



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Appendix A: The Law as it Affects Older Adults

A DRAFT FRAMEWORK FOR AN ANTI-AGEIST APPROACH TO THE LAW

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This is a draft document. It is based on consultation and extensive research, and is now being circulated for further consultation. The LCO invites comment on the content, scope, structure and format of this document. Based on the comments received, a revised final version will be released to the public in early 2012.

The Framework was developed for use by:

- Policy-makers and legislators;
- Advocacy organizations and community groups that deal with issues affecting older adults; and
- Public or private actors that develop or administer policies or programs that may affect older adults.

The Framework is intended to assist with the development and evaluation of laws, policies and practices to ensure that the realities of the circumstances and experiences of older adults are taken into account, and that laws, policies and programs promote positive outcomes for these members of society.

It is accompanied by an extensive Interim Report, which sets out the research and analysis which form the basis for the Framework, and provides examples of its implications and implementation.

It is built upon and expands on work already done in this area, including the *National Framework on Aging and Seniors Policy Lens*, the *International Principles for Older Persons* and other international documents, the *Senate Special Committee Report on Aging*, the work of the Ontario Human Rights Commission on human rights and older age, and many other important initiatives that have been undertaken both in Canada and abroad over the last fifteen years.

It consists of three elements:

1. A set of principles which may form the basis for an anti-ageist approach to law, policy and practice;
2. An outline of key circumstances and contexts of older adults that should be taken into account when developing laws, policies and practices; and
3. A practical guide, based on the above two elements, to assist policymakers in implementing and reviewers in assessing laws, policies and practices as they may affect older persons.

This Framework is intended to be applicable across all laws and policies, including both those that are specifically targeted to older adults and those that will affect older adults as part of the general population. As it is general in this sense, some may find it helpful to adapt it to their own particular area of law or policy.

Notes on Terminology

“Law”: The term “law” as it is used throughout this document 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.

It includes both laws that are specifically targeted to older adults and those that will affect older adults as part of the general population.

“Older adults”: The LCO has used the terms “older adults” or “older persons” throughout this framework document. For the purposes of this framework, the LCO has adopted an expansive approach to the definition of “older adults” as including all those who have been identified as “old” or “older”, whether through legal and policy frameworks, social attitudes and perceptions, or self-identification.

“Ageism”: There are many different definitions of ageism. For the purposes of this framework, 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.

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PART I: PRINCIPLES FOR THE LAW AS IT AFFECTS OLDER ADULTS

This part of the Framework sets out six principles for the law as it affects older adults. These principles identify the goals which laws, policies and practices should aim to achieve. They aim to counteract common stereotypes and negative assumptions about older adults, reaffirm the status of older persons as equal members of society and bearers of both rights and responsibilities, and encourage government and other actors to take positive steps to secure the wellbeing of older adults. This section also sets out some considerations for the application of the principles.

➤ ***For further information on the Principles, see Chapter III of the Interim Report***

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 encourage government to take positive steps to secure the wellbeing of older adults, this framework centres on a set of principles for the law as it affects older adults.

Each of the six principles contributes to an overarching goal of promoting substantive equality for older adults. The concept of equality is central to both the *Charter of Rights and Freedoms* and the Ontario *Human Rights Code*. The Supreme Court has recognized that governments may have a positive duty to promote the equality of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality. Substantive equality is about more than simple non-discrimination, and includes values of dignity and worth, the opportunity to participate, and the necessity of taking needs into account and developing society and its structures and organizations in a way that does not leave marginalized groups outside mainstream society

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, an issue that is discussed in Section B.

A. The Six Principles

1. **Respect for Dignity and Worth:** 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.
2. **Promotion of Independence and Autonomy:** This principle recognizes the importance for older persons of the ability to both make choices and do as much for themselves 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.
3. **Enhancement 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.
4. **Recognition of the Importance 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 respect, independence and autonomy, and participation and inclusion.
5. **Recognition 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.

6. **Understanding Membership in the Broader Community:** This principle recognizes that older adults are part of a broader community in 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.

Example: Principle of Participation
Residents Councils under the *Long Term Care Homes Act*

The *Long Term Care Homes Act, 2007* requires that every long-term care home shall have a Residents Council made up of residents of that home and that the home shall provide an assistant for that Council. The Councils have an advisory role: they can provide advice to residents regarding their rights and obligations under the Act, attempt to resolve disputes between residents and the home, advise the licensee regarding any concerns about the operation of the home, provide recommendations for improvements to the home or to the quality of care, and may report to the government concerns or recommendations regarding the home.

B. Considerations for Application of the Principles

Progressive Realization: Of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. In such circumstances, a progressive implementation approach to the principles should be undertaken, such that the principles are realized to the greatest extent possible at the current time, and concrete steps for future improvements are identified and planned for.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of older adults, in most cases an inclusive design approach that incorporates older adults into the overall design of the law will be the most effective approach. Younger as well as older adults will benefit from a focus on dignity, autonomy, inclusion, security and diversity in the design of laws. Many, if not most of the measures required to fulfil the principles and to make the law more fair, accessible and just for older adults will also make the law more fair, accessible and just for others. Designing laws, policies and programs to include older adults can make the law more effective overall.

Protect, Respect, Fulfil: In the realm of international human rights law, the framework of “protect, respect, fulfil” 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:

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 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, or indeed any group. 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 (fulfil).

Resolving Tensions Between Principles: In some areas of law or policy, there may be tensions between two or more of the principles. For example, the autonomy of older persons is often perceived to conflict with protection of their security – adult protection laws providing one potential example of this tension. In assessing situations where tensions are perceived to exist between principles, one should:

1. Consider Context: Consider the larger context in which the tension is perceived to arise. Often, the difficulty does not arise from irreducible tensions between two principles, but from a larger context in which limited resources, societal attitudes or institutional structures inhibit the simultaneous achievement of two principles. It may appear that the simplest solution is to, for example, prioritize the autonomy of older adults over their security, but the better approach is to develop solutions that will move towards fulfilment of both principles.
2. Analyze the Tension: Where a true tension between principles exists, carefully examine the tension in a nuanced and holistic way. What specific rights or outcomes are at issue?

Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles?

3. Consider the Effect of the Other Principles on the Tension: Where two principles appear to be in tension, it is important to consider how the other principles may affect the dynamic, and how particular resolutions of the tension may impact on the realization of the other principles.
4. Maximize Implementation of the Principles: Consider whether solutions may be identified that permit expression of both principles, to at least some degree.
5. Promote an Anti-Ageist Outcome: Keep in mind that the purpose of the principles is to promote an anti-ageist approach to the law and address the barriers to equality experienced by older adults. What solutions to tensions between principles are most likely to advance this larger goal?

PART II: TAKING THE CIRCUMSTANCES OF OLDER ADULTS INTO ACCOUNT

This part of the Framework sets out some key aspects of the circumstances and experiences of older adults that law and policy-makers should take into account in order to ensure that the law, policy or practice does not have unanticipated negative effects on older adults or some groups of older adults.

This part begins with a brief description of the ways in which older adults may interact with the law. A second section provides a brief overview of some relevant aspects of the circumstances and experiences of older adults, including considerations regarding the impact of particular identities, such as language, ethnicity or sexual orientation on the experiences of older adults, and of the experience of disadvantage and heightened risk for older adults. A final section outlines some key elements for the effective implementation of laws affecting older adults, including approaches to ensuring access to the law for older adults.

For more information, see the following sections of the Interim Report:

- ***The Law and Older Adults, see Chapter V, Section A***
- ***The Circumstances of Older Adults, see Chapter II***
- ***Effective Implementation of the Law, see Chapter IV***
- ***Ensuring Access to the Law, see Chapter V***

While it is generally recognized that older adults make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from younger members of society, laws and policies do not always systematically and appropriately take into account these needs, circumstances and experiences. As a result, laws and policies may have unintended negative effects on older adults, may work at cross-purposes with each other, or may fail to achieve their intended goals. In some cases, stereotypes or negative assumptions about older adults may shape the way in which law is developed, implemented or enforced. In this way, the law may be ageist in its impact on older adults.

A. The Law and Older Adults – A Brief Overview

It is helpful as a starting point to have a very basic understanding of the legal framework for older adults in Ontario.

The *Charter* and Human Rights Laws: All Ontario laws and policies must operate within the framework of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, which provide rights to equality and non-discrimination for older adults, as well as other groups or individuals who may be marginalized or disadvantaged. 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.

Age-Based Laws: There are a significant number of laws and policies that use age-based criteria to specifically target older adults. These include laws regulating access to employment benefits, age-based drivers' license requirements, special provisions for sport fishing licenses and by-laws providing for seniors' focused housing. In the case of most uses of age-based criteria, age is serving as a proxy for some other quality, such as low-income, withdrawal from the workforce, health or ability limitations, or lack of legal capacity.

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 example.

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. Advocates for older adults have identified this area of the law as one which has a very significant impact on the rights of older persons. 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. These laws are the most difficult to identify, and require thoughtful consideration to be given to the ways in which the needs, experiences and circumstances of older adults may differ from those of younger adults.

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.

**Example: Laws of General Application
Legal Capacity to Marry and to Make a Will**

At law, the standards for the legal capacity to marry and the legal capacity to make a will have evolved separately. The test for legal capacity to marry is different from, and lower than, the test for the legal capacity to make a will, reflecting differences in the issues at stake in each kind of decision. Therefore, it is quite possible for an individual to marry who does not have the capacity to make a will. To complicate the matter, under the *Succession Law Reform Act*, marriage automatically revokes a previously existing will.

The differences between the capacity to marry and the capacity to make a will can impose particular unintended burdens on older adults. Older adults are more likely than the general population to be affected by conditions which affect their testamentary capacity, but which may not affect their capacity to marry. Practically speaking, the individual who retains the capacity to marry but not the capacity to draw a new will, will be unable to draw a new will after a marriage. That individual then loses control of his or her testamentary dispositions, and must then die intestate.

Demographic information indicates that older adults are more likely to have complicated familial arrangements, and thus complicated obligations and wills. Divorce and re-marriage, which introduce complex family obligations are increasingly common. The dynamics of the step-families created by subsequent marriages are not captured by intestate succession. Further, subsequent marriages later in life can add a further layer of complexity to an individual's testamentary dispositions.

General comments regarding the law and older adults: Some very general comments may be made about the interaction of older adults with the law.

One is that older adults will most frequently interact with the law in the context of ongoing relationships. These may be personal relationships with family or friends, where laws relating to family formation and dissolution, elder abuse, caregiving responsibilities and supports, or powers of attorney and substitute decision-making may be involved. Or, these may be institutional relationships, for example with home care support providers, government departments responsible for income security programs, operators or staff of retirement or long-term care homes, or health care providers. The need to manage and maintain these relationships will influence how older adults will interact with the law.

The second is that older adults will frequently encounter the law at key transition points. The transition from the workforce to retirement may raise issues regarding employment and pension law, or law related to government programs and benefits. The transition from living in a private setting to a congregate one may lead to interaction with laws relating to long-term care homes or retirement homes. The development of significant health and activity limitations or a disability may lead to encounters with health law, accessibility laws or laws related to legal capacity and substituted decision-making. The points at which older adults may encounter the law are frequently those at which they are most vulnerable.

Finally, many of the laws that most frequently affect older adults are extremely complex, whether they are laws related to reverse mortgages, powers of attorney and substituted decision-making, long-term care homes, or the various income security programs. Older adults may therefore find it difficult to navigate laws, policies and practices, even those intended to benefit or protect them, without some assistance.

B. Taking the Circumstances of Older Adults into Account

One of the starting points for an effective approach to laws and policies that may affect older adults is to recognize the existence of older adults as a group that may in some respects have different needs or experiences than younger persons, whether due to biological changes, the accumulated effects of their life courses, social structures, or the 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.

1. Understanding the Circumstances of Older Adults

While aging is often popularly viewed as mainly an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about aging and older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have lived up prior to entering “old age”. Any description of aging and older adults is therefore necessarily complex. For more detailed discussion, readers may wish to refer to Chapter II of the Interim Report.

Diversity among older adults: As older adults make up a very significant portion of the population, one should expect to find all of the diversity of the population at large reflected among older adults. In addition, the effects of differences at younger ages may be amplified by the life course, so that older adults may in fact be more diverse in many ways than younger age groups. There are therefore limitations to the extent to which one can generalize about older adults, and caution should be used in order to avoid stereotyping.

This is particularly true because “older age”, however one defines it, spans several decades. Just as the life course will likely result in some differences (as well as some commonalities) between a 25 year old and a 55 year old, so it will result in differences as well as commonalities between a 55 year old and an 85 year old.

Aging 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 be affected by a variety of factors, including their:

- gender,
- ethnicity or racialization,
- Aboriginal identity,
- newcomer or citizenship status,
- language,
- sexual orientation or gender identity,
- disability,
- socio-economic status,
- marital or family status,
- geographic location (e.g., residence in rural or remote communities) and
- other factors.

Individuals who have experienced marginalization or discrimination throughout their lives due to one or more of these factors may find that aging compounds it or changes how they experience it.

Social attitudes towards aging and assumptions about older adults: While it is not inevitably so, it is frequently the case in Canada that aging, and by extension older persons, are viewed with fear and avoidance. The experience of aging may be shaped by stereotypes of older persons as frail, incapable, passive and burdensome, resistant to change, inevitably declining and having nothing further to contribute. These negative perceptions of older persons may result in discrimination or poor treatment of older adults in employment, housing or receipt of services, and can lead to exclusion, disadvantage or even abuse of older adults.

Many common assumptions about older adults are simply stereotypes. For example, contrary to the assumption that most older adults are living in congregate settings such as retirement or long-term care homes, over 90 per cent of adults over age 65 live in private households. Although older adults are stereotyped as inevitably frail and in ill-health, a significant proportion of adults over age 65 consider themselves to be in good or excellent health. The assumption that older adults are passive and dependent is belied by the extensive involvement of older adults as volunteers in their communities, as caregivers for their spouses, grandchildren and other loved ones, and in their civic engagement.

Aging and the life course: 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 in middle-age. 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, policies and practices 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?

Social structures and institutions: The network of social structures and institutions will play a major role in how aging is experienced, whether it is the physical accessibility of services and buildings, the existence, or lack thereof, of various types of informal or formal supports, or the web of laws regulating a range of areas of life, from congregate living, to caregiving, to elder abuse.

Consideration of the above factors reinforces that it is essential to rely on current research regarding older adults, as well as to consult with older adults themselves, in order to avoid relying on stereotypes and incorrect assumptions or outdated information. The needs and circumstances of older adults are significantly shaped by their life courses and their current environments, both of which are constantly changing. It is therefore important that the information relied on is current and up-to-date, that attention is paid to future trends, and that

laws and policies are regularly re-evaluated to ensure that they are based on accurate information.

2. Factors to Take into Account When Considering the Impact of Laws or Policies on 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. As well, given that "older age" spans many decades, some of these factors will be more relevant or will operate more significantly at some stages than at others.

Life expectancy: 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 older adults may affect how they view and are affected by the options available to them. For example, if older adults must undergo long-drawn out processes to obtain benefits or enforce their rights, they may decide not to assert these rights and benefits as they are less likely to be seen as providing a meaningful resolution to the issue at hand.

Literacy and education levels: While levels of literacy and education among older adults will rise over time as a result of recent trends in education, at the current time older adults tend to have lower levels of literacy and education than younger Canadians have. As well, on the whole, older adults may have less familiarity with new technology, including information technology. This has a significant impact on how they access information and therefore on their ability to understand and enforce their rights.

Labour force participation: Older workers are more likely than others to be temporarily employed, self-employed, or engaged in part-time work. As well, older adults widely report discrimination and other barriers in the labour market. The incidence of long-term unemployment tends to increase with age. Older women in particular are more likely to have had lower wages and an interrupted work experience.

While this may change in the future, it is currently the case that most older adults have withdrawn from employment by the age of 65 and are reliant on fixed incomes from pensions

or government programs for their livelihood, whether as a result of choice or labour market barriers. 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, for example, that for many older adults, spending considerable sums in order to undertake litigation is not a feasible response to difficulties in accessing their legal rights.

Income security: Government-administered income sources, such as the Canada Pension Plan, Old Age Security, the Guaranteed Income Supplement and Ontario's GAINS program are an important source of income for most of those aged 65 and older.

While low-income is not currently widespread among older adults, some groups of older adults, such as unattached older women, disproportionately live in low-income. As well, current trends in terms of pensions and retirement savings, including declining rates of pension plan membership and the potential volatility of returns on investments, 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: The great majority of older adults live in private dwellings and express a strong preference for aging in their own homes and their own communities. However, lack of accessible and affordable housing, the challenges of living on a fixed income and difficulties accessing personal, community or homecare supports in a private home setting may push older adults into congregate settings.

A significant number of older Ontarians live in "retirement residences", which operate under a variety of models and provide a broad range of services. Some offer only minimal assistive services, while others essentially operate as private long-term care homes. While only a small percentage of Ontario's older adults live in long-term care homes, the likelihood of living in such an institution increases with age, and women are significantly more likely than men to do so. Long-term care homes provide essential supports to the most high-need older adults and can provide real benefits to their residents. Poorly run long-term care homes, however, place their residents in significant jeopardy, particularly because of the very unequal power dynamic between residents and the staff and operators of these homes.

Persons aged 65 and older are disproportionately likely to live in rural or remote areas, and may face particular access issues as a result. 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.

Family, relationships and caring: In general, the most common living arrangement for older adults is to live with a spouse, although the frequency varies and declines with age. As individuals age, the likelihood that they will be living alone increases, as does the risk of social isolation as friends and family members also age and die. Due to longer life expectancies for women and the tendency for women to be the younger partners in heterosexual relationships, women are particularly likely to live alone in older age.

Older adults both give and receive care of various types from family members and friends. Older adults are significant providers of care to spouses, family members with disabilities, and grandchildren (both as secondary and primary caregivers). For older adults with health or activity limitations, informal care from family or friends may be essential to their wellbeing, particularly where formal supports are limited or are difficult to access.

Key Issue
Older Age and Disability

There are, of course, significant intersections between disability and older age:

- Those who are born with a mental or physical disability or acquire one in their youth will age with that disability, and their older age will be shaped by their experiences of disability throughout their lives.
- As age increases, there is increased risk of some types of impairments and disabilities, such as sensory disabilities, mobility disabilities or dementia.
- Older adults may be affected, not by disability itself, but by assumption that age and disability are inevitably linked and that they must either be currently disabled or will inevitably *become* so, and thereby will require accommodations or assistance. Depression, for example, is often assumed to be a natural component of aging, and may therefore be left untreated in older age.

However, it is important to keep in mind that there are also differences.

- Most older adults do not have significant activity limitations, particularly not “younger” older adults.
- There will be significant differences between those older adults who have aged with a disability and those who have developed a disability with age. Those who have lived with a disability throughout their lives, and have therefore experienced barriers to education, employment and social inclusion will likely reach older age with fewer social and economic assets than those who develop a disability later in life.

Health and activity limitations and disability: With advancing age, older adults are more likely to develop impairments, health conditions or disabilities that affect their access to information, processes or buildings. For some older adults, waiting in long line-ups, reading small print, accessing buildings via a flight of stairs or understanding directions in a setting with high levels of ambient noise, becomes more difficult. Barrier-free design of websites, buildings, services and programs becomes increasingly important.

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. Older adults may, for example, 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, some 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 as well as on their relationships, community inclusion and living environments.

Key Issue
Gender and Aging

It is particularly important to consider the experience of aging and older age through a gender lens. With current demographic patterns, most older adults are women, and the older the age reached, the more true this is. The experiences of older women differ from those of older men in many ways. For example, because of longer-life expectancies and because women tend to marry older men, women are more likely than men to be widowed and living alone, which has a number of implications for income, caregiving and living arrangements. Because of historic gender roles, women who are currently older are likely to have lower levels of educational attainment than their male contemporaries, and lower incomes due to lesser workforce attachment. Older women also face particular negative stereotypes and dismissive treatment related to their age and gender. A gender-based analysis is therefore an important piece of any analysis of laws and policies that may affect older adults.

3. Intersecting Identities

In considering the circumstances of older adults, it is important to take into account the particular experiences of those older adults who are also identify as racialized, Aboriginal, LGBT, disabled, newcomer or other identities that may lead to marginalization or disadvantage.

Those who have experienced discrimination throughout their lives due to their gender, sexual orientation, racialization, Aboriginal status or other factors are more likely to enter old age with fewer social or economic resources, and therefore may find navigating the experiences of old age more challenging. For example, discrimination in youth may lead to lower levels of education and literacy. This may result in lower earnings throughout life. As a result, these individuals may enter old age more reliant on government income supports, and with more challenges in finding and using information about their rights. More subtly, those individuals from marginalized groups who survived stigma and discrimination through a strategy of silence and invisibility may be particularly hard to reach through regular services and programs and their needs may be invisible to the larger community.

There may be specific stereotypes or attitudes related to particular groups of older adults. For example, aging in women is seen as particularly unattractive, and older woman are especially likely to be treated in patronizing or dismissive ways. Older immigrants for whom English is a second language are likely to be treated with very low levels of patience, reflecting the impatience with which both older adults and new immigrants are generally treated.

Some relatively common aspects of the experience of aging may have particular effects on some communities of older persons because of circumstances specific to those communities. For example, aging in place is important to the well-being of all older adults. However, it may be particularly important – and particularly difficult to achieve – for some older adults. For example, First Nations older adults who have lived for almost all of their lives in their home communities will experience additional difficulties in being removed from their language, culture and community. For First Nations older adults who lived through the residential schools experience during their youth, re-institutionalization in their old age may hold a special trauma.

**Example: Addressing Compounded Disadvantage
LGBT Positive Long-Term Care Homes**

Recognizing that older LGBT (Lesbian, Gay, Bisexual, Transgendered) adults may face specific barriers when entering long-term care, including homophobic attitudes from residents and staff that may result in social isolation or “re-closeting”, the City of Toronto developed long-term care residences that provided a gay positive environment. Activities include positive programming, and staff that are known for their inclusive and positive attitudes.

4. Disadvantage and Heightened Risk

Older adults have often been considered “vulnerable” as a group, and this vulnerability has been used to justify significant levels of interference with their autonomy. It is inaccurate to assume that all older adults are frail, dependent and therefore in need of protection (whether or not they have requested it). It is also problematic to assume that the only or 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 problematic to assume that all older adults are privileged, affluent and capable. Aging may expose older adults to greater likelihood of certain types of risk and disadvantage, such as those associated with shortened life expectancies, social isolation and disability. Some older adults enter this stage of life with fewer resources (financial or otherwise) than others, such as those who live in low-income, or are racialized, LGBT or otherwise marginalized, and so are disadvantaged when compared to other older adults and to most younger adults. 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.

While there are individual elements to risk, risk must also be understood in a broader social context. An older adult’s family and other relationships, living arrangements, income sources and levels and access to supports may either increase or decrease levels of risk and inequality, depending on their quality and extent. The law may increase or decrease the levels of risk and inequality 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. Discrimination and

negative social attitudes towards older adults may reduce their access to employment, housing or services and thereby increase their levels of risk.

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.

**Example: Addressing Older Adults at Risk
Seniors' Focused Services in Policing**

Several police forces in Ontario and across Canada have developed specialized services or departments to address particular risks or disadvantages for older adults. For example, the Seniors' Issues Office on the Elliot Lake Police Force blends social work and policing service with the goal of supporting and promoting the independence and security of seniors in Elliot Lake. The office was started to supply assistance for seniors who may be alone or isolated and do not venture out of their residences for a month or more. It consists of two major components:

- Seniors' community development project which focuses on promoting the positive aspects of social support: familiarity, interdependency, a sense of belonging, and a sense of connectedness to the community; and
- Senior's prevention/intervention project, aimed at seniors considered to be 'at risk' of victimization.

Partnerships have been developed with Elliot Lake Retirement Living by providing referrals and working cooperatively with the customer service co-ordinator and all staff. By this means, the Seniors Issues Office has access to all rental buildings and assistance of building superintendent to reach any seniors who may be at risk.

C. Ensuring Effective Implementation

Even where laws are based on a thorough and nuanced understanding of the circumstances of older adults and aim to promote positive principles, their implementation may fall far short of their goals. This phenomenon, sometimes referred to as the problem of "good law, bad practice", is not uncommon in the law as it affects older adults. The Report of the United Nations Expert Group Meeting on the Rights of Older Persons specifically urges governments to

“close the gap between law and implementation of the law”. There are two aspects to this issue: implementation strategies for the law, and mechanisms for ensuring that older adults are adequately able to access and enforce their rights.

1. Implementation of the Law

Based on the LCO’s research and consultation, a number of key issues have been identified that commonly lead to problematic implementation of otherwise laudable laws, policies and programs affecting older adults. The following elements of implementation can ensure more effective implementation of laws and policies that may affect older adults:

- 1. Anti-ageist training for those interpreting or implementing laws and policies:** Those working in the field of elder law have repeatedly emphasized the importance of developing and implementing strategies for combating ageism and paternalism among those charged with implementing laws and policies that affect older adults. Unless ageist and paternalistic attitudes are addressed, they will inevitably taint the application of the law, no matter how well it is designed.
- 2. Training on the relevant needs and circumstances of older adults:** It is essential that those who are providing programs and services to older adults understand the actual circumstances of older adults who are seeking to access rights and benefits.
- 3. Adequate training on the law and its implications for those implementing it:** Given the complexity of many areas of elder law, it is perhaps not surprising that those charged with implementing these laws not infrequently have less than adequate information or understanding about the applicable laws. Service providers, government officials and even lawyers may act on misunderstandings of the law or may provide older adults with incorrect information. It is essential that those who are implementing the law receive adequate and appropriate training and resources to ensure the law is implemented as intended.
- 4. Adequate resources for effective implementation of the law:** In some cases, adequate human or financial resources are not provided to ensure the appropriate functioning of a law or program, so that access to rights and benefits is, in effect, rationed. For example, an audit-based compliance system will only be effective if sufficient staff are available to regularly conduct audits.

- 5. Monitoring mechanisms to ensure the law is operating as intended:** Implementation and enforcement mechanisms for laws and programs affecting older adults, particularly vulnerable older adults, would benefit from the consistent use of measures to ensure accountability, transparency and effectiveness. Where there is a lack of such monitoring and oversight mechanisms, it is impossible to know the extent to which older adults have meaningful access to rights and benefits or are subject to abuses or violations of their rights. This results in considerable difficulty in ensuring effective operation of these laws or policies. Mechanisms for monitoring the implementation and impact of a law or policy should be built into the law or policy from the outset.

**Example: Monitoring Mechanisms
Proposals to Reform Enduring Powers of Attorney**

Concerns have often been raised regarding the lack of mechanisms to monitor the operation of enduring powers of attorney, given the very broad powers that attorneys may have under the law, the significant effect on older adults of abuses and the lack of meaningful safeguards against abuse.

The Alberta Law Reform Institute, in its recent review of laws related to enduring powers of attorney, has recommended that transparency and accountability for the exercise of powers of attorney be strengthened by include 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.

2. Access to the Law for Older Adults

For a variety of reasons, older adults may have difficulty in accessing and enforcing the rights and benefits set out in law. Measures to ensure access to the law for older adults include:

- 1. Ensuring that access and enforcement mechanisms take the needs and circumstances of older adults into account:** The mechanisms available to older adults for accessing and enforcing their rights may not adequately take into account their needs and circumstances. For example, complaint mechanisms that rely on older adults accessing information over the internet and downloading and completing extensive forms may form a barrier to older adults with lower levels of literacy or of comfort with newer technologies. In some cases involving laws of general application, it may be appropriate

to develop access mechanisms that specifically target older adults in order to ensure that meaningful access is available to this group.

2. **Empowering older adults:** Older adults may not be aware of their rights, or of how to access and enforce them, or may need assistance in navigating complex systems. Because so many areas of law affecting older adults are so complex – for example, laws regarding capacity and consent and laws regulating long-term care – older adults may have difficulty meaningfully accessing their rights without assistance. Examples of mechanisms that may empower older adults include institutions like the Advocacy Centre for the Elderly, or laws that require the provision of “rights advice” to psychiatric patients whose legal status changes in specific circumstances.
3. **Addressing systemic issues:** Enforcement mechanisms that rely heavily on older adults themselves initiating complaints about problems and pursuing remedies are not likely to be effective in ensuring that complex systems operate as intended and that the rights of older adults who are disadvantaged or at heightened risk are respected. Where complex systems are in play and disadvantaged or at-risk older adults are involved, it is important to include pro-active oversight and enforcement mechanisms. Further, where appropriate remedies must include the opportunity for systemic change. For example, where the Human Rights Tribunal of Ontario makes a finding of discrimination, it has the power to order the organization to develop new policies or practices, or revise existing ones, so that the issue does not recur.
4. **Alternatives to adversarial systems:** As noted above, many laws that significantly affect the lives of older adults involve in some way ongoing relationships that are of importance to older adults. Because the relationships involved may be of great emotional or practical importance to older adults, they may be highly reluctant to engage in adversarial dispute resolution mechanisms that may lead to the breakdown of the relationship at issue. Alternatives may include mediation programs, or the use of non-complaint-based mechanisms like pro-active audits or advocacy systems.

Effective mechanisms for providing access to the law for older adults must take these realities into account.

PART III: EVALUATING LAWS, POLICIES AND PRACTICES

This Part brings together the elements from Parts I and II to create a practical guide for developing new laws, policies and practices or evaluating existing one. It is intended to assist in identifying existing or potential negative effects of current or planned laws, policies or practices on older adults. It sets out a series of questions that users of the Framework may ask themselves to assess the law, policy or practice in question.

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 Part provides guidance on applying the elements of the framework as outlined in Parts I and II to specific laws, policies and practices, through a series of questions for consideration.

It is not the purpose of the questions to point to simple, definitive answers to all of the difficult issues that may arise in developing laws, policies and practices that may affect older adults. The law and the circumstances of older adults are complex and diverse. The nature of aging and our understanding of it are constantly evolving. Rather, the questions are intended to ensure that law and policy makers carefully:

- Consider and apply a consistent set of principles in developing laws and policies that may affect older adults;
- Ensure that potential sources of paternalism and ageism in laws and policies are identified and addressed;
- Take into account the key aspects of the experiences and needs of older adults;

A particular question may be based on more than one principle or more than one aspect of the lives of older adults.

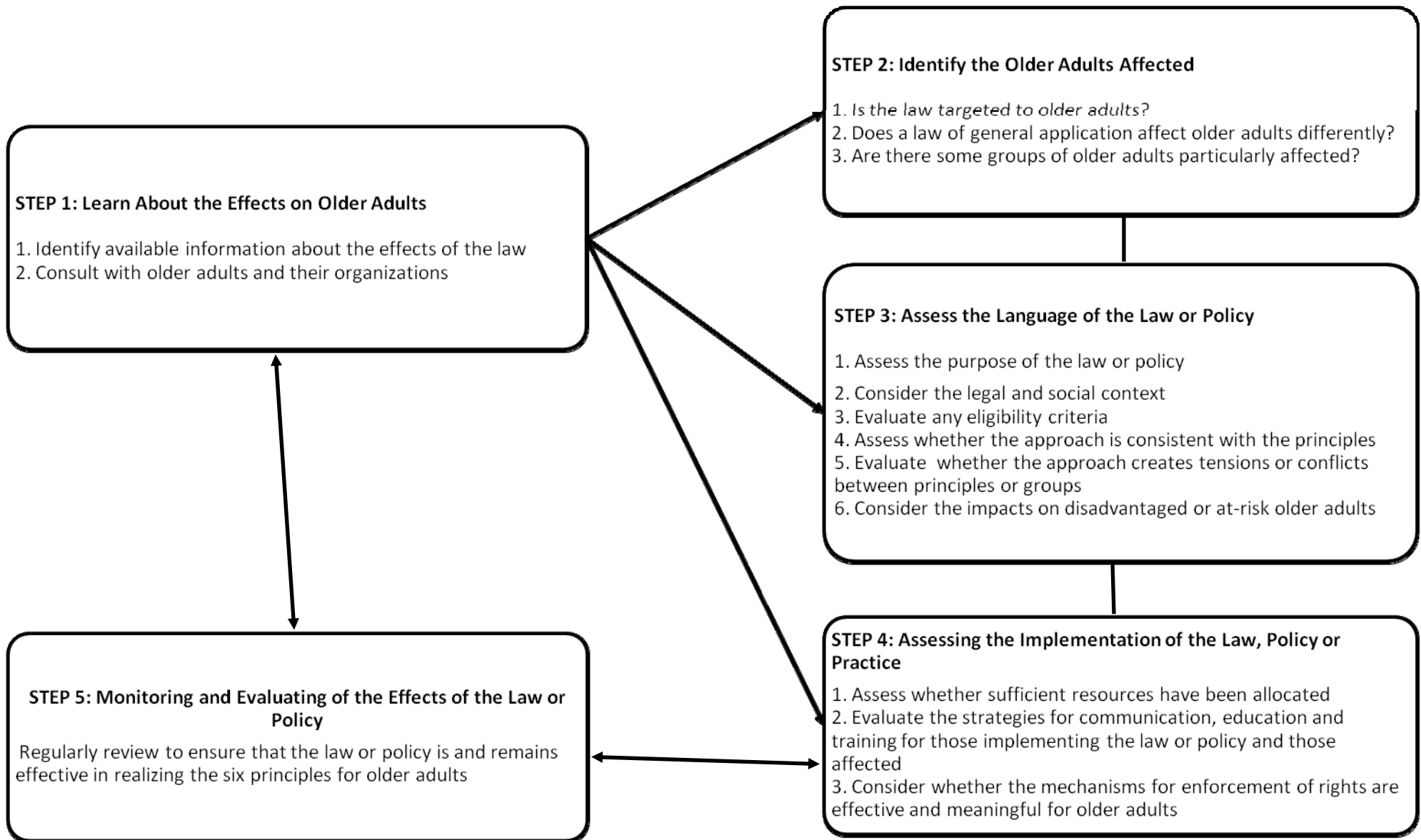
Given the variety of laws affecting older adults, not all questions will apply to all laws, policies and practices.

Many of the questions in this Part are based on good general practice and are not necessarily specific to the law as it affects older adults. All laws and policy development will benefit from good consultation mechanisms and most laws would be improved by the inclusion of appropriate monitoring and evaluation mechanisms. Older adults, like all citizens, will benefit from the use of good practices in these and other respects. In addition however, failure to engage in good practice may have particularly significant effects on those who are already disadvantaged, including disadvantaged or marginalized older adults.

The questions are broken down into six sections, reflecting different aspects of laws, policies and practices. A table showing the sections and their relationships to each other is appended below.

EVALUATING LAWS, POLICIES AND PRACTICES

A Guide to Realizing the Six Principles of Anti-Ageist Policy



A. Evaluating Law and Policy – Taking Older Adults Into Account

At the outset of the law or policy process, law or policy-makers generally identify an issue to be addressed through the law or policy – that is, the general purpose of the law or policy.

This is a crucial stage for law reform: disadvantaged or marginalized groups often have difficulty bringing visibility or priority to their issues, so that the law is not infrequently silent on issues that are central to their concerns. As well, the potential impact of a law on groups that are not its main targets may be easily overlooked at this stage, leading to issues for those groups when the law or policy is implemented.

It is therefore important that, during this stage, consideration be given to whether or not older adults may be affected by the potential law. Whether a new law is being developed, or an existing law reviewed, law and policy-makers should ensure, through their processes and deliberations, that adequate attention has been given to whether older adults or some group of older adults may be affected, and if so, what those effects might be.

QUESTIONS FOR CONSIDERATION

Have the potential effects of the law on older adults been considered, regardless of whether it is a law specifically referencing older age or a law of general application?

- Has the way in which the law may relate to the principles been identified?
- Has the way in which the law may affect older adults been identified?
- Has the group(s) of older adults who may be affected by the law been identified?

Has consideration been given to how the proposed law may impact on particular groups of older adults, including:

- Women?
- Lesbians, gays, bisexuals and transgendered persons?
- Aboriginal people, both urban and in First Nations communities?
- Racialized individuals?
- Low-income persons?
- Recent immigrants?
- Francophones?

- Those for whom neither of Canada’s official languages is a first language?
- Religious minorities?
- Persons with disabilities, including physical, sensory, psychiatric, cognitive, developmental or other disabilities?
- Those with significant caregiving responsibilities?
- Those living in long-term care facilities or other types of congregate living?
- Those who are widowed, divorced or single? and
- Those who are socially isolated?

Has a life course analysis been applied in considering how the law may impact on older adults with various backgrounds and experiences?

B. How Do We Learn About Effects On Older Adults?

This section focuses on the *process* by which laws and policies are developed or reviewed. Subsequent sections will consider the substance and implementation of laws and policies.

It is as important to avoid ageism and the marginalization of older adults in the *process* of developing or reviewing laws and policies as it is to identify and avoid this in the substance of laws and policies. Indeed, a flawed development process may very well result in laws and policies that are flawed in their substance. Older adults must be considered during the process of developing laws, and included, respected and consulted during that process.

The “Madrid International Plan of Action on Ageing” identifies three aspects of participation for older adults in decision-making processes:

1. Taking into account the needs and concerns of older adults when making decisions,
2. Encouraging the establishment of organizations to represent older adults in decision-making, and
3. Taking measures to enable the full and equal participation of older persons, in particular women, in decision-making at all levels.

Laws and policies may be analyzed and evaluated for their impact on older persons either:

- at the time that they are being developed, or
- later on as part of an assessment of their effectiveness or a law reform initiative.

The process of evaluation will differ somewhat depending on whether the law or policy is an existing one or is in development, since a review will naturally focus more heavily on analysis of the effectiveness and impact of the law or policy, and less on its original intent.

The questions below address the two main means through which potential effects on older adults may be identified, and older adults may be involved in the law reform process: research and public consultation.

Research

Research during the law or policy development process may take a variety of forms, but generally seeks to ensure a solid understanding of the potential implications and effects of a proposed law or policy. It is important that during this process potential effects on marginalized or disadvantaged groups not be overlooked, and that the research process not be tainted by stereotypes or assumptions.

Depending on the scope and depth of a review of an existing law or policy, research may include a review and analysis of a wide range of data related to the implementation and impact of the law or policy, including, for example:

- Levels of awareness about the law or policy among the general public or targeted groups,
- Measurable effects on the issues the law or policy was intended to address,
- Perceptions regarding the accessibility of complaints and enforcement mechanisms, and
- The number and types of complaints regarding access to or implementation of the law or policy.

Often a major challenge in reviewing existing law or policy is locating information on the impact of the law or policy on older adults or on specific groups of older adults. In many cases, there is a dearth of information about the effectiveness of the law in general. Because there is often a lack of attention to issues affecting older adults, this lack of information is often exacerbated when it comes to older adults. Where there is a lack of information with which to assess the effectiveness and appropriateness of the law or policy, this in itself indicates an area for reform. It also makes it particularly important to include older adults and the organizations that represent them in the review of the law, as they may be able to provide insight into the operation and impact of the law as it affects older persons.

QUESTIONS FOR CONSIDERATION

Has research been carried out to ensure understanding of the particular circumstances of those older adults who may be affected?

Is the law based on current research and evidence regarding the needs and circumstances of older adults, so as to avoid reliance on ageist assumptions, attitudes and stereotypes?

If the research relates to an existing law or policy, has research been carried out to determine:

- Whether the law or policy has had its intended effect with respect to older adults?
- Whether the law or policy has had the effect of improving or reducing achievement of the principles for older adults?
- Whether implementation of the law has been affected by ageist or paternalistic attitudes on the part of those charged with implementing it?
- Whether older adults have been able to effectively access their rights or understand their responsibilities under the law?
- Whether any particular groups of older adults are differently affected by the law?

Public Consultation

Although their form and extent will vary depending on the nature of the proposed law and the resources available, public consultations are crucial in the law development process as they are the primary means by which those who may be affected by the law can draw their concerns to the attention of those responsible for developing the law. It is therefore important that all of those potentially affected have a meaningful opportunity to be involved in the consultations and to have their perspectives considered.

While reviews of existing laws and policies generally do not involve the same extensive public consultations that accompany development of new laws and policies, the involvement in the review of those affected, including older adults, is crucial to understanding the impact and effectiveness of the law or policy under review.

QUESTIONS FOR CONSIDERATION

Have steps been taken to ensure that older adults and the organizations that represent them have had the opportunity to be meaningfully involved in the development or review of this law, including:

- Providing accessible information about the issues and their potential impact to older adults and the organizations that represent them?
- Providing accessible opportunities for older adults and the organizations that represent them to make their voices heard on the issues?
- Ensuring respectful consideration of the contributions and perspectives of older adults that are gathered through the consultation process?

Have outreach strategies regarding the development or review of the law been targeted to a wide range of older adults and organizations?

Have consultations about the law included a wide range of older adults and organizations?

Has the process for public consultation around the development or review of the law ensured that:

- Accommodations are provided to enable the participation of persons with disabilities including, for example, captioning or other accommodations for persons who are hard of hearing or deaf, physically accessible consultation sites for those with mobility disabilities, and large print materials for those who are low-vision?
- Plain language materials are available to explain the issues at stake and the means of participation in the consultation?
- Where relevant, information about the proposed law or policy and methods of consultation is disseminated in ways that can reach persons who are living in congregate settings, and consultations are carried out in ways accessible to those who live in these settings?
- Information about the proposed law or policy is disseminated in ways that can reach those who do not or cannot access information via the internet?
- Consultation mechanisms are accessible to those who are on low or fixed incomes?

- Consultation mechanisms are accessible to those who live in rural or remote communities?
 - Consultation mechanisms are accessible to those whose first language is not English?
-

C. Which Older Adults Are Affected?

As a starting point for understanding the relationship of a particular law or policy to the lives of older adults, one must of course begin by considering whether older adults are affected at all by a law or policy, and if so, whether all or most older adults may be affected, or, whether there are particular groups of older adults who may be impacted by a law or policy.

For more information see the following sections of the Interim Report:

- *Laws Targeting Older Adults, see Chapter IV, Section B*
- *Laws of General Application Affecting Mainly Older Adults, see Chapter IV Section C*
- *Laws of General Application Affecting Older Adults Disproportionately or Differently, see Chapter IV, Sections D and E*

1. Identifying Which Older Adults May Be Affected

Laws may affect older adults in a variety of ways: in some cases, the law will explicitly and on its face target older adults, either through age-based eligibility criteria, or by focusing on an issue that is solely or mainly a concern of older adults. In other cases, however, laws of general application that seem, on their face, to have very little to do with older adults may in fact have significant effects on all older adults or some group(s) of older adults.

QUESTIONS FOR CONSIDERATION

Does the law include explicit age-based criteria for its application, either in providing or restricting rights?

- What age-ranges are targeted?
- Are the criteria permissive or mandatory? Can older adults attempt to rebut the presumption that they fall within the scope of the law or policy? Can younger persons apply to be included where appropriate?

- Is the criteria based simply on age, or are other factors, such as income or disability, included to reduce the number of older adults affected?

Does the issue identified appear to be one that mainly affects older adults? Examples might include laws or policies related to retirement from the workforce or end of life planning.

- Does it affect all older adults equally, or does it affect some particular group of older adults identified by, for example, low-income, a particular life stage, health limitations or place of residence?

Does the issue identified appear to be one that affects large numbers of older adults? This may be the case even where the law does not affect most older adults, or where older adults make up a minority of those affected by the law. For example, laws or policies dealing with disability-related or health-related issues will often affect significant numbers of older persons.

*Does the law appear to be one of general application? If so, might it have a **different** impact on older adults than it does on others?*

- Might any of the provisions of the law or policy have a different effect on persons whose income is fixed, and who are therefore exposed to greater risks in case of financial loss?
 - Might any of the provisions of the law or policy have a different effect on persons who have withdrawn from the workforce?
 - Might any of the provisions of the law or policy have a particular impact on persons whose level of numeracy or literacy, or whose comfort with technology is lower than average?
 - Might any of the provisions of the law or policy have a particular impact on persons who have physical or sensory disabilities or impairments, health-related limitations, or reduced strength or stamina?
 - Might any of the provisions of the law or policy have a particular impact on persons who lack legal capacity to make decisions, or who live with cognitive impairments?
 - How might this law or policy impact on persons who are living in congregate settings, without easy access to the broader community?
 - Does the law or policy presume relatively lengthy time periods for action to be taken, thereby impacting on persons who are reaching the limits of their life expectancy?
 - How might this law or policy impact on persons who are reliant on formal or informal supports to maintain their security, dignity, independence and autonomy, or participation in the community?
-

Key Issue
Legal Capacity, Decision-Making and the Principles

Making decisions, whether simple ones about what to wear or eat or complex ones about where to live or how to manage one's finances, is a fundamental element of daily life. The right to choose has often been identified as central to any approach to the rights of older adults, given the frequency with which older adults have been stereotyped as passive and incapable and treated with paternalism.

The ability to receive and understand information and to assess risk, and therefore to make sound decisions, may be affected by various disabilities, some of which are congenital or acquired through injury, and others of which may develop later in life, such as the various forms of dementia. A relatively small but significant number of older adults in Ontario live with disabilities that affect their decision-making and therefore their legal capacity.

Older adults who develop cognitive impairments later in life may have acquired some significant financial assets that can prove a temptation to financial exploitation or abuse. As well, there are difficult and confusing role reversals involved where adult children are called upon to provide support and assistance to the parents who were once responsible for guiding and providing for them. These facts create some unique challenges for the development and implementation of laws that will respect, protect and promote the principles.

The ability to choose is of course central to the promotion of the principle of autonomy. It is also central to the principle of security: on the one hand, there is a risk that older adults whose cognitive abilities are impaired may be exploited; on the other hand, the ability to speak for oneself and decide for oneself is empowering and may reduce the risk of abuse and exploitation. Because those with cognitive or intellectual disabilities are often disrespected, excluded or abused, the principles of inclusion and of dignity are also at stake.

The issues surrounding legal capacity and decision-making are some of the most difficult in the area of elder law, and have implications for almost every area of law and policy that affects older adults, whether it is policies regarding the expression of sexuality in long-term care homes, the ability to exercise and enforce legal rights, or the ability to choose whether to continue to live in the community or in a long-term care home. Ontario has a complex and fairly comprehensive legal regime surrounding legal capacity and decision-making. There are ongoing calls for reform, whether based on differing views on the assumptions on which such laws should be based, or concerns about the effectiveness of the implementation of the current laws.

Those developing laws and policies that may affect older adults must take into account this group of older adults, and consider approaches that will maximize the implementation of the principles for these often marginalized individuals.

2. Identifying Effects on Particular Groups of Older Adults

Having identified that older adults are potentially affected by a particular law or policy, one should then determine how these effects might differ among older adults. This is an important step both for laws of general application and for laws that mainly or only affect older adults. Does the law only affect some subgroups of older adults? Or does it affect some older adults differently from others? Consideration of the following questions can assist in identifying the ways in which the law may impact, or impact differently on particular groups of older adults.

QUESTIONS FOR CONSIDERATION

*How might the impact of the law differ for **older women**, given the effects of their:*

- Longer life-expectancies?
- Marital patterns?
- Historical gender roles?
- Caregiving responsibilities?
- The particular stereotypes related to older women?
- Any other relevant factors?

*How might the impact of the law differ for **Aboriginal older adults** given their:*

- Higher rates of disability and impairment?
- The legacy of the residential schools experience for those who are older adults today?
- The effects of historical and continuing social and economic exclusion?
- Ongoing prejudice and discrimination, and cultural differences?
- Any other relevant factors?

*How might the impact of the law differ for **LGBT older adults** given:*

- Effects of historical and continuing stigma and discrimination?
- The effect of that stigma and discrimination on relationships and family structures?
- The effects of historical and continuing stigma and discrimination on the participation of older LGBT individuals in mainstream institutions?
- Any other relevant factors?

*How might the impact of the law differ for **older adults in rural or remote settings** given:*

- Their lesser access to supports and services?
- The challenges of transportation in these areas?
- Any other relevant factors?

*How might the impact of the law differ for **racialized older adults** given:*

- The socio-economic impact of discrimination and racism?
- Needs associated with cultural or linguistic differences?
- Unique stereotypes and negative attitudes associated with particular groups of racialized older adults?
- Any other relevant factors?

*How might the impact of the law differ for **older adults who have developed physical or sensory disabilities in older age** given:*

- Continuing and widespread barriers to accessibility in accessing buildings, information, transportation, employment, housing, services and supports?
- Negative attitudes and lack of understanding towards persons with disabilities on the part of service providers, employers, landlords and others, and the way those attitudes interact with stereotypes regarding older persons?
- The lack of supports and services for persons with disabilities, including access to assistive devices or personal and homemaking supports?
- The additional disability-related expenses that are often encountered, which may place a strain on fixed or limited incomes?

*How might the impact of the law differ for **older adults who have developed cognitive disabilities in older age** given:*

- Widespread lack of understanding and negative attitudes towards persons with cognitive disabilities on the part of service providers, employers, landlords and others, and the way in which those attitudes interact with stereotypes regarding older persons?
- The lack of supports and services for persons with cognitive disabilities?
- The additional difficulties that persons with cognitive disabilities face in accessing and understanding information about their rights and responsibilities under the law?
- The heightened risk of abuse faced by persons with cognitive disabilities?

*How might the impact of the law differ for **older adults who have mental health disabilities** given:*

- The lack of recognition, even among health care providers, about mental health issues for older persons?
- The lack of services and supports available for older persons with mental health disabilities?
- Widespread lack of understanding and negative attitudes towards persons with mental health disabilities and the way those attitudes interact with stereotypes regarding older persons?
- The challenges that persons with mental health disabilities may face in understanding and accessing their rights and communicating their needs?

*How might the impact of the law differ for **older adults who have aged with disabilities**, in addition to the issues identified for those who have developed disabilities in older age, given the effects of long-term social and economic marginalization on education, income, social supports, health and other fundamental measures of security?*

*How might the impact of the law differ for **older adults who live in congregate settings** given:*

- That persons living in congregate settings are generally at higher risk than other older adults due to the significant or multiple disabilities that have caused them to seek a congregate living environment?
- The reduced access that persons living in congregate settings have to the broader community?
- The dependence that older adults in these settings have on the staff and home operators for care and good treatment?

**Example: Differential Impact on Aboriginal Older Adults
Fees for Cashing Government Cheques**

In 2008, the LCO completed a project on Fees for Cashing Government Cheques, examining the legal and policy issues related to the use by many individuals of cheque-cashing services for accessing government funds, such as social assistance benefits. During the LCO's research and consultations, it appeared that the issue had a particular impact on Aboriginal older adults who received significant government payments through residential schools settlements. For those Aboriginal older adults living in remote communities without access to mainstream financial services, there was often no realistic alternative to paying large sums in order to cash the cheque and access the settlement funds.

*How might the impact of the law differ for **immigrant older adults** given their*

- Legal dependence on their sponsors?
- Lack of knowledge of and access to supports?
- Lack of knowledge of Canadian laws and legal systems?
- Relative social isolation?
- Language barriers?
- Any other relevant factors?

*How might the impact of the law differ for **Francophone older adults** given the dearth of supports and services available in the French language, particularly in rural and remote areas?*

D. How Are Older Adults Affected? Assessing the Substance of Laws and Policies

The following sections include questions to assist in evaluating the substance of the law, and ensuring that the law or policy is not tainted by ageism or paternalism, takes older adults and their circumstances into account, and values and prioritizes the needs of older adults equally with those in other age groups. Particular attention is paid to the use of eligibility criteria and to addressing the needs of disadvantaged or at-risk older adults, as these are challenging issues that arise in many laws and policies affecting older adults.

For more information see the following sections of the Interim Report:

- ***Identifying Ageism and Paternalism in the Law, see Chapter IV, Section G***
- ***Assessing the Use of Age-Based Laws, see Chapter IV Section B***

- *Addressing Tensions and Conflicts, see Chapter III, Section B.4*
- *“Vulnerability”, Inequality, Risk and Older Adults see Chapter II, Section D*

1. Assessing the General Purpose of the Law or Policy

As noted above, laws and policies generally begin with an issue, large or small, that is perceived to be of concern and that needs to be addressed. Where new laws and policies are being developed, the purpose may shift, broaden or narrow during the development process, as information is gathered and strategies are assessed. Existing laws and policies frequently explicitly identify their purpose; however, the review process may reveal that the purpose is no longer relevant, or is relevant to a larger or smaller (or different) group than was originally identified.

In evaluating a law or policy, it is helpful to consider how its *general purpose* may relate to the lives of older adults. What might be the general effects of the issue raised by the law or policy on older adults? Might achievement of the general purpose of the law or policy contribute towards the achievement of the principles for older adults? At this stage, the analysis is focused on the general purpose of the law or policy and the issue it addresses, and not the specific strategies and mechanisms selected, which are considered in a subsequent section.

QUESTIONS FOR CONSIDERATION

*How might the issue raised by this law or policy be connected to the **dignity and worth** of older adults?*

- How might the issue raised by this law or policy be connected to the dignity of older adults and respect for them?
- How might effective law or policy in this area increase or diminish the value accorded to older adults, recognition of their contributions, and respect for them as members of the human family?

*How might the issue raised by this law or policy be connected to the **independence and autonomy** of older adults?*

- How might effective law or policy in this area increase or diminish the ability of older adults to make choices for themselves?

- How might effective law or policy in this area increase or diminish the ability of older adults to age in place?
- How might effective law or policy in this area increase or diminish the ability of older adults to continue to work or learn or otherwise do for themselves?

*How might the issue raised by this law or policy be connected to the **participation and inclusion of older adults**?*

- How might effective law or policy in this area increase or diminish the ability of older adults to be part of their communities?
- How might effective law or policy in this area increase or diminish the ability of older adults to have a meaningful role in affairs?
- How might effective law or policy in this area increase or diminish the ability of older adults to be consulted on issues that affect them?

How might the issue raised by this law or policy be connected to the security of older adults?

- How might effective law or policy in this area increase or diminish the physical, emotional, financial and social security of older adults?
- How might effective law or policy in this area increase or diminish the freedom of older adults from abuse or exploitation?
- How might effective law or policy in this area increase or diminish the access of older adults to the health, legal and social services they need to achieve and maintain their dignity and respect, independence and autonomy, and participation and inclusion?

*How might the issue raised by this law or policy be connected to **respect for the diversity of older adults**?*

- How might effective law or policy in this area increase the recognition of older adults as individuals widely varying in needs, abilities, experiences, circumstances and perspectives?
- How might effective law or policy in this area increase the recognition of how the experiences of older adults may be affected by other aspects of their identities, such as gender, racialization, sexual orientation, Aboriginal identity, etc?

*In what ways does this issue involve **connections between older adults and other groups or generations**?*

- How might effective law or policy in this area increase cooperation or understanding between generations?
- How might effective law or policy in this area assist in developing a society that is inclusive for people of all ages?

Might this law or policy affect the dignity and respect, independence and autonomy, participation and inclusion, security or respect for diversity and individuality for persons who are not yet older, when they reach that stage of life?

**Example: Recognizing the Principles
Bill of Rights under the Long-Term Care Homes Act**

The new Ontario *Long Term Care Act, 2007* includes a “Resident’s Bill of Rights” which builds on similar language in predecessor statutes. The Resident’s Bill of Rights explicitly recognizes older adults who live in long-term care homes as individuals who have rights that must be respected and promoted. Rights include:

- The right to be treated with courtesy and respect and in a way that fully recognizes the resident’s individuality and respects the resident’s dignity,
 - The right to exercise the rights of a citizen,
 - The right to have his or her participation in decision-making respected,
 - The right to receive care and assistance towards independence based on a restorative care philosophy to maximize independence to the greatest extent possible,
 - The right to form friendships and relationships and to participate in the life of the long-term care home,
 - The right to have his or her lifestyle and choices respected,
- and many others.

2. Understanding the Issue in its Broader Context

As part of developing a general understanding of how the law may affect older adults, it is important to consider the particular context in which the law or policy will operate. For example, does the law or policy deal with employment, access to housing, income security, access to disability-related supports, or other areas? Each of these areas raise specific issues, constraints and dynamics, and will have particular implications for the achievement of the principles.

QUESTIONS FOR CONSIDERATION

What areas of life does the law or policy potentially affect?

- Does the law or policy relate to living environments, income security, labour force participation, family and other relationships, safety and security, education, health or other areas?
- What are the particular contexts and concerns of older adults in this area of life?

How does the context for the law or policy relate to the dignity and worth, independence and autonomy, participation and inclusion, security, or diversity and individuality of older adults?

- How does effective law or policy in this context potentially strengthen the implementation of the principles for older adults or some group of them?

Are there aspects of the context that tend to limit the implementation of the principles? For example, participation and inclusion in the community may be more difficult to achieve for those living in long-term care settings.

- If so, what strategies can be employed to address this?

How might law or policy in this one particular context affect other areas? For example, laws related to income security may affect access to housing or to supports. Laws related to access to supports may affect access to housing or employment.

3. Evaluating the Use of Eligibility Criteria

Eligibility criteria for laws and policies raise complex issues. They are commonly found in laws and policies as a means of most effectively allocating scarce resources. There is a risk, however, that such criteria may be under- or over- inclusive, or may be based on or exacerbate negative attitudes or stereotypes. The eligibility criteria that most commonly affect older adults in their relationships with the law are those based on age, disability and income.

Evaluating Age-Based Criteria

Where a particular issue affects mainly older adults or some specific group of older adults, law and policy makers may choose to use inclusive design to ensure that laws of general application effectively address the needs or circumstances of the older adults . Alternatively, law and policy makers may use age-based criteria, either on their own or in combination with criteria based on disability, income or other factors, in order to most efficiently target the use of resources. There is a risk that age-based criteria may be founded on, or perpetuate, ageist attitudes about the abilities, worth and contributions of older persons. On the other hand, age-based criteria may also be effective means of taking into account the ways in which older adults may have different needs or circumstances. The following questions are aimed at identifying circumstances where the use of age-based criteria are appropriate, and those where they are not.

QUESTIONS FOR CONSIDERATION

What is the purpose of the law? Is the purpose of the law to promote one or more of the principles of dignity and respect, independence and autonomy, participation and inclusion, security, or diversity and individuality?

On what basis does the law treat older adults differently from the rest of the populace?

- What are the assumptions about differences based on age that the law is based on?
- Are these assumptions based on current research and evidence?
- Are these assumptions based on stereotypes or negative attitudes about older adults?

How has the particular age criterion been selected?

- Is the age criteria based on current research into the needs, circumstances and characteristics of older adults?
- Has the age been selected to minimize inappropriate over or underinclusion in terms of the benefits, supports or restrictions in the law?

Might the law have the effect of reinforcing negative or ageist attitudes or stereotypes about older persons?

Does the law treat older adults as being of equal worth and consideration as other Canadians, or does the law subordinate the needs of older adults to those of others?

If the focus of the law is on protecting the safety or providing opportunities for younger adults:

- Has the impact of the restrictions on older adults been fully taken into account?
- Have the rights of older adults been equally respected with those of younger adults?

Does the law prevent older adults from participating in key social areas, such as employment, education or democratic rights?

Does the law lead to the involuntary social segregation of older adults?

Does the law undermine the economic, physical, financial or emotional security of older adults?

Does the law recognize that older adults are diverse, and that needs and circumstances may vary across this broad group?

- Does the law make provision for individual assessment of older adults where appropriate?
- Does the law provide a mechanism for individual older adults to challenge the appropriateness of their inclusion or non-inclusion in the affected group?

Has there been an effort to identify feasible non-age-based alternatives, such as directly measuring the quality for which age is acting as a proxy, or using key life transition points instead of age?

- Are there alternatives that better address the needs, circumstances and experiences of older adults?
 - Are there alternatives that better respect, promote and fulfil the principles for older adults?
-

Example: Age-Based Criteria
Benefits for Older Adults under the *Employment Standards Act*

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, presumably on the assumption that these older employees no longer have the same need for benefits that younger ones do. Considerable concern has been expressed by the seniors' organizations and workers' advocates regarding these provisions. In its submission to the Standing Committee considering the bill that brought these provisions into law, the Ontario Human Rights Commission 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. “

Evaluating Income-Based Eligibility Criteria

Income-based eligibility criteria are frequently used to determine access to a variety of programs, policies and services, in order to target scarce resources to those most in need. Because the financial situation of older adults may differ from that of younger adults in a number of respects, there is a risk that income-based eligibility criteria may inadvertently be framed in a way that older adults who are truly in need are not included.

Income-based eligibility criteria also are often used in combination with age-based eligibility criteria, in order to focus supports or resources on those older adults who are most in need.

QUESTIONS FOR CONSIDERATION

Do the income criteria take into account the situation of those who have withdrawn from the workforce and must make their current resources last until death?

Do the income criteria take into account the situation of older adults who may be “house-rich” but without other significant resources?

Do the income criteria take into account how the economic status of older women may have been shaped by gender role expectations, caregiving responsibilities, and historical barriers to educational and labour force participation?

Evaluating Disability-Based Eligibility Criteria

Disability-based eligibility criteria raise complex issues, and will be more fully dealt with in the LCO's sister project on the law as it affects persons with disabilities. These questions are not meant to address all of the issues related to disability-based eligibility; rather they focus on the intersection of age and disability.

In considering how disability-based eligibility criteria may affect older adults, two groups must be kept in mind: those who have aged with disabilities, and those who have developed disabilities in old age. As these two groups will enter older age with very different social and economic resources, their situations may be quite different.

Disability-based eligibility criteria may operate on their own, or may exist in combination with age-based criteria.

QUESTIONS FOR CONSIDERATION

Do the disability-based criteria take into account those disabilities and impairments that disproportionately affect older adults, such as arthritis, dementia, diabetes, loss of hearing and others?

Do the criteria take into account the ways in which the experience of disability or impairment are shaped by the life course, and by the experience of aging?

Do the criteria take into account the ways in which assumptions and attitudes regarding aging may affect the treatment and experiences of older persons with disabilities?

4. Assessing the Approach Selected for the Law or Policy

The questions below address the means selected by the law or policy for addressing its key purpose. The questions relate both to laws that are targeted to or mainly affect older adults and to laws of general application, although the answers may be easier to identify in the former case, than in the latter.

Given the wide range of laws and policies that may affect all older adults, not all the questions below will be relevant to all laws and policies.

Adapting the international framework of “respect, protect, fulfil”, at minimum laws and policies should respect the principles – that is, they should not themselves violate the principles. Depending on the purpose of the law or policy, they may aim to go further and ensure that private actors respect the principles, or take positive steps to promote the dignity and worth, independence and autonomy, participation and inclusion, security, and respect for the individuality and diversity of older adults.

QUESTIONS FOR CONSIDERATION

Dignity and Worth

Is the law based on respect for the past and ongoing contributions of older adults?

Does the law respect the fundamental dignity and worth of older adults as part of the human family, regardless of disability, health status, gender, income level, place of residence or other factors?

Is the law explicitly or implicitly based on negative attitudes or stereotypes about older adults as burdensome, passive, dependent, backwards-looking or resistant to change, or inevitably frail and declining? Characterizations of older adults as “bedblockers” or “the grey tsunami” are common examples of influential negative assumptions about older adults.

If appropriate given the nature of the law, does the law include measures to respect the privacy of older adults?

Independence and Autonomy

Is the law based on the premise that older adults are entitled to, and able to make choices about their lives?

Where older adults are considered to be “at risk”, does the law take into account the older person’s assessment of their level of risk?

Does the law include effective mechanisms to ensure that older adults have adequate information to make meaningful choices?

Does the law provide effective decision-making structures, supports and protections for those whose cognitive, psychiatric or intellectual disabilities affect their legal capacity?

Does the law increase or reduce supports for those older adults who need them to maintain independence due to disability or other issues?

Does the law support or promote technologies or devices that can assist older adults in increasing or maintaining their independence and autonomy?

Participation and Inclusion

Does the law reduce the options or restrict opportunities for older adults with respect to their opportunities for education, employment, or political or civic engagement?

Does the law impose barriers, whether physical, financial, technological, institutional or attitudinal to the participation of older adults or some groups of older adults?

Does the law protect or promote the ability of older adults to participate in social spheres such as education, employment, and democratic institutions?

Does the law protect or promote the ability of older adults to directly communicate their needs and wishes?

Does the law protect or promote the ability of older adults to develop and maintain social bonds?

Does the law protect or promote the ability of older adults to remain part of the larger community?

Does the law protect, support or promote a sense of belonging for older adults?

Does the law support older adults in maintaining the familial and other relationships that are important to them?

Security

Does the law expose older adults or particular groups of older adults to unnecessary risks?

Does the law expose older adults or particular groups of older adults to victimization or abuse?

Does the law ensure that older adults are provided with sufficient supports to maintain their independence and autonomy to the greatest extent possible?

Does the law ensure that formal and informal caregivers whose supports are necessary to maintain the dignity and respect, autonomy and independence, participation and inclusion of older adults are not subjected to undue financial, psychological or safety burdens?

Diversity and Individuality

Does the law take into account the impact on older adults of their varying life courses and multiple identities?

Does the law allow for modifications or specific programs to address unique needs of diverse groups of older adults, as the evidence supports?

Membership in the Broader Community

Does the law or policy take into account the various roles that older adults play within the broader community, and the impact on the wellbeing of others of initiatives aimed at older adults?

Has inclusive design, whereby the benefits and responsibilities of a law or policy may be shared across generations, been considered as a strategy for the law or policy?

Taking into account the relations between generations, does the law or policy promote mutual respect and understanding between generations?

Progressive Realization

Have constraints have been identified that prevent the law or policy from fully achieving its intended aims at the current time?

Have specific measures been identified that would make it possible for the law to fully or more fully achieve its intended aims in the future?

Have plans and commitments been made to achieve full or fuller implementation within a specified time frame? Are those plans specified and detailed, with clearly outlined responsibilities and timelines?

5. Addressing Tensions or Conflicts

At times, during a review of the adherence of a law or policy to the principles, either tensions between two or more of the principles or tensions between the needs of older adults and the needs of other groups may be identified.

QUESTIONS FOR CONSIDERATION

If multiple principles are at play in the issue addressed by the law or policy:

- Has consideration been given to context of the tension, and whether adjustments to the broader context may resolve the tension without a need to trade off or balance the principles at stake?
- Has consideration been given to the relationship between the principles, and how reducing or increasing adherence to the principles in tension may impact on the achievement of other principles or of the principles as a whole?
- Has consideration been given to the specific groups of older adults who may be affected by different resolutions of the tensions, and of the types and levels of disadvantage experienced by those older adults?
- Has consideration been given to whether solutions exist that may permit at least partial expression of both or all of the principles in tension?

If other groups are affected by laws or policies affecting older adults, and the needs of the two groups are seen to be in tension:

- Have the sources of the tension been examined to be sure that a tension truly exists?
- Have alternatives been considered that may meet the needs of both groups, such as inclusive design or providing greater options within the law or policy?
- Where the needs of two groups must be balanced, have the needs and circumstances of older adults been considered with equal attention and given equal respect?

6. Addressing the Needs of Older Adults Who Are Disadvantaged or at Heightened Risk

As noted above, changes associated with aging, together with the social, legal and institutional environment may create or exacerbate disadvantage or risk of harm for some older adults.

As part of taking the circumstances of older adults into account, and of moving towards full realization of the principles for all older adults, it is important to identify and address the needs of those older adults who are disadvantaged or at risk. Care must be taken to ensure that responses to disadvantage or risk are not based in ageism or in paternalism and do not actually increase negative outcomes for older adults or violate their rights. Therefore, this aspect of law or policy warrants careful scrutiny.

QUESTIONS FOR CONSIDERATION

Does the law potentially affect older adults who are disadvantaged or at heightened risk due to their:

- Living environment?
- Low socio-economic status?
- Health or activity limitation or disability?
- Social isolation?
- Compounded disadvantage due to their gender, sexual orientation, racialization, Aboriginal identity, language, immigration or citizenship status, geographic location, or other factors?

If so, does the law take into account the circumstances of these older adults in the:

- Level of or access to supports or benefits under the law?
- Measures to ensure access to information and education about the law?
- Access to supports and advocacy with respect to the law?
- Access to complaint and enforcement mechanisms with respect to the law?

With respect to these older adults, does the law increase or decrease the respect for, protection and fulfilment of the principles?

Does the law potentially increase risk or disadvantage for these older adults by:

- Increasing stigmatization of them?
- Reducing options for them?
- Exacerbating the sources of risk or disadvantage?
- Restricting or reducing access to redress for violations of their rights?

Does the law potentially decrease risk or disadvantage for these older adults by:

- Addressing the sources of risk or disadvantage?
- Enhancing access to rights or supports?
- Enhancing access to complaints or enforcement mechanisms?

E. How Are Older Adults Affected? Assessing the Implementation of Laws and Policies

The previous section included questions to assist in evaluating the substance of the law or policy. Equal attention must be paid to both the substance and also to the implementation of the law or policy, as many laws, practices and policies affecting older adults are positive on their face, but problematic in practice. Of particular concern are provisions related to information, training and education, and to access to complaint and enforcement mechanisms.

For more information see the following sections of the Interim Report:

- ***Identifying Ageism and Paternalism in the Law, see Chapter IV, Section G***
- ***Enhancing Access to the Law for Older Adults, see Chapter V, Section C***

1. General Considerations

Provision of adequate, appropriate human and fiscal resources are recurring issues for the effective implementation of laws, whether they are laws of general application or laws focused on older adults.

QUESTIONS FOR CONSIDERATION

Have sufficient human and financial resources been allocated for effective implementation and enforcement of the law?

- Are there mechanisms in place for identifying significant unmet needs for services or supports?
- Where resources are limited, are there clear, transparent and principled criteria and priorities for how scarce resources should be allocated?
- In programs of general application, where resources are limited, have the needs of older adults been given equal consideration with those of other groups?

Does the law include safeguards against its abuse?

Does the law clearly identify the individual or organization who is accountable for its fair and effective implementation?

2. Communication, Training and Education

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 laws, policies and practices that affect older adults. Unless these attitudes are addressed, they will inevitably affect the implementation of the law, no matter how well designed.

As well, those charged with implementing the often complex laws and policies affecting older adults must receive adequate ongoing training and education on the content of those laws and policies.

Finally, for older adults to be able to access laws and policies, and to meet their responsibilities, they must have meaningful access to information about their rights and responsibilities provided in a way that acknowledges and addresses their circumstances.

QUESTIONS FOR CONSIDERATION

Will anti-ageist implementation be supported through the provision of education for those charged with implementation on:

- Anti-ageism, including common negative stereotypes and attitudes towards older adults?
- The experiences and circumstances of older adults, including those of female, LGBT, racialized, Aboriginal, rural, newcomer, immigrant and other disadvantaged older adults?

Have those charged with implementation and enforcement for been provided with:

- Adequate training on the substance of the new law or policy?
- Regular ongoing training and education on the law, as staff turns over or new issues emerge?

Are mechanisms for informing individuals of their rights and responsibilities under the law accessible to all older adults, including through:

- Strategies for providing information to older adults living in remote areas?
 - Specific information distribution mechanisms for older adults living in congregate settings?
 - The provision of accessible materials for persons with disabilities?
 - Plain language materials or non-written materials for those with low literacy levels?
 - Culturally appropriate materials for diverse communities?
 - Strategies to provide information to older adults for whom English is not their first language?
-

Example: Providing Accessible Information for Older Adults and Service Providers - NICE Net

The National Initiative for the Care of the Elderly (NICE) is an international network of researchers, practitioners and students with a mandate to improve the care of older adults through initiatives related to networking and knowledge transfer. NICE has developed a range of practical tools to help older adults and those working in the field to better understand rights and responsibilities under the law. NICE has developed clear, plain-language resources for Ontario grandparents raising their grandchildren, for service providers concerned about potential elder abuse, for family members facing end of life issues, on consent to treatment, and other issues.

3. Ensuring Access to and Enforcement of Rights under the Law or Policy

Concerns regarding access to the law are, of course, not confined to older adults. Many disadvantaged groups find their access to their rights under the law limited in a variety of ways that may also affect older adults. There are also some circumstances that may *particularly* affect older adults. Barriers to access to the law may include ageism, paternalism and stereotypes; lack of information, training and education for both older adults and service providers; lack of adequate oversight mechanisms; lack of adequate mechanisms for recourse where a right has been violated; difficulties in accessing complaints-based systems; and failure to recognize and accommodate the needs of older adults and the limitations of adversarial dispute resolution systems.

QUESTIONS FOR CONSIDERATION

Have mechanisms been developed to ensure that older adults are informed about their rights and responsibilities under the law, and that they have access to the information necessary to seek access to their rights?

- Do they clearly set out how individuals can seek redress where they believe their rights have been infringed or the law not respected?
- Do the materials clearly set out where individuals can seek further information or supports for the complaints process?
- Is information available in disability-accessible formats?
- Is information available in multiple languages?

- Is information available to persons living in rural or remote settings?
- Is it available in plain-language?
- Is information available in non-written formats?
- Is information available to persons living in congregate settings?

Does the law include meaningful and effective complaint mechanisms to ensure that older adults who feel that their rights under the law have not been respected have avenues for redress?

If the complaints and enforcement system is a complex or multi-layered one, have sufficient information and advocacy supports been provided to ensure that older adults are able to navigate the system?

Does the complaints and enforcement mechanism include supports or advocacy measures to assist older adults who are disadvantaged or at heightened risk due to low-income, impairment or disability, social isolation, living environments or other factors in accessing and navigating the system?

- Are support or advocacy mechanisms available for these older adults?

If older adults must attend in person to access or enforce their rights:

- Are all offices accessible for persons with disabilities?
- Are all offices accessible to persons who do not have access to a vehicle?
- Are special provisions made for those who live in remote areas?
- Are special provisions made for those who are living in long-term care facilities?

Are access or enforcement mechanisms sufficiently low-cost to be within the means of low-income persons?

- If not, are financial supports or exemptions available to low-income older adults?
- Have assessments of the impact of costs taken into account potential impacts on persons who are living on fixed incomes, or whose only significant asset is their home?

Example: Information for Vulnerable Older Adults

Mandatory Rights Advice

Rights advice is a protection to ensure fairness and access to justice for individuals who are experiencing a significant change in legal status that affects their rights. In Ontario, there are a limited number of situations where rights advice is mandatory, which mainly involve patients in psychiatric institutions. Where rights advice is mandated, a formal rights advisor, who cannot be someone involved in the direct clinical care of the person in question, must provide information about rights to a person whose legal status has changed. If requested, the rights advisor can take steps to assist the person to challenge the change in the individual's legal status, for example by assisting the individual to apply for Legal Aid. Failure to provide timely rights advice can be a basis for invalidating the change in legal status.

Are forms for complaint processes available:

- In plain language and/or non-written formats?
- In a manner that will reach persons living in congregate settings?
- For persons who cannot access information via the internet?
- With supports for those who are unable to complete them without assistance?
- In the language of the persons affected?

Are mechanisms sufficiently timely to ensure that they have the capacity to provide meaningful remedies to older adults, particularly those who are of advanced age and may have relatively short life expectancies?

Where there are large, complex systems with significant impact on disadvantaged or at-risk older adults, have oversight mechanisms been put in place to ensure compliance with the law, particularly with respect to those particular groups of older adults who have been identified as disadvantaged, and who may not be able to access complaint-based mechanisms?

Do the complaint and enforcement mechanisms provide options that respect and support older adults who wish to enforce their rights in a way that preserves ongoing valued relationships and social bonds?

Is the complaints system transparent, so that information about processes and outcomes are easily available to individuals?

**Example: Respecting the Relationships of Older Adults
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 the older adult's conflicts, and to generate solutions which respect both the parties' ongoing relationship, and to 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.

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. Elder mediation will therefore require high degrees of skill and awareness on the part of the mediator, and will not be appropriate in all circumstances.

There are still few specialized elder mediation programs in Canada, and little research exists on the operation of these programs, making this an important area for further exploration.

Where violations of the rights of older adults are found to have occurred, does the law provide remedies that:

- Meaningfully recognize the harm that has been done to the older adult?
- Where appropriate, can ensure that steps are taken to prevent future violations of the rights of older adults?

F. Monitoring and Evaluating the Effect of the Law

Implementation and enforcement systems affecting older adults, particularly those older adults who are disadvantaged or at heightened risk, would benefit from consistent use of mechanisms to ensure accountability, transparency and effectiveness. Because there is a lack of monitoring and oversight for many systems disproportionately affecting older adults, it is difficult or impossible to determine whether older adults have effective access to those laws or the degree to which older adults are subject to abuses or violations of their rights.

Monitoring of the law and regular evaluation of its effects provides a strong foundation for effective law reform for the law as it affects older adults.

- ***For more information on Monitoring and Evaluating the Effect of the Law, see Chapter V, section C.7 of the Interim Report:***
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QUESTIONS FOR CONSIDERATION

Does the law include a mechanism to allow those affected, including older adults, to provide feedback on the effectiveness of the law and on any unanticipated negative consequences for older adults?

Does the law require that information about its operation and effectiveness be gathered and made publicly available?

Where the law provides significant discretion to those charged with its implementation, does it include additional reporting and monitoring mechanisms to ensure that this discretion is exercised consistently, fairly, transparently and in a principled manner?

Are those charged with implementing and oversee the law, program or policy required to regularly report on their activities and the effectiveness with which the law, program or policy is administered?

Does the law require regular review of its goals, to determine whether they are still meaningful and appropriate?

Does the law require regular review of the effectiveness of the implementation, whether the aims of the law are being achieved, and whether those aims remain appropriate and relevant?

If the law was developed as a partial response to an issue because of resource or other constraints, are there mechanisms in place to ensure that the issue is regularly reviewed and that progress is made towards better fulfilment of the law's aims?

Are the resources allocated to the law or policy regularly reviewed to ensure that they remain adequate and appropriate for its effective implementation?

**Example: Oversight Mechanisms
Long-Term Care Ombudsman Program**

In the United States, each state must, in order to receive funding under the *Older Americans Act*, establish a Long Term Care Ombudsman which can respond to the needs of long-term care residents. These Ombudsman have several responsibilities, including identifying, investigating and responding to resident complaints, protecting the legal rights of residents, advocating for systemic change, and providing information to residents and their families. Ombudsman programs vary in effectiveness from state to state, and often struggle with underfunding, and lack of authority to assess penalties. However, their combination of advocacy, systemic focus and individual complaint receiving mechanisms makes them a valuable complement to government survey agencies and private advocacy.