available to them despite being dissatisfied by the care they receive.⁶⁰¹ Older adults often come to an understanding that the problems they are experiencing happen as a result of tensions within the home care sector. Some feel as though the power to improve the care they are receiving is out of their hands, and out of the hands of the individuals to whom they can complain.⁶⁰² This intensifies their feeling of hopelessness and makes them less likely to complain even when they feel as though they are not receiving the care they need. In addition, some report that they do not want to complain because they fear that voicing their complaints about not receiving enough care could lead to their institutionalization. Others report not wanting to be seen as “troublemakers” for fear that it will negatively affect the care they receive.⁶⁰³

Given these dynamics, the fact that in most cases, there is no independent body to hear the complaints likely worsens the task of complaining for older adults. Certain CCACs have an Ombudsperson who acts as a mediator between a client and his or her case worker,⁶⁰⁴ but others have only a client’s CCAC case manager as an initial point of contact for a client who wishes to make a complaint.⁶⁰⁵ Having the option to contact an Ombudsperson instead of a client’s CCAC case manager increases the transparency of the complaints process and may make it a bit more comfortable for a client to file a complaint without being worried about confronting his or her caseworker directly.

In addition to raising questions of transparency, the lack of a mandatory neutral third party in the CCAC complaints process poses an accessibility problem: it may discourage adults from voicing their complaints. This can make it difficult for CCACs to receive an accurate picture of service recipients’ experience of home care. A clearly articulated complaints mechanism within the HCCSA that includes a neutral third party would help to improve the accountability, accessibility and transparency of home care rendered by CCACs.

Access to Information: Currently, the HCCSA requires that CCACs inform a person receiving community services in writing of the proceedings for initiating complaints about their service providers.⁶⁰⁶ The provincial CCAC website contains a very brief explanation how to initiate a complaint, suggesting that clients contact their local CCACs directly for further details.⁶⁰⁷ Information about the different routes for service quality complaints, or about the options for breaches of the “Bill of Rights” are not outlined in the public materials of the CCACs

While certain clients are comfortable reading written materials and initiating a complaint, accessibility issues arise for older persons receiving home care who have visual or cognitive difficulties. Understanding the complaints process is necessary to understanding the different options that are available to care recipients; for instance the difference between calling the LTCAL versus contacting a care provider directly. Without having access to consultation with a party who has information about the complaints procedure and can ensure that the client understands all available options, the written complaints procedure may not facilitate the process for all older adults. While some older adults may be able to rely on family members or friends to seek additional information when necessary and to paint a complete picture of the process, not all older adults will have access to such secondary sources of information. As such, the ‘written notice’ requirement under the HCCSA may not, in actuality, suffice to inform older persons of the complaints procedure. To alleviate this problem, it may be helpful to articulate a more comprehensive set of requirements for providing assistance with the complaints process within the HCCSA.

Transparency and accountability: Because the complaints mechanism is not centralized, it does not aid the CCACs in gathering information at the provincial level about the care provided by various service providing agencies. Since complaints regarding quality of services do not require written responses, it may also be difficult to track exactly how many complaints are made, what their subject matters are, or how they are dealt with. It also does not appear to facilitate the Ministry’s task of ensuring that high quality services are rendered uniformly across the province.

A study of the complaints received by three CCACs undertaken by the Auditor General of Ontario reported only a small number of formal complaints made by home care recipients across Ontario to their local CCACs. In the first three quarters of the 2009/10 fiscal period, only approximately 3 to 8 out of 1,000 home care recipients in these three CCACs had filed complaints. However, many concerns brought to the CCACs are not classified as formal complaints, but are simply resolved by case managers and included

in the client files. These are considerably more frequent. In a review of the files of three CCACs, the Auditor General found approximately 1300 “events” over a period over nine months at two of the CCACs, and more than 600 events in a period of six months at the third.⁶⁰⁸

Overall then, there are significant gaps and shortfalls in the complaints and enforcement mechanisms for access to home care, so that in practice, older adults, particularly those who are disadvantaged in some way, may not be able to realize the anti-ageist principles that could and should be promoted through the law.

4. *Monitoring and Evaluation of the Law*

This discussion has highlighted the “implementation gap” for the law regarding access to home care. Legislation which is positive in purpose and generally in harmony with anti-ageist principles may, in practice, be falling significantly short of its goals. In such circumstances, ongoing monitoring and evaluation of the implementation of the law and its outcomes may be of significant benefit.

The Ministry has the ultimate responsibility for monitoring the effectiveness of the laws and of the homecare services provided. To be selected by the Ministry, an agency must first be approved. To be approved, the agency must abide by the Bill of Rights and operate with “competence, honesty, integrity and concern for the health, safety and well-being of the persons receiving the service”.⁶⁰⁹ The HCCSA requires the agencies to provide annual reports to the Ministry on their operation, and enables the Ministry to appoint program supervisors where necessary, as well as revoke or suspend approvals.

In late 2008, the Ministry announced a number of initiatives to strengthen the quality of home care services in Ontario, including:

- Requiring CCACs to use “fairness advisors” for all requests for proposals;
- Requiring CCACs to publicly disclose their rationale for the selection of service providers at the conclusion of the request for proposals process
- Introducing public reporting of performance measures; and
- Requiring all CCACs and service providers to develop annual continuous quality improvement plans.⁶¹⁰

CCACs receive some information about clients’ experiences with their service providers from clients who choose to contact them and make complaints about their care, but

there is no explicit requirement that CCACs ensure the adherence of service providing agencies to the Bill of Rights. An explicit oversight requirement would enable CCACs to obtain comprehensive information about service providers' compliance with the Bill of Rights across the province.

While the HCCSA requires every service-providing agency to “ensure that a quality management system is developed and implemented for monitoring, evaluating and improving the quality of the community services provided or arranged by the agency,”⁶¹¹ it does not specify what that system should involve. While the HCCSA allows the Minister to make regulations “governing the quality management system required to be developed and implemented (...),”⁶¹² there is currently no oversight requirement under the HCCSA or its regulations relating to quality management.

Similarly, while the HCCSA mandates that service providers provide timely services, and maintain waitlists, it sets no specific standards in these areas. There are no legislative requirements as to timeliness beyond that it be “reasonable under the circumstances”,⁶¹³ no guidance as to how CCACs should prioritize service needs, and no requirements regarding qualifications and training for homecare staff. Not only does this lead to significant variances in policies and outcomes across the CCACs, it reduces transparency and accountability within the system. Clients do not have a clear sense of the services to which they are entitled.

The CCACs have undertaken a number of initiatives to ensure that safe and quality care is provided “in the right place at the right time”. These include the standard use of Board Quality Committees, annual quality improvement plans, common client satisfaction surveys, common satisfaction surveys with contracted service providers, and satisfaction surveys with employees.⁶¹⁴ CCACs may visit the premises of service providers and review performance data such as rates of referral acceptance and number of missed visits. At least one CCAC has made it a priority to conduct *ad hoc* visits to each of its 14 service providers, in order to observe the quality of services rendered.⁶¹⁵

The Auditor General found that all three of the CCACs it visited had conducted *ad hoc* site visits to some of their service providers, though only one had commenced routine site visits to audit all of their service providers. These CCACs had identified some common issues related to monitoring and oversight. For example, three quarters of the service providers assessed had limited ability to assess whether their staff had delivered the required services in the client's home in a timely manner, and a third of service

providers did not evaluate personal support workers by actually observing them providing services to clients.⁶¹⁶

D. Conclusion

The application of the Framework to the *Home Care and Community Services Act* points to the common problem of the “implementation gap”. The HCCSA deals with an issue of significant importance to older adults and other Ontarians who are vulnerable or at difficult points in their lives. It provides vital services, and is based on appropriate anti-ageist principles.

However, the legislation is largely discretionary rather than directive. Likely this was intended to provide for flexibility in meeting evolving and complex needs in a rapidly shifting environment. However, when combined with a lack of mechanisms for ensuring transparency and accountability, and an ongoing shortage of resources in not only the home-care sector but also in the long-term care and hospital sectors, this leads to access to justice issues for older adults, and for others who are affected by this legislation. This is particularly troubling because those affected by the HCCSA will be living with long or short-term impairments, will be highly dependent on the services provided, and therefore may have difficulty in understanding and asserting their rights. In practice, the legislation may fall significantly short of respecting and promoting the anti-ageist principles that underlie its design.

VIII. NEXT STEPS

The LCO invites your comments on one or more of the issues raised by either the Draft Framework or the Interim Report, or on other issues that you believe the LCO should address in developing a framework for the law as it affects older persons. Your comments will assist the LCO in the preparation of its final report on this project and the completion of its evaluative framework for an anti-ageist approach to the law.

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

Law Commission of Ontario
Project on the Law as it Affects Older Adults
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

You may also use the LCO website comments form at <http://www.lco-cdo.org/en/content/get-touch>

Submissions must be received by **Friday, November 18th, 2011**.

The LCO will undertake ongoing consultations and research after the release of this Interim Report until this project is complete and a final report is released. A final report is anticipated in 2012.

LCO staff would also be pleased to meet to discuss the issues raised in this Interim Report, by telephone or in person. If you wish to set up a consultation meeting with the LCO at your organization, you may contact the Project Head to discuss possible arrangements. Meetings can take place in person, by conference call or via other interactive technologies.

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

ENDNOTES

¹ Federal/Provincial/Territorial Committee of Officials for the Federal/Provincial/Territorial Ministers Responsible for Seniors, *Seniors' Policy Handbook: A Guide for Developing and Evaluating Policies and Programs for Seniors* (June 2009), at 3, online: <<http://www.seniors.alberta.ca/seniors/docs/SeniorsPolicyHandbook.pdf>>. The work of the Committee came to the attention of the LCO after this project was commenced in February 2008.

² For information on this project, please visit the LCO website, online: <<http://www.lco-cdo.org/en/content/persons-disabilities>>

³ This Paper may be found online: <<http://www.lco-cdo.org/en/content/older-adults-pre-study-consultation-paper>>

⁴ This Paper may be found online: <<http://www.lco-cdo.org/en/older-adults-consultation-paper>>

⁵ Quebec supported the Vision and Principles, but intended to assume full responsibility for the entire range of activities relating to health and social services, and so did not participate further in the development of the NFA, online: <http://www.phac-aspc.gc.ca/seniors-aines/nfa-cnv/nfaguide1_e.htm>

⁶ United Nations, "Principles for Older Persons", G.A. Resolution 46/91.

⁷ United Nations, "Madrid International Plan of Action on Ageing", *Report of the Second World Assembly on Ageing* (April 2002), online: <<http://www.un-ngls.org/orf/pdf/MIPAA.pdf>>

⁸ Special Senate Committee on Aging, *Final Report, Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009), online: <<http://www.parl.gc.ca/Content/SEN/Committee/402/agei/rep/AgingFinalReport-e.pdf>>

⁹ Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001), at 20, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>

¹⁰ Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age* (Toronto: 2007), online: <www.ohrc.on.ca/en/resources/Policies/agepolicyen>

¹¹ The materials related to the Law Commission of Canada's project on Law and Relations Between Generations can be found online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12_06/www.lcc.gc.ca/research_project/age_matter-en.asp>. The project was left uncompleted with the demise of the LCC. The reports of the Nova Scotia Law Reform Commission can be found online: <<http://www.lawreform.ns.ca/introduction.htm>>. The 2008 report of the Western Conference of Law Reform Agencies on enduring powers of attorney may be found on the website of the Alberta Law Reform Institute, online: <<http://www.law.ualberta.ca/alri/docs/WCLRA%20epa%20fr.pdf>>, as well as on the websites of the other western law reform agencies.

¹² World Health Organization, "Active Ageing: A Policy Framework", *A Contribution of the World Health Organization to the Second United Nations World Assembly on Ageing* (April 2002) at 12-13, online: <<http://www.who.int/ageing/publications/active/en/index.html>>

¹³ Federal/Provincial/Territorial Ministers Responsible for Seniors, *National Framework on Aging* (Minister of Public Works and Government Services Canada, 1998), online: <http://www.phac-aspc.gc.ca/seniors-aines/nfa-cnv/nfaguide1_e.htm>

¹⁴ For a brief history of elder law in the United States, see Allen Bogutz, "Elder Law: A Personal Perspective" in Israel Doron, ed., *Theories of Law and Aging: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) at 1.

¹⁵ The "Third Age" is generally considered to refer to the span between retirement and the advent of age-imposed limitations, and so includes those who are retired from work, in reasonably good health and socially engaged. The "Fourth Age" includes those individuals of advanced age who are experiencing an increased likelihood of declining health, impairment and end of life. See Charmaine Spencer, "Ageism and the Law: Emerging Concepts and Practices in Housing and Health" (2009) at 3, online: Law Commission of Ontario <<http://www.ontla.on.ca/library/repository/mon/24009/304762.pdf>>

¹⁶ Martin Turcotte & Grant Schellenberg, *A Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2007) at 8, online: <<http://www.statcan.gc.ca/pub/89-519-x/89-519-x2006001-eng.pdf>>.

¹⁷ This approach was adopted in the Special Senate Committee on Aging, *First Interim Report: Embracing the Challenge of Aging* (Ottawa: Senate of Canada, March 2007) at 11. However, the Special Senate Committee's *Final Report* rejected this approach, noting the diversity of the aging experience, and the risk of defining the experience of aging solely in terms of the experiences of the "frail elderly" or of reducing the "frail elderly" to their "frailty".

¹⁸ See, for example, Bill Bytheway, "Ageism and Age Categorization" (2005) 61 *Journal of Social Issues* 361 at 369 and following.

¹⁹ Law Commission of Canada, *Does Age Matter? Law and Relations Between Generations*, (Ottawa: 2004) online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/pdf/does_age_matter.pdf>. This project was not completed due to the de-funding of the Law Commission of Canada in 2006.

²⁰ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 1.

²¹ See especially the discussion of the reasons of the Supreme Court in the mandatory retirement cases of *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.

²² Bytheway, note 18.

²³ Law Commission of Canada, "Does Age Matter? Law and Relationships Between Generations" (Ottawa: 2004) at 22, online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/pdf/does_age_matter.pdf>

²⁴ The term "inclusive design" was initially developed in the context of the built environment and persons with disabilities, but has since expanded to include the concept of "design for all", and to apply to policy and program development, as well as the built environment. The Supreme Court of Canada adopted the principle of inclusive design in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, stating that:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. [para. 38]

²⁵ A helpful survey of the issues associated with the use of age-related categories is provided in Bytheway, note 16.

²⁶ Cristie Ford, "Bright Lines: Status, Recognition and the Elusive Nature of Ageing" (1996) 2 *Appeal: Review of Current Law and Law Reform* 4, at para. 3.

²⁷ Turcotte & Schellenberg, note 16 at 8.

²⁸ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 2.2.

²⁹ This distinction is highlighted in Bytheway, note 18 at 362.

³⁰ Special Senate Committee on Ageing, *Seizing the Opportunity*, note 8 at 3.

³¹ Turcotte & Schellenberg, note 16 at 11.

³² Turcotte & Schellenberg, note 16 at 13.

³³ Turcotte & Schellenberg, note 16 at 107 – 110.

³⁴ Turcotte & Schellenberg, note 16 at 212-218.

³⁵ Turcotte & Schellenberg, note 16 at 115.

³⁶ Turcotte & Schellenberg, note 16 at 116.

³⁷ Turcotte & Schellenberg, note 16 at 116.

³⁸ In 2005, only 32.5 per cent of workers were covered by an employer or union registered pension plan: Statistics Canada, *Proportion of labour force and paid workers covered by a registered pension plan, Pension Plans in Canada Survey* (Ottawa: Statistics Canada, June 2007).

³⁹ The poll contacted 2000 Canadians age 18 years and older, online: <[http:// www.decima.com/en](http://www.decima.com/en)>

⁴⁰ Turcotte & Schellenberg, note 16 at 117-118.

-
- ⁴¹ Human Resources and Skills Development Canada, *Supporting and Engaging Older Workers in the New Economy* (Ottawa: Expert Panel on Older Workers, 2008) at 6, online: <http://www.rhdcc-hrsrc.gc.ca/eng/publications_resources/imp/eow/2008/page19.shtml>
- ⁴² Human Resources and Skills Development Canada, *Supporting and Engaging*, note 41 at 10.
- ⁴³ Human Resources and Skills Development Canada, *Supporting and Engaging*, note 41 at 10.
- ⁴⁴ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 41-42.
- ⁴⁵ Turcotte & Schellenberg, note 16 at 64.
- ⁴⁶ The rate of low income before taxes was about 18 per cent for those under 18, and 15.5 per cent for those 18 to 64. However, the picture changes if one looks to low income after taxes, where the comparator figures are approximately 12 per cent for those under age 64: Turcotte & Schellenbert, note 16 at 95.
- ⁴⁷ Andre Bernard and Chris Li, *Death of a Spouse: The Impact on Income for Senior Men and Women* (Ottawa: Statistics Canada, July 2006); and Chris Li, *Widowhood: Consequences on Income for Senior Women* (Ottawa: Statistics Canada, July 2004).
- ⁴⁸ Turcotte & Schellenbert, note 16 at 95.
- ⁴⁹ Turcotte & Schellenberg, note 16 at 69.
- ⁵⁰ Turcotte & Schellenberg, note 16 at 66.
- ⁵¹ See Konrad Yakabuski, "Retirement Lost", *The Globe and Mail* (October 24, 2009) B1 online: The Globe and Mail <www.globeandmail.com>.
- ⁵² Alternative Planning Group, "Citizenship Matters: Re-examining Income (in)Security of Immigrant Seniors", *Wellesley Institute: Community Perspectives Series*, (May 2009), online: <<http://wellesleyinstitute.com/files/APG%20report%20final.pdf>>
- ⁵³ Armine Yalnizyan, "The Problem of Poverty Post-Recession" (August 2010) at 6-7, online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/publications/reports/problem-poverty-post-recession>>
- ⁵⁴ Acrobat Research, "National Survey on Aging in Place", (December 2009) online: Living Assistance Services <www.laservices.ca>
- ⁵⁵ For example, the Alzheimer's Society, in its recently released policy paper on the implications of the increasing incidence of dementia associated with an aging society, recommends as one option providing increased support for informal caregivers to delay transition into long term care facilities and reduce the economic burden of dementia: Alzheimer's Society, "Rising Tide: The Impact of Dementia on Canadian Society" (2010), online: <www.alzheimers.ca>
- ⁵⁶ Jane Lin, *The Housing Transitions of Seniors Canadian Social Trends* (Statistics Canada: Winter 2005) at 22, online: <<http://www.statcan.gc.ca/pub/11-008-x/2005003/article/8969-eng.pdf>>; Helen Trottier et al., *Living at Home or in an Institution: What Makes the Difference for Seniors?* (Statistics Canada: Spring 2000) at 49, online: <<http://www.statcan.gc.ca/studies-etudes/82-003/archive/2000/5067-eng.pdf>>; Kelly Cranswick, *Help Close at Hand: Relocating to Give or Receive Care* (Statistics Canada: Winter 1999) at 11, online: <<http://www.statcan.gc.ca/pub/11-008-x/11-008-x1999003-eng.pdf>>
- ⁵⁷ Turcotte & Schellenberg, note 16 at 16.
- ⁵⁸ For a compendium of research on these issues, see B.C. Network for Aging Research, "Aging Well in Northern, Rural and Remote Communities: Conference Report" (July 2008) online: <http://www.bcnar.ca/sites/default/files/events/Northern%20Aging%20Well_Conference%20Report.pdf>
- ⁵⁹ Turcotte & Schellenberg, note 16 at 138.
- ⁶⁰ The Home Adaptations for Seniors' Independence (HASI) program offers limited financial assistance (a forgivable loan of up to \$3500) for minor home adaptations for qualifying low-income seniors to enable them to perform the activities of daily living safely and independently, online: <http://www.cmhc-schl.gc.ca/en/co/prfinas/prfinas_004.cfm>. The Residential Rehabilitation Assistance Program for Persons with Disabilities provides forgivable loans in variable amounts up to a maximum of \$36,000 to homeowners or landlords for more significant accessibility modifications, such as ramps, chair lifts, and

height adjustments to counter tops, online: <http://www.cmhc-schl.gc.ca/en/co/prfinas/prfinas_003.cfm>

⁶¹ For a discussion of the nature of reverse mortgages, potential concerns and law reform options, see Canadian Centre for Elder Law Studies, "Consultation Paper on Reverse Mortgages" (Vancouver: 2005), online: <<http://www.bcli.org/bclrg/publications/consultation-paper-reverse-mortgages>>

⁶² *Home Care and Community Services Act, 1994*, S.O.1994, c. 26.

⁶³ Advocacy Centre for the Elderly, "Submission to the Law Commission of Ontario Concerning the Law as it Affects Older Adults" (July 2008) online: <http://www.advocacycentreelderly.org/appimages/file/Law_as_it_Affects_Older_Adults_July_2008.pdf>

⁶⁴ See the discussion in Special Senate Committee on Aging, *Second Interim Report: Issues and Options for an Aging Population* (Ottawa: March 2008) at 39 – 44.

⁶⁵ Centre for Equality Rights in Accommodation, "Human Rights in Housing in Canada: An Advocate's Guide" (May 2008) online: <<http://www.equalityrights.org/cher/National%20Guide%20English%20Final.pdf>> at 21.

⁶⁶ For an overview of the circumstances of older renters in Ontario see Spencer, note 15.

⁶⁷ An overview of social housing in Ontario is provided by Social Housing Services Corporation, "Ontario Social Housing Primer" (December 2008), online: <<http://www.shscorp.ca/shscnew/content/rc/doc/shprimer.pdf>>

⁶⁸ Kingston, Community and Family Services, *Public Information Guide on Rent-Geared-to-Income Assistance and Special Needs Housing*, (City of Kingston: March 2006), online: <<http://www.cityofkingston.ca/pdf/housing/PublicInformationGuide.pdf>>

⁶⁹ City of Toronto, *Housing Toronto Seniors: Planning for the Future – Issues, Challenges and Directions* (City of Toronto: Mayor's Roundtable on Seniors, September 2006), online: <http://www.toronto.ca/seniors/seniorshousingreport_06.htm>

⁷⁰ Region of Peel, *Social Housing for Seniors: Information Sheet*, (Region of Peel: 2007), Online: <<http://www.peelregion.ca/housing/initiatives-resources/programs/seniors.htm>>

⁷¹ The Canada Mortgage and Housing Corporation's 2010 *Seniors Housing Report* (Ontario: 2010) places the number of retirement home spaces in Ontario at 42,680. Online: <<https://www03.cmhc-schl.gc.ca/catalog/home.cfm?lang=en&fr=1296247116893>>

⁷² For a national review of the landscape around assisted or supported living, see Canadian Centre for Elder Law Studies, "Discussion Paper on Assisted Living: Past, Present and Future Trends in Canada" (Vancouver: December 2008) online: <http://www.bcli.org/sites/default/files/2008-10-31_Assisted_Living.pdf>

⁷³ See for example Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (14 April 2010) at 612 (John O'Toole) and at 616 (Peter Kormos).

⁷⁴ S.O. 2006, c. 17.

⁷⁵ Advocacy Centre for the Elderly, "Submission to the Ontario Seniors' Secretariat Concerning Ontario's Consultation on Regulating the Retirement Home Industry" (March 2007) online: <<http://www.advocacycentreelderly.org/appimages/file/Ontario%20Seniors%27%20Secretariat%20-%20Retirement%20Home%20Regulation%20-%20March%202007.pdf>> ACE expressed a number of concerns regarding serious issues in some sectors of the retirement industry, including:

- failure to follow proper procedures for the storage and distribution of medication;
- improper evictions of older persons following a health crisis that results in hospitalization;
- failure to take appropriate steps to protect residents from assaults by other residents or to address such assaults once they have occurred; and
- refusal to accommodate the needs of residents with mobility impairments who use walkers or wheelchairs.

⁷⁶ *Retirement Homes Act, 2010*, S.O. 2010, c. 11.

⁷⁷ Turcotte & Schellenberg, note 16 at 138.

⁷⁸ See Alzheimer Society, "Rising Tide", note 55 at 20.

-
- ⁷⁹ An overview of some of the most pressing issues may be found in the Advocacy Centre for the Elderly's "Law as it Affects", note 63.
- ⁸⁰ *Long Term Care Homes Act, 2007*, S.O. 2007, c. 8.
- ⁸¹ World Health Organization, "Active Ageing" note 12 at 28.
- ⁸² Kathryn Wilkins, *Social Support and Mortality in Seniors*, (Ottawa: Health Statistics Division, 2003) at 21, <online: <http://www.statcan.gc.ca/studies-etudes/82-003/archive/2003/6598-eng.pdf>>
- ⁸³ Figures are from Turcotte & Schellenberg, note 16 at 145.
- ⁸⁴ Cited in Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 74.
- ⁸⁵ Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 76.
- ⁸⁶ Turcotte & Schellenberg, note 16 at 138.
- ⁸⁷ Figures are from Turcotte & Schellenberg, note 16 at 138.
- ⁸⁸ Turcotte & Schellenberg, note 16 at 141 - 142.
- ⁸⁹ Figures are from Turcotte & Schellenberg, note 16 at 143-145.
- ⁹⁰ Figures are from Turcotte & Schellenberg, note 16 at 147 and 151.
- ⁹¹ Turcotte & Schellenberg, note 16 at 155.
- ⁹² Turcotte & Schellenberg, note 16 at 166.
- ⁹³ World Health Organization, "Active Ageing" note 12 at 37.
- ⁹⁴ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 73-76; Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (Toronto: 2007), online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/famconsult>
- ⁹⁵ Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 118.
- ⁹⁶ Turcotte & Schellenberg, note 16 at 153.
- ⁹⁷ United Nations, "MIPAA", note 7 at para. 106
- ⁹⁸ Turcotte & Schellenberg, note 16 at 170-174.
- ⁹⁹ Turcotte & Schellenberg, note 16 at 174-178.
- ¹⁰⁰ Turcotte & Schellenberg, note 16 at pages 178-183.
- ¹⁰¹ Turcotte & Schellenberg, note 16 at 13.
- ¹⁰² Kim Dayton, "A Feminist Approach to Elder Law", in Israel Doron, ed., *Theories of Law and Aging: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) at 46, online: <<http://www.springerlink.com/content/r101226u877247u3/fulltext.pdf>>
- ¹⁰³ In 2003, while almost 70 per cent of men over the age of 65 receive income from a private pension plan, only 53 per cent of women of the same age do so (M. Turcotte and G. Schellenbert, note 16 at 66). 95 per cent of senior men receive CPP/QPP benefits, while 85 per cent of senior women do so (M. Turcotte and G. Schellenbert, note 16 at page 94). Women receive significantly lower levels of CPP/QPP benefits (\$4,900 on average versus \$6,500 on average) (M. Turcotte and G. Schellenbert, note 16 at 66).
- ¹⁰⁴ Turcotte & Schellenberg, note 16 at 107.
- ¹⁰⁵ United Nations, "MIPAA" note 7 at para. 112.
- ¹⁰⁶ See, for example, the World Health Organization's "Active Ageing", note 12 and United Nations, "MIPAA" note 7.
- ¹⁰⁷ Turcotte & Schellenberg, note 16 at 23.
- ¹⁰⁸ For an overview, see Turcotte & Schellenberg, note 16, Chapter 7 "Immigrant Seniors" at 271.
- ¹⁰⁹ Turcotte & Schellenberg, note 16 at 23.
- ¹¹⁰ Turcotte & Schellenberg, note 16 at 24.
- ¹¹¹ Fédération des aînés et des retraités francophones de l'Ontario (FAFO), *Consultation de la Commission du Droit de l'Ontario concernant les modifications à faire à la Loi de l'Ontario pour tenir mieux compte des personnes matures et âgées* (2008).
- ¹¹² Office of Francophone Affairs, *Statistical Profile – Francophone Seniors in Ontario* (1999), online: <<http://www.ofa.gov.on.ca/en/franco-stats-1999seniors.html>>
- ¹¹³ FAFO, *Consultation de la Commission*, note 111.

-
- ¹¹⁴ For an overview, see Neena Chappell, Lynn McDonald & Michael Stones, “Aging and Ethnicity” in *Aging in Contemporary Canada*, 2nd ed. (Toronto, Ontario: Pearson Education Canada, 2008) at 136 – 166.
- ¹¹⁵ Turcotte & Schellenberg, note 16 at 25.
- ¹¹⁶ Lynn McDonald, “The Economic Security of Minorities in Canada” (Toronto: Canadian Sociology and Anthropology Association, 2006).
- ¹¹⁷ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 28.
- ¹¹⁸ Interview of Margaret Parsons, Executive Director of the African Canadian Legal Clinic, by Lauren Bates (September 16, 2008); Interview of Avvy Go, Metro Toronto Chinese and South Asian Legal Clinic, by Lauren Bates (August 28, 2008).
- ¹¹⁹ Kirsten Manley-Casimir, “Law as it Affects Aboriginal Older Adults” (2009), [unpublished], at 9, 13.
- ¹²⁰ Kirsten Manley-Casimir, note 119 at 10.
- ¹²¹ Kirsten Manley-Casimir, note 119 at 11- 12.
- ¹²² Interview of Dick Moore, 519 Community Centre, by Lauren Bates (August 26, 2008). Also, for an overview of barriers faced by older LGBT individuals, see Ontario Human Rights Commission, *Older Ontarians*, note 9 at 25-27.
- ¹²³ For an overview of recent data on health and activity limitations for older adults, see Turcotte & Schellenberg, note 16 at 43- 51.
- ¹²⁴ Turcotte & Schellenberg, note 16 at 47 – 48.
- ¹²⁵ Turcotte & Schellenberg, note 16 at 48-49.
- ¹²⁶ Turcotte & Schellenberg, note 16 at 50 – 52.
- ¹²⁷ Law Commission of Ontario, “The Law as it Affects Persons with Disabilities: Preliminary Consultation Paper, Approaches to Defining Disability” (June 2009), online: <www.lco-cdo.org>
- ¹²⁸ Spencer, note 15 at 73-74.
- ¹²⁹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 77.
- ¹³⁰ Michael Oliver, “Societal responses to long term disability” in Gale Whiteneck et al., eds., *Ageing with Spinal Cord Injury* (New York: Demos Publications, 1993) 251 at 253.
- ¹³¹ Mark Priestley, “Disability and Old Age” in *Disability, A Life Course Approach* (Cambridge: Polity Press, 2003) 143.
- ¹³² Priestley, note 131.
- ¹³³ Priestley, note 131 at 161.
- ¹³⁴ Interview of Dick Moore, note 122.
- ¹³⁵ DAWN- RAHF Canada, “Submission to the Law Commission of Ontario”, Montreal, Quebec, July 7, 2008.
- ¹³⁶ Interview of Avvy Go, note 118.
- ¹³⁷ Canadian Association for Community Living, “Response to the Law Commission of Ontario’s Consultation Paper on the Law as it Affects Older Adults” (July 7, 2008).
- ¹³⁸ It has been argued, for example, that elder abuse within the Chinese Canadian community may take the form of disrespect that violates Chinese cultural norms of filial piety. Sandra Tam & Shelia Neysmith, “Disrespect and Isolation: Elder Abuse in Chinese Communities” (2006) 25 *Canadian Journal on Aging* 141.
- ¹³⁹ Interview of Dick Moore, note 122.
- ¹⁴⁰ Interview of Renee Brady, Northwestern Independent Living Services by Lauren Bates (July 8, 2009).
- ¹⁴¹ Spencer, note 15 at 12.
- ¹⁴² Adult protection and mandatory abuse reporting laws are discussed in Chapter III of this Interim Report.
- ¹⁴³ Margaret Hall, “Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable”, in Isreal Doron, ed., *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) 107 at 108.
- ¹⁴⁴ Martha Fineman, “The Vulnerable Subject and the Responsive State”, 60 *Emory Law Journal*, Research Paper No. 10-130 at 28, online: <<http://ssrn.com/abstract=1694740>>

¹⁴⁵ Fineman, note 144.

¹⁴⁶ Concerns regarding the use of mandatory reporting laws are discussed at some length in Chapter III of this Report.

¹⁴⁷ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67.

¹⁴⁸ Of note, the “Vanguard Project” suggested a definition of vulnerability in the context of capability issues that focuses on the relative, relational and social aspects of vulnerability. B.C. Adult Abuse/Neglect Prevention Collaborative, *Vulnerable Adults and Capability Issues in B.C. – Provincial Strategy Document* (January 2009) at 14-16.

¹⁴⁹ The access to justice issues for older adults living in institutional settings will be considered throughout this Report. An invaluable resource on the barriers in accessing the law faced by residents of institutions is the report produced by the Advocacy Centre for the Elderly, “Congregate Living and the Law as it Affects Older Adults”, *Research Paper for the Law Commission of Ontario* (August 2009) online: <http://www.advocacycentreelderly.org/appimages/file/ACE-LCO-Congregate_Living_and_the_Law_as_it_Affects_%20Older_Adults.pdf>

¹⁵⁰ Fineman, note 144.

¹⁵¹ Hall, note 143 at 3.

¹⁵² Spencer, note 15 at 70.

¹⁵³ Spencer, note 15 at 69.

¹⁵⁴ Ontario Bar Association, “Getting it Right: The Report of the Ontario Bar Association Justice Stakeholder Summit” (April 2008) at 8, online: <http://www.oba.org/en/pdf/Justice%20Summit_sml.pdf>

¹⁵⁵ See, for example, the discussion on lack of accessible plain language resources on elder abuse in Selina Lai, “Community Mobilization Empowering Seniors Against Victimization”, *Final Report: Community Mobilization Empowering Seniors Against Victimization to the National Crime Prevention Centre of Canada Public Safety Canada* (March 2008) at 13 and 15, online: <http://www.uscont.ca/pdf/final_report_march_2008.pdf>

¹⁵⁶ Ontario Bar Association, “Getting it Right: The Report of the Ontario Bar Association Justice Stakeholder Summit” (April 2008) at 6, online: <http://www.oba.org/en/pdf/Justice%20Summit_sml.pdf>

¹⁵⁷ Advocacy Centre for the Elderly, “Congregate Living” note 149.

¹⁵⁸ Turcotte & Schellenbert, note 16 at 31.

¹⁵⁹ For a comprehensive consideration of barriers to access for persons in rural and remote areas, see Karen Cohl & George Thomson, “Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services”, *Final Report of the Linguistic and Rural Access to Justice Project* (Law Foundation of Ontario: December 2008) at 31-35, online: <http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf>

¹⁶⁰ Lai, note 155 at 11.

¹⁶¹ The province of Ontario has undertaken a number of initiatives to enhance the accessibility of its courts, following a December 2006 report from the Courts Disabilities Committee, “Making Ontario’s Courts Fully Accessible to Persons with Disabilities”, online: <http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm>. Ongoing initiatives of the Ontario Courts Accessibility Committee are documented online at <http://www.attorneygeneral.jus.gov.on.ca/english/courts/accessibility_committee/default.asp>.

¹⁶² See Irwin Bess, *Seniors Behind the Wheel* (Statistics Canada: Autumn 1999) online: <http://www.statcan.gc.ca/kits-trousses/pdf/social/edu04_0125a-eng.pdf> At the time of the study, 60 per cent of rural seniors were drivers, as compared to 46 per cent of urban seniors. Senior men are more likely to continue to drive than women.

¹⁶³ Spencer, note 15 at 69.

¹⁶⁴ ARCH Disability Law Centre, “Addressing the Capacity of Parties Before Ontario’s Administrative Tribunals: Respecting Autonomy, Protecting Fairness”, *Access to Administrative Justice for Persons with Disabilities* (November 1, 2009) online: <<http://www.archdisabilitylaw.ca/?q=addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne>>

¹⁶⁵ Robert Butler, "Age-ism: Another Form of Bigotry" (1969) 9 *The Gerontologist* 243 at 243, online: <[www.careandrepair.org.uk/.../Age-ism %20another%20form%20of%20Bigotry.doc](http://www.careandrepair.org.uk/.../Age-ism%20another%20form%20of%20Bigotry.doc)>

¹⁶⁶ Butler, note 165.

¹⁶⁷ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 2.2.

¹⁶⁸ Morley Gunderson, "Age Discrimination in Employment in Canada" (2003), 21 *Contemporary Economic Policy* 319.

¹⁶⁹ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 20.

¹⁷⁰ United Nations, "MIPAA", note 7 at para. 112.

¹⁷¹ A thorough examination of this issue was undertaken in the Special Committee on Aging of the United States Senate, *The Image of Aging in Media and Marketing*, Serial No.107-35 (Washington: U.S. Government Printing Office, 2003). For a Canadian context, see Julia Rozanova et al., "Seniors and Portrayals of Intra-generational and Inter-generational Inequality in the *Globe and Mail*" (2006) 25 *Canadian Journal of Aging* 373.

¹⁷² Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 14.

¹⁷³ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 18; Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 16; United Nations, "MIPAA", note 7 at para. 112-113

¹⁷⁴ Gunhild Hagestad and Peter Uhlenberg, "The Social Separation of Old and Young: A Root of Ageism" (2005), 61 *Journal of Social Issues* 343 at 351.

¹⁷⁵ For an overview of these theories, see Linda Whitton, "Ageism: Paternalism and Prejudice" (1997), 46 *DePaul Law Review* 453.

¹⁷⁶ Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 12, referencing the submissions of the Ontario Network for the Prevention of Elder Abuse.

¹⁷⁷ For an overview of recent media portrayals of older adults in Canada's *Globe and Mail* newspaper, see Julia Rozanova et al., "Seniors and Portrayals of Intra-generational and Inter-generational Inequality in the *Globe and Mail*" (2006) 25 *Canadian Journal of Aging* 373. For an analysis of the "demographic tsunami" meme regarding the Canadian healthcare system, see A. Cassels, "The "Demographic Tsunami" Meme and Canadian Media Coverage" (UBC Centre for Health Services and Policy Research: Feb 22, 2011), online: <<http://www.chspr.ubc.ca/files/conference/2011/Slides/Cassels-BoomerangstConf.pdf>>

¹⁷⁸ United Nations, "MIPAA", note 7 at para. 112.

¹⁷⁹ Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 7.

¹⁸⁰ Todd Nelson, "Ageism as Fear of our Future Selves" (2005), 61 *Journal of Social Issues* 206 at 210.

¹⁸¹ Human Resources and Skills Development Canada, *Supporting and Engaging*, note 41 at 14-15.

¹⁸² Spencer, note 15 at 13.

¹⁸³ Spencer, note 15 at 12.

¹⁸⁴ Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 11.

¹⁸⁵ Michael Billig, *Arguing and thinking: A rhetorical approach to social psychology* (Cambridge: Cambridge University Press, 1987) at 125, cited in Bytheway, note 18.

¹⁸⁶ Human Resources and Skills Development Canada, *Supporting and Engaging*, note 41 at 13.

¹⁸⁷ *Stoffman v. Vancouver General Hospital*, note 21 at 51.

¹⁸⁸ Ontario Human Rights Commission, *Policy on Discrimination*, note 10, The Commission stated that

"Older workers are often unfairly perceived as less productive, less committed to their jobs, not dynamic or innovative, unreceptive to change, unable to be trained or costly to the organization due to health problems and higher salaries." [at section 5]

¹⁸⁹ Gunhild Hagestad & Peter Uhlenberg, "The Social Separation of Old and Young: A Root of Ageism" (2005), 61 *Journal of Social Issues* 343 at 351 and 355; Nelson, note 180 at 209.

¹⁹⁰ Nelson, note 180 at 211-212; Ontario Human Rights Commission, *Older Ontarians*, note 9 at 56.

¹⁹¹ A panel discussion at the 2010 Canadian Conference on Elder Law among various Ontario law schools regarding initiatives related to the law affecting older adults highlighted the current dearth of elder law courses or other opportunities for Ontario law students to learn about older adults and the law.

-
- ¹⁹² Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>
- ¹⁹³ Advocacy Centre for the Elderly "Law as it Affects", note 63 at 11.
- ¹⁹⁴ Whitton, note 175 at 479 and following.
- ¹⁹⁵ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 10, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>
- ¹⁹⁶ Rozanova et al., note 177 at 376.
- ¹⁹⁷ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 36
- ¹⁹⁸ Turcotte & Schellenberg, note 16 at section 4.3.
- ¹⁹⁹ *McDonnell Estate v. Royal Arch Masonic Homes Society*, [1998] 5 W.W.R. 268.
- ²⁰⁰ Ontario Human Rights Commission, *Older Ontarians*, note 9 at 61.
- ²⁰¹ This issue has recently been studied by the Nova Scotia Law Reform Commission: see their "Final Report: Grandparent-Grandchild Access" (May 2007) online: <<http://www.lawreform.ns.ca/Downloads/GrandparentFinal.pdf>> Also see P. Cross, *Grandmothers and the Law* (Ontario Women's Justice Network, May 2005).
- ²⁰² Ontario Human Rights Commission, *The Cost of Caring*, note 94 at 11.
- ²⁰³ Canadian Association for the Fifty-Plus, "Response to the Law Commission of Ontario's Consultation Paper" (July 7, 2008).
- ²⁰⁴ Andy Martens, Jamie Goldenberg & Jeff Greenberg, "A Terror Management Perspective on Ageism" (2005) 61 *Journal of Social Issues* 223 at 223.
- ²⁰⁵ Nelson, note 180 at 214.
- ²⁰⁶ For a discussion of social exclusion as a manifestation of ageism, see Amy Cuddy, Michael Norton & Susan Fiske, "This Old Stereotype: The Pervasiveness and Persistence of the Elderly Stereotype" (2005) 61 *Journal of Social Issues* 267 at 278 and following.
- ²⁰⁷ Gerard Quinn & Theresia Degener, "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in Gerrard Quinn and Theresia Degener, eds., *Human Rights and Disability: The Current Use and Future Potential of United National Human Rights Instruments in the Context of Disability* (New York: United Nations Publication, 2002) 9 at 17.
- ²⁰⁸ Gerald Dworkin, "Paternalism" in Edward Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Summer 2009) online: <<http://plato.stanford.edu/archives/sum2009/entries/paternalism/>>
- ²⁰⁹ Whitton, note 175.
- ²¹⁰ Advocacy Centre for the Elderly's "Law as it Affects", note 63.
- ²¹¹ For a valuable recent compendium that aims to build towards a theoretical approach to elder law, see Isreal Doron ed., *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg: Springer-Verlag Berlin Heidelberg, 2009)
- ²¹² A lengthy discussion of the development of the social model in the context of the disability rights movement may be found in the LCO's initial paper on for its project on the law as it affects persons with disabilities: Law Commission of Ontario, "Defining Disability", note 127 at 26 and following.
- ²¹³ Thomas Humphrey Marshall, *Class, Citizenship and Social Development* (Westport: Greenwood Press, 1964) at 84.
- ²¹⁴ See Alan Cairns "The Fragmentation of Canadian Citizenship" in Douglas Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland & Stewart Inc, 1995) at 157 – 185.
- ²¹⁵ Michael Prince, *Absent Citizen: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009) at 17 and following.
- ²¹⁶ "Making the Shift to a Rights-Based Approach" (Address delivered at the 2010 Canadian Conference on Elder Law plenary session, 30 October 2010), [unpublished].
- ²¹⁷ Centre for Universal Design, "Universal Design Principles" online: <http://www.ncsu.edu/www/ncsu/design/sod5/cud/about_ud/about_ud.htm>

²¹⁸ See Irving Zola, "Disability Statistics: What We Count and What It Tells Us: A Personal and Political Analysis" (1993) 4 *Journal of Disability Policy Studies* 9 at 24; see also Richard Scotch & Kay Schriner, "Disability as Human Variation: Implications for Policy" (1997) 549 *Annals of the American Academy of Political and Social Science* 148 at 154; see also Jerome Bickenbach et al., "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48 *Social Science & Medicine* 1173 at 1182; see also Douglas Surtees, "What Can Elder Law Learn from Disability Law?" in Israel Doron, ed., *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) 93 at 101.

²¹⁹ Richard Scotch & Kay Schriner, "Disability as Human Variation: Implications for Policy" (1997) 549 *Annals of the American Academy of Political and Social Science* 148.

at 154; Surtees, note 218 at 99 citing Michael Stein, "Disability Human Rights" (2007) 95 *Cal. L. Rev.* 75 at 75 & 86.

²²⁰ Irving Zola, "Toward the Necessary Universalizing of a Disability Policy" (1989) 67 *The Milbank Quarterly* 401 at 410

²²¹ Scotch & Schriner, note 219 at 158; Jerome Bickenbach et al. "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48 *Social Science & Medicine* 1173 at 1182 at 1183.

²²² Surtees, note 218.

²²³ This is acknowledged in the Ontario Human Rights Commission's "Policy and Guidelines on Disability and the Duty to Accommodate" (Toronto: 2000), online: <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>>, which proposes a three step approach to ensuring non-discriminatory employment, housing and services: first universal design to prevent barriers; then, barrier removal to identify and remove existing barriers; and finally, individual accommodation to address remaining needs.

²²⁴ For an overview of what such an approach might mean, see Dayton, note 102.

²²⁵ United Nations, "MIPAA", note 7 at para. 113.

²²⁶ "International Covenant on Economic, Social and Cultural Rights", United Nations, 993 U.N.T.S. 3., Can. T.S. 1976 No. 46, entered into force 03 January 1976, accession by Canada 19 August 1976 ((16 December 1966)).

²²⁷ United Nations, 999 U.N.T.S. 171, Can. T.S. 1976, No. 47, entered into force 23 March 1976, accession by Canada 19 August 1976 (19 December 1966).

²²⁸ The term "ageing" is standard in international documents, while standard Canadian spelling is "aging". The term "ageing" is therefore used when referring to international documents.

²²⁹ United Nations, "Principles for Older Persons", note 6.

²³⁰ 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.

²³¹ United Nations, "MIPAA", note 7.

²³² World Health Organization, "Active Ageing", note 12.

²³³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12. It is important to note that, although the concept of dignity was seen as a central principle in the equality analysis under section 15 in *R. v. Kapp*, [2008] S.C.J. No. 42, the Court has identified problems with the extreme emphasis on dignity in section 15 as making it more difficult for claimants to prove their claims (para.22). As a result, the principle of dignity will remain part of the analysis in section 15, but may not take on such a predominant role.

²³⁴ *Law v. Canada (Minister of Employment and Immigration)* note 233 at para. 51-53.

²³⁵ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

²³⁶ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46.

²³⁷ R.S.O. 1990, c. H-19, s. 1.

-
- ²³⁸ Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 14.
- ²³⁹ Ontario Human Rights Commission (Toronto: 2007), online: <www.ohrc.on.ca/en/resources/Policies/agepolicyen>
- ²⁴⁰ Online: <http://www.phac-aspc.gc.ca/seniors-aines/nfa-cnv/nfaguide1_e.htm>
- ²⁴¹ Federal/Provincial/Territorial Committee of Officials for the Federal/Provincial/Territorial Ministers Responsible for Seniors, note 1.
- ²⁴² Special Senate Committee on Aging, *Seizing the Opportunity*, note 8.
- ²⁴³ A full description of the Lens and the principles and methods through which was established may be found in Penny MacCourt and Holly Tuokko, "Development of a Seniors' Mental Health Policy Lens" (2005) 24 Canadian Journal of Community Mental Health 35.
- ²⁴⁴ Prevention of Elder Abuse Working Group, *Prevention of Elder Abuse Policy and Program Lens* (Ontario Seniors' Secretariat and the Elder Health Coalition, 2008).
- ²⁴⁵ A ninth guiding principle, that of Advocacy, is specific to Ontario's legislative framework.
- ²⁴⁶ *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 39.
- ²⁴⁷ Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, Preamble.
- ²⁴⁸ *Miron v. Trudel*, [1995] 2 S.C.R. 418. This statement was taken up by the Court again in *Law v. Canada*, note 233.
- ²⁴⁹ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 2000) at section 3.1.1., online: <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>>
- ²⁵⁰ Online: <<http://www.neami.org.au/publications/documents/TheDignityofRiskarticleversion.doc>>
- ²⁵¹ See, for example, the Ontario Human Rights Commission *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 2000) at section 4.3.3., online: <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>>
- ²⁵² *Turnbull v. Famous Players Inc.*, [2003] O.H.R.T.D. No. 10.
- ²⁵³ *Law v. Canada*, note 233..
- ²⁵⁴ *R. v. Kapp*, 2008 SCC 41.
- ²⁵⁵ World Health Organization, "Active Ageing", note 12 at 12.
- ²⁵⁶ World Health Organization, "Active Ageing" note 12 at 13.
- ²⁵⁷ A helpful discussion of the nature of dignity as a basis for legal decision-making may be found in Darryl Pullman, "Dying with Dignity and the Death of Dignity", (1996) 4 Health Law Journal 197.
- ²⁵⁸ Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed. (Toronto: Irwin Law, 2005) at 204-205.
- ²⁵⁹ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307.
- ²⁶⁰ *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 31-32.
- ²⁶¹ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 77-29.
- ²⁶² United Nations, "MIPAA", note 7 at para. 22.
- ²⁶³ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 4.4.
- ²⁶⁴ See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.
- ²⁶⁵ United Nations, "MIPAA", note 7 at para. 19.
- ²⁶⁶ United Nations, "MIPAA", note 7 at para. 21.
- ²⁶⁷ Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 6.
- ²⁶⁸ World Health Organization, "Active Ageing", note 12 at 28.
- ²⁶⁹ World Health Organization, "Active Ageing", note 12 at 52.
- ²⁷⁰ *Gosselin v. Quebec (Attorney General)*, note 261.
- ²⁷¹ *Gosselin v. Quebec (Attorney General)*, note 261 at para. 82.
- ²⁷² [2003] 2 S.C.R. 504, 2003 SCC 54 at 103.
- ²⁷³ [2004] 3 S.C.R. 657, 2004 SCC 78 at paras. 38 - 41.
- ²⁷⁴ United Nations, "MIPAA", note 7 at para. 113.

-
- ²⁷⁵ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 4.5.
- ²⁷⁶ Ontario Human Rights Commission, *Policy on Discrimination*, note 10 at section 3.
- ²⁷⁷ See, for example, Claudia Stein & Inka Moritz, “A Life Course Perspective of Maintaining Independence in Older Age” (Genever: World Health Organization, 1999), online: <http://whqlibdoc.who.int/hq/1999/WHO_HSC_AHE_99.2_life.pdf>
- ²⁷⁸ See, for example, the United Nations’ World Youth Report, “Young People in a Globalizing World” (2003) online: <www.un.org/esa/socdev/unyin/wyr03.htm> See also the *Quebec Declaration of Intergenerational Solidarity* (Intergovernmental Agency for Francophone Communities: Quebec City, 1999), online: <www.aifa.ca>
- ²⁷⁹ AGE, The European Older People’s Platform, “A Plea for Greater Intergenerational Solidarity” (April 29, 2009) at 5.
- ²⁸⁰ The Honourable Justice Frank Iacobucci, “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) S.C.L.R. (2d) 137 at 158; see also Nedelsky, “Rights as Relationship” at 10; and see also BJ Wray, “Balancing Conflicting Rights: Towards an Analytical Framework” online: OHRC <http://www.ohrc.on.ca/en/resources/discussion_consultation/balancingrights/pdf> at 17.
- ²⁸¹ In “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) S.C.L.R. (2d) 137 at 158, the Honourable Justice Frank Iacobucci argues that the first and potentially most important aspect of reconciling tensions between principles is sensitivity to context; see also Nedelsky, “Rights as Relationship” at 10; and see also Wray, note 280.
- ²⁸² For a variety of perspectives on these issues, see the compendium, Association for Canadian Studies, 8 Canadian Diversity: Balancing Competing Human Rights 3 (Summer 2010).
- ²⁸³ Iacobucci, note 280 at 162, 167.
- ²⁸⁴ Patricia Hughes, *Legal Frameworks: The Reconciliation Model, Balancing Competing Human Rights* (Ottawa: Ontario Human Rights Commission, 2010).
- ²⁸⁵ It has been noted that “Human rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice.” (Lorne Foster & Lesley Jacobs, “Shared Citizenship as the Context for Competing Human Rights Claims” (Summer 2010), 8 Canadian Diversity: Balancing Competing Rights Claims 3 at 13.
- ²⁸⁶ C.C.S.M. c. V90.
- ²⁸⁷ R.S.N.L. 1990, c. N.3.
- ²⁸⁸ R.S.N.S. 1989, c. 2.
- ²⁸⁹ R.S.N.L. 1990, c. N.3, s.2.
- ²⁹⁰ R.S.N.S. 1989, c. 2, s. 3.
- ²⁹¹ C.C.S.M. c. V90, s. 1(1), definitions of “mental disability” and “vulnerable person”.
- ²⁹² Manitoba Law Reform Commission, “Adult Protection and Elder Abuse” (Winnipeg: 1999) at 23. The Report provides a comprehensive principled overview of adult protection and domestic violence legislation in Canada.
- ²⁹³ C.C.S.M. c. V90, s.21(1); R.S.N.S. 1989, c. 2, s.5(1); R.S.N.L. 1990, c. N.3, s. 4.
- ²⁹⁴ Advocacy Centre for the Elderly, “Law as it Affects”, note 63 at 10.
- ²⁹⁵ A comprehensive recent study on barriers to reporting was completed by the United Senior Citizens of Ontario with funding from the National Crime Prevention Strategy of the Government of Ontario. See Lai, note 155.
- ²⁹⁶ Lai, note 155 at 11.
- ²⁹⁷ Manitoba Law Reform Commission, “Adult Protection”, note 292 at 38.
- ²⁹⁸ Government of Manitoba, *Protecting Vulnerable Persons from Abuse and Neglect: Reporting Requirements for Direct Service Providers* at 6, online: <http://www.gov.mb.ca/fs/pwd/pubs/spl_for_service_providers.pdf>
- ²⁹⁹ Manitoba Law Reform Commission, “Adult Protection”, note 292 at 39.

³⁰⁰ For a description and analysis of the concepts of progressive realization and the duties to respect, protect and fulfill, see Maria Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement” 23 Human Rights Quarterly 1062 at 1062-1097.

³⁰¹ As is discussed in Chapter IV’s analysis of issues surrounding workplace transition for older adults, the assumption that mandatory retirement protected job opportunities for younger adults and that its abolition would lead to negative outcomes for younger age groups is by no means accepted wisdom among economists.

³⁰² R.S.O. 1990, c. H-19, s. 1.

³⁰³ Ontario Human Rights Code, R.S.O. 1990, c. H-19, s. 14.

³⁰⁴ Ontario Human Rights Code, R.S.O. 1990, c. H.19, s. 15.

³⁰⁵ [1990] 3 S.C.R. 229.

³⁰⁶ [1990] 3 S.C.R. 229 at page 76.

³⁰⁷ [1990] 3 S.C.R. 483.

³⁰⁸ *McKinney v. University of Guelph*, note 21 at 68.

³⁰⁹ *Stoffman v. Vancouver General Hospital*, note 21 at 51.

³¹⁰ *Canada (Employment and Immigration Commission) v. Tetraault-Gadoury*, [1991] 2 S.C.R. 22.

³¹¹ *Law v. Canada*, note 233.

³¹² *Gosselin v. Quebec (Attorney General)*, note 261.

³¹³ *Withler v. Canada (Attorney General)*, 2011 SCC 12.

³¹⁴ The Human Rights Tribunal of Ontario has not, since the transformation of the human rights system of Ontario, released reports detailing the numbers and breakdown of applications in the system. Figures related to the old system of human rights complaints can be obtained through the Ontario Human Rights Commission’s Annual Reports, online: <www.ohrc.on.ca/en/resources/annualreports>. Complaints related to age discrimination generally made up between 5 and 8 percent of all complaints. It is not possible to determine from the statistics what portion of these complaints were of discrimination based on younger age, and what portion were of discrimination based on older age.

³¹⁵ For information on the work of the OHRC, online: <www.ohrc.on.ca>. Work on age-based discrimination included a public consultation related to age-based discrimination, resulting in the report Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001), online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>, the development of a Policy on *Discrimination Against Older Persons Because of Age*, a public education campaign, and advocacy on the issue of mandatory retirement.

³¹⁶ *Canada (Employment and Immigration Commission) v. Tetraault-Gadoury*, [1991] 2 S.C.R. 22.

³¹⁷ *Ontario Human Rights Commission v. Ontario*, 19 O.R. (3d) 387, 117 D.L.R. (4th) 297 (Ont. C.A.).

³¹⁸ *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143

³¹⁹ *A.C. v. Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 2 S.C.R. 181 at para. 110.

³²⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 67.

³²¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [the “Meiorin” decision]

³²² Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age* (Toronto: 2002, updated 2007), section 4.5, online: <<http://www.ohrc.on.ca/en/resources/Policies/agepolicyen>> (emphasis in the original).

³²³ *R. v. Kapp*, 2008 SCC 41

³²⁴ Ontario Human Rights Code, R.S.O. 1990, c. H-19, s. 14.

³²⁵ For more information on special programs under the Code, see Ontario Human Rights Commission, *Guidelines on Special Programs* (Toronto, 1997), online: <<http://www.ohrc.on.ca/en/resources/Policies/specialprogramsen>>

³²⁶ Ontario Human Rights Code, R.S.O. 1990, c. H.19, s. 15.

³²⁷ As noted earlier, the Supreme Court of Canada upheld mandatory retirement policies against a series of *Charter* challenges: while such policies discriminated on the basis of age under section 15(1) of the

Charter, the Court found that they were saved under section 1: *McKinney v. University of Guelph*, note 21, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, *Stoffman v. Vancouver General Hospital*, note 21. The Supreme Court also upheld age 60 mandatory retirement provisions for firefighters or police officers in *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297; *Saskatchewan (Human Rights Commission) v. Moose Jaw (City)*, [1989] 2 S.C.R. 1317; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733. ADD BOROUGH OF ETOBICOKE, ETC.

³²⁸ As is discussed later, an exception in the Code for justices of the peace was recently the subject of a successful *Charter* challenge in which the Ontario Superior Court of Justice held that the provisions of the Code protecting mandatory retirement policies at age 70 for justices of the peace violated the equality rights provisions of the *Charter*. *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*, 292 D.L.R. (4th) 623, [2008] O.J. No. 2131.

³²⁹ *Espey v. London (City) (No.1)*, (2008) CHRR Doc. 08-1702, 2008 HRTO 412, application for reconsideration refused in 2009 HRTO 271.

³³⁰ For example, the Ontario Municipal Employees Retirement System Act maintains age 65 as a “normal retirement date”, but also creates a “factor 85” unreduced pension entitlement for employees age 55 and older, whose age and years of service add up to 85. *Ontario Municipal Employees Retirement System Act*, S.O. 2006, c. 2, s. 9(3) 2.

³³¹ *Income Tax Act*, R.S.O. 1990, c. I.2, s. 40.1.

³³² 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.

³³³ The amendment is a rare example of a statute explicitly overriding the primacy provisions of the Ontario *Human Rights Code*. It provides that the *Workplace Safety and Insurance Act*, the regulations under it, and any decisions or policies under the *Act* or regulations that require or authorize a distinction on the basis of age continue to apply: *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, s. 2.1.

³³⁴ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A, O. Reg. 134/98, s. 27.

³³⁵ *Income Tax Act*, R.S.O. 1990, c. I.2, s.8(3.2).

³³⁶ For example, see the *Toronto Islands Residential Community Stewardship Act, 1993*, O. Reg. 817/93, s. 6.

³³⁷ *Ontario Guaranteed Annual Income Act*, R.S.O. 1990, c. O.17, s. 2.

³³⁸ *Ontario Drug Benefits Act*, O.Reg. 201/96, s. 2.

³³⁹ *Health Insurance Act*, R.R.O. 1990, Reg. 552, s. 17.

³⁴⁰ *Homemakers and Nurses Services Act*, R.R.O. 1990, Reg. 634, s. 8(3).

³⁴¹ *Ontario Works Act, 1997*, O. Reg. 134/98, s. 41.

³⁴² *Highway Traffic Act*, R.S.O. 1990, c. H-8, *Highway Traffic Act*, O. Reg. 340/94 s. 2, 15, 16

³⁴³ *Agricultural Museum Act*, R.R.O. 1990, Reg. 866, ss. 1-2.

³⁴⁴ *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, O. Reg. 664/98, s.2.

³⁴⁵ *Ontario Guaranteed Annual Income Act*, R.S.O. 1990, c. O.17

³⁴⁶ *Ontario Works Act, 1997*, O. Reg. 134/98, s. 41.

³⁴⁷ An overview of social housing in Ontario is provided by Social Housing Services Corporation, *Ontario Social Housing Primer* (December 2008), online: <<http://www.shscorp.ca/shscnew/content/rc/doc/shprimer.pdf>>

³⁴⁸ Kingston, Community and Family Services, “Public Information Guide on Rent-Geared-to-Income Assistance and Special Needs Housing”, City of Kingston, online: <<http://www.cityofkingston.ca/pdf/housing/PublicInformationGuide.pdf>>

³⁴⁹ City of Toronto, Mayor’s Roundtable on Seniors, “Housing Toronto Seniors: Planning for the Future – Issues, Challenges and Directions”, City of Toronto Roundtable on Seniors, online: <http://www.toronto.ca/seniors/seniorshousingreport_06.htm>

³⁵⁰ Region of Peel, "Social Housing for Seniors: Information Sheet", Region of Peel, online: <<http://www.peelregion.ca/housing/initiatives-resources/programs/seniors.htm>>

³⁵¹ Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001) at 44, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>

³⁵² Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age* (Toronto: 2001) at section 6, online: <<http://www.ohrc.on.ca/en/resources/Policies/agepolicyen>>

³⁵³ Law Reform Commission of Nova Scotia, "Seniors-Only Housing: Final Report" (April 2011) at 29, online: <www.lawreform.ns.ca>

³⁵⁴ See, for example, Naresh Agarwal, "Mandatory Retirement and the Canadian Human Rights Act", *A Paper Prepared for the Canadian Human Rights Act Review Panel* (October 1999)

³⁵⁵ Decima Research poll conducted in 2003 of 2,000 Canadians aged 18 and older. Online: <www.decima.com/en>

³⁵⁶ *Espey v. City of London* (2008) HRTO 412 (Wright).

³⁵⁷ This was pointed out in the Human Rights Tribunal's decision in *Espey*, where the Tribunal noted that: Different methods of risk analysis may have particular advantages and disadvantages from the standpoint of human rights values. There are, for example, potential human rights consequences to a system in which every firefighter, of any age, is analyzed on an individual basis using the methods proposed by Dr. Freeman. firefighter forced to retire under age 60 because of a high level of risk could argue discrimination based upon disability or perceived disability. [at para 90]

The Adjudicator does not expand on this point, leaving an unexamined and unexplained inference that discrimination on the basis of age is less problematic than discrimination on the basis of disability.

³⁵⁸ The design and implementation of eligibility criteria for disability-based supports and programs is a major issue in the area of disability law, and in the LCO's project on the law as it affects persons with disabilities.

³⁵⁹ *Zurich Life Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

³⁶⁰ *Zurich Life Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 36.

³⁶¹ *Zurich Life Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 40.

³⁶² 92 O.R. (3rd) 16, 2008 CanLII 26258.

³⁶³ *Espey v. London (City) (No.1)*, (2008) CHRR Doc. 08-1702, 2008 HRTO 412, application for reconsideration refused in 2009 HRTO 271.

³⁶⁴ *McKinney v. University of Guelph*, note 21 at 129.

³⁶⁵ John McKinnon, "Age-Based Discrimination in Ontario's Worker's Compensation Laws", *A Paper Presented at the 2010 Canadian Conference on Elder Law* (Injured Workers' Consultants Community Clinic: October 2010) at 3, online: <<http://www.lco-cdo.org/ccel-papers/>>

³⁶⁶ The amendment is a rare example of a statute explicitly overriding the primacy provisions of the *Ontario Human Rights Code*. It provides that the *Workplace Safety and Insurance Act*, the regulations under it, and any decisions or policies under the *Act* or regulations that require or authorize a distinction on the basis of age continue to apply: *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A, s. 2.1.

³⁶⁷ For a full discussion of the age-based limitations in Ontario's worker's compensation laws, see John McKinnon, "Age-Based Discrimination in Ontario's Worker's Compensation Laws", *A Paper Presented at the 2010 Canadian Conference on Elder Law* (Injured Workers' Consultants Community Clinic: October 2010) online: <<http://www.lco-cdo.org/ccel-papers/>>

³⁶⁸ Section 41, *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A.

³⁶⁹ Section 43, *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A.

³⁷⁰ United Nations, "Principles for Older Persons", note 6.

³⁷¹ United Nations, "MIPAA", note 7 at para 23

³⁷² The Law Commission of Ontario has undertaken a project which explores some of the issues surrounding vulnerable workers and precarious work, including the employment experiences of women,

new Canadians and racialized individuals. For more information on this project, see online: <<http://www.lco-cdo.org/en/content/vulnerable-workers>>

³⁷³ For an overview of key demographic and labour market changes, see Thomas Klassen, “The Elimination of Mandatory Retirement: Unfinished Business”, *A paper prepared for the 2010 Canadian Conference on Elder Law* (October 2010) online: <<http://www.lco-cdo.org/ccel-papers/3A%20-%20Tom%20Klassen.pdf>>

³⁷⁴ Ontario Human Rights Commission, *Submission to the Standing Committee on Justice Policy on Bill 211* (November 23, 2005), online: <<http://www.ohrc.on.ca/en/resources/submissions/bill211english>>

³⁷⁵ *McKinney v. University of Guelph*, note 21 at 73-74.

³⁷⁶ *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* [2008] 2 S.C.R. 604, at para. 23-24. The challenge took place in the context of the provisions of the New Brunswick *Human Rights Act* that specified that termination of an employee pursuant to a *bona fide* retirement or pension plan did not violate the Act.

³⁷⁷ *Espey v. London (City) (No.1)*, (2008) CHRR Doc. 08-1702, 2008 HRTO 412, application for reconsideration refused in 2009 HRTO 271, para. 92-97.

³⁷⁸ *Canada (Employment and Immigration Commission) v. Tetrault-Gadoury*, [1991] 2 S.C.R. 22.

³⁷⁹ Charles Beach, “Economic Profile of Older Workers”, *A Report Prepared for the Expert Panel on Older Workers* (2007)

³⁸⁰ Thomas Klassen, “The Elimination of Mandatory Retirement: Unfinished Business”, *A paper prepared for the 2010 Canadian Conference on Elder Law* (October 2010) online: <<http://www.lco-cdo.org/ccel-papers/3A%20-%20Tom%20Klassen.pdf>>; see also Don Kerr & Roderic Beaujot “Demographic Change and Mandatory Retirement in Canada” in Gillain, C.T., David MacGregor, & Thomas Klassen eds., *Time’s Up! Mandatory Retirement in Canada* (Toronto: James Lorimer and Company Limited, 2005), and Norene Pupo & Ann Duffy “Locating Mandatory Retirement in the Midst of Economic and Social Transformations”, also in *Time’s Up!*

³⁸¹ Section 23.1, *Workers Compensation Act*, [RSBC 1996] c. 492

³⁸² Section 155(1), O. Reg 79/10, *Long Term Care Homes Act*, 2007 S.O. 2007, c.8.

³⁸³ Some younger persons with complex medical needs have raised concerns about the social and recreational effects of living in long-term care settings that are overwhelmingly populated by persons much older than themselves. The Ministry of Community and Social Services has made some efforts to group together younger persons with complex medical needs in some specific long-term care facilities. For some discussion of these issues, see *Brock v. Ontario Human Rights Commission* 2009 CANLII 709 (ON S.C.D.C.) January 13 2009

³⁸⁴ O.Reg. 79/10, s. 166.

³⁸⁵ *Health Care Consent Act*, S.O. 1996, c.2, Sched. A., s. 21(2)

³⁸⁶ Jane Meadus, “Discharge From Hospital to Long-Term Care: Issues in Ontario”, *A paper prepared for the 2010 Canadian Conference on Elder Law* (October 28, 2010) online: <<http://www.lco-cdo.org>>

³⁸⁷ Concerns arising from financial abuse of older Aboriginal adults who received settlement monies played a key role in the inception of the LCO’s project on Fees for Cashing Government Cheques, the final Report for which is available online: <<http://www.lco-cdo.org/en/content/fees-cashing-government-cheques>>

³⁸⁸ Advocacy Centre for the Elderly, “Congregate Living”, note 149 at 45

³⁸⁹ Margret Hall, “Developing an Anti-Ageist Approach Within Law”, (July 2009) at 27, online: Law Commission of Ontario <<http://www.ontla.on.ca/library/repository/mon/24009/304765.pdf>>. .

³⁹⁰ A comprehensive review of the available literature can be found in Isreal Doron, *From Guardianship to Long-Term Legal Care: Law and Caring for the Elderly* (Doctorate of Jurisprudence Thesis, Osgoode Hall Law School, 2000) [unpublished].

³⁹¹ Doron, *From Guardianship*, note 390 at 240.

³⁹² Doron, *From Guardianship*, note 390 at 240.

³⁹³ See, for example, Advocacy Centre for the Elderly, “Law as it Affects”, note 63 and Ontario Bar Association, “Submission on the Law Commission of Ontario’s Law as it Affects Older Adults Consultation Paper: Shaping the Project”, (July 21, 2008) online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>

³⁹⁴ Dementia is relatively rare prior to age 85: the prevalence rises sharply among the very old, and particularly among women. For those between the ages of 65 and 74, the rate was 28 cases per thousand women and 19 per thousand men. After age 85, the rate increased sharply to 371 per thousand women and 287 per thousand men: Gerry Hill et al. *Dementia Among Seniors*, (Statistics Canada: Autumn 1996) at 7 and following.

³⁹⁵ Alzheimer Society of Canada, “Rising Tide: The Impact of Dementia on Canadian Society” (2010), at 17, online: <http://www.alzheimer.ca/english/rising_tide/rising_tide.htm>

³⁹⁶ The Advocacy Centre for the Elderly has noted that they frequently encounter situations where the decisional capacity of an older adult is unnecessarily questioned, or a presumption of incapacity appears to operate: see Judith Wahl, “Capacity and Capacity Assessment in Ontario”, (May 2009) at 1-3, online: Advocacy Centre for the Elderly <<http://www.advocacycentreelderly.org/index.php>>.

³⁹⁷ Canadian Centre for Elder Law Studies and British Columbia Law Institute, “A Comparative Analysis of Adult Guardianship Laws in B.C., New Zealand and Ontario”, *Canadian Centre for Elder Law Studies, Report No. 4, British Columbia Law Institute, Report No. 46*, (October 2006) at 11, British Columbia Law Institute Online:

<http://www.bcli.org/sites/default/files/Comparative_Analysis_of_Adult_Guardianship_Laws-1.pdf>

³⁹⁸ The province of Alberta, in its 2008 *Adult Guardianship and Trusteeship Act* (AGTA) (in force since October 30, 2009) embraces court-appointed supported decision-making as well as supported decision-making authorizations as a means of promoting the least-restrictive alternative for decision-making. The AGTA offers a range of supportive and substituted decision-making options, aimed at allowing adults to receive assistance according to their needs and to maintain autonomy as much as possible. *Adult Guardianship and Trusteeship Act*, 2008 S.A. 2008, c. A-4.2. As is discussed at length elsewhere in this Report, Ontario offers a single regime for capacity and guardianship.

³⁹⁹ *McDonnell Estate v. Royal Arch Masonic Homes Society* [1998] 5 W.W.R. 268.

⁴⁰⁰ It was suggested, for example, that older African Canadians, may be exploited by church communities: Interview of Margaret Parsons, Executive Director of the African Canadian Legal Clinic, by Lauren Bates (September 16, 2008). Older gay men may be at risk of violence or financial exploitation from younger sexual partners: Interview of Dick Moore, 519 Community Centre, by Lauren Bates (August 26, 2008).

⁴⁰¹ Hall, “Developing an Anti-Ageist Approach”, note 389 at 49.

⁴⁰² *McDonnell Estate v. Royal Arch Masonic Homes Society* 1997 CanLII 1762 (B.C.S.C.) at 11.

⁴⁰³ See, e.g., *Banton v. Banton* (1998) 164 D.L.R. (4th) 176.

⁴⁰⁴ *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549 (Eng. Q.B.)

⁴⁰⁵ *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 16.

⁴⁰⁶ *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 44, O.Reg. 54/95, s. 1.

⁴⁰⁷ *Family Law Act*, R.S.O. 1990, c. F.3, s. 6.

⁴⁰⁸ For a discussion of these issues, see Wendy L Griesdorf, “Crazy in Love: Caregiver Marriages in the Context of Estate Disputes” (2005-2006) 25 *Estates, Trusts and Pensions Journal* 315.

⁴⁰⁹ Jan Goddard, “Substitute Decision-Making and Family Relationships”, (Presentation delivered at the 2008 Canadian Conference on Elder Law, Vancouver B.C., November 14, 2008) [unpublished].

⁴¹⁰ Nina Kohn, “Outliving Civil Rights” (2009) 86 *Washington University Law Review* 1053.

⁴¹¹ Merryn Gott & Sharron Hinchliff, “How important is sex in later life, The views of older people” (2003) 56 *Social Science and Medicine* 1617; P. Ginsburg and K. Framer, “A study of sexuality and health among older adults in the U.S.” 357 *NEJM* 762; Insa Fookien, “Sexuality in the later years – the impact of health and body-image in a sample of older women” (1994) 23 *Patient Education and Counseling* 227 online: <http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6TBC-4C00PJ8-2W-1&_cdi=5139&_user=866177&_pii=0738399194900388&_origin=gateway&_coverDate=07%2F1%2F1994&_sk=999769996&view=c&wchp=dGLbVlz-SkzS&md5=da393ac2c6a9532d372af8a2d56768c3&ie=/sdarticle.pdf>

⁴¹² Micheal Bauer, Rhonda Nay & Linda McAuliffe, "Catering to love, sex and intimacy in residential aged care: What information is provided to consumers?" (2009) 27 *Sexuality and Disability* 3 at 3.

⁴¹³ Shari Brotman et al. "Coming Out to Care: Caregivers of Gay and Lesbian Seniors in Canada" (2007) 47 *The Gerontologist* 490 online: <<http://gerontologist.oxfordjournals.org/content/47/4/490.full.pdf+html>>

⁴¹⁴ Michael Bauer, Linda McAuliffe & Rhonda Nay, "Sexuality and the Reluctant Health Professional", in Rhonda Nay & Sally Garrat, eds., *Caring for Older People: Issues and Innovations*, 3rd ed. (Sydney, Australia: Elsevier, 2009) at 292 – 309.

⁴¹⁵ *Long Term Care Home Act, 2007*, S.O. 2007, c. 8, s. 1.

⁴¹⁶ *Long Term Care Act, 2007*, S.O. 2007, ss. 19, 20.

⁴¹⁷ For a thorough review of the relevant legal issues related to older age, long-term care, legal capacity and sexuality, see J. Wahl, "Sexuality in Long-Term Care Homes – the Legal Issues", online: <http://www.rgpc.ca/rgpc_resource_library/Sexuality%20in%20Long%20Term%20Care%20Homes%20-%20The%20Legal%20Issues.pdf>

⁴¹⁸ J. Wahl, "Sexuality in Long-Term Care, Advocacy Centre for the Elder Newsletter" (Summer 2008) online: <<http://www.ancelaw.ca/appimages/file/NewsletterSummer2008.pdf>>

⁴¹⁹ Hall, "Developing an Anti-Ageist Approach", note 389 at 3

⁴²⁰ This argument for mandatory retirement is examined in depth, and dismissed as based on a profound misunderstanding of basic economic principles, J.R. Kesselman, "Challenging the Economic Assumptions of Mandatory Retirement" in C.T. Gillin ed., *Time's Up! Mandatory Retirement in Canada* (Toronto, Ontario: James Lorimer & Company Limited, 2005) at 161- 189. The author notes that:

The young workers argument runs counter to elementary economic principles by assuming the economy offers only a given total amount of work— what economists call "the lump-of-labour fallacy." Job displacement may arise in the very short run, in narrowly defined occupations, or in recessionary periods, but over the long run the economy can create as many jobs as there are workers able and willing to fill them. Indeed, an economy's long-run growth is constrained by the availability of workers with the requisite skills, motivation, and experience. Moreover, young workers are hardly a substitute for the skilled and experienced workers who are forced to leave on account of mandatory retirement provisions. [at 170 – 171]

⁴²¹ Advocacy Centre for the Elderly "Law as it Affects", note 63 at 5.

⁴²² United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Programme on Ageing "Report of the Expert Group Meeting, 'Rights of Older Persons'" (Bonn, Germany: May 5-7 2009) at 10 online: <<http://www.un.org/ageing/documents/egm/bonn09/reportofegm.pdf>>.

⁴²³ For example, the *Osgoode Hall Law Journal* recently devoted an issue to various perspectives on the notion of access to justice, with a particular focus on the complex relationship between legal justice and social justice: [2008] 46 *Osgoode Hall Law Journal*.

⁴²⁴ For information about these projects, visit the LCO website at www.lco-cdo.org.

⁴²⁵ Ontario Bar Association, "Getting it Right: The Report of the Ontario Bar Association Justice Stakeholder Summit" (April 2008) at 10, online: <http://www.oba.org/en/pdf/Justice%20Summit_sml.pdf>

⁴²⁶ Spencer, note 15 at 72.

⁴²⁷ R.S.O. 1990, c. N.7, section 2(2).

⁴²⁸ *Long Term Care Homes Act, 2007*, S.O. 2007, c. 8, s. 3.

⁴²⁹ For a discussion of the barriers to use of civil litigation as an effective response to violations of rights in congregate settings, see Advocacy Centre for the Elderly, "Congregate Living" note 149 and Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 18 – 20.

⁴³⁰ For a more thorough summary of legislative responses to elder abuse, whether under the *Criminal Code* or provincial statutes, see Hall, "Developing an Anti-Ageist Approach" note 389 at 37-47.

⁴³¹ Hall, "Developing an Anti-Ageist Approach", note 389 at 37.

⁴³² Lai, note 155 at 11. Also see Donald Poirier & Norma Poirier, "Why is it so difficult to combat elder abuse, and in particular, financial exploitation of the elderly?" (Law Commission of Canada: July 1999) at

section 5.3.3., online: <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/research_project/99_elder_2-en.asp#p14>.

⁴³³ [2006] 2 S.C.R. 737.

⁴³⁴ Ontario Law Reform Commission, "Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes" (Toronto: 1995), at 13.

⁴³⁵ *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A., Part IX, Part XI.

⁴³⁶ Ombudsman Ontario, *Long-Term Care Monitoring – Summary of Ombudsman's Findings* (December 2010) at 6-7, online: <<http://www.ombudsman.on.ca/en/what-we-do/special-ombudsman-response-team/sort-investigations.aspx>>

⁴³⁷ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 27, 62.

⁴³⁸ *Substitute Decisions Act*, S.O. 1992, c. 30, ss. 82, 83.

⁴³⁹ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 26.

⁴⁴⁰ Canadian Association for Community Living, "Response to the Law Commission of Ontario's Consultation Paper on the Law as it Affects Older Persons" (July 7, 2008) at 7.

⁴⁴¹ Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 29.

⁴⁴² Ontario Human Rights Commission reports and publications are available on its website, online: <<http://www.ohrc.on.ca>>.

⁴⁴³ See Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perception and Getting Results* (International Symposium on Age Discrimination: London, England, September 5, 2005) online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/AgeSymposiumENG/pdf>

⁴⁴⁴ Statistics on complaints made to the Ontario Human Rights Commission prior to the transformation of the human rights system which came into effect in June 2008 can be found in the OHRC's Annual Reports, available on the OHRC website, online: <<http://www.ohrc.on.ca/en/resources/annualreports>>. For 2007-2008, the last full year in which the OHRC was charged with receiving human rights complaints, approximately 9 per cent of all complaints cited age as one of the grounds of alleged discrimination (328 complaints in total). Of those complaints, 246, or 75 per cent, were in the area of employment. It's important to note that complaints related to "age" can include complaints of discrimination on the basis of youth (age 18 and over) as well as older age.

⁴⁴⁵ See Ombudsman Ontario, *Annual Report 2008-2009*, (June 2009) at 15, online: <<http://www.ombudsman.on.ca/en/publications--resources/annual-reports.aspx>>

⁴⁴⁶ Ombudsman Ontario, *Long-Term Care Monitoring*, note 436.

⁴⁴⁷ *Legal Services Act, 1998*, S.O. 1998, c. 26, s.1.

⁴⁴⁸ For detailed information regarding the mandate and activities of ACE, consult their website online: <www.advocacycentreelderly.org>

⁴⁴⁹ Basic information on eligibility for Legal Aid is provided, online: <<http://www.legalaid.on.ca/en/getting/eligibility.asp>>.

⁴⁵⁰ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 19.

⁴⁵¹ *Mental Health Act*, R.R.O. 1990, Reg. 741, ss. 14 – 16.

⁴⁵² *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A, s. 17.

⁴⁵³ College of Physicians and Surgeons of Ontario, "Policy Statement #4-05: Consent to Medical Treatment" (January/February 2006), online: <<http://www.cpsso.on.ca/policies/policies/default.aspx?ID=1544>>

⁴⁵⁴ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 24

⁴⁵⁵ The powers and functions of Residents and Family Councils are set out in the *Long Term Care Homes Act 2007*, S.O. 2007, c. 8, ss. 56 – 67.

⁴⁵⁶ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 37

⁴⁵⁷ World Health Organization, "Missing Voices: Views of Older Persons on Elder Abuse" (2002) at 9, online: <http://whqlibdoc.who.int/hq/2002/WHO_NMH_VIP_02.1.pdf>

⁴⁵⁸ Lai, note 155 at 12-13.

⁴⁵⁹ For an overview of these issues see Spencer, note 15 at 34-35.

-
- ⁴⁶⁰ See Ontario Human Rights Commission, *Submission of the Ontario Human Rights Commission to the College of Physicians and Surgeons of Ontario Regarding the Draft Policies Relating to Establishing and Ending Physician-Patient Relationships* (February 14, 2008), online: <www.ohrc.on.ca/en/resources/submissions/surgeons> Also see College of Physicians and Surgeons of Ontario, "Accepting New Patients, Policy Number 1-09" (April 2009), online: <<http://www.cpso.on.ca/policies/policies/default.aspx?id=1778>>
- ⁴⁶¹ World Health Organization, "Missing Voices: Views of Older Persons on Elder Abuse" (2002) at 13, online: <http://whqlibdoc.who.int/hq/2002/WHO_NMH_VIP_02.1.pdf>
- ⁴⁶² Spencer, note 15 at 44.
- ⁴⁶³ Advocacy Centre for the Elderly, "Retirement Home Industry", note 75 at 3.
- ⁴⁶⁴ Spencer, note 15 at 43-44.
- ⁴⁶⁵ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 86.
- ⁴⁶⁶ *Retirement Homes Act, 2010* S.O. c. 11, s. 2.
- ⁴⁶⁷ For example, the Advocacy Centre for the Elderly has expressed concerns that retirement homes may operate locked units and use restraints on residents without the same oversights and protections required for long-term care homes. Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 11.
- ⁴⁶⁸ S.O. 2006, c. 17, s. 140.
- ⁴⁶⁹ Concerns are highlighted in the summary of consultations on the Ontario Seniors' Secretariat website, online: <<http://www.culture.gov.on.ca/seniors/english/programs/rhc>> Also see Advocacy Centre for the Elderly, "Law as it Affects", note 63.
- ⁴⁷⁰ Spencer, note 15 at 60-61.
- ⁴⁷¹ *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A, s. 4(2); *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 2.
- ⁴⁷² *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A, s. 70.
- ⁴⁷³ *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A, s. 80.
- ⁴⁷⁴ *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A, s. 81.
- ⁴⁷⁵ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 22, 55.
- ⁴⁷⁶ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 22, 55(2).
- ⁴⁷⁷ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 27, 62.
- ⁴⁷⁸ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 32, 38.
- ⁴⁷⁹ *Substitute Decisions Act*, S.O. 1992, c.30, ss. 66, 67.
- ⁴⁸⁰ Alberta Law Reform Institute, *Enduring Powers for Attorney: Safeguards Against Abuse* (Edmonton: February 2003)
- ⁴⁸¹ *Substitute Decisions Act*, S.O. 1992, c.30, s. 8(1)
- ⁴⁸² *Substitute Decisions Act*, S.O. 1992, c.30, s. 32
- ⁴⁸³ *Substitute Decisions Act*, S.O. 1992, c.30, s. 32(6)
- ⁴⁸⁴ *Substitute Decisions Act*, S.O. 1992, c.30, s. 66.
- ⁴⁸⁵ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 13 and 23, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf> and Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 12.
- ⁴⁸⁶ Poirier & Poirier, note 432.
- ⁴⁸⁷ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 16, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>
- ⁴⁸⁸ United Nations, "Convention on the Rights of Persons with Disabilities", 13 December 2006, G.A. Res. 61/106, Art. 12(4).
- ⁴⁸⁹ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 23.
- ⁴⁹⁰ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 18, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>

-
- ⁴⁹¹ Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 12
- ⁴⁹² Canadian Association for Community Living, "Response to the Law Commission of Ontario's Consultation Paper on the Law as it Affects Older Persons" (July, 2008) at 7.
- ⁴⁹³ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 16, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>
- ⁴⁹⁴ Western Canada Law Reform Agencies, "Enduring Powers of Attorney: Areas of Reform – Final Report" (2008) online: <<http://www.law.ualberta.ca/alri/docs/WCLRA%20epa%20fr.pdf>>
- ⁴⁹⁵ Hall, "Developing an Anti-Ageist Approach", note 389 at 32.
- ⁴⁹⁶ This is a point made by Doron, *From Guardianship*, note 390 at 284.
- ⁴⁹⁷ Spencer, note 15 at 71-72.
- ⁴⁹⁸ Some of the key issues are highlighted in the Background Paper for this project, released in December 2010, online: <<http://www.lco-cdo.org/en/vulnerable-workers-background-paper>>
- ⁴⁹⁹ For information on the Ontario Courts Accessibility Initiative, see the December 2006 "Report of the Courts Disabilities Committee", online: <http://www.ontariocourts.on.ca/accessable_courts/en/report_courts_disabilities.htm>
- ⁵⁰⁰ *Residential Tenancies Act*, S.O. 2006, c. 17, s. 186 and 204.
- ⁵⁰¹ Special Senate Committee on Aging, *Seizing the Opportunity* note 8 at 87.
- ⁵⁰² Statistics Canada. *Table 358-0124 - Canadian Internet use survey, Internet use, by location of access, sex and age group, every 2 years (percent)*, CANSIM (database).
- ⁵⁰³ Spencer, note 15 at 69.
- ⁵⁰⁴ Office of the Ombudsman, *A Duty to Care: An Investigation into Municipal Licensing and Standards' Treatment of a Resident with Dementia* (City of Toronto: November 2010) at 12 -13, online: <http://ombudstoronto.ca/sites/default/files/MLSInvestigationFINAL_0.pdf>
- ⁵⁰⁵ A helpful discussion of the relevance of universal design to the law affecting older adults may be found in Douglas Surtees, "What Can Elder Law Learn from Disability Law?" in Israel Doron, ed., *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) 93 at 95 - 105.
- ⁵⁰⁶ British Columbia Law Institute, "Response to the Law Commission of Ontario Consultation Paper" (July 2008) at 3.
- ⁵⁰⁷ Poirier & Poirier, note 432.
- ⁵⁰⁸ Ontario Bar Association, "Submission to the Law Commission of Ontario" (July 2008).
- ⁵⁰⁹ *McDonnell v. Royal Arch Masonic Homes Society*, note 197.
- ⁵¹⁰ Advocacy Centre for the Elderly, "Law as it Affects", note 63 at 12.
- ⁵¹¹ Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001) at 15-18, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>; Special Senate Committee on Aging, *Seizing the Opportunity*, note 8 at 14-16; United Nations, "MIPAA", note 7 at para. 112.
- ⁵¹² For more information, visit the ONPEA website, online: <www.onpea.org>
- ⁵¹³ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 86.
- ⁵¹⁴ Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (July 2001) at 17, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>
- ⁵¹⁵ Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age*, (March 2002, updated February 2007) at section 4.4, online: <<http://www.ohrc.on.ca/en/resources/Policies/agepolicyen>>
- ⁵¹⁶ For example, the Elliot Lake Police Service has a Seniors' Issues Office blending social work and police services, and focusing on seniors' community development and prevention/intervention services for at-risk seniors, online: <www.cityofelliottlake.com/en/cityservices/seniorsissuesofficer.asp> Edmonton Police Services has an Elder Abuse Intervention Team, a collaboration between the police service, City of

Edmonton Community Services, Catholic Social Services and the Victorian Order of Nurses, online: <www.edmontonpolice.ca/communitypolicing/familyprotection/elderabuse.aspx>, Los Angeles has an Elder Abuse Advocacy and Outreach Program, and Connecticut has a specialized Elder Abuse Unit in the Office of the Chief State's Attorney. These are only a few examples.

⁵¹⁷ For information on these programs, see online: <www.aoa.gov/AOARoot/AOA_Programs/Elder_Rights/EAPrevention/index.asp>

⁵¹⁸ This is a complex scheme, for which this can be only a very cursory summary. A more detailed description is provided in Advocacy Centre for the Elderly, "Congregate Living", note 149 at 70 – 72.

⁵¹⁹ *Commission for Older People (Wales) Act 2006* U.K. 2006, c. 30.

⁵²⁰ Lai, note 155 at 11.

⁵²¹ S.O. 2006, c. 17, s.148(3)

⁵²² Spencer, note 15 at 3.

⁵²³ See generally Susan Gary, "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance" (1997) 32 Wake Forest Law Review 397; Suzanne Schmitz, "Mediation and the Elderly: What Mediators Need to Know" (1998) 16 Mediation Quarterly 71.

⁵²⁴ The University of Windsor Mediation Services Elder Mediation and Conflict Resolution program is a dedicated elder mediation clinic. Some of these generalized programs, including the University of Windsor's, do decline to mediate cases of serious elder abuse.

⁵²⁵ In the Cornwall area, four community agencies are piloting an elder mediation program for caregivers of patients with Alzheimer's and related dementias. The project is funded by a grant from the Ontario Aging at Home strategy, and is a partnership between the Alzheimer Society of Cornwall & District, the Cornwall branch of the Champlain Community Care Access Centre, the Community Living office and the Canadian Mental Health Association branch. In these disputes, the older adult will not necessarily participate in the process, as he or she may not have the capacity to do so. These are still considered elder mediations, in the sense that they are designed in order to productively manage the interpersonal dynamics at the heart of older adults' disputes.

⁵²⁶ See John Bertschler & Patricia Bertschler, "Addressing the Power Imbalance of Power in Elder Mediation Cases" (2009) 59 ADR Forum 5 for more on strategies for rectifying power imbalances in elder mediations.

⁵²⁷ See Susan Crawford et al., "From Determining Capacity to Facilitating Competencies: A New Mediation Framework" (2003) 20 Conflict Resolution Quarterly 385 online: <<http://onlinelibrary.wiley.com/doi/10.1002/crq.33/pdf>> for more on maximizing individuals' participation in processes.

⁵²⁸ In particular, the University of Windsor's Elder Mediation program and the Cornwall's elder mediation program.

⁵²⁹ For pilot projects in elder mediations as creating alternatives guardianship, see Susan Butterwick et al., "Evaluating Mediation as a Means of Resolving Adult Guardianship Cases", *A Report Submitted by the Center for Social Gerontology to the State Justice Institute* (October 2001) online: <http://www.tcsj.org/mediation/SJI_01.pdf>

⁵³⁰ Arlene Groh & Rick Linden, "Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project" (2011) 23 Journal of Elder Abuse and Neglect 127.

⁵³¹ Groh & Linden, note at 6.

⁵³² Groh & Linden, note at 8.

⁵³³ Arlene Groh, "Restorative Justice: A Healing Approach to Elder Abuse" (Paper delivered at the 6th International Conference on Restorative Justice, June 2003), [unpublished] at 4.

⁵³⁴ Groh & Linden, note at 19.

⁵³⁵ Groh & Linden, at 21.

⁵³⁶ Arlene Groh, *A Healing Approach to Elder Abuse and Mistreatment: The Restorative Justice Approaches to Elder Abuse Project*, (Kitchener, Ontario: Pandora Press, 2003) at 28-29.

⁵³⁷ Groh & Linden, at 19.

⁵³⁸ Groh & Linden, at 21-22.

-
- ⁵³⁹ Groh & Linden, at 27.
- ⁵⁴⁰ Groh & Linden, at 26.
- ⁵⁴¹ Groh & Linden, at 27.
- ⁵⁴² Sean O'Sullivan, *You've Got a Friend: A Review of Advocacy in Ontario* (Toronto: Ontario Ministry of the Attorney General, 1987) at vi.
- ⁵⁴³ O'Sullivan, note 542 at 5.
- ⁵⁴⁴ O'Sullivan, note 542 at 57.
- ⁵⁴⁵ Ontario Bar Association, "Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project", (July 21, 2008) at 10, online: <http://www.oba.org/en/pdf/older_adults_lco.pdf>
- ⁵⁴⁶ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 91.
- ⁵⁴⁷ Advocacy Centre for the Elderly, "Congregate Living" at 88-102.
- ⁵⁴⁸ *Commissioner for Older People (Wales) Act 2006* (U.K.) 2006, c. 30.
- ⁵⁴⁹ Cited in Gareth Griffith, *A Commissioner for Older People in NSW? Briefing Paper No. 3/08* (New South Wales: Parliamentary Library Research Service, April 2008) at 3, <online: [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/3FC49510516B6E0DCA257433001C90E3/\\$File/CommissionerFINAL&INDEX.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/3FC49510516B6E0DCA257433001C90E3/$File/CommissionerFINAL&INDEX.pdf)>
- ⁵⁵⁰ See the website of the Older People's Commissioner, online: <<http://www.olderpeoplewales.com/en/splash.aspx>>
- ⁵⁵¹ *Commissioner for Older People (Wales) Act 2006* (U.K.) 2006, c. 30, s. 2.
- ⁵⁵² The activities of the Older People's Commissioner are documented in their Annual Reviews, online: <<http://www.olderpeoplewales.com/en/splash.aspx>>
- ⁵⁵³ Griffith, note 549
- ⁵⁵⁴ Advocacy Centre for the Elderly, "Congregate Living", note 149 and the "Law as it Affects" note 63 at 94.
- ⁵⁵⁵ This law reform proposal is more fully described in Advocacy Centre for the Elderly, "Congregate Living", note 149 at 94 and following.
- ⁵⁵⁶ Advocacy Centre for the Elderly, "Congregate Living", note 149 at 111.
- ⁵⁵⁷ The Ontario government has developed an Aging at Home Strategy, a four year, \$1.1 billion strategy that aims to provide a range of community-based services to help older adults remain healthy and continue to live independently in their homes for as long as possible, online: <<http://www.health.gov.on.ca/english/public/program/ltc/33_ontario_strategy.html>>. Aging in place was also promoted in Special Senate Committee on Ageing, *Seizing the Opportunity*, note 8. The Alzheimer Society's work on planning for increasing prevalence of dementia in the population recommends increasing supports so that affected older adults can remain in their homes for longer, see Alzheimer Society, "Rising Tide", note 55.
- ⁵⁵⁸ The Change Foundation, "Because This is the Rainy Day: A Discussion Paper on Home Care and Informal Caregiving for Seniors with Chronic Heart Conditions" (February 2011) at 3.
- ⁵⁵⁹ Advocacy Centre for the Elderly's "Law as it Affects", note 63 at 16.
- ⁵⁶⁰ Office of the Auditor General of Ontario, *Annual Report of the Auditor General of Ontario* (Ottawa: Office of the Auditor General of Ontario, 2010) at 117, online: <<http://www.auditor.on.ca/en/reports_health_en.htm>>.
- ⁵⁶¹ *Home Care and Community Services Act*, 1994, SO 1994, C 26,
- ⁵⁶² *Home Care and Community Services Act*, 1994, SO 1994, C 26, s 1.
- ⁵⁶³ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 1(3), (4), (5), (6), (7).
- ⁵⁶⁴ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 3.
- ⁵⁶⁵ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 4.
- ⁵⁶⁶ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 5, 6.
- ⁵⁶⁷ For a discussion of the reform, its rationale and some of its effects, see Margaret Denton et al, "Market-Modeled Home Care: Impact on Job Satisfaction and Propensity to Leave" (2007) XXXIII Canadian Public Policy Special Edition 81.

- ⁵⁶⁸ *Community Care Access Corporations Act 2001*, O. Reg. 554/06.
- ⁵⁶⁹ Auditor General of Ontario, *Annual Report*, note 560 at 114.
- ⁵⁷⁰ Auditor General of Ontario, *Annual Report*, note 560 at 119.
- ⁵⁷¹ Denton, note 576 at 83.
- ⁵⁷² Regulation 386/94, *Provision of Community Services*, s. 2.
- ⁵⁷³ See *VK v North East Community Care Access Centre*, 2011.
- ⁵⁷⁴ Regulation 386/94, *Provision of Community Services*, s. 3.
- ⁵⁷⁵ Auditor General of Ontario, *Annual Report*, note 560 at 121.
- ⁵⁷⁶ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 22.
- ⁵⁷⁷ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 23.
- ⁵⁷⁸ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 31.
- ⁵⁷⁹ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 25.
- ⁵⁸⁰ *Home Care and Community Services Act*, 1994, SO 1994, C 26, ss. 26, 27.
- ⁵⁸¹ *Home Care and Community Services Act*, 1994, SO 1994, C 26, ss. 33 – 36.
- ⁵⁸² *Home Care and Community Services Act*, 1994, SO 1994, C 26, ss. 61 – 62.
- ⁵⁸³ *Home Care and Community Services Act*, 1994, SO 1994, C 26, ss. 50 – 52.
- ⁵⁸⁴ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 53.
- ⁵⁸⁵ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 3(3).
- ⁵⁸⁶ *Home Care and Community Services Act*, 1994, SO 1994, C 26, s. 39.
- ⁵⁸⁷ *Home Care and Community Services Act*, 1994, SO 1994, C 26, ss. 40 – 48.
- ⁵⁸⁸ Ontario Association of Community Care Access Centres, *Submission to the Standing Committee on Finance and Economic Affairs* (February 2011) at 1.
- ⁵⁸⁹ See online: <<<http://www.homecareontario.ca/public/about/home-care/system/facts-and-figures.cfm>>>
- ⁵⁹⁰ In a study of older women using home care services, some participants commented on the effect of their baths rationed to once per week, or of having a revolving cast of strangers responsible for personal tasks such as catheter changes: Jane Aronson, “Frail and Disabled Users of Home Care: Confident Consumers or Disentitled Citizens?” (2002) 21 *Canadian Journal on Aging* 11 at 16 – 18.
- ⁵⁹¹ Auditor General of Ontario, *Annual Report*, note 560 at 115.
- ⁵⁹² Auditor General of Ontario, *Annual Report*, note 560 at 115.
- ⁵⁹³ Ontario Association of Community Care Access Centres, *Submission*, note 588 at 3-5.
- ⁵⁹⁴ Ontario Association of Community Care Access Centres, *Submission*, note 588 at 6.
- ⁵⁹⁵ Ontario Association of Community Care Access Centres, *Submission*, note 588 at 6.
- ⁵⁹⁶ Susan Bronskill et al, “Aging in Ontario: An ICES Chartbook of Health Service Use by Older Adults”, *A Report from the Institute for Clinical Evaluative Sciences* (September 2010).
- ⁵⁹⁷ Auditor General of Ontario, *Annual Report*, note 560 at 121-22.
- ⁵⁹⁸ Lautens, Richard, “Seniors find little care in provincial aging strategy” *The Toronto Star* (18 February 2011), online: <<<http://www.thestar.com/news/article/941343--seniors-find-little-care-in-provincial-aging-strategy>>; The Toronto Star, “Begging for care: Keeping seniors healthy and at home” (23 February 2011), online: <<<http://www.thestar.com/opinion/editorials/article/943179>>>; Moira Welsh, “Daughter copes at home with two ailing parents”, *The Toronto Star* (21 February 2011) online: <<<http://www.thestar.com/news/article/941697>>>.
- ⁵⁹⁹ Community Legal Education Ontario, *Home Care Complaints and Appeals* (May 2010) at 15, online: <<<http://www.cleo.on.ca/english/pub/onpub/PDF/health/homecare.pdf>>>.
- ⁶⁰⁰ Spencer, note 15.
- ⁶⁰¹ Jane Aronson, “Silenced Complaints, Suppressed Expectations: The Cumulative Impacts of Home Care Rationing” (2006) 36 *International Journal of Health Services* 535.
- ⁶⁰² Aronson, “Silenced Complaints”, note 601 at 546.
- ⁶⁰³ Aronson, “Silenced Complaints”, note 601 at 545.
- ⁶⁰⁴ Community Care Access Centre- Toronto Central, *Feedback about your experience*, online: <<<http://www.ccac-ont.ca/Content.aspx?EnterpriseID=7&LanguageID=1&MenuID=8>>>.

⁶⁰⁵ Community Care Access Centre- South East, *Feedback about your experience*, online: <<<http://www.ccac-ont.ca/Content.aspx?EnterpriseID=10&LanguageID=1&MenuID=8>>>.

⁶⁰⁶ *Home Care and Community Services Act, 1994*, SO 1994, C 26, s 3(8).

⁶⁰⁷ Community Care and Access Centre, *Complaints, Appeals and Feedback*, online: <<<http://www.ccac-ont.ca/Content.aspx?EnterpriseID=15&LanguageID=1&MenuID=8>>>.

⁶⁰⁸ Auditor General of Ontario, *Annual Report*, note 560 at 125.

⁶⁰⁹ *Home Care and Community Services Act, 1994*, SO 1994, C 26, s 5(1)(ii).

⁶¹⁰ Ministry of Health and Long Term Care, *Ontario Strengthens Home Care Services* (December 2008).

⁶¹¹ *Home Care and Community Services Act, 1994*, SO 1994, C 26, s 27.

⁶¹² *Home Care and Community Services Act, 1994*, SO 1994, C 26, s 68(26).

⁶¹³ *Home Care and Community Services Act, 1994*, SO 1994, C 26, s 23(1).

⁶¹⁴ Ontario Association of Community Care Access Centres, note 588 at 3.

⁶¹⁵ Auditor General of Ontario, *Annual Report*, note 560 at 124.

⁶¹⁶ Auditor General of Ontario, *Annual Report*, note 560 at 124.