

**Submission to the
Law Commission of Ontario**

Concerning:

**DRAFT FRAMEWORK FOR THE LAW AS
IT AFFECTS OLDER ADULTS**

Submitted By:

ADVOCACY CENTRE FOR THE ELDERLY

**2 Carlton Street, Suite 701
Toronto, ON M5B 1J3
T: (416) 598-2656
F: (416) 598-7924**

November 18, 2011

Clara Ho, B.A., LL.B.
Research Lawyer

**Response of the Advocacy Centre for the Elderly
to the Law Commission of Ontario's *Draft Framework for
The Law As It Affects Older Adults***

The Advocacy Centre for the Elderly (ACE) is pleased to be involved in the Law Commission of Ontario's (LCO) project to develop a new framework to analyze and understand the impact of the law on older persons. As part of this project, ACE provided a response to the LCO's paper entitled, *The Law as it Affects Older Adults* in July, 2008, as part of the preliminary consultation. ACE subsequently submitted a Research Report entitled *Congregate Living and the Law as it Affects Older Adults* to the LCO on August 5, 2009.

Based on our review of the *Interim Report* and *Draft Framework*, ACE provides the following Submission and recommendations to the LCO. ACE looks forward to the release of the Final Report and Framework on the LCO's project concerning the law as it affects older adults. We look forward to the continued opportunity to work with the LCO in making the law more accessible and responsive to the needs of older adults living in Ontario.

Advocacy Centre for the Elderly

In ACE's July 2008 Submission to the LCO, we provided information about ACE and the work that we do. We will not reiterate that information. ACE would like to take this opportunity, however, to summarize some of the work that we are currently involved in and highlight the issues that are relevant and of importance to our clients and stakeholders (i.e. older adults living in Ontario). We continue to regularly receive inquiries and requests concerning the following issues:

- Assisting older adults and their family members in navigating the long-term care and home care systems in Ontario. ACE's Institutional Advocate, Jane Meadus, regularly receives telephone calls from older adults in hospital asking for assistance in communicating with hospital administrators and the Community Care Access Centre (CCAC) staff around discharge planning and applications to long-term care;
- Assisting older adults who find themselves in hospital and being advised that they should return home – as part of a provincial aging at home strategy, but it is unclear what kinds of home care and medical care supports these clients are entitled to once they return home. ACE frequently gets inquiries from older adults and/or their families concerning first available bed policies which we previously highlighted in our July 2008 Submission;
- Providing written submissions and recommendations to various government ministries and departments, including but not limited to, the Ministry of

- Health and Long-Term Care with respect to the proposed draft regulations (Initial Phase and Phase Two) to the *Retirement Homes Act*, 2010;
- Ongoing consultations with the government of Ontario on the *Retirement Homes Act*, 2010, as the regulations are released and the implementation of the legislation and regulations continues;
 - Consulting with the Ministry of Health and Long-Term Care on developments that will impact older adults living in Ontario such as the development and implementation of a Personal Support Worker (PSW) Registry;
 - Submitting recommendations to the Ministry of Safety and Correctional Services with respect to their Consultation on Fire Safety for Vulnerable Residents of Ontario; and
 - Delivering public legal education workshops on a variety of different issues including but not limited to: the *Long-Term Care Homes Act*, 2007; *Retirement Homes Act*, 2010; Powers of Attorney; Consent and Capacity; Elder Abuse; sexuality and older adults; to audiences that include older adults and their families; service providers; health care providers; students; law enforcement; and lawyers.

Given ACE's expertise working on legal, policy, and practice issues as they relate to older adults, we take this opportunity to provide our Submission and recommendations to the LCO as they relate to the *Draft Framework for the Law as it Affects Older Adults* ("*Draft Framework*"). We will begin our Submission with some general comments about the *Draft Framework* and then proceed to respond to the four questions posed by the LCO in their request for feedback.

General Comments

As a specialty legal clinic with expertise in elder law issues, ACE is familiar with many of the legal principles, concepts, and approaches discussed in the *Interim Report* and the *Draft Framework*. ACE understands that while the *Draft Framework* is intended to impact a number of different stakeholders including: policy-makers, community organizations, service-providers and older adults themselves, the question of who will ultimately be using or applying the *Draft Framework* is of great importance.

A second important question which we will discuss in further detail later on in our Submission is once the *Draft Framework* is applied to either evaluate an existing law, policy or practice, or prior to the development of the same, what is to be done with the results and information obtained through such an exercise? ACE understands that one of the purposes of the *Draft Framework* is to ". . . assist policy-makers in implementing and reviewers in assessing laws, policies and

practices as they may affect older persons”.¹ The question of what is to be done after the Framework is applied and it becomes apparent that there are serious gaps or problems with the laws, policies and practices under review may be a question beyond the scope of our Submission. Given ACE’s role as an advocate for older adults living in Ontario, our interest, of course, lies in how these laws, policies and practices can be amended to better the quality of life of our clients and stakeholders. As such, we are interested in how the *Draft Framework* can assist organizations such as ours in achieving the goal of policy and/or legislative change.

In its current format, the *Draft Framework* is a useful tool for government, policy-makers, legislators and academics. The education of policy-makers, legislators, government officials, at the top levels will be the key to the success of the *Draft Framework* as a tool for change. Ideally, such education on the Six Principles and on an anti-ageist approach will lead to a commitment on the part of policy-makers and legislators to integrate these things into all aspects of their work. The result will hopefully be a “trickle down” effect that will benefit older adults through the amendment of existing laws, policies or practices or the development of new ones that have as their foundation the Six Principles and anti-ageism.

ACE submits that the *Draft Framework*’s utility with respect to those organizations that work directly with seniors in any number of different capacities, in many cases providing front-line support, is less clear. ACE does not believe that the *Draft Framework* will be readily used by smaller community organizations, front-line service providers and/or older adults themselves. ACE submits that the format of the *Draft Framework* is not accessible to older adults, their families/support providers, or front-line staff or service providers that work directly with older adults.

In order for the *Draft Framework* to be of immediate use and benefit to older adults, there needs to be comprehensive public legal education available for older adults on the Six Principles, the *Draft Framework*, and on the Ontario *Human Rights Code* and the *Charter of Rights and Freedoms*; laws that are key to developing an anti-ageist approach. Similarly, while these concepts form the basis of the rights that older adults have and are entitled to enforce, there also needs to be more public legal education geared towards older adults on specific laws, policies and practices that are of particular relevance and affect them on a day-to-day basis including, but not limited to: *Long-Term Care Homes Act, 2007 (LTCHA)*; *Retirement Homes Act, 2010*; *Residential Tenancies Act, 2006*; *Regulated Health Professions Act, 1991*. Public legal education must not only

¹ Appendix A: *The Law as it Affects Older Adults, A Draft Framework for an Anti-Ageist Approach to the Law*, (June 2011) online: Law Commission of Ontario < <http://www.lco-cdo.org/older-adults-interim-report-draft-framework.pdf>> at page 1 [*Draft Framework*].

meet the informational needs of older adults and their families/support networks, but should also be delivered in a manner and format that accessible as possible.

While the *Draft Framework* is relevant to the work of service-providers and older adults, its current format is not necessarily applicable or accessible to those who are not legislators or policy-makers. ACE submits that without significant modifications or a substantive educational component that targets older adults, community agencies and those front-line service providers working with and advocating on behalf of older adults, it will be the case that the *Draft Framework* will not be of any immediate relevance to the experience of these stakeholders even though they may be the ones ultimately impacted by its application.

Questions Concerning the Draft Framework

ACE's Submission concerning the *Draft Framework* is based on the questions asked by the LCO in its request for feedback. These questions are as follows:

- Whether the principles on which the *Draft Framework* is based are meaningful, and can help improve the laws as they affect older persons;
- What you would like legislators and policy-makers to understand about the circumstances and experiences of older persons when they are making or implementing laws or policies;
- What policies or practices could be put into place to make it easier for older persons to access and enforce their legal rights; and
- Any suggestions for making the framework easier to use or more effective.

Where possible, we have used examples from our work and our contact with older adults to substantiate and clarify our Submission and recommendations.

1. **Whether the principles on which the *Draft Framework* is based are meaningful, and can help improve the laws as they affect older persons**

The Six Principles

Each of the six principles contributes to an overarching goal of promoting substantive equality for older adults. . . . 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.²

- Respect for Dignity and Worth

² *Draft Framework* at pages 2-3.

- Promotion of Independence and Autonomy
- Enhancement of Participation and Inclusion
- Recognition of the Importance of Security
- Recognition of Diversity and Individuality
- Understanding Membership in the Broader Community

Legislators and policy-makers must adopt the approach proposed in the *Draft Framework* and incorporate the Six Principles listed above in all aspects of the drafting and the evaluation of legislation, policy and or practice in order for it to be effective. ACE submits that the Six Principles, if adopted widely, would have the effect of improving laws as they affect older adults but only if they lead to some substantive changes in the development or evaluation of such laws.

In addition to the Six Principles, it is our submission that the fact that all Ontario laws and policies have to operate within the framework of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code* cannot be reiterated enough. Not all older adults living in Ontario are fully aware of their fundamental rights to equality and to be free from discrimination on the basis of age or any other ground listed in the *Human Rights Code*. This may account for why very few older adults choose to enforce their rights in legal venues such as the Human Rights Tribunal of Ontario resulting in very few decisions relating to age being issued by the Tribunal.

Education is also an important factor in ensuring the successful application of the *Draft Framework*. While ACE supports the Six Principles, empowerment and education are also important in ensuring that laws, policies and practices are developed and implemented in such a manner that promotes substantive equality for older adults. Wherever it is possible to have the full and meaningful participation of older adults from a broad range of communities in the development of laws, policies and practices this approach must be supported.

Further, as we previously explained in our paper to the LCO, “good law, bad practice” is a common theme with respect to the administration of the law as it applies to older adults, particularly in the health sector. ACE submits that the education of older adults with respect to law and policies and their rights is one means of overcoming this problem. Where the law may be good but the implementation of it bad, it is important that older adults and those service providers who advocate on their behalf are provided with the necessary information to assist them in navigating through such challenges.

While the adoption of the *Draft Framework* and the Six Principles will move us closer towards a fully anti-ageist approach to laws, policies and practices, the constraints posed by resource limitations will continue make the full realization of the Six Principles that underlie the *Draft Framework* a challenge. Widespread

dissemination, adoption and implementation of the *Draft Framework* will hopefully result in attitudinal changes regarding older adults that will close the gap between good law and bad practice as well as challenge existing ageist stereotypes.

2. What you would like legislators and policy-makers to understand about the circumstances and experiences of older persons when they are making or implementing laws or policies

All statistics point to the fact that the population is aging. According to the Special Senate Committee on Aging, in their Final Report entitled, *Canada's Aging Population: Seizing the Opportunity*, April 2009:

The Canadian population is aging. It is a demographic trend that can be neatly plotted in graphics, counted in statistics. We are living longer.

Statistics Canada recently put numbers to this fact, pointing out the number of people aged 100 or older increased 50 percent between 1996 and 2006, and is set to triple to more than 14 000 by 2031. This made national headlines.

Meanwhile, Canadians are having fewer babies, shifting the historical balance between the young and the old. Add to that the reality that the baby-boom generation is entering the retirement years, and it becomes unavoidable and clear – the Canadian population is aging.³

Lack of resources continues to be a challenge for older adults in a number of areas mostly relating to health care. In Ontario, there continues to be shortage of long-term care beds for those who require them. Many older adults and their families struggle as they are not receiving enough home care hours to support them in remaining at home as long as possible. As we stated in our July 2008 Submission, access to medical care was and continues to be a challenge. Many older adults remain unable to find a family physician in the community that they live in.

In the most recent provincial election, all three political parties had as part of their political platforms a commitment to increase supports to older adults to allow them to age at home. While the platforms of both the Progressive Conservatives (PC) and the New Democratic Party (NDP) called for the elimination of the Local Health Integration Networks (LHIN), it is unlikely that this will happen.⁴

³ Special Committee on Aging, *Final Report, Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009).

⁴ Adam Radwanski, "Where McGuinty could find room for compromise", *The Globe and Mail* (19 October 2011) online: [The Globe and Mail <http://www.theglobeandmail.com/news/politics/adam-radwanski/where-mcguinty-could-find-room-for-compromise/article2200715/>](http://www.theglobeandmail.com/news/politics/adam-radwanski/where-mcguinty-could-find-room-for-compromise/article2200715/).

The Liberals suggested in their platform that if elected, they would redesign home care and primary care systems to include new services such as: doctor house calls, telephone and online check-ins. As well, their platform included the provision of a Health Care Coordinator to facilitate care between different health care providers involved with a senior.⁵ The Liberal platform also called for improved access by older adults to Personal Support Workers (PSWs) through providing an additional three (3) million hours of care. A Health Home renovation tax credit worth up to \$1500.00 annually was also part of the Liberal plan to help older renovate their homes to make them more accessible.⁶ On November 16, 2011, the Premier announced a tax credit that would “. . . make it more affordable for seniors to install lifts and make other improvements to help them stay in their homes more safely and comfortably.”⁷ The tax credit, up to \$1500 per year, would be available to an older adult who is a homeowner or a tenant, or an individual who shares a home with an older adult.

The PCs and the NDP both included in their respective platforms proposals with respect to long-term care beds. In the PC platform, they suggested that they would expand long-term care by 5000 new beds in addition to the 35,000 renovated beds being developed in the next ten years. The PCs also stated that if elected, they would increase annual investments in health care by more than \$6 billion by the end of their first term.⁸

The NDP platform similarly called for the expansion of home care and home services by funding an additional one million hours of home care over four years. With respect to addressing the issue of the waiting list for long-term care beds, the NDP platform also called for the building of more long-term care beds.⁹ It remains to be seen what resources will be put towards home care or other supports for older adults by the provincial government.

Cognitive disabilities such as Alzheimer’s and dementia are also of concern for older adults, their families and health care providers. ACE has received telephone calls from the family members of older adults suffering from Alzheimer’s or dementia who are being advised by long-term care home operators that they and their staff are not able to meet the needs of their loved one. If the older adult is

⁵ Ann Hui, “Compare the Ontario party platforms”, *The Globe and Mail* (18 September 2011) online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/ontario-election/compare-the-ontario-party-platforms/article2161528/>>.

⁶ The Liberal Party of Ontario. *Forward. Together. The Ontario Liberal Plan 2011-2015*, online: Liberal Party of Ontario <http://www.ontarioliberal.ca/OurPlan/pdf/platform_english.pdf> at page 32.

⁷ Government of Ontario, “Helping Seniors Stay Safer at Home”, (16 November 2011) online: <<http://news.ontario.ca/opo/en/2011/11/helping-seniors-stay-safer-at-home.html>>.

⁸ The Ontario PC Party. *Changebook*, online: The Ontario PC Party <http://www.ontariopc.com/pdf/Changebook_en.pdf> at page 19.

⁹ Ontario New Democratic Party. *Plan for Affordable Change*, online: New Democratic Party of Ontario <<http://ontariondp.ca/wp-content/uploads/Plan-for-affordable-change.pdf>> at page 36.

already a resident of the long-term care home, we have seen situations where they may end up being discharged from the home or transferred to a mental health facility because the long-term care home is unable to address the behaviours that are a symptom of their health condition. Alternatively, we have heard cases of older adults with Alzheimer's and dementia being refused admission to a long-term care home of their choosing for these same reasons. These issues are a clear reflection of the lack of resources resulting in policies and practices that are being implemented to the detriment of older adults.

According to the Alzheimer's Society of Ontario:

All Local Health Integration Networks (LHINS) show dramatic increases in people with dementia, yet...

- Only 5 LHINS have specifically included dementia in their plans for elder care
- No system-wide training has ever been supported

The Aging at Home Strategy helps seniors live independently and 17% of home care clients have dementia, yet...

- The Strategy does not identify dementia as a priority
- Fewer Community Care Access Centres have special "dementia teams" than 5 years ago
- Family caregivers report stress levels 3 times greater than those caring for people with other chronic diseases

Ontario hospitals are suited for acute care, yet...

- 25% of patients in Ontario hospitals who remain there too long have dementia

65% or more of residents in Ontario's long term care homes have dementia, yet...

- No new recent investment in dementia training has been made¹⁰

The Alzheimer's Society of Ontario also reports that dementia prevalence in Ontario is projected to rise 40% from 181,000 Ontarians, currently to 255,000 by the year 2010.¹¹

¹⁰ *10 by 20: Ontario Action Plan for Dementia*, online: Alzheimer's Society of Ontario <<http://alzheimerontario.org/10by20/default.asp?s=1#challenges2>>.

¹¹ *Ibid.*

One key thing that legislators and policy-makers need to understand about the circumstances and experiences of older adults is that older adults may find themselves coming into contact or conflict with a particular law, policy or practice at a time in their lives when things are emotional, stressful and difficult (i.e. after being admitted to hospital for an acute care episode; when decisions need to be made about moving to a long-term care home; after losing their employment as a result of discrimination on the basis of age). In such situations, it does not matter whether the laws, policies or practices are themselves anti-ageist, if the implementation of them is in a manner that is not.

ACE recognizes that these bad implementation practices are sometimes a result of lack of resources or conflicting interests. It is often during these situations that older adults and their families contact ACE for assistance and support. One clear example of bad practice and lack of transparency resulting in a practice that is not responsive to the needs of older adults has to do with the application for home care supports through the Community Care Access Centres (CCACs). This is an issue that was evaluated by the LCO in its *Interim Report* when it applied the *Draft Framework* to the legal framework for home care and assessed the *Home Care and Community Services Act, 1994* (HCCSA).¹²

ACE would like policy-makers and legislators to understand that it is not enough to simply apply the *Draft Framework* to develop or evaluate laws, policies and practices through an anti-ageist lens. The implementation of these laws, policies and practices as well as ensuring that there are adequate resources to support their implementation is as important if not more so. ACE submits that anti-ageist laws, policies and practices that have as their basis the Six Principles as well as those set out in legislation such as the Ontario *Human Rights Code* will not improve the lives of older adults of further the objective of an anti-ageist approach to the law if they are misapplied.

3. What policies or practices could be put into place to make it easier for older persons to access and enforce their legal rights

ACE submits that it is often difficult for older adults to access and enforce their legal rights. In our July 2008 Submission to the LCO, we cited the following as some of the factors impeding access to just for older persons:

- Financial barriers – Legal Aid Ontario does not provide certificates for most civil claims and there are no funds for legal representation in the following areas: elder abuse, violation of consent and claims against long-term care homes;

¹² *Home Care and Community Services Act, 1994*, SO 1994, C 26.

- Lack of lawyers and paralegals able to assist a client with an elder law issue. There are very few legal professionals with the expertise in areas of law that are of particular importance to older adults (i.e. retirement homes, public and private home care, long-term care, defence of guardianship applications, health consent, elder abuse);
- Lengthy court proceedings – Older adults are often deterred from filing a claim in court because of the time it will take and the costs involved.

The current mechanisms available to older adults for accessing and enforcing their legal rights are prohibitive because of cost, time, complexity and often all these factors combined.

ACE submits that the following policies or practices, if properly implemented, could make it easier for older adults to access and enforce their rights through the appropriate legal or policy venues:

- More resources allocated to provide older persons with access to legal advice and representation on various areas of law of relevance to them;
- Expand the jurisdiction of the Ombudsman of Ontario to extend to municipalities, hospitals and long-term care homes;
- Public legal education targeting older adults, including those living in congregate settings such as long-term care homes, on laws and policies that affect them including: long-term care homes, retirement homes, landlord and tenant law, human rights;
- Greater protection against reprisal should an older adult and/or their family members decide to enforce the older adult's rights. This would involve not only ensuring such provisions are included in legislation but also, enforcing any breaches of such provisions in a manner that effective and efficient;
- Protections of older adults in situations where they are living in long-term care homes or retirement homes needs to be much more effective but and older adults must also perceive that this is so. Older adults have to have confidence that the law will be effective in protecting them from reprisal in the event that they decide to make a complaint. Where such protections from reprisal are not forthcoming, ACE submits that older adults will be less likely to enforce their rights in circumstances where they have been infringed. In situations where older are living in congregate settings, there may be a reluctance to make a complaint because the stakes are high – with the older adult's housing being at risk;
- Mediation or Alternative Dispute resolution (ADR) processes that would allow for the effective and efficient resolution of conflicts; particularly in situations involving an older adult and his/her family member. There may be exceptions to the use of ADR processes such as where there is

a situation of abuse and/or neglect or clearly a power imbalance between the older adult and other party. In many cases, older adults may be reluctant to pursue legal avenues in complaints against family members if it jeopardizes any ongoing possibility of an ongoing relationship;

- Continued monitoring and review of a matter or complaint even once a resolution is reached would reinforce public confidence and the confidence of older adults in the legal system or process. Any monitoring, however, must not interfere with the autonomy of older adults. ACE submits that older persons may be reluctant to enforce their legal rights because they believe that once they make a complaint and once a resolution is reached, there is no assurance that the same thing will not happen again.

4. **Any suggestions for making the framework easier to use or more effective.**

ACE submits that the *Draft Framework* would be more effective if it is fully adopted by all levels of government – including all policy-makers and legislators. Further, the *Draft Framework* should be considered whenever legislation, policies, or practices are being contemplated in their beginning stages rather than being used as an evaluation tool after the fact. For this to happen there needs to be significant education and changes in attitude amongst government, policy-makers and legislators. We submit that in order to achieve an approach to the law that is fully anti-ageist and follows the Six Principles, the understanding that these factors must pervade all aspects of legislation drafting or policy-making must be accepted by those responsible for these tasks.

In order for the *Draft Framework* to be effective as a tool for evaluating existing laws, policies or practices, the necessary mechanisms must be in place to ensure that any required amendments identified through the application of the *Framework* can and will be made in a timely manner. This will, of course, require a commitment of resources and to the promotion anti-ageist principles. ACE submits that a *Draft Framework* that only serves to show us the shortcomings of law, policy or practice and without providing a means for remedying any problems would be of little utility. In order to improve the quality of life for older adults and ensure that laws, policies and practices are responsive to their needs the *Draft Framework* must somehow become a tool for change.

To make the *Framework* easier to use and more relevant, ACE submits that there needs to be more public legal education designed to meet the information needs of older adults and those service providers in all sectors that work with and advocate on behalf of older adults. Such education should cover anti-ageism as well as the principles set out in the Ontario *Human Rights Code* and the *Charter of Rights and*

Freedoms. As well, older adults should have access to information that will assist them in navigating circumstances where they may encounter “good law, bad practice” in a format that is fully accessible to them and their support networks.

While changes to law, policy and practice cannot happen overnight, ACE submits that the *Draft Framework* is a good step towards the goal of an anti-ageist approach to the law. We hope that our comments and recommendations concerning the *Draft Framework* and *Interim Report* will be of assistance to the LCO. We look forward to any opportunities to continue working on this very important issue.