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BY E-MAIL

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Re: Update of the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*

Thank you for your letter dated March 20, 2015 inviting submissions on the update of the *Policy and Guidelines on Disability and the Duty to Accommodate* produced by the Ontario Human Rights Commission (OHRC).

The Advocacy Centre for the Elderly (ACE) is a specialty community legal clinic funded by Legal Aid Ontario that was established to provide a range of legal services to low income older adults 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 in Toronto, and is the first and oldest legal clinic in Canada with expertise in legal issues of the older population. ACE has provided comments on several OHRC publications including *Time for Action: Advancing Human Rights for Older Ontarians* and the *Policy on Discrimination against Older People*.

We have reviewed the 2001 OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate* (the Policy) and have endeavoured to respond to some of the questions outlined in your letter as they relate to older adults. Many of ACE's clients have experienced discrimination in obtaining service in the health care sector and in the housing sector. As such, our comments in the sections below will focus on these areas.

Our submissions in relation to the Policy will primarily address the following:

1. The interaction between disability (including perceived disability) and age as grounds of discrimination;

2. Discrimination owing to mental disabilities in the provision of services or housing; and,

3. Service and/or housing providers' duty to accommodate.

The Interaction between Age and Disability as Grounds of Discrimination

The OHRC *Policy on Discrimination against Older People* discusses the concept of "double disadvantage" as a result of age combined with other grounds of discrimination.[1] ACE's experience with older persons who have disabilities has been rights-based, focused on empowering these older adults to secure their rights, dignity and worth and enable their full participation in society.

i. Different Needs of Persons who Age with Disabilities and Persons who Acquire Disabilities with Age

Persons who fall within the groups of older adult and persons with disabilities are a severely marginalized and diverse group. Nevertheless, as indicated in the Law Commission of Ontario's report on the law as it affects older adults, anti-ableism and anti-ageism scholarship does not tend to address the experience of disability and aging.[2] Persons who age with disabilities may have a fundamentally different life-experience than those who acquire disabilities when they are older, including differing senses of identity and life experiences, requiring different supports and different preparation for old age.[3]

Persons aging with disabilities may have different needs where rights and entitlements to public services and supports are concerned, because aging may perpetuate low socio-economic statuses. For example, aging persons with intellectual disabilities who have lived with parents might find themselves without these supports as these parents themselves advance in age. For persons whose disabilities appear in older life, this can mean a dramatic change and require new supports. Therefore, knowledge regarding which support services they have access to can be key at this life stage.

In respect of housing and services, one of the major concerns that ACE has identified is that our clientele may not wish to lose their place in their community, where they have built up a supportive social environment for many years. The importance of "aging in place" as emphasized by the OHRC is important to all older adults;[4] however, this may have greater significance for persons also have a disability, as they are likely to have built up a considerable support network in that community. The need to move away from these supports can be a jarring experience. These adults must be provided as much support as possible to allow them to stay in their community and, should a move be necessary because of care needs, be provided the requisite assistance.

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[1] Ontario Human Rights Commission, *Policy on Discrimination against Older People*, (2007) available at: http://www.ohrc.on.ca/en/policy-discrimination-against-older-people-because-age, pg. 7

[2] Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults – Final Report,* (2012), available at: http://www.lco-cdo.org/en/older-adults-final-report

[3] *Ibid.*

[4] Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians*, (2001), pg. 48

ii. Perceived or Anticipated Disability

Often, older persons are not affected by the actual experience of disability itself but by the perception that they will eventually become disabled, despite the fact that the vast majority of older adults do not have such limitations. As the Law Commission of Ontario notes, the definition of disability in the Ontario *Human Rights Code* encompasses current disabilities, past disabilities and perceived disabilities, but does not explicitly address anticipated disabilities.[5]

The Supreme Court of Canada in *Québec (Comm. des droits de la personne et des droits de la jeunesse) et Mercier c. Montréal (Ville)*[6] took an expansive view of disability which did not require the presence of functional limitations but indicated that it would take an approach based on human dignity, respect, the right to equality and the understanding that limitations in everyday activities that may result from prejudice and stereotypes rather than biomedical conditions.

While some of the experience of older age is based in the biomedical aspects of aging, the barriers faced by older persons may be a result of the social environment in which aging takes place, including the physical environments in which older adults access services, the social supports, and the attitudes of employers or service providers.[7] As the OHRC has cautioned, one must be wary of standards, policies or factors which discriminate based on presumed or anticipated characteristics associated with aging.[8]

Mental Disabilities and Aging

Although the percentage of older persons with Alzheimer's and/or dementia is quite low, there is a mainstream assumption that these are normal aspects of aging rather than a medical condition.[9] This results in a perception that all older adults will eventually have some type of mental disability. ACE has encountered this issue in the provision of services in health care and in housing in retirement homes. The Policy as it is written excludes a discussion of mental disabilities in the context of housing and services, instead focusing on employment. This exclusion ignores our clients' lived experiences of discrimination and represents a lost opportunity to provide guidance to housing and service providers in addressing the needs of those who have or are perceived to have mental disabilities.

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[5] Law Commission of Ontario, *supra,* note 2.

[6] 2000 SCC 27

[7] Ontario Human Rights Commission, *Discussion Paper: Discrimination and Age- Human Rights Issues Facing Older Persons in Ontario,* (2000) available at: http://www.ohrc.on.ca/en/discussion-paper-discrimination-and-age-human-rights-issues-facing-older-persons-ontario/specific-issues-facing-older-persons

[8] *Ibid.*

[9] Alzheimer's Disease International, World Alzheimer Report 2012: Overcoming the stigma of dementia, (2012) available at: http://www.alz.org/documents_custom/world_report_2012_final.pdf, pg. 7

i. *Health Care*

Older adults with mental disabilities, who may have more contact with health care providers, meet with negative attitudes while accessing health care services. At ACE, we often encounter issues where treatment is not offered based upon assumptions related to age. For example:

- Older adults are not offered life-saving treatments such as chemotherapy or antibiotics, because of a diagnosis of dementia, for instance.
- Older adults are not referred to psychiatrists or psychologists because depression, anxiety disorders and dementia are considered a normal part of the aging process.
- Older adults are constantly being asked about their "do-not-resuscitate" status, even when attending for a routine procedure.

Owing to perceptions that the patient will not understand information respecting the treatment or appreciate the consequences of their decisions in relation to the treatment, efforts may not be made to seek consent from the patient themselves. Rather, health care providers may go directly to a family member to discuss the treatment, although the person may in fact be capable to consent to that treatment. The older adult is therefore not informed about their conditions and is unable to make a decision about their health care treatment. This denial of their rights may result in the older adult being denied treatment they want, or being given treatment they would have refused. These incidents indicate a discriminatory attitude on the part of health care providers and a biased evaluation of the older adult's quality of life and capability, which contribute to the feelings of invisibility and social isolation on the part of older adults.[10]

Older adults with mental disabilities also experience difficulties in being pressured to be discharged from hospital and seemingly neutral hospital policies may have adverse effects on them. ACE has consistently raised concerns that the push in hospitals for the patient to accept the first available long-term care placement has lead to these persons being prematurely discharged to congregate living conditions without adequate supports for their mental disability.

ii. *Retirement Homes*

Retirement Homes are tenancies and as such are governed by both the *Residential Tenancies Act*[11] as care homes, as well as the *Retirement Homes Act*, *2010*.[12] These homes can be both housing and service providers and vary in the assistive services offered in addition to accommodation. While other rental housing has been criticized owing to a reluctance to rent to older persons as they anticipate future disabilities, the expectation is that retirement homes will offer older persons with disabilities the ability to age in place.

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[10] *Revera Report on Ageism* (2014), available at: http://www.reveraliving.com/about-us/news/publications/report-on-ageism-%281%29/report_ageism

[11] *Residential Tenancies Act*, 2006, S.O. 2006, c. 17

[12] *Retirement Homes Act, 2010*, S.O. 2010, c. 11

Unfortunately, ACE's experience has been that some retirement homes are reluctant to continue to permit persons with advanced dementia to reside in their homes. This may occur where the person's cognitive condition results in falls risks, for example. These retirement homes are hesitant to undertake the expense to modify their units or increase supports from health care providers. Instead, these homes may encourage the tenant to leave. One of the tactics that ACE has observed is for a retirement home to withdraw services, forcing the tenant to bear either the expense of arranging for additional outside services or to leave. Another approach that ACE has observed is retirement homes refusing to allow a tenant to return from hospital out of fear that their care needs may be too high. These refusals are unlawful and do not comply with the requirements of the *Residential Tenancies Act.* Early intervention by the OHRC in these cases would have a profound effect on these residents' quality of life.

Of course, the retirement home should not be held to an impossible standard when seeking to accommodate older adults with mental disabilities. However, one hopes that a discussion of this issue in the Policy would encourage homes to accommodate a person in a manner that most respects their dignity, if to do so does not create undue hardship. Retirement homes, as with other housing providers, must accept requests for accommodation in good faith, take an active role in developing solutions in the short and long term, and respect the dignity of the person seeking accommodation.

Duty to Accommodate

As aging and acquiring disability are seen as biological inevitables, as noted above, the duty to accommodate a person may become obscured. Symptomatic of this fact, service providers across a broad range of sectors that provide services to older adults appear oblivious to their obligations under the *Human Rights Code*. ACE has seen examples of a lack of accommodation, particularly in health care and congregate housing. We believe that policies prepared by the OHRC are instrumental in providing guidance to the service and housing providers regarding their duty to accommodate older adults with disabilities.

The Policy as written does not place an emphasis on the service or housing provider's duty to accommodate. Further, the Policy should further delve into accommodation planning and implementation, focusing on an access to remedy.

i. *Health Care*

In addition to the discussion above around health care, efforts must be made to assist older adults with disabilities to accommodate them in accessing health care. The Supreme Court of Canada's decision in *Eldridge v. British Columbia (Attorney General)* provides that those responsible for provisions of health services to the public must ensure that all persons have access to these services.[13] In *Eldridge* and in the more recent case of *P.S. v. Ontario*[14] at the Ontario Court of Appeal, involving the treatment of a deaf pre-

[13] [1997] 3 S.C.R. 624

[14] 2014 ONCA 900

lingual patient held under the *Mental Health Act*[15] who was not provided with appropriate American Sign Language services, the Courts have stated that disability should not become a barrier to treatment and that efforts must be made to accommodate these persons so that they may benefit equally from these services.

Home care is integral to older clients with disabilities being able to ensure their dignity and independence in their homes, allowing them to age in place, and can be part of the duty to accommodate a person with a disability. Nevertheless, ACE's experience has been that access to information in respect of home care is sparse and information provided is often inaccurate. For example, the "Home First"[16] philosophy, supporting older adults in their homes prior to or instead of admission to a long-term care home, is strongly advocated by Community Care Access Centres (CCACs) and offered to frail, older adults with disabilities, even where it may not be appropriate. As this philosophy does not come with a guarantee of hours of service that a CCAC will to provide to maintain the patients in their homes, it can lead to a premature or inappropriate discharge from hospital. The duty to accommodate an older adult with disabilities must mean that this accommodation is appropriate to the person's care needs.

ii. *Housing*

The person responsible for housing in long-term care homes or retirement homes has the duty to accommodate the needs and capabilities of their residents with disabilities to the point of undue hardship. The bar of reaching undue hardship should remain high so as to encourage creative solutions to barriers to accessibility.

In addition to the example provided above in the context of mental disabilities, ACE has observed a lack of accommodation in the use of motorized wheelchairs in long-term care homes or retirement homes. ACE has received telephone calls from older adults with disabilities in long-term care homes who have been prohibited from using their motorized wheelchairs inside. The home staff often claims that their use is a safety concern or that it upsets those residents who do not require mobility devices. In some cases, staff have physically taken the chairs from the resident and locked them up due to the homes' "policies" or "rules". In other cases, residents have been prohibited from using the congregate dining room if they were in a wheelchair, either due to claims of esthetic or safety reasons.

Despite the *Human Rights Code,* the home does not see this issue as a required accommodation due to disability, even though the seniors require these motorized wheelchairs. In the calls ACE has received, home operators have not understood their obligations to accommodate residents to the point of undue hardship. While there may be a balance to be struck regarding the rights of different residents, ACE's experience has been that accommodation is not even considered. Accommodations such as waiving or changing a rule in the case of motorized wheelchairs, allowing transfer to another or

[15] *Mental Health Act*, R.S.O. 1990, c. M.7

[16] Catherine Brown, Ministry of Health and Long-Term Care, *Memorandum to LHIN CEOs re: Home First Philosophy*, (2013), available at: http://www.acelaw.ca/appimages/file/MOHLTC_HomeFirstPhilosophy_2013.pdf

more private room or unit without penalty in the case of residents with advanced dementia, or physical modifications including visual fire alarms and doorbells for the hearing impaired, should be part of the panoply of options offered to residents.

Inclusive design, ensuring that services or residences are accessible from the start, will also promote aging in place and forestall barriers to accessibility which would later require accommodation. As the Ministry of Health and Long-Term Care is presently re-developing several of its long-term care homes, it should keep in mind this duty to accommodate their residents. There is a dearth of specific treatments and services for persons with Alzheimer's disease or advanced dementia in long-term care and accommodating these mental disabilities should be addressed when these homes are being re-developed.

iii. Organizational Policy

ACE has found that many of its clients do not conceptualize their problems in gaining access to services or housing as human rights issues. Consequently, they do not seek to have their issues adjudicated before the Ontario Human Rights Tribunal. Therefore, it is essential for service or housing providers to have mechanisms in place to remedy complaints about barriers to accessibility. The Policy should be amended to include guidance regarding the contents of a robust complaints procedure.

Any complaints procedure should include access to an impartial decision-maker and a transparent process for resolution. The process itself should be accessible and provide timely resolution. This complaints process should be widely advertised. There should be a mechanism for urgent investigations in situations where a person is at immediate risk, such as a retirement home's refusal to take back a resident after the resident has been sent to hospital.

ACE has found that there is a gap in the implementation of human rights law: we are suffering from "good law, bad practice" in addressing the needs of older adults with disabilities. Presently, many of the providers we encounter are not aware of the human rights implications of their conduct, nor are rights-holders aware of their rights. The OHRC has a key role to play in remedying these issues.

RECOMMENDATIONS:

ACE makes the following recommendations:

1. The Policy should include a section on the intersection with age and disability given that the issues are interconnected and individuals in both groups suffer a double disadvantage.

2. The Policy should include a section under "what is disability" regarding anticipated disability, which is a significant concern for older adults.

3. The Policy should expand its mental disabilities section to include discussions of discrimination by service and housing providers.

4. The Policy should be amended to include more information about service and housing sectors in the duty to accommodate section.

5. The Policy should provide further guidance on appropriate complaints mechanisms.

6. The OHRC should undertake an education campaign targeting those sectors that provide services to older adults who may have disabilities (i.e. long-term care homes, retirement homes or home care services) so that providers can learn about their legal obligations under the *Human Rights Code*.

7. The OHRC should undertake to distribute the Policy to older adults, particularly to those who live in congregate settings, to raise awareness of their rights under the *Human Rights Code* and how to get help in enforcing these rights.

We thank you for the opportunity to respond to the Policy and are available to discuss this letter if requested.

Yours very truly,

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