

A Framework for the Law as it Affects Older Adults:

Advancing Substantive Equality for Older Persons
Through Law, Policy and Practice

FINAL REPORT

April 2012



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. It is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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EXECUTIVE SUMMARY

I. Introduction

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

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

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

This *Final Report* is based on consultation and extensive research undertaken by the LCO, and is a companion document to the *Framework for the Law as it Affects Older Adults*.

II. Taking the Circumstances of Older Adults into Account

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

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

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

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

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

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

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

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

III. Addressing Ageism and Advancing Substantive Equality: Developing a Principled Approach

For the purposes of this project, ageism may be defined as a belief system, analogous to racism, sexism or ableism, that attributes specific qualities and abilities to persons on the basis of their age. Ageism may manifest with respect to older adults in attitudes that see them as less worthy of respect and consideration, less able to contribute and participate in society, and of less inherent value than younger people. Ageism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture.

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

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

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

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

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

There are challenges in applying these principles. The application of the principles cannot be static. The circumstances of older adults will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of the experience of aging continue to evolve, and new perspectives emerge. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

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

As well, attention must be paid to the relationships between principles. Frequently, the principles will support each other; for example, initiatives that increase the inclusion and participation of older persons will generally also thereby promote respect for their dignity and worth. However, sometimes two or more of the principles may be in tension with each other in a particular case. In such cases, careful thought must be given to analyzing and responding to this tension. In assessing tensions between principles, it is essential to be sensitive to the contexts in which these tensions arise, as well as their larger social context, and the overarching value of substantive equality to which the principles were intended to respond.

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

The term “law” as it is used in this project refers not only to statutes, but also to regulations, to the policies through which they are applied, and to the strategies through which statutory provisions, regulations and policies are implemented and experienced by older adults. The implementation of laws is as important as their substance. Laws may be beneficial in intention and on paper, but in practice fall far short of their goals or even have negative affects.

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

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

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

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

V. Deepening Our Understanding of the Implementation Gap: Access to the Law

A key concern in the law as it affects older adults is the “implementation gap”, wherein laws which on their face are neutral or positive with respect to older adults are in practice unproductive or negative in their effects, due to inadequate implementation and poor enforcement. One important aspect of the implementation gap is access to the law for older adults, meaning the existence (or lack thereof) of effective mechanisms for accessing and enforcing existing laws.

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

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

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

A review of key access mechanism available to older adults reveals a number of systemic barriers to access to the law for older adults that may play a role in the implementation gap, including:

1. Ageist or paternalistic attitudes on the part of those implementing the law;
2. Inadequate training and information on the requirements of the law for those charged with implementing it;
3. Lack of adequate oversight mechanisms for key legal rights and protections;

4. Lack of appropriate mechanisms for recourse where rights have been violated;
5. Lack of meaningful remedies where rights appear to have been violated;
6. Over-reliance on complaint-based systems for redressing individual or systemic issues;
7. Failure to recognize and accommodate the needs of older adults in the set-up and delivery of access mechanisms; and
8. Adversarial systems that may jeopardize on-going relationships of central importance to the well-being of the older adult whose rights have been violated.

Measures to ensure access to the law and address the implementation gap for older adults include:

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

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

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

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

VII. Next Steps

It was the intent of the LCO in developing this *Report*, and the *Framework* which it supports, to assist in developing a better understanding of the effects of law, policy and practice on the growing cohort of older adults in the population, and in identifying positive approaches which will advance substantive equality for older adults. The LCO will work to disseminate the *Report* and *Framework* broadly to the groups identified above. As part of this broader strategy, the LCO will work towards the development of plain language materials related to the *Framework*.

The LCO realizes that this is an evolving area. The *Report* and *Framework* should not be considered, and were not intended to be, a final word on the matter. Rather, the LCO intends that these will form the foundation of further research, discussion and analysis, and that the *Framework* can be adapted for use in a variety of contexts. The LCO

itself intends to apply this *Framework*, as well as the results of the sister project on *The Law as it Affects Persons with Disabilities*, to a law reform project focussed on Ontario's laws related to capacity and guardianship, to commence in summer 2012.

VIII. Recommendations

This Chapter briefly sets out the recommendations of the LCO for the future use of the *Framework* by a range of public and private actors and its review and evaluation after a period of seven years.

I. INTRODUCTION

A. Background

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

This is the Final Report for the LCO's project on the law as it affects older adults, and sets out the results of the LCO's research and consultations.

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

Demographic changes have in recent years drawn increased attention to the needs and circumstances of older adults. As has been widely noted and as is further detailed in Chapter II of this *Report*, Canada's (and Ontario's) population, along with that of many other nations, is aging significantly. The number of Canadians over the age of 65 is expected to increase from 4.2 million in 2005 to 9.8 million in 2036, and their share of the population will almost double, from 13.2 per cent to 24.5 per cent.¹ This demographic shift has significant implications for all areas of public policy. As the Senate Special Committee on Aging has stated,

The challenge of an aging population goes far beyond the responsibilities of the federal level of government as defined in the Constitution. It must be a concern for every Canadian, for every province, territory and municipality, for every business large and small, for every volunteer organization and NGO.²

With the aging of Canada's population, the importance of developing sound legal and public policy approaches to issues affecting older Canadians will continue to grow.

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

The LCO's Board of Governors therefore concluded that this is an area of law that would benefit from a comprehensive analysis, and the development of a more holistic

and principled approach. A coherent evaluative analysis for this area of the law can assist in raising the profile of under-examined issues and in spurring and supporting law reform in the many areas where it is needed.

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

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

- the needs and values of seniors are respected
- the contributions of seniors in all aspects of life are acknowledged
- the diversity of the seniors' population is taken into consideration
- activities that affect seniors are approached in a holistic manner that considers linkages and interactions with other policies and programs
- the cumulative impact of change and the implications for seniors have been thoroughly considered
- the concerns and issues of today's seniors and of coming generations of seniors are considered.³

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

The framework developed through this project may be of assistance to those who develop laws and policies, such as legislators, policy-makers and private actors who develop policies and programs affecting older adults; to those who interpret laws, such as courts and tribunals; and to those who identify needs and advocate for reforms.

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

2. *Shaping the Project: The Process*

Given the broad and multi-faceted issues raised by this project, it was planned as a multi-year, multi-stage project.

Older adults are an extremely diverse group, ranging widely in histories, identities and circumstances. Every law that affects the general populace will affect older adults, sometimes in ways that are similar to how it affects others but often differently, and, importantly, often in very different ways for various groups of older adults. The area of “elder law” itself – that area of law dealing specifically or disproportionately with older adults – is extremely complex. As just one example, the law relating to capacity and substitute decision-making has itself been the subject of numerous law reform endeavours and voluminous reports.

Recognizing the challenges inherent in this project, the LCO therefore commenced its work with a “Pre-Study” process, aimed at identifying themes, issues and approaches for the overall project. In May of 2008, the LCO launched the Pre-Study with a *Consultation Paper: Shaping the Project*.⁵ This Paper was posted on the LCO website and distributed to a range of academics and researchers, legal clinics, community organizations and government bodies. The pre-study *Consultation Paper* provided a brief overview of themes and issues identified through its preliminary research, and requested feedback from stakeholders on the scope and design of the Project, including key issues and principles. The LCO received written submissions from 21 organizations, and held meetings with six organizations and individuals.

The LCO reported on the results of this Pre-Study and its initial research in a second Consultation Paper issued in December 2008.⁶ In this *Consultation Paper*, the LCO adopted five preliminary principles: independence and autonomy; dignity and respect; participation and inclusion; security; and respect for diversity. It also identified several thematic areas for focus, including ageism and the law, the relationships of older adults and the living environments of older adults. This input shaped the considerable research undertaken by the LCO for this project.

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

In the fall of 2010, the LCO co-hosted the 2010 Canadian Conference on Elder Law, in partnership with the CCEL (affiliated with the British Columbia Law Institute) and ACE. The Conference brought together a wide range of academics and experts, professionals,

service providers, and community and advocacy organizations to consider the themes of ageism and the law, law reform and older adults, and access to justice for older adults. Approximately 100 presenters and speakers shared their research and ideas, and the Conference resulted in a significant number of new papers, which are available through the LCO website at <http://www.lco-cdo.org/en/ccel-2010-papers>.

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

In the summer of 2011, the LCO released an *Interim Report*, which included a *Draft Framework for an Anti-Ageist Approach to the Law*. These documents were widely circulated, and the LCO conducted public consultations through the fall of 2011. These consultations included:

1. the receipt of submissions from several individuals and organizations;
2. a consultation questionnaire distributed to individuals across the province, which received almost 300 responses;
3. six focus groups (totaling 90 individuals) with groups of older adults, including newcomers, residents of long-term care homes, rural residents, women, informal caregivers, and lesbian, gay, bisexual and transgendered older adults;
4. a full-day Stakeholder Event which brought together approximately 30 experts and organizational representatives from a range of perspectives;
5. a small number of individual interviews;
6. a meeting with the members of the Ontario Seniors' Secretariat Liaison Group.

A full list of organizations and experts participating in the consultations can be found in Appendix B of this *Report*.

Through this process, the LCO gathered extensive information on the law and older adults. While not all of the information gathered and perspectives shared could be specifically referenced in this *Report*, they are reflected in the ultimate outcomes of this project.

3. The Sister Project – Persons with Disabilities and the Law

One of the other initial LCO projects approved by the Board of Governors was a project on the law as it affects persons with disabilities. The aim of that project was to develop a coherent framework for the law as it affects individuals with disabilities by articulating a set of principles and questions, rooted in the lived experience of these individuals, that could form the basis of a consistent analytical framework for this diverse and important area of the law.

Given the similarity in their aims, the project on the law and older persons and the project on the law and persons with disabilities were considered as “sister projects” and

assigned to the same Project Head to ensure consistency in approach, the opportunity to learn from each project aspects that could inform the other, and appropriate consideration of overlapping issues.

Preliminary work on the Law and Persons with Disabilities project began in early 2009 – that is, several months after work commenced on this project. The projects have proceeded in tandem and have been completed within a few months of each other. As a result, it has been possible for the two projects to build on each other.

As is further detailed in Chapter II of this *Report*, there is a challenging relationship between impairment, disability and aging. There is a tendency to inappropriately conflate aging and disability, as well as a ‘normalizing’ of impairment during aging, so that impairment in older age may not lead to a perception of “disability” as would be the case for a younger person. There is further a tendency to overlook the experiences of those who have aged with a disability and how the experiences of this group differ from those of individuals who age *into* disability.

There are significant parallels between the experiences of older adults with the law and those of persons with disabilities (considered as distinct groups). Both groups incorporate considerable diversity despite general assumptions of homogeneity. Both experience a range of negative attitudes and stigma, and have a disproportionate experience of disadvantage and marginalization. As well, both groups are subjects of extensive laws and bureaucracies intended to address their distinctive experiences, and so share the experience of dealing with the complexities, fragmentation and unintended barriers associated with such laws, programs and policies. There are also, of course, significant differences between the two groups. While both groups are subject to stigmas and stereotypes, there are significant differences in the particular attitudes and barriers experienced by each group. The effect of the life course on circumstances and identities cannot be ignored – particularly for those older adults who have not experienced discrimination or marginalization until the onset of older age.

The *Frameworks* therefore must take careful account of both the similarities and the differences, and resist the common tendency to conflate the two. At the same time, the *Frameworks* must be able to address those who fall within both groups – those who have aged *with* disabilities and those who have aged *into* disabilities – as well as recognizing the differences between these two experiences. Finally, the *Frameworks* must reject both ableism and ageism, as well as looking for opportunities, where appropriate, to apply novel or successful concepts or approaches from one group to the other.

4. The Primary Goal: Advancing Substantive Equality in the Law

The concept of “ageism”, and the accompanying idea that older persons may be the subject of systemic disadvantage is relatively recent, generally being traced back to the work of Dr. Robert Butler beginning in the late 1970s. There has been growing recognition of the role of negative attitudes and stereotypes in shaping the experiences

and treatment of older persons, and the importance of addressing these attitudes and stereotypes in order to advance substantive equality for older persons.

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

Thus, older persons, like other groups who experience negative attitudes, stigma and systemic disadvantage, may benefit from approaches focused on advancing substantive equality.

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

5. This Final Report and Framework

The LCO's *Framework for the Law as it Affects Older Adults*, the culmination of this project, is appended to this *Report*. This *Framework* is intended to guide 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 practices promote positive outcomes for these members of society. It is composed of principles and factors to take into account in applying the principles, and uses a step-by-step approach

This *Report* sets out the research and analysis which form the basis for the *Framework*, and provides extended examples of its implications and implementation. It is the product of the LCO's extensive research and consultation as outlined above. It outlines in detail the key components of the LCO's proposed approach to the law as it affects older persons. These include

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

Finally, an example of the application of this analytical framework is set out with respect to the Ontario law regarding access to home care supports.

In order to provide context and nuance to the analysis and the *Framework*, we have included throughout detailed examples of particular issues from the law as it affects older adults, whether as illustrating common barriers in the law or best practices for an approach to the law that advances substantive equality. The examples are selected from issues that were identified through our research and consultation as being of particularly urgent concern to older adults.

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

In developing the *Framework*, the LCO has employed a number of approaches as starting points.

1. The LCO's Mandate and Access to Justice

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

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

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

2. Building on What Has Been Done

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

- 1. The National Framework on Aging (NFA)⁷ and Policy Development Guide:** The NFA was developed jointly by the Federal/Provincial/Territorial Ministers Responsible for Seniors in 1998, and supplemented by the *Policy Development Guide* released in 2009. It adopted as its vision statement

“Canada, a society for all ages, promotes the well-being and contributions of older people in all aspects of life”, and identified five inter-related principles of dignity, independence, participation, fairness and security.

2. **United Nations Principles for Older Persons⁸ (IPOP):** The 1991 IPOP, together with the *Madrid International Plan of Action on Ageing (MIPAA)*⁹, are the most important international documents related to older persons. The IPOP provide a broad and general framework of principles, applicable across a wide range of cultures and circumstances, which can guide states in their policy and program development.
3. **The Senate Special Committee Report on Aging:¹⁰** The Committee released its Final Report in the spring of 2009. The Committee reviewed public programs and services for seniors, identified the gaps that exist in meeting their needs, and examined the implications for service delivery in the future as the population ages. In developing its Report, the Committee consulted widely and across the country with both older adults and organizations that work with or for them.
4. **Ontario Human Rights Commission Project on Human Rights and Older Persons:** In 1999, in order to mark the International Year of Older Persons, the OHRC launched a project on human rights and older persons. Based on its research and public consultations, the OHRC developed a consultation report and recommendations, *A Time for Action*,¹¹ and a *Policy on Discrimination Against Older Persons because of Age*,¹² which set out an analytical framework for understanding ageism and age-based discrimination against older persons in the human rights context.
5. **The Advocacy Centre for the Elderly (ACE):¹³** ACE, operating since 1984, was the first legal clinic in Canada with a specific mandate and expertise in legal issues of the older population. It provides both individual and group client advice and representation, as well as conducting public education and law reform activities. In so doing, ACE is guided by the overarching principle that “seniors are people” – they are presumed to be capable of making decisions for themselves and have the right to make foolish decisions if they so choose. ACE has also focused attention on the phenomenon of “good law/bad practice” and widespread non-compliance with or paternalistic application of laws meant to protect the rights of older adults.
6. **The Canadian Centre for Elder Law (CCEL):¹⁴** CCEL, established in 2003, is an offshoot of the British Columbia Law Institute, British Columbia’s law reform agency. It is a national, non-profit centre focused on exploring the legal issues of particular legal interest to older Canadians, and has conducted research and law reform projects on a variety of issues, including viatical settlements, adult guardianship laws, reverse mortgages, predatory lending and elder mediation.

- 7. Ontario Public Service Inclusion Lens:** The OPS *Inclusion Lens* is a comprehensive analytical tool developed by the OPS Diversity Office to assist OPS staff in considering various dimensions of diversity in developing, implementing or reviewing policies, programs or services. Seventeen dimensions of diversity are identified in this tool, including (both younger and older) age, disability, gender and socio-economic status.
- 8. Health Equity Impact Assessment Tool:** This tool was developed by the Ministry of Health and Long-Term Care in collaboration with Ontario's Local Health Integration Networks as a means of supporting improved health equity and reducing avoidable health disparities between population groups. It provides a step-by-step approach to analyzing how a particular program or policy may affect population groups in different ways.¹⁵

As well, many of Canada's law reform agencies have undertaken important projects on various issues affecting older adults. These include the Law Commission of Canada's project on *Law and the Relations Between Generations*; the Nova Scotia Law Reform Commission's projects on Grandparents' Rights and on Seniors' Only Housing; and the Western Conference of Law Reform Agencies project on enduring powers of attorneys.¹⁶

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

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

3. A Holistic and Contextual Approach

As the LCO's *Strategic Plan*¹⁷ outlines, the LCO undertakes both relatively narrow, focused and technical projects as well as large, socially oriented projects that require multi/interdisciplinary approaches and broad consultation and collaboration. This project falls into the second category.

In understanding the experiences of older persons with the law, the LCO has considered not only relevant legal research, but also findings from the disciplines of social science, medicine, gerontology and public policy. The LCO has sought to understand the social, economic and medical contexts in which older adults encounter and experience the law, and to find approaches which will enable law-makers and policy-makers to take these circumstances into account in designing and implementing laws and policies that may affect older persons.

This includes consideration of a life course approach to the experiences of older adults, as described in section C of this Chapter.

4. A Principles-Based Approach

The LCO is building on the foundation established by the NFA and the IPOP, as well as the work done in developing the *Seniors' Mental Health Policy Lens* and the *Prevention of Elder Abuse Policy and Program Lens*¹⁸ in basing its approach to the law as it affects older adults on a set of principles. Principles can provide a normative framework for the law and identify the goals which laws and policies ought to seek to achieve with respect to older persons. A framework that is based on principles can provide guidance while remaining flexible and applicable in changing circumstances.

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

It is also necessary to understand the principles in relationship with each other, and the ways in which, in any particular context, they may or may not support each other. In certain situations, the principles themselves may be in tension and it may therefore be necessary to determine how those tensions might be resolved. This presents a challenge in the implementation of a principles-based approach, but has the benefit of providing a means of articulating and analyzing the complexities inherent in the law as it affects older adults.

Finally, as part of a principles-based approach, one must recognize that fulfillment of the principles is not a static process, and that laws and policies must continue to evolve as understandings and circumstances develop. Even where one would aspire to implement all the principles to the fullest extent possible, there may be other constraints that might limit the ability of law and policy makers to do so. These constraints may include policy priorities or funding limitations among others. That is, it may be necessary to take a progressive implementation approach to the full realization of the principles. A progressive implementation approach involves concrete, deliberate and targeted steps implemented within a relatively short period of time, with a view to ultimately meeting the goal of full implementation of the principles. At the same time, recognition of the principles allows us to identify the distance still to go to advance substantive equality for older adults.

5. Including the Experiences and Perspectives of Older Adults

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

The LCO's Fall 2011 Consultations, and in particular the consultation questionnaires, individual interviews and focus groups, reflected this commitment on the part of the LCO to ensure that the voices of older adults were heard directly in the development of the *Framework*. The comments of older adults, as well as of the organizations that represent, serve or advocate for them, are included throughout this *Report*.

6. Recognizing the “Implementation Gap” – Taking a Broad Approach to “the Law”

There are laws whose provisions are problematic in terms of their effects on older adults, whether because they incorporate ageist attitudes into their substance or because they fail to take into account the realities of existence for older persons. In many cases, however, the law is sound on paper, but problematic in practice. Laws, policies and practices that are in theory neutral or even intended to benefit older persons may fall short of their goal or have unintended negative consequences. There are many reasons for this, including negative attitudes on the part of those charged with implementing the law or policy, failure to provide age-related accommodations for accessing programs or services, adversarial approaches to program implementation, resource limitations, or lack of accountability, monitoring and transparency.

This points us to the importance of adopting a broad understanding of “the law” when applying the principles. A close analysis of the language of statutes and policies is important, but it is equally important to develop a strong understanding of the effects of the law as implemented. For this reason, the LCO has adopted a broad definition of “the law” for the *Framework*, as including not only statutes and regulations, but also the policies through which they are applied, and the strategies and practices through which they are implemented.

Of course, to understand the effects of the law, we must hear directly from those affected by it – both those charged with implementing it, and the persons whose lives are shaped by it. In this way, the necessity of addressing the “implementation gap” points us again to the importance of including and respecting older persons in the process of developing and reforming the law.

7. Contributing to an Evolving Discussion

Elder law itself is a relatively new field. Although in the United States work on these issues pre-dated attention in Canada and the *Older Americans' Act* of 1965 drew attention to issues of nutrition, socialization and housing for older persons, it was not until 1979 that the American Bar Association established its Commission on the Legal Problems of the Elderly, and it was not until the mid-1980s that the National Academy of Elder Law Attorneys was formed.¹⁹ It is now, however, a rapidly expanding field.²⁰

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

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

This is therefore very much an evolving area of the law. While the *Framework* reflects current understandings the LCO realizes that this project cannot provide the final word in this area. Thus, the LCO recognizes that the *Framework* and its application must develop over time, and hopes that users will adapt the *Framework* to meet their needs as they change.

C. Theories for Understanding Aging and the Law

Reflecting the relatively recent emergence of the field of elder law and of the concept of ageism, little work has been done until recently to develop a cohesive theoretical approach to elder law.²¹ However, there exist a number of approaches developed in other areas that may be valuable in grounding an approach to age and the law. This is not meant as a comprehensive review of all possible theoretical approaches that might apply to older adults and the law, but to identify some useful approaches that are compatible with the starting points identified by the LCO.

Social Models: The experience of aging is popularly viewed mainly as an inevitable biological process, and the challenges that older persons face, such as social isolation and exclusion, difficulty accessing employment or services, or the necessity of leaving one's home to access supports, are seen as the unfortunate but unavoidable effects of this biological process. This perspective tends to obscure the effects that the social environment has on the experience of aging and older age. The use of the social model, influential in feminist, anti-racist, disability rights and other movements, can provide a broader perspective from which to understand the experiences of older persons.²²

While the experience of older age has some roots in the biological aspects of aging, it is also profoundly shaped by the social environments in which aging takes place – the attitudes which we hold towards aging and older persons, the social supports that are or are not available to older persons and their families, the physical environments in which older persons work, live, and access services, and similar factors. The barriers that older persons face in employment, in living environments, and in participation in their communities arise as much from their environments as from the physical and mental changes that may arise during the aging process. In this light, problems associated with aging are societal problems, and not just individual ones.

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

Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is bestowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspirations can be directed.²³

The *Charter*, particularly in its equality rights provisions, has profoundly shaped Canadian notions of citizenship, although the diversification of Canadian society complicates these notions.²⁴ Michael J. Prince, in employing a citizenship discourse to advance policy reform related to disability rights, articulates five dimensions of citizenship: citizenship, legal and equality rights, democratic and political rights, fiscal and social entitlements, and economic integration.²⁵

Rights-Based Approaches: Discussions of elder law in Canada have largely focused on older adults as users of health care services and as recipients of care. This has promoted a vision of older adults as passive consumers and care recipients rather than as rights-bearers, and advocacy efforts have focused more often on improvements to service provision than on empowering older adults and securing rights. It has been suggested that current efforts at reform might be strengthened by a greater focus on elder rights as civil or human rights. Such an approach has the potential to change attitudes towards older adults, promote active engagement among this group, and embrace the right to informed choice.²⁶

Universalism: Universal (or inclusive) design is the development of environments, products and policies to “be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. The intent of universal design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost.”²⁷ Universal design is intended to benefit people of all ages and abilities.

The universalism model, mainly explored in the context of the disability rights movement, posits that all people exist along a continuum of abilities and that people’s abilities will vary along this continuum throughout their lives.²⁸ This acknowledgement of the near universality of impairment highlights the way in which the line between disability and non-disability is socially and politically constructed.²⁹ This approach demands a widening of the range of what is considered “normal” in the context of human abilities, with the result being that more flexibility and adaptation is required in social, political and physical structures.³⁰ To put this principle into action, inclusive design with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.³¹ It has been

argued that this approach, with its focus on inclusive design and “normalization” of differences, has the potential to spur the systemic reform for the law as it affects older adults, and to promote optimal independence and participation in all areas of society, including employment, housing and health care.³²

There are, of course, limits to the ability of universalism and inclusive design to remove or prevent barriers. In some cases, individual accommodation will be required in order to ensure equal access to a building, information or a program.³³ There are also situations where competing needs make it challenging to identify inclusive design solutions. As a simple example, curb cuts, which improve access for persons with mobility disabilities and families pushing strollers, increases difficulties for persons with low vision who require a demarcation of the end of the sidewalk.

Multi-dimensional analysis: Given the predominance of women among older adults, the LCO recognizes the importance of employing a gender-based analysis of law and aging.³⁴ The intersection of disability with old age makes it essential to bring an anti-ableist approach to this area of law. As well, recognizing the diversity of older adults, the LCO has also employed anti-racist and anti-heterosexist approaches.

Life Course Approach: The health, wellbeing and economic and social security of older adults will inevitably be significantly shaped by their experiences as children, youth and adults. For example, the World Health Organization has pointed out that policy on health and aging should be shaped by the recognition that the origins of risk for chronic conditions such as diabetes and heart disease begin in early childhood and are shaped and modified by factors across the life span, such as socio-economic status. Thus, the risks of non-communicable disease should be addressed throughout the life course, in order to enhance opportunities for health and active aging.³⁵ The NFA recommends that policy developers consistently give consideration to the cumulative impacts on later life of policies and programs targeted at earlier life stages.³⁶

Thus, in understanding the impact of laws, programs and policies, it is important to consider the full life course of older persons. The life experiences of each of us will profoundly shape the resources and perspectives we bring to each stage of life. Barriers or opportunities experienced at one stage of life will have consequences that will reverberate throughout the course of life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of individuals. That is, the impact of laws must be understood in the context of every stage of life, from birth to death, and how these stages relate to each other.

This Project therefore recognizes that the adoption of a life course approach to aging can enhance understanding of the experiences and circumstances of older adults and support the development of more effective policy approaches, and applies a life course analysis to law and policy related to aging as appropriate. For example, the Keynote Speaker at the 2010 Canadian Conference on Elder Law, Mr. Justice Murray Sinclair,

Chair of the Truth and Reconciliation Commission, which has a mandate to learn the truth about what happened in the Canada's residential schools for Aboriginal children and to inform all Canadians, highlighted how the early experiences of Aboriginal older adults with residential schools and the historic relationship of Aboriginal Canadians with the law continues to shape how Aboriginal older adults relate to law and government.

A life course analysis assists us in focusing on individuals as the most appropriate unit of analysis for policy decisions; track the effects of policies over time; and to examine the roles of people in relation to a range of different social institutions.³⁷

It is important to recognize that the life course will vary based on a range of factors, such as gender, education, racialization, place of birth, sexual orientation and the presence of a disability. For example, women and men on average continue to have different patterns of labour force participation, with women's labour force participation being significantly shaped by their greater carriage of caregiving responsibilities.³⁸ This has significant implications for old age, affecting the retirement patterns, income security and social networks of men and women. Public policy must take into account these differing life course patterns.

The adoption of a life course analysis supports the recognition of the diversity of older persons. Because of the impact of varying life courses, diversity among individuals tends to increase, rather than decrease, with age. Older adults are not a homogenous group, and understanding their experiences with the law requires a nuanced understanding of the impact that differences in economic status, geographic place of residence, early education opportunities, work experience, age, gender, racialization and multiple other factors play in their experience of law.

D. Using the Framework

Based on the LCO's research and consultations, the goal of the project was to develop a *Framework* that can guide 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 practices promote positive outcomes for these members of society.

The *Framework* has been developed for use by

- policy-makers, courts and legislators;
- advocacy organizations and community groups that work with older people and deal with issues affecting older adults; and
- public and private actors that develop or administer policies or programs that may affect older adults.

The *Framework* is intended to be applicable across all laws and policies, including both those that apply specifically to older adults and those that affect older adults as

members of the general population. As it is general in this sense, some may find it useful to adapt it to their own area of law and policy.

Given the breadth of the issues surrounding older adults and the law, as well as the continual evolution in circumstances and understandings, it is not the purpose of the *Framework* to point to simple, definitive answers to all of these difficult issues. Rather, the *Framework* is intended to assist law and policy-makers to

1. consider and apply a consistent set of principles in developing laws, policies and practices that may affect older persons;
2. ensure that potential barriers and sources of ageism in laws and policies are identified and addressed; and
3. take into account key aspects of the relationships of persons with disabilities with the law.

The LCO aimed to develop a *Framework* that is

1. **holistic**, bringing together the various principles and elements;
2. broad and flexible enough to **apply across contexts**, so as to be able to address the breadth of experiences of older adults and the many different contexts in which they must interact with the law;
3. reflective of the **diversity of experience and identity** among older adults;
4. sufficiently **practical and specific** to provide meaningful guidance for the development of law and policy, and to assist users in concretely understanding the implications of the principles;
5. **useable** in its structure, layout and language, to ensure easy usage as a practical tool.

The *Framework* takes a step-by-step approach to evaluation, including context, questions and practical examples.

The *Report* supports the *Framework* by providing

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

E. Some Comments on Terminology

There is no generally accepted term used to refer to persons who are “older”. Terms in common usage include “seniors”, “elders”, and “older adults”. The terms “Third and Fourth Agers” are also in use, although more rarely.³⁹

The term “seniors” is widely used, and is perhaps the most common term in general parlance. It is frequently used in government, particularly in association with age-specific government programs such as pensions and income-supports. As such, it is often associated with a chronological approach to aging and used to identify those who have passed the legal threshold for qualifying for important programs such as Old Age Security and the Canada Pension Plan. For these reasons, Statistics Canada uses the term specifically to refer to persons age 65 and older.⁴⁰

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

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

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

Depending on how it is defined, “old age” can embrace a very considerable span of time, covering thirty years or more. Over such a lengthy span of time, the circumstances of any individual are likely to change appreciably, such that the term obscures significant variance in circumstances. Therefore, older adults are frequently broken down into subgroups – the “young old” aged 65 to 74, the “middle old” aged 75 to 84, and the “old old” or “frail old” aged 85 and older – on the basis that there are significant differences in health, participation, income, living arrangements and other key indicators among these three groups.⁴¹ Some have raised concerns that, while the use of these subgroupings aims to reduce stereotypes about older adults, the terms retain the problem of obscuring the great individual diversity in the aging process, and may only succeed in pushing ageist stereotypes and attitudes further back, onto the “frail old” sub-group;⁴² therefore, while acknowledging that barriers and experiences may continue to evolve throughout the lifespan, this is not a practice that the LCO will adopt.

II. TAKING THE CIRCUMSTANCES OF OLDER ADULTS INTO ACCOUNT

A. Taking Older Adults into Account

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

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

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

The following sections of this Chapter outline some basic elements of the experiences of older adults. It is clearly not intended to be exhaustive: this would be beyond the range of possibility for any but the most voluminous document. Rather, it is intended to suggest some factors with respect to older adults that should be taken into account when designing laws or policies.

Further, this discussion of the experiences and circumstances of older adults focuses on those aspects that may impact older adults’ relationship with the law. Chapters IV and V of this *Report* outline some key aspects of *how* older adults interact with the law, including some laws that older adults are particularly likely to interact with and the ways in which they may access law and the legal system. For example, older adults are likely to encounter the law in the context of ongoing relationships, whether with family

members or with key institutions, like long-term care homes. As another example, the law is likely to be relevant at key transition points in the lives of older adults – from paid employment to retirement and access to income security programs, for example, or from living in their homes in the community to some form of supported or congregate living. This Chapter’s brief consideration of the circumstances of older adults is intended to assist in understanding that legal and policy context.

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

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

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

1. Age as a Category

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

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

With growing attention to social policy issues related to older adults, and to barriers and negative attitudes faced by older adults, there has been a move to re-examine the use of age as a category: a notable example is the Law Commission of Canada's project, *Does Age Matter? Law and Relations Between Generations*.⁴³ There has been a growing recognition that age distinctions, like distinctions based on race, sex, sexual orientation or disability, are not always based on need and can be hurtful, undermine the dignity of older persons and have significant negative impact on older persons. The Ontario Human Rights Commission (OHRC) has noted that:

Age discrimination is not seen as something that is as serious as other forms of discrimination, despite the fact that it can have the same economic, social and psychological impact as any other form of discrimination.⁴⁴

Indeed, as is discussed in Chapter IV of this Report, some decisions of the Supreme Court of Canada suggest that age-based distinctions may be viewed in law differently (and less critically) than distinctions based on other enumerated grounds, such as disability or sex.⁴⁵

Age-based distinctions may be based on ageist stereotypes about the abilities, worth and contributions of older persons. They may also themselves reinforce ageist thinking: it has been pointed out that the use of categories is unavoidably homogenizing and can foster tensions between social groups. The use of age as a category over-emphasizes the importance of chronological age in determining a person's likes and dislikes, abilities and limitations, hopes and fears, and tends to blur the perception of older adults as unique individuals. The Law Commission of Canada pointed out that:

The categorization of people into age groups for the purpose of awarding benefits or imposing restrictions has a number of disadvantages. Categories lead to comparisons and encourage people to emphasize differences between age groups; this can lead to stereotypes and incorrect assumptions. Categorization can also fail to recognize similarities between age groups and differences within age groups.⁴⁷

The focus on making distinctions and counting people "in" or "out" based on certain characteristics may detract from the principle of "inclusive design". That is, instead of focusing on characteristics assumed to be associated with age and aging, one might more productively focus on how to design programs and policies to include the needs and circumstances of all, regardless of age or abilities.⁴⁸ This does not or should not mean ignoring differences, including those based on age or abilities; rather, it requires us to recognize variation as part of the human condition and to embrace that variation to the degree possible in our plans and designs.

A number of alternatives to the use of age as a category have been proposed, including focusing on key transition points (such as withdrawal from the labour force or relocation into a long-term care setting), using generational criteria, or using self-identification.⁴⁹ Of course, these alternatives may not all be appropriate for all purposes – it is, for

example, hard to imagine an income support program based solely on self-identification – and may frequently be more complicated and expensive to implement than age-based categories.

However, while use of age categories risks reinforcing ageist thinking, it is at the same time indispensable in identifying and describing institutionalized ageism. Without the use of age as a marker in social science research, we would not, for example, be able to identify and attempt to redress age-based disparities in income, access to opportunities or provision of services. Ageism cannot be combated without measuring differences across the lifespan. Without some recognition of shared identity and shared interests, older adults may not be able to undertake advocacy and empower themselves to combat ageism and rights violations.⁵⁰ It is important, therefore, to balance recognition of the diversity of older adults with identification of the common experiences associated with aging. Given that this Project aims to develop an anti-ageist approach to the law, and advance substantive equality for older adults the Project must consider what is meant by older age, at least for the purposes of this Project.

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

2. Approaches to a Definition

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

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

In the context of youth and aging, the slippery and socially constructed nature of our categories becomes especially clear. The human life span is a continuum. Yet for many purposes, society describes the aging process in a series of near water-tight compartments: federally defined childhood ends and adulthood begins at exactly 18 years of age, and adulthood gives way to old age at 65. There may be defensible physical, psychological or developmental reasons for setting these general boundaries. More importantly, they are socially, legally and politically meaningful.... But there is an element of arbitrariness in our line drawing.... [T]he aging process is both an individual and a gradual one: we will not all be equally situated physically, mentally or even financially when we reach 65. Nor will we wake up old one morning, simply because we have received our first pension cheque.⁵¹

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

THE CHRONOLOGICAL APPROACH

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

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

Still, the common association of age 65 with a transition to the status of a “senior” and its value as a clear, easily measured and understood marker means that age 65 continues to be commonly used as a marker of “old age” by many laws and social institutions. For these reasons, Statistics Canada used age 65 as its marker in drawing a statistical portrait of Canada’s senior population.⁵²

SOCIAL IDENTITY AND PUBLIC PERCEPTION

Another interesting thing that I have noticed, I used to dye my hair and I’ve always been a person who slips and falls and trips, and when I had dyed hair and I fell, one or two people would help me up. Since I let my hair grow out, if I should fall flat on my face, which happens fairly frequently, a host of people descend upon on me and 95 people try and help me up and try and send me to the hospital and all these things and all I did was trip on a crack.

LCO Focus Group, Older Women, October 21, 2011

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

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

It is important to remember that the concept of who is an “older” person may be a contextual one. For example, while older workers are generally those over age 45, if the average age in a

workplace is 25, a 37 year old job applicant may be turned away because of a perception that she is unable to fit in with the workplace culture. Therefore in some situations, for example where the allegation pertains to negative attitudes and stereotypes about aging, it may be necessary to think not in terms of absolute, but rather relative age. In other contexts, actual age may be relevant, for example, where a person's age is used to determine eligibility for a program or service.⁵³

The two approaches are not necessarily inconsistent or irreconcilable, as the most appropriate approach for the purpose of combating negative attitudes towards older persons and ageist discrimination may be different from the one most appropriate for describing the demographic characteristics of Canadians. However, they do point to two different aspects of the social identity associated with aging. One aspect, associated with chronological age, is based in a bureaucratically managed identity, and generally serves as a convenient administrative proxy for less clear-cut assessments of program eligibility. Our birthdates are frequently used by government to determine responsibilities and entitlements. Another aspect of aging is conveyed by the physical appearance of the body and the presentation of self in various social settings and is thus not particularly tied to a particular age or date.⁵⁴

SELF-IDENTIFICATION

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

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

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

So we will use the terms “seniors” and “older persons” loosely and give full licence to the reader to determine whether or not these categories apply to them.⁵⁵

3. The LCO's Approach

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

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

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

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

C. Understanding the Circumstances of Older Adults

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

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

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

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

1. Older Adults in Canada and Ontario – An Overview

DEMOGRAPHIC TRENDS

It is by now hardly novel to state that the population of Ontario and of Canada in general is aging and will continue to do so as a result of the combined effect of low fertility rates, longer life expectancies, and the effects of the baby boom generation. In 1981, persons over age 65 made up 9.6 per cent of Canada's population. In 2005, that figure was 13.1 per cent. It is projected that by 2036, persons over aged 65 will make up approximately one-quarter of Canada's population.⁵⁶ The share of the population over age 65 is actually slightly lower in Ontario than the national average, at approximately 12.8 per cent in 2005.⁵⁷ Regardless of the proportion of the population that falls within the category of "older", it is important to give consideration to the needs of older persons in the design of laws; the expansion of this demographic makes the need more pressing.

EDUCATION AND LITERACY LEVELS

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

Overall, education levels are lower among older adults than among the general population; however, this is changing. The widening of access to higher education beginning in the 1960s has resulted over the past 20 years in significant shifts in the levels of educational attainment among older adults. The share of older adults with less than high school education has been steadily shrinking, while the share of those with

some postsecondary education has been increasing. This is true for both men and women, and given current levels of educational attainment, this shift will continue. Currently, just under half of men aged 65 and older have less than a high school education, while less than 10 per cent have a university degree. A study conducted in 2003 found that over 80 per cent of Canadians over the age of 65 had prose literacy levels considered below the desired threshold for coping well in a complex knowledge society, as compared to roughly 40 per cent of those aged 16 to 45, and approximately 45 per cent of those aged 46 to 55. There were similar levels of low numeracy. Again, the literacy and numeracy levels of older adults are likely to increase in the future, based on current educational trends.⁵⁸

Information and computer technology has become increasingly important as a means of communicating and accessing information. Among seniors, home access to personal computers and to the internet has been steadily increasing, although rates of home access are still much lower than for younger age groups. Senior men are more likely than senior women to use the internet or e-mail, and higher levels of education are associated with a greater propensity to use information or computer technology. Seniors tend to be much less comfortable than younger users with installing or upgrading computer software, but most feel that their computer skills meet their current needs.⁵⁹

We are at a time when change is occurring faster and faster just as I'm getting slower and slower at adapting to change.... Everything is being mechanized at a time when I'm less and less comfortable with being mechanized as part of the gearworks and I don't know what the solution is, but I've seen it coming.... we are slowly, I think, sometimes being driven out of a world that we're familiar with into a world we're not as competent in.

LCO Focus Group, Rural Older Adults, November 16, 2011

LABOUR FORCE PARTICIPATION

Approximately one-quarter of Canada's labour force participants are age 50 or older. While labour force participation does decline with age, in 2004 there were just under 300,000 Canadians aged 65 or older in the labour force.⁶⁰

Labour force participation by older persons has been in flux over the past 30 years. While rates of participation for older men fell between the mid-70s and mid-90s, between 1996 and 2004, the rates of participation for older men increased steadily and significantly, both for those aged 55 to 65 and those aged 65 and older.⁶¹ While labour force participation rates for older women continue to be significantly lower than those for men, they have been steadily increasing since the 1970s. In 2004, the participation rate for women aged 55 to 64 was 49 per cent, and for women age 65 and older, it was 11 per cent.⁶² For both men and women, those with a university education are more likely to remain in the labour force as they age: this is particularly true for those aged 65 and older.

With changes in occupational structures, such as the rise in non-standard work and the decline in the number of workers covered by registered pension plans,⁶³ surveys indicate that the proportion of Canadians who wish to work past age 65 or as long as their health enables them to work have continued to grow: in 2003, 26 per cent of those contacted by a Decima poll expressed this view.⁶⁴

Your brain doesn't become mush when you become a senior. The one right I think we need to be careful to preserve in the near future is the right of people over 65 to have gainful employment. Ageism in employment is a problem, I think.

LCO Consultation Questionnaire Respondent

A significant and stable proportion of older workers are engaged in part-time work. Over one-third of employed men over the age of 65 work part-time hours, while about ten per cent of those between the age of 55 and 64 do so. For women over age 65 in the labour force, almost two-thirds are engaged in part-time work, while about one-third of those between the ages of 55 and 64 are.⁶⁵ Overall, older persons who are participating in the labour force are considerably more likely than younger ones to be engaged in part-time work.⁶⁶ They are also more likely to be temporarily employed or self-employed. The *Report of the Expert Panel on Older Workers* stated that,

A large proportion of older workers have non-standard forms of employment. These types of work arrangements can afford older individuals a significant degree of flexibility in their lives. Older workers can better manage the balance between work and family, and retired workers can re-enter the labour force, participate at a level they choose, supplement their retirement income and be involved in meaningful work.

Yet the growth in part-time employment could also reflect lack of full-time work opportunities and part-time or other non-standard jobs may not always be the first choice of older workers ... While non-standard employment offers older workers the opportunity for increased choice and flexibility in how they participate in the labour market, many wish to contribute and be productive through full-time employment.⁶⁷

While older workers generally fare well in the work force, some older workers are vulnerable to long-term unemployment. Among unemployed older workers, a high proportion of those aged 55 to 64 lose their jobs involuntarily, and once unemployed, older workers tend to stay unemployed longer than average. The incidence of long-term unemployment tends to increase with age.⁶⁸

Many older people need and want to work and are good at their jobs and can learn new skills ... The law forbidding ageism in the workplace is toothless – like me! I cannot count the number of people I know who are forced to retire in their 50s ... It is laughable when I hear people say 'older people are going to hog their jobs till 65' – we're not allowed to work until 65. There are many legal ways to get rid of us. Do a survey of people and ask how many people were pushed out of their jobs starting in their 50s.

LCO Consultation Questionnaire Respondent

There are a number of other challenges facing some older workers. For example, they may be concentrated in declining industries; they may have difficulty accessing training and education; and they can face high costs of adjusting when they experience a job loss (for example, the costs of relocation).⁶⁹

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

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

INCOME SECURITY

In terms of income security, the financial situation of Canadian seniors has improved significantly over the past 25 years, with their average before-tax income increasing by close to 25 per cent over that time frame, and rates of low-income dropping significantly, regardless of what measure of low-income is adopted. This is true for all groups of older adults, whether male or female, or single or married.⁷¹ However, disparities remain when groups of older adults are compared, and some have benefited more than others from the increase in income.

In 2003, the rate of low-income among seniors was 15 per cent, if measured based on the Low Income Cutoff before taxes, or approximately seven per cent, if measured based on the Low Income Cutoff after taxes.⁷² Unattached seniors were much more likely to be low-income than married couples. The highest rate of low income, if using the Low Income Cutoff before taxes, is that among unattached women at just under 19 per cent. Because of the impact of historic gender roles, many senior women are dependent on their spouses for income security, and widowhood or divorce may result in a slide into low-income.⁷³ The rate of low-income among older adults is now lower in Canada than in most other industrialized countries, including Sweden, the United States, and Britain.⁷⁴

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

A key factor in the increase in incomes for seniors has been the maturation of the Canada Pension Plan and the creation of various income support programs for older adults. CPP/QPP payments now make up approximately 20 per cent of the income of older adults. As well, over 95 per cent of seniors receive income from Old Age Security, Guaranteed Income Supplement or Spouses Allowance. Seniors have also benefited significantly from improvements in private pension plan coverage in the post-war years. In 2003, close to 70 per cent of men aged 65 and older, and just over half of all women were in receipt of income from a private pension plan.⁷⁶

However, membership in registered pension plans is declining, indicating that in future, older adults may be less financially secure.⁷⁷ Further, not all seniors have access to these benefits. Immigrant seniors, for example, cannot access Old Age Security until they have been resident in Canada for 10 years, a policy that has been identified as having a significant impact on the financial and psychological security of immigrant seniors.⁷⁸

Statistics Canada figures from 2008 indicate that recent economic upheavals in Canada may be having a significant effect on the income security of seniors, who may be heavily reliant on income from investments. Between 2007 and 2008, the number of seniors living below the after-tax Low Income Cutoff increased by 18 per cent – the most substantial increase for any age group.⁷⁹

THE LIVING ENVIRONMENTS OF OLDER ADULTS

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

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

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

The key principle that has been enunciated for the living environments of older adults is that of aging in place. This reflects the expressed preferences of older adults. According to a recent survey, almost 80 per cent of Canadians surveyed believed that aging at home offers a better quality of life, citing greater comfort, independence and the opportunity to be closer to family. The older the survey respondents, the more strongly

they expressed their preference to remain at home as they age.⁸⁰ Aging in place is also considered a more cost-effective approach to aging, since long-term care in an institutional setting is expensive to provide.⁸¹ The principle of aging in place has been incorporated into all of the key Canadian policy documents related to older adults, including the *National Framework on Aging* (NFA), the OHRC's report on human rights and older persons entitled *A Time for Action*, and the *Final Report* of the Special Senate Committee on Aging. However, in reality aging in place may often be more of an ideal than a lived practice. Not infrequently, older adults are compelled to change their living environments in order to obtain supports, find affordable housing or locate an accessible environment.⁸²

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

Geography and Aging: Overall, Canada is increasingly urban. In 2001, almost two-thirds of Canadians lived in large urban centres. At that time, approximately 70 per cent of those over age 65 lived in an urban centre with at least 50,000 inhabitants. About 23 per cent of Canada's seniors live in rural areas. Most of these seniors, however, are living in rural areas that are fairly closely integrated with a nearby metropolitan area.⁸³

Older adults who live in northern, rural or remote communities face special challenges. For example, lack of transportation may create significant difficulties for those older persons who are no longer able to drive, as many of these communities have no public transportation, and necessary services may not be located nearby. Older adults may become isolated, and their physical, mental and emotional well-being may be put at risk.⁸⁴

[There are] people who live out in "the sticks" where transportation, particularly if you lose your licence, you have to move. So, it's a special consideration. A majority makes decisions in the city and it's sometimes kind of one-size fits all. We out in the sticks are bound to be caught as severely, sometimes on special parts of decision-making and laws, as can be. And very severely. My Dad had Alzheimer's. They lived on a farm near Woodstock. He lost his licence. They had a 250 acre farm. My mom couldn't drive. It became a disaster, and very suddenly.

LCO Focus Group, Rural Older Adults, November 16, 2011

Older Adults in Privately Owned Homes: The vast majority of older adults live in private households – about 93 per cent of those age 65 and older do so.⁸⁵ In most cases, older adults own their own homes rather than renting, and live in houses rather than rental apartments. As noted above, the preference of the vast majority of older adults is to continue to live in their own homes as they age; however, they may face a number of challenges to doing so.

- Most homes do not have the accessibility features necessary for those who develop significant mobility disabilities. There are some programs through the Canada Mortgage and Housing Corporation that address this on a limited basis.⁸⁶

- Although older adults are disproportionately home owners compared to younger Canadians, because most live on a fixed income they may be “house rich but cash poor” and face financial barriers to remaining in their homes. The cost of major home repairs or significant property tax increases may make their homes unaffordable. For this reason, older adults may look to financial instruments such as reverse mortgages to meet their financial needs.⁸⁷
- Further, home care supports are often expensive or difficult to access. The *Home Care and Community Services Act, 1994* sets out a framework for the delivery of in-home services in Ontario. As is described in greater length in Chapter VI of this *Report*, while the *Act* provides for community support services, home-making services and personal support services, in practice the requirements for eligibility for such services are not transparent, and access is dependent on funding envelopes.⁸⁹ Lack of access to formal or informal supports for activities of daily living such as shopping, cleaning or cooking may make it impossible for older adults to remain at home. The Special Senate Committee on Aging suggested that the government develop a national home care program, as well as provide better supports to informal caregivers, such as respite care or expanded compassionate care benefits.⁹⁰

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

Older adults living in rental housing may face difficulties and barriers due to minimum income requirements. As well, despite the provisions of the Ontario *Human Rights Code* and the *Residential Tenancies Act*, landlords may be reluctant to rent to older persons for fear that they will become disabled – and therefore a “burden” – in the future. Where older adults do need accommodations that require modifications to their unit or the apartment building, landlords may be reluctant to undertake the expense and may try to encourage the tenant to leave.⁹¹

Over half of renters between the ages of 65 and 74 and close to two-thirds of those aged 75 and over experience housing affordability problems. Older adults who rent are typically less financially well-off than other older adults, and are typically widows who live alone. Older adults represent one-quarter of the applicants for social housing in Ontario.⁹²

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

and homemaking services for the frail elderly and persons with various types of disabilities in a community residential setting.⁹³

Provisions for seniors' social housing are generally found under municipal by-laws and policies. As is described in more detail in Ch IV.B.2 (Special Programs and Preferential Treatment), many municipalities make provision for specialized social housing for low-income seniors.

"Retirement Residences": An increasing number of older Ontarians live in "retirement residences", or "care homes" as they are termed under the *Residential Tenancies Act*. It is estimated that there are over 700 homes providing services to approximately 40,000 older Ontarians.⁹⁴ The services and supports provided by retirement homes range widely. These homes may be very large or very small. Some offer only minimal assistive services while others essentially operate as private long-term care facilities.⁹⁵ Concerns have been expressed that the retirement home sector is evolving towards a private sector parallel to long-term care homes, rather than providing a much-needed "middle option" in a spectrum of supports for older persons.⁹⁶

Until recently, retirement homes in Ontario have been regulated mainly through the *Residential Tenancies Act* (RTA). The lack of a legislated framework regulating the care portion of retirement home living was the source of considerable concern and criticism, particularly given the shortage of long-term care spaces in Ontario and the fact that in some cases retirement homes have operated as "bootleg long-term care homes" with locked-in wards servicing high-need patients.⁹⁷

In 2011, the *Retirement Homes Act, 2010* came into force.⁹⁸ This Act sets out certain minimum standards for the care and safety of residents, and includes a Residents' Bill of Rights. The statute regulates the retirement homes industry through a third-party regulatory model. The Retirement Homes Regulatory Authority is given the authority to issue or refuse licenses to retirement homes, or to impose conditions on licences that are issued. The Authority has the power to appoint inspectors to ensure that licensees meet the requirements of the Act, and can receive and review complaints regarding contraventions of the Act by licensees. The Authority also has the power to make orders under the Act. While the government may appoint members of the board of directors of the Authority, the government may not appoint a majority of the members of the board. The majority of the directors shall be elected by the other members of the board.

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

themselves mean that women are more likely to outlive their spouses and to find themselves alone.⁹⁹

The regulation of the long-term care sector in Ontario has recently been transformed. As of July 1, 2010, the *Long Term Care Homes Act, 2007* (LTCHA)¹⁰⁰ came into effect, replacing three statutes that previously regulated the sector in a patchwork fashion. The LTCHA provides a comprehensive scheme, covering licensing and funding of long-term care homes, admission of residents, standards for appropriate service provision, qualifications for staff, provision of information to residents, resident and family councils, the prevention of abuse and neglect, and complaints, inspections and enforcement. As the LTCHA is so new, it will take some time to evaluate its effectiveness in ensuring that long-term care homes provide safe, dignified and comfortable homes for their residents.

A number of groups have expressed concerns about the lack of appropriate long-term care services for their specific needs. For example, the cultural, linguistic or religious needs of older persons may not be adequately met through existing facilities. LGBT older adults may find themselves forced back into the closet through the lack of appropriate services and facilities. Deaf Canadians have raised the lack of TTY systems and lack of visual alarms in bedrooms and bathrooms in some long-term care homes, as placing the safety of Deaf and hard-of-hearing older adults at risk and excluding them in their own living spaces. The Alzheimer's Society has raised concerns about the lack of specific treatments and services for persons with Alzheimer's Disease or related conditions. This is particularly problematic given that persons with dementia make up a very significant proportion of those living in long-term care facilities.¹⁰¹

I sat as Chief for my community for about two years. There was no service for persons with disabilities ... When people need services, we ship them out to Thunder Bay and the urbanization provides a huge challenge. There are language barriers, plus if they lived off the land most of their life the very structure of urban community will shock them...[Aboriginal] people moving into the city are used to a certain food source. They are not used to this fancy food. They eat fish, waterfowl, moose, deer, berries from the land. And when they ask for this traditional food in old folks homes or hospitals, they are made fun of. One old person said a nurse said that this was food for cave people. The staff discouraged use of traditional food, instead of supporting it.

LCO Focus Group, Thunder Bay, June 16, 2010, Organizations Serving Aboriginal Persons

The new Long-Term Care Homes Act and Regulations creates opportunities to meet these needs. For example, every resident's plan of care must address all aspects of care, including social, religious and spiritual care.¹⁰² Long-term care homes, or units or areas within a home, may be focused on serving the interests of persons of a particular religion, or ethnic or linguistic origin, and may give priority for admission to applicants who are so identified.¹⁰³ As well, the LTCHA permits the establishment of specialized units to provide accommodation, care, services, programs and goods to residents. For example, specialized units may be developed to provide services to persons with Alzheimer's or related conditions.¹⁰⁴

ACE has consistently raised a number of grave systemic issues facing older persons in long-term care, including “first available bed” policies that may place older adults in inadequate or inappropriate facilities; improper admission contracts; questionable policies on detention and use of restraints; and a lack of accessible and effective complaints procedures, which may leave older adults at risk of abuse and mistreatment in their homes.¹⁰⁵ It will take some time to evaluate the degree to which the new LTCHA is able to address or ameliorate these concerns.

FAMILY, RELATIONSHIPS AND CARING

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

Inadequate relationship support is associated not only with an increase in mortality, morbidity and psychological distress but a decrease in overall general health and well being. Disruption of personal ties, loneliness and conflictual interactions are major sources of stress, while supportive social connections and intimate relations are vital sources of emotional strength.¹⁰⁶

Social interaction has a positive effect on both physical and mental health. Several studies have found that people with weak social ties are at greater risk of death, even when age, physical limitations and illness, and socio-economic status are taken into account.¹⁰⁷ Older adults, like others, report that loneliness, isolation and the loss of loved ones have a major negative effect on quality of life.¹⁰⁸ The Alzheimer’s Society reports that social interaction may have a protective effect against the disease, while the Canadian Coalition for Seniors’ Mental Health has stated that:

Social support networks are particularly important for seniors as social isolation is known to be linked to depression and loss of autonomy. Community or institutional based programs that provide social support to seniors help to ensure maintenance of mental health.¹⁰⁹

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

Some older adults are more likely than others to experience social exclusion: these include those who live in low-income, those who are newcomers, those with disabilities, women, and those who are the oldest of the old. The Senate Special Committee on Ageing recommended that the federal government invest in research on the social networks of older adults, and that it support organizations that provide social supports for older adults.¹¹⁰

Relationships and Living Arrangements: As individuals age, the likelihood that they will be living alone increases. This is particularly true for women. Just over one-fifth of older adults age 65 to 74 were living alone in 2001, while just over one-third of those aged 85 and older were living alone. Because of differences in life expectancy between men

and women, and the tendency for men to marry younger women, the patterns differ between the sexes. For example, only 18 per cent of men aged 75 to 84 were living alone in 2001, while this was true for 43 per cent of women in this age group.¹¹¹ In general, the most common living arrangement for older adults is living with a spouse, although the frequency varies by gender and declines with age. Among men aged 85 and older, this was the most common living arrangement – 38 per cent of these men were living with a spouse – while it was the least frequent living arrangement for women of the same age, including only seven per cent of these women.¹¹² The numbers of older adults who have never married or who are divorced is increasing. For example, in 1981, only four per cent of women age 55 to 64 were divorced, but by 2001, this had increased to 11 per cent. This points to some potentially significant changes in the living arrangements of older adults in future years.

Most older adults have children: in 2001, fewer than 10 per cent of all those age 65 to 74 had no children. The average number of children for older adults is decreasing, however, as fertility rates decline. A significant proportion of older adults live with their children or grandchildren: just over 17 per cent in 2001. About four per cent of Canadians live in multi-generational households.¹¹³

Older adults, like younger Canadians, generally report having friends, including close friends. However, the likelihood of having no close friends, or no friends at all, increases with age. For example, of older adults age 75 and older, 18 per cent reported having no close friends, compared to five per cent of those age 25 to 54. This may be partly because older adults are more likely to lose their friends to death, but it may also be attributed to the fact that older adults are less likely than younger ones to have opportunities to meet any new friends. For example, those aged 75 and older are the most likely of any age group to say that they have not met any new people in the last month (82 per cent).¹¹⁴ However, older adults are more likely than younger ones to see or speak regularly to relatives (other than spouses and children) and to know and have relationships with their neighbours.¹¹⁵

Caregiving and Supports: Where older adults become frail or disabled, their relationships with family and friends can make a significant difference to their ability to remain active, to continue to live in their home communities, and to their fundamental health and well-being. For example, through continuing powers of attorney under Ontario's *Substitute Decisions Act*, older adults may identify people that they trust to act as substitute decision-makers for them on issues related to property or personal care, should they lose legal capacity.¹¹⁶ Similarly, under the *Health Care Consent Act*, family members may be charged with making medical decisions for older adults who are unable to make those decisions for themselves.¹¹⁷ The way in which these fundamental powers are exercised will profoundly shape the lives and well-being of those affected. In these ways, the relationships of older adults will affect their ability to participate and be included, their ability to maintain independence and autonomy, and their basic security.

While older adults are often pictured as heavily dependent on loved ones for help with day-to-day tasks, statistics paint a more nuanced picture. Statistics Canada has noted, “Seniors are not the only, and maybe not even the principal, recipients of social support in society.”¹¹⁸ Older adults in general are not more likely than younger persons to receive help from someone not living with them with domestic work, transportation or running errands, and are *less* likely than younger adults to receive emotional support, coaching or practical advice. However, those older adults who live alone are more likely to receive help with domestic work, transportation and errand running needs.

Older adults are more likely than younger ones to be receiving help (from any source) because of a long-term health problem. This is particularly notable for those over the age of 85: only 16 per cent of those aged 65 to 74 are receiving help because of a long-term health problem, while 60 per cent of those over 85 receive help for this reason. Older women are more likely than older men to require such help, particularly if they live alone. About three-quarters of those receiving help because of a long-term health problem receive it, at least in part, from informal sources. As individuals age, they are more likely to receive some or all of their help from formal sources: approximately 60 per cent of those aged 85 and older receive part or all of their help from formal sources.¹¹⁹

As populations age, one of the greatest challenges in health policy is to strike a balance among support for self-care (people looking after themselves), informal support (care from family members and friends) and formal care (health and social services). Formal care includes both primary health care (delivered mostly at the community level) and institutional care (either in hospitals or nursing homes). While it is clear that most of the care individuals need is provided by themselves or their informal caregivers, most countries allot their financial resources inversely, *i.e.*, the greatest share of expenditure is on institutional care.¹²⁰

Many individuals and organizations have expressed concerns about shortfalls in supports for informal caregivers. In both *A Time for Action*, its report on human rights and older adults, and in *The Cost of Caring*, its report on human rights and family caregivers, the OHRC has indicated concern with the impact on older persons and their families of a lack of supports for informal caregiving. The OHRC has recommended that government provide enhanced supports for older adults and those who are providing them with informal care.¹²¹ The recent report of the Senate Special Committee on Aging also made several recommendations for government action on this issue.¹²²

It is often overlooked that older adults make significant contributions to their communities through the care they provide in their relationships with family and friends, whether it be as primary caregivers for ill or disabled family members, the familial supports they provide as grandparents, or the wisdom, advice and experience they share with those with whom they are close. A significant proportion of older adults provide help and care to others. For older adults under the age of 75, more report providing help to others than receiving such help. Younger older adults are more likely than those over age 75 to provide help with such things as domestic work, home

maintenance or outdoor work (about a quarter of those age 65 to 74 report providing such assistance to someone not living with them), and to help with child care (22 per cent of those age 65 to 74). While those over age 75 were more likely to receive help with domestic work, errands and transportation than to provide it, they were more likely to provide emotional support, and teaching and coaching.¹²³ The United Nations, through the *Madrid International Plan of Action on Ageing*, has urged greater recognition, respect and support for the contributions older adults make through their caring roles.¹²⁴ *Domestic violence*: Family violence makes up approximately one-third of the incidents of violent victimization of older adults. Older women are considerably more likely than older men to be the victims of family violence. Of older persons who were the victim of a violent incident in 2003, 40 per cent of older women were victimized by a family member, as compared to 20 per cent of older men. In family violence, most often the accused were male adult children (33 percent) and spouses (30 per cent). Another 15 per cent were male members of the extended family. Most family related assaults took place at home, between people who were sharing a residence.¹²⁵

PARTICIPATION IN THE COMMUNITY

Older adults under the age of 75 are just as likely as younger adults to be a member of a voluntary organization or association (at a participation rate of just over half), and to participate in group activities at least once a week. The likelihood of participation was slightly lower for those over age 75. Older adults are more likely than younger persons to be involved in religious-affiliated organizations, or in fraternal organizations and service clubs. However, older adults are less likely than younger adults to be members of or participants in sports and recreation organizations. Younger persons are also more likely to participate in school, neighbourhood, civic or community organizations. Likelihood of participating in organizations increases with education levels.¹²⁶

About 45 per cent of all Canadians did some volunteer work during 2004. Older adults are slightly less likely to volunteer (39 per cent of those aged 65 to 74 volunteered in 2004), but when they do, they tend to contribute more hours. For example, volunteers age 65 to 74 contributed 250 hours on average in 2004, approximately 100 more hours than those contributed by adults age 25 to 54. The most significant barrier to volunteering for older adults was health or physical limitations: over 70 per cent of those aged 75 and older gave this as their reason for not volunteering.¹²⁷

Older adults are more likely to vote, at all levels of government, than other age groups. In 2003, close to 90 per cent of adults age 65 and older reported voting in the federal election, as compared to 70 per cent of 25 to 54 year olds. They are significantly more likely to be regular voters than younger adults. They are, however, less likely than younger adults to sign a petition, boycott or choose a product for ethical reasons, or to participate in a demonstration or march. This may reflect changes associated with life stages, or it may reflect generational differences in modes of political participation.

2. *Intersecting Identities: Age and Compounded Disadvantage*

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

GENDER AND AGING

One of the reasons that people keep raising this spectrum of society of old people and how, what a tragedy it will be, is ... because it will be a society of older women. And so there is some subtle sexism in this fear of age: the crone, the hag, you know, the witch.

LCO Focus Group, Older Women, October 21, 2011

Most older adults are women, and the older the age group examined, the truer this is. In 2005, while women made up 52 per cent of those between the ages of 65 and 69, they made up 75 per cent of those aged 90 and older.¹²⁹ Although there is some expectation that the size of this discrepancy will decline as differences in life expectancies between men and women narrow, for now aging is, to a significant degree, a "women's issue". As one scholar has argued,

It is thus imperative that scholars examine and expose the legal framework defining the personal, health and income security of their oldest citizens in light of the reality that most elderly persons, as well as those who care for them, are women. Reform of elder law and policy must take account of this reality and assure that such "reform" does not exacerbate existing discrimination against and injustice towards women.¹³⁰

Older men and women differ on a wide range of measurements. Both because of longer life expectancies, and because women tend to marry older men, women are more likely than men to be widowed. This has a number of implications for income (particularly since women who are now older were less likely to participate in the labour force and therefore to have their own pensions and control their own money than younger women now are), for caregiving (women, as they age, are less likely to have a spouse to provide for their care needs) and for living arrangements (such that older women are more likely than men to reside in congregate settings). Older women are also likely to have lower levels of educational attainment than their male contemporaries (another factor that will differ for younger generations). Since education levels have a close relationship with a number of indicators of wellbeing, such as health and social isolation, this is significant. As well, there may be specific assumptions and expectations about older women that may negatively affect how they are treated.

When women, older women, come into the hospital system, they tend to be overdressed... there's a large literature that supports that. And women are often now being told, either that care may not be delivered in terms of rehabilitation because whatever you have is because of your age, and not because you have a particular virus or something that happened to you that can actually be straightened out.

And it is very often women are told that they're depressed when what is happening is something entirely different. And to me that's a very serious issue. That is one that I am afraid of, I must say, that this will happen to me and you're not in a very powerful situation when you're sick and feeling ill and don't have a high level of energy because of that and that these stereotypes will come in and will result in inappropriate treatment.

LCO Focus Group, Older Women, October 21, 2011

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

Women are particularly affected by misleading and negative stereotypes: instead of being portrayed in ways that reflect their contributions, strengths, resourcefulness and humanity, they are often depicted as weak and dependent. This reinforces exclusionary practices at the local and national levels.¹³³

Because of these realities, policy frameworks on aging often recommend that legislators and policy developers pay specific attention to the ways in which gender influences the experiences and circumstances of older persons.¹³⁴

IMMIGRATION AND OLDER ADULTS

A very significant proportion of older adults are immigrants. In 2001, over one-quarter of persons aged 65 to 84 were immigrants. Most, however, arrived in Canada when they were young, and have lived in Canada for decades. Less than ten per cent of immigrant older adults in 2001 had arrived in Canada within the previous ten years. In any given year, persons aged over 65 make up between two and four per cent of immigrants and refugees arriving in Canada.¹³⁵ The number of recent immigrant seniors is therefore small. However, this is a group whose needs are important to take into account, as their circumstances are likely to be significantly more precarious than those of older adult immigrants who have had a lengthy residence in Canada. They will have less access to income support programs, may be dependent on their relatives to maintain their legal status in the country, may not know an official language, and are less likely to have significant social networks on which they can rely.¹³⁶

For example, at the LCO's focus group with newcomer seniors, participants emphasized their struggles to obtain basic financial, psychological and social security. One older woman told us how, despite an extensive professional background overseas, she was only able to find precarious work in the retail sector. As an Afghani-Canadian, after the events of September 11, 2001, she was targeted by co-workers and feared she would lose her job. She was supported by management but, she said, she knew that if they had not supported her, there was nothing she could have done. 'We have nowhere to go', she said.¹³⁷

The changes in Canada's immigration patterns mean that immigrant seniors who are long-time residents of Canada are mostly likely to have come from Western Europe (54

per cent, in 2001). Older adults whose birth place was other than Canada or Western Europe are still a small minority of the total population of older adults.¹³⁸

LANGUAGE

Almost all older adults can speak one of Canada's official languages. In 2001, only 4.5 per cent of older adults could speak neither English nor French. However, 13.5 per cent of those between the ages of 65 and 74 used a non-official language at home.¹³⁹

There are approximately 160,000 francophone seniors in Ontario, out of a total Franco-Ontarian population of 576,000.¹⁴⁰ The Franco-Ontarian population is therefore somewhat older than the Ontario population as a whole. The proportion of seniors who are Francophones is higher in Northeastern and Eastern Ontario, as with the Francophone population as a whole.

Francophones aged 65 and older tend to have a higher rate of language retention (assessed on the basis of the language spoken at home for persons whose mother tongue is French), although language retention is decreasing among seniors, as among the population of Francophones as a whole.¹⁴¹

Francophones experience particular barriers in accessing government services, despite the guarantees of the *French Language Services Act*.¹⁴² The LCO was informed that:

l'un des obstacles à l'accès au système judiciaire pour la population de langue française (576 000 personnes de langue première français en Ontario) et en particulier pour les aînés (environ 160 000) est la faible disponibilité des services en français de qualité équivalente à ceux dispensés en anglais. La Loi stipule que les francophones ont le droit de se faire servir en français dans le domaine de la Justice, mais malgré les efforts indéniables du Ministère du Procureur général de l'Ontario en ce sens (Institut linguistique par exemple, progrès au sein de la Police provinciale de l'Ontario), il y a beaucoup de travail à faire, et peut-être des outils « créatifs » à développer pour atteindre l'objectif de parité de services.¹⁴³

RACIALIZED OLDER ADULTS

There is relatively little information available regarding older adults who are racialized. Ethno-gerontology, which studies the influence of race, ethnicity, national origin and culture on individual and population aging, is a relatively new field of study.¹⁴⁴

Racialized persons make up an increasing share of the older adult population. Between 1981 and 2001, the share of older adults who were "visible minorities" within the definition of the federal *Employment Equity Act* increased from two per cent to seven per cent. The largest share of this group were Chinese Canadians (39 per cent), followed by just over 20 per cent who were South Asian Canadians, and 13 per cent African Canadians.¹⁴⁵ The majority of these older adults live in large urban areas, which has some significant implications for the experience of aging.

Racialized older adults are more likely than non-racialized older adults to experience low income, particularly if they are female, with 25 per cent of older racialized women falling below the low-income cutoff, according to Statistics Canada figures.¹⁴⁶

In its public consultation on human rights and older persons, the OHRC heard concerns regarding the manner in which service providers currently address the needs of various groups of older adults in terms of respecting the cultural and religious needs of some older persons. The OHRC indicated that service providers in all sectors must respect the identity and dignity of all persons and be sensitive to the diverse needs of older persons based on culture, religion, race or ethnicity.¹⁴⁷

In initial consultation meetings regarding this project, the LCO heard that persons from some racialized communities may experience discrimination or racism in the receipt of services, and that the experience of discrimination over the life course may make some groups of racialized older adults more hesitant to demand their rights or to seek help.¹⁴⁸

ABORIGINAL PEOPLE

Due to higher fertility and birth rates, the Aboriginal population in Canada is younger than the non-aboriginal population. In 2006, Aboriginal older adults made up five per cent of the Aboriginal population, or just fewer than 60,000 people. This may not, however, include all persons identifying as Aboriginal within urban areas. It is well-documented that Aboriginal peoples in general have lower health statuses, socio-economic status and literacy rates than the general Canadian population, as well as shorter life spans. The majority of First Nations and Inuit older adults have experienced unhealthy living conditions and poorer health for most of their lives, as compared to non-Aboriginal Canadians. Aboriginal peoples suffer from higher rates of chronic diseases such as diabetes, asthma and heart disease.¹⁴⁹

It is important to note that among Aboriginal individuals, older adults form the highest proportion of those who know and speak their Aboriginal language. Aboriginal older adults who speak an Aboriginal language fluently or well are the most likely to consider both spirituality and traditional culture important. As a result, Aboriginal older adults may constitute the most important link in sharing knowledge of traditions and language with younger generations.¹⁵⁰

Many Aboriginal older adults will have been significantly affected by residential school experiences. Over 40 per cent of First Nations adults over the age of 60 and close to half of those aged 50 to 59 attended residential schools. It has been noted that, as a result of the residential schools experience, Aboriginal older adults are particularly at risk for low self-esteem and increased dependence resulting from devaluation of their cultures and loss of traditional ways of life. Residential school survivors may experience long-term physical, psychological and emotional effects of their experiences.¹⁵¹

SEXUAL ORIENTATION AND GENDER IDENTITY

There is a dearth of information about lesbian, gay, bisexual, transgendered, and transsexual (LGBT) older adults. The lives of LGBT older adults have been shaped by

high historical levels of stigma, discrimination and marginalization, and many LGBT older adults will never have felt safe to publicly disclose their sexual orientation. As well, most LGBT organizations, programs and space have been geared towards younger persons. LGBT older adults are therefore largely invisible both in the older adult community and in the LGBT community, and may have significant difficulty in accessing safe and appropriate supports and services.¹⁵² During the LCO's focus group with LGBTQ older adults, it was stated that agencies serving older persons may decline to do sensitivity training on the issues because they do not believe that they have any LGBTQ clientele, not realizing that they may very well have clientele who are not comfortable disclosing in such an environment, or potential clientele who avoid using their services for fear of mistreatment.

During this focus group, there was much discussion about the effects of covert or subtle homophobia on the ability of LGBT older adults to obtain services. Participants talked about many older LGBTQ individuals fearing that they will be discriminated against when visiting doctors. Some recounted stories of friends who had encountered subtle negative treatment from home care workers, and so preferred to do without services, with significant effects on their mental and physical health, as well as their ability to be part of the community.¹⁵³

HEALTH, ACTIVITY LIMITATIONS AND DISABILITY

For most individuals, aging is associated with a decline in general health, and the onset of various types of activity limitations. However, it is important not to exaggerate the extent of health limitations among older adults. While self-perceived health declines with age, 37 per cent of persons aged 65 years and older considered themselves in very good or excellent health in 2003, as compared to 63 per cent of those aged 25 to 54.¹⁵⁴

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

Some chronic conditions disproportionately affect older adults. Arthritis or rheumatism is the most common of these conditions, affecting just over half of those aged 75 and older. Forty per cent of those over age 65 report living with high blood pressure. As well, older adults are particularly affected by eye-related problems, such as cataracts and glaucoma. In 2003, about 70 per cent of persons over age 65 had some type of vision-related problem, but only 4 per cent had an uncorrected problem (a figure rising to 8 per cent for those over age 80). Alzheimer's disease and other forms of dementia are relatively rare at any age, but the risk increases significantly with age, so that approximately two per cent of all those aged 65 and older have been diagnosed with one of these conditions, again with incidence highest among the oldest of the old.¹⁵⁵

Although older adults are more likely to have activity limitations than younger persons, most older adults do not have activity limitations. In 2003, one in ten older adults aged 75 and older and living in a private household required help with personal care (such as washing, dressing and eating), as compared to one in one hundred adults aged 25-54.

About one-quarter of older adults aged 75 and older required some assistance with housework. Mobility limitations become particularly prevalent for the oldest of the old, with close to half of all those aged 85 and older unable to walk or requiring mechanical or human assistance to get around, as compared to less than 10 per cent of those aged 65 to 74.¹⁵⁶

Contrary to stereotypes, most older adults are in good mental health and have a positive psychological outlook. Levels of psychological distress are highest for those aged 25 to 64, and lowest for those aged 65 to 74, with those aged 55 to 64 and 75 and older scoring similarly. The relationship between age and measures of perceptions of well-being is similar, with older adults having higher levels of self-perceived well-being than those aged 25 to 54.¹⁵⁷

As is discussed at greater length elsewhere in this *Report*, because there is a correlation between increasing age, declining health and increased risk of impairment, age is sometimes used as a proxy for health and impairment. Age is considerably easier to measure than health or impairment. As is discussed at length in another of the LCO's publications, defining disability is complex and controversial, and often requires extensive adjudication mechanisms.¹⁵⁸ This makes the use of age as a proxy appealing, but the very brief overview above of the multi-faceted relationship among aging, health and impairment indicates how problematic such a use can be, particularly when it operates to reinforce inaccurate stereotypes and perceptions of older persons as non-contributing burdens on society.

Interestingly, despite the correlations among aging, health and impairment described above, and the parallels between ageism and ableism, there has been relatively little attention paid to the relationship between age and disability outside of the health care field. Disability advocates rarely focus on the experiences of older people with disabilities, while anti-ageist organizations often fail to address the experience of disability in this group. There is a paucity of academic writing theorizing the intersection of age and disability.

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

The differences are highlighted by the identifying terminology distinguishing between the Deaf, deafened, or hard of hearing.

ARCH Disability Law Centre notes that very little attention has been paid to the experiences of persons with disabilities as they age; therefore, it is not clear how the experiences of this group differ from those of younger persons with disabilities or older persons who have aged without disabilities. Consequently, it is difficult to know whether the needs of this group are adequately addressed by the law, or if particular laws are creating unintended negative consequences for this group. ARCH's submission notes that

... members of this increasingly large population of older persons with disabilities have often not been able to prepare for old age in the same manner as people without disabilities and are often not well integrated into mainstream social networks. More importantly, there is often little available as far as public services or programs that cater specifically to the needs of this population. This is significant, given that a large portion of this population has no access to private resources. It is therefore crucial to identify the needs of this group as well as to clarify and define their rights and entitlements to public services and supports.¹⁵⁹

Older persons may also be affected, not by the experience of disability *per se*, but by the perception that they will inevitably *become* disabled, and therefore will become a burden or will be requesting expensive or administratively onerous accommodations or services.¹⁶⁰ The definition of disability in the Ontario *Human Rights Code* encompasses current disabilities, past disabilities and perceived disabilities, but does not explicitly address anticipated disabilities.¹⁶¹ However, in the *Mercier* case, the Supreme Court of Canada considered a situation where a person with a slight curvature of the spine, which caused no current impairment, was refused employment because the employer anticipated that, in the future, disability could or would result. The Court ruled that these facts fell within human rights protections for disability, stating that

... a multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a "handicap". In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.¹⁶²

There are similarities in the ways in which older persons and persons with disabilities are situated in society, particularly as both groups are largely excluded from the labour market, and therefore experience structural dependency and are not considered "adults".¹⁶³ Both groups, being associated with impaired bodies and incapacity, evoke fear of vulnerability and death, and therefore are subject to social distancing. Persons with disabilities and older persons frequently experience social and locational segregation, living in specialized residential institutions, an experience that some have characterized as a kind of "social death".¹⁶⁴

However, there are some significant differences between the perceptions others hold of younger persons with disabilities and of those who acquire disabilities in older age. While impairment at birth or in youth is commonly characterized as aberrant, impairment and activity limitations in old age are commonly understood as “normal”, even a defining characteristic of this stage of life. As a result, older persons with impairments are often not viewed as “disabled” in the same way that younger persons with similar impairments are. Older persons may not be perceived as living with a disability unless they are unable to engage in the activities that a “normal” older person could. The onset of impairment, along with withdrawal from the workforce, may be the most important social markers of transition to “old age”. Impairment in old age may therefore have a different impact on identity than it has at earlier life stages.¹⁶⁵

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

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

In this way, the strategy of both older people’s movements and disabled people’s movements has been to articulate claims for recognition of adult status and citizenship by distancing their struggles from negative associations with the other. These parallel claims may well be benefiting those at the margins of inclusion (i.e., younger disabled people and older adults in their fifties and sixties) by allowing them to liberate themselves from the imagery of frailty, dependence and burden so often attached to very old people with significant impairments.¹⁶⁶

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

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

INTERSECTING IDENTITIES AND COMPOUNDED DISADVANTAGE

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

Older adults who have, throughout their life course, been marginalized due to other aspects of their identity, carry the effects of that marginalization through into old age.

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

The effects of lifelong marginalization may impact in subtle ways. Older lesbians, gays and bisexuals, for example, are more likely to have remained “closeted” as a survival strategy. This has a multitude of effects on the relationships of LGBT older adults. As well, the adoption of a survival strategy of silence and invisibility can compound the effect of the invisibility often imposed on older adults by ageism, with the result that the needs, and even the very existence, of LGBT seniors may go unrecognized. For example, there is a dearth of appropriate programming for LGBT seniors.¹⁶⁷ Multiple identities may result in uniquely compounded disadvantage. Women with disabilities experience a much higher rate of abuse of all types than either women living without disabilities or men with disabilities; however, women with disabilities may have fewer options than others for leaving abusive situations, for example, because women’s shelters and transition houses are often not accessible.¹⁶⁸ Sponsorship requirements for older immigrants may create power imbalances within family dynamics that can result in abuse and exploitation, which is compounded by the fact that language and cultural barriers may make it especially difficult for these older adults to report or escape abuse.¹⁶⁹

Persons with some disabilities may experience some biological effects of aging at a different rate, or experience greater risk of developing additional disabilities. For example, persons with Down’s Syndrome are at a significantly higher risk of developing dementia symptoms associated with Alzheimer’s Disease. As well, persons with intellectual disabilities who have lived with their parents throughout their lives may, as they themselves reach the threshold of old age and their parents reach advanced old age or die, find themselves suddenly separated from their lifelong support systems and thrown into substantial insecurity in terms of their supports and living arrangements.¹⁷⁰

Disadvantage may manifest *differently* rather than *disproportionately* in some circumstances. Elder abuse may take culturally specific forms, for example.¹⁷¹

Similar outcomes may have a different effect on individuals depending on identity and life course. The principle of “aging in place” recognizes the importance to all older adults of maintaining their place in their home communities. However, the principle will have different meaning or impact for some communities. For a person who has lived with a disability for many years and has built up a community support network, the disruption of that network through a move away from the community may have a profound effect. For an immigrant senior who faces language barriers and has distinct cultural values, the move from independent living into a long-term care setting may be

particularly disruptive. For a First Nations senior who has lived all of his or her life in their First Nations community, the impact of being required, due to lack of appropriate supports, to move away from his or her community in old age, will be unique. Aboriginal communities that have a special and unique role and value for their elders also experience a reciprocal impact from losing their elders in this way. As well, for Aboriginal persons who lived through residential schools during their youth, re-institutionalization in old age may hold a special trauma.¹⁷²

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

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

The brief review in this Chapter of the circumstances of older adults reveals the complex relationship of age with many forms of disadvantage: “older adults”, however one defines them, are an extremely diverse group with a wide range of resources, capacities and outlooks. Not all older adults are poor, ill, living with disabilities or otherwise disadvantaged. There are in fact many older adults who are wealthy, healthy and privileged. Characterizations of all older adults as disadvantaged or needy may lead to inappropriate paternalism, as well as inefficient use of public resources.

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

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

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

Ageism is also the perpetuation of the belief that individuals *by themselves* can achieve this “successful aging”, or that by individual effort and sufficient willpower they can undo all the social inequities that have led up to their later years or the inequities that arise in later life.¹⁷³ [emphasis in the original]

As the material in this Chapter indicates, some older adults enter this stage of life with inadequate resources, financial or otherwise, to meet the challenges of aging. Some aspects of aging, such as the heightened likelihood of ill-health and disability and the

inability to recoup financial losses, create greater risks of disadvantage for older adults. There are indeed some older adults who experience more negative outcomes, and have greater needs for supports and resources, than either younger persons or other older adults. Laws of general application that do not take into account the ways in which some older adults experience higher risks of negative outcomes may make it more difficult for older adults to access and enforce their rights. The challenge is to accurately identify who these older adults are, and to develop conceptual approaches to these needs that will not replicate the problems that became apparent when older adults as a whole were considered “frail” and “vulnerable”.

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

As was briefly noted above, the concept of “vulnerability” has frequently been used to describe those older adults who are in need of heightened supports or protections. This concept has a freighted status in the law as it affects older adults, with ongoing debates about whether older adults, or some portion of older adults, should be considered as “vulnerable”. Given the recurrent policy tensions in the area of elder law between promoting the autonomy of older adults and protecting their safety and security, the concept of vulnerability has broad implications for this field.

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

Reflecting assumptions about the weakness, frailty and dependence of older adults, the popular imagination, as well as the law, has often associated older age *in general* with “vulnerability”. Adult protection laws are a good example of this.¹⁷⁴ The particular vulnerability of older adults to low income was the motivation for the creation of the largely successful set of income security programs that address older adults.

The concept of “vulnerability” and its association with old age is contentious. Assumptions that *all* older adults are vulnerable seem to draw on and perpetuate stereotypes of older adults that are belied by the many active, healthy and engaged older adults. This concern is strengthened by the tendency of discussions regarding older adults and vulnerability to focus on the area of legal capacity and decision-making, to the point where vulnerability and the lack of legal decisional capacity are frequently used as interchangeable concepts. The concept of vulnerability as applied to older adults tends to take on a pejorative aspect, rather than being seen as part of the human condition in general. There is a risk that vulnerability may be seen as *inherent* to the status of being an older person, rather than something that has roots in the life courses and environments of some older persons.

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

Resistance to the idea of vulnerability as key to a conceptually coherent category of “law and aging” is strong, and rooted in the idea that vulnerability = weakness and resistance to the presumption that age = loss of capacity. The fear is that legal theory focusing on personal vulnerability increases social vulnerability, the more significant source of harm, to the extent that it reinforces ageist presumptions of weakness and incapacity. Legal protection for the truly incapable, of whatever age, exists; and beyond that, older adults should be treated in law and otherwise like any other adult persons.¹⁷⁵ [emphasis in the original]

Adult protection legislation, which is examined at some length in Chapter III.B.5, provides an example of how sweeping characterizations of older persons as “vulnerable” may open the door to interventions which may be inappropriate, and may actually have negative effects on those the legislation is intended to assist. As American elder law scholar Nina Kohn has pointed out, adult protection legislation may not only be ineffective in meeting its goals and undermine the autonomy of older adults, it may lead to concrete violations of the privacy and other rights of older adults.¹⁷⁶

Legal scholar Martha Fineman has suggested a reconceptualization of vulnerability, detached from specific subgroups (such as older adults or children), that is focused on vulnerability as at the heart of the human condition, a state that “arises from our embodiment, which carries with it the imminent or ever present possibility of harm, injury and misfortune.”¹⁷⁷ In this approach, vulnerability has institutional as well as individual aspects, and suggests a relationship of responsibility between the state and the individual:

While all human beings stand in a position of constant vulnerability, we are individually positioned differently. We have different forms of embodiment, and also are differently situated within webs of economic and institutional relationships. As a result, our vulnerabilities range in magnitude and potential at the individual level. Vulnerability, therefore, is both universal and particular; it is experienced uniquely by each of us. Important in regard to this particularity point is the fact that our individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command. While society cannot eradicate our vulnerability, it can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures. Therefore, a vulnerability analysis must consider both individual position and institutional relationships.¹⁷⁸

While a shift in focus to state and institutional roles in addressing vulnerability may be helpful, it is important to acknowledge that state and institutional responses to perceived vulnerability on the part of older adults have in some cases been paternalistic, coercive and counterproductive. It has been argued that in some cases, such as mandatory reporting requirements for elder abuse, legal responses to vulnerability may exacerbate rather than reduce risk.¹⁷⁹ The legal reaction to the label of vulnerability may be a cause of valid concern, and it is important to question whether the response of the law to vulnerability has been appropriate, and the degree to which paternalistic or coercive responses are indeed necessary or desirable.

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

2. Applying a Substantive Equality Analysis to the Lives of Older Adults

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

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

It is difficult to define what we mean by “equality”, as is evidenced by the very complex jurisprudence under section 15 of the *Charter*. What is clear is that “equality” does not equal sameness: it is not a matter of “treating likes alike”. People are different, and those differences can matter. Part of ensuring equality is recognizing, and taking into account, the actual circumstances and characteristics of affected individuals and groups. Inequality may result from attributing and acting on differences where none exist (due to stereotyping, for example), but it may also result from ignoring or devaluing differences.¹⁸⁰

Fineman suggests that an understanding of the universality of human vulnerability and the shared possibility that any of us may become dependent as we age or become ill may deepen an equality rights analysis, moving us beyond a formal equality analysis that

...brackets off vulnerability and dependency in order to be able to assume them and the resulting disadvantages and burdens they place on individuals. If we are forced to take vulnerability and dependency into account, it would reveal the inadequacies of our conception of equality as not focused on substance but rather concerned merely with the formality of treatment.¹⁸¹

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

differently with respect to the law, and make it more difficult for them to access or benefit from the law.

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

3. Older Adults and Heightened Risk

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

Unlike the concept of vulnerability, the notion of heightened risk readily accommodates the recognition that the status of an individual will vary from situation to situation and over time: risk is a matter of degree and not an "all or nothing" state. As well, the concept of heightened risk focuses attention not only on the attributes of the individual but also on factors in an individual's immediate or broader environment. That is, the concept of heightened risk accommodates a recognition of the societal factors that may lead to negative outcomes, and reduces the stigma for individuals who are identified in this way.¹⁸² That is, all humans live with risk to some degree, and risk may be increased or decreased by the quality of the resources or assets available. Some older adults may have lesser or greater degrees of risk of negative outcomes than others: the task is to determine the factors or supports that will increase or decrease risk. This approach recognizes the diversity of the older adult population, avoids applying categories in a stigmatizing way as indicating qualities specific and inherent to older adults, and may assist in ensuring that programs and initiatives are targeted to those who are most in need.

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

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

below. This is not intended to be an exhaustive discussion, but rather to point to some areas that may benefit from further analysis.

Living environments: The living environments of older adults may either increase or decrease their vulnerability, depending on their quality or on the supports available in them. Environments which are socially isolating, reduce autonomy, or do not provide basic physical or emotional security will increase risks for older adults. Independent and congregate living environments may either increase or decrease vulnerability, depending on their quality or appropriateness. However, it should be noted that there are unique risks associated with congregate environments in that such living environments, while providing important supports for older adults in need, may also reduce independence and control and may have the effect of socially isolating their residents. Residents of institutions will experience greater barriers than other older adults in making complaints regarding their circumstances and this is particularly true for those who live in locked-in wards.¹⁸³

Family and Relationships: As was highlighted earlier, strong social relationship supports will increase the emotional, mental and physical well-being of older adults. Being able to contribute, practically or emotionally to the well-being of their loved ones allows older adults to continue to be, and to feel part of, their communities. Reciprocally, strong relationships can help maintain the ability of older adults to continue to live in the community and maintain independence and autonomy. They can also help to ensure that the rights of older adults are respected, whether they are living in the community or in congregate settings. Conversely, social isolation has an impact on health and well-being; it may also make older adults more vulnerable to abuse or exploitation. As individuals age, family members and friends may die or become less accessible. As well, negative societal attitudes towards older persons may make it more difficult to make new social bonds.

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

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

During the LCO's consultations, a common theme raised by individuals was a heightened sense of insecurity accompanying the ageing process. This insecurity was associated with a sense of diminished control over their circumstances. Individuals expressed anxiety about their finances once an exit from the labour force reduced their ability to respond to losses or increased needs, their ability to maintain independence as their health and abilities declined, their ability to retain control over their life and maintain dignity in the face of well-intended paternalism or serious illness, and whether they would continue to be treated with respect and consideration as age advanced. The frequency of such comments indicated that this sense of insecurity may be a widespread element of the experience of aging in this society.

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

Societal attitudes may also affect levels of risk. In this sense, it may be reasonable to suggest that older adults as whole have sources of risk distinct from other groups. While many older adults are healthy, economically secure, enjoy strong networks of social support, and are fully engaged in their communities, they are still susceptible to the effects of ageism. The effects of discrimination, negative attitudes and social exclusion may result in greater risks for older adults. For example, as is discussed earlier in this Chapter, older adults may find it harder to locate and maintain employment due to age discrimination, leaving them at greater risk of income insecurity. This may be particularly true for those older adults who are racialized, new immigrants, LGBT or otherwise face unique attitudinal barriers. The biological changes often associated with aging, may result in a greater sense of physical vulnerability as bodies age and become more frail, as well as a greater risk of social isolation as family, friends and spouses age and die. These changes may leave older adults feeling less secure. It is important to acknowledge this, while also acknowledging that some older adults will experience this more than others, and that this common type of disadvantage is not sufficient to justify paternalistic intrusions into the lives of older adults in general.

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

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

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

4. Responding to Risk and Inequality Among Older Adults

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

In tailoring responses to risk, it is important to carefully consider exactly what harms or negative outcomes individuals are at risk for. What is the negative outcome which may materialize? Most often we think of physical, emotional, sexual or financial abuse, but there may be other types of outcomes – such as poverty and homelessness, social isolation and exclusion, discrimination or crime. There are also degrees of harm, and responses should be tailored to the level of harm that may materialize.

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

[I]nstitutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability. Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence. Cumulatively these assets provide individuals with resilience in the face of our shared vulnerability.¹⁸⁴

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

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

A framework for the law that focuses on advancing equality for older adults must begin with an understanding of and respect for the needs and circumstances of older adults. Margaret Hall has suggested that one way in which ageism may manifest in the law is the failure to “respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults

generally are situated differently from younger people and have different needs”.¹⁸⁵ This is as true for the implementation of the law as it is for the substance.

This is not as simple as it sounds. The tendency among some to view older persons as a homogenous “other”, characterized mainly by frailty, dependence and proximity to death does a gross disservice to the diversity of the experience of aging and the richness of life experiences and perspectives among older persons. Law and policy frameworks that take as a starting point the idea of a standardized experience of aging will inevitably result in the over- or under-inclusion of many older adults who diverge from the imagined norm, and potentially result in injustice. This poses a significant challenge for those attempting to develop policies and programs for older persons.

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

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

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

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

The timeliness of legal redress is an important component of access to justice for everyone. Slow processes can discourage justice seekers, or can make remedies ineffective by the time they are obtained. For older adults of advanced age, however,

timeliness may take on particularly urgency, as finite life spans may mean that redress that can only be acquired through lengthy procedures is essentially meaningless.¹⁸⁶ Of course, the older a person is, the greater the concern: the issue is less acute for an individual in his or her 60s than it is for someone in his or her 80s or 90s.

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

Increasingly in many parts of Canada, public information on the law and government information about services and entitlements has been shifting from people sources to virtual sources such as the internet. The Special Senate Committee on Aging notes that a reliance on web-based information assumes a basic level of literacy and people's ability to access the internet. Many older adults, particularly older women, do not have access to or cannot use the internet.¹⁸⁷

This means that older men and women may be less aware of their legal rights, and have more difficulty accessing information about those rights. It becomes increasingly difficult to navigate the legal system:

Stakeholders and members of the public universally found Ontario's legal system to be too expensive and too complicated for the vast majority of people. There is growing inequality between wealthy litigants and poorer litigants. The system is seen as intimidating to the average user and as catering to Ontario's elite. Participants commented that the legal process was overly complex and that such complexity led to unnecessary and harmful delays.¹⁸⁸

It is worth noting as well that many of the laws that particularly affect older adults, such as those related to capacity, consent and substitute decision-making, are extremely complex, even in the best of circumstances. For example, ACE's practitioner's manual on long-term care and retirement homes runs to over 600 pages, while Toronto's Rent-Geared-to-Income Guide explaining the law for staff and directors of cooperative and non-profit housing, is over 200 pages. Lack of knowledge about their rights may form a substantial barrier to access to the law for older adults.¹⁸⁹

Labour Force Participation: While this may change in the future, it is currently the case that most older adults have withdrawn from employment and are reliant on fixed incomes from pensions or government programs for their livelihood. As a result, most older adults have limited capacity to deal with significant unanticipated expenditures, which could tip them into spending the rest of their lifetimes in poverty or financial difficulties. This means that for many older adults, spending the considerable sums required to undertake litigation is not a feasible response to difficulties in accessing their legal rights. This difficulty is exacerbated by the low levels of availability of Legal Aid.

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

Legal aid is unavailable to many lower and middle income applicants because of strict qualifying standards. It is almost wholly unavailable in civil matters. As well, Legal Aid pays lawyers at rates substantially below rates in private practice. As a result, fewer lawyers can take Legal Aid cases. Litigants who do qualify for Legal Aid, particularly in rural areas, are experiencing difficulty in finding a lawyer who will act.¹⁹⁰

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

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

Persons living in congregate settings, may face substantial barriers to accessing justice. ACE has stated that:

The power imbalance between older adults and staff or health care providers in congregate settings is one of the most significant factors contributing to an environment where older people are reluctant to complain and seek justice. Residents are “captives” of the home in which they live: that is, they cannot do without the help that is provided, have little or no say about who provides that care, and cannot leave and go elsewhere if they are unhappy with the care they receive. We heard from residents at our focus groups that they do not complain due to fear of retribution by staff members and concerns about evictions. Also, residents expressed a reluctance to “make a fuss” or “cause trouble”. Some residents feared they would be “evicted” from the retirement home or long-term care home if they did not comply with the “rules”.¹⁹¹

As well, persons aged 65 and older are disproportionately likely to live in rural or remote areas,¹⁹² and may face particular access issues as a result. As noted earlier, transportation may become a major issue for older adults who are unable to drive, and do not have access to public transportation due to their place of residence. The lack of legal and government services in these areas exacerbates these issues.¹⁹³

Family, Relationships and Caring: Some older adults are reliant on others for their wellbeing due to health and disability issues, financial dependency or familial dynamics. As a result, older adults may be reluctant to complain about financial, emotional, physical or sexual abuse by family members or caregivers (formal or informal) on whom they are dependent for maintaining some level of independence and wellbeing.¹⁹⁴ For

example, for an older adult who has continued to live in the community with supports, should a complaint result in the withdrawal of existing support systems, no other option may be available but to move into an institutional setting, something to which they may be adamantly opposed.

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

Along these lines, the physical accessibility of law-related institutions becomes increasingly important, as inaccessible law offices, government services, administrative tribunals and courthouses will make it impossible for many older adults to access their legal rights.¹⁹⁵

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.¹⁹⁶ Older adults may therefore have difficulty in travelling to access justice-related services.

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

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

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

There is no provision to appoint a legal case worker or litigation guardian to act on behalf of a tenant who is mentally incapable of filing an application and pursuing a remedy at the [Landlord Tenant] Board. This interferes with the ability of tenants with mental illnesses to enforce their rights, including defending themselves against eviction. Tenants may not properly recollect events, understand the legal process, remember to attend at hearings or retain legal representation until after an eviction order has been enforced.¹⁹⁷

ARCH, the specialty legal clinic for disability-related issues, undertook a project on the capacity of parties before administrative tribunals and has released an extensive report with recommendations for law reform on this issue.¹⁹⁸

Intersecting Identities: Age is, of course, just one aspect of the identity of an older person, and often is not experienced as the most important aspect of that person's identity. Each person's experience of aging will also be affected by their gender, ethnicity or racialization, Aboriginal status, sexual orientation, socio-economic status, marital and family status, geographic location and other factors. Individuals who have experienced marginalization or disadvantage throughout their lives due to gender, racialization, sexual orientation, Aboriginal status or other factors may find that aging compounds that disadvantage or changes how they experience it. Older adults from marginalized groups are more likely to find themselves disadvantaged in their old age – for example, living in low-income or otherwise lacking access to supports and resources. It is therefore important for policy makers and legislators to take into account these other aspects of aging.

III. ADDRESSING AGEISM AND ADVANCING SUBSTANTIVE EQUALITY: DEVELOPING A PRINCIPLES-BASED APPROACH

At an early stage in this project, the LCO determined that its approach to the law as it affects older adults would be rooted in a set of principles, building on the foundations created by the *International Principles for Older Persons* (IPOP)¹⁹⁹ and the *National Framework on Aging* (NFA).²⁰⁰ Although there are challenges in defining and grounding principles, a principles-based approach can provide a set of norms against which to evaluate existing or potential laws policies and programs.

Based on the results of its consultations, the LCO decided that the principles should have their roots in an anti-ageist approach to the law and aim to advance substantive equality. That is, the norms which are identified through the principles should proactively address negative attitudes and approaches (at the level of both individuals and systems) to older adults as they are manifested in the law. Through research and consultations, the LCO has identified six guiding principles for the law as it affects older adults.

In keeping with this approach, this chapter of the Report outlines some key features of ageism, and the values on which to base a framework for the law that is centred on substantive equality. The second part of this Chapter builds on this foundation to analyze and define principles for the law as it affects older adults, and to briefly consider some implications for their application.

A. Understanding Ageism

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

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

1. The Concept of Ageism

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

[a] process of systematic stereotyping or discrimination against people because they are old, just as racism and sexism accomplish with skin colour and gender. Ageism allows the younger generation to see older persons as different than themselves; thus they subtly cease to identify with their elders as human beings.²⁰¹

Butler pointed out that ageism manifests in a variety of forms, including stereotyping, negative attitudes, discriminatory behaviours, avoidance and social exclusion. Ageism may derive from ignorance – the lack of contact between younger and older persons – or from a profound fear of aging and death. It may also serve a rational purpose, in justifying preferential treatment of younger persons and excluding older persons from a share of societal resources.²⁰²

Ageism may also manifest as systemic disadvantage and exclusion of older persons in societal institutions. The Ontario Human Rights Commission (OHRC) has defined ageism as “a socially constructed way of thinking about older persons based on negative stereotypes about aging as well as a tendency to structure society as though everyone is young.”²⁰³

For the purposes of this project, ageism may be defined as a belief system, analogous to racism, sexism or ableism, that attributes specific qualities and abilities to persons on the basis of their age. Ageism may manifest with respect to older adults in attitudes that see them as less worthy of respect and consideration, less able to contribute and participate in society, and of less inherent value than others. Ageism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society.

There have been considerable efforts, both in Canada and internationally, to identify and address ageism and age discrimination. The United Nations declared 1999 the International Year of Older Persons, and there are now a plethora of international documents focused on inculcating respect for and addressing the needs of older persons.²⁰⁴ Advocacy organizations like the CARP²⁰⁵ vigorously represent the views and needs of their constituencies, while Ontario’s Advocacy Centre for the Elderly (ACE) has been a major force in promoting law reform relating to older persons. In 2000, the OHRC undertook a high-profile endeavour to raise respect and awareness about the human rights of older persons and to advocate for reforms in law and policy.²⁰⁶ The Senate Special Committee on Aging has recently completed a multi-year project on older persons in Canada.²⁰⁷ Change is underway, and attitudes towards older persons continue to evolve.

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

It is the case ... that age discrimination tends not to attract the moral outrage as do many other forms of discrimination. This may reflect in part the fact that we all can expect to be older, but we will not all be members of the other groups involving prohibited grounds for discrimination. Furthermore, age discrimination is often justified in the minds of some in that it involves more opportunities for others, such as jobs and promotion opportunities if, for example, mandatory retirement prevails.²⁰⁸

The OHRC has stated that it “is very concerned that ageism and age discrimination do not appear to invoke the same sense of moral outrage and condemnation as other forms of unequal treatment.”²⁰⁹

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

2. Stereotypes and Negative Attitudes Regarding Aging and Older Adults

Negative attitudes towards aging and older persons are not inevitable. Some societies value their elders highly as sources of wisdom, knowledge and experience. The *Madrid International Plan of Action on Ageing* (MIPAA) points out, “Recognition of the authority, wisdom, dignity and restraint that comes with a lifetime of experience has been a normal feature of the respect accorded to the old throughout history.”²¹⁰

However, many have pointed to the lack of positive images of aging in our own society.²¹¹ The Special Senate Committee on Aging stated that

It is difficult talk about aging in a positive way in a society which fights aging so vigorously. We are assailed with advertising which promises eternal youth. Changing this view will take a concerted effort.²¹²

The MIPAA, the OHRC and the Special Senate Committee on Aging have all recommended government initiatives to promote positive images of aging.²¹³

Some have identified the roots of negative attitudes and stereotypes in the significant age segmentation of our society, in which young, middle-aged and older persons occupy separate social and functional spheres. Associated with this is age segregation, where older persons are separated from the mainstream institutionally, culturally and spatially. Some academics have described old age as “a separate country”. The result is an “us and them” separation between older and younger persons.

[A] key weapon against stereotypes and prejudices is intergroup contact, which allows individuals the opportunity to challenge homogenized categories and see beyond stigmatized characteristics to other relevant qualities of persons in a pivotal category. In our view, arenas that facilitate ongoing interaction, familiarity and personal knowledge across age categories are hard to come by. Institutional arrangements that segregate older and younger persons from each other, and from other age groups, restrict opportunities for individuals to form stable cross-age relationships.²¹⁴

Others have pointed to the development of what some have termed a “youth cult” that associates youth with the future and new technology.²¹⁵ The Special Senate Committee on Aging noted in its Final Report that ours is a youth oriented society. Growing older is viewed as “something to be denied, avoided at all costs, and kept hidden”.²¹⁶

As well, there are commonly negative, even catastrophic, perceptions of the demographic reality of an aging society. An apocalyptic view of demographic trends and an assumption of intergenerational conflict for scarce resources is a common theme in media, fuelling fears about the sustainability of public programs such as medicare and the Canada Pension Plan.²¹⁷ Older persons are viewed as burdens, not only on

individual family members, but on society as whole. They therefore become targets for resentment. The *MIPAA* notes that “older persons are disproportionately portrayed as a drain on the economy, with their escalating need for health and support services.”²¹⁸ ACE notes that stereotypes about older adults as sickly, and the belief that this group is responsible for increases in health care costs, may support policies to reduce social programs for care, and may send the message that older adults are not entitled to services.²¹⁹

Older persons may internalize negative images of aging, which may lead to self-imposed limits on their activities. They may give up their independence or refrain from participating in society in conformance to expectations about what is “appropriate” for persons their age.²²⁰ The Expert Panel on Older Workers noted that one of the barriers that older workers may experience in seeking re-employment is lack of self-esteem or self confidence: older workers may perceive that employers will not see value in them, saying “Who would want to hire me? I’m too old”.²²¹ Internalized ageism may result in older adults accepting the negative valuation placed on older persons, and rejecting any association with “old people”.²²²

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

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

While these are stated in very strong forms, they exist, of course, in various shades and degrees, and may co-exist with other, more positive images and attitudes towards older persons. It is also important to keep in mind that all older adults will not be subject to ageist attitudes and stereotypes to the same degree, so that those with greater economic power, or who live within communities where they have greater social capital may experience less ageism than other more disadvantaged older adults.²²³

As was highlighted in the previous Chapter, in considering stereotypes regarding older persons, it is important to take into account how these may be exacerbated or compounded for persons who are identified by other sources of disadvantage, such as gender, sexual orientation, disability, racialization or Aboriginal identity, citizenship or low-income. For example, stereotypes regarding the declining capacities of older adults may be exacerbated for older immigrants for whom English is a second language, who may be treated with very low levels of patience. Older women are particularly affected

by negative attitudes about the attractiveness of older persons, and often assigned very low status. Older adults who have faced discrimination throughout their lives, such as LGBT or racialized older adults, and who have coped by trying to blend in and not be noticed, may be especially affected by the tendency to overlook older adults and their needs: the combination of their reluctance to complain and the tendency to ignore their needs may result in their complete invisibility to service providers and policy makers.

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

3. Valuing Older Adults

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

OLDER ADULTS AS DIVERSE INDIVIDUALS

Instead of getting more alike, as we age, we continue to get very different.

LCO Consultation Questionnaire Respondent

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

What is the common thread weaving through the lives of such diverse people? As a starting point, they are united by being in an age category which defines them as seniors. This categorization plays a large part in defining the roles they are expected to play in society. Too often, the categorization of “senior” overtly or subtly limits the horizons of the possible. This is ageism.²²⁴

The tendency to put an older person’s age first and foremost, and the corresponding inability to see older persons as individuals with widely varying life experiences, characters, likes and dislikes, hopes and fears, abilities and limitations, is perhaps the basis for all forms of ageism.

We are people first, older adults second.

LCO Consultation Questionnaire Respondent

Academics have pointed out that categories, such as those based on age, are unavoidably homogenizing and foster tensions between social groups. As one writer

describes it, “The prejudiced person exaggerates the extent to which members of the same group are similar to one another, and at the same time chooses to view people belonging to different groups as being very different”.²²⁵ This leads to a perception that all older adults are the same and their older age is the most important of their attributes. The resultant assumptions and stereotypes may vary, from the image of all older adults as “wise elders” to, on the other end of the spectrum, images of older persons as uniformly frail, depressed and out-of-touch with contemporary society. This frame of mind is most easily identified in the use of age-based categories in the law, an issue discussed at length in Chapter IV of this *Report*.

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

OLDER ADULTS AS CAPABLE OF GROWTH, CHANGE AND LEARNING

The stereotype of older persons as living in the past, resistant to change and unwilling to learn new things surfaces most frequently in the employment context. The Expert Panel on Older Workers noted that employer attitudes may create significant barriers for older workers, in that employers may perceive older workers as less adaptable, less learning-oriented or less amenable to adopting and using new technologies.²²⁶

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

[The Hospital] cannot be said to have acted unreasonably in concluding that the retirement, as a matter of course, of those who had reached the age of 65 would ensure the departure from staff of those who would generally be less able to contribute to the hospital’s sophisticated practice.²²⁷

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

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

- are highly-productive, offering considerable on-the-job experience;
- do as well or better than younger workers on creativity, flexibility, information processing, accident rates, absenteeism and turnover;
- can learn as well as younger workers with appropriate training methods and environments; and
- do not fear change but rather fear discrimination.²²⁸

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

It is important not to lump seniors into one category. Most have interests, like to be independent and appreciated for their individual qualities. Many are active volunteers. Seniors are survivors and have

experienced varied situations. Their knowledge needs to be respected. However, they also need opportunities to learn new things.

LCO Consultation Questionnaire Respondent

CHALLENGING ASSUMPTIONS ABOUT HEALTH AND ABILITY AMONG OLDER ADULTS

Despite the fact that health and ability vary widely among older adults, and that most older adults are in fact in good mental and physical health, older adults are often assumed to be frail or incapable, whether physically or mentally. Social science researchers point to the prevalence of “elderspeak” in which older adults, regardless of levels of health and ability, are spoken to in a manner similar to that used with small children, and the widespread phenomenon of “overhelping” older adults who are quite capable of caring for themselves, as two instances of this type of ageist thinking.²²⁹

It's very annoying when people talk down to older persons; e.g., calling them `dear`. People should not assume an older person requires help either physically, ask them if they need or would like help, or mentally. Don't assume they didn't understand or can't answer because they took longer to respond.

LCO Consultation Questionnaire Respondent

During the LCO's consultations, many participants raised concerns about the tendency of service providers to assume incapacity on the part of the older person, and to defer to younger family members or even fail to address the older person at all.

The assumption that older adults are necessarily limited in their health and abilities can lead to under-treatment for actual illnesses or health care needs. Health care providers may take the approach that “this is what can be expected at your age”, or that “nothing can be done”. Mental health issues among older adults may go untreated because depression and cognitive decline are considered to be a natural part of the aging process.²³⁰

Similar issues have arisen in the context of the provision of legal services. Lawyers are not immune from the effect of stereotypes regarding older persons and these may shape the ways in which legal advice and representation is provided. Whether through law school courses or otherwise, there is a dearth of training or education for lawyers on serving older clients.²³¹ The Ontario Bar Association (OBA) notes that there are Guidelines for practitioners serving older clients, but many of the guidelines are out of date, their availability is not known to those who need them and they are often not followed.²³² For example, ACE has received complaints about lawyers failing to consult with their (capable) older clients, and instead seeking instruction from the older adult's friend or family member.²³³ The OBA recommended that the LCO consider whether there should be a minimum level of training in age-related issues in professional curricula and the promulgation of guidelines within each health and legal profession to address age-related rights and services.

A study reviewing American guardianship, will and trust decisions found that, with surprising frequency, advanced age was treated as synonymous with cognitive decline and the need for guardianship. In a number of decisions, advanced age was the only reason given for the imposition of guardianship or was one of the factors considered in determining undue influence in will and trust cases. The researcher also pointed to these attitudes as a reason for the underutilization of limited guardianship provisions: advocates assumed it would be a waste of time and effort to craft limited guardianship agreements since it was assumed that the client's condition would inevitably deteriorate and require further action.²³⁴ Similarly, the OBA, in its submission to the LCO's preliminary consultation, highlighted concerns regarding Ontario's capacity and guardianship regime as examples of ageism in the law. The OBA pointed, for example, to concerns about the extent to which stereotyping, as well as a lack of education and training among health professionals, contributes to a misunderstanding as to the definition of capacity.²³⁵

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

For this reason, some have expressed concerns about emerging stereotypes and social pressures regarding "good" and "bad" aging, in which a "good" older age is healthy, self-reliant and active, as opposed to a "bad" older age characterized by sickness, dependency and premature death. As one focus group participant commented, "There is a pressure to be healthy, active, financially secure – to 'have the yacht'. If you don't have all that, then it's like you're a failure".²³⁶

The biggest problem with stereotypes of good and bad old age is that they marginalize the most vulnerable older adults, those with the fewest personal and economic resources, who are particularly likely to be unattached, female, in precarious health, and to have limited support networks. Stereotypes of good and bad may further devalue and segregate these more marginalized older adults, reinforcing the social, economic, and cultural differences between those who do and those who do not "age well".²³⁷

VALUING THE CONTRIBUTIONS OF OLDER ADULTS

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

The obvious example, of course, is the exclusion of older persons from the market place, either formally, such as through mandatory retirement policies and the laws that upheld them, or informally, through age-based discrimination by employers. While older adults can and do make valued contributions in the workplace, it is also important not to focus on economic productivity as the sole source of human contribution or value. Humans contribute to their societies in many other ways, such as volunteering in the community, providing care for loved ones, giving emotional support to friends and families, and the provision of advice and mentoring based on wisdom and accumulated experience. According to Statistics Canada, a significant portion of older adults help others, and they do so in a variety of ways, whether it is helping persons living outside their home with domestic work, home maintenance or outdoor work, providing childcare to family members, teaching and giving practical advice, or giving emotional support.²³⁸

As our society ages, it is vital that all citizens, especially the elderly, are treated with respect, with dignity ... Those of us who have retired have not withered away, but are a vital part of society with a vast wealth of experience and knowledge to pass on to the younger members of our society, even if we can't come up with all of the advances in technology!

LCO Consultation Questionnaire Respondent

Even the non-economic contributions of older adults are often devalued, however. An example is a British Columbia case where a 77-year-old woman died due to the negligence of a nursing aide. The court declined to award damages to her children for loss of care and companionship on the basis that “their mother had long since ceased to be a companion for she had been physically, mentally and emotionally incapacitated for a considerable time before her death”.²³⁹

OLDER ADULTS AS ACTIVE PARTICIPANTS IN THEIR OWN LIVES AND COMMUNITIES

Older adults are often conceived of as dependents, and as passive recipients of services. As noted above, discussions of Canada’s aging demographics frequently characterize this trend as a crisis and a burden, focusing on concerns regarding the costs of increased health care and social service entitlements.

Older people are on a lifelong continuum of participation in the community and their contribution and participation does not diminish in importance as they age. They are part of the circle (cycle) of life and their needs must be considered to be important as those for all other ages and stages.

LCO Consultation Questionnaire Respondent

As a result of this mindset, the social and economic contributions made by older adults often go unrecognized. For example, discussions of caregiving needs often focus on older persons solely as recipients of care and consider how the “sandwich generation” can be better supported to provide eldercare. This is certainly a need and is an important issue. However, the role of older persons in providing care for others – whether for their aging spouses, for their adult sons and daughters with disabilities, or as primary caregivers for their grandchildren receives considerably less attention and

discussion. Supports are inadequate for all caregivers; however, older caregivers are particularly invisible in these discussions. For example, despite the importance of the relationships between grandparents and grandchildren, grandparents may find themselves in a precarious situation and without legal status regarding access to their grandchildren upon the breakdown of the parent's marriage.²⁴⁰ Similarly, approximately 20,000 Ontario children are currently being cared for by their grandparents. Close to half of these caregivers are single grandmothers, and approximately one-third of these families are living in poverty. These grandparents have raised concerns regarding the lack of social supports and legal protections for their unique circumstances.²⁴¹

4. Manifestations of Ageism

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

INVISIBILITY

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

[A]geism exists precisely because elderly people represent our future in which death is certain, physical deterioration probable, and the loss of current self-worth-enhancing characteristics a distinct possibility.²⁴²

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

Because older people tend to be associated with death, younger persons may adopt ageist attitudes and behaviors to distance themselves from older people. This may include blaming the older person for their state (e.g., external indicators of aging). Doing this may allow the younger person to deny the reality that they too will eventually become part of that outgroup.²⁴³

One of the most common forms of discrimination against older adults is social exclusion. Age discrimination and, in the past, mandatory retirement policies, have led to the exclusion of older adults from the workplace. Frequently, older adults are hived off into separate living spaces. Professionals like health care workers or lawyers are unlikely to choose to specialize in working with older persons: although geriatrics is a recognized medical specialty, there is an ongoing shortage of qualified professionals, and in Canada, elder law is a fledgling area. Service providers tend to spend less time with and overlook the needs of older persons. In this way, older persons become in many ways invisible.²⁴⁴

Too often elder people are removed from the general population, either in adult or seniors residences and communities or in nursing homes, and as such can be more easily forgotten by the public at large.

LCO Consultation Questionnaire Respondent

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

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

This has produced a category of person who, while being dependent on the public sphere for survival, lacks access to or influence over public policy. Such persons are denied full admission to public power and full control over their individual destiny. They remain outside the mainstream of society. This lack of presence – or invisibility – serves to reinforce stereotypical assumption about persons with disabilities. It encourages a lack of respect for people with disabilities as rights holders on an equal footing with others.²⁴⁵

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

PATERNALISM

Philosopher Gerald Dworkin defines paternalism as follows:

When [rules, policies and actions] are justified solely on the grounds that the person affected would be better off, or would be less harmed, as a result of the rule, policy, etc., and the person in question would prefer not to be treated this way, we have an instance of paternalism.²⁴⁶

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

I think at times others try to do too much to help, and as a result one occasionally feels useless.

LCO Consultation Questionnaire Respondent

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

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

This type of paternalism is linked to what some call “compassionate ageism”. This type of ageism takes the form of trying to protect older persons from harm and to improve their lives. While this conjunction of paternalism and benefits may respond to the needs of some for some older adults, this kind of ageism, like any other, may damage older persons by removing their opportunities for self-determination and undermining their dignity.²⁴⁷

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

It is the opinion of ACE that the overarching principle that should guide the law as it affects older adults is that seniors are people. They are presumed to be capable of making decisions and they have the right to make foolish decisions, if they so choose. The government must be careful not to create laws, in its overzealousness to protect so-called vulnerable older adults, which actually limit their rights.²⁴⁸

B. Developing Principles for an Anti-Ageist Approach

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

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

Develop and promote a policy framework in which there is an individual and collective responsibility to recognize the past and present contributions of older persons, seeking to counteract perceived biases and myths and, consequently, to treat older persons with respect and gratitude, dignity and sensitivity.²⁴⁹

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

We strongly endorse all the principles outlined by the Commission. While slightly different, they do not differ in substance. The important issue is what goal the principles serve. The common thread through all the stated principles is anti-ageism. The principles embraced in law should be conducive to people living active, independent and purposeful lives as they age without having to face legal and social barriers as they age.²⁵⁰

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

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

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

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

2. Sources for the LCO's Principles

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

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

INTERNATIONAL DOCUMENTS

In addition to numerous international instruments setting out broadly based rights and principles, such as the *International Covenant on Social, Economic and Cultural Rights*²⁵¹ and the *International Covenant on Civil and Political Rights*,²⁵² there are a significant number of international documents devoted specifically to the rights and needs of older persons. A *Draft Resolution on a Declaration of Old Age Rights* was developed as early as 1948. Beginning in the 1980s, there has been considerable work done to develop and implement an international plan of action on aging, with a first plan developed through the first World Assembly on Ageing²⁵³ in Vienna in 1982, and a second plan put forward through the second World Assembly on Ageing in Madrid in 2002. There have been numerous General Assembly Resolutions related to the implementation of these action plans, and a variety of other documents developed in support. The most relevant of these international documents are described below.

United Nations International Principles for Older Persons (1991)

Perhaps the most important of the international documents related to older persons, is the United Nations IPOP.²⁵⁴ These were adopted in 1991, pursuant to the *United Nations International Plan of Action on Ageing*.²⁵⁵ The IPOP do not have the same status as a Convention: they are not ratified by states and do not impose obligations. However, the principles identified in the IPOP provide a broad and general framework

of principles that are applicable across a wide range of cultures and circumstances, and that can guide states in their policy and program development.

The IPOP are based on the recognition of

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

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

Madrid International Plan of Action on Ageing (2002)

The *Madrid International Plan of Action on Ageing* (MIPAA)²⁵⁶ arose from the Second World Assembly on Ageing, a follow-up and re-evaluation of the outcomes of the 1982 Assembly in Vienna. MIPAA calls for changes for attitudes, policies and practices in all sectors so that the potential of an aging society may be achieved. It identifies a number of central themes, including

- the full realization of all human rights and fundamental freedoms of older persons;
- the achievement of secure aging, which involves eradication of poverty in old age;
- empowerment of older persons to fully and effectively participate in the economic, social and political lives of their societies;
- provision of opportunities for individual development, self-fulfillment and wellness throughout life, including in later life;
- ensuring the enjoyment of economic, social, cultural, civil and political rights;
- recognition of the crucial importance of families and intergenerational interdependence; and
- provision of health care, support and social protection for older persons.

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

World Health Organization Active Ageing Policy Framework (2002)

The World Health Organization (WHO) developed its policy framework on active aging as its contribution to the 2002 Madrid International Assembly on Ageing, at which

MIPAA was developed. Through this framework, the WHO adopted a vision of “active ageing”, which it defined as “the process of optimizing opportunities for health, participation and security in order to enhance quality of life as people age”. The WHO states:

Active ageing ... allows people to realize their potential for physical, social and mental well-being throughout the life course and to participate in society according to their needs, desires and capacities, while providing them with adequate protection, security and care when they require assistance.²⁵⁷

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

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

The Charter of Rights and Freedoms and Human Rights Laws

The specific provisions of the *Charter* and the *Ontario Human Rights Code* that are particularly relevant to the law as it affects older adults are discussed at some length in Chapter IV of this *Report*.

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

The Canadian Charter of Rights and Freedoms

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

Section 15(1) of the *Charter* provides for equality before and under the law, and for equal protection of the law without discrimination on the basis of a number of enumerated grounds, including age, sex, physical or mental disability, religion, colour, race and national or ethnic origin. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those experiencing disadvantage due to their age. As a whole, section 15 promotes a vision of substantive equality, as briefly discussed in section II.D. In *R. v. Kapp*, a decision interpreting section 15(2), The Supreme Court of Canada stated that, “Section 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole.”²⁵⁸ In the Supreme Court’s interpretation of section 15 and the right to equality, the principle of dignity has played an important role. This role reached its highwater mark in *Law v. Canada*, but following the decision of the Supreme Court in *Kapp*, it has had a less predominant place in equality rights

analysis, reflecting concerns that the principle had become a hurdle to applicants.²⁵⁹ The Supreme Court in *Kapp* reaffirmed, however, that “There can be no doubt that human dignity is an essential value underlying the section 15 equality guarantee. In fact, the protection of all the rights guaranteed by the *Charter* has as its lodestar the protection of human dignity.” The principle of dignity means that the affected individual or group feels self-respect and self-worth, and is concerned with physical and psychological integrity and empowerment.²⁶⁰

Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and interference with physical freedom. Liberty includes the right to an irreducible sphere of personal autonomy regarding matters that “can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”²⁶¹ Within that sphere, individual choices must be free from state interference. Security of the person has been interpreted by the Supreme Court of Canada as including an individual’s “psychological integrity”²⁶² where the interference is sufficiently serious.

The Ontario Human Rights Code

The purpose of the *Ontario Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the Code are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.²⁶³

The *Code* prohibits discrimination on the basis of age, as well as of sex, sexual orientation, disability, family and marital status, race, ethnicity, place of origin, and several other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of age, older persons have the right to accommodation up to the point of undue hardship for needs associated with their older age. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.²⁶⁴

The OHRC has broad powers to advance the purposes of the Code as expressed in the Preamble. These powers include the ability to develop statements of policy, interpreting the provisions of the Code. The OHRC has developed a *Policy on Discrimination against Older Persons because of Age*,²⁶⁵ which was released in 2002 and updated in 2007. The Policy outlines a principled analysis of the application of human rights protections related to older age. Based on its research and public consultation, the OHRC adopted

the principles of the NFA as part of its policy analysis. It harmonized these with the fundamental human rights principles of dignity, participation and inclusion, and individualization. The Policy emphasized an anti-ageist approach to human rights, and adopted an intersectional approach to the diversity among older adults.

DOMESTIC POLICY FRAMEWORKS

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

The *National Framework on Aging* (NFA)²⁶⁶ was released in 1998, and updated in 2009 through the *Seniors' Policy Handbook*.²⁶⁷ It was a joint product of the Federal/Provincial/Territorial Ministers Responsible for Seniors (with the exception of Quebec, which supported the Vision and Principles, but which intended to assume full responsibility for the entire range of activities relating to health and social services). This voluntary framework was intended to assist governments in responding to the needs of seniors. It was based on extensive public consultation. At the core of the NFA is this vision: "Canada, a society for all ages, promotes the well-being and contributions of older people in all aspects of life". The NFA adopted five interrelated principles with which to guide actions to achieve the Vision: dignity, independence, participation, fairness and security.

Senate Special Committee Report on Aging (2009)

In 2006, the Canadian Senate struck a Special Senate Committee on Aging. The mandate of the Committee was to review a wide range of issues, with the purpose of determining whether Canada is providing the right programs and services at the right time to the individuals who need them. The Committee reviewed public programs and services for older adults, identified gaps, and examined the service delivery implications of an aging population. The Committee released its final report in the spring of 2009.²⁶⁸ In addition to making numerous specific recommendations with respect to policy and program options and implementation, the Committee emphasized the importance of the following: recognizing the place of older adults as active and engaged citizens; affording older adults the opportunity to age in place; placing as much importance on adding life to years as on adding years to life; and recognizing the aging population as an opportunity for Canada.

Health Equity Impact Assessment Tool (2011)

This tool was developed by the Ministry of Health and Long-Term Care in collaboration with Ontario's Local Health Integration Networks as a means of supporting improved health equity and reducing avoidable health disparities between population groups. It provides a step-by-step approach to analyzing how a particular program or policy may affect population groups in different ways.²⁶⁹

REPORTS ON SPECIFIC ISSUES

There are, of course, a plethora of reports and policy initiatives addressing specific issues related to older adults. Particularly interesting for the purposes of this Project is the *Seniors' Mental Health Policy Lens* that was developed for the B.C. Psychogeriatric

Association.²⁷⁰ The Lens is intended to guide analyses of current and planned policies and programs from a seniors' mental health perspective. It is designed to identify ageist biases in policy that may result in negative impacts on the mental health of older adults, and to foster a social, rather than biomedical, model of care. It is based on older adults' perspectives and values about their mental health. The *Lens* identifies 10 factors to consider when developing or evaluating policies relating to the mental health of older adults, including process factors (such as whether the program or policy was developed in a collaborative and participatory fashion), diversity, recognition of the multiple determinants of health, accessibility, promotion of participation and relationships, independence, security, dignity, fairness, and a life course analysis.

This *Lens* was adapted to create the *Prevention of Elder Abuse Policy and Program Lens*,²⁷¹ which was developed by the Prevention of Elder Abuse Working Group in partnership with the Ontario Seniors' Secretariat and the Elder Health Coalition. The intent of the *Lens* is to strengthen the capacity of government, non-government organizations and service providers to prevent, detect and respond to elder abuse. The *Lens* adopts eight guiding principles: collaboration between the full range of stakeholders and persons affected by any policies, programs or practices that are developed or implemented; consideration of the specific needs of marginalized/vulnerable subgroups among older adults; accessibility; social inclusiveness; independence and self-determination; respect and dignity; fairness and equity; and security, meaning the reduction of the susceptibility of older adults to risk, danger, doubt, anxiety and fear.²⁷²

3. Substantive Equality as an Underlying Value for the Framework

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

Rather than identifying equality as a discrete principle, the LCO has concluded that substantive equality is more appropriately described as "an underlying value" or a goal that observance of the principles will advance and that should influence the interpretation of the principles. As such, the advancement of substantive equality is the overarching aim of the *Framework* in its entirety.

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

"Equality" is often linked with "non-discrimination" and in certain respects they are intended to achieve similar results. Anti-discrimination theory has become intertwined with the notion of equality, and as a result even the broader "equality" tends to carry with it the notion that particular groups (and not necessarily others) have been treated unequally and deserve to be treated equally. There is a major difference between the two, however. "Non-discrimination" requires a comparison with others who do not share distinctive characteristics with a person denied a benefit or opportunity, for example. There is an implicit assumption that the way the comparator group is treated

or the opportunities available to the comparator group is the standard to meet. Both the claimant and the comparator group might be treated “badly”, but nonetheless equally and without discrimination, even though the way they are treated is at a low standard. Accordingly, governments required to extend benefits to a group previously excluded because the exclusion constitutes discrimination can decide not to provide the benefit rather than extend it.

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

Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.²⁷³

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “social citizenship” in society. It incorporates but is not limited to non-discrimination, meaning that no distinctions are imposed upon disadvantaged persons that, in purpose or effect, withhold or restrict access to opportunities, benefits or protection from the law, or impose burdens, obligations, or disadvantages that are not imposed on others. It also means, however, that older persons are not defined by their age, but are recognized as members of society who are able to make contributions and have obligations, as do other members. Substantive equality is about intangible concepts such as dignity and worth, but also about concrete opportunities to participate, have needs taken into account and have society and its structures and organizations develop in a way that does not treat older persons as outside mainstream society.

In this way, an anti-ageist approach is a tool for advancing substantive equality in the law.

4. Principles Adopted by the LCO

Based on its research and consultations, the LCO has adopted the following six principles for its framework for the law as it affects older adults, each of which is considered in some detail below:

1. Respecting dignity and worth;
2. Fostering independence and autonomy;

3. Promoting participation and inclusion;
4. Recognizing the importance of security;
5. Responding to diversity and individuality; and
6. Understanding membership in the broader community.

The six principles are dealt with separately below. However, to some degree, the separation of these principles is artificial. To a significant extent, the principles are inter-related, in the sense that, for example, autonomy is often considered a component of dignity. Further, the principles are interdependent: for example, independence is predicated on a minimal level of security, and older adults who do not have sufficient autonomy to be able to make their own choices and to advocate for themselves are at risk of losing their security. For example, one group of focus group participants connected the ability to participate in the community with the level of dignity and respect accorded older adults in that area:

There are so many people of different [older] ages that are involved in so much work here, which is volunteer, because there aren't enough people to do everything in this town that we are looked on as necessary people, but also we contribute an enormous amount of work that could not be done without us. We are contributing. The fact that there are so many volunteers helps them to integrate and find friends. It's a really good thing.

LCO Focus Group, Rural Older Adults, November 16, 2011

RESPECTING DIGNITY AND WORTH

Dignity is identified as a key principle for older persons in several source documents, including the United Nations IPOP and the NFA. It is also at the core of values incorporated into the *Human Rights Code* and the *Charter*. The Preamble of the *Code* states that its purpose is to “recognize the inherent dignity and worth of every person”.²⁷⁴ In *Miron v. Trudel* the Supreme Court stated that the purpose of section 15 of the *Charter* is “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance”.²⁷⁵ Although the concept of dignity has a core role within all of these source documents, there is considerable variance in how they define it.

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

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

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

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

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well....²⁷⁶

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

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

- All persons are entitled to respect. Respect requires recognition of and concern for the dignity of every person. Dignity is fragile. It must be protected from all harm.
- All persons have inherent dignity. Dignity belongs to us just because we exist. It is not something we earn or receive.
- All persons have inalienable dignity. Dignity cannot rightfully be ignored, diminished or taken away.
- All persons have equal dignity. Dignity does not depend upon physical, intellectual or other characteristics. Neither does it depend upon the opinions that other people have about these characteristics.
- All persons have inherent and equal worth. Our value as persons is neither earned nor accumulated. It is unrelated to health status or any genetic or other personal characteristic.
- All persons have inherent capacity for growth and expression. Every person has the right to be nourished physically, intellectually, socially, emotionally and spiritually.
- All persons are entitled to equal access and opportunity. Equality demands protection from all forms of discrimination or harm, and access to the supports necessary to enable equal participation.²⁷⁷

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

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

People who are not diagnosed [with a psychosocial disability] have the “right” to make risky and potentially self-defeating choices without intervention from authorities, clinicians or service

providers wishing to protect them from the consequences of their choices. The concept of the dignity of risk acknowledges the fact that accompanying every endeavour is the element of risk and that every opportunity for growth carries with it the potential for failure. All people learn through a process of trial and error. We learn through taking risks and trying new things and we often learn as much from our mistakes as we do from our successes. When people living with a mental illness are denied the dignity of risk, they are being denied the opportunity to learn and recover.²⁷⁸

The concept of “dignity of risk” has had some application as a principle of disability law. Where a disability-related accommodation creates health and safety risks, whether to the person with a disability, or to others, the *Code* specifies that this may amount to “undue hardship”. Employers, landlords and service providers are not required to implement accommodations that will result in undue health and safety risks. However, the OHRC *Policy and Guidelines on Disability and the Duty to Accommodate* asserts that in some cases, where making an accommodation to permit a person with a disability to participate will result in some risks to the safety of that person, the person with a disability may have a right to assume the risk to themselves in the pursuit of equality.²⁷⁹ For example, the Ontario Human Rights Tribunal, in *Turnbull v. Famous Players Inc.*, upheld the right of persons who use wheelchairs to assume some reasonable risks to their own safety (for example, those associated with being carried up and down stairs) associated with attending movies in a non-accessible building, so long as they were fully informed regarding those risks.²⁸⁰

As noted above, the principle of dignity plays a considerable role in the interpretation of the equality rights provision of the *Charter*, reaching its highwater mark in the decision of the *Supreme Court in Law v. Canada*,²⁸¹ where the Court gave a central place to dignity in the equality rights analysis – an approach since modified in *R. v. Kapp*.²⁸² Importantly, the *Law v. Canada* case dealt with an age-based distinction under the Canada Pension Plan, in which survivor benefits were denied to able-bodied surviving spouses under the age of 35 who were without dependent children. The Court found that while these provisions did create differential treatment, they did not violate human dignity, and therefore were not discriminatory.

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

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

This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family

are full persons, unique and irreplaceable. The principle 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.

FOSTERING INDEPENDENCE AND AUTONOMY

The principle of independence and autonomy is widely accepted as a foundation for policy related to older adults. It is adopted by the NFA and the United Nations IPOP. The World Health Organization's *Active Ageing Policy Framework* emphasizes that "Maintaining autonomy and independence as one grows older is a key goal for both individuals and policy makers".²⁸³

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

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

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

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

These two approaches to a definition of independence point to two key facets to this principle. These are reflected in the distinction that the World Health Organization makes between the terms "independence" and "autonomy". The World Health Organization defines these the two terms as follows:²⁸⁴

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

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

The first aspect – the aspect that the WHO refers to as autonomy- is the notion that individuals have the right to make choices about their own lives. This notion is sometimes tied, in a line of thought which may be traced back to Kant, to the nature of human dignity. Rationality and autonomy, in this approach, are the basis for a capacity-oriented, individualist “dignity as self-possession”.²⁸⁵

The *Charter* provides some recognition and protection for individual autonomy. Section 7 of the *Charter* protects the “life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. There has been some division of opinion on the scope of “liberty” under the *Charter*, with some advancing the position that liberty includes only freedom from physical restraint by the state, and others advancing the notion that liberty includes the right to make fundamental personal decisions without state interference.²⁸⁶ The latter view was adopted by the majority of the Supreme Court in *Blencoe v. British Columbia*, in which the *Court* included the “right to make fundamental personal choices free of state interference” in section 7.²⁸⁷ In *R. v. Clay*, in which the Supreme Court rejected a challenge from a recreational marijuana smoker, the *Court* stated that:

[T]he liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can properly be characterized as fundamentally or inherently personal.²⁸⁸

It is not clear, however, the degree to which this *Charter* right to personal autonomy extends outside the administration of justice.²⁸⁹

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

The two facets are of course, closely allied, as both rely on notions of control over one’s own destiny. The International Federation on Ageing’s *Declaration on Rights and Responsibilities of Older Persons* balances both approaches in its interpretation of the principle of independence. For example, in the area of employment, the principle of independence requires both the right “to work and to pursue other income-generating opportunities with no barriers based on age” and the right to “retire and participate in determining when and at what pace withdrawal from the labor force takes place.” In terms of education, the principle of independence includes the right to “access educational and training programs to enhance literacy, facilitate employment and

permit informed planning and decision-making.” That is, access to education is important in its own right as part of the ability to *live as one chooses*, but also important insofar as it enhances the ability to *make choices*.²⁹⁰

This points to something important: a precondition to the exercise of autonomy is access to the information necessary to make meaningful choices. This is also relevant to the principle of participation and inclusion, discussed below. The MIPAA identifies access to knowledge, education and training as a “crucial basis for an active and fulfilling life” and as a key policy priority in the area of aging.²⁹¹

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

Legal scholar Martha Fineman argues that we must understand the concept of autonomy in the broader context of a vision of substantive equality:

[W]e must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality. For example, some degree of equalization of resources, so that there is a floor below which no citizen shall fall, would seem to be a prerequisite for the achievement of autonomy Autonomy in this sense concedes that all individuals have an inherent dependence on society. While some, having benefited from history and circumstances, may have the current means and methods that make it fair to expect them to achieve autonomy, others have been disadvantaged and are thus deserving of some compensatory or supplementary social support.²⁹²

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

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

This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the

legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.

PROMOTING PARTICIPATION AND INCLUSION

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

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

We support the principles cited in the *United Nations Principles for Older Persons* (1991), the Canadian National Framework on Ageing, and the goals set out by the World Health Organization in its *Active Ageing Policy Framework*. However, we have a particular concern that, despite these excellent principles and goals, older persons are rarely engaged in planning public policies or programs or changes to the law.²⁹³

Representation and inclusion in the law and policy-making process was a key theme in the LCO's focus groups and in responses to the Consultation questionnaires.

What I've got to say is that the people that make the laws are generally much younger than we are. They have no idea of the type of life and problems that we go through, nor do they consider the amount of funding that needs to be in this growing population. And the problem is getting worse, but it's the legislation, the legislators that have to be told about where they will be in 30 or 40 years and all of the problems that go with it.

LCO Focus Group, Older Adults in Long Term Care, October 31, 2011

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

- taking into account the needs of older persons in decision-making at all levels;
- encouraging the development of organizations of older persons to represent older persons in decision-making; and
- taking measures to enable the full and equal participation of older persons, particularly older women, in decision-making at all levels.²⁹⁴

This list highlights that this element of the principle of participation has a political component, insofar as it seeks to encourage the active participation of older persons in advocacy organizations and in government decision-making processes. For example, several participants in the LCO's consultations spoke highly of the effects of the Residents' Councils in long-term care homes, both on the ability of these older adults to have a say in the running of their homes, but also in terms of the well-being of participants:

If I was home in my condition, I would be house-bound, whereas I'm socializing, I'm on Council, I'm getting involved with the other residents and it's a good feeling when you see the smiles on their faces or families coming up and saying thank-you. That's worth a lot.

LCO Focus Group, Residents of Long-Term Care Homes, October 31, 2011

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

The Commission has defined "ageism" to mean, in part, "a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons". Ageism occurs when planning and design choices do not reflect the circumstances of all age groups to the greatest extent possible. The Supreme Court of Canada has recently made it clear that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then to try to accommodate those who do not fit this assumption. Rather, the age diversity that exists in society should be reflected in the design stages so that physical, attitudinal and systemic barriers are not created.²⁹⁵

The Supreme Court has made the principle of inclusion by design a central aspect of its approach to human rights laws.²⁹⁶ One element of this inclusion is attention to the accessibility of structures, programs and services. The importance of this element is highlighted by the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA).²⁹⁷ The purpose of the AODA is to develop, implement and enforce accessibility standards in order to remove barriers and achieve accessibility for Ontarians with disabilities across a range of contexts by 2025. The AODA defines a barrier as "anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice".²⁹⁸

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

A society for all ages encompasses the goal of providing older persons with the opportunity to continue contributing to society. To work towards this goal, it is necessary to remove whatever excludes or discriminates against them. The social and economic contribution of older persons reaches beyond their economic activities. They often play crucial roles in families and in the

community. They make many valuable contributions that are not measured in economic terms: care for family members, productive subsistence work, household maintenance and voluntary activities in the community. Moreover, these roles contribute to the preparation of the future labour force. All these contributions, including those made through unpaid work in all sectors by persons of all ages, particularly women, should be recognized.²⁹⁹

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

The fourth and final element of the principle of participation is the right to be active in all elements of community life. The WHO, in its *Active Ageing* policy framework, notes that "[t]he word "active" refers to continuing participation in social, economic, cultural, spiritual affairs, not just the ability to be physically active or to participate in the labour force".³⁰⁰

MIPAA recommends that governments take steps to "provide opportunities, programmes and support to encourage older persons to participate or continue to participate in cultural, economic, political, social life and lifelong learning".³⁰¹ This aspect of participation includes the right to continue to participate in the workforce, to access education and to be involved in community activities. Participants in the LCO's focus group for newcomer older adults spoke with pain about the isolation that they experienced due to poverty and distance:

The only problem that older people have in our community is that they are lonely. Back home there are neighbours to talk to and mosques to visit. But they are all far away. This is the problem. Government should encourage people to come to the community centre. [contemporaneous translation]

LCO Focus Group, Newcomer Older Adults, October 20, 2011

One facet of this commitment to the inclusion of older persons in the community is the widely endorsed concept of "aging in place", the idea that older persons should not need to move from their homes in order to access necessary support services in response to changing needs. Aging in place was one of the core concerns identified in the Senate Committee Report on Aging.³⁰²

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

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

This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. 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.

RECOGNIZING THE IMPORTANCE OF SECURITY

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

[address] possible vulnerabilities of older adults, whether short-term or long-term, without discounting the principles of dignity, independence and participation. The LCO is discouraged from recommending a framework based on the notion of vulnerability and a perception that older adults lack capacity and need protection.³⁰³

The notion of security is central to the WHO's Active Ageing Policy Framework. The WHO emphasizes that social and economic environments of older adults are key determinants of active ageing. The presence or absence of social supports, violence and abuse, education and literacy, income, social security and opportunities to work will have a significant influence on the ability of older adults to remain active, engaged members of their communities.³⁰⁴ That is, security is essential to the achievement and maintenance of the other principles of dignity, inclusion and independence.

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

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

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

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

As one of its key policy proposals, the WHO recommended that governments “[e]nsure the protection, safety and dignity of older people by addressing the social, financial and physical security rights and needs of people as they age”.³⁰⁵ This requires policy attention to such areas as social security, consumer protection, elder abuse, shelter and social justice.

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

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

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

The notion of security in the *National Framework on Aging* is a good concept that resembles care in the *Principles for Older Persons*. Unlike the United Nations document, there is no entitlement to services which ensure security of the person, such as health care, institutional care or specialized care. The principle of security could be strengthened if it was expanded to include access to legal and social services, as well as legal definitions of program eligibility for health care and community based long-term care services, such that a person who meets eligibility criteria is entitled to fully participate in the program regardless of scarce resources.³⁰⁶

While section 7 of the *Charter* provides protection for “security of the person”, it is far from clear whether this extends to the provision of basic necessities. The Supreme Court of Canada considered this question in the case of *Gosselin v. Quebec (Attorney General)*,³⁰⁷ but did not finally determine it. While the Court did not make such a finding in this case, it left the door open for future arguments that section 7 might be the basis of an affirmative right to basic subsistence. The Chief Justice, writing for the majority, stated that:

The question therefore is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.³⁰⁸

In *Nova Scotia (Workers’ Compensation Board) v. Martin*, a case under section 15 of the *Charter*, the Supreme Court stated that in section 15 cases involving economic interests,

economic disadvantage or deprivation may be related to a loss of human dignity.³⁰⁹ However, the Court has also been clear, most recently in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* that legislatures are under no obligation to create benefits (though neither are they restricted from doing so). They may target programs to be funded on the basis of their policy decisions, so long as the resulting benefits are not delivered in a discriminatory fashion.³¹⁰

The lack of security was a recurrent theme of the LCO's public consultations. Older adults repeatedly expressed fear for the future, and anxiety about their financial, physical and social independence. They feared slipping into poverty, exploitation by unscrupulous family members or service providers, losing the ability to contribute and be treated with respect, or losing dignity and control over their own bodies due to illness or disability.

There is also financial vulnerability, and I think a lot of us fear that too. And it's possible that you may have a cracker jack lawyer daughter who's going to look after your interests totally competently, but the chances are no, you're going to be on your own and really have very little idea, many people, of whether they are being cheated or whether they are getting what they're entitled to, and there's no system of advocacy.

LCO Focus Group, Older Women, October 21, 2011

This is a crucial issue for women because we live longer. We are entering the hospital system in our final days at a greater age and in greater frequency. Our sense of helplessness and powerlessness increases with our age. If you don't have really good people to help you, you are very much victimized by the system.

LCO Focus Group, Older Women, October 21, 2011

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

This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access to basic supports such as health, legal and social services.

RESPONDING TO DIVERSITY AND INDIVIDUALITY

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

combat ageism is to “encourage the media to move beyond portrayal of stereotypes and to illuminate the diversity of humankind”.³¹¹

The OHRC adopted individualization as a key principle in its *Policy on Discrimination Against Older People because of Age*, noting, “In the past, many standards, factors, requirements and qualifications that discriminate on the basis of age have been justified on the basis of presumed characteristics associated with aging.”³¹²

You need to feel that each person is an individual. Therefore, we need to be treated that way. What is right for one person may not be right for any other person.

LCO Consultation Questionnaire Respondent

The WHO’s Active Ageing Policy Framework recognizes the principle of diversity as part of its adoption of a life course perspective on aging, stating that “[a] life course perspective on ageing recognizes that older people are not one homogeneous group and that individual diversity tends to increase with age”.³¹³ That is, an application of the principle of diversity must incorporate a life course approach to understanding issues associated with aging.

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

The experience of age discrimination may differ based on other components of a person’s identity. For example, certain groups of older persons may experience unique barriers as a result of the intersection of age with gender, disability, sexual orientation, race, ethnicity, religion, culture and language ... This understanding of the complexity of how people experience age discrimination means that, where appropriate to the circumstances of the alleged discrimination, all relevant grounds must be considered along with age ... It may be necessary to examine any stereotypes as well as the historical, social and political context associated with the particular combination of grounds. In some cases persons may be put at a ‘double disadvantage’ as a result of age combined with other grounds of discrimination.³¹⁴

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

This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal identity, immigration or citizenship status, disability or health status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.

UNDERSTANDING MEMBERSHIP IN THE BROADER COMMUNITY

As the previous section makes clear, all of us have many identities, roles, ties, networks and communities. For older adults, their membership in a particular generation or age-grouping is only one, and not necessarily a defining, characteristic; it may not be the most central.

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

If we expect to get good care, we should be concerned about the people that we expect to care for us. I'm talking about the paid caregivers and we should support the laws that are trying to strengthen [the PSWs, the caregivers], their wages and their working conditions. My impression is that there are not very many laws or regulations around helping the caregivers, especially people, girls, women who come from other countries who care for the elderly and are they being protected.

LCO Focus Group, Older Women, October 21, 2011

Employing a life course approach adds another dimension, in that the laws and policies and environments shaping the life of children, young adults and those now in middle-age shape the nature and experience of growing into older.³¹⁵ An age-friendly society takes into account the well-being and resources available to individuals of all ages.

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

The emerging international concept of “intergenerational solidarity” presents another way of understanding and addressing the connections between generations.³¹⁶ The concept of intergenerational solidarity has been described in this way:

Solidarity between the young, the active and the elderly must not be approached solely from a financial perspective, but must be viewed in a wider way, encompassing the promotion of mutual cooperation and exchange between the generations. It must encourage a better mutual understanding of the needs and expectation of other age groups and explore new forms of coexistence. The way in which our society is organised must be reviewed completely in order to rebuild the social fabric and the links between and within the different generations so that all can find the place that suits them where they can flourish and make their contribution to the general well-being as best they can.³¹⁷

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

This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and cooperation and work towards a society that is inclusive for all ages.

5. Applying the Principles

RELATIONSHIPS BETWEEN PRINCIPLES

As these brief discussions of the principles indicate, the principles cannot be neatly separated from each other, and are interrelated in multifaceted ways. Dignity and independence, for example, cannot be achieved without security. Security is based on respect for the inherent worth and dignity of older persons.

However, there may also be tensions between the principles. There are a number of scenarios in which tensions between principles might arise in the context of older persons. In some cases, two principles may be in tension in relation to the same older adult. For example, an older woman could be living in unsafe and unsanitary conditions in her own home but would like to remain there rather than be moved. Here the principle of autonomy – the woman’s right to choose where to live – may come into tension with the principle of dignity – her inherent worth to have the minimum standards for her existence to be met. As an additional complication, the unsafe or unsanitary conditions for this individual might in some circumstances raise concerns about risks to others, thereby implicating the principle of understanding membership in the broader society. There may also be instances where principles may be in tension in relation to two different persons or groups of older persons. Although not insurmountable to resolve, it is important that we develop a framework for resolving such tensions when they do in fact arise.

In assessing tensions between principles, it is essential to be sensitive to the contexts in which those tensions arise.³¹⁸ What specific rights or outcomes are at issue in that particular situation? Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles? That is, the tensions must be examined in a nuanced and holistic manner.

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

One potential pathway to resolving tensions that arise between principles is to create a hierarchy among the principles in order to determine which principle should prevail in the event of a tension with another principle. One advantage of such an approach is that it is predictable, as well as simple, to apply. However, the mechanical nature of such an approach ignores the complexity of the issues where such tensions arise.³¹⁹ It also ignores the interrelatedness of the principles. To elevate the principle of dignity, for example, above all other principles ignores the potential that restrictions in the fulfillment of other principles, such as autonomy or participation, might contribute to an overall lessening of respect for the dignity of older persons. Hierarchical approaches have generally been rejected in the area of rights for this reason: for example, the preamble of the *Convention on the Rights of Persons with Disabilities* reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”.³²⁰

The concepts of “reconciling” or “balancing”, which have been explored in the context of “competing rights”, might be useful to consider in this context.³²¹ Reconciliation is an approach that attempts to give proper recognition of both principles to the greatest degree possible.³²² Balancing may involve the weighing of one principle against the other. Using a balancing approach may have the disadvantage of creating the impression that the principles are actually competing and need to be considered hierarchically.³²³

An important element of addressing tensions that may arise between principles, is to recollect that the principles themselves have been developed as a means of responding to the marginalization, exclusion and oppression of older persons. That is, in considering how to resolve tensions between principles, one might consider the particular types of barriers that the principles were intended to address, and how any specific approach to resolving the tensions might impact on the achievement of the broader goals of an anti-ageist approach to the law.³²⁴

It is also important to realize that the principles in tension should not be viewed in isolation: in trying to resolve tensions, it is often helpful to ask how the other principles that might not be so obviously implicated may help to inform an appropriate resolution.

The case example below highlights approaches and analyses where principles are in tension, in the context of mandatory reporting and adult protection laws.

CASE EXAMPLE: TENSIONS BETWEEN AUTONOMY AND SECURITY

Mandatory Reporting and Adult Protection Laws

One example of the ways in which tensions between principles may manifest in law may be found in considering mandatory reporting and adult protection laws. These are often cited as examples of the tensions between protecting the security of older adults and respecting their autonomy. A careful examination of these laws reveals a more multi-faceted relationship between these principles.

Some provinces have put in place comprehensive adult protection legislation. This legislation aims to address the risk of abuse and neglect for older adults, and creates institutional structures to address instances of abuse and neglect. It generally covers physical, sexual, emotional and financial abuse, as well as self-neglect. To achieve this objective, this type of legislation provides for intervention by third parties. The primary objective of adult protection legislation is to connect individuals with necessary social and medical services.

The application of adult protection legislation varies. Newfoundland's Neglected Adults Welfare Act, applies to adults who: 1) are incapable of properly caring for themselves because of "physical or mental infirmity"; 2) are not suitable to be in a suitable treatment facility under mental health laws; 3) are not receiving "proper care and attention" and 4) refuse, delay or are unable to make provision for proper care and attention.³²⁵ Nova Scotia's Adult Protection Act similarly applies to victims of abuse or neglect (or self-neglect) who are incapable of protecting or caring for themselves due to physical disability or "mental infirmity".³²⁶ That is, the scope of the legislation is not necessarily limited to those who are legally incapable of making decisions for themselves: physical disability or lesser levels of mental disability may also provide a justification for unwanted intervention. Manitoba's Vulnerable Persons Act is rather different in approach, in that it restricts its focus to persons with intellectual disabilities who are in need of assistance to meet basic needs with regards to personal care or financial management.³²⁷

Adult protection legislation focuses on protection from abuse and exploitation by granting broad powers to an agency to intervene. The Manitoba Law Commission notes that in these statutes "[t]he focus thus shifts from competence and legal disability to vulnerability and agency intervention, removal of the victim from the home, and case planning."³²⁸

All three statutes require mandatory reporting of abuse or neglect of an adult who falls within the protective scope of the legislation.³²⁹ Agencies have investigative powers, and may have broad remedial powers to, for example, remove the older adult or some other person from the home, place the older adult under agency

supervision, require a person to provide financial support to the older adult, or do anything else that the designated authority considers appropriate.

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

Adult protection legislation has been, and remains, controversial.³³⁰

ACE has always opposed adult protection legislation of the type in place in Nova Scotia, on the basis that such legislation: (a) limits the Charter values of liberty and security of the person without providing the same substantive rights and procedural safeguards that would be found in alternative criminal justice and mental health legal procedures; and (b) marginalizes already disadvantaged adults, often without providing anything constructive in the way of rights or resources that might assist them in overcoming neglect and abuse.³³¹

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

In considering responses to elder abuse, it is worthwhile to consider the views of older adults themselves, and the reasons that capable older adults may have for not reporting elder abuse.³³² They may, for example, be unaware of their rights and of their legal avenues for securing them. They may fear that the authorities would not take them seriously, or would not provide them with assistance. They may have been intimidated by their abusers, or prevented from contacting others. This may be particularly the case for older immigrants, who may face serious immigration consequences if their relationship with their sponsor is undermined. Older adults may also be reluctant to report their children if they are abusive, for fear of seeing them subjected to criminal penalties that will have life-long impact and destroy the relationship.

Circumstances involving the abuser as being someone in a position of trust also have a negative impact on report rates. A relationship with the abuser can discourage an elderly person to report abuse because many seniors perceive legal intervention as too severe. Some individuals indicated a preference for less formal or community-based response, similar to a restorative justice approach to elder abuse. Restorative justice appealed to group participants because of the belief it could provide an opportunity for victims to speak with their abusers, for the abusers to receive education about appropriate and acceptable behaviours, and present a way to repair the harm without family or loved ones facing serious legal repercussion.³³³

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

In considering these reasons, some conclusions become apparent.

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

[T]he [Manitoba Law Reform] Commission is of the view that legislation per se cannot be a complete answer to social problems. No legal regime can anticipate all eventualities in an area as diffuse and complex as adult protection, where problems take multiple forms and are deeply insinuated into social and familial relationships. Attempts to do so have created, in the Commission's view, blunt and intrusive legal instruments. The extreme protectionism at the heart of such statutes is at odds with the value placed in Canadian society on self-determination.³³⁴

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

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

- *The vulnerable person has the right to refuse protection services, where he or she understands why such services are offered and appreciates the danger or reasonably foreseeable consequences of his or her refusal.*
- *The vulnerable person's wishes, beliefs or values are to be considered so the vulnerable person's independence and self-determination can be maintained, and where these are not known or may endanger the vulnerable person, his or her best interests should be considered; and*
- *Protective action should be the least restrictive and least intrusive to ensure reasonable safety and security under the circumstances and to maintain the vulnerable person's independence, privacy and dignity.³³⁵*

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

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

While comprehensive adult protection regimes may give agencies a necessary "foot in the door" in cases of suspected or actual adult abuse or neglect, such regimes would appear to compromise individual autonomy and due process rights, which rights may not be recognized until long after an adult and his or her intimates have experienced significant loss of liberty and legal repercussions. It is this compromise of rights that is the most serious failing of comprehensive adult protection regimes.³³⁶

It is tempting to analyze the tensions regarding mandatory reporting and adult protection laws as a straight-forward instance of tension between autonomy and security for older adults, but it is important to resist a simplistic analysis. Mandatory

reporting laws, while intended to enhance the security of older adults, may in fact compromise their security by leading older adults at risk to isolate themselves or by exposing them to excessive intervention in their “best interests”. Further, legislation may not be the best avenue for enhancing the security of older persons, at least not as an isolated strategy. A holistic approach which considers the social contexts of the issue may yield solutions which may both respect the autonomy of the older adult and enhance security.

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

6. The Challenge of Application

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

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

The principles and considerations may apply differently depending on the type of law involved. For example, it is easier to identify and analyze potential issues arising in laws

that directly target persons with older adults than with laws of general application. Law and policy-makers may have more difficulty determining whether and how older persons may be differentially affected when developing general laws. Often, problems arise in implementation rather than the substance of these general laws, making issues even harder to identify and address. As well, challenges may arise in reconciling general needs or constraints with the particular needs of older persons.

A framework must take into account the different ways in which various types of laws will shape the lives of older persons, and how the practical implications of the principles and considerations will vary as a result. This will be considered further in the next Chapter of this Report.

7. Addressing Evolving Realities and Recognizing Constraints

The application of the principles cannot be static. The circumstances of older adults will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of the experience of aging continue to evolve, and new perspectives are heard. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

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

One approach to the progressive realization of the principles may be to draw upon the international concept of “respect, protect, fulfill”. In the realm of international human rights law, this framework is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:³³⁷

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

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects older adults. As part of progressive realization of the principles, government might immediately take steps to ensure that no laws interfere with the principles (respect) and pass laws to prevent interference with the principles (protect). That is, as a first step, government might ensure no actual violations of the principles are occurring. As a progressive step, laws might be passed over time to actively promote the realization of the rights.

There may also be situations where the realization of the principles for older persons may have an impact on the rights of other individuals or groups. During public discussions of the rights of older persons, it is almost inevitable that concerns are expressed about the impact of respecting the rights of older persons on other age groups. The debate regarding mandatory retirement is a case in point, with concerns repeatedly raised that the elimination of protections for mandatory retirement policies would have a negative effect on the employment opportunities of younger persons.³³⁸ In this view, there exists an intergenerational struggle for access to scarce resources, in which the rights of older adults must be balanced against the competing interests of other generations.

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

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

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

Principles can provide a set of norms to counteract tendencies towards ageism in the development, substance and implementation of laws that affect older adults. Principles for the law as it affects older adults should aim to promote the worth, participation, individuality and diversity, and contributions of older adults. From this anti-ageist perspective, the LCO has reviewed and analyzed key international and domestic sources for principles, and has identified six core principles for the law as it affects older adults, with substantive equality as a core value underlying all of the principles.

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

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

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

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

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

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

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

- laws which use age-based criteria to specifically address concerns particular to older adults,
- laws of general application which nonetheless apply mainly or disproportionately to older adults;
- laws of general application that affect significant groups of older adults; and
- laws of general application which may have a different effect on older adults (or some group of older adults) than on the remainder of the population.

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

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

A. The Charter and Human Rights Law

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

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

The purpose of the *Ontario Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at “creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community”.³³⁹ The *Code* prohibits discrimination on the basis of age, as well as many other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of age, older persons have the right to accommodation up to the point of undue hardship for needs associated with their older age. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts.

The *Charter* is, of course, fundamental law, applying to any body exercising statutory authority or pursuant to governmental objectives. Section 52 gives the *Charter* overriding effect, such that any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. To the extent that the government acts under common law or prerogative powers, the *Charter* also applies to such government actions. Section 24(1) provides that anyone whose *Charter* guaranteed rights or freedoms have been infringed or denied may apply to a court of competent

jurisdiction to obtain such remedies as the court considers appropriate and just in the circumstances. Section 47(2) of the *Code*, the “primacy clause” states that where a provision of an Act or regulation appears to require or authorize conduct that would contravene the *Code*, the *Code* prevails unless the Act or regulation specifically states otherwise. The *Charter* and the *Code* therefore have a unique status in relation to other laws that affect older adults.

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

As is discussed at more length later, section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the disadvantaged condition of individuals or groups, including those experiencing disadvantage due to their age. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.³⁴⁰ The *Code* also includes some specific provisions related to age. It specifically exempts programs, policies or activities that provide preferential treatment for persons aged 65 and older from the definition of age discrimination. The *Code* permits discrimination on the basis of age where a *bona fide* occupational requirement is demonstrated. As well, section 25(2.2) permits discrimination on the basis of age in employment pensions and benefits where such distinctions are permitted under employment standards laws.³⁴¹

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

In a trio of cases in the early 1990s, the Supreme Court of Canada considered the constitutionality of mandatory retirement policies. In *McKinney v. University of Guelph*,³⁴² the Court considered the (now removed) upper age limit of 65 in the protections of the *Ontario Human Rights Code*, which operated to prevent challenges to mandatory retirement policies. The *Court* found that, while the upper age limit was *prima facie* discriminatory, contrary to section 15 of the *Charter*, the provision was a reasonable limit on the right, and therefore saved by section 1. In concluding that the restriction on the rights of older persons was reasonable, the *Court* considered that the rule was intended to generally benefit workers, and was part of a complex scheme of pension and other employment rights.

Interestingly, in this case *La Forest J.*, speaking for the majority, commented that age, as a ground of discrimination, differed from other enumerated grounds under section 15,

in that “[t]here is a general relationship between advancing age and declining ability”.³⁴³ Similarly, in the companion case of *Stoffman v. Vancouver General Hospital*, which dealt with the revocation of hospital privileges for doctors at age 65, the majority commented on the importance of balancing the concerns of younger and older doctors.³⁴⁴ The decisions in these cases seem to indicate that the ground of age is viewed differently than other grounds.

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

It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in “line drawing”, and in *R. v. Edwards Books and Art Ltd.*, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards.... To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred.³⁴⁵ [citations omitted]

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

In my view, the Board was amply justified, given the current climate of budgetary restraint pervasive in the public sector, in concluding that its ability to bring new doctors on staff depended on the timely retirement of some of those already there. Moreover, it cannot be said to have acted unreasonably in concluding that the retirement, as a matter of course, of those who had reached the age of 65 would ensure the departure from staff of those who would generally be less able to contribute to the hospital’s sophisticated practice. It must be stressed that the policy of applying Regulation 5.04 without exception, save in those “special cases where the physician had something unique to offer the hospital”, was an attempt by the Board to recognize that the assumption of declining capabilities in those 65 and over would not always hold true. Although it operated with regard to the hospital’s requirements rather than with regard to each individual doctor’s health and capabilities, this was probably necessary given the overriding objective of making staff positions available to doctors recently trained in the latest theories and methods.³⁴⁶

However, in a later decision, the Supreme Court of Canada struck down provisions in the *Unemployment Insurance Act* preventing persons over the age of 65 from receiving insurance benefits and restricting them to a minimal lump sum benefit. While noting concerns that older persons might receive a double return of both pension and unemployment benefits, the Court noted that it was doubtful that the objective of fitting the Act within the government’s legislative scheme for social programs could in itself be sufficiently important to justify the infringement of a *Charter* rights.³⁴⁷

Some of the most important and controversial Supreme Court of Canada decisions under section 15 of the *Charter* have involved age-based distinctions, although not older adults. *Law v. Canada* involved a clear age-based distinction: restrictions on survivor benefits for widows and widowers under the age of 45. Despite the clear distinction based on an enumerated ground, the Court found no substantive discrimination, as the distinction was not based on stereotypes, and persons under age 45 were not a disadvantaged group.³⁴⁸

Gosselin v. Quebec (Attorney General) challenged the provisions of Quebec's social welfare scheme that provided lower social assistance rates for persons under age 30 who did not participate in education or work programs. Following *Law*, the Court found that young adults as a class were not especially vulnerable or disadvantaged, and that the program, far from being based on stereotypes, responded to the actual needs and circumstances of younger persons.³⁴⁹

Most recently, in *Withler v. Canada*, the Supreme Court dismissed a section 15 challenge to federal pension provisions that reduced supplementary death benefits to widows based on the age of their husbands at the time of death. While the provisions obviously constituted a distinction based on an enumerated ground, the Court determined that these provisions were, overall, effective in meeting the actual needs of the claimants and in ensuring that retiree benefits were meaningful, and therefore found that section 15 was not violated.³⁵⁰

Like the *Charter*, the human rights system has not been a major venue for raising issues relating to age and inequality. Human rights complaints (now applications) related to age discrimination have made up only a small percentage of the total.³⁵¹ A review of decisions by the Human Rights Tribunal indicates that most complaints of age discrimination have related to employment discrimination.

The Ontario Human Rights Commission (OHRC) has in the past made use of its broad powers under section 29 of the *Code* to address ageism and age discrimination through public consultations, comments on government laws and policies, development of policy statements and public education campaigns.³⁵²

B. Laws Targeting Older Adults

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

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

1. The Legal Framework for Age-Based Distinctions

The use of age-based distinctions in law and policy is of course subject to the requirements of the *Charter* and the *Code*. These laws provide a framework in which to consider the appropriateness of current age-based distinctions. Both section 15 of the *Charter* and the provisions of the *Code* protect the equality and anti-discrimination rights of older persons, and thereby recognize that age-based distinctions may undermine equality and human dignity. As noted above, section 15(1) has been used to strike down some age-based distinctions, such as the provisions of the *Unemployment Insurance Act* prohibiting persons aged 65 and older from collecting benefits and restricting them to a minimal lump sum benefit.³⁵³ Similarly, the provisions of human rights statutes have been used to successfully challenge age-based criteria, such as restrictions on access by older persons to visual aids under the Ontario Assistive Devices Program.³⁵⁴

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

In its decision in *Andrews*, the Supreme Court of Canada underlined that the mere fact that a law classifies individuals based on a prohibited ground does not in itself amount to a violation of section 15(1). Legislative classifications are necessary for governance in a modern society, and section 15 was not intended to eliminate all distinctions in the law – only those that are discriminatory.³⁵⁵ As is clear from the brief discussion in the previous section, age-based distinctions challenged under section 15(1) have frequently been upheld by the Supreme Court of Canada.

In *A.C. v. Manitoba*, a recent decision of the Supreme Court of Canada dealing with age-based distinctions related to younger age, the Court emphasized that “age-based distinctions are a common and necessary way of ordering our society” and that while such distinctions have an element of arbitrariness, this alone will not invalidate them, so long as the age chosen is “reasonably related to the legislative goal”.³⁵⁶ In the Court’s most recent decision relating to age-based distinctions, *Withler v. Canada (Attorney General)* (briefly highlighted above), the Court stated that

In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme.³⁵⁷

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

Similarly, the *Code* permits age to be used to make distinctions in employment, services or housing where age is a *bona fide* requirement. For example, under section 24(1)(b)

of the *Code*, an employer may discriminate for reasons of age or certain other grounds if the ground in question is a reasonable and *bona fide* qualification because of the nature of the employment.

In its decision in *Meiorin*,³⁵⁸ the Supreme Court of Canada set out three requirements that must be met for a policy, program or standard that has a differential impact on a protected group to be found a *bona fide* requirement: the respondent must establish on a balance of probabilities that the standard, factor, requirement or rule

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

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

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

Those seeking to justify age based policies must show that individualized assessment as a form of accommodation is impossible, i.e. there is no method to do so, or that it represents an undue hardship. The onus is on those seeking to justify a discriminatory standard to show they have provided individualized assessment and accommodation that recognizes the “unique capabilities” of every individual, unless to do so would cause undue hardship. Specifically, rather than judging individuals against presumed group characteristics, individualized assessment or testing to determine whether a person has the necessary aptitude or qualifications should be used, subject to the undue hardship standard.³⁵⁹ (emphasis in the original)

Both the *Charter* and the *Code* protect the use of legislative and policy distinctions that are intended to address disadvantage among individuals or groups. Section 15(2) of the *Charter* specifically permits the use of enumerated grounds (including age) as the basis of distinctions in government law and policy, when such distinctions are included in programs, activities or laws that are intended to ameliorate disadvantage among individuals or groups. In *R. v. Kapp*, the Supreme Court stated that subsections 15(1)

and 15(2) work together to promote the vision of substantive equality that underlies the section as whole: while the focus of section 15(1) is on preventing the government from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice, or imposing disadvantage on the basis of stereotyping, section 15(2) preserves the right of governments to proactively combat discrimination by developing programs aimed at helping disadvantaged groups to improve their situation.³⁶⁰

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

- relieve hardship or disadvantage;
- help disadvantaged persons or groups to achieve equality; and
- contribute to eliminating the infringement of rights under the *Code*.³⁶¹

These provisions permit employers, housing providers and service providers to develop programs and policies that specifically target older adults, so long as a link can be demonstrated between the objectives of the program or policy and specific disadvantages or inequalities experienced by older persons.³⁶² The Code also specifically exempts programs, policies or activities that provide preferential treatment for persons aged 65 and older from the definition of age discrimination.³⁶³ This provision operates to protect policies and practices that provide preferences in favour of older adults aged 65 and older that do not meet the higher standard required for special programs under section 14. For example, section 15 shields from human rights scrutiny the common retail practice of providing "seniors' discounts".

2. Current Ontario Laws Using Older Age-Based Distinctions

As noted earlier, as part of its research for this project, in 2009 the LCO undertook a comprehensive review of all Ontario statutes and regulations that rely on distinctions based on older age. The review revealed that Ontario laws currently relying on distinctions based on older age can be classified into three general categories: those related to employment and income security; health, ability and capacity; and special programs and preferential treatment.

EMPLOYMENT AND INCOME SECURITY

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

Until 2006, Ontario law permitted employers to maintain mandatory retirement programs for employees aged 65 and older without a requirement to justify such programs as a *bona fide* occupational requirement.³⁶⁴ Currently in Ontario, unless an employer can demonstrate that mandatory retirement at a particular age is a *bona fide*

occupational requirement, such programs will be considered discriminatory on the basis of age.³⁶⁵ A 2008 decision of the Human Rights Tribunal of Ontario which upheld mandatory retirement at age 60 for firefighters provides a sense of the circumstances under which a mandatory retirement policy may be considered a *bona fide* requirement.³⁶⁶

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

- Some statutes continue to maintain age 65 as the normal (although now in most cases not mandatory) retirement date for pension purposes.³⁶⁷ Under the Ontario Income Tax Act, pension tax credits assume age 65 for pension benefits.³⁶⁸
- 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,³⁶⁹ presumably on the assumption that these older employees no longer have the same need for benefits that younger ones do.
- As is discussed at more length below, at the time when the provisions of the Human Rights Code protecting mandatory retirement policies were removed, the Workplace Safety and Insurance Act (WSIA) was amended to shield from challenge the older age-based distinctions in that statute and the regulations, policies and decisions under it.³⁷⁰
- The Ontario Works social assistance program requires those receiving benefits to seek employment, volunteer or retraining opportunities. However, the Ontario Works Act specifically exempts recipients aged 65 or older from these participation requirements, although these individuals may participate on a voluntary basis.³⁷¹ That is, the Ontario Works program assumes that persons aged 65 and older, unlike younger persons, are unlikely to rejoin the workforce, and does not require these individuals to make efforts towards doing so.
- Persons aged 65 and older who are not eligible for a pension under the federal Old Age Security Act are eligible to receive income supports as a prescribed class under the Ontario Disability Supports Program Act.³⁷²

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

- The Ontario Income Tax Act provides for special property, income and sales tax credits for “seniors” who have reached at least age 65 by December 31st of the previous year.³⁷³ Some municipalities make special provisions to discount property tax increases for older persons.³⁷⁴
- The Guaranteed Annual Income Supplement (GAINS) provides a small income supplement for persons aged 65 and older who meet the requirements for the federal Old Age Security supplement and meet residency requirements.³⁷⁵

The Ontario Drug Benefit Program, which covers most of the cost of prescription drugs listed in the Ontario Drug Benefit Formulary, is automatically available to all Ontarians once they reach age 65, although some co-payments are required.³⁷⁶

HEALTH, DISABILITY AND CAPACITY

As was noted in Chapter II of this *Report*, it is widely assumed that advancing age is associated with declines in health and certain types of capacities and abilities, and an increase in disability. A number of age-based distinctions in Ontario law reflect the assumption that health, abilities and capacity may decline with age. Because the evidence regarding the decline in health and capacities with age is complex, these types of assumptions may be a problematic basis for public policy.

In some cases, this assumption results in the provision of greater or more easily accessible benefits for older persons. For example, the *Health Insurance Act* provides a reduced fee for some optometry services for persons aged 65 or older.³⁷⁷

Occasionally, assumptions about declining health, ability and capacity are the basis for laws restricting the activities of older persons or requiring them to take extra steps to demonstrate ability and capacity. A perennially controversial example is the Ontario Senior Driver Licence Renewal Program. In Ontario, persons with Class G driving licenses must undergo an exam every two years once they reach the age of 80. Generally, this process involves a written test and a vision test, as well as a group education session. These drivers may also be required to take a road test if, for example, they have acquired demerit points on their driving record over the previous two years, or the counselor leading their driver education session finds that the senior driver has trouble understanding the tests or following the group discussion. As well, drivers aged 70 and older who have an accident may be required to undergo a written, driving and/or medical/visual exam.³⁷⁸

SPECIAL PROGRAMS AND PREFERENTIAL TREATMENT

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

Some of these laws deal with relatively trivial issues and could be characterized as minor preferential treatment. Examples might be the reduced entry charges for persons aged 65 and older under the *Ontario Agricultural Museum Act*³⁷⁹ or the provisions under the *Fish and Wildlife Conservation Act* allowing persons aged 65 who have a valid birth certificate to engage in sport fishing without obtaining a sport fishing license.³⁸⁰

There are also legislative distinctions in favour of older persons that are substantial, and may be better characterized as special programs rather than as preferential treatment. Often these are linked to low income or economic vulnerability, or to declining health: the GAINS benefit for low-income seniors³⁸¹ or the monthly allowance for personal

needs due to “advanced age” provided under the *Ontario Works Act* for persons aged 65 and older are examples.³⁸²

A widespread and significant example of services specially tailored to the needs of older adults is “seniors housing” aimed at low-income or frail older adults. As was briefly outlined in Ch. II.C.1, social housing, which targets many marginalized groups, older adults among them, is delivered through a network of services and providers. Social housing providers include private, cooperative, and municipal non-profit corporations, as well as local housing corporations. Funding may come from the federal, provincial or municipal governments. Social housing may take the form of affordable housing units, non-profit housing, co-operative housing with rent-geared-to-income, and supportive housing that provides personal support and homemaking services for frail older adults and persons with various types of disabilities in a community residential setting.³⁸³

Provisions for seniors’ housing are generally found under municipal by-laws and policies. Many municipalities make provision for specialized social housing for low-income seniors. For example, the City of Kingston has eight social housing projects that house either “seniors” only, or a combination of older adults and persons with disabilities. Kingston has a “cascading” admissions policy for its seniors housing: persons aged 65 and older are prioritized on its waiting list, followed by those aged 60 and older, and then those aged 55 and older.³⁸⁴ The City of Toronto operates over 19,000 seniors-only social housing units (including those which are rent-geared-to-income and market rents in non-profit, municipal or cooperative housing).³⁸⁵ The City of Toronto has established aged 59 as the minimum age to qualify for such housing. Peel Region has 32 buildings dedicated to housing for persons aged 65 and older, whether rent-geared to income, market rent, or subsidized housing.³⁸⁶

Seniors housing brings to the fore the difficult issues highlighted in the section on “Vulnerability, Inequality, Risk and Older Adults” in Chapter II of this *Report*. To what degree are low-income older adults disadvantaged or at heightened risk of negative outcomes, and therefore entitled to special protections such as seniors housing? Are low-income older adults more disadvantaged or at risk than other low-income individuals, and if so, how or why? How do we determine whether and when some or all older adults are entitled to special protections?

The OHRC in *A Time for Action*, its Consultation Report on human rights and older Ontarians, reported significant concerns regarding the availability of accessible and affordable housing for older persons, and of special needs housing.³⁸⁷ In its *Policy on Discrimination Against Older People Because of Age*, the OHRC stated that:

It is the Commission’s view that older persons benefit from the support, community, and income security offered by seniors’ housing projects. As well, the concept of “aging in place” has been recognized by the Commission as a central consideration so that in some cases it may be appropriate to offer “seniors’ housing” to those under the age of 65 who may have special needs that will remain as they age. Therefore, the Commission would encourage housing aimed at older persons, including those less than 65 years of age, which will foster the objectives of the Code.³⁸⁸

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

While such an exemption would facilitate seniors-only age limits, and the benefits that may spring from them, we are not persuaded that such benefits are more significant than the interests of those who would be excluded from housing that is otherwise suitable for them ... The Nova Scotia Human Rights Act already permits seniors-only age limits where they are shown to be necessary to ensure the protection of seniors' distinctive interests, or to ameliorate seniors' particular disadvantage. The current legislative context does not appear to dissuade proponents of housing developments.³⁸⁹

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

3. Using Age as a Proxy

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

This raises some concerns. In some cases, the use of age as a proxy is merely the employment of ageist stereotypes and assumptions. For example, the use of age as a marker for the ability to adapt within a workplace, or to bring "cutting-edge" or creative new ideas to a job is really nothing more than a fairly blatant form of age-based discrimination: evidence does not support the assumption that older persons are less able than younger adults to learn or adapt, or to be creative.³⁹⁰ Where unsupported assumptions are at play, the use of age-based criteria may be merely a form of age-based stereotyping. It is therefore essential that when age is being used as a proxy it is based on a careful review of the current available research on the circumstances and needs of older adults, as well as consultation with older adults themselves.

It is also important that this evidentiary base be regularly reviewed and re-evaluated. For example, the assumption that older persons will withdraw from the workforce at age 65 once had a fairly solid basis, but changing demographics and labour market patterns indicate that it is substantially less true now than it once was, and that engagement of older persons in the labour force is likely to continue to increase. In 1996, 15 per cent of Canadians wished to continue to work past age 65, or for as long as their health would permit them; in 2003, this figure was 26 per cent.³⁹¹ Similarly, healthy life expectancies for Canadians have been increasing: old assumptions about the abilities and capacities of older persons may be incorrect. Once endemic levels of low-income among older adults have been substantially addressed for many groups of older adults, through initiatives like the Canada Pension Plan and Old Age Security.³⁹²

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

For example, a crude use of older age as a straight proxy for low-income would result in resources being allocated to some individuals who are not particularly in need, since many older adults are financially comfortable. Where resources are scarce, this may be an ineffective use of them.

Of course, the decision to use age as a proxy for some other attribute is not necessarily or not simply always the result of stereotypical assumptions. There may be a meaningful degree of correlation between age and some types of abilities or circumstances. For example, in *Espey v. City of London*, the Human Rights Tribunal of Ontario found that the relationship between advancing age and the risk of on-the-job cardiac events for firefighters was sufficient to justify the city's mandatory retirement policy.³⁹³ Because age is simple and straightforward to measure, the use of age can be a very efficient way of allocating benefits, resources or requirements. This becomes of particular importance where extensive and complex social programs are being administered. For example, the identification and measurement of disability is difficult, controversial and complicated, and may itself raise human rights issues.³⁹⁴ Often, substantial adjudication mechanisms must be developed to determine whether a person meets disability-based program requirements. These mechanisms can pose substantial hardships, not only for governments administering programs, but also for individuals attempting to prove that they meet the program requirements.³⁹⁵ The use of age as a criterion avoids these difficulties.

The Supreme Court of Canada considered the human rights implications of the use of protected grounds as proxies in the case of *Zurich Insurance Co. v. Ontario (Human Rights Commission)*.³⁹⁶ This case dealt with the practice of insurance companies of using age, sex and marital status as proxies for assessing risk levels for drivers, and thereby for setting rates for insurance premiums.

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

Human rights values cannot be over-ridden by business expediency alone. To allow "statistically supportable" discrimination would undermine the intent of human rights legislation which attempts to protect individuals from collective fault. To allow discrimination simply on the basis of statistical averages would only serve to perpetuate traditional stereotypes with all of their invidious prejudices. Society has decided not to hold the individual responsible for the sins of his or her "group" and the courts must seek to further rather than restrict this decision.³⁹⁷

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

[t]he insurance industry must be allowed time to determine whether it can restructure its classification system in a manner that will eliminate discrimination based on enumerated group characteristics and still reflect the disparate risks of different classes of drivers. It would therefore be inappropriate for this Court to find a particular practice to be unreasonable when no reasonable alternative exists. While the situation as it existed in 1983 did not provide a reasonable alternative to setting premiums based on age, sex and marital status, the situation today and in the future may be quite different. The insurance industry must strive to avoid setting premiums based on enumerated grounds.³⁹⁸

That is, there is a high standard set for demonstrating that the use of age-based distinctions is permissible. Such distinctions are permissible only where other alternatives are not reasonably available. That is, the door is not foreclosed to bringing another similar case.

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

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

A variant on the individualized testing approach is to use individual testing beginning at a certain age. For example, most senior drivers' license programs in Canada provide for individualized assessment beginning at a specific age. A modified version of this was endorsed by the Ontario Superior Court in *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*. A requirement for justices of the peace to retire at age 70 was held to violate section 15 of the *Charter*. In order to address concerns regarding security of tenure, rather than striking down mandatory retirement altogether, justices of the peace, like provincial court judges, were permitted to remain in office after age 65, subject to an annual review by the Chief Justice, with mandatory retirement postponed to age 75.³⁹⁹

A third option is to create a rebuttable presumption: age is used as a category, but older persons are provided with the opportunity to demonstrate that they should not fall

within the rule. This was the suggestion of the Human Rights Tribunal in *Espey*: that mandatory retirement for firefighters at age 60 should stand because of the risk of on-the-job cardiac events, but that a process or mechanism could be developed for individuals to demonstrate that their risk was no higher than that for younger persons and that the rule could be waived for them if they did so.⁴⁰⁰

4. Assessing the Use of Age-Based Laws

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

discriminates because it does not distinguish between those who are and those who are not able to work. In this way, the section operates to perpetuate the stereotype of older persons as unproductive, inefficient, and lacking in competence. By denying protection to these workers the *Code* has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.⁴⁰¹

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

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

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

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

In some cases, like mandatory retirement or drivers' licence testing, part of the purpose of the age-based distinction may be to protect the opportunities or the health and safety of others, whether younger workers, or others who are using the roadways. In addition to considering whether the identified risks are indeed borne out by the evidence, it is important to ensure that the rights of older persons are not lightly

dismissed or subordinated to those of others, and that the impacts of restrictions on older adults are fully taken into account and considered.

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

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

The case example below applies these considerations regarding the use of age-based distinctions in the law to the provisions of the Workplace Safety and Insurance Act.

CASE EXAMPLE: AGE-BASED DISTINCTIONS IN THE LAWS

Age-Based Restrictions under the Workplace Safety and Insurance Act

One of the Ontario statutes that retains older age-based restrictions on benefits is the Workplace Safety and Insurance Act (WSIA)⁴⁰². Ontario's workers' compensation system was originally envisioned as a compromise between the needs of employers and employees: injured workers were entitled to legislated no-fault benefits, speedily administered, related to their earning power and paid for as long as the disability lasted. In return, employers were protected from lawsuits by workers and funded the system on a collective liability basis through which their annual rates were easily incorporated into the cost of production and passed on to customers in the price of goods. This is often referred to as the "historic compromise".⁴⁰³

At the time when the provisions of the Human Rights Code protecting mandatory retirement policies and other employment-based distinctions aimed at persons age 65 or older were removed, the WSIA was amended to protect the age distinctions in that statute and the regulations, policies and decisions under it.⁴⁰⁴ There are five provisions limiting or terminating rights for older workers.⁴⁰⁵ For the purposes of this discussion, the focus will be on the following two provisions terminating benefits for older workers:

1. While the WSIA places a limited duty on employers to re-employ injured workers, this duty ends at the point when a worker reaches age 65. Under the WSIA, workers who have more than one year's service and who have lost time from work due to a compensable injury in a workplace with 20 or more employees are entitled to return to their old job or a comparable one. If the injured worker is not able to perform the essential duties of their old job but can do other work, the employer is obligated to offer suitable work if it is available. In either case, the employer is obligated provide disability-related accommodations to enable the employee to perform the work, to the point of undue hardship. In all cases, the employer's obligation continues for a maximum of 2 years, or one year after the injured worker is able to return to their pre-injury work.⁴⁰⁶ However, the re-employment obligation also ends when a worker reaches age 65, so that workers who are injured between age 63 and 65 receive a reduced re-employment opportunity, and those injured after age 65 receive no re-employment opportunities at all.
2. The WSIA places age 65 limits on loss of earnings benefits. Workers who experience an income loss due to a work related accident are entitled to loss of earnings benefits until the day on which the worker reaches age 65 years of age, if the worker was less than 63 years of age at the time of the injury; or two years after the date of the injury if the worker was 63 years or older at the time of the injury.⁴⁰⁷

These provisions ignore the importance to older persons of having the choice to continue to participate in the workforce. This has been recognized, notably, in the United Nations' Principles for Older Persons (IPOP), which include, as elements of the principle of independence, the opportunity to work or to have access to other income-generating opportunities and to participate in determining when and at what pace withdrawal from the labour force takes place.⁴⁰⁸ The Madrid International Plan of Action on Ageing (MIPAA) emphasizes, "Older persons should be enabled to continue with income generating work for as long as they want and for as long as they are able to do so productively."⁴⁰⁹

Age-based rules regarding workforce participation, such as the limitation on the duty to re-employ, make age a central, overriding factor in assessing the needs and abilities of workers, ignoring the diversity of experiences and circumstances among

older workers. Women, of course, will often have different labour market experiences than men. The caregiving responsibilities that women disproportionately take on may lead to interruptions in their workplace participation or to reduced participation. As well, women are more likely to be found in low-paid or precarious work. As a result, women have more difficulty in developing pensions or other resources for retirement. New Canadians may have a shorter period of employment in Canada upon which to build up assets for retirement and they, along with racialized persons and persons with disabilities, also tend to have more restricted access to the labour market, lower incomes and greater unemployment during their working lives.⁴¹⁰ Overall, Canadian's lifecycles and labour force patterns have shifted dramatically since the 1970s, and are now much more varied and complex.⁴¹¹

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

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.⁴¹²

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

This understanding has shaped key Supreme Court decisions regarding age-based distinctions in the areas of employment and income supports. The Supreme Court in McKinney noted that the acceptance of age 65 as the "normal" age for retirement had profound implications for the organization of the workplace – the structuring of pension plans, for fairness and security in the workplace, and the provision of workplace opportunities, such that mandatory retirement "has become part of the very fabric of the organization of the labour market in this country".⁴¹³

In a 2008 decision, the Supreme Court of Canada upheld the provisions of a pension that required mandatory retirement as part of the plan, noting that the provisions were an attempt to balance concerns regarding age discrimination with the importance of ensuring the financial protection of employees under genuine pension plans.⁴¹⁴ The Human Rights Tribunal in the Espey decision made a similar point, noting that the mandatory retirement provisions in question were part of a collective agreement that had been shaped as a trade-off to maximize a number of goals important to the parties.⁴¹⁵

On the other hand, the Supreme Court of Canada, in striking down restrictions on unemployment insurance benefits for persons aged 65 and older, noted that it was doubtful that the objective of fitting the provisions of the Unemployment Insurance Act within the government's legislative scheme for social programs, could in itself be sufficiently important to justify the infringement of a Charter rights.⁴¹⁶

The view that these common age-based distinctions are part of a broader package that is overall favourable to older adults has been challenged. It has been pointed out that there have been very significant shifts in demographics, in the labour market, in occupational conditions, and in life cycles since the mid-1960s, when current laws, policies, institutions and assumptions regarding withdrawal from the workforce were developed. Given the aging population, increasing diversity in life cycles, and the shift towards service work and non-standard jobs (and the subsequent decline in the number of workers who have access to employer-sponsored pension plans), older workers are increasingly economically vulnerable, uncertain about the future, and unable to afford retirement.⁴¹⁷ The assumption of a single standard age for withdrawal from the workforce is increasingly tenuous.⁴¹⁸ The use of age 65 as the sole marker for the end of protections and benefits under the WSIA therefore raises concerns.

Other jurisdictions have taken different approaches, without jeopardizing the financial stability of the regime. For example, in British Columbia, although the "normal" age for the end of worker's compensation protections remains age 65, workers can individually present their particular circumstances. Where the Board is satisfied that the worker would have retired later than 65 years of age, or more than 2 years after the injury, the legislation allows the Board to pay workers' compensation benefits up to the date the worker would retire.⁴¹⁹

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

Some laws do not explicitly reference age, but mainly impact on older adults. Such laws may operate almost like age-based programs and are often thought of as such because

the vast majority of those affected are older adults. However, there are no age-based criteria at play – it is only that the law in question deals with an issue that disproportionately affects older adults.

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

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

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

- (a) the person is at least 18 years old;
- (b) the person is an insured person under the Health Insurance Act;
- (c) the person,
 - (i) requires that nursing care be available on site 24 hours a day,
 - (ii) requires, at frequent intervals throughout the day, assistance with activities of daily living, or
 - (iii) requires, at frequent intervals throughout the day, on-site supervision or on-site monitoring to ensure his or her safety or well-being;
- (d) the publicly-funded community-based services available to the person and the other caregiving, support or companionship arrangements available to the person are not sufficient, in any combination, to meet the person's requirements; and
- (e) the person's care requirements can be met in a long-term care home.⁴²⁰

Beyond the requirement that the person seeking admission be an adult, the criteria are not age-based. In fact, some younger persons with complex and significant medical needs live in long-term care facilities. However, the vast majority of the residents are older adults.⁴²¹

Persons living in long-term care homes face heightened or different risks and disadvantages than many other Ontarians. They have significant medical or disability-related needs that require the extensive nursing supports available in such settings, and these needs can leave them dependent on or vulnerable to those who provide them with care. While long-term care homes provide vital supports not available to residents in the community, the trade-off is that their residents are living in institutional settings, removed from the broader community and the supports, community and social roles available there. To manage the needs of some residents whose disability-related behaviors put themselves or others at risk, long-term care homes have considerable

powers over residents, including the use of restraints and placement of residents in locked-in wards. Good long-term care homes are vital to the dignity and security of older adults; poorly operated long-term care homes place their residents at significant risk and undermine security, dignity, autonomy, inclusion and respect for individuality and diversity.

A submission from Ontario government officials commented:

We recognize that the current economic environment and increased number of older adults will continue to limit the availability of resources for long-term care (LTC) homes. In an effort to ensure continued services for older adults and in response to stated preferences of older adults to “age at home” for as long as possible, the MOHLTC has provided funding for services in the community so that persons who can be cared for at home can remain at home. This includes investments in the Aging at Home Strategy and more recently, the Behavioural Supports Ontario project.⁴²²

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

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

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

As the example of long-term care highlights, older adults not infrequently encounter the effects of resource limitations in programs intended to provide benefits. Programs that are intended to provide basic supports for those who are disadvantaged or marginalized may be in effect rationed by tight eligibility criteria or long waiting lists, and may therefore not achieve their intended impact. The effects on the dignity, autonomy, inclusion and security of older adults may be significant. Particularly in an era of scarce resources, service providers may find it challenging to ensure that their programs and policies respect the principles.

Where resource limitations exist, the concept of ‘progressive realization’, as outlined in Ch. III.B.7, may be helpful. This concept suggests that where resources are limited, the

principles may be realized over time, as understandings and resources develop. This does not mean that one should be satisfied with laws that fall short of the principles; rather, the principles should be realized to the greatest extent possible at the current time, and concrete steps for future improvements continually identified and planned.

The example of “First Available Bed Policies” as described below provides a striking illustration of the effects of resource limitations on positively intended laws and on the attainment of the principles for older adults.

CASE EXAMPLE: LAWS AFFECTING MAINLY OLDER ADULTS

First Available Bed Policies

A consistently raised concern in the area of elder law in Ontario has been “First Available Bed” policies, policies which have been implemented by hospitals and Community Care Access Centres (CCACs) to manage the transition of older adults from hospital care to placement in a long-term care home.

Placement in a long-term care home in Ontario is regulated by the Long-Term Care Homes Act (LTCHA) and its regulations. The law places responsibility for placement in a long-term care home with the local CCAC placement coordinator, so that the individual in question or their substitute decision-maker must make an application through the placement coordinator. Where application is being made with respect to a person who is currently hospitalized, the hospital discharge planner or other hospital staff may work to facilitate the application.

Under the regulations to the LTCHA, an individual seeking long-term care may select up to five long-term care homes to apply to (in crisis situations, more may be selected).⁴²³ Section 46 of the LTCHA defines the elements of a valid consent as including that it relate to the admission, that it be informed, that it be given voluntarily, and that it not be obtained through misrepresentation or fraud. Section 46 further sets out the information that individuals are entitled to prior to giving a consent, including what the admission entails, the expected advantages and disadvantages of the admission, alternatives to the admission, and the likely consequences of not being admitted. The HCCA sets out requirements where a substitute decision-maker is involved, the fundamental principle being that the admission must be in accordance with the prior capable wishes of the individual involved, or where these are not known, the best interests of the individual. Under the HCCA, the best interests of the individual include the following:

- (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;

- (b) any wishes expressed by the incapable person with respect to admission to a care facility that are not required to be followed under paragraph 1 of subsection (1); and
- (c) the following factors:
 1. Whether admission to the care facility is likely to,
 - i. improve the quality of the incapable person's life,
 - ii. prevent the quality of the incapable person's life from deteriorating, or
 - iii. reduce the extent to which, or the rate at which, the quality of the incapable person's life is likely to deteriorate.
 2. Whether the quality of the incapable person's life is likely to improve, remain the same or deteriorate without admission to the care facility.
 3. Whether the benefit the incapable person is expected to obtain from admission to the care facility outweighs the risk of negative consequences to him or her.
 4. Whether a course of action that is less restrictive than admission to the care facility is available and is appropriate in the circumstances.⁴²⁴

The legislation, in total, sets out a framework that is based on the autonomy and security of the older person. It does not prioritize as a consideration the needs of the hospital or long-term care systems.

In practice, however, consent to placement in a long-term care home has been constrained by a range of policies and practices that arise from the shortage of hospital and long-term care beds in the province of Ontario: hospitals are overcrowded, and waiting lists for long-term care are long. To manage the difficulties of the resource shortage, administrators developed and implemented a range of policies, frequently referred to as "First Available Bed" policies, which arguably have violated both the letter and the spirit of the legislative framework. The issue of First Available Bed policies has been raised in the provincial legislature. ACE notes that in 2010 alone, the clinic received over 160 requests for assistance related to discharge from hospital and admission to long-term care homes:

Most hospitals in Ontario have discharge policies with which they require patients to comply when moving from hospital into another care setting. The policy may require that the patient or their substitute decision-maker select a certain number of "short list" long-term care homes from a list provided by the hospital or CCAC; or may require the patient to accept a "suitable bed" as determined by the hospital, which may not be in one of the homes chosen by the patient or their substitute decision-maker. Usually, the person is told that if they do not comply with the policy, they will be charged the "daily rate". This is the rate charged for an acute care bed for someone who does not have OHIP or other insurance. Although there is no specific number, this rate may range from \$500 to \$1,500 or more per day.⁴²⁵

Patients may be offered other options to accepting the first available bed, such as returning home to wait for their home of choice, or moving to a retirement home to await their home of choice.

While recognizing the pressures under which the health-care and long-term care systems operate, one cannot ignore the negative effects on older adults of First Available Bed policies. Beds which are deemed “acceptable” from the perspective of administrators may be far from such from the perspective of the individual involved, whether because of the extent or quality of the care available in the placement, or because it is at a distance that completely removes the older adult from families and community support systems. In some cases, long-term care homes may have beds available because of the low quality of services provided, and individuals may be coerced into accepting placements in homes with poor records in terms of respecting the dignity, autonomy and security of their residents.

The Ministry of Health and Long-Term Care has undertaken a number of initiatives to address the issues raised by First Available Bed policies. In February 2011, the Ministry sent a letter to all LHINs, the Ontario Hospital Association and all Community Care Access Centres clarifying the relevant provisions of the LTCHA regarding individuals’ right to choose an LTC home and confirming that policies and programs that do not respect this right may not be implemented. In addition, the Ministry has provided training to placement coordinators to improve understanding of the law governing placement, and is developing a plain language guide to the LTCHA.⁴²⁶

D. Laws That Affect a Disproportionate Number of Older Adults

In other cases, while older adults do not make up the majority of those affected by a particular law and the law has an impact across age groups, a substantial portion of older adults are affected by that law.

The extent or nature of the disproportionate impact may vary among groups of older adults. For example, laws regarding financial exploitation will have particular significance for older adults as a whole, as financial abuse is the most common type of abuse of older adults. They may be especially significant, however, for Aboriginal older adults, many of whom are residential school survivors, and who may be targets of financial abuse due to their receipt of settlement monies.⁴²⁷

As laws of general application are likely to be age-neutral on their face, it is essential to examine whether or how laws addressing large numbers of older adults may, in design or implementation, be shaped by ageist attitudes or assumptions. Not uncommonly, the consequences of ageist attitudes may play out in the day-to-day context in which service providers, legal professionals and decision-makers address the rights and needs of older adults. Regardless of how well-designed a law or program is, ageist or paternalistic attitudes on the part of those charged with implementing the law or program will make

it ineffective for older adults. If, for example, competent older adults attempting to exercise their rights to make choices for themselves are undermined by health care providers who think that older adults should defer to others, the laws regarding consent and capacity will be ineffective. ACE has provided examples in long-term care settings of competent older adults being prevented from leaving their residences, even for short periods of time, unless they are accompanied by family members or family members have provided consent. There have also been instances of care providers discussing care issues with the resident's family instead of the competent resident.⁴²⁸ The influence of this type of ageism is hard to make visible as it happens in small, everyday decisions and interactions and is not overt, and so may not be recognized even by those who are carrying it out.

Margaret Hall provided an example in her paper for the LCO on developing an anti-ageist approach to the law:

The system or scheme created by Ontario's substitute decision making legislation is non-ageist, and does a good job of protecting the individual's rights; balancing the individual's rights to autonomy in decision making with the individual's rights to physical dignity and integrity, not to be subjected to prolonged suffering or denied treatment. The implementation of that legislation is, however, problematic; rights that cannot be effectively exercised are rights "in the air" (as opposed to rights on the ground). Older adults who become engaged with substitute decision making, under either the *Substitute Decisions Act* or the *Health Care Consent Act*, will be in a vulnerable situation; entrenched ageist attitudes and stereotypes among professionals implementing the legislation will increase that vulnerability and the likelihood that autonomy will not be respected. The frequently high-conflict family context in which the legislation is implemented also increases the likelihood that substitute decision making will not occur in accordance with the guidelines set out in the legislation, but reflect conflicts and the interests of family members ... [P]rofessionals and (possibly particularly) institutional staff may tend to make decisions that primarily meet institutional interests, in the absence of a strong counter-weight. These tendencies do not connote "badness" or selfishness, but reflect the coincidence of basic human tendencies to prefer decisions in one's own interests, where they can be plausibly justified, with the ageist social attitudes that provide that justification.⁴²⁹

Recognizing that older adults may have different needs and circumstances from other populations, one of the challenges in laws that affect disproportionate numbers of older adults is to balance the particular needs of older adults with those of others who are affected by the law. The case example below, regarding capacity and guardianship laws, illustrates the tensions that arise when the needs of multiple groups must be balanced within a single statutory scheme.

CASE EXAMPLE: BALANCING NEEDS ACROSS GROUPS***Capacity and Guardianship Laws***⁴³⁰

Laws regarding legal capacity, consent and decision-making provide a good example of laws that have a disproportionate impact on older adults, and the challenges of designing laws and programs in these circumstances. While there is surprisingly little in the way of empirical research into the relationship between older adults and Ontario's legal capacity and decision-making framework,⁴³¹ what information is available does indicate that these systems have a disproportionate impact on older adults. While the Ontario Public Guardian and Trustee (OPGT) does not generally release demographic information, the results of an information request for the fiscal year 1996/1997 indicated that just over half of those individuals who were under personal or property guardianship through the OPGT were aged 65 or older, and 57 per cent of that group was over the age of 75. Approximately 60 per cent of those individuals over age 65 were female, and over 90 per cent were living in an institutionalized setting.⁴³² The typical case for emergency guardianship involved an older woman who lived alone, had dysfunctional family relationships, and had experienced neglect or misuse of money or of a power of attorney.⁴³³ Advocates for older adults have identified capacity and guardianship laws as having a very significant impact on the rights of older persons, and as a key locus for law reform efforts.⁴³⁴

This disproportionate effect on older adults is largely due to the incidence of dementia among older adults. Dementia is a disease of aging which is also an important cause of loss of legal capacity, and has its most significant impact on the very old.⁴³⁵ As the population continues to age over the next 30 years, issues related to consent, capacity and decision-making are likely to become more pressing. The Alzheimer's Society of Canada recently released a report estimating that the prevalence of dementia will more than double over the next 30 years, to a projected 2.8 per cent of Canada's population.⁴³⁶

However, capacity and guardianship laws are not age-specific, or disability-specific. The laws apply equally to persons with developmental disabilities at any point in their lives, to persons with psychiatric disabilities, and to persons who develop cognitive disabilities such as Alzheimer's Disease as they age. An assessment of the impact of these laws is therefore difficult. The life experiences of a person with a psychiatric disability will be very different from those of a person with dementia or a developmental disability. Equally, the experiences and needs of a young person with a developmental disability may be different from those of the same person in old age. One must bring both an anti-ableist and an anti-ageist analysis to this area of the law.

As well, one must keep in mind that different types of disabilities will affect legal capacity differently. For example, persons with cognitive disabilities such as Alzheimer's Disease will vary in their capacities over time, and will often vary in their abilities from day to day, which may present special challenges.

In bringing an age-based analysis to these laws, it is important to take into account how capacity and decision-making laws may impact differently across various groups of older adults, and consider the circumstances, both of those older adults who have acquired a disability at birth or early in life and are living into old age, and those who have acquired a disability later in life.

Older adults who have developed cognitive disabilities late in life are more likely to have gathered some significant financial assets, if only a house. These assets may prove a temptation to financial abuse or exploitation. On the other hand, those who have lived with a disability since their younger years are more likely to have experienced poverty and marginalization throughout their lives, and to lack the financial resources necessary to obtain adequate supports as they age.

As well, the development of cognitive disabilities later in life may subject older adults and their families to difficult and often confusing role reversals, as adult children find themselves called upon to provide support and assistance to the parents who once were responsible for guiding and providing for them, and old family dynamics take on new forms. On the other hand, those who have lived with disabilities throughout their lives may lose what have been central lifelong support systems as their parents and siblings age and die.

It is also important to keep in mind that older adults as a whole are subject to stereotypes about their frailty, incapacity and need for protection. Older adults who are capable within Ontario's laws may nonetheless be treated as if they are incapable, because of assumptions about the abilities of older adults in general,⁴³⁷ and for those who have an intellectual, psychiatric or cognitive disability, the effect of that disability may be exacerbated or exaggerated due to its intersection with these general stereotypes about the incapacity of older adults.

Therefore, while older adults with cognitive disabilities will share concerns and experiences with others who find themselves subject to Ontario's capacity and guardianship regime, there will also be some concerns and experiences that will be unique.

These differences in needs, life experiences and perspectives between those affected by capacity and guardianship laws raise challenges for law reform. It may be impossible for a single approach to adequately address the range of views and needs. It has been suggested that the differences in approaches may be a barrier to

law reform in some cases.⁴³⁸ While dialogue across differences may promote greater understanding and identify greater common ground, it is unlikely to do away with all of these differences. The perspectives and circumstances of older adults must be respected, as must those of persons with intellectual or psycho-social disabilities.

E. Laws of General Application – Affecting Older Adults Differently

In some cases, laws of general application may not affect more older adults as a group, but may impact *differently* on older adults as compared to others. In considering the impact of laws that appear on their face not to have any particular relationship to older adults, it is important to give thought to how the circumstances and experiences of older adults, or of some older adults, may differ from those who are younger, and whether that will have an effect on how older adults are affected by that law. For example, caselaw regarding damages awards create a barrier for older adults who are seeking justice: as most older adults are no longer working, they cannot claim damages for loss of income, and courts have narrowly interpreted damages for loss of companionship.⁴³⁹

Laws may differentially impact on some older adults, or only a smaller subgroup, such as low-income older adults, or older adults with disabilities. Sometimes the extent or nature of the differential impact will vary among groups of older adults: for example, elder abuse may take different forms among some racialized communities.⁴⁴⁰

In other words, laws that do not recognize the ways in which older adults may differ from other groups, and provide rules, rights and benefits as if those differences do not exist, may provide *formal* equality for older adults, but will fail to achieve substantive equality.

Margaret Hall notes in the context of elder abuse and guardianship laws that:

The great majority of the legislation discussed in this paper is facially “age neutral.” Both subject areas will disproportionately impact older adults. Ensuring substantive equality in these areas means, therefore, recognising how “age neutrality” may play out in real life situations involving older adults in vulnerable situations: where capacity is in question and where others must make decisions on the person’s behalf, and where a person is suffering from abuse or exploitation or where abuse and exploitation is suspected. In these situations, pervasive social and individual-level ageist attitudes will interact with personal vulnerability in a way that makes ostensibly available “age-neutral” rights difficult to assert. Legislation that allows “space” for patronising and ageist approaches (as where incapacity is defined broadly and substitute decision making guidelines are not specific) effectively invites those attitudes in these contexts.⁴⁴¹

The effect of laws of general application on older adults may be shaped by ageist assumptions on the part of those interpreting and applying those laws. Ageist stereotypes may not be explicit, but may take the form of subtle assumptions about the worth or contributions of older persons. For example, the case of *McDonnell Estates v.*

Royal Arch Masonic Homes Society involved an action for damages against a long-term care home by the family of an older woman who died as a result of caregiver negligence. As the plaintiffs had not suffered any pecuniary loss as a result of their mother's death, the damages sought were for loss of care and companionship. The Court rejected the plaintiffs' claim for loss of companionship consequent upon the death of their mother:

I have said these plaintiffs claim damages only for the loss of the companionship of their mother, not the loss of her love and guidance. With respect, I find the claim is without merit. Sadly their mother had long ceased to be a companion for she had been physically, mentally and emotionally incapacitated for a considerable time before her death. The plaintiffs had established lives and families separate and apart from their mother. I suspect they anticipated that following three disabling strokes, her death at any time was a distinct possibility. It is understandable that they suffered grief and sorrow over the loss of their mother and the cause of it.⁴⁴²

The example of revocation of wills upon marriage discussed below provides an illustration of how the particular experiences and circumstances of older adults may not be adequately recognized or addressed through laws of general application.

CASE EXAMPLE: LAWS AFFECTING OLDER ADULTS DIFFERENTLY

Revocation of Wills Upon Marriage

One example of a law that impacts differently on older adults than on younger ones is the automatic revocation of wills upon marriage.

Under the law, a marriage where one of the individuals did not have the capacity to consent is void ab initio. The law in this area is not settled, and different lines of cases suggest different understandings of the capacity required to enter into a valid marriage. One line of cases suggests that marriage is a distinct kind of contract, for which the parties must have an understanding of the basic nature of marriage and its consequences. It is not clear whether this required understanding stretches beyond the emotional bond and responsibilities of marriage to include an understanding of its financial, estate and property consequences.⁴⁴³

The capacity required to make a will differs from the capacity required to marry: to make a will, an individual must have "a sound disposing mind, which means the individual must understand the nature and effect of making the will; the extent of his or her property; and appreciate the moral claims of close family members to his or her property."⁴⁴⁴

Under the Succession Law Reform Act (SLRA), a valid will is revoked when an individual's marital status changes, although there is an exception where the will indicates that it was made in contemplation of marriage.⁴⁴⁵ The law reflects that

marriage is a significant life change, which should prompt an individual to reconsider his or her affairs, including testamentary dispositions, as well as the importance of protecting the interests of surviving spouses.

It is important to note that if an individual dies without a valid will, the estate will be distributed according to the provisions of the Family Law Act and the SLRA. Essentially, if an individual dies without issue, the spouse is entitled to the property absolutely, whereas if there are issue, the estate is divided between the spouse and children. Parents, nephews and nieces, and siblings will only receive part of the estate if there is no surviving issue or spouse.⁴⁴⁶ Under the Family Law Act, a spouse may choose to receive entitlements under the SLRA, or to receive a division of net family property under the family law statute.⁴⁴⁷

This web of laws related to capacity, marriage and wills has a particular effect on older adults. Because testamentary capacity requires a relatively sophisticated understanding of the consequences of making a will, while capacity to marry sets a lower standard, it is quite possible that an individual will have the capacity to marry, but not to make a will. And because marriage revokes previous wills, such individuals are left without the ability to make choices regarding the disposition of their estates, and their estates will necessarily be apportioned according to the rules of the SLRA and the Family Law Act.

Older adults are more likely than the general population to be affected by conditions like dementia that affect their testamentary capacity but may not affect their capacity to marry. They are also more likely to have complex family arrangements, including children from previous marriages, and thus complex obligations and wills as well as complex family dynamics. As divorce and re-marriage become increasingly common, these issues will continue to grow.

The automatic revocation of wills has also been identified as particularly problematic in the context of “predatory marriages”, in which a younger individual allegedly marries an older one in order to receive a share of the individual’s estate after death.⁴⁴⁸

The law as it stands therefore fails to adequately recognize and address the particular circumstances surrounding the marriages and wills of older persons.

F. Where Law is Silent

In some cases, law negatively affects older adults, not by what it does, but by what it fails to do. Law may fail to take into account the needs and experiences of older adults, and may therefore fail to address issues of pressing importance to this group. As a result, older adults may be left without adequate direction to make decisions on important issues, or without adequate supports or protections.

There are numerous examples of this problem. There is, for example, a lack of legal guidance around access to older adults. Where older adults have physical or mental impairments that restrain their ability to independently maintain their relationships, those individuals who provide care or support to these older adults may use their position to control access to that person. For example, an adult child living with his or her aging parent may be able to effectively cut off access to other siblings or to friends of that parent. Powers of attorney for property or personal care may be misused to attempt to control access to the older adult. There is no legislation directly dealing with these issues. In this vacuum, the SDA may be used as a mechanism whereby family members continue or attempt to resolve long-standing relationship issues revolving around the older adult.⁴⁴⁹ The case example below provides an illustration of such dynamics.

CASE EXAMPLE: WHERE LAW IS SILENT

Long-Term Care Homes and the Sexuality of Older Adults

One of the most prevalent stereotypes about older persons is that they lack the interest and/or the capacity to be sexually active. Indeed, attitudes may extend beyond the assumption that older adults are not interested in being sexually active to the belief that they should not be interested in being sexually active. This is further complicated by notions of older adults as dependents, akin to children, who must be protected in their best interests.⁴⁵⁰ However, research indicates that sexuality can remain meaningful and important to older people, and that older adults can and do participate in sexual activity throughout their lives.⁴⁵¹

In terms of the LCO principles, the sexuality of older adults may be linked to their autonomy (their right to make choices regarding their private lives), as well as their dignity (their right to be considered as full individuals, regardless of their age). Because some older adults experience particular forms of disadvantage (for example, due to a physical or intellectual disability) and experience a heightened risk of sexual abuse, the principle of security is also at play. As with many areas of the law as it affects older adults, there is a tension between the autonomy of older adults and their right to take risks and make bad choices, and the security of older adults, including their physical, emotional and mental well-being.

Physical health and disability may create barriers to sexual activity for older adults, as may loss of a partner. Often, a key barrier is institutionalization of older adults. There may be a variety of barriers to sexual expression in congregate settings.

- *Most older adults in long-term care facilities are housed in ward rooms, rather than private or semi-private rooms, and so older adults may lack the privacy necessary for sexual activity. Some LTC homes have set aside private rooms that residents may use for sexual activities. However, use of these rooms may be restricted.*

- Institutional staff may defer to family members, who may object to sexual activities on the part of their resident family members. Adult children, for example, may be profoundly discomforted by a parent's sexual activity outside of their marriage.
- Nursing school curricula and on-site training for staff deal only minimally with issues of sexual rights, sexual health, and capacity and consent. Staff may therefore be uncomfortable with sexual expression on the part of older persons, and view it as something to be discouraged or repressed.⁴⁵²
- For older adults who are LGBT, negative attitudes or behaviours on the part of staff or other residents, or concerns about homophobia may inhibit not only sexual expression, but even acknowledgement of their sexual identities, essentially forcing some of these older adults into the closet.⁴⁵³
- The development of physical disabilities may create difficulties for sexual expression unless assistance is provided, but staff may be uncomfortable about providing assistance with sexual expression.⁴⁵⁴

These challenges are exacerbated by the fact that a significant portion of older adults who are living in long-term care settings have some degree of dementia, which may in some (not all) cases affect the capacity of that individual to consent to sexual activity, or disinhibit sexual expression.

The law provides little specific guidance on these complex and often difficult issues. The new LTCHA has as a guiding principle that "a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met."⁴⁵⁵ This principle recognizes the importance of meeting the needs of residents in a holistic manner, and could be read in a way that includes a recognition of the importance of sexuality to meeting the psychological and other needs of older adults.

Section 3 of the Act, the "Residents' Bill of Rights", recognizes a range of rights relevant to the expression of sexuality, including the right to form friendships and relationships, to have his or her lifestyle and choices respected, to meet privately with his or her spouse or another person in a room that assures privacy, and to share a room with another resident according to their mutual wishes if appropriate accommodation is possible.

The LTCHA also places the responsibility on the operators of long-term care homes to protect residents from abuse, including sexual abuse and neglect, and to create policies regarding the prevention and the response to abuse.⁴⁵⁶

The LTCHA does not provide, however, any further guidance on how these various rights and principles, all important, are to be implemented in practice. The issues

are challenging, as they raise not only practical difficulties (including the necessity of combating the subtle effects of ageist attitudes among staff and family members), but also the necessity of balancing the promotion of autonomy of older adults with respect to their sexuality with the necessity of protecting the security of those older adults who are not consenting or not able to consent to sexual activity.

Some of the issues around sexual expression in long-term care homes are relatively straight forward in law, and require “only” better implementation through policies and training. For example, it is clear that the adult children of legally capable older adults should not be able to interfere with the sexual choices of their parents, no matter how uncomfortable those choices may make them, and that the staff of long-term care homes should not assist adult children in attempting to interfere with those choices. This does not mean that the issues are simple to resolve, but only that the substance of the law is not the cause of the difficulty.⁴⁵⁷

Where the legal capacity to consent is unclear, however, the issues become much more difficult. Capacity for decision-making is not a blanket issue: it will vary according to the specific type of decision to be made. The capacity to make decisions about property will be different from the capacity to make decisions about whether one should be admitted to a long-term care home, or from the capacity to decide on which friends or acquaintances the older adult wishes to see. The capacity to consent to sexual activity therefore must be separately determined; however, the law is quite unclear on the test for that capacity. Nor is the process or the responsibility for determining capacity to consent to sexual activity anywhere clarified. As the SDA does not deal with the issue of decision-making related to sexual activity, it does not appear that a substitute decision-maker can consent to sexual activity on behalf of an incapable older adult.

In the absence of any clear test or standard, long-term care homes may default to paternalistic responses to sexual expression, in order to ensure that they meet their obligation to prevent sexual abuse. As a result, older adults who live in long-term care homes may be denied legitimate sexual expression.

As has been stated:

Sexual expression is a normal part of a healthy life. People that live in long-term care homes should be able to engage in “normal” living which includes the right to sexual expression. What is the legal framework related to sexuality that will ensure that those persons who can consent to engage in intimate sexual relationships are provided with privacy and the appropriate supports? Conversely, what is the legal framework for those persons who cannot consent in order to protect them from sexual exploitation and abuse?⁴⁵⁸

In summary, the law as it relates to the sexuality of older adults living in institutional settings operates indirectly. There is little in the way of current caselaw or statute law that relates specifically to this issue, although the new Long Term Care Homes Act, 2007 creates a legal framework that offers the opportunity for a positive approach. Currently, the law is framed mainly through the lens of elder abuse laws and policies. The overriding concern in institutional settings with respect to the sexuality of older adults is to prevent sexual abuse of older adults in institutional settings. This is exacerbated by the lack of clear legal standards regarding capacity, consent and sexuality among older adults. The lack of clarity leaves staff with little guidance, and in the attempt to minimize the risk of sexual abuse staff may unnecessarily intervene to prevent behaviour which is not, in fact, abusive. Therefore, the lack of guidance and clarity in the current state of the law appears to indirectly operate to constrain the expression of sexuality by capable older adults.

This is compounded by negative attitudes and lack of understanding regarding the sexuality of older persons on the part of institutional staff and family members. There is a failure to recognize that older persons, like younger ones, are sexual beings and to respect that older adults have a right to express their sexuality as part of their right to live a full human life. Respect for this right would require greater attention to the privacy of older adults, as well as greater efforts to provide training and education for staff on related issues.

As well, the paternalistic attitudes on the part of institutional staff and family members that operate to ill effect in many areas related to the rights of older adults are active here also, as staff and family members may act to prevent older adults from making “bad decisions” or to subordinate the needs of older adults to the wishes and needs of their family members.

G. Identifying Ageism and Paternalism in the Law

Given the above, how can we identify ageism and paternalism in the substance and implementation of the law as it affects older adults?

1. Stereotypes and Negative Attitudes in the Law or its Implementation

Stereotypes and paternalistic or negative attitudes towards older adults may be present in the substance or the implementation of the law, either explicitly or implicitly.

Stereotypes and problematic attitudes may be easiest to identify when examining laws that specifically target older adults (*i.e.*, that employ age-based distinctions), or that are mainly targeted towards older adults. For example, assumptions about the capacity of older adults to actively participate in the workplace or attitudes about the value of their

doing so may be apparent in some of the laws restricting the access of older adults to employment protections or benefits. Similarly, paternalistic attitudes may underlie mandatory reporting and adult protection laws. A review of the purposes of such laws in light of the principles of dignity, autonomy, participation, security, membership in the broader society and diversity can reveal the operation of ageist attitudes in the formation of the law.

Analysis of the substance of laws of general application which differently affect older adults, or affect some portion of older adults, is less likely to reveal the operation of ageist assumptions, except insofar as the impact on older adults may not have been considered during the development process. Rather, ageist assumptions may affect the implementation of the law, for example, through the stereotypes and attitudes of those charged with putting the law into practice. Presumptions about the incapacity and dependency of older adults may, for example, shape how the laws around capacity and consent are implemented by service providers, legal and health care professionals and decision-makers.

Margaret Hall suggests that when evaluating laws, in addition to considering whether a particular statute or regulation explicitly or implicitly includes or refers to ageist stereotypes and/or paternalistic attitudes, we should also ask whether there are “sufficient mechanisms provided for by the legislation to prevent or protect against the legislation being implemented in an ageist manner, including the acting out of individual ageism”,⁴⁵⁹ something particularly important when considering laws not directly targeted at older adults. Returning to the international rights framework of “respect, protect, fulfil” referenced in Chapter III of this *Report*, this suggests that laws, rather than simply taking a neutral stance in terms of ageism, should actively recognize the existence of ageism and paternalism and include proactive measures to prevent or address it.

As is discussed further in the following Chapter, proactive measures might take various forms, such as providing education and training for service providers and professionals on ageing and ageism, providing strong complaint and advocacy mechanisms to ensure that older adults can make their concerns heard, or proactively monitoring and reviewing the implementation of law to make certain that the law is fulfilling its intended purpose and is being implemented in harmony with that purpose.

2. Failure to Take Older Adults into Account

Laws may, in either their substance or their implementation, fail to take into account the real needs of older adults. Laws that employ age-based criteria may, for example, be based on assumptions about the needs, circumstances and abilities of older adults that are true for some, but fail to recognize the diversity of older adults. As the example of the revocation of wills demonstrates, laws of general application may be designed or developed in a manner that does not take into account that older adults, or some significant group of older adults, may differ from the general population in meaningful

ways. As another example, income eligibility criteria for programs may be designed in a way that does not take into account the fact that most older adults are on fixed incomes, and have no means of recouping any financial losses.

This points to the importance, both of increasing awareness and understanding about ageing and older adults among policy-makers and legislators, and of enhancing the opportunities for older adults to be involved in the design of laws and policies that may affect them.

3. Ignoring or Subordinating the Needs of Older Adults

Legislators, policy-makers, service providers and professionals face many competing priorities for time, attention and resources. This is a reality that affects everyone, not only older adults.

As was highlighted in Chapter III, it is also true that in some circumstances, the needs or rights of older adults may be perceived to compete with those of other groups. Laws regarding mandatory retirement have often framed in this way, based on the notion that older workers are “taking jobs” from younger ones (although it is not generally accepted among those who have studied the issue).⁴⁶⁰ The ongoing debate regarding reform to capacity and consent laws raises a different tension: the issue is of considerable importance to both the disability and older adult communities, but there appears to be significant variance between the two communities in terms of principles and priorities for reform.

As a starting point, it should be clear that the needs and circumstances of older adults should be considered to be of equal value and priority as those of other age groups. Negative attitudes that view older adults as dependents who have no further contributions to make to society may influence the willingness to provide adequate resources to ensure that laws are properly implemented and that older adults are able to live at basic levels of economic, physical and emotional security, or to address the issues that are of pressing concern to older adults.

V. DEEPENING UNDERSTANDING OF THE IMPLEMENTATION GAP: ACCESS TO THE LAW

As is apparent from the discussion in Chapter IV, equal attention must be paid to both the substance of laws and how they are implemented. Laws which on their face are neutral or even positive with respect to older adults, may be in practice ineffective or negative due to inadequate implementation and poor enforcement. This is the problem that the Advocacy Centre for the Elderly (ACE) has referred to “good law, bad practice”.

In a number of areas of law, the law is good but the practice is bad. Therefore, law reform per se would not be necessary, but research on why the law is not being followed could be very useful since it has a negative impact on older adults and their rights. Good laws should not be changed merely because there is resistance to comply.⁴⁶¹

The *Report of the United Nations Expert Group Meeting on the Rights of Older Adults* specifically urges governments to “close the gap between law and the implementation of the law”.⁴⁶²

Chapter IV highlighted several aspects of the implementation gap, including limited resources, and lack of knowledge about older adults or the law among those implementing programs and services. One of the most significant aspects of the implementation gap is access to justice (or the lack thereof) for older adults. This Chapter will take a deeper look at this aspect of the implementation gap and how the principles may point towards means of addressing it.

While the importance of access to justice is widely discussed, there is considerable divergence of opinion as to what “access to justice” means and what would be required to ensure it.⁴⁶³ It is beyond the scope of this document to consider these debates in depth; however, as a starting point for considering the issues in this section, it is essential to clarify some terms as they are used here.

In its broadest sense, the term “access to justice” can incorporate concepts of social justice, and involve considerations of substantive outcomes and the achievement of justice for previously excluded groups. In that sense, this project as a whole aims to increase access to justice for older adults.

More narrowly, the term “access to justice” may be used to refer to access to the legal system as one mechanism for ensuring that the law as written is effective as intended. Unless the law is actually implemented and enforced, and is a living reality, it has little meaning for those whom it was intended to benefit. The term “access to the law”, as it is used in this *Report*, refers to the ability of individuals to effectively access the intended benefits of the law.

This concept of access to the law is clearly closely related to the issue of “good law/bad practice”, and the implementation gap. Lack of effective mechanisms for accessing and enforcing existing laws may be one of the reasons for this phenomenon.

Clearly, one element of access to the law is access to the legal system, which includes the ability to acquire information about one’s legal rights, to obtain competent legal advice and representation as required, and to access existing legal dispute resolution mechanisms. However, access to the law can be ensured in many other ways; for example, through advocacy organizations such as ombuds offices, or administrative complaint systems or through proactive monitoring and auditing structures. Some mechanisms for facilitating access to the law are discussed in this Chapter.

A. Older Adults and Access to the Law

As is described in Chapter II of this *Report*, older adults are an extremely diverse group, ranging widely in income, education, health status and place of residence, among other factors. The nature and level of concerns related to access to the law will therefore vary widely among older adults. For example, a married couple in their early 60s, in good health and with solid retirement savings and access to pension benefits, will have considerably fewer challenges in accessing the law than a widow who was recently sponsored to come to Canada in order to help care for her grandchildren, who is not entitled to government supports such as the Old Age Security (OAS), who does not have connections and supports in the community, and who does not have strong English language skills.

Of course, concerns regarding access to the law are not confined to older adults. Many disadvantaged groups find their access to the law limited in a variety of ways. Immigrants may experience linguistic barriers in accessing the law, while those with low or moderate incomes will face financial barriers. Discrimination and the effects of historical disadvantage may marginalize racialized, Aboriginal or LGBT individuals, as well as others. As outlined in the LCO’s project on the law as it affects persons with disabilities, physical or other barriers may reduce access for persons with disabilities. As many older adults are also immigrants, low-income, racialized, Aboriginal, LGBT, persons with disabilities or members of other marginalized groups, they will face disadvantages as members of these groups, which in some circumstances are compounded by their age.

There are also some circumstances that are particularly prevalent among older adults that may limit access to the law for this group. These circumstances were discussed at some length in Chapter II of this *Report* and include fixed incomes and withdrawal from the workforce, lower than average literacy and educational levels, the onset of health and activity limitations with the advancement of age, and limitations in life expectancy. Some significant portions of the older adult population also have their experiences shaped by cognitive disabilities, living environments that reduce their autonomy and community inclusion, and the consequences of physical, financial or other forms of

dependency. These older adults may be at heightened risk of violations of their rights and may experience greater challenges in obtaining redress.

Any discussion about access to the law and older persons must be placed in the context of the larger and ongoing discussion regarding the accessibility of Ontario's legal system, issues also examined in the LCO's projects on entry to the family law system and on vulnerable workers and precarious work.⁴⁶⁴ Concerns have been raised from many quarters regarding the accessibility of the legal system, and in recent years numerous initiatives and reports have been undertaken to address the problem. As summarized by the Ontario Bar Association's Report, *Getting it Right*:

Ontario's legal system is in critical need of reform. A lack of resources in terms of judicial appointments, court facilities, justice and community support services and the under-funding of Legal Aid have combined with other challenges to create significant barriers to justice for Ontarians.

We need change: just as a health care system is there to deliver health care, Ontario's justice system is there to deliver justice. If we think health care is expensive, try disease. There comes a point in a patient's deterioration that bandages just won't work anymore. Ontario's justice system is at that stage now.⁴⁶⁵ (emphasis in the original)

One important aspect of access to the law is access to legal advice and representation, whether through lawyers or paralegals. The high cost of legal services has frequently been identified as a significant barrier for middle and low income individuals,⁴⁶⁶ and the cost of legal services was repeatedly raised as a concern during the LCO's public consultations. There are several initiatives in place to address the need. Some very low-income individuals may have access to legal services through Legal Aid Ontario; however, income criteria are restrictive, as are the range of issues addressed. In 2006, Ontario became the first jurisdiction in North America to license paralegals, who can represent individuals and provide legal services related to tribunal hearings, Small Claims Court, traffic matters and minor criminal matters.⁴⁶⁷ The Law Society of Upper Canada administers a Lawyer Referral Service that provides individuals with a no-charge 30 minute consultation with a lawyer or paralegal.⁴⁶⁸ Pro Bono Law Ontario facilitates pro bono legal services to low-income individuals for civil (non-family) legal issues not covered by legal aid.⁴⁶⁹ As well, *JusticeNet* is a not-for-profit service helping people in need of legal expertise, whose income is too high to access legal aid and too low to afford standard legal fees.⁴⁷⁰ The cost of legal services remains a serious problem.

Older adults may of course deal with the full range of legal issues that affect individuals in general. However, as was noted in previous chapters, due to their circumstances there are some issues which older adults are more likely to encounter. For example, because older adults tend to have withdrawn from the workforce and are also disproportionately likely to have needs related to impairments or disabilities, they are more likely to be users or potential users of government programs and services. They are therefore more likely to be affected by the laws related to the provision of certain

government programs, such as health care, income security, long-term care homes, and home care supports. Because issues related to the receipt of government programs and services will often involve general policies and procedures rather than individual interactions and decisions, the legal issues that older adults face may often be extremely complex and may require systemic remedies.

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

Charmaine Spencer has noted some of the implications of these dynamics for access to justice for older adults:

[T]he legal process often pits an individual against someone with whom they have an ongoing relationship – a landlord or home care agency – so that many people who face real and serious barriers are reluctant to file complaints. This means that they will often wait until they have already suffered substantial harm before trying to deal with it. Formal and informal advocates can face significant challenges when acting for older adults and advocating for them in systems on which they are dependent or will need. There is the ever-pressing need to address ‘conflict’ while recognizing the reality that the older client must continue to use the service of the service provider with whom they are having conflict.⁴⁷¹

B. Assessing the Access Mechanisms Available to Older Adults

Taking the above considerations into account, how well do currently available mechanisms for accessing and enforcing the law serve the older adult population?

Given that older adults, as part of the general populace, are affected by all laws of general application, and therefore have access to all of the complaint and enforcement mechanisms available to the general populace, there are a wide variety of mechanisms available and regularly used by older adults in accessing the law. It is well beyond the scope of this discussion to outline in detail all these mechanisms. Rather, the focus will be on outlining some of the most important mechanisms currently available, given the types of issues most commonly encountered by older adults. This overview, albeit cursory, allows for some assessment of the characteristics and potential of various types of mechanisms in enhancing access to the law for older adults and helps us to identify some key elements of the implementation gap.

1. Selected Key Mechanisms for Accessing the Law

CIVIL LITIGATION

Often rights accorded to older adults must be enforced through civil actions. A notable example of this is the “Residents’ Bill of Rights” which was initially found in the predecessor legislation including *Nursing Homes Act*,⁴⁷² and in an amended and expanded version is in the new *Long Term Care Homes Act, 2007* (LTCHA).⁴⁷³ The “Residents’ Bill of Rights” includes the right to be treated with courtesy and respect; to be properly sheltered, fed, clothed, groomed and cared for; to be afforded privacy in treatment and in caring for personal needs; to keep and display personal possessions in one’s room; not to be restrained except under specified and limited circumstances; to communicate in private and to receive visitors; and many others. Under the LTCHA, these rights are subject of a deemed contract between the resident and the licensee.⁴⁷⁴ Enforcement of these rights would therefore take the form of an action against the licensees for breach of contract.

Civil litigation is a challenging route for enforcement of rights. Despite efforts at speeding and streamlining, it is often a slow and time-consuming process. It is also a costly one, dependant as it is on access to a lawyer, and therefore out of reach for low-income Ontarians, excepting the minority who can access Legal Aid funding. For example, in the case of rights under the Residents’ Bill of Rights, the power imbalance between care home residents and licensees makes an action for breach of contract an unhelpful means of pursuing such basic rights.⁴⁷⁵ The adversarial nature of the process may make it unsuitable for resolving some types of issues, although it should be noted that many matters are now subject to mandatory mediation.⁴⁷⁶ Finally, individual actions are unlikely to provide an adequate remedy where systemic or widespread violations of rights are at issue.

CRIMINAL JUSTICE SYSTEM

The *Criminal Code* is the primary legal vehicle for ensuring accountability for elder abuse in Ontario. While the *Code* does not deal specifically with elder abuse, its general provisions cover most of the issues of concern. Relevant provisions include those addressing theft, assault, sexual assault, false imprisonment, failure to provide the necessities of life to a dependent, fraud, misappropriation of funds by a person in a position of trust and theft by power of attorney. The sentencing provisions of the *Criminal Code* provide that evidence that the offence was motivated by bias, hate or prejudice based on age shall be deemed an aggravating factor, as well as abuse of a position of trust or authority in relation to the victim.⁴⁷⁷

The *Criminal Code* also includes a number of evidentiary and procedural safeguards that may be of assistance in prosecutions involving these issues. For example, section 486.1 allows a judge to make an order, under certain circumstances, permitting a witness to have a support person of their choice be present and to be close to them during their testimony. Section 486.2 permits a judge to make an order permitting a witness to

testify from behind a screen or outside the courtroom. Section 715.2 permits the admission of a video-recording as evidence in some circumstances where the victim or witness is available and able to testify, but may have difficulty communicating the evidence due to a mental or physical disability.

However, many have noted that the criminal justice system, while important in addressing elder abuse, has significant limitations, and cannot provide a comprehensive response to the issue.⁴⁷⁸ The relationship dynamics underlying some forms of elder abuse, together with the effects of shame and fear of retaliation, may make the victims of such abuse reluctant to disclose it or to see family members face criminal penalties.⁴⁷⁹ Delays in the administration of justice can mean that victims of abuse may be dead or incapable by the time the case goes to trial.⁴⁸⁰ For example, in *R. v. Khelawon*, the manager of a retirement home was accused of assaulting five residents; however, by the time the matter reached trial, four of the victims had died and the remaining victim was no longer competent to testify. The Supreme Court of Canada ruled that the videotaped statements made by the victims after the assaults were inadmissible as being unreliable, and as a result, the accused was acquitted.⁴⁸¹ As is detailed later in this chapter, dedicated elder abuse teams aim to address some of the challenges associated with addressing these difficult issues and there are several successful examples in Ontario.

ADMINISTRATIVE TRIBUNALS

Administrative tribunals are an important mechanism for enforcing rights related to many areas of day-to-day life for older Ontarians.

For example, rights under the *Ontario Human Rights Code* to freedom from discrimination on the basis of age in the areas of housing, services, employment, contracts and professional associations are enforced by filing an application with the Human Rights Tribunal of Ontario (HRTO). The protections of the *Residential Tenancies Act* with respect to rental housing and retirement homes are accessed through application to the Landlord Tenant Board (LTB). The Consent and Capacity Board (CCB) hears challenges to findings of incapacity with respect to treatment, property, personal health information and admission to long-term care.

Administrative tribunals are meant to provide dispute resolution forums that are expert in their specific area, and provide relatively inexpensive, speedy and flexible procedures. In this way, they are intended to increase the accessibility of the law.

Accessibility is the underlying rationale for both the “Dicean” and “post-Dicean” – the legal and the administrative – aspects of administrative tribunals. To be accessible therefore, administrative tribunals must provide a service that attracts those that wish to avail themselves of its jurisdiction. Since the time and expense required to resolve a dispute may inhibit parties ... who are seeking the assistance of a workplace regime, disputes must be resolved quickly and inexpensively.⁴⁸²

Tribunals such as the HRTO and the LTB include provisions for alternative dispute resolution processes, such as mediation. These tribunals have powers of inquiry, as well as broader discretion with respect to the rules of evidence.

Tribunals are, however, subject to some of the same criticisms as the civil justice system. In practice, tribunal procedures can be complex, and given the importance of the rights at stake, many applicants feel disadvantaged without legal representation. A review of the website of the LTB reveals ten separate forms for tenant applications, each of which is accompanied by instructions of 10 to 20 pages in length, and many of which have filing fees attached. In recognition of the complexities of the human rights application process, a Human Rights Legal Support Centre has been created which provides supports to some applicants to the HRTO.

As well, tribunals, like the civil justice system, are subject to delays and backlogs. For example, there have been concerns about the length of time required for resolution of human rights matters, both prior to and following the 2008 reform of the human rights system.⁴⁸³

ADMINISTRATIVE OVERSIGHT MECHANISMS

Many complex systems include mechanisms for monitoring and oversight. For example, one of the mechanisms in place to ensure that long-term care homes comply with the law is the accountability framework implemented through the Local Health Integration Networks (LHINs). Under the *Local Health System Integration Act, 2006*, and the Memorandum of Understanding between the Minister and each LHIN, the LHINs are given significant service accountability responsibilities and tools, including service accountability agreements with each of their health service providers (including long-term care homes).⁴⁸⁴

ADMINISTRATIVE COMPLAINT MECHANISMS

Access to the law may also be provided through administrative complaint mechanisms. The complaint mechanisms under the *Consumer Protection Act* provide one example. As older adults are frequently the target of consumer fraud, consumer protection is of particular concern to this group. While victims of violations of the Consumer Protection Act may pursue a civil action, they also have the option of registering a complaint with the Ministry of Small Business and Consumer Protection. The Ministry has the power to make inquiries, gather information and work towards the resolution of disputes and complaints of any matter that comes to its attention with respect to consumer protection. The Ministry's investigative powers are broad, and include powers to obtain warrants and to conduct site inspections. The Ministry has the power not only to address individual complaints but to audit and control systemic practices.⁴⁸⁵

Similarly, the Ministry of Health and Long Term Care operates the ACTION line as a means for residents of long-term care homes to report concerns about the care and services that they receive, as well as concerns regarding home care (as is described further in Ch. VI). An operator assesses the urgency of the matter and may refer the

information to a compliance advisor to complete an investigation. The monitoring system for long-term care homes, including the ACTION line, was the subject of an investigation by the Ombudsman Ontario, which concluded in December 2010. The Ombudsman noted a number of issues with the ACTION line complaints process, which the Ministry committed to address. The Ombudsman noted that the investigation process at that time was not particularly rigorous:

To begin with the first contact most individuals have with the Ministry is with a call centre which is not equipped to provide any detailed information regarding long-term care issues. Some complainants as well as Ministry compliance staff expressed concerns about the accuracy of information provided by Infoline/Action Line staff to individuals calling to report resident care concerns. We also learned that the Ministry routinely refers individuals back to the home that is the subject of the complaint. Many complainants have expressed fear about complaining directly to a home because of the risk of reprisal against them or their loved ones. Some of those who complained to our office noted that as a result of making a complaint to a specific long-term care home they were threatened with being banned from the home and in one case a lawsuit was threatened.⁴⁸⁶

The Ombudsman also noted problems with delays, cursory investigations, and a lack of transparency and accountability regarding the results of the investigations. As of mid-2011, the Ministry and the Ombudsman were continuing to work together to address the issues.

STATUTORY INVESTIGATIVE AGENCIES

In some case, specialized bodies have statutory investigative powers. For example, the Office of the Public Guardian and Trustee (OPGT) has a statutory duty to investigate any allegations that a mentally incapable adult is suffering or is at risk of suffering serious financial or personal harm. It has taken the position, however, that it will undertake such investigations only where no other alternative is available. The OPGT may, where the results of an investigation warrant, request a court to grant it temporary guardianship.⁴⁸⁷ The OPGT's investigative powers include a right of entry to facilities or controlled-access residences, a right to meet in private with the allegedly incapable person and a right of access to relevant records.⁴⁸⁸

ACE has raised concerns regarding the OPGT's narrow approach to its investigative powers, reporting that it often receives calls from friends, family members and health practitioners who have contacted the OPGT with concerns regarding the well-being of an older adult and who have been told that an investigation will not be completed.⁴⁸⁹

On the other hand, the Canadian Association for Community Living has raised concerns that there are not sufficient checks and balances on the OPGT's exercise of its statutory powers:

Our Association is concerned that the exercise of authorities under the OPGT and the Consent and Capacity Review Board are without adequate checks and balances. We say this in full recognition

that there are individuals who work in both of these systems, which undertake their work with great sensitivity and care to the needs of their clients and those who come before them. We recognize the necessity of such authorities. We believe they have an important place in a system to help manage and support personal decision making for older adults. But in the absence of other elements of a system that independently address adult protection issues, provide independent advocacy, and provide support in the exercise of legal capacity, these Offices can do harm. We believe that some actions of the OPGT can be, and have been, extremely harmful to the integrity of persons and families.⁴⁹⁰

ADVOCACY INSTITUTIONS

There are also a number of institutions dedicated to advocating on behalf of groups including older adults.

The Ontario Human Rights Commission (OHRC) has a mandate to undertake research and public inquiries, develop policies and conduct programs of public education in order to advance the purposes of the *Ontario Human Rights Code*, which include the prevention and redress of discrimination on the basis of older age. While the OHRC no longer receives and investigates individual complaints, it does have the power to initiate and intervene in applications at the HRTO.⁴⁹¹ As noted earlier, it has in the past exercised its broad advocacy powers to advance the rights of older Ontarians through public education, advocacy and policy development,⁴⁹² a notable example being the involvement of the OHRC in the successful campaign to amend the *Code* with respect to mandatory retirement.⁴⁹³

There have been, however, relatively few human rights complaints (now applications) related to age discrimination, and most have been related to employment discrimination.⁴⁹⁴ Human rights mechanisms have not at this point proved to be an effective method for challenging the systemic disadvantages faced by older adults in terms of institutional care, provision of caregiving supports, access to health care services, and housing.

The Ombudsman of Ontario has a mandate to receive and investigate complaints from individuals regarding the provision of services by the provincial government and its organizations. While the Ombudsman cannot issue orders, it can issue reports and recommendations. In recent years, the Ombudsman has used its powers to conduct many high-profile systemic investigations on issues which affect large numbers of people. The Ombudsman does not have the power to investigate issues related to the extended public sector, including municipalities, hospitals, and long-term care homes, all institutions of particular importance to older adults, and has been advocating for the extension of its mandate to cover this important sector.⁴⁹⁵ Because its mandate includes government services, the Ombudsman's mandate has, however, included the power to conduct a systemic investigation into the Ministry of Health and Long-Term Care's oversight of the long-term care home sector, as outlined above.⁴⁹⁶

Among the most important of the advocacy institutions available to older adults is Legal Aid Ontario. The mandate of Legal Aid Ontario is to provide access to justice for low-income individuals.⁴⁹⁷ Legal Aid Ontario provides very low-income individuals with access to legal services through a variety of mechanisms, including legal aid certificates, duty counsel, advice lawyers, and legal clinics.

The major criticism of Ontario's legal aid system is its very limited scope. The income thresholds for eligibility for its services are very low. For example, a family of four with an annual income of anything over \$37,000 may not qualify.⁴⁹⁸ Many people who are living on low or fixed incomes will not qualify for legal aid, despite being unable to afford to pay for legal services out of their own pockets. Further, even those who qualify may be asked, if they are homeowners, to put a lien on their house in order to receive assistance, something which many older adults are understandably hesitant to do lest they lose their homes. Finally, Legal Aid covers only a limited number of subject areas: certificates are not provided, for example on civil matters such as violations of consent and claims against long-term care homes.⁴⁹⁹

An innovative service funded by Legal Aid Ontario is ACE. ACE was Canada's first legal clinic devoted to the needs of older persons, and still one of the few such clinics in the country. ACE provides not only legal advice and representation to qualifying older adults, but also public legal education and law reform on behalf of older adults in general.⁵⁰⁰

MANDATORY DISCLOSURE AND RIGHTS ADVICE

There are a number of situations where, under Ontario law, individuals must be informed of their rights by a rights advisor. The entitlement to rights advice is triggered when there is a substantial change in the status of the individual, such as where a patient in a psychiatric facility has his or her status changed from voluntary to involuntary, or where a physician decides that a patient is incapable to manage property. The rights advisor cannot be a person involved in the direct clinical care of the person to whom the rights advice is given. The rights advisor must explain the significance of the change in legal status for the individual, and if requested to do so, must assist that person to apply for a hearing to challenge the decision. Failure to provide appropriate rights advice can invalidate a finding of incapacity.⁵⁰¹

Rights advice is not mandated for persons found to be incapable outside of a psychiatric facility; however, there is an entitlement to rights information, which is provided by health care professionals.⁵⁰² The requirements for rights information are laid out by Guidelines of the relevant health care professions, so that failure to provide appropriate rights information can be the source of a complaint to the governing body of the profession, as is briefly described below. For example, the Policy Statement on *Consent to Medical Treatment* for the College of Physicians and Surgeons of Ontario requires the physician to

- inform the incapable patient that a substitute decision-maker will assist the patient in understanding the proposed treatment and will be responsible for making the final decision;
- involve the incapable patient, to the extent possible, in discussions with the substitute decision-maker;
- if the patient disagrees with the need for a substitute decision-maker, or disagrees with the involvement of the present substitute, advise the patient of his or her options, including finding another substitute of the same or more senior rank, and/or applying to the Consent and Capacity Board for a review of the finding of incapacity; and
- reasonably assist the patient if he or she expresses a wish to exercise the options outlined above.⁵⁰³

SELF-REGULATION

In some cases, institutional sectors or service providers have developed mechanisms for self-regulation. For example, health professions such as the medical, nursing and legal professions are self-regulating, within the parameters of the Regulated Health Professions Act, 1991 and the accompanying *Health Professions Procedural Code*.⁵⁰⁴ Within that framework, the health professions have established regulatory colleges which are responsible for regulating the relevant profession in the public interest. The framework set out by the *Act* and the *Procedural Code* are intended to protect the public from unsafe, unqualified or incompetent practitioners. The *Procedural Code* sets time frames for addressing complaints, as well as substantive and procedural rights for complainants. ACE has pointed out that these mechanisms, like others are at times subject to concerns related to cost and timeliness:

[i]t is ACE's experience that the complaints process is lengthy and, if legal counsel is retained, expensive. Some of our clients opt not to make a complaint because it will take too long to address a problem that needs to be addressed immediately.⁵⁰⁵

INTERNAL INSTITUTIONAL MECHANISMS

Legislation may also mandate internal institution mechanisms for identifying and resolving issues. For example, under the new LTCHA, each home must have a Residents' Council, with the power to advise residents on their rights and obligations; review certain documentation related to the home; mediate and attempt to resolve disputes between residents and the home; and report any concerns and recommendations to the Minister. The LTCHA also permits the creation of Family Councils, which have powers similar to those of the Residents' Councils. As the LTCHA is new, and those Councils in existence have developed on a voluntary basis, it is difficult to assess the how effective these Councils will be in identifying and addressing issues.⁵⁰⁶

Some hospitals, long term care homes and retirement homes employ patient advocates whose function is to assist patients or residents. These advocates are not mandated by law. ACE has commented on these patient advocates as follows:

One must be wary of this type of advocate because their objectivity may be compromised as they are paid by the institution itself. Furthermore, many of these advocates would appear to have no power and are there merely to placate those who complain when problems arise. Although these advocates can be a source of support and assistance, where there are real difficulties involving serious conflicts with the institution, it is unlikely that they will be able to advocate as strongly as most people would like, or as strongly as an advocate who is not connected with the institution due to a potential conflict of interest.⁵⁰⁷

2. Systemic Barriers

A review of the above suggests some themes and common gaps or problems in the mechanisms available to provide older adults with effective access to the laws intended to protect or benefit them.

AGEIST AND PATERNALIST ATTITUDES AND ACCESS TO THE LAW

The potential impact of ageism in the development and application of laws was considered throughout Chapter IV. Ageism and paternalism may, of course, also shape the experience of older adults in attempting to access the law and may be a key element in the implementation gap.

For example, ageist and paternalistic attitudes have been identified as a key cause of elder abuse (as well as themselves a form of abuse), whether in private settings or government institutions.⁵⁰⁸ Lack of respect and sensitivity by police officers may create a barrier to older adults reporting abuse:

[N]early half of the seniors who reported a negative interaction with the police recall experiencing some form of mistreatment, specifically lack of respect, compassion, or understanding from the responding officer. Seniors need to feel appreciated, understood, and reassured that their problems are important and that they are doing the right thing by reporting.⁵⁰⁹

It has been suggested that subtle ageism among health care providers may limit access to health care for older adults; for example, there is a tendency to treat mental illness in older persons as less worthy of intervention than when it manifests in younger persons, and to misdiagnose depression among older adults as dementia.⁵¹⁰ A more systemic form of ageism in health care can be identified in the problematic practice of physicians who manage their caseloads by screening out patients with chronic or complex medical issues, many of whom are older.⁵¹¹

Negative, paternalistic attitudes and stereotypes about older persons may combine with negative attitudes related to gender, race, sexual orientation, disability or other aspects of identity to create particular stereotypes and barriers. The World Health Organization, for example, has recommended that elder abuse and responses to it be considered in the context of gender and socio-economic status, as these factors underpin almost all contexts of elder abuse.⁵¹² An emphasis on respect for the dignity and worth of older adults in the implementation of the law as well as in its design, is necessary for effective implementation of the law.

INADEQUATE TRAINING AND INFORMATION

Given the complexity of many areas of elder law, it is perhaps not surprising that those charged with implementing these laws have often received inadequate training and information. Service providers, government officials and even lawyers may act on misunderstandings of the law or may provide older adults with incorrect information about the law.

Ageism can also be manifested when individuals and organizations do not take the time to understand and accurately represent the law to those to whom they provide the service. Older adults' dignity, personal integrity, and health care rights are fundamentally affected by that inaction. It has been pointed out for example that patients often receive misinformation from health care providers or sometimes from government forms on health care consent, advance care planning, etc. In some cases, as previously noted, tools such as advance care directives which are intended to be instruments to aid personal autonomy, become misused and in effect circumvent communication with the older person.⁵¹³

For example, only a small number of lawyers in Ontario have developed expertise in the legal issues that mainly impact on older adults, such as regulation of congregate settings, public and private home care, guardianship applications, health care consents and elder abuse. Lawyers who are not familiar with the relevant subject area may have difficulty in providing competent representation.⁵¹⁴

Similarly, health care custodians may misunderstand and misapply the requirements of the *Personal Health Information Protection Act, 2004*, which sets out a framework for collecting, using and disclosing personal health information, which may result in undue barriers for individuals attempting to access or protect their health care information.⁵¹⁵

So one of the problems in the hospital system is that doctors and nurses and hospital staff do not know the rights of the patient and the patient does not know what his or her rights are vis-à-vis the hospital staff. And that is a source of great anguish because there are certain things that people want to have done or not done and the hospital tries to override them and so this end-of-life area is, it's crucial that something be done about patient rights and educating hospital staff.

LCO Focus Group, Older Women, October 21, 2011

Professionals and service providers may also require training and education on issues affecting older adults. For example, in order to meet their responsibilities, professionals and service providers may require training on how to identify and respond to signs that an older person may have a disability that affects their legal capacity to make decisions, or that an older person may be experiencing some form of elder abuse. That is, it is important that professionals and service providers have access to and make use of information to ensure that the needs and circumstances of older adults are taken into account, and to understand and take account of the diversity that exists among older persons. In the context of the legal profession, increased focus on elder law in law school curricula, and more opportunities for continuing education following licensing may provide an important starting point.⁵¹⁶

ACCESS TO INFORMATION FOR OLDER ADULTS

A lack of knowledge among older adults of their rights and responsibilities under the law was a pervasive theme in the LCO's public consultations. Almost one-fifth of the older adults responding to the LCO's consultation questionnaire either disagreed or strongly disagreed with the statement "I am well informed about my rights and the legal options available to me". Many respondents expressed frustration with the barriers they experienced when trying to access information and raised concerns about the difficulties in navigating complex systems. During the focus groups, many participants had difficulty in identifying where they might go to find information about rights and responsibilities. This was particularly apparent during the focus group for newcomer older adults.

The problem is particularly acute because many of the laws affecting older adults are both high-stakes and difficult to understand and navigate. Decisions regarding capacity and guardianship, or long-term care, or end of life matters have serious consequences for older adults and those around them. It is therefore particularly important to ensure that older adults are able to access the information necessary to make these important decisions.

As a result, one of the premier priorities emphasized by all those involved in this project is education for both service providers and older adults. ACE has suggested that education has the potential to help close the gap between good law and bad practice, by putting residents in a position to exercise their rights and force good practice.⁵¹⁷

What I find is that many of the people I talk to in our residence are not aware of the different parts of government that will help out financially. For example, I've talked to three people in the last two weeks they had a tough time making ends meet and yet they've never been told about the GIS and this is available to all low-income residents. And it hurts me when I find out that somebody's been without 3000 to 6000 dollars a year, enough to get them by and enough to get the worries off their mind, financially.

LCO Focus Group, Older Adults in Long Term Care, October 31, 2011

LACK OF OVERSIGHT

At times, there is a lack of clear rights and protections for older adults, which leaves them vulnerable to abuse or mistreatment.

For example, over the years, concerns have been expressed regarding the oversight regime for retirement homes in Ontario. Retirement homes are defined by the new *Retirement Homes Act*, 2010 as

- a residential complex or the part of a residential complex,
- (a) that is occupied primarily by persons who are 65 years of age or older,
- (b) that is occupied or intended to be occupied by at least the prescribed number of persons who are not related to the operator of the home, and

- (c) where the operator of the home makes at least two care services available, directly or indirectly, to the residents...⁵¹⁸

Retirement homes operate across a range of services and models. Some are very small; others are large and institutional. Services may include meals, assistance with the activities of daily living, recreational and social programming, housecleaning and laundry, personal emergency response services and nursing care. With significant pressures on the availability of long-term care and home care services in Ontario, retirement homes are an essential part of the landscape for older adults who need supports. Retirement homes may offer many of the same services as long-term care homes, including services for high-needs patients and locked wards, making adequate oversight and protections essential.⁵¹⁹

Until recently, the retirement home industry essentially operated on a “consumer choice” model. There was no provincial licensing or granting of approval to operate, no government funding, and no oversight of the services provided, except through the industry association’s complaints line. The *Residential Tenancies Act* includes some requirements for providing potential residents with contractual information (the Care Home Information Package, or CHIP).⁵²⁰

Very considerable concerns were raised regarding the lack of effective protections for residential retirement homes, particularly as a significant portion of the residents of these homes may be considered vulnerable.⁵²¹ It has been noted that a consumer choice model is not well suited to this particular market:

[F]or the market to operate effectively, certain conditions must be met:

- Consumers must have an adequate supply of products or services to choose from;
 - They must be capable of exercising choice (that is, they must have decision making capacity and be free from coercion or undue influence) and
 - They must have recourse when things go wrong.
- These criteria are noticeably absent in retirement homes and similar types of supportive housing in Canada.⁵²²

Ontario has very recently introduced a new regulatory model for retirement homes, one which is still transitioning into full effect. The *Retirement Homes Act* includes provisions that set standards for retirement homes, including a Bill of Rights; requirements for provision of information to residents, their families and the public; the establishment of Resident Councils; development of plans of care; requirements for staff hiring and training; prevention of abuse and neglect; and restrictions on the use of restraints and locked-in wards. A regulatory authority is created, which has the authority to issue or refuse licences to retirement homes, appoint inspectors to ensure that the minimum standards and any conditions placed on licences are met, and to receive and review complaints regarding licensees. While the government may appoint members of the Board of Directors of the Authority, it may not appoint a majority of the members. Concerns have been expressed that the Authority is likely to be industry-dominated,

and therefore be unable to provide effective oversight for this industry. The effectiveness of this form of regulatory structure in ensuring dignity and security for older adults, many of whom may be disadvantaged or at-risk in some fashion, remains to be seen.

Below, a case example focusing on continuing powers of attorney highlights the importance and the challenges associated with developing effective mechanisms for monitoring, accountability and transparency.

CASE EXAMPLE: MONITORING MECHANISMS

Continuing Powers Of Attorney

As was highlighted earlier in this Report, where individuals are assessed to be legally incapable of making decisions on particular issues, the law as expressed in the Health Care Consent Act (HCCA)⁵²³ and the Substitute Decisions Act (SDA)⁵²⁴ provides a mechanism for decision-making on behalf of the individual in question.

These laws affect persons with cognitive, psycho-social, intellectual and developmental disabilities. As older adults are disproportionately likely to develop certain forms of cognitive disabilities such as dementia, these laws are of significant importance to older adults. For the purposes of this case example, the discussion will focus on the provisions of the SDA.

The SDA sets out definitions of capacity for decisions related to property and personal care, and affirms a presumption of capacity.⁵²⁵ The SDA also sets out mechanisms for assessing capacity. A finding of incapacity may be challenged by application to the Consent and Capacity Board (CCB). The CCB⁵²⁶ has the power to hold hearings under the HCCA, the SDA, the Mental Health Act, and the Personal Health Information Protection Act. Appeals from decisions of the CCB are to the Ontario Superior Court of Justice.⁵²⁷ The CCB is governed by the Statutory Powers Procedures Act. Parties may be represented by legal counsel, and where the CCB finds it appropriate, it may order the Office of the Public Guardian and Trustee (OPGT) to appoint counsel to act on behalf of the person whose capability is in issue.⁵²⁸

The consequences of a decision that a person lacks legal capacity to make decisions about property or personal care are significant. At this point, under Ontario law, the power to make decisions for the incapable person becomes vested in a substitute decision-maker (SDM). In other words, the person has lost the authority to make decisions, often major ones, about his or her life.

Under the SDA, an SDM may be appointed in a number of ways. The now-incapable person may have, when capable, completed a continuing power of

attorney within the requirements of the SDA, appointing an attorney in case of incapability for property decisions, personal care decisions, or both. The power of attorney becomes effective when a finding of incapacity is made.

Under the SDA, if there is no valid continuing power of attorney relevant to the property or personal care decision(s) that must be made, a guardian may be appointed by the court, upon application by “any person”.⁵²⁹ The Court may not appoint a guardian if the need for decisions to be made may be met by an alternative course of action that does not require a finding of incapability and is less restrictive of the person’s decision-making rights.⁵³⁰

The OPGT may be appointed as a statutory guardian of property or personal care. As well, the OPGT, which has a statutory duty to investigate allegations that a person is incapable of managing their personal care or property and that serious adverse effects are occurring or may occur as a result, may bring an application that results in its appointment as a temporary guardian.⁵³¹

The SDA requires guardians and attorneys for property to act as fiduciaries and to consider the impact of decisions on the person’s comfort or well-being. As well, the SDM for property must explain his or her role to the person, encourage the person to participate to the best of his or her abilities in decisions, foster regular contact between the person and his or her family and friends, and consult with others who are close to the person.⁵³² Guardians and attorneys for personal care must take into account when making decisions the wishes and instructions of the person while capable, as well as the values and beliefs that the person held while capable and the person’s current wishes if they can be determined. The guardian must also strive to foster the person’s independence and to choose the least restrictive and intrusive course of action that is available and appropriate.⁵³³

Given the broad powers associated with continuing powers of attorney, the risk and consequences of abuse are substantial. As the Alberta Law Reform Institute has noted:

The downside of an EPA [Enduring Power of Attorney] is that it turns over control of some or all of a donor’s property and affairs to another individual, the attorney, whom the donor, because of their mental incapacity or infirmity, cannot effectively supervise. It is possible for an attorney to abuse these powers by using the donor’s assets for purposes other than the donor’s benefit. For example, an attorney may apply a donor’s assets for a purpose beneficial to the attorney rather than for a purpose beneficial to the donor, or an attorney may simply steal the donor’s property. Or an attorney who will benefit from the donor’s estate may refuse to use the donor’s money for the proper care of the donor.⁵³⁴

The SDA includes some minimum safeguards to protect older adults lacking in legal capacity from abuse by those appointed as guardian or holding a continuing power of attorney for property or personal care. Donors of powers of attorney must be aware of the possibility that the attorney could misuse his or her powers.⁵³⁵ Guardians for property are obliged to explain their powers and duties to the person in question, and to regularly consult with the person's family and friends and those providing personal care.⁵³⁶ They are required to keep accounts for all transactions concerning the property.⁵³⁷ Similar requirements are set out for guardians for personal care, including a duty to keep records of decisions made on behalf of the incapable person.⁵³⁸

Concerns have been expressed that these protections are inadequate.⁵³⁹ There is no mechanism for monitoring the use of continuing powers of attorney, beyond complaints by the donor or by family and friends, and in such cases, challenges to the exercise of the power of attorney must take place through the courts, a costly, complex and time-consuming mechanism. Although estimates of its prevalence vary, financial abuse is the most commonly self-reported form of elder abuse, and misuse of powers of attorney makes up a significant portion of this type of elder abuse.⁵⁴⁰ Financial abuse via power of attorney can have a devastating impact, not only on the financial security of older adults, but also on their emotional and psychological well-being. The Ontario Bar Association has commented that:

We are concerned not only that our current legislative framework is inadequate, but also that the processes and in the implementation of the laws, and both the laws and procedures are misapplied. A prime example is the Substitute Decisions Act (SDA) which is intended to protect the vulnerable. However, it makes the appointment of substitute decision makers and creation of powers of attorney an unsupervised process, while making the scrutiny of appointments and the abusive acts of the substitute decision-makers inaccessible, complex, slow, and expensive. As a result, powers of attorney are vulnerable to misuse and abuse, and justice delayed in the curtailing of abuse of these powers, is almost certainly justice denied. These breaches of the spirit and intent of the law involve fundamental Charter rights.⁵⁴¹

The United Nations Convention on the Rights of Persons with Disabilities affirms the importance of providing sufficient monitoring and safeguards related to legal capacity for persons with disabilities. Article 12 (4) requires that:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and

impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.⁵⁴²

The drive for efficiency and clarity among service providers may lead to a tendency to extend SDM powers beyond their legal limits or to ignore the requirements of the law. For example, ACE has noted that

Many long-term care homes routinely fail to obtain consent to treatment at all. Other homes attempt to obtain 'blanket' consents at the time of admission which purportedly apply to all treatments that might be prescribed during the course of their stay. This is not legal as it in no way meets the requirements of "informed" consent as defined by the Health Care Consent Act. In some homes, treatment will be started, and some time thereafter a staff member will contact the substitute decision-maker to "advise" them that the resident is now taking the medication, leaving no option open for "consent".⁵⁴³

The Ministry of Health and Long-Term Care has undertaken a number of initiatives to combat this problem, including providing information sessions for long-term care home operators and staff, and the development of plain language materials.⁵⁴⁴

Redress for abuse of SDM powers must be sought through the courts. This type of adversarial setting may be inappropriate for difficult familial issues, and may in fact exacerbate conflict rather than resolve it. As the OBA has stated,

When the Substitute Decisions Act and the Health Care Consent Act, 1996 were passed into law, they did not anticipate the degree to which these laws would be applied in the context of 'high conflict' families. A significant number of court applications now involve substitute decision making for incapable adults and pit family members against each other. The legislation was never intended to address conflicts of this degree and type, and the current processes do not lend themselves to appropriate resolutions.⁵⁴⁵

As well, these court-based processes are often, in practice, inaccessible.

One of the topics [on] which ACE receives the most question is powers of attorney, particularly the issue of abuse. While the framework of the Substitute Decisions Act provides mechanisms for individuals to challenge a "rogue" attorney who is not fulfilling their functions or who is taking advantage of the grantor, it is not very accessible as it is court-based. For example, an individual can apply to the court for a passing of accounts or seek guardianship of property and/or the person for an incapable person but the costs are prohibitive.⁵⁴⁶

As was noted earlier in this Chapter, concerns have also been raised about the lack of checks and balances for the powers vested in the OPGT and the CCB. The OPGT, for example, has in certain situations extraordinary powers to make decisions regarding personal care, health and finances, which may only be challenged through expensive, time-consuming litigation which may be beyond the resources of concerned family members.⁵⁴⁷

As noted above, OBA has raised concerns that legislation which is intended to protect the vulnerable does not do so in fact.

Therefore, mechanisms for greater monitoring of SDMs have been recommended. As an example, the Western Conference of Law Reform Agencies, in its Final Report on its project, Enduring Powers of Attorney: Areas for Reform, set out a number of recommendations for preventing inadvertent or intentional misuse of powers of attorney by ensuring greater transparency and scrutiny. For example, these recommendations included the creation of 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.⁵⁴⁸

Development of protections against abuse of powers of attorney again involves a careful balance between protecting the security of at-risk older adults, and upholding the autonomy and self-determination of those creating powers of attorney:

Some have argued that more complex power of attorney legislation including duties and limited powers, and protections such as registration intended to minimize power of attorney abuse, infringe donor autonomy and privacy, making court appointed guardianship, a more invasive and controlling process, more likely. On the other hand, it has also been suggested that greater oversight, including registration, allows for a more relaxed approach to capacity for creating a power of attorney, and so increases accessibility.⁵⁴⁹

Finally, some of the concerns regarding the operation of consent and capacity laws point to the lack of monitoring and oversight in general. Overall, there is a lack of data that could be used to properly evaluate whether Ontario's capacity and decision-making laws are operating as intended, or operating in a way that negatively affects the rights of persons with disabilities and older persons. It is impossible, for example, to determine even the most basic starting points for analysis, such as how many older persons in the province of Ontario have been found to be legally incapable and how many continuing powers of attorney for property or personal care are in effect, let alone the degree to which those acting as

SDMs understand their roles, or the extent of abuse and exploitation of substitute decision-making powers.⁵⁵⁰ Without such monitoring and oversight of the implementation of the law, it is difficult to determine whether the principles of an approach to the law based on substantive equality are being respected, or to determine appropriate priorities for reform. This, in itself, tends to undermine the dignity, autonomy, participation, security, membership in the broader community and respect for diversity of older adults.

LACK OF APPROPRIATE MECHANISMS FOR RECOURSE

In some cases, there is no effective method of recourse for a violation of rights. As discussed above, the Residents' Bill of Rights for residents of long-term care homes is one example: where the only redress for a violation of rights is a civil action for breach of contract against the institution where one lives and on which one is dependent for services, the potential for redress is illusory.⁵⁵¹

Similarly, as is discussed at length in Chapter VI of this *Report*, while there is a review process for the decisions of Community Care Access Centres (CCACs), which are responsible for managing access to home care supports, older adults are often ill-informed about this right and how to access it. While a termination of services can be appealed from a CCAC to the Health Services Appeal and Review Board, there is no appeal mechanism related to the quality of services provided. Community Legal Education Ontario suggests that one method of recourse may be to sue the CCAC for breach of contract. However, since Legal Aid does not cover these types of issues, this is not likely an effective avenue for redress for a person dependent on publicly funded home care. Effectively, this means these rights are, for the most part, "paper rights" only, and the security and dignity of affected older Ontarians are at risk.⁵⁵²

COMPLAINT-BASED SYSTEMS

The majority of systems in place to ensure the effective application of the law to older adults require the aggrieved individual to take action individually to raise and resolve the issue, whether through commencing litigation before a court or administrative tribunal, or filing a complaint through a government process, third party system or internal complaint process.

Complaint-based systems leave decisions about action to the initiative of older adults. This may be understood as respecting the autonomy of older adults. In some circumstances, however, complaint-based systems may be problematic, particularly where older adults are at-risk or marginalized due to disability, low-income, immigration status or other issues. Where older adults are dependent on others for ongoing care or supports, whether the others are family members or service providers, the negative consequences of filing a complaint against these individuals or institutions may be seen to outweigh any potential positive outcomes. As well, complaint systems may involve

expenses, bureaucratic obstacles, or delays beyond the capacity of vulnerable older adults to absorb. As is discussed later in this Chapter, for this reason there has been recent interest in the possibilities associated with less adversarial means of resolving conflict, such as mediation.

Where services are targeted to at-risk older adults, as with, for example, long-term care or home care services, systems that rely entirely on older adults to identify issues and pursue remedies may fall short of addressing needs. As well, where systemic problems are at issue, individual complaint systems are unlikely, by themselves, to spur the changes that are needed to make a more effective system.

Complaint-based systems are common in many areas of the law, and so the issues raised here are not necessarily, or not all, unique to older adults. The limitations of complaints-based systems are also an issue in the LCO's project on *Vulnerable Workers and Precarious Work*,⁵⁵³ as well as in the project on *The Law as it Affects Persons with Disabilities*.

FAILURE TO RECOGNIZE AND ACCOMMODATE THE NEEDS OF OLDER ADULTS

As noted above, while older adults are an extremely diverse population, they are disproportionately likely to live with a disability or chronic health condition, to have lower levels of literacy and numeracy, to live on a fixed income, to rely on the assistance of others to manage the activities of daily living and maintain their independence, to live in a congregate setting, and to have a relatively short life expectancy.

Mechanisms for implementing and enforcing laws that affect older adults may not take these circumstances into account, and may therefore create barriers. As an obvious example, while efforts are being made to increase the physical accessibility of the justice system,⁵⁵⁴ much remains to be done. The costs of accessing justice are a significant issue for many older adults, as they are for many other groups. The LTB, for example, charges an application fee and has the power to award costs against an applicant, which may be a disincentive to pursue one's rights.⁵⁵⁵ As a further example, it has been pointed out that although public legal education has made important contributions to making the law more understandable and more accessible for many, it is still geared to the functionally literate person, which leaves many older adults at a disadvantage: older adults continue to point to the lack of plain language information on legal rights as a serious barrier. Further,

[i]ncreasingly in many parts of Canada, public information on the law and government information about services and entitlements has been shifting from people sources to virtual sources such as the Internet. The Special Senate Committee on Aging notes that a reliance on web-based information assumes a basic level of literacy and people's ability to access the internet.⁵⁵⁶ Many older adults, particularly older women, do not have access to or cannot use the Internet. In 2007, about one third (33.8%) of all men aged 65 and over and less than one quarter (23.1%) of all women aged 65 and over in Canada accessed the Internet at home and only about 1% of seniors used computers in public places like libraries.⁵⁵⁷ Internet use still is largely limited to higher income seniors and those with higher education.⁵⁵⁸

A recent example of failure to acknowledge and accommodate the particular needs of older adults occurred in the context of bylaw enforcement in the City of Toronto. The neighbour of an older resident with dementia asked the City to cut down a mature tree on the older resident's property. An order for the removal of the tree was issued by a Property Standards Officer and the tree was ultimately cut down, at considerable expense to the property owner. An investigation by the City Ombudsman found that the City lacked proper policies or processes for accommodating the needs of individuals with diminished legal capacity, resulting in unfairness to this individual. The City was aware of the resident's dementia and diminished capacity, but did not take steps to ensure that the resident, through her substitute decision-maker, was fully informed about the issue and had appropriate opportunities to respond and have concerns addressed. The Ombudsman commented that:

Public service is most accessible to those who can navigate the established processes. It favours those with education and those who can meet the bureaucracy on its own terms. In this case, the resident is marginalized and is representative of many others in similar situations. In fact, many residents with dementia do not have a family member readily available to advocate on their behalf. The absence of policy or an established process to accommodate persons with dementia or diminished capacity is a gap MLS must address. At a systemic level, its absence creates an adverse impact on what is already a vulnerable group. A process to fairly serve the needs of those with dementia is especially urgent as the population ages. It is time to address this gap ... The City cannot hope to be accessible, equitable or age friendly to residents with dementia unless it has ensured that barriers to this population have also been identified and removed.⁵⁵⁹

The challenges in ensuring mechanisms for access to the law take into account the needs of older adults will differ depending on the type of law in question. Where laws are age-based or mainly affect older adults, systems may be specifically designed to meet the needs of older adults. Where older adults make up a smaller proportion of those affected by a law, legislators and policy-makers must consider whether universal design approaches will be sufficient, or if some older-adult specific procedures or supports are necessary in order to ensure meaningful access for older adults.⁵⁶⁰

ADVERSARIAL SYSTEMS

Many of the issues of most concern to older adults – for example, capacity and guardianship applications; elder abuse; and services in long-term care homes, retirement homes and home care – often involve ongoing relationships on which older adults are dependent for their well-being. This raises difficulties for implementation, monitoring and enforcement.⁵⁶¹

Older adults may be reluctant to use adversarial systems in these circumstances. For example, older adults who are subjected to abuse may be very reluctant to see their abuser prosecuted through the criminal law system, despite their desire for the abuse to end.⁵⁶²

As well, in such circumstances, adversarial systems may exacerbate rather than resolve issues. For example, the Ontario Bar Association has pointed out that substituted decision-making laws have become, to a significant degree, a venue for familial disputes, and may foster conflict rather than resolving issues.⁵⁶³

INADEQUATE REMEDIES

Even where older adults pursue enforcement of their rights, the remedies available may be inadequate to provide real redress to older adults, or, where the violation of rights was caused by a systemic issue, to spur meaningful change. For example, because there are very few damages options available to older adults, civil litigation may not be an effective means of obtaining redress. Not only does this potentially perpetuate injustices, it creates a disincentive for older adults to attempt to enforce their rights, and thereby may prevent problems from coming to light.

The previously highlighted case of *Royal Arch Masonic Homes* involved the death of a 77-year-old female resident of a long-term care home, following a fall that resulted from the negligence of a care aide. The three adult children of the victim sought redress from the long-term care home. The Court determined that the only damages that the long-term care home was obliged to pay were the funeral and burial costs. There was no economic loss resulting from the death of the victim, and the Court declined to award costs for loss of care and companionship, due to the victim's age and her various physical and mental disabilities.⁵⁶⁴ It has been pointed out that such a judgment essentially permits caregivers to harm older adults with impunity.⁵⁶⁵

C. Strategies for Enhancing Access to the Law for Older Adults and Addressing the Implementation Gap

It should perhaps be unnecessary to emphasize that a right without an effective mechanism for redress is not really a right at all; it is merely a statement of aspirations. A first principle for ensuring effective implementation of the law for older persons is surely to make certain that legal rights and protections for older adults are accompanied by clear and effective mechanisms for accessing those rights and protections.

No single strategy for ensuring access to and enforcement of the law will address all concerns. Some will work better in some contexts or for some groups of older adults than others. In some cases, it may be appropriate to use a range of mechanisms. For example, as is apparent even from the brief discussion above, Ontario's long-term care home system includes a variety of mechanisms for identifying and addressing issues, including Resident and Family Councils, the "Bill of Rights" embedded in the *LTCHA* and the Long-Term Care Action Line. As well, the *LTCHA* imposes a duty to report abuse or improper treatment, includes whistle-blowing protections, requires homes to provide information to residents about complaint procedures, and imposes a duty on licensees to respond to complaints and to report any complaint about care or the operation of the home to the Ministry.⁵⁶⁶ Given the complexity and size of the system, this multi-

faceted approach may be more effective than any single tool could be. As the Ministry comments, “there are multiple mechanisms available under the *LTCHA* for accessing information and enforcing the requirements under the *LTCHA*. Each mechanism may not always serve the needs of every resident, but it is important to provide for multiple mechanisms through which issues may be addressed.”⁵⁶⁷

The above review of barriers to access to the law for older persons suggests the following as key strategies for designing effective mechanisms for older adults.

1. Combating Ageism and Paternalism

Those working in the field of elder law have repeatedly emphasized the importance of developing and implementing strategies for combating ageism and paternalism, both in the populace at large and among those charged with designing and implementing laws and policies that affect older adults. Unless ageist and paternalistic attitudes are addressed, they will inevitably taint the application of the law, regardless of how well it is designed. Thus, the United Nations, the OHRC, and most recently the Senate Special Committee on Aging, to name just a few bodies, have made recommendations for anti-ageist education and training.⁵⁶⁸ Anti-ageist education and training is fundamental to ensuring respect and dignity for older persons.

Public education is, for example, central to the Ontario government’s 2002 Strategy to Combat Elder Abuse. This includes coordination of community services, training for front-line staff, and public education to raise awareness. Public education initiatives include 53 community response networks, and a province-wide Seniors’ Safety toll-free line that provides information and support in over 150 languages. The Ontario Network for the Prevention of Elder Abuse has developed a Core Curriculum and Resource Guide to educate workers about elder abuse and interactions with older adults, online e-training modules on financial and emotional elder abuse, a variety of training materials and a number of Public Service Announcements.⁵⁶⁹

The general population and those who care for or provide services for older adults should be trained (or at least aware of the frustrations) to help and consider older adults and their needs. Older adults have a specific set of needs plus their individual needs. Then older disabled adults have another set of needs and frustrations. As adults get older they all have more needs. I worry about the younger generation and their respect for older adults.

LCO Consultation Questionnaire Respondent

ACE has this to say about the type of education and training that service providers should receive:

The most important principle that needs to be conveyed to all stakeholders is that seniors are people. Older adults are presumed to be capable of making decisions and they have the right to make foolish decisions, just as people living outside a congregate setting do. ACE is of the opinion that many staff members and some families do not understand that older adults are allowed to take risks or make foolish decisions. Educational resources need to emphasize that residents’ rights

are a two-way street: not only do they recognize the independence and autonomy of residents, but they protect staff from liability.⁵⁷⁰

Anti-ageist training and education must address, not only negative attitudes, but the tendency to forget the existence of older persons and to fail to take into account their needs and circumstances:

The needs of all citizens, including older persons, must be taken into account up-front so that physical, attitudinal and systemic barriers are not created. Assuming that everyone is young and able-bodied and designing programs and facilities on that basis is a form of ageism that must be addressed in our society. The [Ontario Human Rights] Commission heard that some levels of government are now undertaking gender-based analysis. Similarly, government should consider the impact of laws, policies and programs on all age groups.⁵⁷¹

2. Empowering Older Adults

As noted above, older adults frequently lack information about their rights or about the benefits and services that they are entitled to. Given the complexity of many areas of the law that disproportionately affect older adults, this is perhaps not surprising. However, it is problematic. Older adults who are not aware of their rights are not able to assert and claim those rights, with the consequence that the law may become ineffective.

Lack of awareness of legal rights and mechanisms for redress undermines the autonomy and independence of older adults. Without knowledge of their rights and recourse, older adults lack the ability to make meaningful choices about how they will live their lives and take responsibility for the things that affect them.

As a person who is supposedly literate and educated, I have found it very difficult to find out what happens when you turn 65. What do you get, what do you not get, what are your responsibilities. It's been a trial and error process. There is no sort of easy way at the moment to find out because it's all little different pieces. And I still don't know, for instance, exactly what you get health-wise. I mean, I noticed my drugs cost less and I think I'm able to get glasses when I couldn't before, but I don't know what all the pieces are and finding out is very difficult.

LCO Focus Group, Older Women, October 21, 2011

Provision of accurate, accessible information about legal rights and how to enforce them is therefore essential to ensuring access to the law for older adults.

People have to know how to research and find out about their rights. No one agency does that for you. I spent hours on the phone talking to various government agencies and to individuals who have had to 'fight' the system.

LCO Consultation Questionnaire Respondent

Ensuring access by older adults to information about their rights and responsibilities under the law and how to access these promotes the participation and inclusion of

older adults, as well as fostering independence and autonomy. Those involved in the LCO's consultations had many suggestions about means to enhance access to information for older adults, including greater access to in-person or telephone information (as opposed to distribution of information mainly via internet or lengthy documents), creating a centralized clearinghouse for information related to older adults and the law or a free telephone hotline to direct people to appropriate resources, and making greater use of formal and informal seniors' organizations as distribution points for information. In the context of congregate settings, ACE, in their commissioned research paper for the LCO, made several recommendations related to education, including the development of a standard curriculum, along with comprehensive training respecting residents' rights, for residents, families and staff of long-term care homes and retirement homes.⁵⁷²

3. Designing Mechanisms that Take Older Adults into Account

Mechanisms for access to the law must be designed in a way that takes older adults into account, regardless of whether or not the law in question is specifically targeted to older persons. As the OHRC has stated in its Policy on *Discrimination Against Older People Because of Age*:

The Commission has defined "ageism" to mean, in part, "a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons." Ageism occurs when planning and design choices do not reflect the circumstances of all age groups to the greatest extent possible.

The Supreme Court of Canada has recently made it clear that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then to try to accommodate those who do not fit this assumption. Rather, the age diversity that exists in society should be reflected in the design stages so that physical, attitudinal and systemic barriers are not created.

As a corollary to the notion that barriers should be prevented at the design stage through inclusive design, where systems and structures already exist, organizations should be aware of the possibility of systemic barriers and actively seek to identify and remove them.⁵⁷³

This means that mechanisms should take into account the following, for example:

- the financial demands imposed on those seeking justice, both in the context of low-income, and for those who are living on fixed incomes;
- accessibility for persons with physical, mental, cognitive and sensory disabilities, and for those with health limitations;
- how information and assistance may be provided to those whose literacy or numeracy or comfort with technology is limited;
- whether dispute resolution and remedies can be provided within time limits that are meaningful for older persons;

- providing meaningful access for persons who are living in settings such as long-term care homes, where there is more limited access to information and to the broader community;
- how meaningful access can be provided for older adults who face additional barriers due to gender roles, linguistic or cultural barriers, immigration status, sexual orientation, dependency relationships, or other issues.

As was discussed in Chapter III, in some cases the needs of older adults can be taken into account through inclusive design. Inclusive design approaches are appealing for law reform because the benefits may be widely applicable beyond older adults, and such initiatives may thereby garner widespread support rather than resentment. For example, policies or programs that address physical accessibility issues will also benefit persons with disabilities and frequently families with young children. Communication strategies that reach beyond the internet and focus on plain language will improve outreach in many communities, not just among older adults. As well, they reduce the focus on older age as a binary concept opposed to youth.

However, there are limitations to the inclusive design approach. Older adults may have needs that are sufficiently unique that they are not easily accommodated within an inclusive design approach. Or in some cases, the needs of older adults may conflict with those of others. In such cases, it may be most appropriate to design policies or programs that are specifically tailored to older adults, as outlined below.

4. Use of Mechanisms Focused on Older Adults

It is relatively rare to find mechanisms for access to the law that focus specifically on the needs of older adults. For example, while mechanisms related to long-term care homes will mainly impact on older adults, who form the vast majority of residents of these homes, they also extend protection to the minority of residents who are younger adults with significant disabilities and complex medical needs.

Most frequently, access to the law mechanisms specifically directed to the needs of older adults are focused on elder abuse. For example, many police forces in Ontario have units specializing in elder abuse, and the majority of police services have a coordinator specializing in elder abuse to act as a resource and community liaison. As one instance, the Ottawa Police Service has an Elder Abuse Section, launched in January 2005. Its mandate is to investigate all allegations of abuse that fall within its definition of elder abuse, and to educate front-line workers and the general community about elder abuse.

Similar programs have been developed in other parts of Canada and in other common-law jurisdictions such as Australia and the United States.⁵⁷⁴ In the United States, the Administration on Aging administers the Prevention of Elder Abuse, Neglect and Exploitation Program, which provides federal leadership in strengthening elder justice strategic planning and direction for programs, activities and research related to elder abuse awareness and prevention. The Administration on Aging also operates the National Centre on Elder Abuse, as a national resource centre on the issue.⁵⁷⁵

There are some general mechanisms, however. Ontario's ACE, discussed above, is a notable example, providing legal advice and representation to older adults, as well as general advocacy and law reform activities, and serving as a centre for the development of knowledge and expertise in the area of the law and older adults.

The Canadian Centre for Elder Law Studies was created by the British Columbia Law Institute. It is a national, non-profit body dedicated to studying legal issues that have a particular impact on older persons. As well as conducting its own legal research and law reform projects, it facilitates study and discussion of elder law issues through such venues as a regular Canadian conference on elder law, and hosting the World Study Group on elder law issues.

The Australian government has funded the National Aged Care Advocacy Program, which aims to promote the rights of people receiving Australian Government-funded aged care services through community-based organizations that provide older adults with information about rights and assistance with exercising those rights. These centres also work with the aged care industry to encourage the development of policies and practices that protect consumers. Those living in an Australian government-funded place in an aged-care home have access to free, confidential and independent advocacy services. Australia also has an Aged Care Complaints Investigation Scheme, which can look into complaints by older persons regarding any aspect of their care, and can require service providers, where appropriate, to take remedial action. Concerns regarding Aged Care Complaints Investigation Schemes may be examined by an independent Aged Care Commissioner.⁵⁷⁶

As is discussed at greater length below, Wales has recently established a statutory, independent Older People's Commissioner. This is a watchdog agency, carrying out promotion, consultation, review, advocacy, education and investigative functions. The Commissioner can review and make recommendations about the adequacy and effectiveness of law for the protection of vulnerable older people and ask the Assembly Government to consider making changes where necessary. The Commissioner can also provide guidance on best practices to regulated service providers and review their policies and programs to ensure adequate safeguards for the rights of older persons. The Commissioner has the power to undertake investigations where there are systemic concerns at issue and the issue is not likely to be addressed in other ways.⁵⁷⁷

As discussed at some length in Chapter IV of this *Report*, the use of older age-based programs and policies raises difficult issues. It is important not to overemphasize the idea of older persons as a homogenous group. Not all older adults are disadvantaged or at-risk, and these older adults may share the experience of barriers and challenges with other disadvantaged groups. Age, by itself, does not make older adults different or lesser. Programs based on an assumption of vulnerability among all older adults may lead to paternalism and undermine the autonomy and independence of older adults.

At the same time, there are certainly subgroups of older adults who are disadvantaged or at-risk and whose circumstances require particular attention and accommodation.

There may be circumstances where programs particularly targeting older adults are the most effective way to ensure the security and dignity of older adults. The programs developed by many police services focused on elder abuse recognize the unique needs and circumstances of older adults who experience abuse and the particular barriers they may face in asserting their rights, likely fall within this category.

Therefore, taking into account the general issues raised in the discussion of age-based criteria in Chapter IV, advocacy or enforcement programs targeted to older persons must be individually assessed, to ensure that the use of age as a criterion for eligibility is the most effective means of addressing the needs or vulnerabilities that are targeted; that the program is based on current research rather than stereotypes; and that the program effectively addresses the needs identified. The following case example examines a targeted enforcement program focusing on elder abuse.

CASE EXAMPLE: MECHANISMS FOCUSED ON OLDER ADULTS

Elder Abuse and Police Services

As highlighted earlier in this Chapter, older adults may face a range of barriers to reporting elder abuse. The complex relationship dynamics underlying some forms of elder abuse, together with the effects of shame and fear of retaliation, may make some older adults reluctant to disclose the abuse, or to see the perpetrators face criminal penalties. As a recent report on barriers to reporting summarized:

Greatest are fears of retaliation, followed by loss of residency, increased vulnerability, and isolation, especially when there is daily contact with the abuser. Ultimately, there is a fear that the situation will get worse after reporting abuse.... Circumstances involving the abuser as being someone in a position of trust also have a negative impact on report rates. A relationship with an abuser can discourage an elderly person to report abuse because many seniors perceive the legal intervention as too severe.⁵⁷⁸

There may be additional barriers for some older adults related to culture, language or remote location. Older adults may also fear that they will not be believed or treated respectfully by professionals in the justice system, including police officers.

In order to address these kinds of barriers, several police forces in Canada have developed specialized elder abuse units or services. The Vancouver Police, for example, in September 2007 launched an Elder Abuse Unit, modeled on and connected to its Domestic Violence Unit. In Ontario, there are Seniors' Units in a number of cities, including Hamilton, Thunder Bay, Waterloo and Ottawa, and many other police services have specialized Elder Abuse Coordinators, who act as a resource and community liaison.

Hamilton's Crimes Against Seniors Unit (CASU) was the first specialized unit of its kind in Ontario, formed in March 2004. It consists of two Detectives who work from the Hamilton Police's Victims of Crime Branch, supported by the three Seniors' Support Officers who work in each of the three Divisions.

The Seniors' Support Officers have three key roles: developing and delivering education programs related to the safety and security of older adults; assisting in investigations of abuse and neglect of older adults; and co-operating with community services and other agencies to address issues related to the quality of life of older adults. These Seniors' Support Officers are the initial point of contact for older adults.

CASU is responsible for the investigation of crimes against persons who are 60 years of age or older, and who are victimized primarily because of their age. The investigations of CASU have included physical, psychological and financial abuse, neglect and self-neglect, and coroner's investigations. The work of the Unit is dominated by investigations of financial abuse, which include frauds, scams and thefts, and theft by power of attorney. CASU has successfully investigated a number of high profile cases, including those of a son who used his power of attorney to obtain and gamble away the OAS and CPP payments of his disabled mother; an administrator of a retirement home who defrauded several residents, as well as her employer, of over a million dollars; a home care worker who stole from her client; and an unlicensed contractor who scammed numerous residents for roofing repairs that were never performed.

The work of the CASU requires detailed knowledge of laws that police officers are not usually required to become familiar with, including the Consumer Protection Act, the Substitute Decisions Act and Health Care Consent Act, the Trustee Act and the Succession Law Reform Act, and the law governing long-term care homes, and therefore involves the development of specialized skills and knowledge.

The Unit works closely with various community agencies and services to ensure that all reported cases of assault, financial exploitation and neglect are properly investigated. The Unit has developed partnerships with the Community Care Access Centres, the Office of the Public Guardian and Trustee, the Alzheimers' Society, local hospitals and financial institutions, the Canada Revenue Agency and the Ministry of Small Business and Consumer Services, among others.

5. *Alternative Dispute Resolution Mechanisms*

As noted earlier in this Chapter, there has been considerable interest expressed in the potential of alternative dispute resolution mechanisms such as mediation to benefit older adults in attempting to resolve issues arising in the context of ongoing relationships. Elder and guardianship mediation are growing and evolving fields.⁵⁷⁹

However, concerns have also been noted about the imposition of mandatory mediation on older adults in some contexts. For example, under Ontario's *Residential Tenancies Act*, care home residents who are facing eviction due to changing care needs must attend mandatory mediation, where the parties may contract out of their rights under the Act.⁵⁸⁰ While the provision may have been intended to benefit retirement home residents by mandating a less formal, adversarial and time-consuming process, given the power imbalances between the retirement home operator and the resident who is facing eviction, who may have significant health limitations, who may not be represented and who may not be fully informed of his or her rights, concerns have been expressed about the effect of this provision on older adults.⁵⁸¹

One form of alternative dispute resolution is elder mediation. Elder mediation is a voluntary, non-adversarial dispute resolution process where one party to the dispute is an older adult. The process is specifically designed in order to facilitate the dynamics of older adults' conflicts, and to generate solutions which respect both the parties' ongoing relationship, and protect the older adult's interests. Elder mediators typically have knowledge of ageing and the ageing process, and are therefore ideally situated to create processes which enhance older adults' capacity to deal with conflict.⁵⁸²

Certain elder mediation programs mediate the diverse range of disputes which older adults face.⁵⁸³ Other elder mediation programs specialize in certain disputes which older adults face more often than the general population. For example, some elder mediation programs mediate conflicts in caregiving arrangements.⁵⁸⁴

Despite its potential, resolving conflicts through elder mediation can create risks for older adults. Older adults are often dependent upon the other party to the conflict, which will distort the power dynamic between the parties. If left unaddressed, the imbalance of power may mean that the older adult is not able to freely express his or her opinions, and that consent to any agreement may not be freely given.⁵⁸⁵ Older adults are also more likely to have age-related illnesses which affect their ability to participate meaningfully in the discussions which directly affect them.⁵⁸⁶ An elder mediation's potential to create resolutions which respect the older adult's autonomy and safety will then depend upon the elder mediator's training, skills and judgment throughout the process to ensure the older adult's free and meaningful participation.

Further, elder mediation is not appropriate in all circumstances, or for all issues. For example, there are special issues raised where the decisional capacities of a party to mediation may be affected by a disability. These issues are beyond the scope of this brief discussion, but must be carefully addressed by an elder mediation program.⁵⁸⁷

Preliminary experiences with elder mediation show this process has, in the appropriate circumstances, tremendous potential to increase access to justice for older adults, and to increase communities' capacities to deal with conflicts involving older adults. When successfully established in a community, elder mediation programs can provide a physically and emotionally accessible alternative for those older adults who face barriers in existing institutionalized dispute resolution processes. Preliminary experiences with the process have shown outcomes which enable older adults to recognize and respond to conflict, and generate solutions which maximize older adults' dignity, independence and autonomy.⁵⁸⁸

The British Columbia Law Institute has recently completed a comprehensive Report on Elder and Guardianship Mediation in that province, examining the current legal landscape, the nature of elder mediation and the issues associated with it, and promising projects in the field.⁵⁸⁹ In Ontario, there are currently very few elder mediation services, and little research exists on these programs' operation. Further research is necessary in order to assess the feasibility of introducing elder mediation programs across the province.⁵⁹⁰

CASE EXAMPLE: ALTERNATIVE DISPUTE RESOLUTION AND ELDER ABUSE

Waterloo's Restorative Justice Approach to Elder Abuse

Restorative justice is a philosophy which responds to what society labels a "crime." The philosophy emphasizes repairing the harm done to a victim and the community, in contrast to the criminal justice system's emphasis on prosecuting and punishing offenders. A restorative justice approach to resolving conflict is distinct from many elder mediation programs discussed, as it identifies the parties to a dispute as victim and offender, rather than as disputants. The parties come to the table already having acknowledged their roles in the dispute in this way, and this relational orientation shapes the goals and results of the process. Further, restorative justice shares greater similarities with transformative mediation than facilitative mediation, as the emphasis is on empowering the parties to move past their patterns of conflict rather than on reaching a resolution for a specific issue.

One example of the operationalization of the restorative justice philosophy as a response to elder abuse was developed in Waterloo, Ontario. Though restorative justice is different from the most common forms of elder mediation programs, it shares with these other programs an emphasis on increasing older adults' ability to recognize and resolve conflict.

The Waterloo program has existed in two different forms: first as a dedicated "circle" process, and now as a holistic team-based conflict management approach to responding to elder abuse and increasing older adults' capacity to deal with conflict.

Restorative Justice Circles

The program first operationalized the restorative justice philosophy in the form of “circles.” These “circles” were led by a trained facilitator, who brought together the people directly or indirectly affected by the conflict, discussed the issues and attempted to resolve them. The program was led by a partnership between Community Care Access Centre of Waterloo, the Waterloo Regional Police Service, the Kitchener-Waterloo Multicultural Centre, White Owl (an association of urban Aboriginal persons), the Network: Interaction for Conflict Resolution, and Community Justice Initiatives of Waterloo.⁵⁹¹

The restorative justice circles were offered at no cost to the parties to the dispute. In these cases, however, costs were likely not the most significant barrier that older adults faced to resolving the conflict, as if an older adult were to press criminal charges, the legal costs would be minimal. The emotional and relational costs would in contrast be significant.

In order to minimize barriers arising from the lack of familiarity with justice processes and legal rights among older adults, the restorative justice program undertook a specific educational program. This educational program went into the community in order to directly build relationships with older adults, and to give them the tools necessary to recognize the signs of elder abuse, and to encourage them to report this abuse. The program also did outreach with stakeholders who worked with older adults in order to educate them in the signs of abuse and to give them the resources necessary to encourage older adults to report the abuse.⁵⁹²

Further, the program had broad community support, both from its partners and other organizations. The program was therefore ideally suited to inform older adults about this possible dispute resolution mechanism.

The restorative justice program recognized that ageism is one of the key barriers that older adults face in reporting elder abuse. The program adopted a restorative justice approach over any other, as they believed it particularly suited to employing an anti-ageist approach to conflict resolution. The program was designed in order to respond sensitively to age-related challenges, and the process was designed as physically accessible. These processes would facilitate older adults’ ability to come forward and share their experiences.

Because of its strong community ties, the program also had the potential to encourage anti-ageist perspectives in the mainstream justice system. The program worked with law enforcement officials, court staff and Crown prosecutors, and this work had the potential to increase these stakeholders’ capacity to respond to ageing more appropriately.

The program also worked with Crown prosecutors in some cases where charges had already been laid. The prosecution would refer these to restorative justice circles, with the possibility of charges being dropped if the process was successful.⁵⁹³

The program's process was designed in light of the reality that often the parties in elder abuse have a relationship of care and dependence, and that the older adult has an interest in continuing this relationship.⁵⁹⁴ Accordingly, the process emphasized the development of a relationship based on responsibility and rehabilitation. The program also emphasized that the process would not result in punishing the offender, or removing him or her from the community. This decreased the fear that the process would destroy the relationship underlying the conflict.

The restorative justice circles addressed an older adults' conception of a dispute as private by making the process confidential. Unless charges had also been laid, the process would take place outside of the public scrutiny of the Court system. However, the program's evaluation identified a key weakness as being a low referral rate, and attributed this to the fact that the issues were too sensitive and private for older adults to come forward. This suggests that in spite of the private and less rigid structure of the circles, older adults may still be reluctant to introduce outside scrutiny into their personal conflicts.⁵⁹⁵

The circles emphasized healing and transforming relationships rather than punishment, and so the solutions were typically more consistent with many older adults' desires than the some aspects of the criminal justice system. The circles provided an opportunity for the older adult to regain a sense of control that would be difficult to achieve in the criminal justice system, where victims often play only minor roles. The older adult was involved in all steps of the circle, including identifying the underlying issues and identifying the relevant parties to the dispute. Further, the older adult had the opportunity to speak his or her experiences in the way of his or her choice.

Given that the process was more consistent with some older adults' conceptions of conflict, it was likely able to increase their willingness to address their conflicts in this way. The program did however considerably emphasize the complicated pre-circle process, and the evaluation found that this may have been an overly lengthy process. The evaluation recommended a simpler process, such as mediation, a concern that was addressed through the Elder Abuse Response Team program described later.⁵⁹⁶

The circle leaders were trained volunteers, who organized a pre-circle case development process, and then facilitated the circle itself. The mediators were trained in the restorative justice philosophy that would inform their practice. They also received training in the dynamics of elder abuse and how to monitor safety, and how to address older adults' specific needs. Volunteers received ongoing

education in case review, development, family dynamics and substance abuse.⁵⁹⁷ The mediators were able to draw on training and knowledge from the variety of community groups who organized and supported the initiative. As they had access and connections with these groups, the mediators had the skills necessary to recognize their own shortcomings and refer older adults to appropriate agencies.

Whether the risk of imminent harm had been addressed was one of the key criteria for intake. If there was imminent danger, the conflict was referred to other agencies as restorative justice was inappropriate. Since mediators had access to a broad range of community supports, they were able to recognize cases which required immediate intervention, and refer these cases to more appropriate service providers.

The program's facilitators received training in ageing, and the circles were designed to be accessible to individuals who may have faced accessibility barriers. Despite this training, one of the program's shortcomings was a difficulty in completing circles. Many of the cases involved older adults with diminished mental capacity who had difficulty understanding the process and what was happening.⁵⁹⁸ In cases such as this, the program recognized the limits of enhancing individuals' ability to participate in the process, and that the circles were no longer appropriate. Though this recognition decreased the number of settlements reached, this may be less of a weakness than a recognition of the program's limitations.

Abusive relationships often have remarkably distorted power dynamics, where one party uses his or her power in an abusive way. Given this dynamic, power imbalances were always a particular challenge in the circle process. To address these, the mediators conducted pre-mediation sessions to identify all of the issues and began the process of recognition and healing prior to the circle. This context was important to restoring the balance as between the parties. Further, the process itself was physically structured in a circle shape so as to promote the idea of equality and balance as between the parties. The program also worked to equalize power imbalances by allowing all members of the circle to bring their "supporters," such as friends or personal care workers.

As the entire program was designed to respond to elder abuse, conflicts were not turned away because they involved situations of prior abuse. However, as already noted, if the risk of imminent harm persisted, other agencies were notified in order to address this risk. Situations where charges had been laid were also considered appropriate for restorative justice, with agreement from the Crown. In these cases, if a satisfactory agreement could be reached, there was the possibility that charges would be dropped. Restorative justice was also appropriate in cases where a criminal trial had already occurred, as the process could help with healing. The program also accepted what would be civil disputes.

The project's evaluation identified its greatest strengths as its educational component, and its strong network of community partners. These aspects contributed to an attitudinal shift towards elder abuse in the Waterloo community. This attitudinal shift in turn enhanced the community's ability to respond to elder abuse, and created dispute resolution options for older adults which would maximize communication and healing.

Participants to the program consistently reported that the process served the victim's and the perpetrator's needs. There was, however, concern that the process did not sufficiently acknowledge the injustice done to the victims.⁵⁹⁹

The program's greatest weakness was its lack of referrals. As noted above, the program evaluators hypothesized that the reason for this was because these issues were too sensitive and personal. Through educational and outreach efforts, and building trust with stakeholders, the program could increase individuals' capacity to deal with and respond to elder abuse, and to diminish the stigma attached to elder abuse. There is also however the possibility that no amount of education could encourage some individuals to resolve these conflicts in this conflict resolution process.

Elder Abuse Response Team

As the restorative justice program's funding was running out, the program's supporters reformulated their initial philosophy in an Elder Abuse Response Team (EART). The goal of this initiative was to translate the program's successes into a more sustainable form, which would be able to reach more individuals. The program retained the principles of restorative justice; however, its operations shifted from the circle process to a more comprehensive conflict management strategy.

Currently, the program's response after the intake stage is very flexible, and does not necessarily lead to a single conflict resolution process, as was the case in the circle process. The appropriate team members will meet with the older person wherever they feel most comfortable, and with whomever they believe should also be present. From there, the staff will determine the best way of resolving the conflict. Because of its broad community support, the team can draw on a variety of available resources to help address and resolve the conflict. Only a handful of cases have ultimately been referred to the criminal justice system, suggesting that the conflicts are most productively managed in an alternative way.⁶⁰⁰

The EART is very similar to the earlier restorative justice circles' approach to increasing access to justice. Noted below are some differences in how program design affects the program's ability to increase access to justice for older adults.

The program's earlier educational and outreach activities are ongoing, and part of the EART's ongoing mandate is to mobilize community support and capacity to deal with elder abuse.⁶⁰¹ There was no problem of lack of referrals in the new EART, and these came from fourteen different sources, suggesting the program's strong ties in the community.⁶⁰² By continuing to work with so many different community agencies, the program has the potential to increase the individual's familiarity with his or her legal rights, and to empower individuals to recognize when they have been the victims of a wrong.

As already noted, contacting the EART does not automatically launch criminal proceedings, or now even a restorative justice circle. In this way, the older adult will not be deterred from seeking resources and information, out of a fear that this will threaten the ongoing relationship at the centre of the dispute. Contacting the EART does not automatically lead to a circle, but rather, to providing the older adult with information about his or her options, and support to pursue those options. This not only enhances the individual's ability to him or herself manage conflict, but also gives the individual the ability to control the degree of third party intervention in the resolution.

Since the EART is not an elder mediation service per se, but rather a team which responds to conflict as the particular situation requires, it is difficult to determine whether it faces the same challenges as an "elder mediation" proper service. Its focus is on conflict management and responsiveness rather than a more rigid "mediation" program.

This program's success has depended on community partnerships. These partnerships mean that outreach efforts will be more effective and increase the community's own capacity for recognizing and dealing with conflicts involving older adults. Further, this multi-agency approach increases the ways and manners in which the community can support older adults in their conflicts.

The EART's success as compared to the restorative justice circle's approach can also be attributed to its flexibility. Whereas the restorative justice circles led automatically to a specific conflict resolution mechanism, the EART created a range of possibilities, and recognized that the circle may not always be the most appropriate means of resolving the conflict. Rather, the most appropriate means depended on the conflict and the older adult. For some this may in fact mean a circle, for others, a consultation in the individual's home, for others a referral to another agency or group. This flexible mandate recognizes that each conflict is individual, presents different challenges, and therefore requires a different resolution process.

The flexibility of this dispute resolution service may hold particular potential in rural areas. In rural areas, it may be difficult to create dedicated "elder mediation"

services, and so a more flexible approach may be necessary. Police services and community agencies may already have the tools in place to offer mediation as part of their services, and would require only a model and additional resources. The EART may be such a model.

6. Advocacy Mechanisms

Advocacy mechanisms can provide an effective supplement to complaint-based enforcement mechanisms. Advocacy has been defined as “an activity which involves taking up the case of an individual or group of individuals as speaking on their behalf to ensure that their rights are respected and their needs are met.”⁶⁰³ Advocacy may be individual or systemic; instructed or non-instructed; legal or social. Individual models of advocacy include, for example, Ontario’s Psychiatric Patient Advocacy Office. Systemic advocacy includes some aspects of the Ombudsman function, or potentially some aspects of the mandate of the reformed OHRC. Individual and systemic advocacy perform different functions in promoting the protection of rights, and both can make significant contributions to effective access to the law for older adults.

The 1987 *Report of the Review of Advocacy for Vulnerable Adults* concluded that:

The concept of “vulnerability” can create a need for advocacy as the vulnerable are often dependent on others which will leave them susceptible to abuse, neglect or abandonment.⁶⁰⁴

Vulnerable adults, in this 1987 Report, included those whose physical, emotional or cognitive impairments made them dependent on others for care, impaired their ability to communicate, led to stigma and undervaluation by others, or resulted in institutionalization. The 1987 Report concluded that advocacy services, properly designed, could promote respect for the rights and dignity of vulnerable adults; ensure that rights are understood, recognized and protected; assist vulnerable adults to achieve self-determination; enhance autonomy and independence; and protect vulnerable adults from financial, physical and psychological abuse.⁶⁰⁵

The Ontario Bar Association, in its submission to the LCO, highlighted the potential of advocacy systems to benefit older persons, so long as they appropriately balance needs for efficacy and accessibility with protection of review rights and due process.⁶⁰⁶

In ACE’s focus groups with residents of long-term care homes and their families, a consistent theme was the need for third-party advocacy:

ACE consistently heard that some form of third-party advocacy where advocates went directly to homes to meet with residents would be beneficial. Many residents stated that they were afraid to voice their concerns for fear of retribution or being labeled a troublemaker. A number of residents complained that their concerns were ignored until a family member became involved. Several family members explained that they were only able to notice and prevent problems if they were at the home on a daily or regular basis.⁶⁰⁷

ACE has recommended advocacy for long-term care residents, both on an individual and a systemic basis, through the establishment of a Health Care Commission, and the expansion of the jurisdiction of the Ontario Ombudsman's Office.⁶⁰⁸ The Health Care Commission would be an independent office of the Legislature which would be responsible for the oversight of health care advocates working in hospitals, long-term care and retirement homes. Based on the information provided by individual advocates, this Health Care Commission could undertake systemic as well as individual advocacy.⁶⁰⁹ While such a Health Care Commission would be of significant benefit to older adults, its mandate would be inclusive of all ages, and be defined by issues rather than age.

ACE does not support the creation of a specialized Seniors' Advocate. While some jurisdictions, such as Wales and Australia, have limited their services to older adults, we do not believe this is the correct approach. We discourage a framework based on the perception that older adults lack capacity and need protection. Simply stated, older adults are people. ACE believes that all people navigating the health care system could benefit from the services of an advocate, regardless of age. We want to move away from ageist stereotyping towards a rights-based approach. Moreover, as there is no generally accepted definition of an older person, younger individuals residing in long-term care homes or in hospital would be precluded from obtaining assistance from a Seniors' Advocate.⁶¹⁰

The Older People's Commissioner for Wales described in the case example below provides an interesting example of a targeted advocacy mechanism for older adults.

CASE EXAMPLE: ADVOCACY MECHANISMS

Older People's Commissioner for Wales

Wales recently established the world's first statutory, independent Older People's Commissioner. The establishing legislation was passed in 2006,⁶¹¹ and the first Commissioner was appointed in the spring of 2008.

The Advisory Group established to consider the development of such a Commissioner commented that, given the very wide range of services available to older adults in Wales, a Commissioner for Older People could play an important role by:

ensuring that, across these many services, older people's interests and rights are taken into account. Through monitoring and representation he or she will seek to influence improvement and tailoring of services so that older people suffer no disadvantage in terms of access, delivery or outcomes compared to the rest of the population. He or she will be able to take on an 'umpire' role if, as a last resort, an older person is unable to find a public agency which is willing to lead on finding a solution to his or her problem with a service.⁶¹²

The vision of the Older People's Commissioner has been expressed broadly, as follows:

We want to see a Wales in which respect for the rights and dignity of older people is a practical reality in all areas of life, where age discrimination is a thing of the past and where a positive view of ageing and of older people prevails.⁶¹³

The Commission has an expansive mandate. The legislation empowers the Commission to:

- a) promote awareness of the interests of older people in Wales and of the need to safeguard those interests;*
- b) promote the provision of opportunities for, and the elimination of discrimination against, older people in Wales;*
- c) encourage best practice in the treatment of older people in Wales;*
- d) keep under review the adequacy and effectiveness of law affecting the interests of older people in Wales.*

*The Commissioner may also consider, and make representations to the Assembly about, any matter relating to the interests of older people in Wales.*⁶¹⁴

It should be noted that the involvement of the Commissioner in individual cases is limited to cases of general relevance – even if there is no other body that can deal with the case. That is, this is a body whose mandate is entirely focused on systemic, rather than individual advocacy.

The Commission has powers of entry and interviewing as part of its powers of review, as well as powers to require the provision of information. The Commissioner has the power to issue reports and recommendations, and to require written responses to its recommendations. It does not, however, have the power to enforce compliance with its recommendations; in this way, it functions like an Ombuds' office.

To date, the Commissioner has:

- a) undertaken an inquiry into the treatment of older people in hospitals, resulting in a major report that calls for "fundamental change" to ensure that older adults are treated with dignity and respect in these settings; hospitals have a fixed period of time to respond in writing to recommendations for change set out in that report;*
- b) held public consultations to shape recommendations to the Law Commission of England and Wales' project on reform of the law related to Adult Social Care;*
- c) established an information service where older adults, together with referral and dispute intervention services;*

- d) developed Policy Position papers on a number of issues, including elder abuse and the Attendance Allowance benefit; and
- e) developed a partnership with government departments administering pension entitlements to encourage and assist older adults in claiming their entitlements.⁶¹⁵

*The establishment of similar bodies has been considered in several jurisdictions, including Scotland and Australia.*⁶¹⁶

7. Oversight and Monitoring Mechanisms

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

Public reporting requirements can be effective in inducing institutions to comply with the law, as well as making it easier to identify problems and abuses without the necessity for individual complaints. For example, ACE notes with respect to public reporting requirements for long-term care homes that:

[t]he available information is not up-to-date or organized in a manner which is easy to understand. It also provides insufficient details about the actual infractions as it merely states which general criteria or standard was unmet. Posting the actual inspection report (minus any identifying information about residents or staff) would be beneficial for several reasons. First, it would be an impetus for homes to improve as the public would have greater access to detailed information and be less inclined to choose homes with a higher number of complaints and unmet standards. Second, it would benefit some homes by showing that their infractions were administrative in nature and not reflective of poor resident care. The Ministry should look to other countries (e.g., Wales and Australia) which post significantly more comprehensive reports as examples.⁶¹⁷

Oversight mechanisms can also include direct government oversight through licensing or audit mechanisms. The new retirement homes regulatory mechanism, as described earlier in this Chapter, includes a licensing requirement.

VI. APPLYING THE FRAMEWORK: THE LAW AND ACCESS TO HOME CARE

This Chapter will illustrate the application of the *Framework* through consideration of a current issue in the law as it affects older adults: the law regarding access to home care supports.

The intent of this illustration is not to provide a comprehensive description of this area of the law or to propose specific reform initiatives. Rather, the aim is to reflect on this area of law in light of the principles and considerations that have been identified in this *Report*, and where possible, to discover some concerns and general directions for reform that arise from the application of these principles and considerations, with the intent to provide some foundation for further research and reform initiatives.

The law with respect to home care also raises concerns for younger persons with disabilities, and could be considered through the lens of the LCO's sister project on the law as it affects persons with disabilities, but this Chapter will focus on the experiences of older persons.

This area was chosen because although it is vital to the well-being of many older adults and is a recurrent topic of public discussion and policy concern, the law in this area is under-examined. It is an area of the law that connects in a fundamental way to many of the principles that have been identified. It also illustrates a number of the key themes in this area of the law, including the "implementation gap".

A. Background

As is discussed in Chapter II of this *Report*, most older adults express a strong preference to "age in place" – to remain in their homes and communities for as long as possible. Aging in place has also been identified as a policy priority for governments, partly because it provides better outcomes for older adults, and partly because it can help to support the overall sustainability of the health care system.⁶¹⁸

Because overall health may decline with age and older adults may experience various types of ability limitations, older adults may need supports of various kinds in order to age in place. This may include supports with domestic tasks, such as shopping, errand-running or cleaning, or with personal care tasks such as bathing. It may also include health-related supports, such as occupational therapy. Most frequently such supports are provided by family and friends, whether it be spouses, children, neighbours or others. Some older adults, however, do not have family or friends who are located nearby, or who have the health or ability to provide these supports. In other cases, the supports needed by the older adult may be beyond what can be provided informally. In such cases, formal home care supports are necessary.⁶¹⁹

Home care services are, of course, closely connected to hospital care and long-term care services. Strong home care services can reduce the pressures on both hospital services and long-term care, by allowing older adults and others who use these services to return to and/or remain in their homes with appropriate supports, rather than by accessing the higher intensity services provided through hospitals and long-term care. Conversely, resource strains in long-term care or hospital care can create challenges for the home care system as high-need individuals are unable to obtain the intensive supports they require, and are reliant on home care supports while waiting for higher levels of care.

Policies and programs regarding formal home care supports are also closely linked to those related to informal care. Most elder care is provided in the community by family and friends. As demographic patterns change, older adults may have less access to informal supports, whether because families are spread out across the country (or around the world), because families are becoming smaller, because changes in labour force patterns have created new time pressures, or because informal caregivers are themselves aging and consequently less able to provide care. At the same time, lack of formal home care supports may create intense pressure on informal care providers. Where insufficient supports are provided, informal networks may collapse under the strain, resulting in institutionalization for the older person.⁶²⁰ As the Health Council of Canada has noted,

Family caregivers are often described as the backbone of the health care system as they are vital to health care, yet invisible and often vulnerable themselves If a caregiver experiences physical or emotional stress or becomes physically injured, or for other reasons is unable to continue in his/her duties as a caregiver, then the quality of care and life for the senior and the caregiver can be jeopardized.⁶²¹

Home care supports are of course valuable to others besides older adults. Persons who have experienced acute illness may need home care supports to assist their recovery upon discharge from hospital. Persons with disabilities who are not yet “older” may benefit from a range of personal, domestic and professional services provided in the home.

Therefore, governments, including the government of Ontario, have invested in various types of home care supports for older adults. Ontario’s Auditor General has noted,

The Ministry has recognized the dual benefit of enhancing home care services. Having people receive care in their homes whenever possible not only means better quality of life for the patient, it is also far more cost effective than housing a patient in a hospital, long-term-care facility, or other institutional setting to receive care. One CCAC we spoke to informed us that, for instance, personal support services can enable individuals who have moderate risks/needs to continue living independently in their homes. Not having these services could lead to deterioration in a client’s condition that could result in hospitalization or institutionalization.⁶²²

In Ontario, home care supports are regulated by the *Home Care and Community Services Act, 1994* (HCCSA)⁶²³ and provided through a network of Community Care Access Centres (CCACs) situated across the province.

As changing demographics and limited resources place increasing pressures on home care services, significant concerns about access to home care have begun to surface. Lack of access to adequate home care may leave older adults in unsafe, undignified conditions, and place unbearable strains upon family care providers, as well as result in avoidable admissions to hospital or long-term care. Commentators have raised concerns about patchwork services, lack of transparency regarding the services provided, confusing eligibility criteria, and inadequate complaints and enforcement mechanisms. While there has been some significant attention to home care in recent years, very little of that attention has focused on the legal aspects of the issues. This section examines Ontario law regarding access to home care supports through the lens of the LCO's *Framework*.

B. Ontario's Legal Framework for Home Care

1. Background

The stated purposes of the HCCSA include ensuring that “a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist”, providing “support and relief to relatives, friends, neighbours and others who provide care for a person at home”, promoting “equitable access to community services through the application of consistent eligibility criteria and uniform rules and procedures”, and integrating community services with other types of services, including those provided by hospitals and long-term care homes.⁶²⁴

The HCCSA regulates the provision of:

1. **community support services**, such as meals, transportation, caregiver support, home maintenance and recreational services;
2. **homemaking services**, such as housecleaning, laundry, shopping, banking, meal preparation and childcare;
3. **personal support services**, including assistance with or training for personal hygiene activities or routine personal activities of living; and
4. **professional services**, including nursing, occupational therapy, physiotherapy, social work, dietetics and similar services.⁶²⁵

Services governed by the HCCSA include acquired brain-injury services, attendant care services and assisted living services in supportive housing, services that assist their users to live in their communities with a greater degree of independence.

The HCCSA includes a Bill of Rights for those receiving services under its governance. This includes rights to

- be dealt with in a courteous and respectful manner, and to be free of any type of abuse;
- be dealt with in a way that respects autonomy, dignity and privacy;
- be dealt with in a way that respects individuality, and is sensitive to needs related to ethnicity, language, culture, spirituality or family;
- receive information about the community services he or she is receiving; the laws, rules and policies affecting the operation of the service provider; and the procedures for initiating a complaint;
- participate in the assessment of his or her needs and in the development of a plan of service;
- give or refuse consent to the provision of any service;
- raise concerns or recommend changes in connection with the services provided or policies and decisions that affect his or her services; and
- have records kept confidential.⁶²⁶

2. Service Delivery Structure

The HCCSA gives the Minister of Health and Long-Term Care (MOHLTC) considerable latitude in terms of the provision of services: services may be provided directly by the government; the government may pay others to provide community services, whether through grants and contributions, or financial assistance for operating expenditures or capital expenditures; or the government may make agreements with others for the provision of services.⁶²⁷ The Minister has the power to approve agencies to provide services and to approve premises for the provision of services, and may impose terms and conditions for approval.⁶²⁸

The Community Care Access Centres (CCACs), which are approved agencies under section 5 of the HCCSA, were created in 1996, replacing regional home care and placement services that had been criticized as fragmented and inequitable.⁶²⁹ Originally 42 in number, in 2006 they were consolidated into 14 organizations in order to align them with the Local Health Integration Networks (LHINs).⁶³⁰ Each CCAC is now accountable to one of the LHINs and every LHIN is accountable to the Ministry.⁶³¹ The CCACs assess potential clients for service eligibility, approve clients for home care and determine the allocation of available funds.⁶³² The CCACs do not themselves provide services. In theory, non-profit and for-profit organizations may compete to provide services by bidding for contracts through a Request for Proposals. In practice, the competitive process has been suspended on a number of occasions.⁶³³

3. Eligibility Criteria for Home Care Services

Some requirements for eligibility for services are set out in Regulation 386/99. The requirements set out who is eligible for consideration for services. For example, homemaking services may not be provided unless the individual in question:

- is insured under the *Health Insurance Act*,
- is eligible for *both* personal support services and homemaking services,

- *either* receives personal support and homemaking services from an informal caregiver who requires assistance in order to continue providing all of the required care *or* requires constant supervision as a result of a cognitive impairment or acquired brain injury and the person's caregiver requires assistance with homemaking services,
- will receive the services in a place with the necessary physical features, and
- there is no significant risk of serious physical harm to the person providing the homemaking services, or if there is such a risk, steps can be taken to reduce it so it is no longer significant.⁶³⁴

Not all individuals who meet these criteria will actually receive services.

There is relatively little caselaw interpreting the eligibility criteria under the HCCSA. In one case, however, the Appeal Board held that the criteria must be interpreted in light of the purposes of the HCCSA, including the purposes of promoting "equitable access to community services through the application of consistent eligibility criteria and uniform rules and procedures" and "the effective and efficient management of human, financial and other resources involved in the delivery of community service".⁶³⁵

The Regulation sets out maximum amounts of services. For example, the maximum amount of combined personal support and homemaking services is 120 hours in the first 30 days of service, and 90 hours in any subsequent 30 day period. Some exceptions are provided, such as for those who are in the last stages of life, for persons who are waitlisted for long-term care or other extraordinary situations.⁶³⁶

In practice, eligibility is determined by CCAC representatives. Since there is no legislatively required standard for assessing eligibility beyond the provisions of the Regulation setting out who is *not* eligible for services, the CCACs have developed a Contact Assessment Tool which constitutes a standard means of assessing client eligibility and is to be applied across all 14 CCACs.⁶³⁷

4. Service Provision

When an individual applies for services, the agency must conduct an assessment of the individual's requirements, determine eligibility and create a written plan of care for each individual receiving services. The plan of service must be regularly reviewed to adapt to changing circumstances, and the individual must have an opportunity to participate fully in the development, evaluation and review of the plan of service. The plan of service must take into account the person's preferences, including those based on ethnic, spiritual, linguistic, familial and cultural factors.⁶³⁸

Services outlined in the plan of service must be provided within a reasonable time frame, and if services are not immediately available, the individual must be waitlisted.⁶³⁹

Service providers must post in their premises a copy of the Bill of Rights and of any service accountability agreement entered into.⁶⁴⁰ As well, each agency must provide to its clients or their substitute decision-maker a written notice outlining

- their rights under the Bill of Rights,
- the agency's complaint procedures,
- information regarding privacy and confidentiality issues, and
- (if applicable) information about service accountability agreements entered into by the agency.⁶⁴¹

Agencies must also develop and implement plans for preventing, recognizing and addressing abuse of persons who receive services, as well as a quality management system.⁶⁴² The HCCSA sets out requirements for the protection of the privacy and confidentiality of client information.⁶⁴³

5. Oversight of Agencies

The Minister may appoint program supervisors, who may conduct inspections of community service providers (with a warrant where necessary) and who have power to copy and remove records.⁶⁴⁴

The Minister may revoke or suspend approvals of agencies or premises designations where the Minister believes on reasonable grounds that there has been a contravention of the terms and conditions imposed by the Minister, of the Act or regulations, or breach of an agreement.⁶⁴⁵ The Minister may also "takeover" an agency, removing and replacing some or all of the directors or directly taking control of, operating or managing the agency or some part of it.⁶⁴⁶ These provisions do not, however, apply to CCACs.⁶⁴⁷ The Minister may issue directions on matters relating to the exercise of a CCAC's rights and powers and the exercise of its duties under the law.⁶⁴⁸ As well, the Minister may appoint a supervisor in the public interest, who may, unless the appointment provides otherwise, exclusively exercise all the powers of the CCAC, its board or the Executive Director.⁶⁴⁹

6. Complaint Mechanisms and Enforcement

The Bill of Rights provisions of the HCCSA are a deemed contract between the service provider and the person receiving the service, so that the service recipient could, in theory, bring an action for breach of contract in order to enforce those rights, although the practicality of this is highly questionable.⁶⁵⁰

Agencies approved to provide services are required to establish a process for receiving and reviewing complaints regarding

1. decisions about eligibility for services,
2. decisions to exclude a particular service from an individual's plan of service,
3. decisions about the amount of service to be included in an individual's plan of service,
4. decisions to terminate the provision of services to an individual,
5. the quality of service provided to an individual, and
6. violations of the provisions of the Bill of Rights.⁶⁵¹

The agency must review and respond to all complaints regarding service quality or the Bill of Rights within 60 days. For all other types of complaints, the agency must give a written notice of its decision on the complaint within 60 days. These decisions may be appealed to the Health Services Appeal and Review Board. The Appeal Board is then required to begin a hearing into the complaint within 30 days. The Appeal Board may affirm the decision, rescind it and return the matter for a fresh decision, or rescind it and substitute its own decision for that of the agency. The decisions of the Appeal Board are not appealable.⁶⁵²

Recently, clients of home care services have also been provided with the option of contacting the Long-Term Care Action Line (LTCAL) to receive information and assistance with issues regarding the services they receive. The LTCAL can facilitate the intake and referral of home care complaints. Upon request, clients may be referred to an Independent Complaints Facilitator to discuss their concerns. These Facilitators are required to contact the client within 10 business days of the referral, and can, with permission, contact the client's CCAC to help address concerns.

C. Evaluating the Legal Framework for Homecare in Ontario

The following evaluation of the HCCSA is based on the questions set out in the *Framework* (Appendix A) that accompanies this Report. As not all questions from the *Framework* are applicable to this particular area of law, not all are addressed. In particular, this evaluation does not address the *Framework's* "Step 2: Does the Legislative Development/Review Process Respect the Principles", as it is focused on the current state of the law. The results are therefore presented in a narrative format, rather than question by question.

The evaluation is based on a review of the legislation, caselaw, government documents and relevant social science research. It has not been the subject of public consultation or original research. As noted at the opening of this Chapter, it is not intended as an exhaustive review of this area of the law. Rather, it is a preliminary evaluation that points to areas of concern and issues for further examination.

As well, because this is not an area that has been subject to intensive scrutiny, there are a number of areas where information is lacking, and further research is required to make a thorough assessment of the impact of the law on older adults. Should a thorough evaluation of the HCCSA be undertaken, further research on the implementation and effects of the law would be beneficial, and consultation with service providers, older adults and the groups that represent or advocate for older adults would be necessary to provide a more thorough evaluation of how this area of the law may affect older adults.

1. How Do the Principles Relate to the Context of the Law?

The HCCSA, and policy and practice in implementing it, are profoundly connected to the realization of the principles for older adults. For older adults who are ill, frail or living with a disability, the ability to access adequate supports, whether to maintain their health or to carry out essential life activities such as grooming and self care or basic domestic tasks, is central to their ability to maintain their physical, emotional and social security, as well as their independence and autonomy. Society's value and respect for older adults is demonstrated by the degree to which it ensures that older adults who are frail, ill or disabled are able to maintain minimum levels of security, independence and autonomy. Certainly the self-respect of older adults may be affected if they do not have the means to maintain basic personal and domestic cleanliness, or if they are not treated appropriately in the provision of services such as bathing.⁶⁵³

The provision of adequate services in the community also affects the ability of older adults (and informal caregivers) to meaningfully continue in their valued roles, whether as spouses, parents, grandparents, friends or neighbours; as volunteers or employees; or as active citizens involved in their communities.

The way in which services are provided is as important to the realization of the principles as the fact of their provision. Disrespectful or abusive services can undermine the security, dignity and independence of older adults. Services which are inflexible, impersonal or not respectful of the diversity of older adults may undermine the principle of diversity and individuality.

As was briefly noted above, a lack of adequate supports may mean that informal caregivers for older persons may face significant strains in providing sufficient care and attention to their aging loved ones, maintaining participation in the labour force and meeting all of their other obligations. That is, the security and participation of informal caregivers may also be affected by a lack of adequate appropriate supports for older adults in need, highlighting the principle of membership in the broader community.⁶⁵⁴

2. Does the Purpose of the Law Respect and Fulfil the Principles?

The purposes of the HCCSA, as well as the provisions of the Bill of Rights, are well-aligned with the principles for older adults. The purposes of the Act, for example, include the recognition of "the importance of a person's needs and preferences, including preferences based on ethnic, spiritual, linguistic, familial and cultural factors". The Bill of Rights explicitly recognizes the rights of older adults to be treated in a manner that "respects the person's dignity and privacy and that promotes the person's autonomy", and to be dealt with "in a courteous and respectful manner and to be free from mental, physical and financial abuse by the service provider", as well as rights to have the confidentiality of their information respected, and to raise concerns or recommend changes in connection with community services provided. There are no stereotypes or negative attitudes towards older adults embedded in the legislation. The intent of the law is to promote positive outcomes for older adults (and others) and to remove barriers by providing supports.

The legislation includes a number of mechanisms to provide older adults (and all clients) with information to make meaningful choices (and thereby to enhance autonomy), including posting requirements and obligations to provide information directly to clients or potential clients. It includes measures to prevent abuse of clients by service providers, and thus safeguard security and dignity.

3. *Who is Affected by the Law and How Does this Relate to the Principles?*

ASSESSING A LAW OF GENERAL APPLICATION

The law regarding home care supports is one of general application. It does not explicitly target older adults or contain age-based criteria. However, it does disproportionately affect older adults.

According to the Ontario Association of Community Care Access Centres (OACCAC), in the most recent fiscal year CCACs provided coordinated access to health care and support services to over 600,000 Ontarians, including

- 200,000 patients discharged from hospital,
- 150,000 older adults living in the community,
- 50,000 children who needed supports to live at home and attend school, and
- 23,000 individuals requiring end-of-life care at home.⁶⁵⁵

The website of the Ontario Home Care Association indicates that since 2006, individuals aged 65 or older have made up well over half of those receiving CCAC services. Approximately two-thirds of the services provided were personal support and homemaking services, with nursing services and occupational therapy in distant second and third places.⁶⁵⁶

It therefore appears that the majority of those affected by this law are older adults, although there are also substantial numbers of persons with disabilities and individuals with acute illnesses affected. Given the type of services regulated by this law, those older adults affected will, in most cases, be those who have either acute or chronic health conditions and require supports in order to maintain their independence, dignity, security, and ability to participate and be included.⁶⁵⁷ That is, for older adults the law often applies at the intersection of aging and disability.

Given the demographics of aging, it is not surprising that two-thirds of those receiving home care in Ontario are women.⁶⁵⁸ It is also likely that those older adults who do not have strong informal support networks – those who are socially isolated – will have greater need for, and be more dependent on the services provided through the HCCSA. Since those who are able to privately purchase home care services or home care insurance will be less affected by any shortfalls in the design or implementation of the law, the law may also disproportionately affect those older adults who are living in low-income.

There were no statistics publicly available regarding the linguistic, ethnic, religious or other makeup of the client base for home care services, information that would be valuable in properly assessing the impact and effectiveness of the law on the diverse populace that it targets.

Indirectly, informal caregivers are also affected by this law, as the adequacy of available formal home care supports for their loved ones will significantly affect their psychological, emotional and financial well-being.

DISADVANTAGED OLDER ADULTS

As noted above, since the law targets older adults in need of supports in order to live in security, dignity and independence, all of the older adults affected by this law are, to some degree, disadvantaged, although the degree of the disadvantage will vary depending on the level of impairment or disablement experienced, the level of informal supports available to that person, and the ability of the individual to understand the system and advocate within it. This means that extra measures are required in order to ensure that these older adults are able to fully access the benefits of the legislation and to achieve the principles.

For example, it is particularly important that the law ensure that these older adults have adequate access to clear and accessible information about their rights and responsibilities. As well, the processes for voicing concerns and enforcing rights must take into account the circumstances of older adults, including the impact of health limitations or disability, low-income, lower levels of education and literacy, and the ways in which traditional gender roles may affect resources and options for older persons. Older adults who live with these barriers will have difficulty in accessing complex, time-consuming or adversarial systems without supports, and thus will be less able to assert and protect their dignity, security, participation, autonomy and individuality.

ELIGIBILITY CRITERIA

As was noted above, the legal eligibility criteria for home care services are not age-based. They take into account functional as well as practical criteria. As they are negative criteria (in the sense that they set out who is not eligible rather than who is eligible) they leave considerable room for discretion on the part of the CCACs. The criteria used by the CCACs are not readily publicly available, and given the lack of transparency, older adults may have difficulty in planning for their future needs and in asserting their rights. Compounding this issue, in 2010 the Auditor General reported that due to varying resource availability across the CCACs, different criteria applied in different areas of the province:

Ministry policy requires CCACs to administer programs in a consistent manner to ensure fair and equitable access for all consumers no matter where they live in the province. Due to funding constraints, one of the three CCACs we visited had prioritized its services so that only those individuals assessed as high-risk or above would be eligible for personal support services, such as

bathing, changing clothes, and assistance with toileting. Clients assessed as moderate risk were deemed not eligible for funded services as a necessary cost-containment measure to achieve a balanced budget. However, we noted at the other two CCACs we visited that clients assessed as moderate risk were provided with personal support services or placed on a waitlist to receive them.⁶⁵⁹

This raises concerns that older adults who require home care services may not consistently receive them, thus jeopardizing their security, dignity, participation and independence. As well, the difficulties that older adults face in obtaining meaningful information about their rights and options within the home care system undermine their ability to make meaningful choices, and therefore their autonomy.

4. Do the Processes Under the Law Respect the Principles?

DISCRETION AND ACCOUNTABILITY

The key concern with the processes under the law is that they provide wide discretion to the agencies (CCACs) and to the service providers themselves in terms of eligibility criteria, levels of service provided, quality management programs, complaints processes, and provision of information, without also providing sufficiently strong mechanisms for transparency and accountability. A shortage of resources together with uneven distribution of those resources makes the problem more acute. The Auditor General has noted that the CCACs vary widely in terms of eligibility criteria, waitlist policies, level of services provided and monitoring of the quality of care provided. For example, the Auditor General found that

The absence of standard service guidelines has resulted in each CCAC developing its own guidelines for frequency and duration of services. As a result, guidelines varied in the time allocated for each task and the frequency of service visits recommended. This means that the level of service offered may vary from one CCAC to another.⁶⁶⁰

Therefore, despite the laudable principles and purposes underpinning the legislation, it is difficult to determine whether or not those principles are actually being achieved, or to take remedial action if they are not.

As is noted above, the HCCSA sets out strong, positive principles and identifies purposes that are in harmony with the LCO's anti-ageist principles and potentially very beneficial for older adults. Concerns regarding home care often derive from the implementation of the law – particularly since the law provides considerable discretion to the CCACs and the service providing agencies as to how they implement the law.

RESOURCES

A significant aspect of the challenges faced in providing adequate and appropriate home care supports lies in the resource constraints faced by those responsible for allocating and providing services.

With changing demographics, shifting health care needs and expectations, and the fiscal effects of the recent economic downturn, the full spectrum of health care services

is under pressure. The home care system faces multiple pressing priorities, particularly because acute care and long-term care are also under pressure, and has limited resources for meeting these priorities. For example, in 2008 the Ontario government announced that reduction of emergency room wait times was a top health care priority.

One of the key strategies for achieving that priority was to reduce the number of patients waiting in hospital for alternate levels of care (ALC) such as long-term care. The CCACs play a key role in that strategy, including through enhanced targeted support for those in the community at highest risk of hospital admission, and the “Home First” strategy, which focuses on bringing hospital patients who require long-term care (or other ALC) to wait at home for that care, rather than in a hospital setting.⁶⁶¹

The OACCAC has identified concerns with the level and structure of funding for home care services:

In spite of this [increasing pressure on CCAC services], the 2010 Annual Report of the Auditor General of Ontario confirmed that CCACs have received a relatively small proportion (approximately \$45 million) of the government’s multi year \$1.1 billion Aging at Home Strategy. Much of the funding provided to CCACs has been one time funding to introduce new initiatives or address short term pressures. In order to sustain the results CCACs have been able to achieve, stable, predictable long term funding is needed that recognizes the role CCACs have played in reducing wait time pressures on other parts of the health care system, principally hospitals and long term care homes.⁶⁶²

In addition to funding levels, there are challenges associated with the structure of funding. The OACCAC has pointed out that predictable funding, announced in a timely manner, is essential to sustaining effective services:

Annual budgets in CCACs range from 38\$ million to 235\$ million and to ask organizations of this size and complexity to balance their considerable budgets in a single fiscal year, when funding announcements can take place as late as six months into the year, is like landing a 747 on a postage stamp. The impact can range from unnecessary reductions in service when funding reductions are anticipated to the inability to use funding increases or in-year funding targeted to serve more clients. Clients bear the impact.⁶⁶³

Research by the Institute for Clinical Evaluative Sciences indicates that there is some significant unmet need for home care supports. According to a 2010 report, the average wait time for home care services following application was seven days for short-stay clients and nine days for long-stay clients. These wait times varied considerably across the CCACs, however, with wait times for long-stay clients reaching a high of almost 17 days in one region, compared to a low of 7.4 days in another. Unmet care needs were higher for those aged 75 and older (approximately six per cent reported unmet needs) as compared to those aged 65 to 75, for women as opposed to men (five per cent compared to three per cent), those living alone as opposed to those living with others (six per cent compared to four per cent) and among those in the lowest income bracket (eight per cent) as opposed to those in the highest income bracket (none).⁶⁶⁴

Those needing services may be waitlisted, and in some regions may not be considered eligible even to be waitlisted. Policies vary across CCAC locations with regard to whom they will place on a waiting list. While certain CCACs place all eligible clients on a waiting list, certain CCACs are unable to accommodate all clients and must be selective in which applicants they place on the list. As a result, certain CCACs are only able to place those clients assessed as high risk or higher on a waiting list. Typically, low or moderate risk clients will instead be referred to other community organizations.⁶⁶⁵

A recent series in the *Toronto Star* highlighted the stories of a number of older adults and their informal care providers struggling with inadequate services. For example, a number of older adults with dementia reported being turned away when requesting home care; a woman who cares for her husband, who suffers from Parkinson's Disease, was refused home care after she broke her back; financially strained children were forced to beg for more hours due to a CCAC policy whereby a client's hours are eventually cut if her situation does not deteriorate. CCAC employees report feeling strained as they cannot provide all of the care that is needed with the resources they are given. They are forced to make decisions they do not want to make, as no policy choices can remedy the lack of funding under which their agency operates.⁶⁶⁶

That is, although the substance of the law respects and promotes anti-ageist principles, the lack of resources for adequate implementation of the law creates significant challenges for their realization.

COMMUNICATION AND EDUCATION

There is little information publicly available regarding training and education for service delivery staff. While the CCACs no doubt consider the qualifications of staff in contracting with various service providers and as part of their quality management programs, the HCCSA and regulations do not set out any minimum requirements for staff qualifications or for ongoing training and education.

In terms of information provided to the public about home care services, the main venues for information appear to be the websites of the LHINs and CCACs, and telephone information services. Not all CCACs list their telephone numbers on their home page: in some cases, recourse must be made to the Ministry of Health website. Calls to telephone services were often re-directed to the websites. That is, information is mainly available through the internet and in a print format.

A review of the home care information provided through the websites of the 14 LHINs and CCACs revealed significant variance in the extent and format of information. Some CCACs provide video presentations on their services and options, although most rely exclusively on print information. The majority of information is presented in pdf files, which may pose barriers to persons with visual disabilities who are reliant on screen readers. Some CCACs provide documents in large print formats, though many do not. Some, though not all, regions provide information in French as well as English; information in other languages is not accessible. Some CCACs provide detailed information about service providers in their region, while others do not.

5. Do the Complaint and Enforcement Mechanisms Respect the Principles?

Several issues have been raised concerning the adequacy of the complaints mechanisms under the HCCSA, including the complexity of the system, lack of access to a neutral third party, lack of access to information about complaints processes, and the lack of transparency and accountability in the complaints processes.

Complexity: As was described earlier, there are different complaint options for different types of issues.

- “Bill of Rights” issues may be the subject of a complaint to the agency, or may be treated as a breach of contract between the individual and the service provider.
- Issues regarding service levels or eligibility must be brought to the attention of the agency. The agency must respond in writing, and decisions may be appealed to HSARB.
- Service quality issues must be brought to the attention of the agency. The agency need not provide responses in writing, and there are no rights of appeal to HSARB.
- For any issue, concerns may now be brought to the attention of the LTCAL.

The complaints process is therefore complex, with different alternatives for different issues, and may be confusing for an older person trying to determine his or her options and the possible outcomes, as well as for informal caregivers providing supports to the older person. And because the HCCSA has no specific requirements regarding such complaints processes, they vary between agencies, making it harder to clients to navigate the system.

Practicability of options provided: As was noted earlier, when a client finds that a provision under the Bill of Rights has been violated, he or she may also have recourse to civil courts by initiating an action for breach of contract. Even without an explicit contract, there is an implied agreement between service providing agencies and the CCAC and clients receiving home care.⁶⁶⁷ While in theory, recourse to civil courts grants older adults an avenue outside of the administrative system, in reality, such recourse is not accessible to most of the older adults receiving home care from CCACs. Both the limited resources of Legal Aid Ontario and the lack of lawyers practising elder law in Ontario pose a problem for older adults who might otherwise choose to pursue their case in court. In addition, the limited financial means of many of the older adults who rely on provincially-funded home care may prevent those considering the option of pursuing lengthy and expensive court proceedings from doing so. Older adults who can afford civil litigation may decide to invest their resources in purchasing home care services out of pocket rather than to invest resources, time and energy into the uncertain process of civil litigation.⁶⁶⁸

Lack of recourse to a neutral third party: Complaints about quality of care or about decisions regarding eligibility or service levels can be made to the service providing agency. As such, the Act only provides a mechanism whereby older adults can complain

about the services they are receiving to the providing agencies themselves. Decisions of the agencies regarding complaints about eligibility or service levels can be appealed to HSARB; however, this is not true for responses to complaints regarding quality of care, so that for these complaints there is at no stage any recourse to a true third-party. In other words, for service level and eligibility issues, the first level of recourse is to complain to those responsible for providing that care, and for those who have received poor quality care, this is the only option.

Some home care recipients report not using the complaint mechanisms available to them despite being dissatisfied by the care they receive.⁶⁶⁹ Older adults often come to an understanding that the problems they are experiencing happen as a result of tensions within the home care sector. Some feel as though the power to improve the care they are receiving is out of their hands, and out of the hands of the individuals to whom they can complain.⁶⁷⁰ This intensifies their feeling of hopelessness and makes them less likely to complain even when they feel as though they are not receiving the care they need. In addition, some report that they do not want to complain because they fear that voicing their complaints about not receiving enough care could lead to their institutionalization. Others report not wanting to be seen as “troublemakers” for fear that it will negatively affect the care they receive.⁶⁷¹

Given these dynamics, the fact that in most cases, there is no independent body to hear the complaints likely worsens the task of complaining for older adults. Certain CCACs have an Ombudsperson who acts as a mediator between a client and his or her case worker,⁶⁷² but others have only a client’s CCAC case manager as an initial point of contact for a client who wishes to make a complaint.⁶⁷³ Having the option to contact an Ombudsperson instead of a client’s CCAC case manager increases the transparency of the complaints process and may make it a bit more comfortable for a client to file a complaint without being worried about confronting his or her caseworker directly.

In addition to raising questions of transparency, the lack of a mandatory neutral third party in the CCAC complaints process poses an accessibility problem: it may discourage adults from voicing their complaints. This can make it difficult for CCACs to receive an accurate picture of service recipients’ experience of home care. A clearly articulated complaints mechanism within the HCCSA that includes a neutral third party would help to improve the accountability, accessibility and transparency of home care rendered by CCACs.

Access to Information: Currently, the HCCSA requires that CCACs inform a person receiving community services in writing of the proceedings for initiating complaints about their service providers.⁶⁷⁴ The provincial CCAC website contains a very brief explanation how to initiate a complaint, suggesting that clients contact their local CCACs directly for further details.⁶⁷⁵ Information about the different routes for service quality complaints, or about the options for breaches of the “Bill of Rights” are not outlined in the public materials of the CCACs.

While certain clients are comfortable reading written materials and initiating a complaint, accessibility issues arise for older persons receiving home care who have visual or cognitive difficulties. Understanding the complaints process is necessary to understanding the different options that are available to care recipients; for instance the difference between calling the LTCAL versus contacting a care provider directly. Without having access to consultation with a party who has information about the complaints procedure and can ensure that the client understands all available options, the written complaints procedure may not facilitate the process for all older adults. While some older adults may be able to rely on family members or friends to seek additional information when necessary and to paint a complete picture of the process, not all older adults will have access to such secondary sources of information. As such, the “written notice” requirement under the HCCSA may not, in actuality, suffice to inform older persons of the complaints procedure. To alleviate this problem, it may be helpful to articulate a more comprehensive set of requirements for providing assistance with the complaints process within the HCCSA.

Identifying and Addressing Systemic Issues: Because the complaints mechanism is not centralized, it does not aid the CCACs in gathering information at the provincial level about the care provided by various service providing agencies. Since complaints regarding quality of services do not require written responses, it may also be difficult to track exactly how many complaints are made, what their subject matters are, or how they are addressed. It also does not appear to facilitate the Ministry’s task of ensuring that high quality services are rendered uniformly across the province.

A study of the complaints received by three CCACs undertaken by the Auditor General of Ontario reported only a small number of formal complaints made by home care recipients across Ontario to their local CCACs. In the first three quarters of the 2009/10 fiscal period, only approximately 3 to 8 out of 1,000 home care recipients in these three CCACs had filed complaints. However, many concerns brought to the CCACs are not classified as formal complaints, but are simply resolved by case managers and included in the client files. These are considerably more frequent. In a review of the files of three CCACs, the Auditor General found approximately 1,300 “events” over a period over nine months at two of the CCACs, and more than 600 events in a period of six months at the third.⁶⁷⁶

Overall then, there are significant gaps and shortfalls in the complaint and enforcement mechanisms for access to home care, so that in practice, older adults, particularly those who are disadvantaged in some way, may not be able to realize the principles that could and should be promoted through the law.

6. Do the Monitoring and Accountability Mechanisms Respect the Principles?

This discussion has highlighted the “implementation gap” for the law regarding access to home care. Legislation which is positive in purpose and generally in harmony with anti-ageist principles may, in practice, be falling significantly short of its goals. In such circumstances, ongoing monitoring and evaluation of the implementation of the law and its outcomes may be of significant benefit.

The Ministry has the ultimate responsibility for monitoring the effectiveness of the laws and of the homecare services provided. To be selected by the Ministry, an agency must first be approved. To be approved, the agency must abide by the Bill of Rights and operate with “competence, honesty, integrity and concern for the health, safety and well-being of the persons receiving the service”.⁶⁷⁷ The HCCSA requires the agencies to provide annual reports to the Ministry on their operation, and enables the Ministry to appoint program supervisors where necessary, as well as revoke or suspend approvals.

In late 2008, the Ministry announced a number of initiatives to strengthen the quality of home care services in Ontario, including

- requiring CCACs to use “fairness advisors” for all requests for proposals;
- requiring CCACs to publicly disclose their rationale for the selection of service providers at the conclusion of the request for proposals process
- introducing public reporting of performance measures; and
- requiring all CCACs and service providers to develop annual continuous quality improvement plans.⁶⁷⁸

CCACs receive some information about clients’ experiences with their service providers from clients who choose to contact them and make complaints about their care, but there is no explicit requirement that CCACs ensure the adherence of service providing agencies to the Bill of Rights. An explicit oversight requirement would enable CCACs to obtain comprehensive information about service providers’ compliance with the Bill of Rights across the province.

While the HCCSA requires every service-providing agency to “ensure that a quality management system is developed and implemented for monitoring, evaluating and improving the quality of the community services provided or arranged by the agency,”⁶⁷⁹ it does not specify what that system should involve. While the HCCSA allows the Minister to make regulations “governing the quality management system required to be developed and implemented,”⁶⁸⁰ there is currently no oversight requirement under the HCCSA or its regulations relating to quality management.

Similarly, while the HCCSA mandates that service providers provide timely services, and maintain waitlists, it sets no specific standards in these areas. There are no legislative requirements as to timeliness beyond that it be “reasonable under the circumstances”,⁶⁸¹ no guidance as to how CCACs should prioritize service needs, and no requirements regarding qualifications and training for homecare staff. Not only does this lead to significant variances in policies and outcomes across the CCACs, it reduces transparency and accountability within the system. Clients do not have a clear sense of the services to which they are entitled.

The CCACs have undertaken a number of initiatives to ensure that safe and quality care is provided “in the right place at the right time”. These include the standard use of Board Quality Committees, annual quality improvement plans, common client

satisfaction surveys, common satisfaction surveys with contracted service providers, and satisfaction surveys with employees.⁶⁸² CCACs may visit the premises of service providers and review performance data such as rates of referral acceptance and number of missed visits. At least one CCAC has made it a priority to conduct ad hoc visits to each of its 14 service providers, in order to observe the quality of services rendered.⁶⁸³

The Auditor General found that all three of the CCACs it visited had conducted ad hoc site visits to some of their service providers, though only one had commenced routine site visits to audit all of their service providers. These CCACs had identified some common issues related to monitoring and oversight. For example, three quarters of the service providers assessed had limited ability to assess whether their staff had delivered the required services in the client's home in a timely manner, and a third of service providers did not evaluate personal support workers by actually observing them providing services to clients.⁶⁸⁴

D. Conclusion: Is the Law True to the Principles?

The application of the Framework to the *Home Care and Community Services Act* points to the common problem of the "implementation gap". The HCCSA deals with an issue of significant importance to older adults and other Ontarians who are disadvantaged or at difficult points in their lives. It provides vital services, and is based on principles that support substantive equality.

However, the legislation is largely discretionary rather than directive. Likely this was intended to provide for flexibility in meeting evolving and complex needs in a rapidly shifting environment. However, when combined with a lack of mechanisms for ensuring transparency and accountability, and an ongoing shortage of resources in not only the home-care sector but also in the long-term care and hospital sectors, this leads to access to justice issues for older adults, and for others who are affected by this legislation. This is particularly troubling because those affected by the HCCSA will be living with long or short-term impairments, will be highly dependent on the services provided, and therefore may have difficulty in understanding and asserting their rights. In practice, the legislation may fall significantly short of respecting and promoting the positive principles that underlie its design.

Recognizing that a shortage of resources may make it very difficult to fully attain the principles in this area at this time, the concepts of progressive realization and "respect, protect, fulfill" point towards the importance of clearly identifying the shortfalls, immediately addressing these where possible, and developing an implementable plan for addressing these shortfalls within a reasonable timeframe.

VII. NEXT STEPS

Today's shifting demographics challenge law and policy-makers to understand and adapt to an aging population. It is important that all of those involved in serving older adults or developing law and policy affecting them better understand the needs and circumstances of this group. This includes government at all levels, service providers both public and private, community and advocacy organizations, and the legal profession (including its organizations). To ensure equitable and effective law and policy, this deeper understanding should be paired with a holistic, comprehensive and principled approach to the area.

As has often been noted, efforts to improve understanding among law and policy-makers must be paired with a shift in attitudes towards aging and older people among the general populace, away from stereotypes and paternalism and towards recognizing the value, contributions and capacities of older persons.

Older persons themselves will benefit from better access to information and supports regarding laws, policies and practices that may affect them, as this will support their abilities to make informed choices and to be active participants in their communities and in the development of laws, policies and practices.

It was the intent of the LCO in developing this *Report* and the *Framework* which it supports, to assist in developing a better understanding of the effects of law, policy and practice on the growing cohort of older adults in the population, and in identifying positive approaches which will advance substantive equality for older adults. This will benefit not only older adults, but all of us. As the principle of membership in the broader community highlights, we are all connected. Failure to respect the dignity, autonomy, security, inclusion and diversity of older adults will affect the wellbeing of all of us.

The LCO will disseminate the *Report* and *Framework* broadly to the groups identified above. As part of this broader strategy, the LCO intends to develop plain language materials related to the Framework.

The LCO realizes that this is an evolving area. The *Report* and *Framework* should not be considered, and were not intended to be, a final word on the matter. Rather, the LCO intends that these will form the foundation of further research, discussion and analysis, and that the *Framework* can be adapted for use in a variety of contexts. The LCO itself intends to apply this Framework, as well as the results of the sister project on *The Law as it Affects Persons with Disabilities* to a law reform project focussed on Ontario's laws related to capacity and guardianship, to commence in summer 2012.

VIII. RECOMMENDATIONS

In developing the *Framework*, it is the LCO's objective that the *Framework* and the accompanying *Final Report* will be broadly useful in advancing the law as it affects older adults, and in particular that it will assist in ensuring that laws, policies and practices reflect the aspirations of older adults, take into account their particular circumstances and experiences, are effectively implemented and are accessible to older persons. Therefore,

The LCO recommends that:

1. Organizations and individuals that currently have or will develop laws, policies and practice that may affect older adults adopt and use the *Framework*, and in particular that:
 - a. The Government of Ontario adopt the *Framework for the Law as it Affects Older Adults* and its Ministries disseminate it to their policy, program development and legislative staff, as an aid to developing laws, policies and practices that are responsive to older adults.
 - b. Ontario municipalities adopt the *Framework* and disseminate it to their policy, program development and legislative staff, as an aid to developing by-laws, policies and practices that are responsive to older adults.
 - c. Broader public sector organizations make use of the *Framework for the Law as it Affects Older Adults* in developing policies and programs that may affect older adults.
 - d. Private actors, such as employers, landlords, financial institutions, service providers and professional organizations and others, make use of the *Framework* in developing policies and programs that may affect older adults.
 - e. Legal organizations such as the Law Society of Upper Canada and the Ontario Bar Association adopt the *Framework* for their own advocacy, law reform and policy development work, and provide information about the *Framework* to their members.
 - f. Those who interpret the law have access to the *Framework* as a resource in understanding the potential effects of laws and policies on older adults.
 - g. Advocacy and community organizations that represent, serve or are made up of older adults make use of the *Framework* in their law reform efforts.
2. The relevant Ontario government ministries, in consultation with the above identified organizations and with older adults themselves, review the use of the *Framework* after a period of seven years, with a view to ensuring that it remains current and meaningful.

APPENDIX A

A FRAMEWORK FOR THE LAW AS IT AFFECTS OLDER ADULTS

Advancing Substantive Equality for Older Persons Through Law, Policy and Practice

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The Law Commission of Ontario (LCO) would like to express its appreciation to all of those who contributed to the development of this Framework for the Law as it Affects Older Adults through their research or their involvement in our public consultations. A special debt of gratitude is owed to the outstanding Advisory Group.

Introducing the Framework

INTRODUCING THE FRAMEWORK

Using the Framework

This *Framework for the Law as it Affects Older Adults* is intended to guide the development and evaluation of laws, policies and practices so that they take into account the realities of the circumstances and experiences of older adults, and promote positive outcomes for these members of society. It is composed of principles and factors to take into account in applying the principles, and uses a step-by-step approach. It has been developed for use by:

- policy-makers, courts and legislators;
- advocacy organizations and community groups that work with older people and deal with issues affecting older adults; and
- public and private actors that develop or administer policies or programs that may affect older adults.

The accompanying *Final Report: A Framework for the Law as it Affects Older Adults* sets out the research and analysis which form the basis for the *Framework*, and provides extended examples of its implications and implementation. Throughout the *Framework*, we have made links to the relevant sections of the *Report*. All of the referenced LCO documents may be found on the LCO website at <http://www.lco-cdo.org/en>.

This *Framework* is intended to be applicable across all laws and policies, including both those that apply specifically to older adults and those that will affect older adults as members 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. It should be noted that, given the breadth and diversity of the law as it affects older adults, not all sections of the *Framework* will be relevant for every law, policy or practice.

It is not the purpose of this *Framework* 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 its personal and societal implications are constantly evolving. Rather, the *Framework* is intended to assist law and policy-makers to:

1. consider and apply a consistent set of principles in developing laws, policies and practices that may affect older persons;
2. ensure that potential barriers and sources of ageism in laws and policies are identified and addressed; and
3. take into account key aspects of the relationships of older adults with the law.

This *Framework* is the result of extensive research and public consultation. It is built upon and expands on work already done in this area, including the *National Framework on Aging and Seniors Policy Lens*, the *Senate Special Committee Report on Aging*, the work of the Ontario Human Rights Commission on human rights and older age, international documents such as the *United Nations Principles for Older Persons*, and other important initiatives that have been undertaken in Canada and globally over the last fifteen years. It has roots in the legal foundations of the *Charter of Rights and Freedoms*, the *Ontario Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*, and as such has foundations in the legal obligations and policy commitments that bind governments. It does not replace current documents, but aims to build on these foundations and provide a basis for the further development of the law as it affects older adults. The LCO recognizes that this is an evolving area of the law, and this project is not intended as a final word on the subject, but as a contribution to ongoing research, analysis and debate.

- For more information on the LCO's approach to, and development of the *Framework* see the *Final Report*, Ch. I.

Definitions

“Ageism”: For the purposes of this Framework, ageism may be defined as a belief system, analogous to racism, sexism or ableism, that attributes specific qualities and abilities to persons on the basis of their age. Ageism may manifest with respect to older adults in attitudes that see them as less worthy of respect and consideration, less able to contribute and participate in society, and of less inherent value than others. Ageism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society.

- For more information, see the Final Report, Ch. III.A.

“Diversity”: For the purposes of this Framework, diversity refers to a number of aspects of difference among individuals that may impact on the way that they encounter the law. It includes the wide range of identities that individuals may hold and that may intersect with the experience of aging, such as those related to sexual orientation, racialization, citizenship, Aboriginal identity, (dis)ability, and many others. It also includes the range of barriers that individuals may encounter that may complicate the experience of aging, such as those related to geographic location or place of residence, caregiving responsibilities, socio-economic status and others. It also recognizes that the experiences of each individual will be shaped by their life course, and that this may lead to differences that should be taken into account.

- For more information, see the Final Report, Ch. II.C.2.

“The Law”: The term “law” as it is used for this project includes both statutes and regulations. It also includes the policies through which statutes and regulations are applied, and the strategies and practices through which statutory provisions, regulations and policies are implemented. As such, the implementation of laws is as important as their substance. Laws may be beneficial in intention and on paper, but in practice fall short of their goals or even have negative effects. Whenever the term “law” is used in this Framework, it is used in this broad sense.

- For more information, see the Final Report, Ch. I.B.6.

“Older adults”: The terms “older adults” or “older persons” are used interchangeably in this Framework. For the purposes of this Framework, the LCO has adopted an expansive approach to defining “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.

- For more information, see the Final Report, Ch. II.B.

“Substantive Equality”: Substantive equality is often contrasted with “formal equality”. It goes beyond simple non-discrimination. It includes values of dignity and worth, the opportunity to participate, having one’s needs met, and the opportunity to live in a society whose structures and organizations include them. It recognizes and responds to societal patterns that result in different outcomes on the basis of irrelevant characteristics, as well as real differences that inappropriately disadvantage members of a particular group (such as women’s capacity for reproduction). Substantive equality may require differential treatment in order to fulfil these values.

- For more information, see the Final Report, Ch. III.B.3.

Principles for the Law as it Affects Older Adults

In order to counteract negative stereotypes and assumptions about older adults, reaffirm the status of older adults 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 to be considered 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. It aims towards a society whose structures and organizations include marginalized groups and do not leave them outside mainstream society.

There is no hierarchy among the principles, and although they are identified separately, the principles must be understood in relationship with each other. The principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting 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. The principle 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. **Fostering Autonomy and Independence:** This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.
3. **Promoting Participation and Inclusion:** This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. 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. **Recognizing the Importance of Security:** This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access basic supports such as health, legal and social services.
5. **Responding to Diversity and Individuality:** This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal

identity, immigration or citizenship status, disability or health status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.

6. **Understanding Membership in the Broader Community:** This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and obligation and work towards a society that is inclusive for all ages.

- *For more information on the LCO's principles for the law as it affects older adults, see the Final Report, Ch. III.B.*

Implementing the Principles

As principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors be taken into account in the application of the principles.

Taking the Circumstances of Older Adults into Account: 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 those of younger members of society, laws do not always systematically and appropriately take these needs and circumstances into account. As a result, laws may have unintended negative effects on older adults. In some cases, stereotypes or negative assumptions about older persons may shape the degree to which or the way in which older adults are taken into account. As a result, the law may be ageist in its impact. As part of respecting and implementing the principles, the circumstances of older persons must be taken into account in the development, implementation and review of all laws, policies and practices that may affect them.

While aging is often popularly viewed as an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about growing older and about older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have lived prior to entering "old age". Any description of aging and older adults is therefore necessarily complex, as is the case for all life stages.

Life Course Analysis: In applying the principles, it is important to consider older adults as in a phase of 'the life course'. Older adults have complex needs and circumstances that are based on a lifetime of experiences and relationships that helped to shape who they are and the choices available to them. Barriers or opportunities experienced at earlier stages of life will have had consequences that reverberate throughout life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of that individual. That is, the impact of laws on older persons must be understood in the context of every stage of their lives, and how these stages relate to each other.

Gender Based Analysis: It is particularly important to consider the experience of aging and older age through a gender lens. Demographic patterns globally indicate a longer life for women, and give rise to gender-specific issues. 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. Older women also face particular negative stereotypes and dismissive treatment related to their age and gender.

Treating Law as Person-Centred: Law is often developed, implemented and analyzed as a set of separate and largely independent areas, such as family, criminal and real estate law. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of complex and fragmented systems. This approach requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. It requires law to respond to individuals as persons with diverse needs and identities, and therefore to take into account the ways in which individuals transition through the life course or between systems.

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 approach that is responsive to individuals at various stages of the life course and incorporates older adults into the overall design of the law will be most effective. Younger as well as older adults will benefit from a focus on dignity, autonomy, inclusion, security, diversity and membership in the broader community 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. An inclusive design approach to laws, policies and practices can make the law more effective overall.

Effective Implementation of Laws: 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.

Progressive Realization: The fulfilment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of older persons and the aging process evolve, or as resources or circumstances make progress possible. And 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. Therefore, a progressive implementation approach to the principles may be undertaken, and should ensure that there is a focus on continuous advancement, principles are realized to the greatest extent possible at the current time while regression is avoided, and concrete steps for future improvement are continually identified and planned.

Applying the Concept of “Respect, Protect Fulfil”: In the realm of international human rights law, the concept of “respect, protect, 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.
2. The obligation to protect – States parties must prevent violations of these rights by third parties.
3. The obligation to fulfil – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

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. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- For information on implementation of the principles see the Final Report, Ch III.B.5 -7, and on the circumstances of older adults see Ch. II.

Evaluating Law, Policy and Practice Against the Principles: A Step-By-Step Approach

The *Framework* uses a step-by-step approach to evaluating laws, policies and practices against the principles. The process is broken down into eight steps. For each step, the *Framework* provides context, examples and questions to help assess the law, policy or practice in light of the principles.

Step 1: How Do the Principles Relate to the Context of the Law?

Identify the context in which the law will operate and its relationship to the principles

Step 2: Does the Legislative Development/Review Process Respect the Principles?

Consider whether the process that has been designed for developing or reviewing the law respects the principles

Step 3: Does the Purpose of the Law Respect and Fulfil the Principles?

Assess the goals of the law, including the assumptions on which it is based

Step 4: Who Does the Law Affect and How Does This Relate to the Principles?

Analyze the way in which the law may affect older adults and how this may impact on respect for the principles

Step 5: Do the Processes Under the Law Respect the Principles?

Consider the procedural aspects of the law, including provisions related to accessibility, information provision, and supports for applicants

Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?

Assess how the law is enforced, whether through proactive measures like audits, or individual complaint mechanisms

Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?

Does the law contain provisions to ensure transparency, accountability and monitoring of its effectiveness?

Step 8: Final Assessment: Is the Law True to the Principles?

Based on the results of the previous steps, is the law true to the principles? What more must be done?

Step 1: How Do the Principles Relate to the Context of the Law?

As a first step in undertaking an evaluation of a particular law, it is helpful to begin by understanding the context in which that law will operate, and analyzing how that context may relate to the principles. This includes the general social area which the law addresses, as well as the existing laws and policies that interact with the law that is proposed or under review. This section considers how the context of the law may situate it in relation to the principles.

Applying the Principles to Step 1

Note: “Law” here refers to law, policy and practice, as appropriate.

As a first step in the evaluation of a law, it is helpful to consider the specific social area in which the law operates, such as employment, housing, education, family relationships or caregiving, for example. Different social areas will have different relationships to and effects on the attainment of the principles. For example, the attainment of *security* and of *participation and inclusion* will be significantly affected by laws related to income security. Laws related to decision-making will impact heavily on the *independence and autonomy* of older persons with cognitive disabilities.

Some contexts may involve particular challenges or constraints for the attainment of the principles. For example, residence in a long-term care home by its very nature constrains the ability of residents to *participate* in and be *included* by the broader community. Such particular challenges to the principles should be taken into account when designing the law in question.

Existing laws at various levels of government are an important part of the context to be considered, and careful attention should be paid to how the proposed law will affect the principles in **combination with existing laws**. Law in one area may affect realization of the principles in quite another area of the law. For example, law related to income security will affect access to housing. Lack of supports and protections for informal caregivers will have significant effects on all aspects of life for those older adults who require supports, including health, housing and community participation.

- For information on relating the principles to the contexts of the law, see the Final Report, Ch. IV

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 1

1. What area(s) of life does the law potentially affect? What are the particular contexts and concerns of older adults in this area of life?
2. Which principles seem relevant for this context?
3. Are there aspects of this context that tend to constrain the implementation of any of the principles? If so, are there strategies that can be employed to address this?
4. How might law in this one particular context affect other areas, and the attainment of the principles in those areas?

APPLYING THE FRAMEWORK: EXAMPLES OF RELATING THE PRINCIPLES TO THE CONTEXT OF THE LAW

Access to Housing by Older Adults and the Principles

Like everyone, older persons want to have access to housing that meets their needs. We all need housing that is safe, affordable and enables us to be part of our community. The *International Covenant on Economic, Social and Cultural Rights*, which Canada has ratified, recognizes adequate housing as a fundamental right, although no laws to this effect have been enacted in Canada. The *United Nations Principles for Older Persons* state that “older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities”. While most older adults are homeowners, as individuals age, their housing needs may change. Loss of a spouse or of the ability to drive, or the onset of impairments may make change of residence necessary. Older adults generally strongly prefer to “age in place”, so as to retain the benefits of community supports that may have been built up over many years; however, they may face many barriers to doing so, including lack of accessible housing options, limited availability of home care supports, restricted access to mainstream or specialized public transportation, housing affordability, and discrimination against people who are perceived to be likely to develop disabilities and to need accommodations related to their disabilities.

A primary concern of older adults in the context of housing is *participation and inclusion*. Lack of supports or adequate housing in their home communities can jeopardize vital supports and connections that have been built up over many years. The principle of *diversity and individuality* points to the importance of law recognizing the particular needs of older adults in the housing context, including the need for community-based supports and accessible options. Lack of supports may pressure older adults into transitioning into more restrictive environments, such as long-term care homes, leading to a reduction in *independence and autonomy*. As well, lack of access to adequate housing may jeopardize the attainment of the principles in other areas of life. For example, the federal government has recognized housing as central to reducing poverty and exclusion.

- See LCO Commissioned Research Paper, C. Spencer “Ageism and the Law: Emerging Concepts and Practices in Housing and Health” (2009)

First Nations Older Adults with Disabilities and Access to Supports

The onset of disability and the resultant need for access to supports in the community or long-term care poses challenges for all affected older adults. First Nations older adults, however, face significant additional challenges. The lower than average socio-economic status of First Nations communities leads to higher than average rates of disability and significantly reduced lifespans, so that the pressures surrounding disability and aging, acute across all groups, are particularly severe for these communities. In some First Nations communities, inadequate and overcrowded housing, together with a lack of community services, makes it impossible for older adults who have developed significant health or ability limitations to remain in their home communities. However, a move to a major centre where long-term care is available may mean a very significant dislocation, separating the resident not only from family and community, but also from culture and in some cases language. In this way, the principle of *participation and inclusion* is engaged, although the particular cultural context of First Nations persons must be taken into account in interpreting and applying it. As well, because many First Nations individuals who are now older will

have experienced the residential school system, re-institutionalization at the end of the life course may have a profound negative emotional and psychological impact. That is, the principle of *security* may be in jeopardy due to the shortage of community-based and culturally appropriate options. Finally, historically and in most contemporary Aboriginal cultures, older members are accorded great respect and Elders play a central role in family, community and spiritual life. When First Nations older adults leave their home communities for geographically distant long-term care institutions, it is a significant loss for the community as well as the individual older person, raising issues related to the principle of *membership in the broader society*.

- See LCO, A Framework for the Law as it Affects Persons with Disabilities: Final Report, “Chapter IV: Transitions and the Law as it Affects Persons with Disabilities, Applying the Principles” (forthcoming)

Step 2: Does the Legislative Development/Review Process Respect the Principles?

This section focuses on the process through which laws are developed and reviewed. The process, like the substance of the law in question, should comply with the principles. Laws may be analyzed and evaluated for their impact on older persons both at the time of their development, and later as part of a law reform initiative or assessment of their effectiveness. This section deals with the issues raised by either kind of process, with a particular emphasis on research and public involvement.

Applying the Principles to Step 2

Note: “Law” here refers to law, policy and practice, as appropriate.

The process for developing or reviewing laws is often complex and multi-layered, and will differ depending on the particular issue or the level of government involved. This process will have a significant effect on the final shape of the law. As citizens who are members of the broader community, older adults should be involved in this process, and have their perspectives and experiences taken into account in the shaping of the law. It is essential that the principles be applied to the process of evaluating and reviewing laws, as well as to the substance of those laws.

The overriding principle at stake here is that of promoting *inclusion and participation*, ensuring that older adults have the opportunity to be meaningfully involved as citizens in the development of laws and policies. Implicit in the principle of *dignity and worth* is respect for the value of the experiences and perspectives of older persons, indicating that these experiences and perspectives should be sought out, included in the process, and meaningfully considered. The principle of *membership in the broader community* highlights that participation in the development of laws and institutions is a responsibility as well as a right for older adults, as it is for others. The principle of *autonomy and independence* highlights the importance for older persons of the right to make choices on issues that affect them, not only in their day to day lives, but at a broader societal level. Finally, the principle of *diversity* emphasizes that in the law development or reform process, a wide variety of voices should be heard from, including the range of experiences and opinions among older adults. This requires that public consultation processes be accessible and inclusive.

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 2

1. Has research been carried out to determine how older adults may be affected by the law, and to ensure understanding of the particular circumstances of those older adults who will be affected?
2. 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, whether positive or negative?

3. Are older persons directly involved and integrally included in developing or reviewing the law?
4. Have steps been taken to ensure that a wide range of older adults and organizations have been informed about and had the opportunity for involvement in the process for developing or reviewing this law? Have efforts been made to reach out to older persons with differing disabilities, socio-economic status, racial or ethnic identities, creeds, sexual orientations, places of residence, and other aspects of diversity?
5. Have steps been taken to ensure that all stages of public consultation are accessible to older adults, within the requirements of the Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*?
6. Have steps been taken to ensure that all stages of public consultation are accessible to older adults who may face barriers because of their low-income, caregiving responsibilities, newcomer status, geographic area of residence, disability or health status, or other issues?
7. Is the process through which older persons are involved respectful of their contributions and mindful of their circumstances and experiences?
8. Have the perspectives and concerns shared by older adults been meaningfully considered in shaping the outcomes?
9. Have the analysis and decisions made throughout the development or review process with respect to older adults been documented?

APPLYING THE FRAMEWORK: EXAMPLE OF THE RELATIONSHIP OF THE PRINCIPLES TO LEGISLATIVE DEVELOPMENT

Public Consultations and the *Ontario Long-Term Care Homes Act, 2007*

The *Long-Term Care Homes Act, 2007* was a long-awaited and significant transformation of Ontario law relating to long-term care, replacing three predecessor statutes. The aim of the reform was to modernize the legal framework, improve accessibility and accountability, and create a more resident-focussed system. In keeping with these aims, a broadly consultative approach was taken to the development of the new law. From the beginning of the process, informal consultations reached out to a broad range of stakeholders, to ensure that the goals of the reform were meaningful to those affected and the proposed mechanisms were practicable. The formal consultation process included three days of public hearings, and the receipt of hundreds of submissions. Stakeholders received formal responses on key issues raised by the consultations, as a means of furthering discussion and ensuring a positive outcome. The focus on communication and consultation has continued through the implementation of the new law, including the development of the regulations and of information tools for long-term care residents.

In these ways, the process for developing the *Long-Term Care Homes Act* embodied the principles of *respect for the dignity and worth* of older adults, and of promoting inclusion and participation. The close connection between the values embodied in the development process and those reflected in the provisions of the *Act* illustrate how respect for

the principles in the process of developing laws and policies may effectively promote respect for the principles in the resultant law or policy as well.

Step 3: Does the Purpose of the Law Respect and Fulfil the Principles?

Laws generally begin with an issue, large or small, that is perceived to be of concern and that needs to be addressed. The purpose of a law may be explicitly identified, for example in a preamble, or may be implicit in the provisions. While in practice, a law may or may not achieve the goals set out for it, the purpose of the law and the assumptions that underlie that purpose (or purposes) will shape the general approach of the law. This section sets out considerations for evaluating the purpose of a law against the principles.

Applying the Principles to Step 3

Note: “Law” here refers to law, policy and practice, as appropriate.

The overall goal or purpose of a law will of course profoundly shape every aspect of that law, and will itself be shaped by a set of underlying assumptions or values. In the case of laws that directly target older adults or affect mostly older adults, many of those assumptions and values will be directly associated with older age, while for laws of general application, they will be less directly connected with age, but still influential in terms of the impact of the law on older adults. Those assumptions and values may be positive for older persons, or they may be influenced by ageist or paternalistic attitudes and assumptions. For this reason, it is very important to carefully evaluate the purpose(s) of a law, and the underlying attitudes against the principles.

As at all stages of the evaluation, most commonly, multiple principles will be engaged by any one law, particularly since the principles are interdependent. Frequently, the principles will support each other; for example, initiatives that increase the *inclusion and participation* of older persons will generally also thereby promote *respect for their dignity and worth*. However, sometimes two or more of the principles may be in tension with each other in a particular case. In such cases, careful thought must be given to analyzing and responding to this tension.

Because older persons are often characterized as passive and “vulnerable”, it is particularly common to see the principle of the *autonomy* of older persons subordinated to the principle of *security*. It is therefore particularly important to carefully scrutinize laws that are framed in this way to ensure that ageist assumptions are not leading to an inappropriate sacrifice of autonomy for older persons. The analysis of the relationships between the principles may be relevant at any of the steps in the evaluation process.

- For information on identifying ageism and paternalism in the law, see the Final Report, Ch. IV.G; for information on relationships between principles, see Ch. III.B.5

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 3

1. What assumptions about older persons underlie the purpose of the law? Does the law recognize older adults as persons of worth, value their contributions, and treat them as of equal value with other members of society?
2. Does the purpose of the law take into account the actual needs and circumstances of older adults, and respond appropriately?

3. Does the purpose of the law take into account variances among older adults, whether due to their life courses, differences in their abilities or health status, or intersecting aspects of their identity such as gender, racialization, sexual orientation, Aboriginal identity, age, citizenship, socio-economic status, marital or family status, or other aspects of identity?
4. Does the purpose of the law take into account the variable nature of aging, and the multiple transitions that older persons experience throughout the aging process?
5. Does the purpose of the law enhance the ability of older adults to be meaningfully involved in their communities, be civically engaged, and to be heard on issues that affect them?
6. Does the purpose of the law address potential abuse, exploitation, mistreatment or victimization of older adults?
7. Does the purpose of the law foster the ability of older adults to make choices for themselves, including by providing appropriate supports?
8. Does the purpose of the law enhance the economic or personal independence of older persons, and provide support for such independence as required, for example through access to health, legal or social supports?
9. Does the purpose of the law recognize older persons as members of the broader society, and support their ability to take on the responsibilities associated with such membership?
10. Might this law affect the attainment of the principles for those who are not yet older adults when they reach that stage of life?
11. How do the principles in play relate to each other? Do they support each other or are there tensions between any of these considerations, so that satisfying one may threaten to undermine the realization of another? If so, have you considered:
 - a. Whether there are broader contextual issues (such as a lack of appropriate resources) causing the tensions between principles, and if so, whether these issues can be addressed to resolve the tension?
 - b. Whether there are approaches to the issue that will permit at least partial achievement of both competing principles?
 - c. Which of the potential approaches will best advance substantive equality for older adults?
 - d. Whether older adults have been consulted in determining how to resolve the tensions?

APPLYING THE FRAMEWORK: EXAMPLES OF THE RELATIONSHIP BETWEEN PRINCIPLES AND THE PURPOSE OF THE LAW

Embodying Principles in the Law: The *Long-Term Care Homes Act*

The Ontario *Long-Term Care Homes Act, 2007* has at its core a set of principles that are in harmony with this *Framework*. The fundamental principle of the *Act* is that a long-term care home is a home and should be a place

where residents “may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met”. This fundamental principle is reflected throughout the statute. For example, it includes a “Residents’ Bill of Rights” which explicitly recognizes that older adults who live in long-term care homes are individuals who have rights that must be respected and promoted, including:

- 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.

As another example of the ways in which the *Act* reflects the principles, it requires that every long-term care home ensure that a Residents’ Council, made up of residents of that home, is established. 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. These Councils embody the principles of *participation and inclusion*, and help ensure that long-term care homes fulfil the other principles. For example, their ability to address concerns may improve the *security* of residents, and the recognition that residents have valuable perspectives increases respect for their *dignity and worth*.

- See Long-Term Care Homes Act, 2007, S.O. 2007, c. 8, ss.1, 3, 56

Tensions Between Principles: Adult Protection Laws

Some provinces have put in place comprehensive adult protection legislation. This legislation aims to address the risk of abuse and neglect for older adults, and creates institutional structures to address instances of abuse and neglect. It generally covers physical, sexual, emotional and financial abuse, as well as self-neglect. To achieve this objective, this type of legislation provides for intervention by third parties. The primary objective of adult protection legislation is to connect individuals with necessary social and medical services.

Adult protection legislation has been, and remains controversial. A key element in the negative response to current mandatory reporting legislation regimes in the Atlantic provinces is the very broad scope of that legislation, which permits unilateral and potentially heavy-handed intervention in the lives of older adults who in other contexts would be considered quite capable of making their own decisions. There are some adults who, due to the nature of their disabilities, are not able to speak or act for themselves or to make decisions to protect their own safety and security, and who may need others to assist them to take action or to simply take action for them. The scope of adult protection legislation in some provinces goes far beyond this, however, and in doing so, permits paternalistic decision-making, potentially influenced by ageist stereotypes or attitudes, that significantly undermines the *autonomy* of older adults. These laws, then, may be understood as exemplars of the common tension in elder law between the principles of security and independence and autonomy.

- For information on tensions between principles and adult protection laws, see the Final Report, Ch. III.B.5

Step 4: Who is Affected by the Law and How Does This Relate to the Principles?

To conduct a meaningful evaluation, it is essential to identify how and which older adults may be affected by a particular law. In some cases, laws are specifically targeted to older persons, or some group of older persons. Seniors' social housing, and the senior drivers' licence renewal program are examples of these. As well, older persons are, by definition, affected by laws of general application. In some cases, laws of general application may affect older adults or some group of older adults differently or disproportionately compared to others. This section considers how specific instances of the ways in which laws may affect older persons may interact with the principles.

Applying the Principles to Step 4

Note: "Law" here refers to law, policy and practice, as appropriate.

There are a number of laws that specifically target older persons – in some cases through age-based eligibility criteria and in others by focusing on an issue, such as long-term care, that mainly affects older persons. Some of these target older persons in general, and others target some particular group of older persons. These laws may include definitions or criteria setting out who is affected by the restrictions or has access to the rights or entitlements in the law. These criteria or definitions must be carefully scrutinized for stereotypical or ageist assumptions or attitudes that violate the principle of *respecting dignity and worth*. 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, thereby undermining *dignity and worth* and potentially having adverse consequences for the attainment of the other principles. On the other hand, age-based criteria may also be effective at addressing the particular circumstances of older adults and thereby advance fulfilment of the principles. Laws of general application may, of course, affect the attainment by older adults of any of the principles.

As older persons are often invisible in the law development process, the effects on them of a particular law of general application may not be identified or considered. This may be especially true for some groups of older persons who are particularly marginalized, such as Aboriginal older adults or those who have aged with disabilities. The principles of *promoting participation and inclusion*, and of *recognizing diversity* require that older adults, in all their variety, be carefully considered whenever a law of general application is designed or reviewed, to ensure that it takes into account their particular needs and circumstances. Failure to take into account the particular needs of older adults or some group of older adults may negatively affect their *security*.

- For information on applying the principles to targeted laws and to laws of general application, see the Final Report, Ch. IV.B-E

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 4

Age-Based Laws

1. If the law specifically targets older persons or a particular group of older persons:
 - a. does the law reflect the principle of membership in the broader community, and incorporate an understanding of older persons as citizens with both rights and responsibilities?
 - b. has consideration been given to the most appropriate way to tailor the program in light of levels of heightened risk or disadvantage, potential benefits and available resources?
 - c. has an inclusive design approach, meaning one that applies to everyone but where necessary recognizes the particular circumstances and needs of older adults, been considered as an alternative?

2. If the law uses age-based criteria:
 - a. is the **purpose** of the criteria in harmony with the principles? Might the **effect** of the law undermine the principles, for example by reinforcing age-based segregation or stereotypes?
 - b. are the criteria based on current and relevant research into the needs and circumstances of older adults?
 - c. do the criteria recognize the diversity of older adults, for example by making provision for individual assessment or for individuals to challenge their inclusion or exclusion from the group?
3. If the focus of the age-based law is on protecting the security or promoting opportunities for younger persons, has the impact of the restrictions on older persons been fully taken into account and the needs of older adults been weighed equally with those of younger persons?

Other Types of Eligibility Criteria

4. Has the impact of non-age-based eligibility criteria on older adults, or on some groups of older adults been taken into account? For example:
 - a. If the law uses disability-based eligibility criteria:
 - i. does the definition of disability take into account the types of impairments disproportionately affecting older adults?
 - ii. do the criteria take into account the ways in which the experience of disability or impairment are shaped by the life course?
 - iii. 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?
 - b. If the law uses income-based criteria, do the criteria take into account current information and research on the economic status of older adults in all of their diversity and the particular financial circumstances of some groups of older adults, such as
 - i. the effect of withdrawal from the workforce on financial security?
 - ii. how the economic status of some older adults, such as women, racialized individuals, and those who have lived with disabilities throughout their lives may be shaped by unequal life experiences?

Laws of General Application

5. If the law is one of general application, might it, taking the circumstances of older adults into account, affect older persons differently or in greater numbers than the general population?
6. If the law is one of general application, might it affect some particular groups of older adults differently or in greater numbers than the general population? For example:
 - a. Does the law have a significant effect on persons who live in low-income? If so, given the particular circumstances of older persons who live in low-income, what might be the effect on this group?
 - b. If the law has a different or disproportionate effect on older persons in general, has consideration been given to how this might differ for older men and women?
 - c. If the law has a different or disproportionate impact on older persons in general, has consideration been given to how that impact might differ for older persons who have lived with disabilities throughout their lives, or developed disabilities with age?
 - d. Has consideration been given to how the law might affect older persons who are from historically marginalized communities, such as for example Aboriginal or racialized older persons, or those who are LGBT, newcomers to Canada or francophone, particularly given how inequality may have shaped their life courses?

- e. Has consideration been given to how the law might affect older persons facing barriers related to their family or marital status, area of geographic residence (such as in rural or remote areas) or socio-economic status?

7. If differential impacts have been identified, have they been addressed?

APPLYING THE FRAMEWORK: EXAMPLES OF THE RELATIONSHIP BETWEEN THE PRINCIPLES AND THE SCOPE OF THE LAW

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

When the Ontario *Human Rights Code* was amended to remove protections for mandatory retirement requirements, provision was made to maintain age-based criteria both in employment benefits under the *Employment Standards Act* and in the *Workplace Safety and Insurance Act* (WSIA). For example, while the WSIA places a limited duty on employers to re-employ injured workers, this duty ends at the point when a worker reaches age 65. As well, the WSIA places age 65 limits on loss of earnings benefits. These provisions may have a devastating impact on the economic security of older workers who become injured. They appear to assume that older workers would necessarily have left the workforce at the age of 65, ignoring current trends, individual circumstances and the contributions of older workers to their workplaces, and as such undermine the dignity and worth of older workers.

- For information on eligibility criteria and the WSIA, see the Final Report, Ch. IV.B

Laws of General Application: Older Persons and the Revocation of Wills Upon Marriage

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, unless that will indicates that it was developed in contemplation of marriage. 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. These laws of general application can therefore significantly affect the *autonomy* of older adults in terms of disposing of their assets upon death, as well affecting their security by placing them at some risk of financial exploitation through predatory marriages.

- For information on laws of general application and on the revocation of wills upon marriage, see the Final Report, Ch. IV.E

Step 5: Do the Processes Under the Law Respect the Principles?

The implementation of a law is equally as important as its substantive provisions. Laws may be positive in their conception and on paper, but in practice may be cumbersome, difficult to access, or otherwise ineffective in achieving their goals. This section applies the principles to the implementation of the law, including considerations related to training and education, resources and provision of adequate supports and accommodations for age-related needs.

Applying the Principles to Step 5

Note: “Law” here refers to law, policy and practice, as appropriate.

Well-intentioned laws may fail to achieve their purposes due to problems in implementation. Many laws are exceedingly complex, so that understanding and navigating them requires considerable effort and expertise, and older adults may be expected to do so on their own, without supports or the appropriate accommodations where these are required. Those operating such systems may have an imperfect understanding of the needs and circumstances of older persons, or may harbor ageist attitudes or assumptions. Often such systems are under-resourced and under strain.

Applying the principles to these processes requires that older adults be treated with *dignity* when seeking to access the law. Those implementing the law must have the skills, knowledge and resources to treat those accessing it with respect, accommodate their needs, and ensure they receive any supports or benefits to which they are entitled. *Responding to diversity* requires that systems be able to accommodate the particular needs of individuals, including needs arising from the accumulated effects of the life course or the intersection of older age with other aspects of identity. The principles of *autonomy and independence*, and *participation and inclusion* require that systems intended to serve older adults can be understood and navigated by them, which requires provision of appropriate information and supports.

- For information on access to the law for older adults, see the Final Report, Ch. V

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 5

1. Have sufficient human and financial resources been allocated to ensure that older persons will receive the services intended by the law with dignity and respect?
 - a. Are there mechanisms in place for identifying significant unmet needs?
 - b. Where resources are limited, does the law include clear, transparent and principled criteria and priorities for how scarce resources should be allocated?
 - c. In the implementation of laws of general application, where resources are limited, have the needs of older persons been given equal consideration with those of other groups?
2. Have the processes under the law been designed to be as simple and transparent as possible for users?
3. Does the law include clear rights to services to be provided and accountability for providing those services in a timely, respectful, accessible and appropriate manner?

4. Have those charged with implementation of the law been provided with adequate ongoing training and education to enable them to perform their duties in a way that respects the principles, including training and education on:
 - a. The substance of the law in question, as well as the Canadian *Charter of Rights and Freedoms*, the Ontario *Human Rights Code* and accessibility requirements under the *Accessibility for Ontarians with Disabilities Act*?
 - b. Anti-ageism, including common negative stereotypes and assumptions about older persons in general and particular groups of older adults, access and accommodation issues for older adults, and systemic barriers?

5. Have mechanisms been developed to ensure that older persons 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 these mechanisms address common barriers? For example:
 - a. Has information been provided on where individuals can seek further information or supports for accessing their rights or exercising their responsibilities?
 - b. Have strategies been developed to disseminate information to organizations that represent, advocate for or support older persons?
 - c. Is information available in disability-accessible formats that comply with the provisions of the *Accessibility for Ontarians with Disabilities Act* and the Ontario *Human Rights Code*?
 - d. Is information available in plain language?
 - e. Is information available in non-written formats (such as by telephone)?
 - f. Is information available to persons living in settings such as long-term care homes where there may be more limited access to the broader community and to information?
 - g. Is information available to persons living in rural or remote settings?
 - h. Is information available in multiple languages?

6. If the access mechanism is complex or multi-stage, have supports or advocacy services been provided to ensure that older persons are able to navigate the system, particularly those older persons who face additional barriers due to disability, low-income, language barriers or other issues?

7. Have the services been designed to include and accommodate the particular needs of older persons, including those who are facing additional barriers due to low-income, or who have needs related to other aspects of their identities?

APPLYING THE FRAMEWORK: EXAMPLES OF THE RELATIONSHIP OF THE PRINCIPLES TO PROCESSES UNDER THE LAW

Providing Accessible Information – NICE and CLEO

The law in general, and as it affects older adults, is often complex and confusing. Many older adults, as well as those providing services to older adults, have difficulty locating information about rights and responsibilities under the law or face barriers to doing so. This undermines the ability of laws to achieve their goals (and thereby the principles). The lack of information also undermines the *autonomy* of older adults in that they lack sufficient information to make meaningful choices.

Two organizations address these issues, at different levels. 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 in a number of areas to help older adults and those working in the field to better understand rights and responsibilities under the law. Community Legal Education Ontario (CLEO) has a mandate to provide accessible plain-language information about the law, so that people are able to understand and exercise their rights. CLEO's work has a particular focus on those who face barriers to accessing information, such as those living in low-income and newcomers. Community legal clinics and other organizations also use these publications to help clients with legal problems.

- *For information on accessible information and empowering older adults, see the Final Report, Ch. V.C.2*

Seniors-Focused Services – 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 of 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 a 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 a seniors' 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 superintendents to reach any seniors who may be at risk. Such programs, by recognizing the particular barriers and risks that some older adults may experience, may promote their security as well as their participation and inclusion.

- *For information on the principles and initiatives targeted specifically to older adults, see the Final Report, Ch. V.C.4*

Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?

No law will operate perfectly: errors and problems will inevitably arise, and mechanisms must be put in place to identify and address these. Therefore, older adults require meaningful access to the law. Some laws rely on complaint mechanisms of various types to identify and resolve issues, others use proactive mechanisms like audits or institutional advocates for this purpose, and others use a combination of mechanisms. This section applies the principles to complaint and enforcement mechanisms.

Applying the Principles to Step 6

Note: “Law” here refers to law, policy and practice, as appropriate.

Meaningful complaint and enforcement mechanisms are important, not only for addressing individual issues that may arise in the implementation of a law but also for identifying and addressing systemic problems with a law or its implementation. Older adults may face a range of barriers in accessing the law, including a lack of clear rights and remedies, complex or inaccessible systems that fail to take into account their needs and circumstances, power imbalances, a reluctance to complain and a lack of information and advocacy supports.

The principles of *respecting dignity and worth* and of *security* mean that there must be meaningful mechanisms to ensure that older persons are able to raise concerns about mistreatment, exploitation or abuse, that there is meaningful redress when such issues arise, and that they are not subject to retaliation for doing so. *Responding to diversity* requires that complaint and enforcement mechanisms take into account the diverse needs and circumstances of older adults and ensure that all aspects of complaint and enforcement mechanisms are accessible for these individuals. This includes ensuring that complaint mechanisms are sufficiently simple and transparent for older adults to navigate – or if not, that they have the advocacy supports necessary to do so. To ensure autonomy and independence, older persons must have access to the information that they need to understand and enforce their rights. The principle of promoting inclusion and participation requires that complaint mechanisms facilitate the ability of older persons to be actively involved in claiming their rights, including provision of the supports necessary to empower them to do so.

- For information on access to the law and older adults, see the Final Report, Ch. V.C

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 6

1. Does the law include access to a complaint and enforcement mechanism that clearly and meaningfully identifies, addresses and remedies both individual and systemic violations of the law, including for those individuals who are particularly disadvantaged or at heightened risk?
2. Are the complaint and enforcement mechanisms designed in a way that addresses power imbalances and prevents potential retaliation against those who raise issues?
3. Are the complaint and enforcement mechanisms accessible for older adults, including respecting the requirements of the Code and the Accessibility for Ontarians with Disabilities Act, providing appropriate accommodations, addressing barriers related to low-income, and recognizing intersecting identities?

4. Are the complaint and enforcement mechanisms navigable for older adults, whether through ensuring the mechanisms are simple and transparent, or by providing navigational assistance?
5. Are older persons provided with meaningful and accessible information about their rights and how to enforce them?
6. Are supports available to older persons to empower them to understand their rights and advocate for themselves?

APPLYING THE FRAMEWORK: EXAMPLES OF THE RELATIONSHIP OF THE PRINCIPLES TO COMPLAINT AND ENFORCEMENT MECHANISMS

Long-Term Care Homes and Barriers to Accessing the Law

Long-term care homes provide crucial supports to individuals with significant, complex needs, and so may play a vital role in promoting the principles for their residents. However, residents may experience barriers to asserting their rights. Residents are generally living with significant impairments or health issues, which may make it difficult for them to realize when their rights have been violated and to pursue redress. There are significant power imbalances between residents and those who are providing their care: residents may be extremely vulnerable to reprisal. The segregated nature of the living environment makes it more difficult to access information and resources. Therefore, rights enforcement mechanisms that rely entirely on individual complaints may be of only limited utility in preventing violation of the rights of residents and ensuring that the principles are respected and fulfilled.

Therefore, persons living in these types of settings are at particular risk of having their rights violated, or of experiencing a violation without a realistic possibility of redress. This raises issues related to the principle of *security*. The principle of *responding to diversity* requires the law to take into account the needs of this particular group when designing complaint and enforcement mechanisms. Additional outreach, supports or enforcement mechanisms may be required to ensure that the dignity and worth of persons living in these settings are respected.

- For information on access to the law and older adults in long-term care homes, see LCO Commissioned Research Paper, Advocacy Centre for the Elderly, “Congregate Living and the Law as it Affects Older Adults” (2009)

Community Care Supports and Complaint Mechanisms

The provision of community care supports for those individuals who are frail or have disabilities, but who wish to remain in their own homes are central to the principles of independence, security and participation and inclusion for these individuals. These supports are regulated by the *Home Care and Community Services Act*. Agencies providing services are required to develop complaint processes and to respond to complaints regarding service quality within 60 days. Because the Act has no specific requirements for complaints processes, they vary from agency to agency, but essentially, where an individual has concerns about the quality of services provided, these complaints must be brought to the attention of the agency providing services. Responses to complaints need not be in writing, and for some issues there is no right of appeal to a third party. Many concerns have been raised about the effectiveness of

this complaint process, especially since those using home care services are likely to be frail or in poor health and therefore not in a strong position to navigate unclear processes or to strongly advocate for their rights where there is a potential for reprisal.

- For information on the principles and access to community care, see the Final Report, Ch. VI

Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?

In general, laws benefit from the inclusion of mechanisms to ensure accountability, transparency and effectiveness. Often there is a lack of monitoring and oversight mechanisms for systems disproportionately or exclusively affecting older persons; as a result, it is difficult or impossible to determine whether these systems are operating effectively 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 meaningful law reform, and mechanisms for monitoring and evaluation should be built into the law from the outset. This section considers the mechanisms within laws for accountability, transparency, monitoring and evaluation.

Applying the Principles to Step 7

Note: “Law” here refers to law, policy and practice, as appropriate.

Monitoring and accountability mechanisms relate to the principles in a general way, in that without them, we cannot determine whether or ensure that a particular law is respecting or advancing the principles. As well, accountability mechanisms can promote the principle of *participation and inclusion* by giving older persons the opportunity to have a voice in the operation and reform of laws that affect them, and of *security* by ensuring that laws are not negatively affecting the wellbeing of older adults.

- For information on the principles and monitoring and accountability mechanisms see the Final Report, Ch. V.C.7

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 7

1. 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?
2. Does the law include provisions that require meaningful information about its impact and effectiveness to be systematically gathered and documented?
3. Does the law require that information about its operation and effectiveness be made publicly available?
4. Are those charged with implementing and overseeing the law required to regularly report on their activities and the effectiveness with which the law is administered?
5. 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?

6. Does the law require regular review of its goals, to determine whether they are still meaningful and appropriate?
7. Does the law require regular review of the effectiveness of its implementation, and whether the aims of the law are being achieved?
8. 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?
9. Are the resources allocated to the law regularly reviewed to ensure that they remain adequate and appropriate for its effective implementation?
10. Where reviews are carried out, are steps taken to act on the results of the review? Has consideration been given to making the results of significant reviews available to the public?

APPLYING THE FRAMEWORK: EXAMPLE OF THE RELATIONSHIP OF THE PRINCIPLES TO MONITORING AND ACCOUNTABILITY MECHANISMS

Monitoring Enduring Powers of Attorney

Individuals designated as substitute decision makers through enduring powers of attorney have very broad powers. Their decisions have the potential to radically affect the *security, dignity, independence and autonomy, and participation and inclusion* of the person granting the power of attorney. Significant concerns have been raised about abuses through powers of attorney, particularly financial abuse of older persons. However, there are no substantial mechanisms for monitoring enduring powers of attorney. It is impossible to know even how many of these powers of attorney are currently in effect in Ontario, let alone how they are being exercised. While it was hoped that enduring powers of attorney would enhance the *security* and *autonomy* of older persons by allowing individuals to plan for the future, it is impossible to tell how well this legal regime is operating and whether the principles are being enhanced or undermined. That is, it is possible that current laws, although well-intended, are undermining rather than promoting the principles.

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 including provisions requiring attorneys, upon commencing responsibilities for a legally incapable person, to issue a formal notice in which they formally acknowledge and accept a specified list of duties as an attorney, as well as provisions enabling persons concerned about misuse to report concerns to a designated public official who will have discretion to investigate.

- See Alberta Law Reform Institute, “Enduring Powers of Attorney: Safeguards Against Abuse” (2003)

Step 8: Addressing the Results of the Evaluation in Steps 1 - 7: Is the Law True to the Principles?

Having evaluated the various aspects of the law through Steps 1 to 7, the final Step is to gather the results, evaluate the degree to which the law is true to the principles, and develop strategies for addressing any identified shortfalls.

Applying the Principles in Step 8

Note: “Law” here refers to law, policy and practice, as appropriate.

It is not uncommon for laws to fall short of fully promoting or achieving the principles for older persons. After all, we live in a world of competing policy priorities and limited resources, and the principle of *understanding membership in the broader society* reminds us of the importance of working together to develop a society that is inclusive for all ages. As well, our understanding of the principles and of the experiences of older adults will continually evolve. However, the principle of *dignity and worth* reminds us that shortfalls should occur only where truly unavoidable, and not as a matter of course or without serious consideration, and that the aim should be to move forwards toward full realization and not backwards. Where an evaluation identifies a shortfall, it should be carefully assessed, and any determination that a shortfall cannot be immediately rectified should be made in a transparent and accountable manner. International human rights law recognizes that not all rights can be immediately and fully attained: the legal principles of progressive realization and “respect, protect, fulfil” come into play in these circumstances, and can be applied in the context of this *Framework*. While laws may not completely fulfil all the principles, actual contraventions of the principles should be immediately addressed as a matter of priority. Further, where it is not possible to immediately and fully attain the principles in either the substance or the implementation of a particular law, concrete plans should be developed, with clear accountability and timelines, for fully realizing the principles over time.

QUESTIONS FOR CONSIDERATION IN APPLYING STEP 8

1. For new laws, does the law, **overall**, represent progress towards the full attainment of the principles?
2. Are there areas in which the substance or implementation of the law contravenes the principles? If so, what steps will be taken to ensure that the law does not undermine the principles?
3. Have issues or areas been identified where the principles are in tension? If so, has the tension been analyzed as proposed in **Step 3**, and the analysis and response clearly articulated and documented?
4. Are there areas in which the substance or implementation of the law falls short of fully achieving the principles? If so, can steps be taken to ensure immediate complete fulfilment of the principles?
5. If complete fulfilment of the principles cannot be achieved immediately, for example due to a shortage of resources, has a clear plan been made to address the shortfall over time? Does the plan include clear timelines and accountability for implementation?
6. Have the results of the evaluation and the decisions made in response to the results been fully documented and considered?
7. Are the results of the evaluation available to older adults, to the extent possible while respecting confidentiality and privacy rights?

APPENDIX B

ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

A. Organizations and Experts

The following list includes all organizations and experts who provided written submissions to one or more of the consultations, provided practical support to the Fall 2011 Public Consultations, attended the Stakeholder Event, or were interviewed by LCO staff. Some of the organizations listed participated in multiple ways over the course of the project.

The Advisory Group for this project was integral to its success. The members of the Advisory Group are listed at the front of this *Report*.

1. 519 Community Centre, Seniors' Program
2. Access Committee of Cobourg
3. Advocacy Centre for the Elderly
4. African Canadian Legal Clinic (Margaret Parsons)
5. Alzheimers' Society of Ontario
6. ARCH Disability Law Centre
7. Association of Community Legal Clinics of Ontario (Lenny Abramowicz)
8. Association of Management, Administrative & Professional Crown Employees Ontario
9. Mary Bart, Losing Our Parents
10. CARP
11. Canadian Association for Community Living
12. Canadian Coalition for Seniors' Mental Health (Kimberley Wilson)
13. Canadian Centre for Elder Law
14. Canadian Pensioners Concerned
15. Circle of Care
16. Barry Corbin, Corbin Estates Law Professional Corporation
17. Tamara Daly, York University, School of Health Policy & Mgmt
18. DAWN Canada
19. Mary Jane Dykeman, Dykeman Dewhirst O'Brien LLP
20. Family Service Toronto - Changing Lives Program (Lisa Manuel)
21. Fédération des aî-nés et des re-trai-tés fran-co-pho-nes de l'Ontario
22. Jan Goddard, Jan Goddard and Associates
23. Joint Centre for Bioethics (Frank Wagner)
24. L'union culturelle des Franco-Ontariennes
25. Meaford Fifty-Five Plus Club
26. Ministry of the Attorney General
27. Ministry of the Attorney General - Ontario Victim Services Secretariat (James Truman and Karyn Slaven)
28. Metro Toronto Chinese and South Asian Legal Clinic (Avvy Go)
29. Multicultural Council for Ontario Seniors (Zul Kassamali and Anice Sajan)

30. Office of the Public Guardian and Trustee (Saara Chetner)
31. Office of the Worker Advisor (Ministry of Labour)
32. Older Women's Network
33. Ontario Association of Social Workers (Sandra Loucks Campbell)
34. Ontario Association of Residents' Councils (Donna Fairley)
35. Ontario Bar Association
36. Ontario Caregiver Coalition (Joanne Bertrand)
37. Ontario Human Rights Commission
38. Ontario Legal Clinics' Workers' Compensation Network
39. Ontario Network for the Prevention of Elder Abuse
40. Ontario Nurses Association
41. OPS Diversity Office (Noëlle Richardson)
42. Ontario Seniors Secretariat
43. Parkdale Community Legal Clinic
44. Dr. Sadhana Prasad, Associate Clinical Professor of Medicine (Geriatrics)
McMaster University
45. Prevention of Senior Abuse Network (Simcoe County)
46. Reh'ma Community Services (Amra Munawar)
47. Retired Teachers of Ontario (Harold Braithwaite)
48. Professor Charmaine Spencer, Gerontology Research Centre, Simon Fraser University
49. Toronto Central Community Care Access Centre (Kim Ibarra)
50. Toronto Community Housing Corporation (Chuck Dowdall)
51. Toronto Council on Aging (Carol Abugov)
52. Toronto Lawyers Association
53. Toronto Police Service Community Mobilization Unit (Patricia Fleischmann)
54. United Senior Citizens of Ontario
55. Women's Institutes of Ontario
56. Yee Hong Centre for Geriatric Care (Amy Go)

B. Private Individuals

In accordance with our mandate, and reflecting the nature of this project, the LCO made efforts throughout not only to make participation accessible to individual older adults, but also to actively encourage their participation.

The LCO received input from over **400** individual older adults over the course of this project. This includes **292** responses to its consultation questionnaire, some of which reflected the experiences of multiple individuals. Over **90** individuals participated in the LCO's six focus groups. As well, throughout the course of the project, the LCO received numerous online comments, submissions and phone calls from individual older adults, identifying concerns and priorities for the law as it affects older adults.

In accordance with the LCO's *Privacy Policy*, the names of contributing individuals are not listed here. However, the participation of these individuals fundamentally shaped this project throughout, and the LCO wishes to express our gratitude to them for sharing their expertise and experiences with us.

C. 2010 Canadian Conference on Elder Law

In October of 2010, the LCO co-hosted the 2010 Canadian Conference on Elder Law, in partnership with the Canadian Centre for Elder Law and the Advocacy Centre for the Elderly. The goal of the Conference was to promote contribution and access to a knowledge base regarding legal issues affecting older adults, with a view to reducing vulnerability, social isolation and abuse. The Conference brought together professional groups, lawyers, community members, advocates, health specialists, researchers and interested individuals, and highlighted some of the most innovative research and practices in the field.

The theme of the Conference was “Developing an Anti-Ageist Approach to the Law”, reflecting and supporting this project, as well as the Advocacy Centre for the Elderly’s pioneering role in promoting access to justice for older adults, and the unique mandate of the Canadian Centre for Elder Law. The Conference explored issues of elder rights, ageism and the law, access to justice, and law reform for older persons.

The Conference included a mix of plenary sessions and 25 breakout sessions, bringing together experts, advocates and professionals from across North America. The Conference Programme and the papers produced can be found on the LCO website at <http://www.lco-cdo.org/en/older-adults-conference>.

D. Commissioned Research Papers

In major projects such as this, the LCO issues a call for the preparation of research papers in particular subjects relevant to the project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO’s views.

Advocacy Centre for the Elderly, *Congregate Living and the Law as it Affects Older Adults*. Summer 2009. Available online at <http://www.lco-cdo.org/en/older-adults-call-for-papers-advocacy-centre-elderly>.

Margaret Hall, *Developing an Anti-Ageist Approach within Law*. Summer 2009. Available online at <http://www.lco-cdo.org/en/older-adults-call-for-papers-margaret-hall>.

Charmaine Spencer, *Ageism and the Law: Emerging Concepts and Practices in Housing and Health*. Summer 2009. Available online at <http://www.lco-cdo.org/en/older-adults-call-for-papers-charmaine-spencer>.

APPENDIX C

CONSULTATION QUESTIONNAIRE – SUMMARY OF RESULTS

A. Introduction

As one aspect of its fall 2011 consultations, the LCO distributed a questionnaire to individual older adults. The questionnaire was designed to complement the other aspects of the consultation, including the focus groups and the Stakeholder Event, by gathering input from older adults across the province about their experiences with and perceptions of the law. Questionnaires were distributed to older adult networks throughout Ontario, including through the public libraries system and partnering organizations such as the Retired Teachers of Ontario, the Ontario Association of Residents' Councils, Women's Institutes, and others. The results were instrumental in developing the LCO's *Framework for the Law as it Affects Older Adults*, and are reflected throughout the *Final Report*. This Appendix provides a brief overview of the results of the questionnaire.

It is important to note that this questionnaire was intended as a method of public consultation, and not as a validated social science instrument. Further, it was intended as only one aspect of the LCO's consultations, which also included strategies to reach out to organizations and experts and focus groups targeted to several marginalized groups of older adults. The questionnaire provided an opportunity for input to individual older adults not targeted by the focus groups. As all but one of the focus groups took place in Toronto, outreach to rural Ontarians through the questionnaire was important. As well, realizing that the questionnaire would be unlikely to elicit many responses from some groups, such as racialized, LGBT and low-income older adults, the focus groups were targeted to gather perspectives from such groups. Due to a very positive response and support from the long-term care sector, the questionnaire was also an effective means of providing an opportunity to contribute for this group.

A copy of the distributed questionnaire is appended to this document. It included a mix of scored questions and open-ended queries, focussing on three areas: principles to guide laws, programs and policies; understanding the circumstances of older adults; and enforcing rights.

B. Who Participated?

In total, 292 questionnaires were completed and returned to the LCO. Some reflected the responses of multiple individuals. The following is a demographic break-down of the respondents.

Age					
Under 45	45-54	55-64	65-74	75-84	85 and over
–	2%	18%	29%	26%	25%

Gender: Female: 57% Male: 48%

Disability: Disability: 53% No Disability: 47%

Racialized: Yes: 4% No: 96%

Aboriginal identity: No respondents identified themselves as Aboriginal.

Sexual Identity

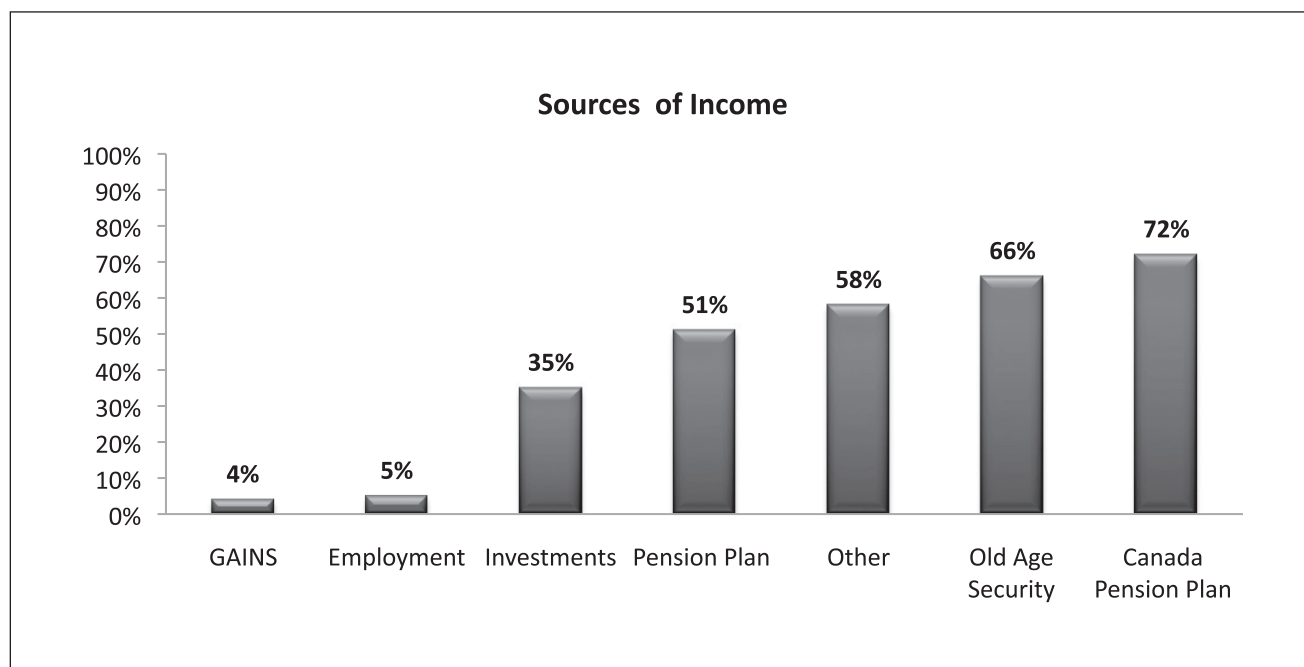
Heterosexual	Lesbian	Gay	Bisexual	Tran-sexual
98%	2%	0%	0%	0%

Living With

On my own	With a spouse or partner	With my children	With extended family	In a group setting
13%	27%	3%	1%	58%

Urban/Rural Residence: It was difficult to determine with accuracy the percentage of respondents living in urban or rural area. However, a review of the addresses provided by respondents indicated a broad distribution across the province.

In Canada for less than 10 years? Yes : 1% No: 99%



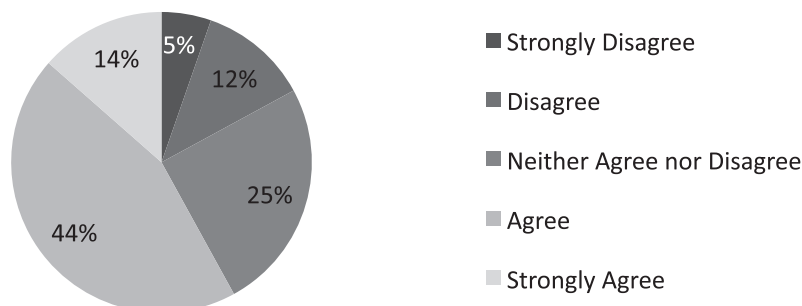
Of those participants who checked-off “other”, those sources of income came primarily from disability benefits, foreign country pensions, and financial assistance from family members.

Note: The results of the questions regarding race and sexual orientation should be interpreted with caution as many respondents did not answer the question, and some indicated an objection to the question.

C. Responses to the Questionnaire

1. Attitudes and Aging

My older age is viewed as a positive attribute by people that I encounter.

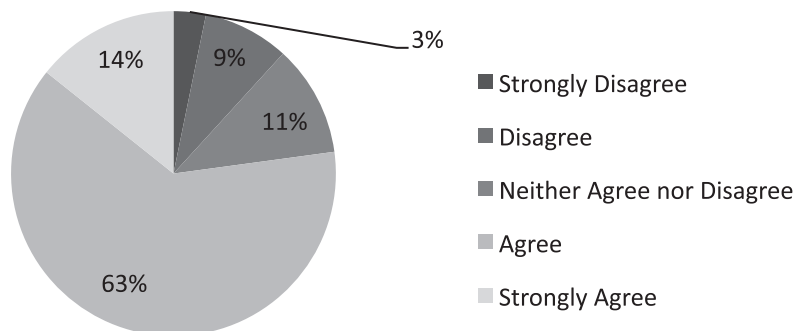


Of those participants who agreed with the above statement (58%), many gave reasons related to the experience and wisdom they have accumulated in their general lives, their professions, and their volunteer work. Many claimed that “older adults...are experts in their field” and that younger generations appreciate this “expertise”.

Of those participants who disagreed with the above statement (17%), the primary reasons related to experiences of discrimination, devaluation or disrespect based on age. The instances of discrimination adduced ranged from the requirement of more frequent drivers licence testing to employment discrimination, which was a frequent complaint. Many respondents complained of being laid off or denied employment due to their age. Respondents experienced such instances of devaluation as being overlooked or being belittled, usually during social interactions. For instance, one participant made the typical complaint that “I am overlooked, when there isn’t anything wrong with my brain.” Another noted, “I find it problematic when I see...people automatically addressing the younger person accompanying an older person.” Comments regarding disrespect emphasized the media’s portrayal of older adults as “silly, foolish people” rather than people of dignity and intellect. Others noted the over-emphasis on older adult’s social and medical needs, while “the independence and self sufficiency evinced in most of our lives is overlooked.” Many participants also commented on patronizing treatment, assumptions of incompetence, and being talked to “like I’m a four year old”.

Respondents emphasized the importance of using public education to address negative attitudes related to aging. “Recognize the discrimination in ageism. The courts and society have recognized racism, sexism, homophobia, and disability but not ageism” remarked one man. Participants often reflected negatively on common stereotypes of older adults as incompetent, useless or frail, as well as stereotypes that depict older adults as a needy cohort, sucking up resources and requiring constant attention and care. Some respondents complained that even their own children and loved ones applied such stereotypes to them. They vehemently disavowed these stereotypes, and insisted that media and legislators promote anti-ageism education - both for the general public, and particularly for professionals providing services to older adults.

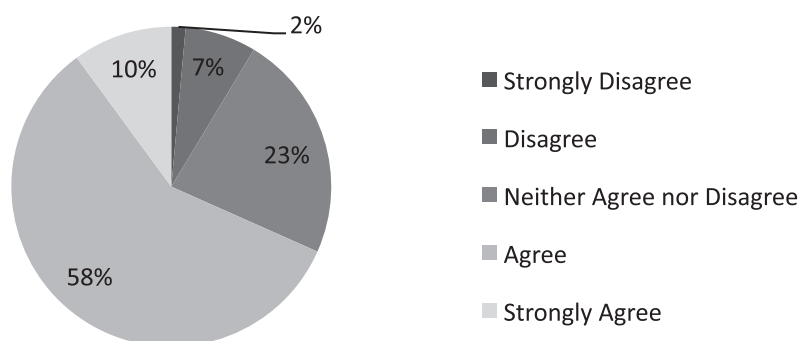
As an older person, I am usually treated as well as others when using public or private programs or services.



Positive comments about the above question emphasized the sensitivity and kindness of the public and service-workers toward older adults. Instances included the offering of seats on public transit, the giving of special assistance, the opening and holding of doors, and even the provision of “a little extra service” at banks and restaurants to older persons. Some participants also touted seniors’ discounts.

Negative comments about the above question focused on the perception that, as one ages, one receives less respect from store clerks, bank tellers and other service providers. Some respondents complained conversely that they had received patronizingly excessive assistance and special attention, leaving the older adult feeling demeaned and useless.

The public and private services and programs I use help me to achieve my goals as an older adult.



While the majority of respondents (68%) agreed with the above statement, their comments primarily centred on the lack of accessibility for people with mobility disabilities, both in public and private buildings and on public transport; lack of sufficient inclusion in the electoral process; and unclear or inaccessible information about services and programs.

Respondents particularly emphasized the difficulty of accessing services and programs, especially medical, commercial and financial programs, due to insufficient information (for example, doctor and nurse schedules), prohibitively complex information, or the incorrect assumption by those responsible for providing information that information commonly placed on the internet can be accessed by older adults. Many respondents complained of the

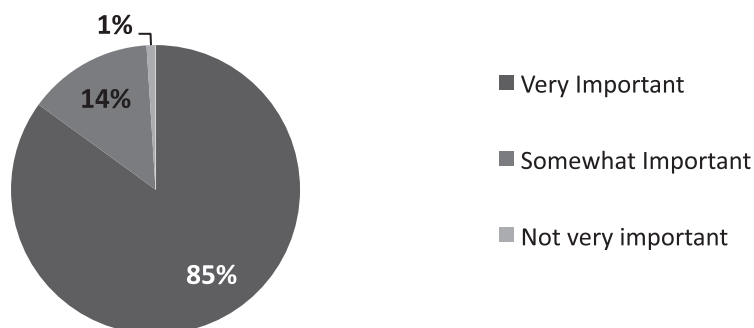
arduous task of navigating automated telephone services to gain information, or of attempting to converse with workers who lack clear communication skills. One respondent, summing up the general sentiment, described the process of trying to obtain information as “a long and torturous procedure and not for the faint of heart”.

2. Principles to Guide Laws, Programs and Policies

Participants were asked to rate the importance of the following six principles as very important, somewhat important, not very important or not at all important:

1. Respecting the dignity and worth of older persons;
2. Promoting autonomy and independence of older persons;
3. Enhancing participation and inclusion of older persons;
4. Recognizing the importance of security for older persons;
5. Recognizing the diversity and individuality of older persons; and
6. Understanding that older adults are members of the broader community.

The answers for each of the six principles were very similar and, as such, the results have been averaged in the graph below to illustrate the general trend (note: no participants indicated that any of the principles were “not at all important”):



Responses explaining why the above principles were ranked in this manner focused on two primary rationales. The first was that older adults are no different than other individuals, and as such, deserve to be treated in the same way as other members of society. Respondents also discussed the idea that older adults have contributed to society throughout their lives, and continue to do so in many ways, and should therefore be respected and included in a similar manner to younger generations. Additionally, respondents emphasized that, like any other group of people, older adults are diverse, and should not be “lumped into one category.” In fact one respondent noted that, “instead of getting more alike, as we age we continue to get very different”.

The second rationale was that the principles are important because consideration should be made for the particular needs and circumstances of older adults. These include awareness of ageism and faulty assumptions surrounding the competence of older adults. Additional considerations include elder abuse and exploitation, and isolation leading to loneliness and targeting by, for instance, “unscrupulous mailings and salespersons”. One participant, discussing the topic of lack of inclusion remarked, “I don’t want to be placed in the lobby with no interaction.” Some also highlighted

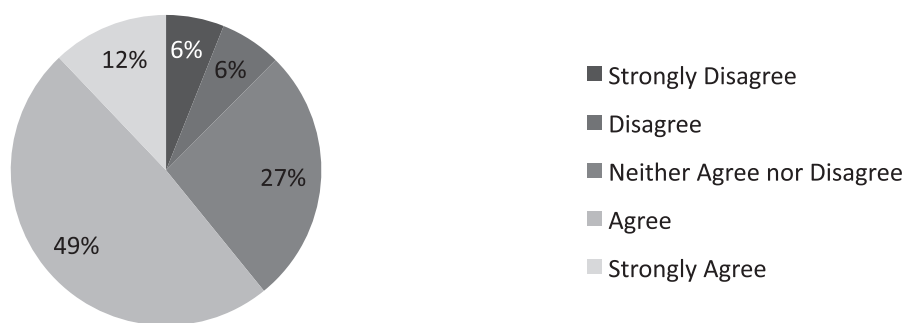
the sense of helplessness and institutionalization that occurs in group homes, for instance, “living in a nursing home I have all my faculties. However, I tend to become ‘one of the crowd’ - as if I could not think on my own”.

The comments responding to the open-ended questions placed a particular emphasis on the principle of participation and inclusion. Participants complained about the increased helplessness and voicelessness that comes with aging – particularly for those in congregate settings. “I feel issues and needs are somewhat ignored. We are treated like toys”, noted one nursing-home resident; another participant made the typical observation that “you are old so you just have to put up with things as they are”. In a similar vein, many participants emphasized the isolation of older adults due either to having already lost family and friends, or, as one participant aptly noted, being “removed from the general population, [and being put] either in ‘adult’ or ‘seniors’ residences and communities or in nursing homes & as such, [becoming] more easily forgotten by the public”. These concerns were voiced most strenuously by rural seniors and persons with disabilities. The fear of most participants that they will “fall below the radar” was evident, and was apparent in many of their demands that legislators, and the public at large, should actively incorporate older adults into the community, as well as into the decision-making processes that affect their lives. A common piece of advice on this topic was that legislators and younger generations should “keep in mind that they will, one day, be older persons themselves...and these laws [or lack thereof] will also affect them.”

Comments relating to security generally emphasized financial security. “A safe place to live is sometimes a luxury” noted one of several respondents whose primary concern was financial security. Given their fixed incomes, older adults feared running out of money, coming to depend on their children, being unable to afford health and care services, and being unable to live comfortably in their old age.

3. Understanding the Needs and Circumstances of Older Adults

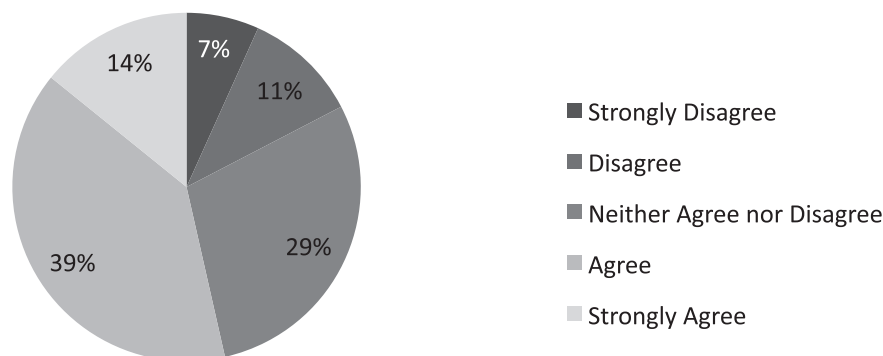
The programs and services that I use, and the rules and laws that I come into contact with take into account my circumstances as an older adult.



Comments about this question echoed those about the statement: “the public and private services and programs I use help me to achieve my goals as an older adult.” Respondents drew attention to a lack of wheelchair access in buildings, public transport, and roadways; a lack of information about various programs and services; and the lack of accessibility of political information and polling stations during elections.

The few positive comments noted the benefit of seniors’ discounts that increase access to programs and services.

Individuals administering programs and services that affect older persons have the skill and the knowledge regarding age-related issues to do their work effectively



Respondents had mixed responses with respect to the above question. It was often noted that some individuals administering programs are competent and effective while others are not, as is reflected in the large percentage (29%) who neither agree nor disagree.

Responses focused on the performance of doctors, care-workers, and staff of long-term care and retirement homes. Respondents complained that these people often lacked the knowledge and skills to respond to the needs and frustrations of older adults, particularly those who have various disabilities and special needs. A large number of comments noted that hospitals, home care services and congregate settings are chronically understaffed and therefore incapable of properly attending to their responsibilities. This also causes lengthy wait-times.

In addition to being technically incompetent, respondents complained that care workers demonstrated a lack of emotional sensitivity manifested in impatience, impoliteness and disinterestedness. A couple of comments noted that it would be better if some of the individuals administering older adult programs and services, or making laws pertaining to older adults were themselves older adults, as they might then better appreciate their circumstances.

What would you like legislators and policy makers to understand about older persons when they are making or implementing programs, services or laws?

There were several main responses to this question. A common remark was that there is a need for adequate and accessible (both physically and financially) transportation, particularly for persons with disabilities. One participant aptly remarked, "if you can't afford transportation, what value is the program being offered?"

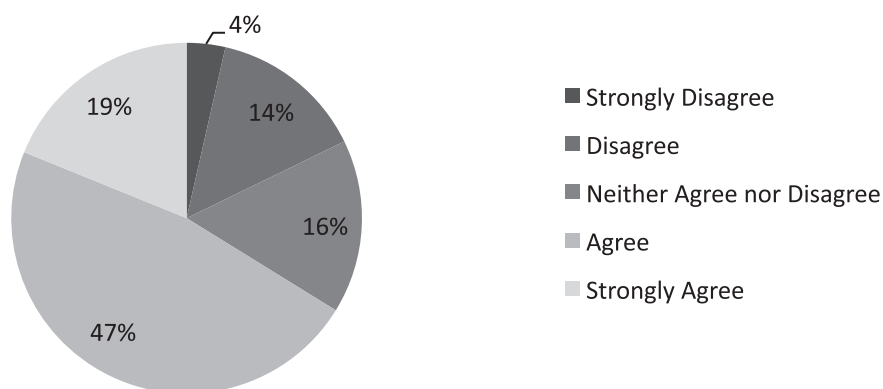
Another theme from the responses emphasizes the need to provide increased opportunities for older adults to participate in the community, including: discounts for community activities; allowing older persons to continue working if they are able to; and being very mindful of the fact that many older adults are isolated and may therefore "fall beneath the radar".

Respondents also emphasized a need to promote a shift in societal attitudes towards older persons, including recognizing ageism as a form of discrimination, and promoting more positive images of older persons as dignified, self-sufficient and competent individuals

A final key theme for this question was an emphasis on the need to integrate older adults into the legislative process. This includes the “need [for politicians] to visit long term care and retirement centres to see the conditions and situations for themselves before they make any decisions” and the “need to...have a committee of older adults for input prior to drawing up legislation”.

D. Enforcing Your Rights

I am well informed about my rights and the legal options available to me.



Respondents were frustrated about what they considered insufficient or overly complex information regarding their rights and legal options. They were frustrated also by their inability to obtain information over the internet, as well as the difficulty they experienced in obtaining information over the phone. For some, the problem is even more basic: they do not even “know the route to take to get the right person for assistance”. The telephone is clearly the primary means of communication for many older adults, and some participants were concerned about the difficulty of finding the right number to call to get information, navigating the automated systems, and then trying to explain their problems to impatient or incomprehensible agents. One frustrated respondent remarked, “how many buttons on the phone do you have to push to get the right person???”

Have you had an experience within the last five years where you felt your rights were being denied you?

Yes: 15% No: 85%

If you answered yes to the previous question, did you take steps to enforce your rights?

Yes: 71% No: 29%

If you answered yes to the previous question, was the experience a positive one?

Yes: 42% No: 58%

Those who answered “yes” to all three of the above questions did not go into detail about their experiences, but generally wrote something along the lines of, “I spoke to the person in authority and nothing happened.” One woman who lives in a nursing home explained that “issues and needs are just ignored; we are treated like toys”. No comments were provided by any of the respondents relating a positive experience of trying to exercise their rights.

What do you think is necessary for older adults to be able to enforce their rights?

The most common response to this question was “family and friends”. Other recurring responses included the suggestion of an ombudsman for older adults, and trustworthy doctors and lawyers. Other suggestions included a free senior’s hotline that can provide information and advice; an older adults’ newsletter; periodic inspections in congregate settings by an independent observer with powers of investigation; and “money, determination, and moxie”.

SURVEY QUESTIONNAIRE

The Law and Older Adults

ABOUT THE SURVEY

The Law Commission of Ontario (LCO) and our Project on the Law as it Affects Older Adults

The LCO works independently of government to recommend measures to make the law of Ontario more just and effective. In preparing our recommendations, we conduct research and public consultations.

The LCO has undertaken a project to improve the law as it affects older persons. We are developing a tool that government and other organizations that develop or implement laws and policies can use to help them understand how laws affect older persons and to be sure that the laws are effective and just for this group.

In developing this tool, we would like to hear directly from older adults.

What do we mean by “law”?

When we talk about the law, we include:

- Laws that specifically affect older people, like the special laws regarding seniors' drivers' licensing or prohibiting discrimination on the basis of age, or regulating nursing homes.
- Laws that apply to everyone, that might have different effects on older people than younger ones, like consumer protection or family law.
- Laws that create programs and services that older adults use, like seniors' housing or the GAINS income support program.

Protecting Your Privacy

The LCO will protect your privacy in compliance with the law.

The information that you provide to us through this questionnaire may be used by the LCO in preparing its public documents. For example, the LCO may use quotes from what you have written, or include your comments in paraphrased form. The LCO will not, however, use the information that you provide in any way that might identify you personally.

The LCO will keep hard copies of completed questionnaires in a safe space, and electronic data will be password protected.

This Survey Questionnaire

The information from this questionnaire will be used to help us understand what might make a law just and effective from the perspective of older adults. Your perspectives will help us develop our Final Report, which will be submitted to the government and broadly distributed.

This questionnaire may be filled out online. You may also download the form, and send a completed copy by mail, or telephone us and complete the survey over the telephone.

If You Have Questions

If you have questions about the LCO, this project or the questionnaire, please contact:

Lauren Bates, Staff Lawyer
 Telephone: (416) 650-8100
 Toll-Free: 1-866 – 950-8406
 TTY: 1-877-650-8082
 E-mail: lbates@lco-cdo.org

YOUR CONTACT INFORMATION

Would you like to be added to our mailing list for this project?

- ☐ Yes, please add me to your mailing list
☐ No, please do not contact me

If you would like to be added to our mailing list, please provide us with your contact information:

Name:

Telephone Number (optional):

Address :

E-mail address:

SURVEY QUESTIONS

Please note: You need not answer all the questions below if you do not have comments on all of the issues we have identified.

Attitudes and Aging

The purpose of the LCO's project is to help make sure that the law is fair, effective and positive for older persons. In thinking about what we want the law to achieve, it is helpful to start by thinking about how things currently are for older persons. To help us understand this, please answer the following questions:

My older age is viewed as a positive attribute by people that I encounter.

- ☐ Strongly disagree
☐ Disagree
☐ Neither agree nor disagree
☐ Agree
☐ Strongly agree

As an older person, I am usually treated as well as others when using public or private programs or services (such as services provided by any level of government, non-profit service agencies, or for-profit businesses).

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither agree nor disagree
- ☐ Agree
- ☐ Strongly agree

Have you ever been discriminated against because of your older age?

- ☐ Yes
- ☐ No

The public and private services and programs I use help me to achieve my goals as an older adult.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither agree nor disagree
- ☐ Agree
- ☐ Strongly agree

Tell us about an experience where your older age has affected how you have been treated, either positively or negatively.

Please feel free to add more detail or provide examples related to the questions above.

Principles to Guide Laws, Programs and Policies

The LCO is proposing that laws, programs and policies be guided by a set of six principles. Please rate how important you think each of the following principles are for ensuring that laws, programs and policies that affect older persons are fair and effective.

Respect for the dignity and worth of older persons

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Promoting autonomy and independence of older persons

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Enhancing participation and inclusion of older persons

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Recognizing the importance of security for older persons

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Recognizing the diversity and individuality of older persons

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Understanding that older adults are members of the broader community

- ☐ Very important
- ☐ Somewhat important
- ☐ Not very important
- ☐ Not at all important

Please feel free to tell us why you rated any of the principles in the way that you did.

Are there other principles that should be included? What are they?

Understanding the Needs and Circumstances Of Older Adults

While many ways older adults are just like everyone else, sometimes they may have needs or circumstances that are unique. If laws or policies don't take these differences into account, the law may not be just or effective.

The programs and services that I use, and the rules and laws that I come into contact with take into account my circumstances as an older adult.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither agree nor disagree

- ☐ Agree
- ☐ Strongly agree

Individuals administering programs and services that affect older persons have the skill and the knowledge regarding age-related issues to do their work effectively

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither agree nor disagree
- ☐ Agree
- ☐ Strongly agree

Please feel free to add more detail or provide examples related to the questions above.

What would you like legislators and policy makers to understand about older persons when they are making or implementing programs, services or laws?

Enforcing Your Rights

Sometimes it may be necessary to take steps to assert your legal rights. For example, someone may have discriminated against you, or you may have been denied access to a government program that you believe you are entitled to. Sometimes you may have to respond to legal issues, such as if you are involved in a family law dispute. Enforcing your rights might involve getting a lawyer and going to a court or tribunal. It might also involve contacting a government office for help, or appealing a decision by a government office.

I am well informed about my rights and the legal options available to me.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Neither agree nor disagree
- ☐ Agree
- ☐ Strongly agree

Have you had an experience within the last five years where you felt that your rights were being denied you?

- ☐ Yes
- ☐ No

If you answered yes to the previous question, did you take steps to enforce your rights?

- ☐ Yes
- ☐ No

If you answered yes to the previous question, was the experience a positive one?

- ☐ Yes
- ☐ No

Please feel free to add more detail or provide examples related to the questions above.

What do you think is necessary for older adults to be able to enforce their rights?

Other

Is there anything else that you would like to tell us?

DEMOGRAPHIC INFORMATION

The LCO would like to gather some demographic information about you. This will help us to better understand the diverse experiences of older persons. It will also help us to ensure that we are hearing from older people with a range of experiences and circumstances.

Please note, however, that completion of this section of the survey is **completely voluntary**. If you choose not to complete any or all of the questions in this section, you may still submit the general questions above on your experiences with the law as an older person.

1. What is your age?

- ☐ Under age 45
- ☐ Age 45 – 54
- ☐ Age 55 – 64
- ☐ Age 65-74
- ☐ Age 75 – 84
- ☐ Age 85 or older

2. Are you a person with a disability or disabilities?

- ☐ Yes
☐ No

Please identify your disability or disabilities: _____

3. What is your gender? _____
4. Do you consider yourself a racialized person? If so, how do you self-identify?
5. Do you identify as an Aboriginal person?

If so, with which Aboriginal nation(s) or community(ies)

do you identify? _____ Do you live on or off-reserve? _____

6. How do you self-identify with respect to your sexual orientation?

7. With whom do you live? Please check all that apply:

- ☐ On my own
☐ With a spouse or partner
☐ With my children
☐ With extended family
☐ In a group setting (e.g., a retirement home)
☐ Other _____

8. Have you been in Canada for less than 10 years?

- ☐ Yes
☐ No

If yes, how many years have you been in Canada? _____

9. What are your sources of income? Please check all that apply.

- ☐ Employment
☐ Canada Pension Plan
☐ Old Age Security
☐ Ontario Guaranteed Annual Income System (GAINS)
☐ Investments
☐ Pension Plan
☐ Other _____

10. Where do you live? _____

11. Is there anything else that you would like to tell us about yourself?

Thank you very much for sharing your information with us, and for being a part of the law reform process.

How to submit the questionnaire:

1.) Mail

Law Commission of Ontario
276 York Lanes, York University
4700 Keele Street
Toronto, ON M3J 1P3

2.) Fax

416-650-8418

3.) E-mail

arodrigues@lco-cdo.org

ENDNOTES

- ¹ Martin Turcotte and Grant Schellenberg, *A Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2007) at 11, online: <http://www.statcan.gc.ca/pub/89-519-x/89-519-x2006001-eng.pdf> [Turcotte and Schellenberg]. Further information on the demographic issues may be found in Ch. II.C.1 of this Report.
- ² Special Senate Committee on Aging, *Final Report, Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009) at 5, online: <http://www.parl.gc.ca/Content/SEN/Committee/402/agei/rep/AgingFinalReport-e.pdf> [Senate Committee].
- ³ Federal/Provincial/Territorial Committee of Officials for the Federal/Provincial/Territorial Ministers Responsible for Seniors, *Seniors' Policy Handbook: A Guide for Developing and Evaluating Policies and Programs for Seniors* (June 2009), at 3, online: <http://www.seniors.alberta.ca/seniors/docs/SeniorsPolicyHandbook.pdf> [Seniors' Policy Handbook].
- ⁴ For information on this project, please visit the LCO website, online: <http://www.lco-cdo.org/en/content/persons-disabilities>.
- ⁵ This Paper may be found online: <http://www.lco-cdo.org/en/content/older-adults-pre-study-consultation-paper>.
- ⁶ This Paper may be found online: <http://www.lco-cdo.org/en/older-adults-consultation-paper>.
- ⁷ Federal/Provincial/Territorial Ministers Responsible for Seniors, *National Framework on Aging* (Minister of Public Works and Government Services Canada: March 1998) Quebec supported the Vision and Principles, but intended to assume full responsibility for the entire range of activities relating to health and social services, and so did not participate further in the development of the NFA, online: http://www.phac-aspc.gc.ca/seniors-aines/nfa-cnv/nfaguide1_e.htm [NFA].
- ⁸ United Nations, *Principles for Older Persons*, G.A. Resolution 46/91 [IPOP].
- ⁹ United Nations, *Madrid International Plan of Action on Ageing, Report of the Second World Assembly on Ageing* (April 2002), online: <http://www.un-ngls.org/orf/pdf/MIPAA.pdf> [MIPAA].
- ¹⁰ Senate Committee, note 2.
- ¹¹ Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: 2001), online: http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL [Time for Action].
- ¹² Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age* (Toronto: 2007), online: www.ohrc.on.ca/en/resources/Policies/agepolicyen [Policy on Discrimination].
- ¹³ Information about ACE's mandate and activities can be found online at www.advocacycentreelderly.org.
- ¹⁴ CCEL's Reports and other publications can be accessed online at www.bcli.org/ccel.
- ¹⁵ The HEIA Template and Workbook can be accessed online at <http://www.health.gov.on.ca/en/pro/programs/heia/tool.aspx>. HEIA is intended for use across the health system. As of fall 2011, all 14 LHINs had received training on HEIA. Training has also been provided to MOHLTC staff.
- ¹⁶ The materials related to the Law Commission of Canada's project on Law and Relations Between Generations can be found online: http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12_06/www.lcc.gc.ca/research_project/age_matter-en.asp. The project was left uncompleted with the demise of the LCC. The reports of the Nova Scotia Law Reform Commission can be found online: <http://www.lawreform.ns.ca/introduction.htm>. The 2008 report of the Western Conference of Law Reform Agencies on enduring powers of attorney may be found on the website of the Alberta Law Reform Institute, online: <http://www.law.ualberta.ca/alri/docs/WCLRA%20epa%20fr.pdf>, as well as on the websites of the other western law reform agencies.
- ¹⁷ Available online at www.lco-cdo.org/strategic-plan.
- ¹⁸ Penny MacCourt, *Promoting Seniors' Wellbeing: A Seniors' Mental Health Policy Lens Toolkit* (Victoria, B.C.: British Columbia Psychogeriatric Association, 2008) and Prevention of Elder Abuse Working Group, *Prevention of Elder Abuse Policy and Program Lens* (Ontario Seniors' Secretariat and the Elder Health Coalition, 2008). A full description of the *Seniors' Mental Health Policy Lens* and the principles and methods through which was established may be found in P. MacCourt and H. Tuokko, "Development of a *Seniors' Mental Health Policy Lens*" in *Canadian Journal of Community Mental Health* (2005) Vol. 24, No. 2, Fall. Both of these documents, as well as many other helpful policy lens resources relevant to older adults may be found online at www.seniorspolicylens.ca.
- ¹⁹ For a brief history of elder law in the United States, see Allen Bogutz, "Elder Law: A Personal Perspective" in Israel Doron, ed., *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer-Verlag Berlin Heidelberg, 2009) at 1.
- ²⁰ For a brief overview of the current state of American elder law, see Nina A. Kohn, "The Lawyer's Role in Fostering An Elder Rights Movement", *William Mitchell Law Review*, (2010) Vol 37:1, 49, at 64-66 [Kohn, Elder Rights].
- ²¹ For a valuable recent compendium that aims to build towards a theoretical approach to elder law, see Israel Doron, ed., *Theories of Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg: Springer-Verlag Berlin Heidelberg, 2009).
- ²² A lengthy discussion of the development of the social model in the context of the disability rights movement may be found in the LCO's initial paper for its project on the law as it affects persons with disabilities: Law Commission of Ontario, *Preliminary Consultation Paper: Approaches to Defining Disability*

- (June 2009) at 26 and following, online: <http://www.lco-cdo.org/en/disabilities-threshold-paper> [Defining Disability].
- ²³ Thomas Humphrey Marshall, *Class, Citizenship and Social Development* (Westport: Greenwood Press, 1964) at 84. Marshall's analysis has been criticized as not recognizing that the claim to citizenship by some people has been based on the exclusion of others. See C. Lynn Smith, "Is Citizenship a Gendered Concept?" in Alan Cairns, et al., eds., *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal and Kingston: McGill-Queen's University Press, 1999) 137 and Barbara L. Marshall, *Engendering Modernity: Feminism, Social Theory and Social Change* (Boston: Northeastern University Press, 1994).
- ²⁴ See Alan Cairns "The Fragmentation of Canadian Citizenship" in Douglas Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart Inc, 1995) at 157 – 185.
- ²⁵ Michael Prince, *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009) at 17 and following.
- ²⁶ "Making the Shift to a Rights-Based Approach" (Plenary Panel at the 2010 Canadian Conference on Elder Law, 30 October 2010) [unpublished]. Also see Kohn, *Elder Rights*, note 20.
- ²⁷ Centre for Universal Design, *Universal Design Principles* online: http://www.ncsu.edu/www/ncsu/design/sod5/cud/about_ud/about_ud.htm.
- ²⁸ See Irving Zola, "Disability Statistics: What We Count and What It Tells Us: A Personal and Political Analysis" (1993) 4 *Journal of Disability Policy Studies* 9 at 24; see also Richard Scotch and Kay Schriner, "Disability as Human Variation: Implications for Policy" (1997) 549 *Annals of the American Academy of Political and Social Science* 148 at 154 [Scotch and Shriner]; see also Jerome Bickenbach et al., "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48 *Social Science and Medicine* 1173 at 1182 [Bickenbach]; see also Douglas Surtees, "What Can Elder Law Learn from Disability Law?" in Doron, ed., note 21, 93 at 101 [Surtees].
- ²⁹ Scotch and Schriner, note above at 154; Surtees, note above at 99 citing Michael Stein, "Disability Human Rights" (2007) 95 Cal. L. Rev. 75 at 75 and 86.
- ³⁰ Irving Zola, "Toward the Necessary Universalizing of a Disability Policy" (1989) 67 *The Milbank Quarterly* 401 at 410
- ³¹ Scotch and Schriner, note 28 at 158; Bickenbach, note 28 at 1183.
- ³² Surtees, note 28.
- ³³ This is acknowledged in the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 2000), online: <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>, [Policy and Guidelines on Disability and the Duty to Accommodate] which proposes a three step approach to ensuring non-discriminatory employment, housing and services: first universal design to prevent barriers; then, barrier removal to identify and remove existing barriers; and finally, individual accommodation to address remaining needs.
- ³⁴ For an overview of what such an approach might mean, see Kim Dayton, "A Feminist Approach to Elder Law", in Doron, ed., note 21 at 46 [Dayton].
- ³⁵ World Health Organization, *Active Ageing: A Policy Framework, A Contribution of the World Health Organization to the Second United Nations World Assembly on Ageing* (April 2002) at 12-13, online: <http://www.who.int/ageing/publications/active/en/index.html> [Active Ageing Policy Framework].
- ³⁶ NFA, note 7.
- ³⁷ A very helpful framework for understanding and applying a life course analysis may be found in Policy Research Initiative, *A Life Course Approach to Social Policy Analysis, A Proposed Framework* (August 2004).
- ³⁸ Gender and aging is further discussed in Chapter II.C.2.
- ³⁹ The "Third Age" is generally considered to refer to the span between retirement and the advent of age-imposed limitations, and so includes those who are retired from work, in reasonably good health and socially engaged. The "Fourth Age" includes those individuals of advanced age who are experiencing an increased likelihood of declining health, impairment and end of life. See Charmaine Spencer, *Ageism and the Law: Emerging Concepts and Practices in Housing and Health* (Law Commission of Ontario: 2009) at 3, online: <http://www.ontla.on.ca/library/repository/mon/24009/304762.pdf> [Spencer].
- ⁴⁰ Turcotte and Schellenberg, note 1, at 8.
- ⁴¹ This approach was adopted in the Special Senate Committee on Aging, *First Interim Report: Embracing the Challenge of Aging* (Ottawa: Senate of Canada, March 2007) at 11. However, the Special Senate Committee's *Final Report*, note 2, rejected this approach, noting the diversity of the aging experience, and the risk of defining the experience of aging solely in terms of the experiences of the "frail elderly" or of reducing the "frail elderly" to their "frailty".
- ⁴² See, for example, Bill Bytheway, "Ageism and Age Categorization" (2005) 61 *Journal of Social Issues* 361 at 369 and following [Bytheway].
- ⁴³ Law Commission of Canada, *Does Age Matter? Law and Relations Between Generations*, (Ottawa: 2004) online: http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/pdf/does_age_matter.pdf. This project was not completed due to the defunding of the Law Commission of Canada in 2006 [Law Commission of Canada].
- ⁴⁴ *Policy on Discrimination*, note 12 at section 1.
- ⁴⁵ See especially the discussion of the reasons of the Supreme

Court in the mandatory retirement cases of *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [McKinney] and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [Stoffman].

⁴⁶ Bytheway, note 42.

⁴⁷ Law Commission of Canada, note 42.

⁴⁸ The term “inclusive design” was initially developed in the context of the built environment and persons with disabilities, but has since expanded to include the concept of “design for all”, and to apply to policy and program development, as well as the built environment. The Supreme Court of Canada adopted the principle of inclusive design in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [Meiorin], stating at para. 38 that: Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible.

⁴⁹ A helpful survey of the issues associated with the use of age-related categories is provided in Bytheway, note 34.

⁵⁰ For an exploration of some of these issues, see Kohn, *Elder Rights*, note 20 at 49.

⁵¹ Christie Ford, “Bright Lines: Status, Recognition and the Elusive Nature of Ageing” (1996) 2 *Appeal: Review of Current Law and Law Reform* 4, at para. 3.

⁵² Turcotte and Schellenberg, note 1 at 8.

⁵³ *Policy on Discrimination*, note 12 at section 2.2.

⁵⁴ This distinction is highlighted in Bytheway, note 42 at 362.

⁵⁵ Special Senate Committee, note 2 at 3.

⁵⁶ Turcotte and Schellenberg, note 1 at 11.

⁵⁷ Turcotte and Schellenberg, note 1 at 13.

⁵⁸ Turcotte and Schellenberg, note 1 at 107 – 110.

⁵⁹ Turcotte and Schellenberg, note 1 at 212-218.

⁶⁰ Turcotte and Schellenberg, note 1 at 115.

⁶¹ Turcotte and Schellenberg, note 1 at 116.

⁶² Turcotte and Schellenberg, note 1 at 116.

⁶³ In 2005, only 32.5 per cent of workers were covered by an employer or union registered pension plan: Statistics Canada, *Proportion of labour force and paid workers covered by a registered pension plan, Pension Plans in Canada Survey* (Ottawa: Statistics Canada, June 2007).

⁶⁴ The poll contacted 2000 Canadians age 18 years and older, online: [http:// www.decima.com/en](http://www.decima.com/en).

⁶⁵ Turcotte and Schellenberg, note 1 at 117-118.

⁶⁶ Turcotte and Schellenberg, note 1 at 117-118. Turcotte and

Schellenberg note that the share of employed men aged 55 to 64 working part-time increased from 3.7% to 10.0% between 1976 and 1996, while the share of employed men aged 65 or older doing so increased from 27.2% to 36.3%. Since 1996, the incidence of part-time employment among older men has remained quite stable. The incidence of part-time employment among men aged 25 to 54 also increased between the mid-1970s and early 1990s, but has never exceeded 5%. For women, the incidence of part-time employment among women aged 55 to 64 has remained since the early 1980s within a range of about 29% to 33%, while among women aged 65 or older the incidence of part-time employment has remained within a range of about 55 to 60%.

⁶⁷ Human Resources and Skills Development Canada, *Supporting and Engaging Older Workers in the New Economy* (Ottawa: Expert Panel on Older Workers, 2008) at 6, online: http://www.rhdcc-hrsdc.gc.ca/eng/publications_resources/Imp/eow/2008/page19.shtml [Supporting and Engaging].

⁶⁸ *Supporting and Engaging*, note above at 10.

⁶⁹ *Supporting and Engaging*, note 67 at 10.

⁷⁰ *Time for Action*, note 11 at 41-42.

⁷¹ Turcotte and Schellenberg, note 1 at 64.

⁷² The rate of low income before taxes was about 18 per cent for those under 18, and 15.5 per cent for those 18 to 64. However, the picture changes if one looks to low income after taxes, where the comparator figures are approximately 12 per cent for those under age 64: Turcotte and Schellenberg, note 1 at 95.

⁷³ Andre Bernard and Chris Li, *Death of a Spouse: The Impact on Income for Senior Men and Women* (Ottawa: Statistics Canada, July 2006); and Chris Li, *Widowhood: Consequences on Income for Senior Women* (Ottawa: Statistics Canada, July 2004).

⁷⁴ Turcotte and Schellenberg, note 1 at 95.

⁷⁵ Turcotte and Schellenberg, note 1 at 69.

⁷⁶ Turcotte and Schellenberg, note 1 at 66.

⁷⁷ See Konrad Yakabuski, “Retirement Lost”, *The Globe and Mail* (October 24, 2009) at B1.

⁷⁸ Alternative Planning Group, “Citizenship Matters: Re-examining Income (In)Security of Immigrant Seniors”, *Wellesley Institute: Community Perspectives Series*, (Wellesley Institute: May 2009), online: <http://wellesleyinstitute.com/files/APG%20report%20final.pdf>.

⁷⁹ Armine Yalnizyan, “The Problem of Poverty Post-Recession” (Canadian Centre for Policy Alternatives: August 2010) at 6-7, online: <http://www.policyalternatives.ca/publications/reports/problem-poverty-post-recession>.

⁸⁰ Acrobat Research, *National Survey on Aging in Place* (Living Assistance Services: December 2009) online: www.laservices.ca.

- ⁸¹ For example, the Alzheimer's Society, in its recently released policy paper on the implications of the increasing incidence of dementia associated with an aging society, recommends as one option providing increased support for informal caregivers to delay transition into long term care facilities and reduce the economic burden of dementia: Alzheimer's Society, *Rising Tide: The Impact of Dementia on Canadian Society* (2010), online: www.alzheimers.ca [Rising Tide].
- ⁸² Jane Lin, *The Housing Transitions of Seniors, Canadian Social Trends* (Statistics Canada: Winter 2005) at 22, online: <http://www.statcan.gc.ca/pub/11-008-x/2005003/article/8969-eng.pdf>; Helen Trottier *et al.*, *Living at Home or in an Institution: What Makes the Difference for Seniors?* (Statistics Canada: Spring 2000) at 49, online: <http://www.statcan.gc.ca/studies-etudes/82-003/archive/2000/5067-eng.pdf>; Kelly Cranswick, *Help Close at Hand: Relocating to Give or Receive Care* (Statistics Canada: Winter 1999) at 11, online: <http://www.statcan.gc.ca/pub/11-008-x/11-008-x1999003-eng.pdf>.
- ⁸³ Turcotte and Schellenberg, note 1 at 16.
- ⁸⁴ For a compendium of research on these issues, see B.C. Network for Aging Research, *Aging Well in Northern, Rural and Remote Communities: Conference Report* (July 2008) online: http://www.bcnar.ca/sites/default/files/events/Northern%20Aging%20Well_Conference%20Report.pdf.
- ⁸⁵ Turcotte and Schellenberg, note 1 at 138.
- ⁸⁶ The Home Adaptations for Seniors' Independence (HASI) program offers limited financial assistance (a forgivable loan of up to \$3,500) for minor home adaptations for qualifying low-income seniors to enable them to perform the activities of daily living safely and independently, online: http://www.cmhc-schl.gc.ca/en/co/prfinas/prfinas_004.cfm. The Residential Rehabilitation Assistance Program for Persons with Disabilities provides forgivable loans in variable amounts up to a maximum of \$36,000 to homeowners or landlords for more significant accessibility modifications, such as ramps, chair lifts, and height adjustments to counter tops, online: http://www.cmhc-schl.gc.ca/en/co/prfinas/prfinas_003.cfm.
- ⁸⁷ For a discussion of the nature of reverse mortgages, potential concerns and law reform options, see Canadian Centre for Elder Law, *Consultation Paper on Reverse Mortgages* (Vancouver: 2005), online: <http://www.bcli.org/bclrg/publications/consultation-paper-reverse-mortgages>.
- ⁸⁸ *Home Care and Community Services Act*, 1994, S.O.1994, c. 26 [HCCSA].
- ⁸⁹ Advocacy Centre for the Elderly, *Submission to the Law Commission of Ontario Concerning the Law as it Affects Older Adults* (July 2008) online: http://www.advocacycentreelderly.org/appimages/file/Law_as_it_Affects_Older_Adults_July_2008.pdf [ACE Submission].
- ⁹⁰ See the discussion in Special Senate Committee on Aging, *Second Interim Report: Issues and Options for an Aging Population* (Ottawa: March 2008) at 39 – 44.
- ⁹¹ Centre for Equality Rights in Accommodation, *Human Rights in Housing in Canada: An Advocate's Guide* (May 2008) online: <http://www.equalityrights.org/cher/National%20Guide%20English%20Final.pdf> at 21.
- ⁹² For an overview of the circumstances of older renters in Ontario see Spencer, note 39. For legislative provisions prohibitions on discrimination in rental housing, see the Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 2 [Code] and the *Residential Tenancies Act*, S.O. 2006, c. 17, s. 10 [RTA].
- ⁹³ An overview of social housing in Ontario is provided by Social Housing Services Corporation, *Ontario Social Housing Primer* (December 2008), online: <http://www.shscorp.ca/shscnew/content/rc/doc/shprimer.pdf>.
- ⁹⁴ The Canada Mortgage and Housing Corporation's 2010 *Seniors Housing Report* (Ontario: 2010) places the number of retirement home spaces in Ontario at 42,680. Online: <https://www03.cmhc-schl.gc.ca/catalog/home.cfm?lang=en&id=1296247116893>.
- ⁹⁵ For a national review of the landscape around assisted or supported living, see Canadian Centre for Elder Law, *Discussion Paper on Assisted Living: Past, Present and Future Trends in Canada* (Vancouver: December 2008) online: http://www.bcli.org/sites/default/files/2008-10-31_Assisted_Living.pdf.
- ⁹⁶ See for example Ontario, Legislative Assembly, *Official Report of Debates* (Hansard) (14 April 2010) at 612 (John O'Toole) and at 616 (Peter Kormos).
- ⁹⁷ Advocacy Centre for the Elderly, *Submission to the Ontario Seniors' Secretariat Concerning Ontario's Consultation on Regulating the Retirement Home Industry* (March 2007) [Retirement Home Industry]. ACE expressed a number of concerns regarding serious issues in some sectors of the retirement industry, including:
- failure to follow proper procedures for the storage and distribution of medication;
 - improper evictions of older persons following a health crisis that results in hospitalization;
 - failure to take appropriate steps to protect residents from assaults by other residents or to address such assaults once they have occurred; and
 - refusal to accommodate the needs of residents with mobility impairments who use walkers or wheelchairs.
- ⁹⁸ *Retirement Homes Act*, 2010, S.O. 2010, c. 11 [Retirement Homes Act]. As of the writing of this Report, licensing of Ontario retirement homes is underway. All homes must apply for a license by July 1, 2012. This initial licensing process has identified a number of retirement homes that are not meeting minimum standards, and are under review by the Retirement Homes Regulatory Authority: Moira Welsh, "Licensing of

- Ontario retirement homes begins", *Toronto Star* (April 16, 2012), online: www.thestar.com/news/canada/article/1162158--licensing-of-ontario-retirement-homes-begins.
- ⁹⁹ Turcotte and Schellenberg, note 1 at 138.
- ¹⁰⁰ *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8 [LTCHA].
- ¹⁰¹ *Rising Tide*, note 81 at 20.
- ¹⁰² LTCHA, note 100, s. 6(3).
- ¹⁰³ LTCHA, note 100, O.Reg. 79/10, ss. 165 and 173.
- ¹⁰⁴ LTCHA, note 100, s. 39 (3), O.Reg. 79/10 ss. 198-206.
- ¹⁰⁵ The access to justice issues for older adults living in institutional settings will be considered throughout this Report. An invaluable resource on the barriers in accessing the law faced by residents of institutions is the report produced by the Advocacy Centre for the Elderly, *Congregate Living and the Law as it Affects Older Adults, Research Paper for the Law Commission of Ontario* (Law Commission of Ontario: August 2009), online: http://www.lco-cdo.org/en/older_adults [ACE, Congregate Living].
- ¹⁰⁶ *Active Ageing Policy Framework*, note 35 at 28.
- ¹⁰⁷ Kathryn Wilkins, *Social Support and Mortality in Seniors*, (Ottawa: Health Statistics Division, 2003) at 21, online: <http://www.statcan.gc.ca/studies-etudes/82-003/archive/2003/6598-eng.pdf>.
- ¹⁰⁸ Figures are from Turcotte and Schellenberg, note 1 at 145.
- ¹⁰⁹ Cited in Senate Committee, note 2 at 74.
- ¹¹⁰ Senate Committee, note 2 at 76.
- ¹¹¹ Turcotte and Schellenberg, note 1 at 138.
- ¹¹² Figures are from Turcotte and Schellenberg, note 1 at 138.
- ¹¹³ Turcotte and Schellenberg, note 1 at 141 - 142.
- ¹¹⁴ Figures are from Turcotte and Schellenberg, note 1 at 143-145.
- ¹¹⁵ Figures are from Turcotte and Schellenberg, note 1 at 147 and 151.
- ¹¹⁶ *Substitute Decisions Act*, S.O. 1992, c. 30 [SDA].
- ¹¹⁷ *Health Care Consent Act*, S.O. 1996, c.2, Sched. A [HCCA].
- ¹¹⁸ Turcotte and Schellenberg, note 1 at 155.
- ¹¹⁹ Turcotte and Schellenberg, note 1 at 166.
- ¹²⁰ *Active Ageing Policy Framework*, note 35 at 37.
- ¹²¹ *Time for Action*, note 11 at 73-76; Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (Toronto: 2007), online: http://www.ohrc.on.ca/en/resources/discussion_consultation/famconsult [Cost of Caring].
- ¹²² Senate Committee, note 2 at 118.
- ¹²³ Turcotte and Schellenberg, note 1 at 153.
- ¹²⁴ MIPAA, note 9 at para. 106
- ¹²⁵ These statistics are drawn from Kathy AuCoin, "Family Violence Against Seniors" in Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile 2005* (National Clearinghouse on Family Violence: 2005) at 79-80. Also see Mia Dauvergne, "Family Violence Against Seniors", *Canadian Social Trends* (Spring 2003) 10.
- ¹²⁶ Turcotte and Schellenberg, note 1 at 170-174.
- ¹²⁷ Turcotte and Schellenberg, note 1 at 174-178.
- ¹²⁸ Turcotte and Schellenberg, note 1 at pages 178-183.
- ¹²⁹ Turcotte and Schellenberg, note 1 at 13.
- ¹³⁰ Dayton, note 34 at 46.
- ¹³¹ In 2003, while almost 70 per cent of men over the age of 65 receive income from a private pension plan, only 53 per cent of women of the same age do so (M. Turcotte and G. Schellenberg, note 1 at 66). 95 per cent of senior men receive CPP/QPP benefits, while 85 per cent of senior women do so (M. Turcotte and G. Schellenberg, note 1 at page 94). Women receive significantly lower levels of CPP/QPP benefits (\$4,900 on average versus \$6,500 on average) (M. Turcotte and G. Schellenberg, note 1 at 66).
- ¹³² Turcotte and Schellenberg, note 1 at 107.
- ¹³³ MIPAA, note 9 at para. 112.
- ¹³⁴ See, for example, *Active Ageing Policy Framework*, note 35 and MIPAA, note 9.
- ¹³⁵ Turcotte and Schellenberg, note 1 at 23.
- ¹³⁶ For an overview, see Turcotte and Schellenberg, note 1, Chapter 7 "Immigrant Seniors" at 271.
- ¹³⁷ LCO Focus Group, Newcomer Older Adults, October 20, 2011.
- ¹³⁸ Turcotte and Schellenberg, note 1 at 23.
- ¹³⁹ Turcotte and Schellenberg, note 1 at 24.
- ¹⁴⁰ Fédération des aînés et des retraités francophones de l'Ontario (FAFO), *Consultation de la Commission du Droit de l'Ontario concernant les modifications à faire à la Loi de l'Ontario pour tenir mieux compte des personnes matures et âgées* (2008) [FAFO].
- ¹⁴¹ Office of Francophone Affairs, *Statistical Profile – Francophone Seniors in Ontario* (1999), online : <http://www.ofa.gov.on.ca/en/franco-stats-1999seniors.html>.
- ¹⁴² *French Language Services Act*, R.S.O. 1990, c. F.32.
- ¹⁴³ FAFO, note 124 :We will need this professionally translated from French to English.
- ¹⁴⁴ For an overview, see Neena Chappell, Lynn McDonald and Michael Stones, "Aging and Ethnicity" in *Aging in Contemporary Canada*, 2nd ed. (Toronto, Ontario: Pearson Education Canada, 2008) at 136 – 166.
- ¹⁴⁵ Turcotte and Schellenberg, note 1 at 25.
- ¹⁴⁶ Lynn McDonald, "The Economic Security of Minorities in Canada" (Toronto: Canadian Sociology and Anthropology Association, 2006).
- ¹⁴⁷ *Time for Action*, note 11 at 28.

- ¹⁴⁸ Interview with Margaret Parsons, Executive Director of the African Canadian Legal Clinic, by the LCO (September 16, 2008) [Parsons]; interview with Avvy Go, Metro Toronto Chinese and South Asian Legal Clinic, by the LCO (August 28, 2008) [Avvy Go].
- ¹⁴⁹ For population statistics, see Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census*, Catalogue no. 97-558-XIE (Ottawa: Minister of Industry, 2008) [Aboriginal Peoples Census 2006] at 14, online: <http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/index-eng.cfm>. For information on health conditions for Aboriginal older adults, see Rodolfo Stavenhagen, "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Addendum. Mission to Canada" Doc.#E/CN.4/2005/88/Add.3 (Geneva: United Nations Commission on Human Rights, 2004) at 10, online: <http://www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm>; Claudette Dumont-Smith, "Aboriginal Elder Abuse in Canada" (Aboriginal Healing Foundation: 2002) at 11, online: www.ahf.ca/pages/download/28_37; Susan Judith Ship and Reaghan Tarbell, "Ageing and Cultural Diversity: A Cross-Cultural Approach" *Our Nations Elders Speak* (1997) 7(4) In Touch at 4, online: [http://www.niichro.com/2004/pdf/INTouch/in-touch-vol-07-\(04\).pdf](http://www.niichro.com/2004/pdf/INTouch/in-touch-vol-07-(04).pdf) [[Ship and Tarbell]; Lylee Williams & Star Horn, "Spirit in Motion: Active Living & Aboriginal Older Adults" (2000) 14 In Touch 1 at 3, online: <http://www.niichro.com/2004/pdf/INTouch/in-touch-vol-14.pdf>, citing R. Cyr & P. MacFarlane, "Active Living for Older Aboriginal Adult Literature Review" at 2.
- ¹⁵⁰ Jeff Reading and Brenda Elias, *An Examination of Residential Schools and Elder Health* (Ottawa: First Nations and Inuit Regional Health Survey National Steering Committee, 1999) at 37, online: http://uregina.ca/library/holdings/FN_regional_survey_ch2.pdf [Reading and Elias], citing Barbara W. Yee, "Gender and family issues in minority groups" (1990) 14(3) *Generations* 39; Claudette Dumont-Smith, *Aboriginal Elder Abuse in Canada* (Aboriginal Healing Foundation: 2002) at 10, online: www.ahf.ca/pages/download/28_37.
- ¹⁵¹ Kathy Bent, *Literature Review: Aboriginal Senior Abuse in Canada*, A Document Prepared for the Native Women's Association of Canada (Ottawa: NWAC, 2009) at 31; see also Ship and Tarbell, note 132; Jeff Reading and Brenda Elias, note above at 31; Arlene Vrtar-Huot, "Residential Schools and their Historical Effects on the Elders of Today" (2004) 27 In Touch 1 at 7, online: http://www.niichro.com/inspired/ibe_3.html; Joint Management Committee, *Aboriginal Healing and Wellness Strategy: Phase III Longitudinal Study Final Report* (Toronto: AHWS, 2009) at 106, online: http://www.ahwsontario.ca/publications/AHWS_Longitudinal_Study2009.pdf.
- ¹⁵² Interview with Dick Moore, 519 Community Centre, by the LCO (August 26, 2008). Also, for an overview of barriers faced by older LGBT individuals, see *Time for Action*, note 9 at 25-27.
- ¹⁵³ LCO Focus Group, LGBTQ Older Adults, January 23, 2011.
- ¹⁵⁴ For an overview of recent data on health and activity limitations for older adults, see Turcotte and Schellenberg, note 32 at 43- 51.
- ¹⁵⁵ Turcotte and Schellenberg, note 32 at 47 – 48.
- ¹⁵⁶ Turcotte and Schellenberg, note 32 at 48-49.
- ¹⁵⁷ Turcotte and Schellenberg, note 32 at 50 – 52.
- ¹⁵⁸ *Defining Disability*, note 22.
- ¹⁵⁹ ARCH Disability Law Centre, *Submission to the Law Commission of Ontario* (November 18, 2011) at 2.
- ¹⁶⁰ Spencer, note 39 at 73-74.
- ¹⁶¹ *Code*, note 92, s. 10(1), (3) [Code].
- ¹⁶² *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 77.
- ¹⁶³ Michael Oliver, "Societal responses to long term disability" in Gale Whiteneck et al., eds., *Ageing with Spinal Cord Injury* (New York: Demos Publications, 1993) 251 at 253.
- ¹⁶⁴ Mark Priestley, "Disability and Old Age" in *Disability, A Life Course Approach* (Cambridge: Polity Press, 2003) 143 [Priestly].
- ¹⁶⁵ Priestley, note above.
- ¹⁶⁶ Priestley, note 164 at 161.
- ¹⁶⁷ Interview with Dick Moore, note 152.
- ¹⁶⁸ DAWN – RAHF Canada, *Submission to the Law Commission of Ontario* (July 7, 2008).
- ¹⁶⁹ Avvy Go, note 148.
- ¹⁷⁰ Canadian Association for Community Living, *Response to the Law Commission of Ontario's Consultation Paper on the Law as it Affects Older Adults* (July 7, 2008) [CACL Submission].
- ¹⁷¹ It has been argued, for example, that elder abuse within the Chinese Canadian community may take the form of disrespect that violates Chinese cultural norms of filial piety. Sandra Tam and Shelia Neysmith, "Disrespect and Isolation: Elder Abuse in Chinese Communities" (2006) 25 *Canadian Journal on Aging* 141.
- ¹⁷² Interview with Renee Brady, Northwestern Independent Living Services by LCO (July 8, 2009).
- ¹⁷³ Spencer, note 39 at 12.
- ¹⁷⁴ Adult protection and mandatory abuse reporting laws are discussed in Chapter III.B.5 of this *Final Report*.
- ¹⁷⁵ Margaret Hall, "Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable", in Doron, ed., note 21, 107 at 108 [Hall, *Equity Theory*].
- ¹⁷⁶ Nina Kohn, "Outliving Civil Rights" (2009) 86 *Washington University Law Review* 1053 [Kohn, *Civil Rights*].
- ¹⁷⁷ Martha Fineman, "The Vulnerable Subject and the Responsive State", 60 *Emory Law Journal*, (2010) Research Paper No. 10-

- 130 at 28, online: <http://ssrn.com/abstract=1694740> [Fineman, *Vulnerable Subject*].
- ¹⁷⁸ Fineman, *Vulnerable Subject*, note above.
- ¹⁷⁹ Concerns regarding the use of mandatory reporting laws are discussed at some length in Chapter III.B.5 of this *Report*.
- ¹⁸⁰ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67.
- ¹⁸¹ Martha Fineman, "Evolving Images of Gender and Equality: A Feminist Journey", 43 *New England Law Review* 437, 2008-2009 at 452.
- ¹⁸² Of note, the "Vanguard Project" suggested a definition of vulnerability in the context of capability issues that focuses on the relative, relational and social aspects of vulnerability. B.C. Adult Abuse/Neglect Prevention Collaborative, *Vulnerable Adults and Capability Issues in B.C. – Provincial Strategy Document* (January 2009) at 14-16.
- ¹⁸³ ACE, *Congregate Living*, note 105.
- ¹⁸⁴ Fineman, *Vulnerable Subject*, note 177.
- ¹⁸⁵ Hall, *Equity Theory*, note 176 at 3.
- ¹⁸⁶ Spencer, note 39 at 70.
- ¹⁸⁷ Spencer, note 39 at 69.
- ¹⁸⁸ Ontario Bar Association, *Getting it Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (April 2008) at 8, online: http://www.oba.org/en/pdf/Justice%20Summit_sml.pdf [Getting it Right].
- ¹⁸⁹ See, for example, the discussion on lack of accessible plain language resources on elder abuse in Selina Lai, *Final Report: Community Mobilization Empowering Seniors Against Victimization to the National Crime Prevention Centre of Canada Public Safety Canada* (United Seniors of Ontario: March 2008) at 13 and 15, online: http://www.uscont.ca/pdf/final_report_march_2008.pdf [Lai].
- ¹⁹⁰ *Getting it Right*, note 187 at 6.
- ¹⁹¹ ACE, *Congregate Living*, note 05.
- ¹⁹² Turcotte and Schellenbert, note 1 at 31.
- ¹⁹³ For a comprehensive consideration of barriers to access for persons in rural and remote areas, see Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services, Final Report of the Linguistic and Rural Access to Justice Project* (Law Foundation of Ontario: December 2008) at 31-35, online: http://www.lawfoundation.on.ca/pdf/linguistic_rural_report_dec2008_final.pdf.
- ¹⁹⁴ Lai, note 188.
- ¹⁹⁵ The province of Ontario has undertaken a number of initiatives to enhance the accessibility of its courts, following a December 2006 report from the Courts Disabilities Committee, *Making Ontario's Courts Fully Accessible to Persons with Disabilities*, online: http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm [Accessible Courts]. Ongoing initiatives of the Ontario Courts Accessibility Committee are documented online at http://www.attorneygeneral.jus.gov.on.ca/english/courts/accessibility_committee/default.asp.
- ¹⁹⁶ See Irwin Bess, *Seniors Behind the Wheel* (Statistics Canada: Autumn 1999) online: http://www.statcan.gc.ca/kits-trousses/pdf/social/edu04_0125a-eng.pdf. At the time of the study, 60 per cent of rural seniors were drivers, as compared to 46 per cent of urban seniors. Senior men are more likely to continue to drive than women.
- ¹⁹⁷ Spencer, note 39 at 69.
- ¹⁹⁸ ARCH Disability Law Centre, *Addressing the Capacity of Parties Before Ontario's Administrative Tribunals: Respecting Autonomy, Protecting Fairness, Access to Administrative Justice for Persons with Disabilities* (November 1, 2009) online: <http://www.archdisabilitylaw.ca/?q=addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairness>.
- ¹⁹⁹ See note 8.
- ²⁰⁰ See note 7.
- ²⁰¹ Robert Butler, "Age-Is: Another Form of Bigotry" (1969) 9 *The Gerontologist* 243 at 243, online: www.careandrepair.org.uk/.../Age-Is%20another%20form%20of%20Bigotry.doc.
- ²⁰² Butler, note above.
- ²⁰³ *Policy on Discrimination*, note 12 at section 2.2.
- ²⁰⁴ For a useful compendium of international documents related to older persons, see Israel Doron and Kate Mewhinney, eds., *The Rights of Older Persons*, (Jerusalem: 2007)
- ²⁰⁵ CARP has previously been known as the "Canadian Association for Retired Persons" and the "Canadian Association for the Fifty-Plus", but is no longer an acronym. For more information about CARP, see their website at www.carp.ca.
- ²⁰⁶ This included a public consultation and report (see note 11), the development of a policy on age discrimination on the basis of older age (see note 12), a public awareness campaign, and a campaign for legislative reform of the provisions of the *Human Rights Code* that permitted mandatory retirement.
- ²⁰⁷ Consultations were broad, and several reports were issued. For the *Final Report*, see note 2.
- ²⁰⁸ Morley Gunderson, "Age Discrimination in Employment in Canada" (2003), 21 *Contemporary Economic Policy* 319.
- ²⁰⁹ *Time for Action*, note 11 at 20. As is discussed in Ch. IV.A, the Supreme Court of Canada appears to have taken a differing approach, frequently viewing age-based distinctions as legitimate ways of structuring laws and institutions.
- ²¹⁰ MIPAA, note 9 at para. 112.

- ²¹¹ A thorough examination of this issue was undertaken in the Special Committee on Aging of the United States Senate, *The Image of Aging in Media and Marketing*, Serial No.107-35 (Washington: U.S. Government Printing Office, 2003). For a Canadian context, see Julia Rozanova *et al.*, "Seniors and Portrayals of Intra-generational and Inter-generational Inequality in the Globe and Mail" (2006) 25 *Canadian Journal of Aging* 373 [Rozanova *et al.*]
- ²¹² Senate Committee, note 2 at 14.
- ²¹³ *Time for Action*, note 11 at 18; Senate Committee, note 2 at 16; United Nations, MIPAA, note 9 at para. 112-113.
- ²¹⁴ Gunhild Hagestad and Peter Uhlenberg, "The Social Separation of Old and Young: A Root of Ageism" (2005), 61 *Journal of Social Issues* 343 at 351 [Hagestad and Uhlenberg].
- ²¹⁵ For an overview of these theories, see Linda Whitton, "Ageism: Paternalism and Prejudice" (1997), 46 *DePaul Law Review* 453 [Whitton].
- ²¹⁶ Senate Committee, note 2 at 12, referencing the submissions of the Ontario Network for the Prevention of Elder Abuse.
- ²¹⁷ For an overview of recent media portrayals of older adults in Canada's *Globe and Mail* newspaper, see Julia Rozanova *et al.*, note 211. For an analysis of the "demographic tsunami" meme regarding the Canadian healthcare system, see A. Cassels, *The "Demographic Tsunami" Meme and Canadian Media Coverage* (UBC Centre for Health Services and Policy Research: Feb 22, 2011), online: <http://www.chspr.ubc.ca/files/conference/2011/Slides/Cassels-BoomerangstConf.pdf>.
- ²¹⁸ MIPAA, note 9 at para. 112.
- ²¹⁹ ACE Submission, note 89 at 7.
- ²²⁰ Todd Nelson, "Ageism as Fear of our Future Selves" (2005), 61 *Journal of Social Issues* 206 at 210 [Nelson].
- ²²¹ *Supporting and Engaging*, note 67 at 14-15.
- ²²² Spencer, note 39 at 13.
- ²²³ Spencer, note 39 at 12.
- ²²⁴ Senate Committee, note 2 at 11.
- ²²⁵ Michael Billig, *Arguing and thinking: A rhetorical approach to social psychology* (Cambridge: Cambridge University Press, 1987) at 125, cited in Bytheway, note 42.
- ²²⁶ *Supporting and Engaging*, note 67 at 13.
- ²²⁷ Stoffman, note 45 at 51.
- ²²⁸ In the *Policy on Discrimination*, note 12, the Commission stated in section 5 that
- Older workers are often unfairly perceived as less productive, less committed to their jobs, not dynamic or innovative, unreceptive to change, unable to be trained or costly to the organization due to health problems and higher salaries.
- ²²⁹ Hagestad and Uhlenberg, note 214; Nelson, note 220 at 209.
- ²³⁰ Nelson, note 220 at 211-212; *Time for Action*, note 11 at 56.
- ²³¹ A panel discussion at the 2010 Canadian Conference on Elder Law among various Ontario law schools regarding initiatives related to the law affecting older adults highlighted the current dearth of elder law courses or other opportunities for Ontario law students to learn about older adults and the law.
- ²³² Ontario Bar Association, *Submission on the Law Commission of Ontario's Law as it Affects Older Adults Consultation Paper: Shaping the Project*, (July 21, 2008) online: http://www.oba.org/en/pdf/older_adults_lco.pdf [OBA Submission].
- ²³³ ACE Submission, note 89 at 11.
- ²³⁴ Whitton, note 215 at 479 and following.
- ²³⁵ OBA Submission, note 232 at 10.
- ²³⁶ LCO Focus Group, Older Women, October 21, 2011.
- ²³⁷ Rozanova *et al.*, note 211 at 376.
- ²³⁸ Turcotte and Schellenberg, note 1 at section 4.3.
- ²³⁹ *McDonnell Estate v. Royal Arch Masonic Homes Society*, [1998] 5 W.W.R. 268 [McDonnell Estate].
- ²⁴⁰ This issue has been studied by the Nova Scotia Law Reform Commission: see their *Final Report: Grandparent-Grandchild Access* (May 2007) online: <http://www.lawreform.ns.ca/Downloads/GrandparentFinal.pdf>. Also see P. Cross, *Grandmothers and the Law* (Ontario Women's Justice Network, May 2005).
- ²⁴¹ *Cost of Caring*, note 121 at 11. Some grandparents may be eligible for Ontario's Temporary Care Assistance Allowance, which provides some funding, based on the needs of the child, for relatives or non-relatives providing temporary care for a child: *Ontario Works Act*, 1997, S.O. 1997, c.25, Sched.A., s. 10(1); *Ontario Works Directive 3:10*, Temporary Care Assistance (December 2011), online: <http://www.mcsc.gov.on.ca/documents/en/mcsc/social/directives/ow/0310.pdf>.
- ²⁴² Andy Martens, Jamie Goldenberg and Jeff Greenberg, "A Terror Management Perspective on Ageism" (2005) 61 *Journal of Social Issues* 223 at 223.
- ²⁴³ Nelson, note 220 at 214.
- ²⁴⁴ For a discussion of social exclusion as a manifestation of ageism, see Amy Cuddy, Michael Norton and Susan Fiske, "This Old Stereotype: The Pervasiveness and Persistence of the Elderly Stereotype" (2005) 61 *Journal of Social Issues* 267 at 278 and following.
- ²⁴⁵ Gerard Quinn and Theresia Degener, "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in Gerrard Quinn and Theresia Degener, eds., *Human Rights and Disability: The Current Use and Future Potential of United National Human Rights Instruments in the Context of Disability* (New York: United Nations Publication, 2002) 9 at 17.
- ²⁴⁶ Gerald Dworkin, "Paternalism" in Edward Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Summer 2009) online: <http://plato.stanford.edu/archives/sum2009/entries/paternalism/>.

- ²⁴⁷ Whitton, note 215.
- ²⁴⁸ ACE *Submission*, note 89.
- ²⁴⁹ MIPAA, note 9 at para. 113.
- ²⁵⁰ Canadian Association for the Fifty-Plus, *Response to the Law Commission of Ontario's Consultation Paper* (July 7, 2008) at 2 [CARP *Submission*].
- ²⁵¹ *International Covenant on Economic, Social and Cultural Rights*, United Nations, 993 U.N.T.S. 3., Can. T.S. 1976 No. 46, entered into force 03 January 1976, accession by Canada 19 August 1976 (16 December 1966).
- ²⁵² United Nations, 999 U.N.T.S. 171, Can. T.S. 1976, No. 47, entered into force 23 March 1976, accession by Canada 19 August 1976 (19 December 1966).
- ²⁵³ The term "ageing" is standard in international documents, while standard Canadian spelling is "aging". The term "ageing" is therefore used when referring to international documents.
- ²⁵⁴ IPOP, note 8.
- ²⁵⁵ The "International Plan of Action on Ageing" was adopted by the first World Assembly on Ageing in Vienna in 1982, and endorsed by the United Nations General Assembly later that year (Res. 37/51). It was the first international instrument on aging, and guided thinking and the formulation of policies and programs on aging.
- ²⁵⁶ MIPAA, note 9.
- ²⁵⁷ *Active Ageing Policy Framework*, note 35.
- ²⁵⁸ In *R. v. Kapp*, [2008] 2 S.C.R. 483, [Kapp] para. 16.
- ²⁵⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 [Law]. It is important to note that, although the concept of dignity was seen as a central principle in the equality analysis under section 15 in *R. v. Kapp*, note above, the Court has identified problems with the extreme emphasis on dignity in section 15 as making it more difficult for claimants to prove their claims (para.22). As a result, the principle of dignity will remain part of the analysis in section 15, but may not take on such a predominant role.
- ²⁶⁰ *Kapp*, note above at para. 21. Law, note above at para. 51-53.
- ²⁶¹ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.
- ²⁶² *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46.
- ²⁶³ *Code*, s. 1, note 92.
- ²⁶⁴ *Code*, note 92, s. 14.
- ²⁶⁵ *Policy on Discrimination*, note 12.
- ²⁶⁶ NFA, note 7.
- ²⁶⁷ *Seniors Policy Handbook*, note 3.
- ²⁶⁸ Senate Committee, note 2.
- ²⁶⁹ HEIA, note 15.
- ²⁷⁰ See note 18.
- ²⁷¹ *Prevention of Elder Abuse Policy and Program Lens*, note 18.
- ²⁷² A ninth guiding principle, that of Advocacy, is specific to Ontario's legislative framework.
- ²⁷³ *Withler v. Canada (Attorney General)*, 2011 SCC 12. at para. 39 [Withler]. It should be noted, however, that Withler's claim of age discrimination, based on the reduction of federal death benefits because of the age of her husband at the time of his death, was ultimately dismissed by the Supreme Court.
- ²⁷⁴ *Code*, note 92, Preamble.
- ²⁷⁵ *Miron v. Trudel*, [1995] 2 S.C.R. 418. This statement was taken up by the Court again in *Law v. Canada*, note 259.
- ²⁷⁶ *Policy and Guidelines on Disability and the Duty to Accommodate*, note 33 at section 3.1.1.
- ²⁷⁷ *CACL Submission*, note 170 at 2.
- ²⁷⁸ Online: <http://www.neami.org.au/publications/documents/TheDignityofRiskarticleversion.doc>.
- ²⁷⁹ See, for example, the *Policy and Guidelines on Disability and the Duty to Accommodate*, note 33 at section 4.3.3.
- ²⁸⁰ *Turnbull v. Famous Players Inc.*, [2003] O.H.R.T.D. No. 10.
- ²⁸¹ *Law v. Canada*, note 259.
- ²⁸² *R. v. Kapp*, note 258.
- ²⁸³ *Active Ageing Policy Framework*, note 35 at 12.
- ²⁸⁴ *Active Ageing Policy Framework*, note 35 at 13.
- ²⁸⁵ A helpful discussion of the nature of dignity as a basis for legal decision-making may be found in Darryl Pullman, "Dying with Dignity and the Death of Dignity" (1996) 4 *Health Law Journal* 197.
- ²⁸⁶ Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed. (Toronto: Irwin Law, 2005) at 204-205.
- ²⁸⁷ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307.
- ²⁸⁸ *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 31-32.
- ²⁸⁹ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 77-29 [Gosselin].
- ²⁹⁰ International Federation on Ageing, *Declaration of the Rights and Responsibilities of Older Persons* (1990).
- ²⁹¹ MIPAA, note 9 at para. 35 and following.
- ²⁹² Martha Fineman, "The Social Foundations of Law", 54 *Emory Law Journal* 201 (2005), at 227.
- ²⁹³ Canadian Pensioners Concerned, Ontario Division, *Submission to the Law Commission of Ontario Consultation* (May 2008) at 2.
- ²⁹⁴ MIPAA, note 9 at para. 22.
- ²⁹⁵ *Policy on Discrimination*, note 12 at section 4.4.
- ²⁹⁶ See Meoirin, note 48 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

- ²⁹⁷ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 [AODA].
- ²⁹⁸ AODA, note above, s. 2.
- ²⁹⁹ MIPAA, note 9 at para. 19.
- ³⁰⁰ *Active Ageing Policy Framework*, note 35 at 12.
- ³⁰¹ MIPAA, note 9 at para. 21.
- ³⁰² Senate Committee, note 2 at 6.
- ³⁰³ *ACE Submission*, note 89 at 5.
- ³⁰⁴ *Active Ageing Policy Framework*, note 35 at 28.
- ³⁰⁵ *Active Ageing Policy Framework* note 35 at 52.
- ³⁰⁶ *ACE Submission*, note 89 at 5.
- ³⁰⁷ *Gosselin*, note 289.
- ³⁰⁸ *Gosselin*, note 289 at para. 82.
- ³⁰⁹ [2003] 2 S.C.R. 504, 2003 SCC 54 at 103.
- ³¹⁰ [2004] 3 S.C.R. 657, 2004 SCC 78 at paras. 38 - 41.
- ³¹¹ MIPAA, note 9 at para. 113.
- ³¹² Policy on Discrimination, note 12 at section 4.5.
- ³¹³ *Active Ageing Policy Framework*, note 35 at 14.
- ³¹⁴ *Policy on Discrimination*, note 12 at section 3.
- ³¹⁵ See, for example, Claudia Stein and Inka Moritz, *A Life Course Perspective of Maintaining Independence in Older Age* (Geneva: World Health Organization, 1999), online: http://whqlibdoc.who.int/hq/1999/WHO_HSC_AHE_99.2_life.pdf
- ³¹⁶ See, for example, the United Nations' World Youth Report, *Young People in a Globalizing World* (2003), online: www.un.org/esa/socdev/unyin/wyr03.htm. See also the *Quebec Declaration of Intergenerational Solidarity* (Intergovernmental Agency for Francophone Communities: Quebec City, 1999), online: www.aifa.ca.
- ³¹⁷ AGE, The European Older People's Platform, *A Plea for Greater Intergenerational Solidarity* (April 29, 2009) at 5.
- ³¹⁸ The Honourable Justice Frank Iacobucci, "Reconciling Rights, The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) S.C.L.R. (2d) 137 at 158 ["Reconciling Rights"]; see also Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1; and see also B.J. Wray, *Balancing Conflicting Rights: Towards an Analytical Framework* (Ontario Human Rights Commission: 2007) online: [http://www.ohrc.on.ca/en/resources/discussion_consultation/balancingrights/pdf\[Wray\]](http://www.ohrc.on.ca/en/resources/discussion_consultation/balancingrights/pdf[Wray]) at 17.
- ³¹⁹ In "Reconciling Rights", note above, the Honourable Justice Frank Iacobucci argues that the first and potentially most important aspect of reconciling tensions between principles is sensitivity to context; and see also Wray, note above.
- ³²⁰ United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106 [CRPD].
- ³²¹ For a variety of perspectives on these issues, see the compendium, Association for Canadian Studies, 8 *Canadian Diversity: Balancing Competing Human Rights* 3 (Summer 2010).
- ³²² "Reconciling Rights", note 314 at 162, 167.
- ³²³ Patricia Hughes, *Legal Frameworks: The Reconciliation Model, Balancing Competing Human Rights* (Ottawa: Ontario Human Rights Commission, 2010).
- ³²⁴ It has been noted that "[h]uman rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice": Lorne Foster and Lesley Jacobs, "Shared Citizenship as the Context for Competing Human Rights Claims" (Summer 2010), 8 *Canadian Diversity: Balancing Competing Rights Claims* 3 at 13.
- ³²⁵ R.S.N.L. 1990, c. N.3, s.2.
- ³²⁶ R.S.N.S. 1989, c. 2, s. 3.
- ³²⁷ C.C.S.M. c. V90, s. 1(1), definitions of "mental disability" and "vulnerable person".
- ³²⁸ Manitoba Law Reform Commission, *Adult Protection and Elder Abuse* (Winnipeg: 1999) at 23 [*Adult Protection and Elder Abuse*]. The Report provides a comprehensive principled overview of adult protection and domestic violence legislation in Canada.
- ³²⁹ C.C.S.M. c. V90, s.21(1); R.S.N.S. 1989, c. 2, s.5(1); R.S.N.L. 1990, c. N.3, s. 4.
- ³³⁰ There is an extensive literature on the subject. See for example Kohn, *Civil Rights*, note 176; Seymour Moskowitz, "Saving Granny From the Wolf: Elder Abuse and Neglect – the Legal Framework", 31 *Connecticut Law Review* (1998) 77, 107-109; Ruthann M. Macolini, *Elder Abuse Policy: Considerations in Research and Legislation*, (1995) 13 *Behavioural Science and Law* 349; Lawrence R. Faulkner, "Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults" (1982) 16 *Family Law Quarterly* 69.
- ³³¹ *ACE Submission*, note 89 at 10.
- ³³² See Lai, note 189.
- ³³³ Lai, note 189 at 11.
- ³³⁴ *Adult Protection and Elder Abuse*, note 328 at 38.
- ³³⁵ Government of Manitoba, *Protecting Vulnerable Persons from Abuse and Neglect: Reporting Requirements for Direct Service Providers* at 6, online: http://www.gov.mb.ca/fs/pwd/pubs/spl_for_service_providers.pdf.
- ³³⁶ *Adult Protection and Elder Abuse*, note 328 at 39.
- ³³⁷ For a description and analysis of the concepts of progressive realization and the duties to respect, protect and fulfill, see Maria Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement" 23 *Human Rights Quarterly* 1062 at 1062-1097.
- ³³⁸ As is discussed in Chapter IV's analysis of issues surrounding workplace transition for older adults, the assumption that

mandatory retirement protected job opportunities for younger adults and that its abolition would lead to negative outcomes for younger age groups is by no means accepted wisdom among economists.

³³⁹ *Code*, note 92, s. 1.

³⁴⁰ *Code*, note 92, s. 14.

³⁴¹ *Code*, note 92, s. 15.

³⁴² *McKinney*, note 45.

³⁴³ *McKinney*, note 45 at page 76.

³⁴⁴ *Stoffman*, note 45.

³⁴⁵ *McKinney* note 45 at 68.

³⁴⁶ *Stoffman*, note 45 at 51.

³⁴⁷ *Canada (Employment and Immigration Commission) v. Tetrault-Gadoury*, [1991] 2 S.C.R. 22 [*Tetrault-Gadoury*].

³⁴⁸ *Law v. Canada*, note 259.

³⁴⁹ *Gosselin*, note 289.

³⁵⁰ *Withler*, note 273.

³⁵¹ The Annual Report of the Human Rights Tribunal of Ontario can be found online at <http://www.hrto.ca/hrto/?q=en/node/26>. In the fiscal year 2009-2010, applications citing age (both older and younger) as a ground of discrimination made up approximately 14 per cent of the total. Figures related to the old system of human rights complaints can be obtained through the Ontario Human Rights Commission's *Annual Reports*, online: www.ohrc.on.ca/en/resources/annualreports. Complaints related to age discrimination generally made up between 5 and 8 percent of all complaints. For 2007-2008, the last full year in which the OHRC was charged with receiving human rights complaints, approximately nine per cent of all complaints cited age as one of the grounds of alleged discrimination (328 complaints in total). Of those complaints, 246, or 75 per cent, were in the area of employment. It is not possible to determine from the statistics what portion of these complaints were of discrimination based on younger age, and what portion were of discrimination based on older age.

³⁵² See note 206. For information on the work of the OHRC, online: www.ohrc.on.ca.

³⁵³ *Tetrault-Gadoury*, note 347.

³⁵⁴ *Ontario Human Rights Commission v. Ontario*, 19 O.R. (3d) 387, 117 D.L.R. (4th) 297 (Ont. C.A.).

³⁵⁵ *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143

³⁵⁶ *A.C. v. Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 2 S.C.R. 181 at para. 110.

³⁵⁷ *Withler*, note 273.

³⁵⁸ *Meiorin*, note 48.

³⁵⁹ *Policy on Discrimination*, note 12.

³⁶⁰ *Kapp*, note 258.

³⁶¹ *Code*, note 92, s. 14.

³⁶² For more information on special programs under the *Code*, see Ontario Human Rights Commission, *Guidelines on Special Programs* (Toronto, 1997), online: <http://www.ohrc.on.ca/en/resources/Policies/specialprogramsen>.

³⁶³ *Code*, note 92, s. 15.

³⁶⁴ As noted earlier, the Supreme Court of Canada upheld mandatory retirement policies against a series of Charter challenges: while such policies discriminated on the basis of age under section 15(1) of the Charter, the Court found that they were saved under section 1: *McKinney*, note 45, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, *Stoffman*, note 45. The Supreme Court also upheld age 60 mandatory retirement provisions for firefighters or police officers in *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297; *Saskatchewan (Human Rights Commission) v. Moose Jaw (City)*, [1989] 2 S.C.R. 1317; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733.

³⁶⁵ As is discussed later, an exception in the *Code* for justices of the peace was the subject of a successful *Charter* challenge in which the Ontario Superior Court of Justice held that the provisions of the *Code* protecting mandatory retirement policies at age 70 for justices of the peace violated the equality rights provisions of the *Charter*. *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*, 292 D.L.R. (4th) 623, [2008] O.J. No. 2131 [*Assn. of Justice of the Peace*].

³⁶⁶ *Espey v. London (City) (No.1)*, (2008) CHRR Doc. 08-1702, 2008 HRTO 412 [*Espey*], application for reconsideration refused in 2009 HRTO 271. While acknowledging that the distinction was *prima facie* discriminatory, the Tribunal accepted the argument of the respondents that the risk of cardiac events, including heart attacks, increases dramatically with age. This risk is considerably higher for firefighters engaged in fire suppression, in particular while on duty. The Tribunal further held that there was insufficient medical evidence as to the possible efficacy of individualized testing for firefighters over the age of 60 to adopt that as an alternative to mandatory retirement.

³⁶⁷ For example, the Ontario Municipal Employees Retirement System Act maintains age 65 as a "normal retirement date", but also creates a "factor 85" unreduced pension entitlement for employees age 55 and older, whose age and years of service add up to 85. *Ontario Municipal Employees Retirement System Act*, S.O. 2006, c. 2, s. 9(3) 2.

³⁶⁸ *Income Tax Act*, R.S.O. 1990, c. I.2, s. 40.1 [ITA].

³⁶⁹ Section 25(2) of the Ontario *Human Rights Code* protects from challenges pension and benefit plans that comply with the *Employment Standards Act, 2000* and its accompanying regulations. O. Reg. 286/01, which regulates employment-related health, insurance and dental plans, regulates such plans only insofar as they apply to persons between the ages of 18 and 65, thereby permitting differential treatment of persons over age 65.

- ³⁷⁰ The amendment is a rare example of a statute explicitly overriding the primacy provisions of the Ontario Human Rights Code. It provides that the Workplace Safety and Insurance Act, the regulations under it, and any decisions or policies under the Act or regulations that require or authorize a distinction on the basis of age continue to apply: *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, s. 2.1 [WSIA].
- ³⁷¹ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A, O. Reg. 134/98, s. 27 [OWA].
- ³⁷² *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 3(1) and O. Reg. 222/98, s. 4(1) [ODSPA].
- ³⁷³ *ITA*, note 368, s. 8(3.2).
- ³⁷⁴ For example, see the *Toronto Islands Residential Community Stewardship Act, 1993*, O. Reg. 817/93, s. 6.
- ³⁷⁵ *Ontario Guaranteed Annual Income Act, R.S.O. 1990*, c. O.17, s. 2 [Guaranteed Annual Income Act].
- ³⁷⁶ *Ontario Drug Benefits Act*, O. Reg. 201/96, s. 2.
- ³⁷⁷ *Health Insurance Act*, R.R.O. 1990, Reg. 552, s. 17; also see Ministry of Health and Long-Term Care, Schedule of Benefits for Optometry Services (April 1, 2009), online: http://www.health.gov.on.ca/english/providers/program/ohi/p/sob/optometry/sob_optometrist_services_20090401.pdf.
- ³⁷⁸ *Highway Traffic Act*, R.S.O. 1990, c. H-8, *Highway Traffic Act*, O. Reg. 340/94 ss. 2, 15, 16. Ontario is considering additional restrictions directed at drivers with dementia, raising concerns that they will disadvantage some older drivers unfairly: Moira Welsh and Julian Sher, "Ontario's elderly drivers to face tough new rules," *Toronto Star* (February 21, 2012) at A1, A14.
- ³⁷⁹ *Agricultural Museum Act*, R.R.O. 1990, Reg. 866, ss. 1-2.
- ³⁸⁰ *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, O. Reg. 664/98, s.2.
- ³⁸¹ *Guaranteed Annual Income Act*, note 375.
- ³⁸² OWA, note 371.
- ³⁸³ An overview of social housing in Ontario is provided by Social Housing Services Corporation, *Ontario Social Housing Primer* (December 2008), online: <http://www.shscorp.ca/shscnew/content/rc/doc/shprimer.pdf>.
- ³⁸⁴ Kingston, Community and Family Services, "Public Information Guide on Rent-Geared-to-Income Assistance and Special Needs Housing", City of Kingston, online: <http://www.cityofkingston.ca/pdf/housing/PublicInformationGuide.pdf>.
- ³⁸⁵ City of Toronto, Mayor's Roundtable on Seniors, "Housing Toronto Seniors: Planning for the Future – Issues, Challenges and Directions", City of Toronto Roundtable on Seniors, online: http://www.toronto.ca/seniors/seniorshousingreport_06.htm.
- ³⁸⁶ Region of Peel, "Social Housing for Seniors: Information Sheet", Region of Peel, online: <http://www.peelregion.ca/housing/initiatives-resources/programs/seniors.htm>.
- ³⁸⁷ *Time for Action*, note 11 at 44.
- ³⁸⁸ *Policy on Discrimination*, note 12 at section 6.
- ³⁸⁹ Law Reform Commission of Nova Scotia, *Seniors-Only Housing: Final Report* (April 2011) at 29, online: www.lawreform.ns.ca.
- ³⁹⁰ See, for example, Naresh Agarwal, "Mandatory Retirement and the Canadian Human Rights Act", *A Paper Prepared for the Canadian Human Rights Act Review Panel* (October 1999).
- ³⁹¹ Decima Research poll conducted in 2003 of 2,000 Canadians aged 18 and older. Online: www.decima.com/en.
- ³⁹² See the discussion of income security among older adults in Ch. II.C.1.
- ³⁹³ Espey, note 366. The Adjudicator determined that the correlation between advancing age and cardiac events for firefighters was sufficiently strong that it was more effective to use age to measure fitness than individual assessments of good health.
- ³⁹⁴ This was pointed out in the Human Rights Tribunal's decision in Espey, note 366, where the Tribunal noted at para 90 that: Different methods of risk analysis may have particular advantages and disadvantages from the standpoint of human rights values. There are, for example, potential human rights consequences to a system in which every firefighter, of any age, is analyzed on an individual basis using the methods proposed by Dr. Freeman. A firefighter forced to retire under age 60 because of a high level of risk could argue discrimination based upon disability or perceived disability.
- The Adjudicator does not expand on this point, leaving an unexamined and unexplained inference that discrimination on the basis of age is less problematic than discrimination on the basis of disability.
- ³⁹⁵ The design and implementation of eligibility criteria for disability-based supports and programs is a major issue in the area of disability law, and in the LCO's project on the law as it affects persons with disabilities. For information see *The Law as it Affects Persons with Disabilities: Consultation Paper* (September 2011), online: www.lco-cdo.org/en/content/persons-disabilities.
- ³⁹⁶ *Zurich Life Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 [Zurich].
- ³⁹⁷ *Zurich*, note above at 36.
- ³⁹⁸ *Zurich*, note 396 at 40.
- ³⁹⁹ *Assn. of Justice of the Peace*, note 365.
- ⁴⁰⁰ *Espey*, note 366.
- ⁴⁰¹ *McKinney*, note 45 at 129.
- ⁴⁰² Note 370.
- ⁴⁰³ John McKinnon, *Age-Based Discrimination in Ontario's Worker's Compensation Laws, A Paper Presented at the 2010 Canadian*

Conference on Elder Law (Injured Workers' Consultants Community Clinic: October 2010) at 3, online: <http://www.lco-cdo.org/ccel-papers/> [McKinnon].

⁴⁰⁴ See note 370.

⁴⁰⁵ For a full discussion of the age-based limitations in Ontario's worker's compensation laws, see McKinnon, note 402.

⁴⁰⁶ *WSIA*, note 370, s. 41.

⁴⁰⁷ *WSIA*, note 370, s. 43.

⁴⁰⁸ *IPOP*, note 8.

⁴⁰⁹ *MIPAA*, note 9 at para 23.

⁴¹⁰ The Law Commission of Ontario has undertaken a project which explores some of the issues surrounding vulnerable workers and precarious work, including the employment experiences of women, new Canadians and racialized individuals. For more information on this project, see online: <http://www.lco-cdo.org/en/content/vulnerable-workers>.

⁴¹¹ For an overview of key demographic and labour market changes, see Thomas Klassen, *The Elimination of Mandatory Retirement: Unfinished Business, A paper prepared for the 2010 Canadian Conference on Elder Law* (October 2010) online: <http://www.lco-cdo.org/ccel-papers/3A%20-%20Tom%20Klassen.pdf> [Klassen].

⁴¹² Ontario Human Rights Commission, *Submission to the Standing Committee on Justice Policy on Bill 211* (November 23, 2005), online: <http://www.ohrc.on.ca/en/resources/submissions/bill211english>.

⁴¹³ *McKinney*, note 45 at 73-74.

⁴¹⁴ *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* [2008] 2 S.C.R. 604, at para. 23-24. The challenge took place in the context of the provisions of the New Brunswick Human Rights Act that specified that termination of an employee pursuant to a bona fide retirement or pension plan did not violate the Act.

⁴¹⁵ *Espey*, note 366 at para. 92-97.

⁴¹⁶ *Tetrault-Gadoury*, note 347.

⁴¹⁷ Charles Beach, *Economic Profile of Older Workers, A Report Prepared for the Expert Panel on Older Workers* (2007).

⁴¹⁸ See Klassen, note 410; see also Don Kerr and Roderic Beaujot "Demographic Change and Mandatory Retirement in Canada" in Gillian, C.T., David MacGregor, and Thomas Klassen eds., *Time's Up! Mandatory Retirement in Canada* (Toronto: James Lorimer and Company Limited, 2005), and Norene Pupo and Ann Duffy "Locating Mandatory Retirement in the Midst of Economic and Social Transformations", also in *Time's Up!*

⁴¹⁹ Section 23.1, *Workers Compensation Act*, [RSBC 1996] c. 492.

⁴²⁰ Section 155(1), *O. Reg 79/10, LTCHA*, note 100.

⁴²¹ Some younger persons with complex medical needs have raised concerns about the social and recreational effects of living in long-term care settings that are overwhelmingly

populated by persons much older than themselves. The Ministry of Community and Social Services has made some efforts to group together younger persons with complex medical needs in some specific long-term care facilities. For some discussion of these issues, see *Brock v. Ontario Human Rights Commission* 2009 CANLII 709 (ON S.C.D.C.) January 13 2009.

⁴²² Ministry of the Attorney General, *Submission on the Law as it Affects Older Adults: Interim Report*, November 18, 2011, p. 5 [MAG Submission].

⁴²³ *O.Reg. 79/10*, s. 166.

⁴²⁴ *HCCA*, note 117, s. 21(2).

⁴²⁵ Jane Meadus, *Discharge From Hospital to Long-Term Care: Issues in Ontario, A paper prepared for the 2010 Canadian Conference on Elder Law* (October 28, 2010) online: <http://www.lco-cdo.org>.

⁴²⁶ *MAG Submission*, note 422, p. 5-6.

⁴²⁷ Concerns arising from financial abuse of older Aboriginal adults who received settlement monies played a key role in the inception of the LCO's project on Fees for Cashing Government Cheques, the final Report for which is available online: <http://www.lco-cdo.org/en/content/fees-cashing-government-cheques>.

⁴²⁸ *ACE Congregate Living*, note 191 at 45.

⁴²⁹ Margaret Hall, *Developing an Anti-Ageist Approach Within Law*, (Law Commission of Ontario: July 2009) at 27, online: <http://www.ontla.on.ca/library/repository/mon/24009/304765.pdf> [Hall].

⁴³⁰ The Board of Governors of the LCO has approved a law reform project on capacity and guardianship laws, to commence in 2012.

⁴³¹ A comprehensive review of the available literature can be found in Israel Doron, *From Guardianship to Long-Term Legal Care: Law and Caring for the Elderly* (Doctorate of Jurisprudence Thesis, Osgoode Hall Law School, 2000) [unpublished] [Doron, *From Guardianship*].

⁴³² Doron, *From Guardianship*, note above at 240.

⁴³³ Doron, *From Guardianship*, note 431 at 240.

⁴³⁴ See, for example, *ACE Submission*, note 89 and *OBA Submission* note 232.

⁴³⁵ Dementia is relatively rare prior to age 85: the prevalence rises sharply among the very old, and particularly among women. For those between the ages of 65 and 74, the rate was 28 cases per thousand women and 19 per thousand men. After age 85, the rate increased sharply to 371 per thousand women and 287 per thousand men: Gerry Hill *et al.*, *Dementia Among Seniors* (Statistics Canada: Autumn 1996) at 7 and following.

⁴³⁶ *Rising Tide*, note 81.

⁴³⁷ The Advocacy Centre for the Elderly has noted that they frequently encounter situations where the decisional capacity

- of an older adult is unnecessarily questioned, or a presumption of incapacity appears to operate: see Judith Wahl, *Capacity and Capacity Assessment in Ontario*, (May 2009) at 1-3, online: <http://www.advocacycentreelderly.org/index.php>.
- ⁴³⁸ Canadian Centre for Elder Law and British Columbia Law Institute, *A Comparative Analysis of Adult Guardianship Laws in B.C., New Zealand and Ontario*, Canadian Centre for Elder Law Studies, Report No. 4, British Columbia Law Institute, Report No. 46 (October 2006) at 11, online: http://www.bcli.org/sites/default/files/Comparative_Analysis_of_Adult_Guardianship_Laws-1.pdf.
- ⁴³⁹ *McDonnell Estate*, note 239.
- ⁴⁴⁰ It was suggested, for example, that older African Canadians may be exploited by church communities: Parsons, note 148. It has also been suggested that in some Asian Canadian communities, emotional abuse may be carried out through the violation of cultural norms of respect and filial obligation, see note 153.
- ⁴⁴¹ Hall, note 392 at 49.
- ⁴⁴² *McDonnell Estate*, note 214 at 11.
- ⁴⁴³ See, e.g., *Banton v. Banton* (1998) 164 D.L.R. (4th) 176.
- ⁴⁴⁴ *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549 (Eng. Q.B.).
- ⁴⁴⁵ *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 16 [SLRA].
- ⁴⁴⁶ SLRA, note above, s. 44, O.Reg. 54/95, s. 1.
- ⁴⁴⁷ *Family Law Act*, R.S.O. 1990, c. F.3, s. 6.
- ⁴⁴⁸ For a discussion of these issues, see Wendy L Griesdorf, "Crazy in Love: Caregiver Marriages in the Context of Estate Disputes" (2005-2006) 25 *Estates, Trusts and Pensions Journal* 315.
- ⁴⁴⁹ Jan Goddard, *Substitute Decision-Making and Family Relationships* (Presentation delivered at the 2008 Canadian Conference on Elder Law, Vancouver B.C., November 14, 2008) [unpublished].
- ⁴⁵⁰ Kohn, *Civil Rights*, note 176.
- ⁴⁵¹ Merryn Gott and Sharron Hinchliff, "How important is sex in later life, The views of older people" (2003) 56 *Social Science and Medicine* 1617; P. Ginsburg and K. Framer, "A study of sexuality and health among older adults in the U.S." 357 *New England Journal of Medicine* 762; Insa Fooker, "Sexuality in the later years – the impact of health and body-image in a sample of older women" (1994) 23 *Patient Education and Counseling* 227.
- ⁴⁵² Micheal Bauer, Rhonda Nay and Linda McAuliffe, "Catering to love, sex and intimacy in residential aged care: What information is provided to consumers?" (2009) 27 *Sexuality and Disability* 3 at 3.
- ⁴⁵³ Shari Brotman et al., "Coming Out to Care: Caregivers of Gay and Lesbian Seniors in Canada" (2007) 47 *The Gerontologist* 490, online: <http://gerontologist.oxfordjournals.org/content/47/4/490.full.pdf+html>.
- ⁴⁵⁴ Michael Bauer, Linda McAuliffe and Rhonda Nay, "Sexuality and the Reluctant Health Professional", in Rhonda Nay and Sally Garrat, eds., *Caring for Older People: Issues and Innovations*, 3rd ed. (Sydney, Australia: Elsevier, 2009) at 292 – 309.
- ⁴⁵⁵ LTCHA, note 100, s. 1.
- ⁴⁵⁶ LTCHA, note 100, ss. 19, 20.
- ⁴⁵⁷ For a thorough review of the relevant legal issues related to older age, long-term care, legal capacity and sexuality, see Judith Wahl, *Sexuality in Long-Term Care Homes – the Legal Issues*, online: http://www.rgpc.ca/rgpc_resource_library/Sexuality%20in%20Long%20Term%20Care%20Homes%20-%20The%20Legal%20Issues.pdf [Wahl].
- ⁴⁵⁸ Judith Wahl, "Sexuality in Long-Term Care", *Advocacy Centre for the Elder Newsletter* (Summer 2008) online: <http://www.ancelaw.ca/appimages/file/NewsletterSummer2008.pdf>.
- ⁴⁵⁹ Hall, note 429 at 3.
- ⁴⁶⁰ This argument for mandatory retirement is examined in depth, and dismissed as based on a profound misunderstanding of basic economic principles in J.R. Kesselman, "Challenging the Economic Assumptions of Mandatory Retirement" in C.T. Gillian ed., *Time's Up! Mandatory Retirement in Canada* (Toronto, Ontario: James Lorimer and Company Limited, 2005) at 161- 189. The author notes at 170-171 that:
- The young workers argument runs counter to elementary economic principles by assuming the economy offers only a given total amount of work— what economists call "the lump-of-labour fallacy." Job displacement may arise in the very short run, in narrowly defined occupations, or in recessionary periods, but over the long run the economy can create as many jobs as there are workers able and willing to fill them. Indeed, an economy's long-run growth is constrained by the availability of workers with the requisite skills, motivation, and experience. Moreover, young workers are hardly a substitute for the skilled and experienced workers who are forced to leave on account of mandatory retirement provisions.
- ⁴⁶¹ *ACE Submission*, note 89 at 5.
- ⁴⁶² United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Programme on Ageing, *Report of the Expert Group Meeting, 'Rights of Older Persons'* (Bonn, Germany: May 5-7 2009) at 10 online: <http://www.un.org/ageing/documents/egm/bonn09/reportofegm.pdf>.
- ⁴⁶³ For example, the *Osgoode Hall Law Journal* devoted an issue to various perspectives on the notion of access to justice, with a particular focus on the complex relationship between legal justice and social justice: [2008] 46 *Osgoode Hall Law Journal*.

- ⁴⁶⁴ For information about these projects, visit the LCO website at www.lco-cdo.org.
- ⁴⁶⁵ *Getting it Right*, note 188 at 10.
- ⁴⁶⁶ This issue was considered at some length, for example, in *Listening to Ontarians, Report of the Ontario Civil Legal Needs Project* (The Ontario Civil Legal Needs Project Steering Committee: May 2010), online: http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf.
- ⁴⁶⁷ *Access to Justice Act, 2006*, S.O. 2006, c. 21.
- ⁴⁶⁸ For a description of this service, see the Law Society of Upper Canada website at <http://www.lsuc.on.ca/faq.aspx?id=2147486372>.
- ⁴⁶⁹ For a description of the organization and the services provided, visit the website at <http://www.pblo.org/>.
- ⁴⁷⁰ See <http://www.justicenet.ca/directory/search/>.
- ⁴⁷¹ Spencer, note 39 at 72.
- ⁴⁷² R.S.O. 1990, c. N.7, section 2(2).
- ⁴⁷³ *LTCHA*, note 100, s. 3.
- ⁴⁷⁴ *LTCHA*, note 100, s. 3(3).
- ⁴⁷⁵ For a discussion of the barriers to use of civil litigation as an effective response to violations of rights in congregate settings, see ACE, *Congregate Living*, note 105 and ACE *Submission*, note 89 at 18 – 20.
- ⁴⁷⁶ *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rules 24.1, 75.1.
- ⁴⁷⁷ For a more thorough summary of legislative responses to elder abuse, whether under the *Criminal Code* or provincial statutes, see Hall, note 429 at 37-47.
- ⁴⁷⁸ Hall, note 429 at 37.
- ⁴⁷⁹ Lai, note 189 at 11. Also see Donald Poirier and Norma Poirier, *Why is it so difficult to combat elder abuse, and in particular, financial exploitation of the elderly?* (Law Commission of Canada: July 1999) at section 5.3.3., online: http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/research_project/99_elder_2-en.asp#p14 [Poirier and Poirier].
- ⁴⁸⁰ Ontario's "Justice on Target" initiative aims to reduce delays in the justice system, and has seen some improvements in the timeliness and efficiency. Initiatives include streamlined disclosure process, providing earlier access to information to support timely decision-making, increased availability of plea courts, on-site legal aid, and many others. Information on the Justice on Target initiative can be found at <http://www.attorneygeneral.jus.gov.on.ca/english/jot/>.
- ⁴⁸¹ [2006] 2 S.C.R. 737.
- ⁴⁸² Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (Toronto: 1995) at 13.
- ⁴⁸³ For a review of the statistics under both the old and new systems, see the brief of the AODA Alliance to the 2012 Human Rights System Review: Accessibility for Ontarians with Disabilities Act Alliance, *Brief to the Andrew Pinto Ontario Human Rights Code Review* (March 1, 2012), available online: <http://www.aodaalliance.org/reform/default.asp>.
- ⁴⁸⁴ The accountability framework begins with the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4, which gives the LHINs the responsibility for planning, funding and integrating the local health system (s. 5). Each LHIN enters into an accountability agreement with the Minister (s. 18) and reports to the Minister. LHINs enter into accountability agreements with service providers (s. 19) and has the power to require audits or reports (ss. 20 -22).
- ⁴⁸⁵ *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A., Part IX, Part XI.
- ⁴⁸⁶ Ombudsman Ontario, *Long-Term Care Monitoring – Summary of Ombudsman's Findings* (December 2010) at 6-7, online: <http://www.ombudsman.on.ca/en/what-we-do/special-ombudsman-response-team/sort-investigations.aspx>. Also see the Ombudsman Ontario's Annual Report 2010-2011 for a progress update, online: <http://www.ombudsman.on.ca/Ombudsman/files/13/13d51988-95ef-4e71-a21b-c27ef1112d3b.pdf>.
- ⁴⁸⁷ *SDA*, note 116, ss. 27, 62.
- ⁴⁸⁸ *SDA*, note 116, ss. 82, 83.
- ⁴⁸⁹ ACE, *Congregate Living*, note 105 at 26.
- ⁴⁹⁰ *CACL Submission*, note 170 at 7.
- ⁴⁹¹ *Code*, note 92, s. 29.
- ⁴⁹² Ontario Human Rights Commission reports and publications are available on its website, online: <http://www.ohrc.on.ca>.
- ⁴⁹³ See Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perception and Getting Results* (International Symposium on Age Discrimination: London, England, September 5, 2005), online: http://www.ohrc.on.ca/en/resources/discussion_consultation/AgeSymposiumENG/pdf.
- ⁴⁹⁴ See note 351.
- ⁴⁹⁵ See Ombudsman Ontario, *Annual Report 2008-2009* (June 2009) at 15, online: <http://www.ombudsman.on.ca/en/publications--resources/annual-reports.aspx>.
- ⁴⁹⁶ Ombudsman Ontario, *Long-Term Care Monitoring*, note 439.
- ⁴⁹⁷ *Legal Services Act, 1998*, S.O. 1998, c. 26, s.1.
- ⁴⁹⁸ Basic information on eligibility for Legal Aid is provided online: <http://www.legalaid.on.ca/en/getting/eligibility.asp>.
- ⁴⁹⁹ ACE, *Congregate Living*, note 105 at 19.
- ⁵⁰⁰ For detailed information regarding the mandate and activities of ACE, consult their website online: www.advocacycentreelderly.org.
- ⁵⁰¹ *Mental Health Act*, R.R.O. 1990, Reg. 741, ss. 14 – 16.
- ⁵⁰² *HCCA*, note 117, s. 17.
- ⁵⁰³ College of Physicians and Surgeons of Ontario, *Policy Statement #4-05: Consent to Medical Treatment*

- (January/February 2006), online: <http://www.cpsso.on.ca/policies/policies/default.aspx?ID=1544>.
- 504 *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.
- 505 ACE, *Congregate Living*, note 105 at 24.
- 506 The powers and functions of Residents' and Family Councils are set out in the *LTCHA*, note 100, ss. 56 – 67.
- 507 ACE, *Congregate Living*, note 105 at 37.
- 508 World Health Organization, *Missing Voices: Views of Older Persons on Elder Abuse* (2002) at 9, online: http://whqlibdoc.who.int/hq/2002/WHO_NMH_VIP_02.1.pdf [Missing Voices].
- 509 Lai, note 170 at 12-13.
- 510 For an overview of these issues see Spencer, note 39 at 34-35.
- 511 See Ontario Human Rights Commission, *Submission of the Ontario Human Rights Commission to the College of Physicians and Surgeons of Ontario Regarding the Draft Policies Relating to Establishing and Ending Physician-Patient Relationships* (February 14, 2008), online: www.ohrc.on.ca/en/resources/submissions/surgeons. Also see College of Physicians and Surgeons of Ontario, "Accepting New Patients, Policy Number 1-09" (April 2009), online: <http://www.cpsso.on.ca/policies/policies/default.aspx?id=1778>.
- 512 *Missing Voices*, note 460 at 13.
- 513 *Spencer*, note 39 at 44.
- 514 ACE, *Retirement Home Industry*, note 97 at 3.
- 515 *Spencer*, note 39 at 43-44.
- 516 During the 2010 Canadian Conference on Elder Law, a panel of academics from several of Ontario's law schools was brought together to discuss elder law initiatives, as a means of starting discussion on these issues.
- 517 ACE, *Congregate Living*, note 105 at 86.
- 518 *Retirement Homes Act, 2010*, note 98, s. 2.
- 519 For example, the Advocacy Centre for the Elderly has expressed concerns that retirement homes may operate locked units and use restraints on residents without the same oversights and protections required for long-term care homes: ACE *Submission*, note 89 at 11.
- 520 S.O. 2006, c. 17, s. 140.
- 521 Concerns are highlighted in the summary of consultations on the Ontario Seniors' Secretariat website, online: <http://www.culture.gov.on.ca/seniors/english/programs/rhc>. Also see ACE *Submission*, note 79.
- 522 *Spencer*, note 31 at 60-61.
- 523 *HCCA*, note 117.
- 524 *SDA*, note 116.
- 525 *HCCA*, note 117, s. 4(2); *SDA*, note 116 at s. 2.
- 526 *HCCA*, note 117, s. 70.
- 527 *HCCA*, note 117, s. 80.
- 528 *HCCA*, note 117, s. 81.
- 529 *SDA*, note 116, ss. 22, 55.
- 530 *SDA*, note 116, ss. 22, 55(2).
- 531 *SDA*, note 116, ss. 27, 62.
- 532 *SDA*, note 116, ss. 32, 38.
- 533 *SDA*, note 116, ss. 66, 67.
- 534 Alberta Law Reform Institute, *Enduring Powers for Attorney: Safeguards Against Abuse* (Edmonton: February 2003).
- 535 *SDA*, note 116, s. 8(1).
- 536 *SDA*, note 116, s. 32.
- 537 *SDA*, note 116, s. 32(6).
- 538 *SDA*, note 116, s. 66.
- 539 OBA *Submission*, note 232 at 13 and 23, and ACE *Submission*, note 89 at 12.
- 540 *Poirier and Poirier*, note 479.
- 541 OBA *Submission*, note 232 at 16.
- 542 CRPD, note 320, Art. 12(4).
- 543 ACE *Congregate Living*, note 105 at 23.
- 544 MAG *Submission*, note 422 at 6.
- 545 OBA *Submission*, note 232 at 18.
- 546 ACE *Submission*, note 89 at 12.
- 547 CACL *Submission*, note 170 at 7.
- 548 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas of Reform – Final Report* (2008) online: <http://www.law.ualberta.ca/alri/docs/WCLRA%20epa%20fr.pdf>.
- 549 Hall, note 429 at 32.
- 550 This is a point made by Doron, *From Guardianship*, note 431 at 284.
- 551 *LTCHA*, note 100, s. 3.
- 552 *Spencer*, note 39 at 71-72.
- 553 Some of the key issues are highlighted in the *Background Paper* for this project, released in December 2010, online: <http://www.lco-cdo.org/en/vulnerable-workers-background-paper>.
- 554 See note 195 regarding initiatives to increase the physical accessibility of the courts.
- 555 *RTA*, note 92, s. 186 and 204.
- 556 Senate Committee, note 2 at 87.
- 557 Statistics Canada. Table 358-0124 - *Canadian Internet use survey, Internet use, by location of access, sex and age group, every 2 years (percent)*, CANSIM (database).
- 558 *Spencer*, note 39 at 69.
- 559 Office of the Ombudsman, *A Duty to Care: An Investigation into Municipal Licensing and Standards' Treatment of a Resident with Dementia* (City of Toronto: November 2010) at 12 -13, online: http://ombudstoronto.ca/sites/default/files/MLSInvestigationFINAL_0.pdf.
- 560 A helpful discussion of the relevance of universal design to the law affecting older adults may be found in Surtees, note 28 at 95 - 105.

- ⁵⁶¹ British Columbia Law Institute, *Response to the Law Commission of Ontario Consultation Paper* (July 2008) at 3.
- ⁵⁶² Poirier and Poirier, note 479.
- ⁵⁶³ OBA Submission note 232.
- ⁵⁶⁴ *McDonnell Estate*, note 239.
- ⁵⁶⁵ *ACE Submission*, note 89 at 12.
- ⁵⁶⁶ *LTCHA*, note 100, ss. 24, 26, 22, 78.
- ⁵⁶⁷ *MAG Submission*, note 422, p. 7.
- ⁵⁶⁸ *Time for Action*, note 11 at 15-18; Senate Committee, note 2 at 14-16; MIPAA, note 9 at para. 112.
- ⁵⁶⁹ For more information, visit the ONPEA website, online: www.onpea.org.
- ⁵⁷⁰ *ACE, Congregate Living*, note 105 at 86.
- ⁵⁷¹ *Time for Action*, note 11 at 17.
- ⁵⁷² *ACE, Congregate Living*, note 105 at 85-88.
- ⁵⁷³ *Policy on Discrimination*, note 12 at section 4.4.
- ⁵⁷⁴ For example, the Elliot Lake Police Service has a Seniors' Issues Office blending social work and police services, and focusing on seniors' community development and prevention/intervention services for at-risk seniors, online: www.cityofelliotlake.com/en/cityservices/seniorsissuesofficer.asp. Edmonton Police Services has an Elder Abuse Intervention Team, a collaboration between the police service, City of Edmonton Community Services, Catholic Social Services and the Victorian Order of Nurses, online: www.edmontonpolice.ca/communitypolicing/familyprotection/elderabuse.aspx. Los Angeles has an Elder Abuse Advocacy and Outreach Program, and Connecticut has a specialized Elder Abuse Unit in the Office of the Chief State's Attorney. These are only a few examples.
- ⁵⁷⁵ For information on these programs, see online: www.aoa.gov/AOARoot/AOA_Programs/Elder_Rights/EAPrevention/index.asp. On April 16, 2012, the Department of Health and Human Services announced that the Administration on Aging would be amalgamated with the Office on Disability and the Administration on Developmental Disabilities to form a new "Administration for Community Living". Administration on Aging, News Release, "Announcement of a New Organization Within the Department of Health and Human Services" (April 16, 2012).
- ⁵⁷⁶ This is a complex scheme, for which this can be only a very cursory summary. A more detailed description is provided in *ACE Congregate Living*, note 105 at 70 – 72.
- ⁵⁷⁷ *Commissioner for Older People (Wales) Act 2006* U.K. 2006, c. 30 [Commissioner for Older People].
- ⁵⁷⁸ Lai, note 189 at 11.
- ⁵⁷⁹ Canadian Centre for Elder Law, *Elder and Guardianship Mediation*, CCEL Report No. 5 (January 2012), 1, online: www.ccels.ca [CCEL, *Mediation*].
- ⁵⁸⁰ *RTA*, note 92, s.148(3).
- ⁵⁸¹ Spencer, note 39 at 3.
- ⁵⁸² See generally Susan Gary, "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance" (1997) 32 *Wake Forest Law Review* 397; Suzanne Schmitz, "Mediation and the Elderly: What Mediators Need to Know" (1998) 16 *Mediation Quarterly* 71.
- ⁵⁸³ The University of Windsor Mediation Services Elder Mediation and Conflict Resolution program is a dedicated elder mediation clinic. Some of these generalized programs, including the University of Windsor's, do decline to mediate cases of serious elder abuse.
- ⁵⁸⁴ In the Cornwall area, four community agencies are piloting an elder mediation program for caregivers of patients with Alzheimer's and related dementias. The project is funded by a grant from the Ontario Aging at Home strategy, and is a partnership between the Alzheimer Society of Cornwall and District, the Cornwall branch of the Champlain Community Care Access Centre, the Community Living office and the Canadian Mental Health Association branch. In these disputes, the older adult will not necessarily participate in the process, as he or she may not have the capacity to do so. These are still considered elder mediations, in the sense that they are designed in order to productively manage the interpersonal dynamics at the heart of older adults' disputes.
- ⁵⁸⁵ See John Bertschler and Patricia Bertschler, "Addressing the Power Imbalance of Power in Elder Mediation Cases" (2009) 59 *ADR Forum* 5 for more on strategies for rectifying power imbalances in elder mediations.
- ⁵⁸⁶ See Susan Crawford et al., "From Determining Capacity to Facilitating Competencies: A New Mediation Framework" (2003) 20 *Conflict Resolution Quarterly* 385 online: <http://onlinelibrary.wiley.com/doi/10.1002/crq.33/pdf> for more on maximizing individuals' participation in processes.
- ⁵⁸⁷ There is some helpful discussion of these issues in CCEL, *Mediation* note 575, at 27-29, and 136 – 138.
- ⁵⁸⁸ In particular, the University of Windsor's Elder Mediation program and Cornwall's elder mediation program (as described in note 527).
- ⁵⁸⁹ CCEL, *Mediation*, note 583.
- ⁵⁹⁰ For pilot projects in elder mediations as creating alternatives guardianship, see Susan Butterwick et al., *Evaluating Mediation as a Means of Resolving Adult Guardianship Cases, A Report Submitted by the Center for Social Gerontology to the State Justice Institute* (October 2001) online: http://www.tcsg.org/mediation/SJI_01.pdf.
- ⁵⁹¹ Arlene Groh and Rick Linden, "Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project" (2011) 23 *Journal of Elder Abuse and Neglect* 127 [Groh and Linden].
- ⁵⁹² Groh and Linden, note above at 6.
- ⁵⁹³ Groh and Linden, note 587 at 8.

- ⁵⁹⁴ Arlene Groh, *Restorative Justice: A Healing Approach to Elder Abuse* (Paper delivered at the 6th International Conference on Restorative Justice, June 2003) [unpublished] at 4.
- ⁵⁹⁵ Groh and Linden, note 587 at 19.
- ⁵⁹⁶ Groh and Linden, note 587 at 21.
- ⁵⁹⁷ Arlene Groh, *A Healing Approach to Elder Abuse and Mistreatment: The Restorative Justice Approaches to Elder Abuse Project*, (Kitchener, Ontario: Pandora Press, 2003) at 28-29.
- ⁵⁹⁸ Groh and Linden, note 587 at 19.
- ⁵⁹⁹ Groh and Linden, note 587 at 21-22.
- ⁶⁰⁰ Groh and Linden, note 587, at 27.
- ⁶⁰¹ Groh and Linden, note 587, at 26.
- ⁶⁰² Groh and Linden, note 587, at 27.
- ⁶⁰³ Sean O'Sullivan, *You've Got a Friend: A Review of Advocacy in Ontario* (Toronto: Ontario Ministry of the Attorney General, 1987) at vi [O'Sullivan].
- ⁶⁰⁴ O'Sullivan, note above at 5.
- ⁶⁰⁵ O'Sullivan, note 599 at 57.
- ⁶⁰⁶ OBA *Submission*, note 232 at 10.
- ⁶⁰⁷ ACE, *Congregate Living*, note 105 at 91.
- ⁶⁰⁸ ACE, *Congregate Living*, note 105 at 88-102.
- ⁶⁰⁹ This law reform proposal is more fully described in ACE, *Congregate Living*, note 105 at 94 and following.
- ⁶¹⁰ ACE, *Congregate Living*, note 105 and the ACE *Submission*, note 89 at 94.
- ⁶¹¹ *Commissioner for Older People*, note 573.
- ⁶¹² Cited in Gareth Griffith, *A Commissioner for Older People in NSW?* Briefing Paper No. 3/08 (New South Wales: Parliamentary Library Research Service, April 2008) at 3, online: [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/3FC49510516B6E0DCA257433001C90E3/\\$File/CommissionerFINALandINDEX.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/3FC49510516B6E0DCA257433001C90E3/$File/CommissionerFINALandINDEX.pdf) [Griffith].
- ⁶¹³ See the website of the Older People's Commissioner, online: <http://www.olderpeoplewales.com/en/splash.aspx>.
- ⁶¹⁴ *Commissioner for Older People*, note 573.
- ⁶¹⁵ The activities of the Older People's Commissioner are documented in their Annual Reviews, online: <http://www.olderpeoplewales.com/en/splash.aspx>.
- ⁶¹⁶ Griffith, note 608.
- ⁶¹⁷ ACE, *Congregate Living*, note 105 at 111.
- ⁶¹⁸ The Ontario government has developed an Aging at Home Strategy, a four year, \$1.1 billion strategy that aims to provide a range of community-based services to help older adults remain healthy and continue to live independently in their homes for as long as possible, online: http://www.health.gov.on.ca/english/public/program/ltc/33_ontario_strategy.html. Aging in place was also promoted in Senate Committee, note 2. The Alzheimer Society's work on planning for increasing prevalence of dementia in the population recommends increasing supports so that affected older adults can remain in their homes for longer, *Rising Tide*, note 81.
- ⁶¹⁹ A comprehensive national overview of older adults' needs for home care, the place of home care in the health care system, levels of care currently provided, and the impact on older adults and their informal care providers can be found in Health Council of Canada, *Seniors in Need, Caregivers in Distress* (April 2012), online: http://healthcouncilcanada.ca/tree/HCC_HomeCare_FA.pdf [Health Council of Canada].
- ⁶²⁰ The Change Foundation, *Because This is the Rainy Day: A Discussion Paper on Home Care and Informal Caregiving for Seniors with Chronic Heart Conditions* (February 2011) at 3 [Change Foundation].
- ⁶²¹ Health Council of Canada, note 619, at 27.
- ⁶²² Office of the Auditor General of Ontario, *Annual Report of the Auditor General of Ontario* (Ottawa: Office of the Auditor General of Ontario, 2010) at 117, online: http://www.auditor.on.ca/en/reports_health_en.htm [Auditor General].
- ⁶²³ HCCSA, note 88.
- ⁶²⁴ HCCSA, note 88, s. 1.
- ⁶²⁵ HCCSA, note 88, s. 1(3), (4), (5), (6), (7).
- ⁶²⁶ HCCSA, note 88, s. 3.
- ⁶²⁷ HCCSA, note 88, s. 4.
- ⁶²⁸ HCCSA, note 88, ss. 5, 6.
- ⁶²⁹ For a discussion of the reform, its rationale and some of its effects, see Margaret Denton et al., "Market-Modeled Home Care: Impact on Job Satisfaction and Propensity to Leave" (2007) XXXIII *Canadian Public Policy Special Edition* 81 [Denton].
- ⁶³⁰ *Community Care Access Corporations Act 2001*, c. 33 [CCAC Act], O. Reg. 554/06.
- ⁶³¹ Auditor General, note 622 at 114.
- ⁶³² Auditor General, note 622 at 119.
- ⁶³³ Denton, note 629 at 83.
- ⁶³⁴ Regulation 386/94, *Provision of Community Services*, s. 2.
- ⁶³⁵ See *VK v North East Community Care Access Centre*, 2011 CanLII 10016 (ON HSARB).
- ⁶³⁶ Regulation 386/94, *Provision of Community Services*, s. 3.
- ⁶³⁷ Auditor General, note 622 at 121.
- ⁶³⁸ HCCSA, note 88, s. 22.
- ⁶³⁹ HCCSA, note 88, s. 23.
- ⁶⁴⁰ HCCSA, note 88, s. 31.
- ⁶⁴¹ HCCSA, note 88, s. 25.
- ⁶⁴² HCCSA, note 88, ss. 26, 27.
- ⁶⁴³ HCCSA, note 88, ss. 33 – 36.
- ⁶⁴⁴ HCCSA, note 88, ss. 61 – 62.

- ⁶⁴⁵ HCCSA, note 88, ss. 50 – 52.
- ⁶⁴⁶ HCCSA, note 88, s. 53.
- ⁶⁴⁷ CCAC Act, note 630 s. 3
- ⁶⁴⁸ CCAC Act, note 630, s. 11.
- ⁶⁴⁹ CCAC Act, note 630, s. 14.
- ⁶⁵⁰ HCCSA, note 88, s. 3(3).
- ⁶⁵¹ HCCSA, note 88, s. 39.
- ⁶⁵² HCCSA, note 88, ss. 40 – 48.
- ⁶⁵³ In a study of older women using home care services, some participants commented on the effect of their baths rationed to once per week, or of having a revolving cast of strangers responsible for personal tasks such as catheter changes: Jane Aronson, “Frail and Disabled Users of Home Care: Confident Consumers or Disentitled Citizens?” (2002) 21 *Canadian Journal on Aging* 11 at 16 – 18.
- ⁶⁵⁴ Recent reports emphasize the strains under which many informal caregivers live: see for example *Cost of Caring*, note 121; Change Foundation, note 620; Health Council of Canada, note 619. This was also a key preoccupation of the Focus Group that the LCO held with informal caregivers.
- ⁶⁵⁵ Ontario Association of Community Care Access Centres, *Submission to the Standing Committee on Finance and Economic Affairs* (February 2011) at 1 [OACCAC Submission].
- ⁶⁵⁶ See online: <http://www.homecareontario.ca/public/about/home-care/system/facts-and-figures.cfm>.
- ⁶⁵⁷ The Health Council of Canada found that a high percentage of home care clients have chronic conditions such as emphysema, cancer, heart failure or diabetes, and including 20 per cent with a diagnosis of dementia: Health Council of Canada, note 619, pages 11-13.
- ⁶⁵⁸ Health Council of Canada, note 619, page 11.
- ⁶⁵⁹ Auditor General, note 622 at 115.
- ⁶⁶⁰ Auditor General, note 622 at 115.
- ⁶⁶¹ OACCAC Submission, note 655 at 3-5.
- ⁶⁶² OACCAC Submission, note 655 at 6.
- ⁶⁶³ OACCAC Submission, note 655 at 6.
- ⁶⁶⁴ Susan Bronskill et al., *Aging in Ontario: An ICES Chartbook of Health Service Use by Older Adults, A Report from the Institute for Clinical Evaluative Sciences* (September 2010). The report of the Health Council of Canada confirms this concern; note 619.
- ⁶⁶⁵ Auditor General, note 622 at 121-22.
- ⁶⁶⁶ Richard Lautens, “Seniors find little care in provincial aging strategy” *Toronto Star* (18 February 2011), online: <http://www.thestar.com/news/article/941343--seniors-find-little-care-in-provincial-aging-strategy>; *Toronto Star*, “Begging for care: Keeping seniors healthy and at home” (23 February 2011), online: <http://www.thestar.com/opinion/editorials/article/943179>; Moira Welsh, “Daughter copes at home with two ailing parents”, *Toronto Star* (21 February 2011) online: <http://www.thestar.com/news/article/941697>.
- ⁶⁶⁷ Community Legal Education Ontario, *Home Care Complaints and Appeals* (May 2010) at 15, online: http://www.cleo.on.ca/english/pub/onpub/PDF/health/home_care.pdf.
- ⁶⁶⁸ Spencer, note 39.
- ⁶⁶⁹ Jane Aronson, “Silenced Complaints, Suppressed Expectations: The Cumulative Impacts of Home Care Rationing” (2006) 36 *International Journal of Health Services* 535 [Aronson].
- ⁶⁷⁰ Aronson, note 669 at 546.
- ⁶⁷¹ Aronson, note 669 at 545.
- ⁶⁷² Community Care Access Centre- Toronto Central, *Feedback about your experience*, online: <http://www.ccac-ont.ca/Content.aspx?EnterpriseID=7andLanguageID=1andMenuID=8>.
- ⁶⁷³ Community Care Access Centre - South East, *Feedback about your experience*, online: <http://www.ccac-ont.ca/Content.aspx?EnterpriseID=10andLanguageID=1andMenuID=8>.
- ⁶⁷⁴ HCCSA, note 88 at s 3(8).
- ⁶⁷⁵ Community Care and Access Centre, *Complaints, Appeals and Feedback*, online: <http://www.ccac-ont.ca/Content.aspx?EnterpriseID=15andLanguageID=1andMenuID=8>.
- ⁶⁷⁶ Auditor General, note 622 at 125.
- ⁶⁷⁷ HCCSA, note 88, s. 5(1)(ii).
- ⁶⁷⁸ Ministry of Health and Long Term Care, *Press Release and Backgrounder, “Ontario Strengthens Home Care Services”*, December 15, 2008.
- ⁶⁷⁹ HCCSA, note 88, s. 27.
- ⁶⁸⁰ HCCSA, note 88, s. 68(26).
- ⁶⁸¹ HCCSA, note 88, s. 23(1).
- ⁶⁸² OACCAC Submission, note 655 at 3.
- ⁶⁸³ Auditor General, note 622 at 124.
- ⁶⁸⁴ Auditor General, note 622 at 124

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