

LCO launches followup to frameworks for elderly, people with disabilities

BY JUDY VAN RHIJN
For Law Times

The Law Commission of Ontario has recently been turning the spotlight on the struggles of the elderly and people with disabilities. During the last year, the law commission completed two multi-year projects aimed at providing a set of principles for appraising all legislation, regulations, and policies related to the elderly and those with disabilities. It has now begun a followup project that will apply the frameworks to the thorny issues of legal capacity, decision-making, and guardianship.

Commission staff lawyer Lauren Bates notes both framework projects required a lot of research and provincewide public consultations. "An issue that came up very strongly from a wide range of stakeholders was that the area of legal capacity, decision-making, and guardianship urgently needs

a second look," she says. "The board of governors were hoping to take the first two projects and apply them to a specific area of law. Given such strong feedback, we proposed to do a project in this area and were approved."

The population under scrutiny includes both the elderly and people with disabilities. Ivana Petricone, executive director of the ARCH Disability Law Centre, says Ontario has good laws with respect to disability. But, she adds, "What gets lost is translating the laws into the lives of real people. We need to turn our minds to that."

One area frequently identified as rife with problems is that of substitute decision-making. "There is a lot of interest, supported by international work in the area, in supported decision-making," says Bates.

"Rather than move the locus of decision-making away from the person, it is possible to create a circle of support"



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Another problem area relates to powers of attorney. "There is a lack of understanding as to what powerful tools they are," says Bates. "We heard a lot about abuse of powers of attorney."

One challenge is the sheer diversity among the elderly and people with disabilities. "There

are areas of overlap and areas of difference," says Bates.

"Persons with an intellectual disability don't have the option of using a power of attorney. They are more likely to be dealing with guardianship issues. Another difference is that a disproportionate number of the disabled are living in poverty. One dynamic of older people is that they often have a house, a pension, and some income. There is a real incentive for financial abuse. So different life courses affect how different laws apply."

At the start of the framework projects, a working group of the Ontario Bar Association made submissions that the law commission should approach the task with a list of principles legislators and decision-makers should apply when addressing discrimination against the elderly and people with disabilities. Mark Berlin, chairman of the committee, is happy the law commission adopted that approach by naming

six principles in the frameworks: respecting dignity and worth, fostering independence and autonomy, promoting participation and inclusion, recognizing the importance of security, responding to diversity and individuality, and understanding membership in the broader community. "It speaks well for the law practising bar who work with this day in and day out," says Berlin.

The principles form the basis for evaluating current laws and policies and developing new ones. The framework uses an eight-step approach to holding up legislation and decisions against the principles. "Principles are very flexible and aspirational," says Bates.

"They give us something to aim for so that we can progressively move forward. They cover a wide range of circumstances and fit very well with a law reform agenda."

But the frameworks involve a different type of report from the law commission's typical approach. "We trust some day the government will be back to legislating," says Petricone.

"The frameworks are meant to be tools for lawmakers but also for policymakers and to assist those of us who make submissions to the government on laws, policies, and regulations about the kind of principles it should take into account."

Berlin also sees value in the principles. "It will really ensure that people look at it from that perspective that full participation in society is a right, not a privilege," he says.

"It is a call to arms for decision-makers that this is the lens through which you should examine and analyze."

Berlin is also confident the different ministries will be able to work collectively. "We recommended that they look at both the elderly and the disabled in a holistic fashion."

The new project is now underway as the first meeting of the advisory group took place on Jan. 31. Bates expects the project will take a few years to complete "because the area is so complex and so many people are affected in so many ways."

Law reform is the ultimate goal along with changes in practice and policies. The original OBA submission noted that although there are gaps in the law that enable institutional administrators and substitute decision-makers to ignore the rights of people with disabilities, general ignorance of the nuances of capacity creates the most obvious barrier.

"One of the things we heard was that, while some of the issues stem from the way the legislation is drafted, some involve implementation," says Bates.

"We can make recommendations that can have a very positive effect on practice without changing the statute." **LT**



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