Submission to the Standing Committee on Social Policy: Bill 21, *Retirement Homes Act, 2010*

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INTRODUCTION TO ACE

ACE is a specialty community legal clinic that was established to provide a range of legal services to low income seniors in Ontario. The legal services include individual and group client advice and representation, public legal education, community development, and law reform activities. ACE has been operating since 1984 and is the first and oldest legal clinic in Canada with a specific mandate and expertise in legal issues of the older population.

ACE receives, on average, over 2,500 client intake inquiries a year. These calls are primarily from the Greater Toronto Area but approximately twenty per cent are from outside this region. The individual client services are in areas of law that have a particular impact on older adults. These include, but are not limited to: capacity, substitute decision-making and health care consent; end-of-life care; supportive housing and retirement home tenancies; long-term care homes; patients' rights in hospitals; and elder abuse.

Clients regularly seek our advice on issues relating to accommodation and care in retirement homes. ACE also receives many requests for assistance from community legal clinics and others across Ontario for recommendations on legal approaches to "care home" cases under the *Residential Tenancies Act*.

ACE has also been involved in several high profile inquests. For example, following the deaths of eight people by fire at the Meadowcroft Retirement Home in 1995, ACE represented one of the interveners, the Alzheimer's Society. The coroner's jury made a total of 53 recommendations, including changes to the *Fire Code* to require sprinkler retrofits of all residential care buildings with more than eight residents across Ontario.

In addition to producing written educational materials in the forms of brochures and newsletters, ACE has written a text in excess of 600 pages that is now in its third edition entitled *Long Term Care Facilities in Ontario: The Advocate's Manual*. In addition to material about long-term care homes, this manual includes chapters on retirement homes, home care, substitute decision-making, powers of attorney and advocacy. ACE is planning to publish a fourth edition in 2011.

Additionally, ACE lawyers are in high demand as speakers on seniors' issues and residents' rights. Numerous presentations on these issues have been made by ACE at the local, provincial, national and international levels. We are pleased to contribute our views on retirement home regulation to the Standing Committee on Social Policy based on our extensive experience advocating for seniors in Ontario.

OVERVIEW

Residents of retirement homes[1] are a potentially vulnerable group as they are often dependent on the institution that provides their care and shelter, in addition to the fact that they are "out of sight" and sheltered from public scrutiny. Moreover, it appears that the care levels provided in retirement homes are increasing due to demand and lack of available beds in long-term care homes. While ACE is definitely not saying that all tenants at retirement homes are vulnerable, many are.

At present, the quality of care in retirement homes cannot be guaranteed because there is little or no oversight.[2] There is a clear and pressing need for a comprehensive regulatory scheme for retirement homes in Ontario to ensure that older adults can live in an environment that promotes their independence while also ensuring their safety and protecting their rights. While ACE supports the spirit of the proposed legislation, we cannot support Bill 21 unless significant changes are made. We submit that retirement home regulation is of such critical importance in the lives of Ontarians that it should be carried out by way of a government-administered scheme.

Our submission is divided into three main parts. The first section provides some information about the consultation process undertaken by the Ontario Seniors' Secretariat that led to the development and underlying foundation of Bill 21. In the second section, we take the position that although the government is trying to convince the public that the proposed legislation is creating a third party regulatory model, the model as drafted is more similar to "enhanced self-regulation." We then present a critique as to why Bill 21's governance structure is unsuitable for retirement homes, as well as what ACE believes to be an appropriate model. Finally, the last section is an effort to improve the proposed legislation by identifying our specific concerns and recommendations for changes to Bill 21.

Please note that we refer to long-term care homes throughout our submission because, if this legislation is passed, many retirement homes will be analogous to long-term care homes as they will be able to provide the same services.

We urge the Standing Committee on Social Policy to consider our analysis and recommendations respecting Bill 21 in order to use this once in a lifetime opportunity to "get it right" and provide proper protections to individuals living in retirement homes.

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[1] In this submission, we will refer to this form of accommodation as a "retirement home" although it is defined and governed by Part IX of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 as a "care home."

[2] While general provincial and municipal laws apply to retirement homes (e.g., *Building Code Act, 1992*, S.O. 1992, c. 23*, Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4, *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7), the only area of substantial regulation unique to retirement homes is the regulation of landlord-resident matters under the *Residential Tenancies Act*.

ONTARIO SENIORS' SECRETARIAT CONSULTATION

In 2007, the Ontario Seniors' Secretariat released a consultation document proposing a "third-party regulatory model" for retirement homes. Under this model, the government would create an agency that would develop standards and monitor its member organizations to ensure compliance with these standards. The government itself would not be responsible for creating any minimum standards, conducting inspections or penalizing non-compliance.

Over 800 participants attended the consultation sessions organized by the Ontario Seniors' Secretariat regarding the regulation of the retirement home industry while over 250 written responses were submitted.[3] The following excerpt summarizes the written comments received by the Secretariat (and which was very similar to the feedback received at the consultation sessions):

> Although all categories of respondents agreed that the retirement home sector should be regulated (including the vast majority of operators), there was little agreement on the specific features that could be included in a definition of a retirement home (such as size and care services). There was widespread agreement about which administrative, resident care, food services and environment areas should be covered by standards. While the enforcement activities of a monitoring entity were generally agreed by all respondents, there was disagreement about the enforcement body. While the majority of respondents felt that a third party agency was appropriate, a fairly significant number felt that enforcement was a government responsibility.[4]

The government has emphasized to the Legislative Assembly of Ontario that these consultations greatly contributed to shaping Bill 21.[5] It must not be forgotten, however, that there was no consensus amongst consultation participants. Further, ACE identified significant problems with both the content and process of the consultation which we relayed to three different government ministries via written correspondence. The following represents a summary of our concerns:

- The right questions were not addressed at the consultation. Namely, whether retirement homes are part of the continuum of housing or whether retirement

[3] Ontario, Ontario Seniors' Secretariat, *Retirement Homes Consultations*, online: <http://www.culture.gov.on.ca/seniors/english/programs/rhc/> (last modified: 30 July 2007).
[4] Ontario, Ontario Seniors' Secretariat, *Regulating Care in Ontario's Retirement Home Industry: The Findings from Written Submissions to the Ontario Seniors' Secretariat* (2007) at 10, online <http://www.culture.gov.on.ca/seniors/english/programs/rhc/docs/WrittenSubmissions.pdf>.
[5] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 14 (13 April 2010) at 565 (Gerry Phillips) and 566 (Vic Dhillon).

homes constitute a parallel but privately paid system along-side long-term care homes.

- Both the proposed model third party regulatory model and the consultation process placed heavy reliance on input from ORCA.
- The appropriate stakeholders were not consulted. People invited to the consultation sessions were mainly from the retirement home industry, some municipal representatives and members from seniors' organizations. Members and groups representing the disability community, non-profit housing and long-term care providers were not invited to the table.
- Participants were hampered by a lack of knowledge of the existing law and health care framework related to retirement homes. For instance, at least one participant at one round table discussion thought they were providing input into "nursing homes" while others said they did not really understand the topic on which they were being asked to consult.
- The consultation document glossed over the existing law governing retirement homes. The care homes section of the *Residential Tenancies Act*, for example, was so minimal that readers may have been left with the impression that the legal relationship between retirement home operators and tenants was entirely unregulated.

CRITIQUE OF THE THIRD-PARTY REGULATORY MODEL IN BILL 21

Bill 21 purports to govern retirement homes and protect consumers by way of a third-party regulatory model. This is the form of regulation the government has established for industries such as travel agencies, real estate agencies and motor vehicle dealerships. Each agency is set up as a non-profit corporation and the board of directors of the agency sets policies and standards for the respective industries. Board members are appointed by the regulated industry and/or the government. ACE does not believe that this type of regulation is appropriate for retirement homes for the reasons as discussed below. Many of these points were identified and raised at the consultation with the Ontario Seniors' Secretariat in 2007.

Two-Tiered Health Care

ACE's fundamental critique of Bill 21's third-party regulation of retirement homes is its presumption that health care is a commodity that should be privatized. Although retirement homes essentially constitute a private relationship between the operator-as-landlord and the tenant, it is the health care aspect of the retirement home that gives it a public character. Unfortunately, Bill 21 fails to stipulate any cap or limitations on the care that retirement homes can offer. By permitting retirement homes to provide the same services available in long-term care homes, the government is creating a two-tiered health care system that primarily benefits the wealthy

Many older adults cannot afford to live in retirement homes. The average total monthly cost (including both rent and care) is $2,750 for a standard retirement space and $3,440 for a heavy care space (1.5 hours or more of health care).[6] We expect that retirement homes will raise their rates if Bill 21 is passed because they will be able to provide a significantly higher level of care to those eager to pay top dollar for extra health care services. On the other hand, homes that purport to provide care at rates affordable to those on the lowest fixed income (government pensions) cannot possibly provide the care that many of the residents actually need.

ACE believes it is illogical to have the government stringently regulate long-term care homes if retirement homes providing the same level of care and services are subject to different rules and regulation. The weaker regulatory system for retirement homes and increased opportunity for profits will likely persuade some long-term care homes to convert to retirement homes.[7] Instead of viewing retirement homes as part of the

[6] Canadian Housing Mortgage Corporation, *Seniors' Housing Report: Canada Highlights* (2009) at 5.
[7] Section 308(4)(b) of O. Reg. 70/10 to the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8 requires a licensee to give five years notice to the Ministry of Health and Long-Term Care of an intent to close a home although it is not clear what, if any, penalty would be levied on a licensee who fails to provide the requisite notice.

continuum of accommodation options available to older adults, the government is encouraging a parallel, unfunded system.

Single versus Multi-Faceted Transactions

Consumer contact with the types of industries already regulated by a third-party agency is typically in the nature of a single transaction, such as purchasing a vacation. As such, disputes and disagreements tend to be bilateral and straightforward. For example, if a person pays for a trip but is unable to go because the registered travel agency through which the person bought the package goes out of business, the person is entitled to a refund and the Travel Industry Council of Ontario may investigate and assist with compensation.

In contrast, the receipt and provision of accommodation and care in a retirement home is by necessity an ongoing relationship with many points of contact between the tenant and the operator or the operator's employees and/or contractors. Further, these points of contact involve some of the most personal and important aspects of a tenant's daily life: health information; personal information such as names of family or friends; regular financial transactions; food and nutrition; and social activities, to name but a few. Retirement home tenants may be in a position of vulnerability in relation to the operators since tenants may to some degree depend on the operators for the necessities of life and for assistance with the activities of daily living. In short, the relationship is ongoing and multifaceted as is the resolution of disputes. Disagreements could involve care providers who are members of regulated health professionals, or could relate to the provision of service over time, such as in the context of meals or activities.

Limited Choices for Tenants

When there is a dispute between a consumer and a provider in one of the self-regulated industries in the examples above, the consumer can decide to take her business elsewhere: she can book her next trip through a different travel agent (or on her own through the Internet). In contrast, a retirement home tenant who is in a dispute with the operator of his home will likely not want, nor be able, to simply move to a new home pending the outcome of any dispute resolution mechanism. In fact, being tenancies, the resident is restricted in their ability to break the agreement as they have to give 30 days notice.

Limited Remedies

The consequences of inadequate or incompetent service provision in the industries cited previously can indeed be serious but the damages can be remedied by compensation or restitution, and the regulatory body can censure the service provider in some fashion – including by removing their licence. In the care home context, however,

the potential consequences of poor or inadequate care can be very serious, and even deadly. However, as set out almost 20 years ago in the "Lightman Report", we are unable to determine the extent of the problem, as we have only a rough estimate of how many tenants live in these premises, as there is still no obligation for them to make themselves known to any government body.[8]

Consider, for example, the unreported case involving Janet Longford, who was a "private nursing home owner" of a 16-bed home in Orillia. In 2006, she pleaded guilty to failing to provide the necessaries of life severely neglecting Sarah Eisemann, one of her residents. A Superior Court judge sentenced her to six months' house arrest and three years' probation after hearing of the malnutrition, severe stage four bedsores and restraint of Mrs. Eisemann.[9]

A more recent case was reviewed by the Geriatric and Long-Term Care Committee to the Chief Coroner for the Province of Ontario. In that case, the Committee cautioned hospitals from discharging patients to retirement homes when their care needs really required long-term care. They also recommended that a public sector agency be created to regulate, oversee and inspect retirement homes.[10]

Remedies for such inadequate care would not be purely monetary. Further, as we have seen in the long-term care industry, it is difficult to simply "pull" a license from a home providing care to residents as it penalizes the residents even more by making them homeless – finding alternate accommodation can be impossible.

Industry Domination through Enhanced Self-Regulation

The third-party regulatory bodies described above are governed by boards of directors. In most situations, these boards are dominated by representatives of the industry. Representatives of the retirement home industry have stated that they desire regulation so that the reputation of the industry as a whole will improve (and therefore competition will increase). However, when boards are dominated by industry representatives, there is a risk that decisions and policies will reflect the interests of the industry rather than those of consumers.

Although the provincial government touts Bill 21 as creating an arms-length third-party authority, ACE contends that it is actually legislating the *status quo* by permitting and even encouraging a system of what we call "enhanced self-regulation."

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[8] Ernie S. Lightman, *A Community of Interests: The Report of the Commission of Inquiry into Unregulated Residential Accommodation* (Ontario: Queen's Printer, 1992) at 3.
[9] Roberta Avery, "Woman gets house arrest for elder abuse", *The Toronto Star*, (6 September 2006).
[10] Ontario, Office of the Chief Coroner, *Nineteenth Annual Report of the Geriatric and Long-Term Care Review Committee to the Chief Coroner for the Province of Ontario* (September 2009) at 35-41.

Self-regulation has been defined as "a process whereby an organized group regulates the behaviour of its members."[11] Critics of self-regulation say it does not work in practice. They claim "self-regulatory standards are usually weak, enforcement is ineffective and punishment is secret and mild."[12] A strong body of cross-jurisdictional evidence indicates that the bulk of self-regulatory regimes are primarily motivated by the fear of government regulation.

Bill 21 creates a Retirement Homes Regulatory Authority (the Authority) whose mandate is not only to administer the statute and its regulations but to set its own by-laws. It goes without saying the Authority will be an extremely powerful entity. Section 12(5) of Bill 21 says that the majority of directors will be appointed by the board itself, not the government. As a result, there is nothing in Bill 21 that prevents the regulatory body from being dominated by the major stakeholders in the retirement home industry. Gerry Phillips, the Minister Responsible for Seniors, has stated that "we have told the industry that we're looking for board members who understand the industry but are not there representing the industry."[13] Unfortunately, we cannot share Minister Phillips' optimism, given that retirement homes are a multi-million dollar industry and the control of the Authority represents an irresistible opportunity to protect its self-interests.

ACE does not believe that the retirement home industry has demonstrated the credibility necessary to vest responsibility for regulation solely within the industry. The Ontario Retirement Communities Association (ORCA), a voluntary trade organization that sets professional operating standards and accredits retirement residences, is the representative body of the industry. While the industry is certainly knowledgeable about the business operational aspects of running a retirement home, ORCA has not shown that it can effectively deal with areas of critical importance to tenants.

For instance, the Ontario government provides funding to ORCA to maintain a hotline called the Complaints Response and Information Service (otherwise known as the CRIS Line). Tenants may call the line to get information about retirement homes services and accommodation options and to obtain help resolving complaints about a retirement home. While the funding for the CRIS Line requires it to attempt to resolve complaints about both ORCA and non-ORCA homes, ORCA does not presently have the authority to force non-member homes to change in response to complaints. Member homes may be threatened with loss of membership if they fail to comply with ORCA standards. If complaints against particular homes are not resolved, the date of the complaint, the name of the home, and information as to the nature of the complaint may be posted on the ORCA website. Since its inception on September 1, 2000, the CRIS line has not

[11] Neil Gunningham & Duncan Sinclair, "Instruments for Environmental Protection" in *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998) at 50.
[12] *Ibid*. at 53.
[13] *Supra* note 5 at 570 (Gerry Phillips)

had any unresolved complaints.[14] Based upon our experience with retirement home issues, it us inconceivable that in nine years they have been able to resolve all retirement home complaints. Further, older adults who know about and have used the CRIS Line have expressed concerns to ACE that is not independent as it is operated by an industry organization. Finally, based on our experience at ACE, many older adults do not seem to know about the existence of the CRIS Line. This demonstrates that neither the industry nor the retirement homes themselves have adequately promoted and encouraged the utilization of this service.

Self-regulation requires that tenants must be comfortable complaining and that they have the wherewithal to do so. Unfortunately, this ability is not universal. Even those who do know their rights are afraid to ask that they be enforced because they may experience retaliation. As pointed out previously, residents cannot simply pack-up and leave when they are unhappy: most will continue to be reliant upon the operator and the services provided while they pursue their complaints.

Many homes that are accredited by ORCA do not comply with the requirements of the existing landlord-tenant legislation. Our clients report that many tenants in ORCA homes are not provided with the legislatively mandated Care Home Information Package ("CHIP"). Our clients further report that in some ORCA homes, operators charge tenants not per rental unit, as provided for in the legislation, but per tenant. Further, tenants in some cases have been evicted illegally when they have a health care crisis and are sent to hospital, even though this is not a ground for lawful eviction.

In short, industry self-regulation by a body such as ORCA is inappropriate and akin to allowing the fox to guard the henhouse.

The True Intent of the Legislation: Limiting the Future Development of Publicly Funded Long-Term Care?

It comes as no surprise to say that many long-term care homes have extremely long waiting lists. The average wait-time has doubled from 49 days to 106 days in the past few years, although the waits can be much lengthier in different parts of the province.[15]

After years of cut-backs and bed closings, many hospitals in Ontario complain of beds being taken up by those awaiting placement in long-term care homes. Through no fault of their own, these patients are awaiting placement in long-term care while occupying an acute care hospital bed. Once a patient is "designated" by the physician as requiring long-term care (often referred to as being "alternate level of care" or "ALC"), the hospital

[14] Email from Tracy Fairfield, Complaints Response and Information Service, Ontario Retirement Communities Association to Judith Wahl, Executive Director, ACE (2 July 2009).
[15] Ontario Health Quality Council, *Long-Term Care in Ontario: A Report on Quality* (May 2009), online: http://www.ohqc.ca/pdfs/ohqc_2009_ltc_supplement_e.pdf at 3.

will attempt to have the person moved as quickly as possible. At some point, the patient or their substitute decision-maker may be advised of the hospital's policy regarding the acceptance of the "first available bed" although such policies are not legal. Many hospitals advise patients or their substitute decision-makers that they must accept beds from a "short list" of beds which are in homes that have short or no waiting lists. In other cases, they will be advised that when a bed becomes available even if it is not one that they have chosen, they will be told that they have to take it (often known as first available bed policies). Some hospitals will require the patient or their substitute decision-maker to sign a "contract" indicating that they "agree" with this policy. Failure to agree may result in the patient being forced to return home to wait for their facility of choice, go to a retirement home to await their facility of choice or pay the uninsured "daily rate" for the hospital bed. ACE is of the view that none of these choices are legal.[16]

Recently, there has been a move to designate retirement homes as temporary long-term care home beds in order to alleviate the bed shortage problem. These beds are being funded through the local hospital or Local Health Integration Networks but governed by the Ministry of Health and Long-Term Care through the appropriate legislation and are subject to the same inspection and regulation as any other long-term care home. While this is a better situation than people who require long-term care being put into unregulated nursing homes, people still cannot be forced into them as part of hospital "programs." The rules of consent and choice continue to apply to these beds, and only when these are met can individuals be placed in these beds.

Both the plight of ALC patients and lengthy waiting lists for admission to long-term care have been reported in the media and the subject of debate in the Legislative Assembly. We submit that the true intent of Bill 21 is an attempt to manage the health budget, ALC problems and the shortage of long-term care beds by creating a parallel, privatized, and unfunded long-term care home system called "retirement homes" which would require seniors to pay for their own long term health care.

ACE's Proposal

ACE supports a licensing system for retirement homes in conjunction with standards for safety, care and quality of service and a meaningful scheme for complaint resolution. Where we primarily differ from Bill 21 centres on the nature of the highest level of care available to tenants, who should be the regulator and the highest level of care available to tenants. As previously stated, retirement homes should not be long-term care homes. The reasons for this are twofold: first, those who require high levels of care are entitled to obtain it in a place that must meet the highest standards available; secondly,

[16] ACE has written two papers entitled *Ethical Issues Paper Respecting First Available Beds* and *Discharge to a LTC Home from Hospital* that explains these issues in detail. These documents are available on our website at www.acelaw.ca.

the individual is also entitled to this service as part of our healthcare system and should not be required to pay as would be necessary in the retirement home system.

We also believe that there is no place for a Retirement Homes Regulatory Authority dominated by industry stakeholders with self-perpetuating membership. Instead, there should be a retirement homes division overseen by a board of directors under the purview of the Ministry of Health and Long-Term Care. This would be the appropriate government authority since retirement homes will continue to provide significant amounts of care to their tenants. Moreover, the Ministry of Health and Long-Term Care would be responsible for compliance and enforcement as they already have expertise in these areas due to their experiences in long-term care. We agree that the tenancy aspects of retirement homes would continue to be governed by the *Residential Tenancies Act*. As with Bill 21, the retirement home industry will fund the regulatory regime. Further, we recommend that all of the directors be appointed by the government with equal representation from the community, consumers and the retirement home industry.

Details about our proposal will be discussed throughout our submission. Although we urge the government to adapt our suggested model of governance, for consistency and simplicity, we will continue to use the language of Bill 21 (e.g. Authority) while making alternate recommendations.

ANALYSIS OF BILL 21: COMMENTS AND RECOMMENDATION

Part I: Interpretation

Inconsistencies with the *Residential Tenancies Act*

It must be recognized that certain aspects of retirement homes are already governed by the "care home" provisions of the *Residential Tenancies Act*. The drafting of Bill 21 is deficient as it does not adequately address the interplay between it and the *Residential Tenancies Act*. Without clarification, ACE submits that there will be confusion and misunderstanding. This section of our submission will identify several key areas within Bill 21 that need to be amended.

One problem is the use of inconsistent language: the *Residential Tenancies Act* uses the word "tenant" and "care home" while Bill 21 refers to "resident" and "retirement home." We believe that individuals living in a retirement home should be referred to as tenants to emphasize the tenancy aspect of the relationship.

Section 52 says that if a retirement home is also a care home, the provisions of the *Residential Tenancies Act* continue to be applicable. ACE is of the opinion that all retirement homes satisfy the criteria to be a care home although not all care homes may be retirement homes. Therefore, not only should this provision be amended to clarify that all retirement homes are care homes, but the interpretation section should include a definition for care home.

Both Bill 21 and the *Residential Tenancies Act* require landlords to provide a package of information (commonly known as the "care home information package" or CHIP) to tenants before entering into a tenancy agreement. Bill 21, however, does not make reference to the CHIP requirement in the *Residential Tenancies Act.* Thus, it is not evident whether the information to be provided in the CHIP in Bill 21 differs from the CHIP in the *Residential Tenancies Act*. To guarantee that tenants understand exactly the information to which they are entitled, section 54(1) should be amended to state that every tenant must be provided with a CHIP pursuant to the *Residential Tenancies Act,* in addition to the content listed in section 54(2).

The contents of the CHIP includes a statement about the application of the *Residential Tenancies Act* if the retirement home is also a care home. Similar to our comments above about section 52, we feel this section must be changed to reflect that all retirement homes are also care homes.

Recommendations:

- Promote consistency and understanding of the true nature of the individual's relationship with the operator of the retirement home by using the language of "tenants" instead of "residents."
- Revise section 52 and 54(2)(b) to state: "All retirement homes are care homes pursuant to the *Residential Tenancies Act.* Nothing in this Act overrides or affects the provisions of the *Residential Tenancies Act*."
- Add the definition of care home from the *Residential Tenancies Act* to section 2(1) for purposes of clarity.
- Amend section 54 to say: "Every licensee of a retirement home shall ensure that each tenant is provided a package of information pursuant to the *Residential Tenancies Act.*"

Definition of Retirement Home

Age of Residents

One component of the definition of retirement home is a requirement that it be occupied primarily by persons who are 65 years of age or older. ACE has concerns regarding the age restriction because it does not recognize that there are vulnerable adults who are younger than 65 years of age living in other settings defined as care homes under the *Residential Tenancies Act*. We strongly urge the government to consult with the disability community to determine whether Bill 21 should be extended to include this population.

Recommendation:

- Revisit the age restriction in the definition of retirement of retirement home to consider including other vulnerable groups living in similar situations.

Number of Tenants in a Retirement Home

The definition of retirement home in Bill 21 does not specify a minimum number of tenants required to qualify as a retirement home but instead leaves this decision to the regulations. Public statements by the government indicate that this number will be set at six. ACE does not understand why homes with fewer than six people should not receive the same attention or protection. Several of the court cases concerning assault and neglect of seniors (some of which have resulted in death) have involved operators of small homes. Many of the smaller homes with less than six tenants are located in rural or small urban areas or serve Ontario's lower income population. Support for a higher number can also be found by looking at other jurisdictions. For instance, the

number of residents required to qualify as a retirement home is five in Newfoundland and Labrador,[17] four in Alberta[18] and two in Saskatchewan.[19] Thus, ACE believes that this number should be lowered to two tenants as it is those individuals living in the smallest retirement homes that are potentially the most vulnerable and shielded from public scrutiny. It should go without saying that people deserve to be safe and properly cared for whatever the size of the retirement home in which they live.

Regulations are subsidiary pieces of legislation which can be easily changed by the Lieutenant Governor in Council, as opposed to statutes which are approved by elected members of government. The self-interest of an Authority dominated by the retirement home industry suggests that it would likely lobby the government to increase the minimum number of tenants if this number is designated by regulation. Retirement homes that do not fall under the jurisdiction of this legislation would not be subject to oversight and could do as they please. Given the importance of protecting persons living in retirement homes, it is important to specify the minimum number of tenants in the statute, not the regulations.

Recommendations:

- Require the legislation, not the regulations, to stipulate the minimum number of tenants.
- Amend the definition of retirement home to require only two tenants for a home to be defined as a retirement home and subject to this legislation.

Familial Relationship between Tenants and Operators

By precluding family members in the calculation of the minimum number of tenants in a retirement home, the legislation potentially violates the Ontario *Human Rights Code*. For example, if two siblings, cousins, or a married couple who are related to the operator enter a retirement home with only four other tenants, this could mean it no longer meets the definition of a retirement home. If the family member is receiving compensation to provide accommodation and care, then the regulatory system should apply to that situation just as it would to any other. All forms of elder abuse can take place in family situations just as easily as in relationships with strangers.

Recommendation:

- Remove the words “who are not related to the operator of the home” from the definition of retirement home.

[17] *Personal Care Home Regulations*, N.L.R. 15/01, (*Health and Community Services Act*), s.2(h).
[18] *Supportive Living Accommodation Licensing Act,* S.A. 2009, c.S-23.5, s.2(1)(a).
[19] *Personal Care Homes Act.* S.S. 1989-90, c. P-6.01.

Part II: Retirement Homes Regulatory Authority

Board of Directors

As previously noted, Bill 21 establishes a regulatory authority to educate, license and inspect retirement homes to ensure they meet prescribed standards. The board of directors which supervises and manages the affairs of the Authority is composed of nine members. After the Authority's first two years of existence, a majority of members will be appointed by the board itself and a minority by the government.

Due to our concerns about the over-representation of members of the retirement home industry on the Authority, and the need for government intervention in the retirement homes sector, ACE recommends the creation of a retirement homes division within the Ministry of Health and Long-Term Care. Government involvement would not affect the public purse as retirement homes would finance the retirement homes division.

Similar to Bill 21 – but with modifications – the operations of the retirement homes division would be overseen by a board of directors. Each director would be selected based on a set of defined competencies.

Despite the importance of receiving input from the people who are subject to this legislation, there is no requirement for consumer representation on the board. Bill 21 states that directors appointed by the government "may" include licensees, consumers and representatives of business, government and other organizations, but does not require that this shall occur. Also, there is no corresponding provision regarding representation for members appointed by the board. This is a glaring omission. Further, the Minister Responsible for Seniors "may" set the qualifications for being a director. ACE believes that failing to include a requirement that members satisfy certain qualifications is problematic considering the critical role played by directors. To be truly reflective of diverse interests, the board should be appointed by the government with equal representation from the community, consumers and the retirement home industry. The community members would be lay people with no affiliation to the industry or consumers. In the alternative, a majority of the directors should be appointed by the government. Persons would become members on the basis of their relevant experience and recruitment would be an open and transparent process. A body of competent and skilled members would only serve to enhance the efficiency, quality and expertise of the work of the board.

Bill 21 is vague respecting the remuneration and expenses of directors as it merely says that they must be "reasonable." We support either upper limits or some sort of accountability mechanism to ensure that money is wisely spent. Moreover, there should be full disclosure to the public about the compensation of directors.

The reappointment of directors is also not adequately addressed. The proposed legislation simply states that a director is eligible to be reappointed or re-elected. We suggest that terms limits be established.

Recommendations:

- Establish a retirement homes division within the Ministry of Health and Long-Term Care in lieu of the Authority.
- Delete sections 12(5) and (7) and amend section 12(4) to say that the Lieutenant Governor in Council "shall" appoint each of the directors to the board.
    - Alternatively, amend section 12(5) to say that the Lieutenant Governor in Council shall appoint a majority of the directors to the board.
- Strengthen the representation and qualification sections found in sections 12(6) and 12(8) by requiring equal numbers of directors from the community, consumers and the retirement home industry.
- Develop concrete accountability mechanisms for the remuneration and expenses of directors in section 12(10).
- Impose term limits on directors in section 12(11).

By-Laws

The board is permitted to make by-laws respecting the management and administration of the Authority. Thirty days after the drafting of the by-laws, they must be made available for public inspection. Despite the broad power to create rules for the Authority and therefore itself, the board is not expected to invite public consultations. We feel this is problematic.

Recommendation:

- Amend section 14(2) to require the board to consult with the public regarding the drafting of by-laws.

Fees

The Authority has the ability to set, collect and use fees collected by retirement homes to carry out the objects of the Authority. The government has indicated that it will fund the Authority for the first two years. There has been no public commitment from the government about the amount of money it plans to allocate to the Authority, nor is there any information about the fees to be paid by retirement homes.

To be truly effective, the Authority must have adequate resources. There are approximately 700 retirement homes and 40,000 tenants in Ontario. Speculation about the costs of enforcing merely the basic requirements in Bill 21 demonstrates that regulation will be expensive. Nobody can accurately predict how many non-annual inspections will need to completed or how many tenant complaints will be made to the Registrar and Complaints Review Officer. If the Authority is under-resourced, the rights afforded to tenants will be hollow as they will not be adequately enforced.

It is fair to say that the costs for operators of retirement homes will increase with the passage of the proposed legislation. Therefore, it is logical to presume that these costs will be passed onto tenants in the form of higher prices.

While many people may believe that only the affluent reside in retirement homes, this is not true. Many retirement homes, for example, are members of the Ontario Association of Non-Profit Homes and Services for Seniors (OANHSS). ACE is concerned that implementation of Bill 21 will cause some not-for-profit homes to either cease operating or prevent the provision of important services. The government must strive to protect affordable accommodation and services for older adults residing in retirement homes. Additionally, some retirement homes providing care to low-income residents already struggle to provide it in an adequate manner. As the individual resident cost of enforcement will not differ between high end and low end retirement homes, a flat rate would be disproportionate and unfair to low-income tenants. Not only would the percentage of fees be much higher for low-income tenants, but they will ultimately suffer if they are forced to leave because they cannot afford to pay more due to their fixed government pension incomes. Consequently, the government should consider granting subsidies to low-income individuals to enable them to live in retirement homes.

Recommendations:

- Protect both operators of and tenants living in not-for-profit homes by developing mechanisms that reduce the costs of regulation, such as sliding scale fees for licenses and incentives for good performance.
- Consideration by the government of granting subsidies to low-income individuals for the purposes of living in retirement homes.

Risk Officer

Besides preparing annual reports for both the board and the Minister about the Authority's activities and proposed activities, the proposed legislation states that the Risk Officer may also prepare reports as requested by the Minister or on his or her own initiative if it is in the public interest to do so regarding the effectiveness of the Authority's administration of the Act. These latter types of report must be reviewed by

the Minister and the board and made available to the public within one year of receipt. To encourage transparency and given the importance of these reports, ACE is of the opinion that the timeframe for releasing the reports be reduced.

Recommendation:

- Amend sections 24(7) and (8) by reducing the amount of time that the Minister and board have to review and release reports to the public from one year to three months.

Part III: License to Operate a Retirement Home

Application for License

There are no requirements in Bill 21 for public notice or consultation about the application process. To increase transparency and to allow the public to voice any concerns about potential operators, ACE is of the opinion that the public be advised of applications and permitted to make submissions about the application, similar to what occurs for long-term care homes today.

Recommendation:

- Encourage transparency by adding a provision that requires the public to be informed about and given an opportunity to comment on applications to obtain a retirement home license.

Ceasing to Operate a Retirement Home

Section 49(1) states that a retirement home shall not cease operating as a retirement home until the licensee submits a transition plan to the Registrar that complies with the prescribed requirements within the prescribed number of days. As it can be extremely difficult, if not impossible, for some tenants to find suitable alternate accommodation, ACE recommends that the legislation specify that notice must be given by a licensee a minimum of 120 days before ceasing operations.

Recommendation:

- Amend section 49(1) to set a minimum notice period of at least 120 days for licensees who wish to cease operating a retirement home.

Part IV: Residents' Rights, Care and Safety

Residents' Bill of Rights

Bill 21 creates a lengthy Bill of Rights for retirement home tenants. These rights are an important element of this legislation as it enshrines many of the rights that are essential to the day-to-day quality of life of retirement home tenants. One of the problems associated with bills of rights, however, is the belief that if a right is not written down and included within the bill of rights, the person does not have or loses this legal right. We have consistently seen this problem in long-term care.

It must be understood that generally, the rights set out in the Bill of Rights are simply reiterations of rights that the residents already possess. Unfortunately, when people enter into care situations, such as retirement or long-term care homes, there is often an assumption that they lose some, if not the most basic, societal rights. For this reason, Bills' of Rights have been statutorily enshrined to ensure that operators and residents are clear that residents continue to have rights despite living in care settings.

Unfortunately, as currently drafted, the Bill of Rights neglects certain key rights and offers insufficient protection to others. In order for the Bill of Rights to achieve its purpose, several rights must be clarified, added, amended or strengthened. For example, we have identified the following two issues:

- Having two statutes pertaining to retirement homes is confusing so a right should be articulated to confirm that a tenant continues to have the rights articulated by the *Residential Tenancies Act* as well as those set out in the *Retirement Homes Act.*
- The right to advocacy must be enshrined in the legislation. Care plan and other types of meetings can be difficult for tenants, especially where the tenant has complaints or concerns. These meetings are often attended by a number of staff members which can be intimidating, especially where tenants or their substitute decision-makers question, oppose or criticize the care received by the tenant. Given the importance of these meetings to the day-to-day well-being of the tenant, a right to have the assistance or representation of an advocate is crucial. We have had numerous calls about such meetings where the home has refused to allow the resident or substitute decision maker to bring a family member, friend or advocate with them to these meetings.

Bill 21 also says that the licensee is deemed to have entered into a contract with each tenant of the home, agrees to respect and promote the rights of the tenant. Tenants may "enforce" their rights but, regrettably, there are no concrete enforcement mechanisms available to tenants to do so in the legislation.

Access to justice is a huge obstacle in the administration of both civil and criminal justice for older persons, especially tenants of retirement homes. Barriers include financial difficulties, the insufficient number of lawyers practicing elder law, lengthy court proceedings, a lack of an established body of law respecting retirement home litigation, the minimal monetary awards in successful cases and evidentiary issues.[20] To combat these problems, the legislation must include mechanisms which permit tenants to effectively exercise their rights; otherwise, these rights will be hollow.

Recommendations:

- Change the word "resident" to "tenant."
- Add the following rights to the Bill of Rights:
  - Every tenant is afforded the rights and protections of both the *Residential Tenancies Act* and the *Retirement Homes Act.*
  - Every tenant has the right to have any friend or advocate of their own choosing attend any meeting with home staff.
  - Every tenant has the right to be protected from abuse.
  - Every tenant has the right not to be neglected by the licensee or staff.
  - Every tenant has the right to exercise the rights of a citizen.
  - Every tenant has the right to be told who is responsible for and who is providing the resident's direct care.
  - Every tenant has the right to have his or her personal health information within the meaning of the *Personal Health Information Protection Act* kept confidential in accordance with the Act, and to have access to his or her records of personal health information.
  - Every tenant has the right to participate in the Residents' Council.
  - Every tenant has the right to be informed in writing of any law, rule or policy affecting services provided to the resident and of the procedures for initiating complaints.
- Amend the right respecting restraint to read: "Every tenant has the right not to be restrained except in accordance with the common law."
- Draft sections pertaining to "how" tenants can meaningfully enforce the rights contained in the Bill of Rights.

[20] For a detailed discussion about barriers to justice for older adults, please see ACE's report called *Congregate Living and the Law as it Affects Older Adults* (2009) which can be found at the website for both ACE (www.acelaw.ca) and the Law Commission of Ontario (http://www.lco-cdo.org/en/olderadultsresearchpapers.html).

Fire Standards

As previously mentioned, ACE represented a public interest group at the Meadowcroft inquest which was held after eight people died as a result of a fire in a retirement home. One of the many recommendations of the coroner's jury was to amend the *Fire Code* to require sprinkler retrofits of all residential care buildings with more than eight residents across Ontario. Instead of following this recommendation, the provincial government amended the *Building Code* to require sprinklers for residential care facilities built after 1997.

Tragically, two elderly residents died and eight residents were critically injured as a result of a fire at Muskoka Heights Retirement Residence on January 19, 2009. The home was in compliance with the *Fire Code* and a safety plan approved by the Orillia fire service. However, the home did not have a sprinkler system as it was not legally necessary due to the age of the building. The fire raised the issue – yet again – about mandatory sprinkler systems in all retirement homes.

The Ontario Association of Fire Chiefs, the Canadian Association of Fire Chiefs and the Canadian Council of Fire Marshals and Fire Commissioners all support the need for residential fire sprinklers in all residential occupancies.[21] This includes retirement homes.

Bill 21 represents the perfect opportunity to legislatively require sprinklers in retirement homes. However, section 60(3) only calls for the "prescribed safety standards including standards with respect to fire, safety and public health requirements and emergency evacuation plans." ACE strongly believes that all retirement homes must have sprinklers.

Recommendations:

- Require mandatory sprinklers in all retirement homes.

Plans of Care

According to sections 62(1) and (2), the licensee shall ensure that a plan of care is developed for every resident but only with the consent of the tenant. While ACE agrees that consent is essential to developing the plan of care, Bill 21 does not specify what happens if a tenant refuses to give consent or to complete a plan of care.

[21] Ontario Association of Fire Chiefs, *Position Paper: Residential Fire Sprinklers*, online: <http://www.milton.ca/fire/07-12-11_Position_Paper_Residential_Fire_Sprinklers.pdf>.

The proposed legislation fails to acknowledge that some tenants are extremely healthy, high functioning individuals who do not want or need plans of care. (It must be remembered that tenants are not required to purchase any care services in order to live in a retirement home.) Clients of ACE have complained in the past that retirement home staff have used plan of care meetings as a platform to promote and sell other services available at the home. Even where services may be recommended, tenants may not wish to have the services, or be unable to afford them. While some services may be included in the basic plan, the home cannot force the tenant to take them if they do not wish, nor require them to accept extra services that they do not want.

Bill 21 is also unclear as to who must actually complete the plan of care. Section 62(9) says that the licensee shall ensure that the plan of care is "approved" by certain individuals (the tenant or their substitute decision-maker, a prescribed person or a person with the requisite expertise in assessing the suitability of care services). Reading this section together with section 62(1) suggests that the legislation intends for one person (perhaps a social worker or administrative staff person) to create a plan of care which is approved by a second person (maybe a health practitioner). Due to the very nature of a plan of care, ACE believes it must be completed in the first instance by a health care practitioner.

The law respecting consent to treatment is often misunderstood (as will be discussed in greater detail in the next section) and Bill 21 continues to perpetuate this problem. Section 62(5) says tenants or their substitute decision-maker, if any, shall be given an "opportunity" to participate in the development and implementation of the plan of care. However, tenants or their substitute decision-maker, where applicable, are integral to creating the plan of care, pursuant to the requirements of consent under the *Health Care Consent Act*. The current wording implies that their role is minimal and optional. Returning to the language of section 62(9), using the word "approved" erroneously implies that the plan of care need not be consented to by the tenant or their substitute decision-maker.

<u>Recommendations</u>:

- Amend section 62(1) to clarify that plans of care should only be completed when a tenant is purchasing health care services.
- Amend section 62(1) by specifying that plans of care must be completed by regulated health professionals with the requisite experience in assessing the suitability of care services.
- Delete the words "are given an opportunity" in section 62(5).
- Improve compliance with the *Health Care Consent Act* by deleting section 62(9).

Training

The requirement to obtain consent to treatment from capable individuals, or to have treatment consented to by a substitute decision-maker if incapable, continues to be ignored and is one of the issues about which ACE receives the greatest number of complaints. Part of the problem stems from the lack of understanding by physicians, staff and management of the *Health Care Consent Act* and its requirements for consent to treatment. For example:

- Staff at retirement homes often fail to obtain consent from the capable tenant or the substitute decision-maker of tenants who are incapable for treatment.
- Staff merely inform the substitute decision-maker after the fact of the treatment ordered by the physician; this does not meet the requirements of "informed" consent as set out in section 11 of the *Health Care Consent Act.*
- Consent is not obtained from capable tenants. Instead, they are ignored and consent is purportedly obtained from the person who would be the tenant's substitute decision-maker if the tenant became incapable in the future.
- Staff may seek consent from a person that is not the lawful substitute decision-maker.
- Advance directives or level of care forms are used as consents in place of informed consent. We frequently see situations where these documents are used in place of informed consent from either a tenant or the incapable tenant's substitute decision-maker. (Substitute decision-makers can *never* make advance directives on behalf of an incapable person.) We have also identified that there is confusion between a "plan of treatment" and an "advance care plan."
- Attempts are often made to obtain "blanket" consents at the time of admission to apply to all treatments that might be prescribed during the course of the tenant's stay. This in no way can meet the definition of "informed" consent required by law.

The requirement of informed consent to treatment must be promoted and strengthened in the proposed legislation. There should be mandatory training to staff providing direct care on health care consent and advance care planning. This training must include such topics as: informed consent; the principles of substitute decision-making; and the differences between consent and advance care planning.

<u>Recommendation</u>:

- Amend section 65(2) by adding a requirement for every licensee of a retirement home to ensure that all staff who provide direct care to tenants receive training in health care consent and advance care planning.

Restraints and Confinement to Secure Units

Bill 21 contains a general prohibition against the use of restraint but allows restraint in certain circumstances. The proposed legislation also permits licensees to confine tenants to a secure unit if certain requirements are satisfied.

In Canada, no one may be detained or restrained against their will except by process of law. Under the common law, persons can only be restrained in an emergency where immediate action is required to prevent serious bodily harm to the person or to others, and only for so long as the emergency continues. Restraint can only be utilized in non-emergency situations where allowed by legislation, and only then in accordance with the *Charter of Rights and Freedoms*. There is no common law duty to detain as detention goes beyond an emergency situation.

Based on our extensive experience working with residents in the long-term care sector, ACE is acutely aware of the problems facing residents who are improperly restrained or detained. Continued issues regarding restraint and detention in long-term care homes have taught us that their use is fraught with problems and should only be allowed under the most strictly controlled situations. Since its inception, the Geriatric and Long-Term Care Review Committee to the Chief Coroner of Ontario has reviewed and expressed concern over the use of restraints in long-term care. It has been consistent in its view that restraint should be strictly controlled and utilized only on a limited basis. These concerns were the impetus for the *Long-Term Care Homes Act* to limit the use of restraint and detention. To expand the use of restraint and detention into retirement home settings would be contrary to current practices to severely restrict their use. The government must continue this approach by banning the use of restraint and detention in retirement homes.

ACE is unequivocal in its opinion that retirement homes should never be allowed to restrain or detain tenants, accept in accordance with the common law. Retirement homes are tenancies which lack government inspection under Bill 21; to allow them to restrain or detain is analogous to allowing a superintendent to lock tenants in their apartments if they deem it to be appropriate.

If tenants require restraint or confinement on a regular basis, they should be admitted to a long-term care home or hospital which is better equipped to deal with their health concerns than a retirement home.

In the event that the government chooses to retain the current provisions respecting detention and confinement on secure units, ACE believes strict safeguards must be added for the protection of tenants. For instance, section 70(3)(d) currently allows a legally qualified medical practitioner, a registered nurse in the extended class or another prescribed person to make recommendations about confining tenants to a secure unit.

Given the deprivation of liberty resulting from this detention, ACE believes that only a legally qualified medical practitioner or a registered nurse in the extended class can make such a decision.

Although the legislation gives tenants a right pursuant to sections 70(6) and (7) to challenge decisions made by their substitute decision-makers consenting to detention on secure units, there are very few details about this important safeguard; these sections merely say tenants are entitled to a review conducted by a prescribed person or entity in accordance with the regulations. ACE does not understand why this review would not be conducted by the Consent and Capacity Board as it already hears applications concerning involuntary detention under the *Mental Health Act* and it will soon adjudicate applications about admission to secure units in long-term care homes under the *Long-Term Care Homes Act*.

Bill 21 does not provide comprehensive rights advice to incapable tenants whose substitute decision-makers have consented to their confinement to a secure unit. Instead, section 70(9) merely requires licensees to inform the tenant of a right to "consult" with a rights adviser in accordance with the process set out in the regulations.

Rights advice is a legal process whereby an individual is informed of their rights by a rights adviser shortly after their legal status has changed. There are currently eight mandatory rights advice situations, most of which only affect patients in psychiatric facilities.[22] The rights adviser cannot be a person involved in the direct clinical care of the person to whom the rights advice is given. The rights adviser has the responsibility to explain the significance of the legal situation to the individual. If requested to do so, the rights adviser will assist the person to: apply for a hearing to challenge the finding before the Consent and Capacity Board; retain a lawyer; and apply for financial assistance from Legal Aid Ontario. Under Bill 21, however, the onus is shifted to the tenant to make a request to "consult" and it is unclear if this entails a telephone conversation, a personal meeting or something entirely different. ACE believes tenants should be afforded full rights advice which represents a higher standard of advice commensurate with the significance of being detained. In other words, once a substitute decision-maker consents to confinement, the legislation should oblige licensees to notify a rights adviser forthwith to physically meet with the person at the retirement home to explain their rights and options. The rights adviser must be independent of the retirement homes in order to maintain neutrality and credibility.

[22] *Mental Health Act*, R.S.O. 1990, c. M.7 and R.R.O. 1990, Reg. 741, ss. 14-16. The *Long-Term Care Homes Act* also contains requirements for rights advice when a person is admitted or transferred to a secure unit. Although there is a proclamation date of July 1, 2010 for the majority of the Act, there is no proclamation date for the sections pertaining to secure units and rights advice and no regulations have yet been drafted for this section.

Should the government go ahead and allow retirement homes to restrain and detain, ACE is of the opinion that they will likely be subject to legal challenges. We know of no other tenant situations where a landlord would have such authority and query whether such authority would be legal even if included in the legislation.

Recommendations:

- Delete sections 68 and 70.
- Change section 71(1) to say: "Nothing in this Act authorizes a retirement home to detain or restrain a mentally capable tenant, except in accordance with the common law."
- Amend the sixth right in the Bill of Rights to read: "Every tenant has the right not to be restrained or detained, accept in accordance with the common law."
- In the alternative, if the government does not omit the sections authorizing restraint and detention:
  - Amend section 70(3)(d) so that only legally qualified medical practitioners and registered nurses in the extended class can make recommendations about confinement to a secure unit.
  - Change sections 70(6) and (7) to say that reviews of decisions respecting confinement to secure units will be conducted by the Consent and Capacity Board.
  - Replace section 70(9) with the requirement that the licensee contact a rights adviser independent of the retirement home forthwith if a substitute decision-maker consents to a tenant's detention on a secure unit and that the rights adviser meet with the tenant to explain their rights.

Part V: Enforcement

Inspectors

As currently drafted, section 76(1) contains the permissive language "may appoint inspectors" rather than the mandatory "shall appoint inspectors." As the inspection and compliance regime is an integral component of Bill 21, this section must place a mandatory obligation to appoint inspectors.

Recommendation:

- Replace the word "may" with "shall" in section 76(1).

Complaints to the Registrar

Complaints about alleged contraventions of the Act may be lodged with the Registrar of the Authority and, in certain circumstances, the Registrar's response may be reviewed by a Complaints Review Officer.

The legislation as drafted does not include a requirement for the Registrar or the Complaints Review Officer to provide a copy of any inspection report to a complainant. Sections 87 and 88(9) simply say that the Registrar will notify the complainant in writing of its decision and any action taken.

It is important that persons who make complaints be provided with a copy of any report created as a result of the investigation. Without a copy of the report, complainants cannot be assured that their complaint (which can trigger an inspection of a home) was properly reviewed. Absent this essential communication with complainants, the compliance process is not transparent.

A decision of the Complaints Review Officer is final and not subject to appeal. Therefore, tenants cannot have their complaints assessed by anyone outside of the Authority. This process should be contrasted with certain appeals brought by operators of retirement homes against the Registrar. Operators can appeal to the License Appeal Tribunal (an independent quasi-judicial administrative tribunal) as well as the Divisional Court. ACE believes tenants of retirement homes should have recourse to a fair and impartial adjudicator who is not affiliated with the body governing retirement homes.

Recommendations:

- Sections 87 and 88(9) should be amended to provide that reports regarding complaints be released to the complainant.
- Add a new section to allow tenants of retirement homes to appeal decisions of the Complaints Review Officer to an entity which is separate and distinct from the governing body.

Part VII: General

Review of the Act

Bill 21 mandates a single comprehensive review of the Act by the Minister Responsible for Seniors within five years of the effective date. The Minister must deliver the report to the Speaker of the Assembly who shall lay the report before the Assembly at the earliest reasonable opportunity. ACE believes it is crucial to review the status of the new legislation in a timely manner to prevent the continuation of any problematic

provisions. We do not feel that five years is timely. ACE proposes that an initial three-year interval is appropriate with subsequent reviews every five years thereafter. Reviews must also include consultations with stakeholders. Reports about the reviews must be readily available to the public.

Recommendations:

- Amend section 120 to require a review to be completed within three years of the effective date and every five years thereafter.
- Require that the legislative reviews involve consultations with stakeholders.
- Reports resulting from reviews must be made available to the public at the same time it is provided to the Legislative Assembly.

Regulations

Application of the Health Care Consent Act

Section 121(1)21 of Bill 21 allows the regulations to specify which provisions of the *Health Care Consent Act* apply to retirement homes and their tenants, in addition to permitting any modifications or variations of the existing legislation. The *Health Care Consent Act* is a comprehensive piece of legislation that sets out a positive framework for decision-making with regards to treatment, personal assistance services and admission to care homes. ACE is mystified as to why Bill 21 suggests that it can supersede the *Health Care Consent Act* and possibly dilute the rights afforded to retirement home tenants. This is simply unacceptable.

Recommendation:

- Delete section 121(1)21.

PART IX: CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Coroners Act

Currently, section 10(2.1) of the *Coroners Act* requires deaths in long-term care homes to be immediately reported to a coroner and the coroner will complete an investigation to determine if an inquest ought to be held. While the vast majority of the deaths in retirement homes are expected due to the disease processes of its residents, there are others that are unexpected and which would benefit from review. We believe it is important, given the increased vulnerability of much of the retirement home population,

that the reporting and investigation of deaths in retirement homes mirror that which is required for long-term care.

Recommendation:

- Add a new section which amends section 10(2.1) of the *Coroners Act* to require deaths occurring in retirement homes to be reported to a coroner.

CONCLUSION

ACE does not believe that a third-party regulatory system is a suitable model to ensure public safety and consumer protection in the retirement home context. While the intent of the legislation is laudable, we do not believe that what has been drafted will create a retirement home sector which can ensure safe care to its tenants. We ask that the government withdraw the proposed legislation as it requires extensive changes that are more appropriately made by the Legislative Assembly as a whole, not at the committee level. ACE looks forward to reading a redrafted statute which truly meets the needs of retirement home tenants.