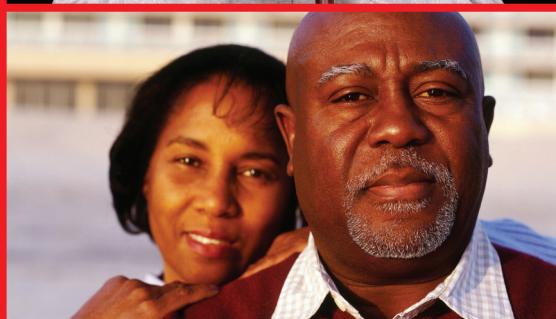


A Framework for the Law as It Affects Older Adults:

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

THE FRAMEWORK

April 2012



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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The Framework For The Law As It Affects Older Adults

**This publication can be found as Appendix A
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Advancing Substantive Equality for Older Persons
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PREFACE

The Framework is the culmination of the Law Commission of Ontario's (LCO) project on the law as it affects older adults. It distills the LCO's research and public consultations into an evaluative framework that can assist in understanding how laws, policies or practices may affect older persons, and in making them more fair and effective.

For those who would like more information or assistance in understanding and applying the Framework, the LCO has published the *Final Report: A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*. The Report includes information on the development of the project, the LCO's principles for the law as it affects older adults and how the circumstances of older adults may affect their interactions with the law. It also includes extended examples of the application of The Framework.

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The Law Commission of Ontario would also like to extend its thanks to the numerous organizations and individuals who shaped this Framework and the entire project through their involvement in the several stages of public consultations, or through their development of the Commissioned Research Papers.

INTRODUCING THE FRAMEWORK

Using the Framework

This *Framework for the Law as It Affects Older Adults* is intended to guide the development and evaluation of laws, policies and practices so that they take into account the realities of the circumstances and experiences of older adults, and promote positive outcomes for these members of society. It is composed of principles and factors to take into account in applying the principles, and uses a step-by-step approach. It has been developed for use by:

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

The accompanying *Final Report: A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (“the Final Report”) sets out the research and analysis which form the basis for the *Framework*, and provides extended examples of its implications and implementation. Throughout the *Framework*, we have made links to the relevant sections of the *Final Report*. All of the referenced LCO documents may be found on the LCO website at <http://www.lco-cdo.org>.

This *Framework* is intended to be applicable across all laws and policies, including both those that apply specifically to older adults and those that will affect older adults as members of the general population. As it is general in this sense, some may find it helpful to adapt it to their own particular area of law or policy. It should be noted that, given the breadth and diversity of the law as it affects older adults, not all sections of the *Framework* will be relevant for every law, policy or practice.

It is not the purpose of this *Framework* to point to simple, definitive answers to all of the difficult issues that may arise in developing laws, policies and practices that may affect older adults. The law and the circumstances of older adults are complex and diverse. The nature of aging and our understanding of its personal and societal implications are constantly evolving. Rather, the *Framework* is intended to assist law and policy-makers to:

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

This *Framework* is the result of extensive research and public consultation. It is built upon and expands on work already done in this area, including the *National Framework on Aging* (NFA) and *Seniors Policy Lens*, the *Special Senate Committee Report on Aging*, the work of the Ontario Human Rights Commission (OHRC) on human rights and older age, international documents such as the United Nations *International Principles for Older Persons* (IPOP), and other important initiatives that have been undertaken in Canada and globally over the last fifteen years. It has roots in the legal foundations of the *Charter of Rights and Freedoms*, the *Ontario Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act* (AODA), and as such has foundations in the legal obligations and policy commitments that bind governments. It does not replace current documents, but aims to build on these foundations and provide a basis for the further development of the law as it affects older adults. The LCO recognizes that this is an evolving area of the law, and this project is not intended as a final word on the subject, but as a contribution to ongoing research, analysis and debate.

- For more information on the LCO’s approach to, and development of the *Framework* see the *Final Report*, Chapter I.

Definitions

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

- For more information, see the Final Report, Chapter III.A.

“Diversity”: For the purposes of this *Framework*, diversity refers to a number of aspects of difference among individuals that may impact on the way that they encounter the law. It includes the wide range of identities that individuals may hold and that may intersect with the experience of aging, such as those related to sexual orientation, racialization, citizenship, Aboriginal identity, (dis)ability, and many others. It also includes the range of barriers that individuals may encounter that may complicate the experience of aging, such as those related to geographic location or place of residence, caregiving responsibilities, socio-economic status and others. It also recognizes that the experiences of each individual will be shaped by their life course, and that this may lead to differences that should be taken into account.

- For more information, see the Final Report, Chapter II.C.2.

“The Law”: The term “law” as it is used for this project includes both statutes and regulations. It also includes the policies through which statutes and regulations are applied, and the strategies and practices through which statutory provisions, regulations and policies are implemented. As such, the implementation of laws is as important as their substance. Laws may be beneficial in intention and on paper, but in practice fall short of their goals or even have negative effects. Whenever the term “law” is used in this *Framework*, it is used in this broad sense.

- For more information, see the Final Report, Chapter I.B.6.

“Older adults”: The terms “older adults” or “older persons” are used interchangeably in this *Framework*. For the purposes of this *Framework*, the LCO has adopted an expansive approach to defining “older adults” as including all those who have been identified as “old” or “older”, whether through legal and policy frameworks, social attitudes and perceptions, or self-identification.

- For more information, see the Final Report, Chapter II.B.

“Substantive Equality”: Substantive equality is often contrasted with “formal equality”. It goes beyond simple non-discrimination. It includes values of dignity and worth, the opportunity to participate, having one’s needs met, and the opportunity to live in a society whose structures and organizations include them. It recognizes and responds to societal patterns that result in different outcomes on the basis of irrelevant characteristics, as well as real differences that inappropriately disadvantage members of a particular group (such as women’s capacity for reproduction). Substantive equality may require differential treatment in order to fulfil these values.

- For more information, see the Final Report, Chapter III.B.3.

Principles for the Law as It Affects Older Adults

In order to counteract negative stereotypes and assumptions about older adults, reaffirm the status of older adults as equal members of society and bearers of both rights and responsibilities, and encourage government to take positive steps to secure the wellbeing of older adults, this *Framework* centres on a set of principles to be considered for the law as it affects older adults.

Each of the six principles contributes to an overarching goal of promoting substantive equality for older adults. The concept of equality is central to both the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*. The Supreme Court has recognized that governments may have a positive duty to promote the equality of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality. Substantive equality is about more than simple non-discrimination, and includes values of dignity and worth, the opportunity to participate, and the necessity of taking needs into account. It aims towards a society whose structures and organizations include marginalized groups and do not leave them outside mainstream society.

There is no hierarchy among the principles, and although they are identified separately, the principles must be understood in relationship with each other. The principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting Dignity and Worth:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family are full persons, unique and irreplaceable. The principle therefore includes the right to be valued, respected and considered; to have both one's contributions and one's needs recognized; and to be treated as an individual. It includes a right to be treated equally and without discrimination.
2. **Fostering Autonomy and Independence:** This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.
3. **Promoting Participation and Inclusion:** This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. An important aspect of participation is the right of older adults to be meaningfully consulted on issues that affect them, whether at the individual or the group level.
4. **Recognizing the Importance of Security:** This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access basic supports such as health, legal and social services.

5. **Responding to Diversity and Individuality:** This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal identity, immigration or citizenship status, disability or health status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.
6. **Understanding Membership in the Broader Community:** This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and obligation and work towards a society that is inclusive for all ages.
 - *For more information on the LCO's Principles for the Law as It Affects Older Adults, see the Final Report, Chapter III.B.*

Implementing the Principles

As the principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors be taken into account in the application of the principles.

Taking the Circumstances of Older Adults into Account: While it is generally recognized that older adults make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from those of younger members of society, laws do not always systematically and appropriately take these needs and circumstances into account. As a result, laws may have unintended negative effects on older adults. In some cases, stereotypes or negative assumptions about older persons may shape the degree to which or the way in which older adults are taken into account. As a result, the law may be ageist in its impact. As part of respecting and implementing the principles, the circumstances of older persons must be taken into account in the development, implementation and review of all laws, policies and practices that may affect them.

While aging is often popularly viewed as an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about growing older and about older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have lived prior to entering "old age". Any description of aging and older adults is therefore necessarily complex, as is the case for all life stages.

Life Course Analysis: In applying the principles, it is important to consider older adults as in a phase of "the life course". Older adults have complex needs and circumstances that are based on a lifetime of experiences and relationships that helped to shape who they are and the choices available to them. Barriers or opportunities experienced at earlier stages of life will have had consequences that reverberate throughout life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of that individual. That is, the impact of laws on older persons must be understood in the context of every stage of their lives, and how these stages relate to each other.

Gender Based Analysis: It is particularly important to consider the experience of aging and older age through a gender lens. Demographic patterns globally indicate a longer life for women, and give rise to gender-specific issues. For example, because of longer life expectancies and because women tend to marry older men, women are more likely than men to be widowed and living alone, which has a number of implications for income, caregiving and living arrangements. Older women also face particular negative stereotypes and dismissive treatment related to their age and gender.

Treating Law as Person-Centred: Law is often developed, implemented and analyzed as a set of separate and largely independent areas, such as family, criminal and real estate law. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of complex and fragmented systems. This approach requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. It requires law to respond to individuals as persons with diverse needs and identities, and therefore to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of older adults, in most cases an approach that is responsive to individuals at various stages of the life course and incorporates older adults into the overall design of the law will be most effective. Younger as well as older adults will benefit from a focus on dignity, autonomy, inclusion, security, diversity and membership in the broader community in the design of laws. Many, if not most of the measures required to fulfil the principles and to make the law more fair, accessible and just for older adults will also make the law more fair, accessible and just for others. An inclusive design approach to laws, policies and practices can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of older adults and aim to promote positive principles, their implementation may fall far short of their goals. This phenomenon, sometimes referred to as the problem of ‘good law, bad practice’, is not uncommon in the law as it affects older adults. The *Report of the United Nations Expert Group Meeting on the Rights of Older Persons* specifically urges governments to “close the gap between law and implementation of the law”. There are two aspects to this issue: implementation strategies for the law, and mechanisms for ensuring that older adults are adequately able to access and enforce their rights.

Progressive Realization: The fulfilment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of older persons and the aging process evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles may be undertaken, and should ensure that there is a focus on continuous advancement, principles are realized to the greatest extent possible at the current time while regression is avoided, and concrete steps for future improvement are continually identified and planned.

Applying the Concept of “Respect, Protect, Fulfil”: In the realm of international human rights law, the concept of “respect, protect, fulfil” is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must prevent violations of these rights by third parties.
3. The obligation to fulfil– States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects older adults, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- *For information on implementation of the principles see the Final Report, Chapter III.B.5 - 7, and on the circumstances of older adults see Chapter II.*

Evaluating Law, Policy and Practice Against the Principles: A Step-By-Step Approach

The *Framework* uses a step-by-step approach to evaluating laws, policies and practices against the principles. The process is broken down into eight steps. For each step, the *Framework* provides context, examples and questions to help assess the law, policy or practice in light of the principles.

Step 1: How Do the Principles Relate to the Context of the Law?

Identify the context in which the law will operate and its relationship to the principles.

Step 2: Does the Legislative Development/Review Process Respect the Principles?

Consider whether the process that has been designed for developing or reviewing the law respects the principles.

Step 3: Does the Purpose of the Law Respect and Fulfil the Principles?

Assess the goals of the law, including the assumptions on which it is based.

Step 4: Who Does the Law Affect and How Does This Relate to the Principles?

Analyze the way in which the law may affect older adults and how this may impact on respect for the principles.

Step 5: Do the Processes Under the Law Respect the Principles?

Consider the procedural aspects of the law, including provisions related to accessibility, information provision, and supports for applicants.

Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?

Assess how the law is enforced, whether through proactive measures like audits, or individual complaint mechanisms.

Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?

Does the law contain provisions to ensure transparency, accountability and monitoring of its effectiveness?

Step 8: Final Assessment: Is the Law True to the Principles?

Based on the results of the previous steps, is the law true to the principles? What more must be done?

Step

1

How Do the Principles Relate to the Context of the Law?

As a first step in undertaking an evaluation of a particular law, it is helpful to begin by understanding the context in which that law will operate, and analyzing how that context may relate to the principles. This includes the general social area which the law addresses, as well as the existing laws and policies that interact with the law that is proposed or under review. This section considers how the context of the law may situate it in relation to the principles.

Applying the Principles to Step 1

Note: “Law” here refers to law, policy and practice, as appropriate.

As a first step in the evaluation of a law, it is helpful to consider the specific social area in which the law operates, such as employment, housing, education, family relationships or caregiving, for example. Different social areas will have different relationships to and effects on the attainment of the principles. For example, the attainment of *security* and of *participation* and *inclusion* will be significantly affected by laws related to income security. Laws related to decision-making will impact heavily on the *independence and autonomy* of older persons with cognitive disabilities.

Some contexts may involve particular challenges or constraints for the attainment of the principles. For example, residence in a long-term care home by its very nature constrains the ability of residents to *participate* in and be *included* by the broader community. Such particular challenges to the principles should be taken into account when designing the law in question.

Existing laws at various levels of government are an important part of the context to be considered, and careful attention should be paid to how the proposed law will affect the principles in **combination with existing laws**. Law in one area may affect realization of the principles in quite another area of the law. For example, law related to income security will affect access to housing. Lack of supports and protections for informal caregivers will have significant effects on all aspects of life for those older adults who require supports, including health, housing and community participation.

- For information on relating the principles to the contexts of the law, see the Final Report, Chapter IV.

Questions for Consideration in Applying Step 1

1. What area(s) of life does the law potentially affect? What are the particular contexts and concerns of older adults in this area of life?
2. Which principles seem relevant for this context?
3. Are there aspects of this context that tend to constrain the implementation of any of the principles? If so, are there strategies that can be employed to address this?
4. How might law in this one particular context affect other areas, and the attainment of the principles in those areas?

Applying the Framework: Examples of Relating the Principles to the Context of The Law

Access to Housing by Older Adults and the Principles

Like everyone, older persons want to have access to housing that meets their needs. We all need housing that is safe, affordable and enables us to be part of our community. The *International Covenant on Economic, Social and Cultural Rights*, which Canada has ratified, recognizes adequate housing as a fundamental right, although no laws to this effect have been enacted in Canada. The IPOP state that “older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities”. While most older adults are homeowners, as individuals age, their housing needs may change. Loss of a spouse or of the ability to drive, or the onset of impairments may make change of residence necessary. Older adults generally strongly prefer to “age in place”, so as to retain the benefits of community supports that may have been built up over many years; however, they may face many barriers to doing so, including lack of accessible housing options, limited availability of home care supports, restricted access to mainstream or specialized public transportation, housing affordability, and discrimination against people who are perceived to be likely to develop disabilities and to need accommodations related to their disabilities.

A primary concern of older adults in the context of housing is *participation and inclusion*. Lack of supports or adequate housing in their home communities can jeopardize vital supports and connections that have been built up over many years. The principle of *diversity and individuality* points to the importance of law recognizing the particular needs of older adults in the housing context, including the need for community-based supports and accessible options. Lack of supports may pressure older adults into transitioning into more restrictive environments, such as long-term care homes, leading to a reduction in *independence and autonomy*. As well, lack of access to adequate housing may jeopardize the attainment of the principles in other areas of life. For example, the federal government has recognized housing as central to reducing poverty and exclusion.

- See LCO Commissioned Research Paper, C. Spencer “Ageism and the Law: Emerging Concepts and Practices in Housing and Health” (2009).

First Nations Older Adults with Disabilities and Access to Supports

The onset of disability and the resultant need for access to supports in the community or long-term care poses challenges for all affected older adults. First Nations older adults, however, face significant additional challenges. The lower than average socio-economic status of First Nations communities leads to higher than average rates of disability and significantly reduced lifespans, so that the pressures surrounding disability and aging, acute across all groups, are particularly severe for these communities. In some First Nations communities, inadequate and overcrowded housing, together with a lack of community services, makes it impossible for older adults who have developed significant health or ability limitations to remain in their home communities. However, a move to a major centre where long-term care is available may mean a very significant dislocation, separating the resident not only from family and community, but also from culture and in some cases language. In this way, the principle of *participation and inclusion* is engaged, although the particular cultural context of First Nations persons must be taken into account in interpreting and applying it. As well, because many First Nations individuals who are now older will have experienced the residential school system, re-institutionalization at the end of the life course may have a profound negative emotional and psychological impact. That is, the principle of *security* may be in jeopardy due to

the shortage of community-based and culturally appropriate options. Finally, historically and in most contemporary Aboriginal cultures, older members are accorded great respect and Elders play a central role in family, community and spiritual life. When First Nations older adults leave their home communities for geographically distant long-term care institutions, it is a significant loss for the community as well as the individual older person, raising issues related to the principle of *membership in the broader society*.

- See LCO, A Framework for the Law as It Affects Persons with Disabilities: Final Report.

Step 2

Does the Legislative Development/Review Process Respect the Principles?

This section focuses on the process through which laws are developed and reviewed. The process, like the substance of the law in question, should comply with the principles. Laws may be analyzed and evaluated for their impact on older persons both at the time of their development, and later as part of a law reform initiative or assessment of their effectiveness. This section deals with the issues raised by either kind of process, with a particular emphasis on research and public involvement.

Applying the Principles to Step 2

Note: “Law” here refers to law, policy and practice, as appropriate.

The process for developing or reviewing laws is often complex and multi-layered, and will differ depending on the particular issue or the level of government involved. This process will have a significant effect on the final shape of the law. As citizens who are members of the broader community, older adults should be involved in this process, and have their perspectives and experiences taken into account in the shaping of the law. It is essential that the principles be applied to the process of evaluating and reviewing laws, as well as to the substance of those laws.

The overriding principle at stake here is that of promoting *inclusion and participation*, ensuring that older adults have the opportunity to be meaningfully involved as citizens in the development of laws and policies. Implicit in the principle of *dignity and worth* is respect for the value of the experiences and perspectives of older persons, indicating that these experiences and perspectives should be sought out, included in the process, and meaningfully considered. The principle of *membership in the broader community* highlights that participation in the development of laws and institutions is a responsibility as well as a right for older adults, as it is for others. The principle of *autonomy and independence* highlights the importance for older persons of the right to make choices on issues that affect them, not only in their day to day lives, but at a broader societal level. Finally, the principle of *diversity* emphasizes that in the law development or reform process, a wide variety of voices should be heard from, including the range of experiences and opinions among older adults. This requires that public consultation processes be accessible and inclusive.

Questions for Consideration in Applying Step 2

1. Has research been carried out to determine how older adults may be affected by the law, and to ensure understanding of the particular circumstances of those older adults who will be affected?
2. Is the law based on current research and evidence regarding the needs and circumstances of older adults, so as to avoid reliance on ageist assumptions, attitudes and stereotypes, whether positive or negative?
3. Are older persons directly involved and integrally included in developing or reviewing the law?
4. Have steps been taken to ensure that a wide range of older adults and organizations have been informed about and had the opportunity for involvement in the process for developing or reviewing this law? Have efforts been made to reach out to older persons with differing disabilities, socio-economic status, racial or ethnic identities, creeds, sexual orientations, places of residence, and other aspects of diversity?

5. Have steps been taken to ensure that all stages of public consultation are accessible to older adults, within the requirements of the Ontario *Human Rights Code* and the AODA?
6. Have steps been taken to ensure that all stages of public consultation are accessible to older adults who may face barriers because of their low-income, caregiving responsibilities, newcomer status, geographic area of residence, disability or health status, or other issues?
7. Is the process through which older persons are involved respectful of their contributions and mindful of their circumstances and experiences?
8. Have the perspectives and concerns shared by older adults been meaningfully considered in shaping the outcomes?
9. Have the analysis and decisions made throughout the development or review process with respect to older adults been documented?

Applying the Framework: Example of the Relationship of the Principles to Legislative Development

Public Consultations and the *Ontario Long-Term Care Homes Act, 2007*

The *Long-Term Care Homes Act, 2007* (LTCHA) was a long-awaited and significant transformation of Ontario law relating to long-term care, replacing three predecessor statutes. The aim of the reform was to modernize the legal framework, improve accessibility and accountability, and create a more resident-focussed system. In keeping with these aims, a broadly consultative approach was taken to the development of the new law. From the beginning of the process, informal consultations reached out to a broad range of stakeholders, to ensure that the goals of the reform were meaningful to those affected and the proposed mechanisms were practicable. The formal consultation process included three days of public hearings, and the receipt of hundreds of submissions. Stakeholders received formal responses on key issues raised by the consultations, as a means of furthering discussion and ensuring a positive outcome. The focus on communication and consultation has continued through the implementation of the new law, including the development of the Regulations and of information tools for long-term care residents.

In these ways, the process for developing the LTCHA embodied the principles of *respect for the dignity and worth* of older adults, and of promoting *inclusion and participation*. The close connection between the values embodied in the development process and those reflected in the provisions of the Act illustrate how respect for the principles in the process of developing laws and policies may effectively promote respect for the principles in the resultant law or policy as well.

Step 3

Does the Purpose of the Law Respect and Fulfil the Principles?

Laws generally begin with an issue, large or small, that is perceived to be of concern and that needs to be addressed. The purpose of a law may be explicitly identified, for example in a preamble, or may be implicit in the provisions. While in practice, a law may or may not achieve the goals set out for it, the purpose of the law and the assumptions that underlie that purpose (or purposes) will shape the general approach of the law. This section sets out considerations for evaluating the purpose of a law against the principles.

Applying the Principles to Step 3

Note: “Law” here refers to law, policy and practice, as appropriate.

The overall goal or purpose of a law will of course profoundly shape every aspect of that law, and will itself be shaped by a set of underlying assumptions or values. In the case of laws that directly target older adults or affect mostly older adults, many of those assumptions and values will be directly associated with older age, while for laws of general application, they will be less directly connected with age, but still influential in terms of the impact of the law on older adults. Those assumptions and values may be positive for older persons, or they may be influenced by ageist or paternalistic attitudes and assumptions. For this reason, it is very important to carefully evaluate the purpose(s) of a law, and the underlying attitudes against the principles.

As at all stages of the evaluation, most commonly, multiple principles will be engaged by any one law, particularly since the principles are interdependent. Frequently, the principles will support each other; for example, initiatives that increase the *inclusion and participation* of older persons will generally also thereby promote *respect for their dignity and worth*. However, sometimes two or more of the principles may be in tension with each other in a particular case. In such cases, careful thought must be given to analyzing and responding to this tension.

Because older persons are often characterized as passive and “vulnerable”, it is particularly common to see the principle of the *autonomy* of older persons subordinated to the principle of *security*. It is therefore particularly important to carefully scrutinize laws that are framed in this way to ensure that ageist assumptions are not leading to an inappropriate sacrifice of autonomy for older persons. The analysis of the relationships between the principles may be relevant at any of the steps in the evaluation process.

- For information on identifying ageism and paternalism in the law, see the Final Report, Chapter IV.G; for information on relationships between principles, see Chapter III.B.5.

Questions for Consideration in Applying Step 3

1. What assumptions about older persons underlie the purpose of the law? Does the law recognize older adults as persons of worth, value their contributions, and treat them as of equal value with other members of society?
2. Does the purpose of the law take into account the actual needs and circumstances of older adults, and respond appropriately?

3. Does the purpose of the law take into account variances among older adults, whether due to their life courses, differences in their abilities or health status, or intersecting aspects of their identity such as gender, racialization, sexual orientation, Aboriginal identity, age, citizenship, socio-economic status, marital or family status, or other aspects of identity?
4. Does the purpose of the law take into account the variable nature of aging, and the multiple transitions that older persons experience throughout the aging process?
5. Does the purpose of the law enhance the ability of older adults to be meaningfully involved in their communities, be civically engaged, and to be heard on issues that affect them?
6. Does the purpose of the law address potential abuse, exploitation, mistreatment or victimization of older adults?
7. Does the purpose of the law foster the ability of older adults to make choices for themselves, including by providing appropriate supports?
8. Does the purpose of the law enhance the economic or personal independence of older persons, and provide support for such independence as required, for example through access to health, legal or social supports?
9. Does the purpose of the law recognize older persons as members of the broader society, and support their ability to take on the responsibilities associated with such membership?
10. Might this law affect the attainment of the principles for those who are not yet older adults when they reach that stage of life?
11. How do the principles in play relate to each other? Do they support each other or are there tensions between any of these considerations, so that satisfying one may threaten to undermine the realization of another? If so, have you considered:
 - a. Whether there are broader contextual issues (such as a lack of appropriate resources) causing the tensions between principles, and if so, whether these issues can be addressed to resolve the tension?
 - b. Whether there are approaches to the issue that will permit at least partial achievement of both competing principles?
 - c. Which of the potential approaches will best advance substantive equality for older adults?
 - d. Whether older adults have been consulted in determining how to resolve the tensions?

Applying the Framework: Examples of the Relationship Between Principles and The Purpose of the Law

Embodying Principles in the Law: The *Long-Term Care Homes Act, 2007*

The Ontario LTCHA has at its core a set of principles that are in harmony with this *Framework*. The fundamental principle of the Act is that a long-term care home is a home and should be a place where residents “may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs

adequately met”. This fundamental principle is reflected throughout the statute. For example, it includes a “Residents’ Bill of Rights” which explicitly recognizes that older adults who live in long-term care homes are individuals who have rights that must be respected and promoted, including:

- the right to be treated with courtesy and respect and in a way that fully recognizes the resident’s individuality and respects the resident’s dignity;
- the right to exercise the rights of a citizen;
- the right to have his or her participation in decision-making respected;
- the right to receive care and assistance towards independence based on a restorative care philosophy to maximize independence to the greatest extent possible;
- the right to form friendships and relationships and to participate in the life of the long-term care home;
- the right to have his or her lifestyle and choices respected;

and many others.

As another example of the ways in which the Act reflects the principles, it requires that every long-term care home ensure that a Residents’ Council, made up of residents of that home, is established. The Councils have an advisory role: they can provide advice to residents regarding their rights and obligations under the Act, attempt to resolve disputes between residents and the home, advise the licensee regarding any concerns about the operation of the home, provide recommendations for improvements to the home or to the quality of care, and may report to the government concerns or recommendations regarding the home. These Councils embody the principles of *participation and inclusion*, and help ensure that long-term care homes fulfil the other principles. For example, their ability to address concerns may improve the *security* of residents, and the recognition that residents have valuable perspectives increases respect for their *dignity and worth*.

- See Long-Term Care Homes Act, 2007, S.O. 2007, c. 8, ss.1, 3, 56

Tensions Between Principles: Adult Protection Laws

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

Adult protection legislation has been, and remains controversial. A key element in the negative response to current mandatory reporting legislation regimes in the Atlantic provinces is the very broad scope of that legislation, which permits unilateral and potentially heavy-handed intervention in the lives of older adults who in other contexts would be considered quite capable of making their own decisions. There are some adults who, due to the nature of their disabilities, are not able to speak or act for themselves or to make decisions to protect their own safety and security, and who may need others to assist them to take action or to simply take action for them. The scope of adult protection legislation in some provinces goes far beyond this, however, and in doing so, permits paternalistic decision-making, potentially influenced by ageist stereotypes or attitudes, that significantly undermines the *autonomy* of older adults. These laws, then, may be understood as exemplars of the common tension in elder law between the principles of security and independence and autonomy.

- For information on tensions between principles and adult protection laws, see the Final Report, Chapter III.B.5.

Step**4****Who is Affected by the Law and How Does This Relate to the Principles?**

To conduct a meaningful evaluation, it is essential to identify how and which older adults may be affected by a particular law. In some cases, laws are specifically targeted to older persons, or some group of older persons. Seniors' social housing, and the senior drivers' licence renewal program are examples of these. As well, older persons are, by definition, affected by laws of general application. In some cases, laws of general application may affect older adults or some group of older adults differently or disproportionately compared to others. This section considers how specific instances of the ways in which laws may affect older persons may interact with the principles.

Applying the Principles to Step 4

Note: "Law" here refers to law, policy and practice, as appropriate.

There are a number of laws that specifically target older persons – in some cases through age-based eligibility criteria and in others by focusing on an issue, such as long-term care, that mainly affects older persons. Some of these target older persons in general, and others target some particular group of older persons. These laws may include definitions or criteria setting out who is affected by the restrictions or has access to the rights or entitlements in the law. These criteria or definitions must be carefully scrutinized for stereotypical or ageist assumptions or attitudes that violate the principle of *respecting dignity and worth*. There is a risk that age-based criteria may be founded on or perpetuate ageist attitudes about the abilities, worth and contributions of older persons, thereby undermining *dignity and worth* and potentially having adverse consequences for the attainment of the other principles. On the other hand, age-based criteria may also be effective at addressing the particular circumstances of older adults and thereby advance fulfilment of the principles. Laws of general application may, of course, affect the attainment by older adults of any of the principles.

As older persons are often invisible in the law development process, the effects on them of a particular law of general application may not be identified or considered. This may be especially true for some groups of older persons who are particularly marginalized, such as Aboriginal older adults or those who have aged with disabilities. The principles of *promoting participation and inclusion*, and of *recognizing diversity* require that older adults, in all their variety, be carefully considered whenever a law of general application is designed or reviewed, to ensure that it takes into account their particular needs and circumstances. Failure to take into account the particular needs of older adults or some group of older adults may negatively affect their *security*.

- For information on applying the principles to targeted laws and to laws of general application, see the Final Report, Chapter IV.B-E.

Questions for Consideration in Applying Step 4**Age-Based Laws**

1. If the law specifically targets older persons or a particular group of older persons:
 - a. does the law reflect the principle of membership in the broader community, and incorporate an understanding of older persons as citizens with both rights and responsibilities?

- b. has consideration been given to the most appropriate way to tailor the program in light of levels of heightened risk or disadvantage, potential benefits and available resources?
 - c. has an inclusive design approach, meaning one that applies to everyone but where necessary recognizes the particular circumstances and needs of older adults, been considered as an alternative?
2. If the law uses age-based criteria:
 - a. is the **purpose** of the criteria in harmony with the principles? Might the **effect** of the law undermine the principles, for example by reinforcing age-based segregation or stereotypes?
 - b. are the criteria based on current and relevant research into the needs and circumstances of older adults?
 - c. do the criteria recognize the diversity of older adults, for example by making provision for individual assessment or for individuals to challenge their inclusion or exclusion from the group?
 3. If the focus of the age-based law is on protecting the security or promoting opportunities for younger persons, has the impact of the restrictions on older persons been fully taken into account and the needs of older adults been weighed equally with those of younger persons?

Other Types of Eligibility Criteria

4. Has the impact of non-age-based eligibility criteria on older adults, or on some groups of older adults been taken into account? For example:
 - a. if the law uses disability-based eligibility criteria:
 - i. does the definition of disability take into account the types of impairments disproportionately affecting older adults?
 - ii. do the criteria take into account the ways in which the experience of disability or impairment are shaped by the life course?
 - iii. do the criteria take into account the ways in which assumptions and attitudes regarding aging may affect the treatment and experiences of older persons with disabilities?
 - b. if the law uses income-based criteria, do the criteria take into account current information and research on the economic status of older adults in all of their diversity and the particular financial circumstances of some groups of older adults, such as
 - i. the effect of withdrawal from the workforce on financial security?
 - ii. how the economic status of some older adults, such as women, racialized individuals, and those who have lived with disabilities throughout their lives may be shaped by unequal life experiences?

Laws of General Application

5. If the law is one of general application, might it, taking the circumstances of older adults into account, affect older persons differently or in greater numbers than the general population?
6. If the law is one of general application, might it affect some particular groups of older adults differently or in greater numbers than the general population? For example:
 - a. does the law have a significant effect on persons who live in low-income? If so, given the particular circumstances of older persons who live in low-income, what might be the effect on this group?
 - b. if the law has a different or disproportionate effect on older persons in general, has consideration been given to how this might differ for older men and women?

- c. if the law has a different or disproportionate impact on older persons in general, has consideration been given to how that impact might differ for older persons who have lived with disabilities throughout their lives, or developed disabilities with age?
 - d. has consideration been given to how the law might affect older persons who are from historically marginalized communities, such as for example Aboriginal or racialized older persons, or those who are LGBTQ, newcomers to Canada or Francophones, particularly given how inequality may have shaped their life courses?
 - e. has consideration been given to how the law might affect older persons facing barriers related to their family or marital status, area of geographic residence (such as in rural or remote areas) or socio-economic status?
7. If differential impacts have been identified, have they been addressed?

Applying the Framework: Examples of the Relationship Between the Principles and the Scope of the Law

Age-Based Restrictions in the *Workplace Safety and Insurance Act*

When the Ontario *Human Rights Code* was amended to remove protections for mandatory retirement requirements, provision was made to maintain age-based criteria both in employment benefits under the *Employment Standards Act* and in the *Workplace Safety and Insurance Act* (WSIA). For example, while the WSIA places a limited duty on employers to re-employ injured workers, this duty ends at the point when a worker reaches age 65. As well, the WSIA places age 65 limits on loss of earnings benefits. These provisions may have a devastating impact on the economic security of older workers who become injured. They appear to assume that older workers would necessarily have left the workforce at the age of 65, ignoring current trends, individual circumstances and the contributions of older workers to their workplaces, and as such undermine the dignity and worth of older workers.

- For information on eligibility criteria and the WSIA, see the Final Report, Chapter IV.B.

Laws of General Application: Older Persons and the Revocation of Wills Upon Marriage

At law, the standards for the legal capacity to marry and the legal capacity to make a will have evolved separately. The test for legal capacity to marry is different from, and lower than, the test for the legal capacity to make a will, reflecting differences in the issues at stake in each kind of decision. Therefore, it is quite possible for an individual to marry who does not have the capacity to make a will. To complicate the matter, under the *Succession Law Reform Act* (SLRA), marriage automatically revokes a previously existing will, unless that will indicates that it was developed in contemplation of marriage. The differences between the capacity to marry and the capacity to make a will can impose particular unintended burdens on older adults. Older adults are more likely than the general population to be affected by conditions which affect their testamentary capacity, but which may not affect their capacity to marry. Practically speaking, the individual who retains the capacity to marry but not the capacity to draw a new will, will be unable to draw a new will after a marriage. That individual then loses control of his or her testamentary dispositions, and must then die intestate.

Demographic information indicates that older adults are more likely to have complicated familial arrangements, and thus complicated obligations and wills. Divorce and re-marriage, which introduce complex family obligations, are increasingly common. The dynamics of the step-families created by subsequent marriages are not captured by intestate succession. Further, subsequent marriages later in life can add a further layer of complexity to an individual's testamentary dispositions. These laws of general application can therefore significantly affect the *autonomy* of older adults in terms of disposing of their assets upon death, as well affecting their security by placing them at some risk of financial exploitation through predatory marriages.

- *For information on laws of general application and on the revocation of wills upon marriage, see the Final Report, Chapter IV.E.*

Step

5

Do the Processes Under the Law Respect the Principles?

The implementation of a law is equally as important as its substantive provisions. Laws may be positive in their conception and on paper, but in practice may be cumbersome, difficult to access, or otherwise ineffective in achieving their goals. This section applies the principles to the implementation of the law, including considerations related to training and education, resources and provision of adequate supports and accommodations for age-related needs.

Applying the Principles to Step 5

Note: “Law” here refers to law, policy and practice, as appropriate.

Well-intentioned laws may fail to achieve their purposes due to problems in implementation. Many laws are exceedingly complex, so that understanding and navigating them requires considerable effort and expertise, and older adults may be expected to do so on their own, without supports or the appropriate accommodations where these are required. Those operating such systems may have an imperfect understanding of the needs and circumstances of older persons, or may harbor ageist attitudes or assumptions. Often such systems are under-resourced and under strain.

Applying the principles to these processes requires that older adults be treated with *dignity* when seeking to access the law. Those implementing the law must have the skills, knowledge and resources to treat those accessing it with respect, accommodate their needs, and ensure they receive any supports or benefits to which they are entitled. *Responding to diversity* requires that systems be able to accommodate the particular needs of individuals, including needs arising from the accumulated effects of the life course or the intersection of older age with other aspects of identity. The principles of *autonomy and independence*, and *participation and inclusion* require that systems intended to serve older adults can be understood and navigated by them, which requires provision of appropriate information and supports.

- For information on access to the law for older adults, see the Final Report, Chapter V.

Questions for Consideration in Applying Step 5

1. Have sufficient human and financial resources been allocated to ensure that older persons will receive the services intended by the law with dignity and respect?
 - a. Are there mechanisms in place for identifying significant unmet needs?
 - b. Where resources are limited, does the law include clear, transparent and principled criteria and priorities for how scarce resources should be allocated?
 - c. In the implementation of laws of general application, where resources are limited, have the needs of older persons been given equal consideration with those of other groups?
2. Have the processes under the law been designed to be as simple and transparent as possible for users?
3. Does the law include clear rights to services to be provided and accountability for providing those services in a timely, respectful, accessible and appropriate manner?
4. Have those charged with implementation of the law been provided with adequate ongoing training and

education to enable them to perform their duties in a way that respects the principles, including training and education on:

- a. the substance of the law in question, as well as the Canadian *Charter of Rights and Freedoms*, the Ontario *Human Rights Code* and accessibility requirements under the AODA?
 - b. anti-ageism, including common negative stereotypes and assumptions about older persons in general and particular groups of older adults, access and accommodation issues for older adults, and systemic barriers?
5. Have mechanisms been developed to ensure that older persons are informed about their rights and responsibilities under the law, and that they have access to the information necessary to seek access to their rights? Do these mechanisms address common barriers? For example:
- a. has information been provided on where individuals can seek further information or supports for accessing their rights or exercising their responsibilities?
 - b. have strategies been developed to disseminate information to organizations that represent, advocate for or support older persons?
 - c. is information available in disability-accessible formats that comply with the provisions of the *Accessibility for Ontarians with Disabilities Act* and the Ontario *Human Rights Code*?
 - d. is information available in plain language?
 - e. is information available in non-written formats (such as by telephone)?
 - f. is information available to persons living in settings such as long-term care homes where there may be more limited access to the broader community and to information?
 - g. is information available to persons living in rural or remote settings?
 - h. is information available in multiple languages?
6. If the access mechanism is complex or multi-stage, have supports or advocacy services been provided to ensure that older persons are able to navigate the system, particularly those older persons who face additional barriers due to disability, low-income, language barriers or other issues?
7. Have the services been designed to include and accommodate the particular needs of older persons, including those who are facing additional barriers due to low-income, or who have needs related to other aspects of their identities?

Applying the Framework: Examples of the Relationship of the Principles to Processes Under the Law

Providing Accessible Information – NICE and CLEO

The law in general, and as it affects older adults, is often complex and confusing. Many older adults, as well as those providing services to older adults, have difficulty locating information about rights and responsibilities under the law or face barriers to doing so. This undermines the ability of laws to achieve their goals (and thereby the principles). The lack of information also undermines the *autonomy* of older adults in that they lack sufficient information to make meaningful choices.

Two organizations address these issues, at different levels. The National Initiative for the Care of the Elderly (NICE) is an international network of researchers, practitioners and students with a mandate to improve the care of older adults through initiatives related to networking and knowledge transfer. NICE has developed a range of practical tools in a number of areas to help older adults and those working in the field to better understand rights and responsibilities under the law. Community Legal Education Ontario (CLEO) has a mandate to provide accessible plain-language information about the law, so that people are able to understand and exercise their rights. CLEO's work has a particular focus on those who face barriers to accessing information, such as those living in low-income and newcomers. Community legal clinics and other organizations also use these publications to help clients with legal problems.

- *For information on accessible information and empowering older adults, see the Final Report, Chapter V.C.2.*

Seniors-Focused Services – Policing

Several police forces in Ontario and across Canada have developed specialized services or departments to address particular risks or disadvantages for older adults. For example, the Seniors' Issues Office of the Elliot Lake Police Force blends social work and policing service with the goal of supporting and promoting the independence and security of seniors in Elliot Lake. The Office was started to supply assistance for seniors who may be alone or isolated and do not venture out of their residences for a month or more. It consists of a seniors' community development project which focuses on promoting the positive aspects of social support: familiarity, interdependency, a sense of belonging and a sense of connectedness to the community; and a seniors' prevention/intervention project, aimed at seniors considered to be 'at risk' of victimization. Partnerships have been developed with Elliot Lake Retirement Living by providing referrals and working cooperatively with the customer service co-ordinator and all staff. By this means, the Seniors Issues Office has access to all rental buildings and assistance of building superintendents to reach any seniors who may be at risk. Such programs, by recognizing the particular barriers and risks that some older adults may experience, may promote their security as well as their participation and inclusion.

- *For information on the principles and initiatives targeted specifically to older adults, see the Final Report, Chapter V.C.4.*

Step

6

Do the Complaint and Enforcement Mechanisms Respect the Principles?

No law will operate perfectly: errors and problems will inevitably arise, and mechanisms must be put in place to identify and address these. Therefore, older adults require meaningful access to the law. Some laws rely on complaint mechanisms of various types to identify and resolve issues, others use proactive mechanisms like audits or institutional advocates for this purpose, and others use a combination of mechanisms. This section applies the principles to complaint and enforcement mechanisms.

Applying the Principles to Step 6

Note: “Law” here refers to law, policy and practice, as appropriate.

Meaningful complaint and enforcement mechanisms are important, not only for addressing individual issues that may arise in the implementation of a law but also for identifying and addressing systemic problems with a law or its implementation. Older adults may face a range of barriers in accessing the law, including a lack of clear rights and remedies, complex or inaccessible systems that fail to take into account their needs and circumstances, power imbalances, a reluctance to complain and a lack of information and advocacy supports.

The principles of *respecting dignity and worth* and of *security* mean that there must be meaningful mechanisms to ensure that older persons are able to raise concerns about mistreatment, exploitation or abuse, that there is meaningful redress when such issues arise, and that they are not subject to retaliation for doing so. *Responding to diversity* requires that complaint and enforcement mechanisms take into account the diverse needs and circumstances of older adults and ensure that all aspects of complaint and enforcement mechanisms are accessible for these individuals. This includes ensuring that complaint mechanisms are sufficiently simple and transparent for older adults to navigate – or if not, that they have the advocacy supports necessary to do so. To ensure *autonomy and independence*, older persons must have access to the information that they need to understand and enforce their rights. The principle of *promoting inclusion and participation* requires that complaint mechanisms facilitate the ability of older persons to be actively involved in claiming their rights, including provision of the supports necessary to empower them to do so.

- For information on access to the law and older adults, see the Final Report, Chapter. V.C.

Questions for Consideration in Applying Step 6

1. Does the law include access to a complaint and enforcement mechanism that clearly and meaningfully identifies, addresses and remedies both individual and systemic violations of the law, including for those individuals who are particularly disadvantaged or at heightened risk?
2. Are the complaint and enforcement mechanisms designed in a way that addresses power imbalances and prevents potential retaliation against those who raise issues?

3. Are the complaint and enforcement mechanisms accessible for older adults, including respecting the requirements of the *Code* and the *Accessibility for Ontarians with Disabilities Act*, providing appropriate accommodations, addressing barriers related to low-income, and recognizing intersecting identities?
4. Are the complaint and enforcement mechanisms navigable for older adults, whether through ensuring the mechanisms are simple and transparent, or by providing navigational assistance?
5. Are older persons provided with meaningful and accessible information about their rights and how to enforce them?
6. Are supports available to older persons to empower them to understand their rights and advocate for themselves?

Applying the Framework: Examples of the Relationship of the Principles to Complaint and Enforcement Mechanisms

Long-Term Care Homes and Barriers to Accessing the Law

Long-term care homes provide crucial supports to individuals with significant, complex needs, and so may play a vital role in promoting the principles for their residents. However, residents may experience barriers to asserting their rights. Residents are generally living with significant impairments or health issues, which may make it difficult for them to realize when their rights have been violated and to pursue redress. There are significant power imbalances between residents and those who are providing their care: residents may be extremely vulnerable to reprisal. The segregated nature of the living environment makes it more difficult to access information and resources. Therefore, rights enforcement mechanisms that rely entirely on individual complaints may be of only limited utility in preventing violation of the rights of residents and ensuring that the principles are respected and fulfilled.

Therefore, persons living in these types of settings are at particular risk of having their rights violated, or of experiencing a violation without a realistic possibility of redress. This raises issues related to the principle of *security*. The principle of *responding to diversity* requires the law to take into account the needs of this particular group when designing complaint and enforcement mechanisms. Additional outreach, supports or enforcement mechanisms may be required to ensure that the dignity and worth of persons living in these settings are respected.

- For information on access to the law and older adults in long-term care homes, see LCO Commissioned Research Paper, *Advocacy Centre for the Elderly*, “Congregate Living and the Law as It Affects Older Adults” (2009)

Community Care Supports and Complaint Mechanisms

The provision of community care supports for those individuals who are frail or have disabilities, but who wish to remain in their own homes are central to the principles of independence, security and participation and inclusion for these individuals. These supports are regulated by the *Home Care and Community Services Act* (HCCSA). Agencies providing services are required to develop complaint processes and to respond to complaints regarding service quality within 60 days. Because the Act has no specific requirements for complaints processes, they vary from agency

to agency, but essentially, where an individual has concerns about the quality of services provided, these complaints must be brought to the attention of the agency providing services. Responses to complaints need not be in writing, and for some issues there is no right of appeal to a third party. Many concerns have been raised about the effectiveness of this complaint process, especially since those using home care services are likely to be frail or in poor health and therefore not in a strong position to navigate unclear processes or to strongly advocate for their rights where there is a potential for reprisal.

- *For information on the principles and access to community care, see the Final Report, Chapter VI.*

Step

7

Do the Monitoring and Accountability Mechanisms Respect the Principles?

In general, laws benefit from the inclusion of mechanisms to ensure accountability, transparency and effectiveness. Often there is a lack of monitoring and oversight mechanisms for systems disproportionately or exclusively affecting older persons; as a result, it is difficult or impossible to determine whether these systems are operating effectively or the degree to which older adults are subject to abuses or violations of their rights. Monitoring of the law and regular evaluation of its effects provides a strong foundation for meaningful law reform, and mechanisms for monitoring and evaluation should be built into the law from the outset. This section considers the mechanisms within laws for accountability, transparency, monitoring and evaluation.

Applying the Principles to Step 7

Note: “Law” here refers to law, policy and practice, as appropriate.

Monitoring and accountability mechanisms relate to the principles in a general way, in that without them, we cannot determine whether or ensure that a particular law is respecting or advancing the principles. As well, accountability mechanisms can promote the principle of *participation and inclusion* by giving older persons the opportunity to have a voice in the operation and reform of laws that affect them, and of *security* by ensuring that laws are not negatively affecting the wellbeing of older adults.

- For information on the principles and monitoring and accountability mechanisms see the Final Report, Chapter V.C.7.

Questions for Consideration in Applying Step 7

1. Does the law include a mechanism to allow those affected, including older adults, to provide feedback on the effectiveness of the law and on any unanticipated negative consequences for older adults?
2. Does the law include provisions that require meaningful information about its impact and effectiveness to be systematically gathered and documented?
3. Does the law require that information about its operation and effectiveness be made publicly available?
4. Are those charged with implementing and overseeing the law required to regularly report on their activities and the effectiveness with which the law is administered?
5. Where the law provides significant discretion to those charged with its implementation, does it include additional reporting and monitoring mechanisms to ensure that this discretion is exercised consistently, fairly, transparently and in a principled manner?
6. Does the law require regular review of its goals, to determine whether they are still meaningful and appropriate?

7. Does the law require regular review of the effectiveness of its implementation, and whether the aims of the law are being achieved?
8. If the law was developed as a partial response to an issue because of resource or other constraints, are there mechanisms in place to ensure that the issue is regularly reviewed and that progress is made towards better fulfilment of the law's aims?
9. Are the resources allocated to the law regularly reviewed to ensure that they remain adequate and appropriate for its effective implementation?
10. Where reviews are carried out, are steps taken to act on the results of the review? Has consideration been given to making the results of significant reviews available to the public?

Applying the Framework: Example of the Relationship of the Principles to Monitoring and Accountability Mechanisms

Monitoring Enduring Powers of Attorney

Individuals designated as substitute decision makers through enduring powers of attorney have very broad powers. Their decisions have the potential to radically affect the *security, dignity, independence and autonomy, and participation and inclusion* of the person granting the power of attorney. Significant concerns have been raised about abuses through powers of attorney, particularly financial abuse of older persons. However, there are no substantial mechanisms for monitoring enduring powers of attorney. It is impossible to know even how many of these powers of attorney are currently in effect in Ontario, let alone how they are being exercised. While it was hoped that enduring powers of attorney would enhance the *security* and *autonomy* of older persons by allowing individuals to plan for the future, it is impossible to tell how well this legal regime is operating and whether the principles are being enhanced or undermined. That is, it is possible that current laws, although well-intended, are undermining rather than promoting the principles.

The Alberta Law Reform Institute, in its recent review of laws related to enduring powers of attorney, has recommended that transparency and accountability for the exercise of powers of attorney be strengthened by including provisions requiring attorneys, upon commencing responsibilities for a legally incapable person, to issue a formal notice in which they formally acknowledge and accept a specified list of duties as an attorney, as well as provisions enabling persons concerned about misuse to report concerns to a designated public official who will have discretion to investigate.

- See Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (2003)

Step 8 Addressing the Results of the Evaluation in Steps 1 - 7: Is the Law True to the Principles?

Having evaluated the various aspects of the law through Steps 1 to 7, the final Step is to gather the results, evaluate the degree to which the law is true to the principles, and develop strategies for addressing any identified shortfalls.

Applying the Principles in Step 8

Note: “Law” here refers to law, policy and practice, as appropriate.

It is not uncommon for laws to fall short of fully promoting or achieving the principles for older persons. After all, we live in a world of competing policy priorities and limited resources, and the principle of *understanding membership in the broader society* reminds us of the importance of working together to develop a society that is inclusive for all ages. As well, our understanding of the principles and of the experiences of older adults will continually evolve. However, the principle of *dignity and worth* reminds us that shortfalls should occur only where truly unavoidable, and not as a matter of course or without serious consideration, and that the aim should be to move forwards toward full realization and not backward. Where an evaluation identifies a shortfall, it should be carefully assessed, and any determination that a shortfall cannot be immediately rectified should be made in a transparent and accountable manner.

International human rights law recognizes that not all rights can be immediately and fully attained: the legal principles of progressive realization and “respect, protect, fulfil” come into play in these circumstances, and can be applied in the context of this *Framework*. While laws may not completely fulfil all the principles, actual contraventions of the principles should be immediately addressed as a matter of priority. Further, where it is not possible to immediately and fully attain the principles in either the substance or the implementation of a particular law, concrete plans should be developed, with clear accountability and timelines, for fully realizing the principles over time.

Questions for Consideration in Applying Step 8

1. For new laws, does the law, **overall**, represent progress towards the full attainment of the principles?
2. Are there areas in which the substance or implementation of the law contravenes the principles? If so, what steps will be taken to ensure that the law does not undermine the principles?
3. Have issues or areas been identified where the principles are in tension? If so, has the tension been analyzed as proposed in **Step 3**, and the analysis and response clearly articulated and documented?
4. Are there areas in which the substance or implementation of the law falls short of fully achieving the principles? If so, can steps be taken to ensure immediate complete fulfilment of the principles?
5. If complete fulfilment of the principles cannot be achieved immediately, for example due to a shortage of resources, has a clear plan been made to address the shortfall over time? Does the plan include clear timelines and accountability for implementation?
6. Have the results of the evaluation and the decisions made in response to the results been fully documented and considered?
7. Are the results of the evaluation available to older adults, to the extent possible while respecting confidentiality and privacy rights?

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