

**ADVOCACY CENTRE FOR THE ELDERLY –
SUBMISSIONS TO THE HOUSE OF COMMONS STANDING COMMITTEE
ON JUSTICE AND HUMAN RIGHTS**

Mme. Chair and Honourable Members: Thank you for inviting me to speak today on the important issue of elder abuse and neglect, on my own behalf and on behalf of the Advocacy Centre for the Elderly.

1. The Advocacy Centre for the Elderly [“ACE”]

The Advocacy Centre for the Elderly is a community legal-aid clinic established in 1984 that is committed to upholding the rights of low-income seniors. Its purpose is to improve the quality of life of seniors by providing legal services which include direct client assistance, public legal education, law reform, community development, and community organizing.

ACE receives thousands of calls per year, and it provides legal advice and representation to low-income seniors on age-related issues, including long-term care homes, retirement homes and other congregate living facilities, and elder abuse across a broad range of settings.

2. My Own Background and Experience

Before joining ACE, I was a lawyer in private practice for 10 years from 1985 to 1995. I practised criminal defence law and carried criminal jury and non-jury trials before all levels of court, and criminal appeals before the Ontario Court of Appeal and the Supreme Court of Canada.

I joined ACE in 1995 as a Staff Litigation Lawyer and worked in that capacity for 21 years until 2016 when I became Executive Director. I am now in my fifth year as Executive Director of the Advocacy Centre for the Elderly.

I have advised hundreds of clients on elder-abuse matters throughout my 21 years as a Staff Litigation Lawyer, and I have represented older adults on civil and criminal elder-

abuse related legal proceedings, including victim and witness representation before the courts in criminal elder-abuse matters.

I am a former chair of the Canadian Bar Association, National Elder Law section; a member of the Ontario Courts Accessibility Committee; the Ontario Public Guardian and Trustee, Guardianship Advisory Committee; the Ontario Retirement Homes Regulatory Authority, Stakeholder Advisory Committee; and of many other committees and organizations that deal directly with issues of aging and elder abuse and neglect. I have won an award for excellence in teaching gerontology at Ryerson University. For nearly a decade, I taught elder abuse on a regular basis to Toronto police officers at the former C.O. Bick Police College. I have presented on elder abuse at Elder Abuse Awareness and Prevention Conferences and training programs at the Ontario Police College; to Ontario Provincial Police detectives and investigators; and at the Ontario Crown Attorneys' Association annual training conference. I am a distinguished fellow of the Canadian Centre on Elder Law studies.

I am familiar with issues of elder abuse and neglect in long-term care homes, retirement homes and other congregate living facilities, and with the criminal ramifications of elder abuse and neglect in those situations.

3. Elder Abuse and Neglect in Long-Term Care Homes Is a Systemic Problem That Requires a Systemic Response from the Criminal Justice System

The *Criminal Code* of Canada needs to be amended by adding a new charging section that is separate and distinct from failure to provide the necessities of life and from criminal negligence, both of which offences speak to duties tending to the preservation of life, but do not sufficiently respond to elder abuse and neglect in long-term care homes, retirement homes and other congregate living facilities.

I think of a new offence as “criminal endangerment”, which could include the following essential elements:

- i. an individual or an organization has entered into a contract to provide care and/or supervision to a person;
- ii. the individual or organization has failed to provide adequate care and/or supervision to the person; and,
- iii. the failure to provide adequate care and or supervision has endangered the health and/or safety of the person.

In keeping with a similar crime against the person of failure to provide the necessities of life under section 215 of the *Criminal Code*, a punishment of imprisonment of up to five years, upon conviction by indictment, or of up to two years less a day upon conviction by summary conviction procedure could be an appropriate range of sentence.

As is the case with criminal negligence under sections 219-21 of the *Criminal Code*, discrete offences of criminal endangerment causing bodily harm and criminal endangerment causing death could be created, with similar penalties of imprisonment of up to 10 years for criminal endangerment causing bodily harm, and of life imprisonment for criminal endangerment causing death.

These proposals represent serious offences with serious consequences that reflect the severe vulnerability of the victims, the position of trust held by care providers, and the profound power imbalances that exist between those who provide care and those who receive it.

4. Whistleblower Protection

It is critically important that the *Criminal Code* should also protect whistleblowers by creating a separate and distinct offence in the nature of a crime against the administration of justice for an individual or organization to retaliate against a resident of a long-term care home, retirement home, or other congregate living facility for making complaints concerning criminal endangerment or other aspects of failure to provide adequate care and supervision.

A similar offence is found in section 139 (2) and (3) of the *Criminal Code* in respect of obstruction of justice and the intimidation or interference with witnesses in an existing or proposed judicial proceeding.

Without strong whistleblower protection, there will be no existing or proposed judicial proceedings because complaints will not be made and charges will not be laid

Many older adults are afraid to make complaints about inadequate care because they fear retaliation from their caregivers. Any criminal offences concerning failure to provide adequate care and supervision would be meaningless in the absence of strong whistleblower protections that would give long-term care home residents, their families,

substitute decision-makers, friends and other loved ones assurances that interference with their right to make complaints will be respected and upheld.

Obstruction of justice carries a maximum penalty of two years imprisonment, on conviction by indictment; or of up to two years less a day upon conviction by summary conviction procedure under section 787 of the *Criminal Code*.

5. Criminal Responsibility of Officers and Directors

It is critical that criminal responsibility extend not just to individuals and organizations in general, but specifically to those who own, govern and operate long-term care homes, retirement homes and other congregate living facilities. This means that criminal responsibility should specifically apply to the directors and officers – and any others who are in the position of owning, governing and/or operating – such a congregate living facility.

One of the many difficulties in prosecuting offences such as failure to provide the necessities of life and criminal negligence causing death or bodily harm is identifying which, if any, of the individuals associated with the operation of a home should be held personally responsible for criminal sanctions where the home has profoundly failed to provide adequate care that has endangered a person's health and safety, even to the point of bodily harm or death.

It may be tempting during the course of an investigation to identify and prosecute individuals farther down the food chain, who are more closely connected with hands-on resident care, as scapegoats for an organization that has failed to provide the systems and resources that are needed to ensure the safety and security of its residents and the provision of adequate care.

Those who own, govern and operate congregate living facilities are fundamentally responsible for committing resources, setting budgets, establishing operating procedures, recruiting and maintaining adequate staff, and ensuring that enough well qualified staff are on site at all times to provide essential care. If a home is not managed properly, it is foreseeable that registered staff such as nurses, social workers and occupational therapists, and unregistered staff such as personal support workers will be placed in highly compromised situations in which they are completely unable to provide the care that is needed for want of adequate resources.

Responsibility for the overall operation of the home rests at the highest levels of ownership, governance and management. Those occupying these positions should have personal criminal responsibility for ensuring compliance with the *Criminal Code* of Canada in respect of the caregiving functions of the home. Otherwise, a systemic criminal justice response would not be provided to a systemic issue of elder abuse and neglect.

By comparison, sections 69 and 182 of the Ontario *Long-Term Care Homes Act* place personal responsibility and the following penalties for directors and officers of a long-term care home in respect of provincial offences:

- i. a fine of up to \$2,000 for a director or officer of a not-for-profit home; and,
- ii. in all other cases, a fine of up to \$100,000 for a first offence, and a fine of up to \$200,000 for each subsequent provincial offence.

In view of the fact that elder abuse and neglect in long-term care homes, retirement homes and other congregate living facilities is a systemic issue that largely derives from inadequate resources and poor management of a home, it would be fit and just to extend criminal liability for custodial sentences to the owners, governors and operators who are in a position to provide the systemic responses that are necessary for the good and safe operation of the home.

All of which is respectfully submitted this 6th day of May, 2021.

ADVOCACY CENTRE FOR THE ELDERLY

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