



**ONTARIO  
BAR ASSOCIATION**  
*A Branch of the* CANADIAN BAR ASSOCIATION

**OBA Submission**  
**on the**  
**Law Commission of Ontario's**  
***The Law as it Affects Older Adults –***  
***Consultation Paper: Shaping the Project***

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## **About the Ontario Bar Association**

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 17,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

## Introduction

The Ontario Bar Association (OBA) is pleased to provide its comments in support of the Law Commission of Ontario upon the consultation paper, **The Law as it Affects Older Adults – Consultation Paper: Shaping the Project** (the “Consultation Paper”).

OBA applauds the Law Commission of Ontario for this initiative. How legal systems deliver social services, laws and legal services, and facilitate access to meet the varying needs of its citizens, is an important measure of its culture.

OBA recognizes that any sound, consistent legal framework requires a sound, consistent, and well-formulated social policy to provide the road map for the legal framework to access the laws and legal systems and to receive care through social services.

The Consultation Paper clearly recognizes that societal ageism stereotypes adversely impact older adults, and that ageism injects bias, attitudes and assumptions directly and indirectly, both in the formulation and in the application of the law. The Consultation Paper also recognizes the diversity of functioning and demographics among older adults, and that the majority of older adults function independently and well, some working well beyond traditional retirement age by reason of desire or need.

Improvements in the law and to accessibility to legal services designed to meet the specific needs of the older adults will improve access to legal services for all citizens. Not only will the older adult benefit from the improvements, but also the caregivers and the community at large. This is an inclusive project in its scope and impact.

To review the Consultation Paper and to prepare this response, OBA has sought input from, consulted with, and received the contributions of its diverse membership who practice in a broad range of fields of law. Our Association will be pleased to respond to any questions or to provide further or more detailed information, if requested.

## RESPONSES

### ***Question 1: What aspects of diversity should any approach to the law affecting older persons take into account?***

Diversity exists among the general population and among older adults. The wide diversity among older adults includes issues of diversity that are specific to this age group. Age-related changes in demographics, environment and social status impact the older adult disproportionately.

OBA considered, in this context, that the Older Adult is more likely than the younger adult:

to have more complex family structures: had more than one marriage, or to have experienced broken marriages and subsequent marriages among their children, their siblings and their families, to have obligations for, and to seek rights to maintain, relationships with extended family configurations.

To be single, have lost a life partner and peer supports;

To be female;

To contend with financial, physical and emotional vulnerability and consequential loss of choice and control;

To have assumed caregiver roles during career development years, particularly if female, impacting their pension and retirement income;

To have widely variable pension income impacted by the various rights to contribute during employment years.

To be demographically disproportionately represented in small rural areas, or if of a First Nation, to be on a Reserve, with reduced access to care, services and protections;

If a new immigrant, to have reduced opportunity to assimilate in language and culture;

To look to religious and cultural roots for supports, with possible additional shielding from language and cultural assimilation that may limit exposure and tolerance to diversity;

To suffer differential health care as a result of racism, sexism, ageism, resulting in shorter life spans for certain groups (such as our native population);

To have increasing limits on mobility and to contend with isolation and dependence upon unfamiliar supports;

To have diminished choices and diminished access to assistance, leading to vulnerability to physical and financial abuse;

To suffer the humiliation of being preyed upon, especially if isolated and fear of being declared “incapable” may contribute to embarrassment and reluctance to report a scam;

To be reluctant to speak up when discriminated against or abused;

To find acceptance of certain aspects of diversity is more difficult, particularly among those who immigrated late in life and had little opportunity to assimilate into the culture and language; and,

To have need or desire to continue to work beyond the traditional retirement age.

OBA recognizes that an informed social policy framework is fundamental to the framing and functional consistency in the laws that affect the older adult, and, further, that such laws cannot stand alone. Social and legal frameworks should anticipate the life cycles, and recognise the best interests of the vulnerable person. Protecting and balancing principles of autonomy, dignity and self determination for the older adult at this time in the life cycle when availability of choices are diminishing, should be framed to anticipate the continuum in the life cycle: age-related, but not determined by a chronological age.

**OBA would urge the Law Commission of Ontario to consider:**

1. A need for reform in the area of retirement income to ensure that older persons have sufficient income to live with dignity and autonomy. A big concern is lack of private pension plan coverage. The Canadian retirement system is built on "three pillars": government programs (e.g., CPP, OAS), employer programs (e.g., registered pension plans, Group RRSPs) and individual savings. There is general concern in the industry about the lack of adequate pension coverage particularly for low- to moderate- income earners because, among other things, employer programs in the private sector are on the decline and lower income workers are not able to accumulate adequate savings. Some experts (notably Keith Ambachtsheer, author of "Pension Revolution: A Solution to the Pensions Crisis" (Wiley Finance 2007)) suggest the establishment of an Ontario workplace pension plan for employees that do not have an employer pension plan.
2. The lack of public and private pension coverage for homemakers, caregivers, and others, who are not in the workforce. It is suggested that consideration be given to whether new laws that facilitate expanded coverage under the public and private systems, are required. The OBA recognizes that some of these issues and/or the solutions straddle federal/provincial lines. The OBA further recognizes that the *Ontario Expert Commission on Pensions* may address some of these issues in its report which is expected to be released in October 2008. The Expert Commission may make recommendations for changes in the existing laws to deal with these issues. It is anticipated that there will be changes made to the *Pension Benefits Act (Ontario)* as a result of the Ontario Expert Commission's work. However, the mandate of the Ontario Expert Commission is somewhat restricted in that it is focussed on defined benefit plan coverage. It is therefore it is

- important for Ontario lawmakers to address the larger concern about implementing a legal framework which ensures that older persons in Ontario have adequate retirement income.
3. A need to consider pension reforms in other jurisdictions, such as phased retirement and pension benefit unlocking. The *Income Tax Act (Canada)* was amended this year to permit phase retirement. Several jurisdictions have since announced corresponding changes to their pension laws. At the present time Ontario's pension laws do not permit phased retirement and we have not heard of any plans to introduce it. Under Ontario law, benefits accumulated under a pension plan are "locked-in" and can only be accessed in the form of an income stream after the member has reached age 55 (even if the benefits are transferred into another retirement vehicle, such as an RRSP). "Unlocking" of pension benefits entitlements in Ontario is available only in cases of severe financial hardship following a very rigorous application process. Some jurisdictions have adopted more liberal unlocking regimes. Consideration needs to be given to whether the policy considerations that underlie the unlocking rules are still valid in Ontario or whether a different regime may be appropriate.
  4. Legislation, education, and informational outreach to reinforce the reality of ability among older adults, to address systemic discrimination and ageism that is directed against older workers in the workplace in our culture. In part this arises from the inaccurate perception of older persons as having disabilities which prevent them from competing for the same job opportunities as other people.
  5. A variety of ways of improving advocacy for the elderly in long term care, and what are appropriate models. Various processes exist. Cumbersome processes need to be simplified, without compromising due process. However, it is not enough to have available processes, there must be effective means to access those processes and the appropriate advocacy. OBA noted that in jurisdictions where an "in-house" advocate or ombudsman has been established, that it has been reported that advocate becomes identified with the institution and loses effectiveness. OBA would encourage the expansion of the Ontario Ombudsman's jurisdiction into the MUSH sector.
  6. Inconsistencies exist in the family laws relating to support. The Divorce Act (federal legislation) provides that conduct is not relevant for the purposes of determining spousal support. However, the SCC decided in *Leskun* that the impact of a spouse's misconduct can affect the right to spousal support. Among the elderly, domestic violence by one spouse is often treated by the police, family and society as less significant than in general society when in fact the economic disadvantages, emotional consequences and disruption to the family unit can be much more devastating. The elderly may have less ability to defend themselves or to respond to change and enforced separation. Should this be considered as a factor in determining support.

7. The *Family Law Act* addresses rights to property, matrimonial homes (both ownership and occupation), spousal support and restraining orders. Elderly are deemed to appreciate the consequences of marriage yet marriage invalidates a will and generates rights to the other spouse to property, home, and support. Case law has determined that capacity to create a will is a more rigorous standard than the capacity to marry, and there can be no ability to re-execute or complete a new will to replace the invalidated will.
8. Marriage automatically creates rights to possession and ownership to the matrimonial home. These appear not to have contemplated the inheritance of the home by a widow, or acquisition upon separation from previous marriage. The impact of subsequent marriages upon pre-existing property rights demonstrates a need to consider whether there are circumstances in which there should be a deduction for the value of the home at marriage, and any variation of the right to exclusive occupation that exists upon separation.
9. The *Family Law Act* addresses reverse child support (support payable by adult child to older parent). Reverse child support are provisions in the Family Law Act that have been rarely applied. Consideration of reverse child support can include specific provisions and guidelines that address the determination of entitlement, quantum and duration for the dependent older adult.
10. The courts have provided conflicting decisions on the rights of grandparents in the field of custody and access that is set out in *the Children's Law Reform Act* (CLRA). These rights should also be considered for aunts, uncles, and other members of the child's extended family. Specific provisions might be added to sections 20-24 of the CLRA to provide guidance on a grandparent/aunt/uncle right of custody and access.

***Question 2: What principles and goals should guide the law as it affects older persons?***

The principles that inform the laws as they affect the older adult should favour autonomy and self-determination, and recognize that the vast majority of older adults are capable and competent. If ability is an issue, and it should be assumed that it is not – placing the onus of proof clearly upon the party alleging incapacity – then the law should strike a balance between the autonomy of the individual, the protection of those individuals at risk, and the resources of the family and community available to support, protect and participate. The principles and goals should favour the autonomy and participation of the older adult in all decisions, and promote self-determination as being in the best interests of the older adult whenever practicable as the default underlying social policy.

Our group considered:

The United Nations Principles for Older Persons and found the principles commendable, clear and comprehensible.

The Canadian Charter of Rights and Freedoms

Canada's National Framework on Aging – Policy Questions – lists several questions that should be asked when dealing in five areas: Dignity, Independence, Participation, Fairness, Security. The Policy Questions are quite extensive and could be made mandatory as a checklist for any service or program directed at seniors. We would add to the five areas identified in that report.

The Report of WHO (World Health Organization) that promotes a life-course perspective and coordinated approach for both health and social services – that they “need to be integrated, coordinated and cost-effective.” This report also promoted a “right’s-based” approach rather than a needs-based” approach.

OBA report: The Justice Stakeholder Summit Report "Getting it Right" which focuses on making justice accessible to all.

That lack of capacity is often mistakenly assumed in the face of disability, such as deafness or neurological conditions affecting speech or movement.

that some older adults have age-related vulnerabilities, particularly when infirm, isolated or have diminished mental capacities and are more likely to be the object of undue influence by others.

OBA commends the extensive work done by the organizations referred to above that have laid the groundwork for a social policy essential to creating a rational legal framework of laws affecting the older adult. Laws that affect the older adult will be increasingly critical and relevant as the population ages.

**OBA would urge the Law Commission of Ontario to consider:**

1. Canada's National Framework on Aging (NFA) adopted the principles of dignity, independence, participation, fairness, and security, and to consider two additional principles:
  - a. The right to receive "care" – the right to access to health and institutional care, and to legal and social services; and,
  - b. The principle of respect for human rights and freedoms.
2. A review of the process for evaluating legal capacity to ensure that assessors of capacity are duly qualified and the proper evaluative processes are undertaken.
3. Effective advocacy models for seniors that will balance the need for efficacy, accessibility, and reduced family polarization with protection of review rights and due process.
4. A means to assess whether the needs for legal and social services are being met. Canada's National Framework on Aging policy questions list questions appropriate to pose to monitor success, covering five areas: Dignity, Independence, Participation, Fairness, Security, to which consideration be given to the addition of "care" and "human rights and freedoms". These Policy Questions are extensive and a potential basis of a checklist to ensure that older adults are for any services or programs directed at seniors.
5. Whether, for the older adult, language and culture affect a seniors' understanding of the law adversely: whether fear of being found "incompetent", or threats by others of such findings deters access to legal processes; and, what means might be available to empower the older adult in these situations.
6. The delivery of a comprehensive approach to access to legal and social services as contemplated by the report of the World Health Organization.
7. Development of legislation and policies that promote the image of the older adult as competent and able: which promote the full and active participation of the older adult in society and in the workplace; and, empower the older adult through ability-based criteria.

***Question 3: Do negative attitudes or stereotypes about the characteristics, capacities or contributions of older adults affect the law or the administration of the law? Does the law adequately take into account the needs and experiences of older persons? Are there specific issues or areas of the law that are of concern?***

Ageism and negative stereotypes about the characteristics, capacities and contributions of the older adults are pervasive and harmful. There is poor understanding of the predominance of ability and independence among older adults in the community. Society fails to give credit to ability or to value the contributions of this segment of our community. We need to make the same effort to eliminate age discrimination, as we have made to promote multiculturalism, and to eliminate homophobia. Employment is a significant area of concern. Maintaining employment opportunities fosters health and competence, and reduces the costs of social services. This is a benefit to society, contrary to a commonly held discriminatory belief that older workers are an impediment to advancement of younger workers. Within every age group there is diversity of ability.

OBA considered:

OBA report: The Justice Stakeholder Summit Report "Getting it Right".

The percentage of hearings in which the CCB overturns findings of incapacity for admission to long-term care (generally for the elderly) made by health practitioners which is higher than for findings of incapacity for treatment (generally for psychiatric patients),

Concerns articulated about the extent to which stereotyping, as well as lack of education and training among health professionals, contributes to a misunderstanding as to the definition of incapacity.

That this period of life is typically one of major concurrent life stresses that temporarily affect function, such as retirement, housing changes, mortality of contemporaries, reduced vision, limitations in mobility, reduction in social networks, and for some a decrease in health. At any age major changes are recognized as stresses that have a temporary impact upon energy, health, concentration, mood and mental functioning, and ability to cope.

Concerns articulated about the lack of sufficient capacity assessment officers, and concerns about inadequate training and the inconsistent quality of their work.

The effect of a global declaration by a practitioner that the person is incapable upon any decision-making rights.

The effect of a mistaken belief by an attorney as to the scope of the actual power given.

Whether there is a prevalent and basic lack of understanding of capacity/incapacity with respect to personal care that results in many older adults being denied control or participation regarding decisions about themselves of a highly personal nature.

That maintaining employment opportunities maintains health and competence, and reduces the costs of social services. This is a benefit to society, contrary to a commonly held discriminatory belief that older workers are an impediment to advancement of younger workers. Within every age group there is diversity of ability.

Discriminatory practices in hiring based upon age exist, and may be further compounded by discriminatory practices and disrespect shown towards other groups of which the older adult might also belong (women, visible minorities, disabled).

A need for strong social policy statements regarding positive attitudes towards integration of the older adult in all segments of our society, and that ageism, sexism, discriminatory practices and stereotyping has no place in our society. Age discrimination is not a universal phenomenon; rather, it is a function of a current bias in Western culture.

**OBA would urge the Law Commission of Ontario to consider:**

1. The application of the *Substitute Decisions Act, 1992* (“SDA”) to older adults, particularly with respect to capacity. Our greatest concerns relate to the court process and capacity assessment, and in particular:
2. The adversarial nature of the court process is inappropriate to the circumstances; requires allegations that the person is incapable; and, forces parties into the roles of applicant and respondent. The polarization of positions exacerbates conflict and strips the respondent of dignity.
3. That the costs of court processes are a barrier to access: in many cases, the alleged incapable person is unable to access help, or afford to retain and be represented by counsel, even as control over their person and property is denied or has already been taken away.
4. Barriers to getting timely access to the court or a timely resolution.
5. Inappropriateness of remedies available through the current court process, and the failure to address the real needs of the persons involved.
6. Unavailability of alternative dispute resolution processes in most cases.
7. Whether the real motivating issues of family conflict, personal financial needs are frequently obscured by the focus on “capacity” in the law and legal processes. The primary focus of these processes should be needs-based, addressing the social relationships of the person, how the people in those relationships are interacting with each other, and the best plan for that person and his or her finances or living arrangements.

8. Whether the “all or nothing” capacity findings fail to address the “shades of grey” nature of the issues that arise in *Substitute Decisions Act* cases.
9. The thresholds for the determination of incapacity:
  - when a person is “incapable”;
  - when a person loses capacity to make decisions regarding their personal care;
  - when a person loses the ability to conduct financial transactions;
  - when a person loses the ability to make financial decisions;
  - when a person lacks capacity to marry or make a will; and,
  - whether any or all of these events occur concurrently.
10. The potential for misuse of powers of attorney for personal care, and the practices in place in many hospitals and long term care facilities. By way of example, many such institutions encourage the use of powers of attorney for personal care for purposes that are unlawful or inappropriate. Institutions may routinely seek “do not resuscitate” orders upon admission to long term care facilities from attorneys. Attribution for decisions then falls to attorneys for personal care of powers they do not actually have in law, including assumption of custodial powers over “incapable” persons, and the ability to control social relationships between allegedly “incapable” persons and others.
11. How to empower the older adult in the workplace, and in hiring processes; how to promote the fair evaluation of the older adult in job competitions; the role of education, social policies, and employment standards based on ability, in eliminating discrimination in employment; and, penalties, and accessibility of remedies through human rights and employment tribunals. How to foster a lifecycle approach to employment issues that is inclusive of all workers with the skills to perform the job, regardless of age, race, sex, and disabilities.
12. Review of employment practices as they apply to the older adult to prohibit discriminatory employment and hiring practices.
13. Review of the protections from door-to-door salesmen and telephone solicitations and whether age-related protections would be discriminatory or helpful. Whether requiring independently witnessed contracts, extended “cooling off” periods, particularly for significant or long-term contracts, effective accessible penalties and enforcement for abuse should be considered for the older adult, or indeed be universal.
14. That the older adult may have chronic age-related health, hygiene and medical needs, and whether the social policy should exist to exempt such needs from GST and PST.

***Question 4: Should the use of age-based criteria in laws and programs affecting older adults be re-examined? Are there specific age-based criteria that warrant the attention of the LCO?***

The use of age-based criteria in laws and programs requires re-examination. Specific age-based criteria are most common in employment, pension, insurance and driving. A comprehensive, articulated social policy framework should underlie these laws and programs, and be proactive in anticipating the life-cycles and age-specific requirements.

Our group considered factors that impact the appropriateness of age-based laws and programs:

That capabilities of the elderly vary markedly with age – much more so than in teenagers and young adults. For example, some sixty-year-olds are less capable than many eighty-five-year-olds.

Chronological age is not the measure of age-related vulnerability, or of capacity or need.

Age-specific testing that has an “all-or-nothing” outcome to remove critical privileges, such as driving or employment, create enormous stress, and adversely affect performance.

Choice of living arrangements can affect eligibility for services, since there are diverse programs without a consistent needs-based right to services.

OBA recognizes the important balance of individual rights and privileges with the issues of personal and public safety concerns.

**OBA would urge the Law Commission of Ontario to consider:**

1. Legislation and regulations pertaining to renewal of driving licences, since this is an extremely stressful event for many elderly people, including whether arbitrary testing at age eighty be replaced by a more integrated approach to maintaining driving skills to start at a younger age (such as sixty-five) to familiarize the process and identify problem drivers and provide retraining earlier.
2. The use of alternate measures to removal of all driving privileges: issuing degraded licences, that restrict the roads and time of day that a person may drive, comparable to new drivers’ licences; the role of medical certificates or alternative methods to determine ability to drive. OBA had concerns as to the possibility of erosion of the doctor-patient trust associated with the person’s own doctor holding the responsibility to determine driving ability, and that physicians are not generally trained in the necessary evaluative skills to make the determination of driving ability.

***Question 5: Do current legal frameworks adequately support access and participation for older adults? What are the key barriers to access to justice for older adults?***

The current legal provisions appear to be poorly understood by the older adult and by the health professionals and caregivers, and are inconsistently applied or accessed. There are specific areas of the law where the processes fail to take into account, and to compensate for, the age-related barriers that face the most vulnerable in this age group in access to justice.

Our group specifically reviewed the following:

That there exist Guidelines for practitioners assisting these individuals, but many of the Guidelines are out of date, the availability is not known to those who need them, and the Guidelines are not followed or provide inaccurate information.

That recourse for residents in long term care facilities currently are to have recourse to challenge a decision to place them in a locked unit under *The Long Term Care Homes Act*.

That court application to obtain guardianship is frequently prohibitively expensive and inappropriately adversarial as a means of obtaining the right to protect an incapable person.

That recommendations of the World Health Organization promote accessibility to health care and provision for services within one's own home, the need for care-givers within the home rather than the institutional setting, and the societal value of such affordable options.

The need for mandatory inclusion of life-cycle training that includes geriatric studies (not just paediatrics) in the education of physicians and other healthcare professionals.

That these issues involve fundamental charter rights and freedoms.

*The Weiler Report: Making Ontario's Courts Fully Accessible to Persons with Disabilities [Report of Courts Disabilities Committee - Ontario]*

That mediation and arbitration is an increasingly popular and effective means to resolve disputes, and to provide speedier and more economical access to justice in many situations.

OBA report: The Justice Stakeholder Summit Report "Getting it Right" which focuses on making justice accessible to all.

We are concerned not only that that our current legislative framework is inadequate, but also that the processes and in the implementation of the laws, and both the laws and

procedures are misapplied. A prime example is the Substitute Decisions Act (SDA) which is intended to protect the vulnerable. However, it makes the appointment of substitute decision makers and creation of powers of attorney an unsupervised process, while making the scrutiny of appointments and the abusive acts of the substitute decision makers, inaccessible, complex, slow, and expensive. As a result powers of attorney are vulnerable to misuse and abuse, and justice delayed in the curtailing of abuse of these powers, is almost certainly justice denied. These breaches of the spirit and intent of the law involve fundamental Charter rights.

**OBA would urge the Law Commission of Ontario to consider:**

1. Consideration should be given as to whether barriers inhibit an elderly person's access to justice. The barriers may arise as a result of:
  - a. a lack of timely available information and advice;
  - b. the cost of retaining legal counsel; and
  - c. the inappropriateness of current court procedures as a mechanism to address the older adult's issues and needs in a timely manner.
2. Consideration should be given to the fact that the elderly and people with disabilities share common barriers (e.g. wheelchair accessibility, accommodations for visually and hearing impaired, and for those with reading or language challenges). The issues are more fully addressed by Madam Justice Karen Weiler in her report *Making Ontario's Courts Fully Accessible to Persons with Disabilities [the Report of Courts Disabilities Committee]*.
3. Consideration should be given to introducing mediation as an option early in certain types of disputes, including those related to guardianship, capacity and administration. Mediation might help alleviate the burden on the court system and on litigants by providing the opportunity for early and economical resolution of disputes.
4. The *Substitute Decisions Act, 1992* should be examined to determine whether it prohibits or impedes parties from resolving guardianship and related disputes in a timely manner. Consideration should be given to whether the court's exclusive jurisdiction in this area should be lifted so as to permit parties to resolve the issues through alternative means (e.g. private mediation or arbitration).
5. Expansion of the jurisdiction of the Ontario Ombudsman's office to investigate, since many of the provincially-funded services are barred from bringing concerns to this office – specifically the MUSH sector (municipalities, universities, school boards, hospitals and long-term care facilities, police and children's aid societies; and the cost-effectiveness of so doing.
6. Review of processes for reporting physical, emotional, and financial abuse. OBA recognises that this is an area that requires considerable and in-depth research and evaluation.

7. Promoting access to health care and legal services based on needs, regardless of place of residence.
8. Whether there should be a minimum level of training in age-related issues in professional curricula, and the promulgation of guidelines within each health and legal profession to address age-related rights and services that incorporate the applicable and current social policies and legislation.
9. Whether a less adversarial and less costly forum might be in charge of appointing substitute decision makers for routine property management purposes, providing always that there exists access to advocacy and due process.
10. Regardless of forum for determination of capacity, that due process through an appeal process be readily available, accessible, and clear, and with access to legal aid.
11. That accessibility may include designing instructions and information about essential services and safety warnings, having regard to the fact that vision changes with age.

***Question 6: What are the key legal issues with respect to the relationships of older adults? Are there aspects of the relationships of older adults that have not been adequately addressed by current legal frameworks?***

This question includes issues raised in the previous question. We identified further issues in this point, those of marital discord, loss of spouse, and other family stresses that are found to be common among the elderly. These stresses may be worsened by deteriorating health. Manipulation by a spouse or child or by a healthcare worker, interacting with older adults during times of increased vulnerability, is frequent

In response to this question, we considered the following:

Health professionals report that adult children of the elderly pressure their parents into decisions that the elderly person does not truly agree with and, conversely, relatives report that healthcare workers exert pressure on their elderly relatives also resulting in outcomes that the elderly did not want.

That appeal routes are of no value to the older adult when services are denied or misrepresented when the processes are not time sensitive.

That the duties of the Substitute Decision Maker to follow the incapable elderly person's previous wishes, values, and beliefs are not well understood, and can be challenging to follow in practice.

When the *Substitute Decisions Act* and the *Health Care Consent Act, 1996*, were passed into law, they did not anticipate the degree to which these laws would be applied in the context of “high conflict” families. A significant number of court applications now involve substitute decision making for incapable adults and pit family members against each other. The legislation was never intended to address conflicts of this degree and type, and the current processes do not lend themselves to timely or appropriate resolutions.

Hospital policies, practices, and guidelines are not necessarily consistent with the law and therefore are not always helpful in assisting healthcare professionals to handle conflicts.

There are situations when earlier assumption by the Public Guardian and Trustee of its role under the *Substitute Decisions Act* may be appropriate to the needs of an incapable person who is at the centre of a high conflict situation.

Often the laws are improperly used by substitute decision makers to control an elder's societal relationships.

That Section 20(1) of the *HCCA* sets out the list of substitute decision makers (SDMs) who may give or refuse consent for individuals found incapable for treatment, admission to a care facility and personal assistance services. Section 20(2) sets out that an SDM must be, among other things, “*capable with respect to the treatment*”. The aged are often

affected by this provision as they may be “found incapable” by the health practitioner to give or refuse consent on behalf of the incapable spouse. In contrast with the other provisions of the *HCCA*, there is no specific legislative provision to review the health practitioner’s determination about an SDM’s “incapacity”.

The financial impact of loss of spouse, which is compounded by the loss of the tax benefits associated with joint filing for dependent relationships. Just as married couples, whether they be same sex or heterosexual, are given a preferred tax status if one can be claimed as the dependent of the other, that older adults who choose to live together with the express intent to care for each other might be allowed to claim equivalent exemptions. This could allow two siblings, sisters, brothers, cousins, or good friends, amongst others, to live together in a dependent relationship and the one with the higher income to claim an exemption for the other. The Income Tax Act would need to be changed to recognize this coupling as being beneficial for all of society.

That the drafters of the legislation governing substituted decision making did not contemplate the manner in which the provisions might foster conflict and the obstacles to access to the remedies.

OBA recognizes that the relationships of older adults as they become more dependent bring challenges of personal and financial security specific to age-related vulnerabilities.

**OBA urges the Law Commission of Ontario to consider the following:**

1. Availability of information for substitute decision makers (SDMs) about their legal obligations and of their duties with respect to the elderly person’s beliefs and wishes .
2. Whether the current legislation providing that SDMs can only give consent when person becomes incapable, is appropriate in all cases.
3. Guidelines and support for healthcare workers facing conflict between appointed SDMs and facing bullying by relatives and interested parties, whether or not they are SDMs.
4. Processes to manage disputes between joint SDMs, and joint and several powers without having to involve the PGT.
5. Legislative/regulatory changes affecting hospital policies and procedures that could reinforce the legal obligations of both the healthcare workers and the SDM, (such as reinforcing the institution’s Consent Form to include a reminder to healthcare workers that the consent must be from the named SDM, and a declaration by the SDM acknowledging that the power remains in force, and further, that the power requires the SDM to take the incapable person's wishes, values, and beliefs into account).

6. The implications of Section 20(2) for an SDM when their spouse's physician finds the SDM not "*capable with respect to the treatment*" since in this case there exists no recourse to review the health practitioner's determination about "incapacity" and permit the spouse to assume the role of SDM.
7. The implications of substitute decision making laws being used by substitute decision makers and others to control social relationships.
8. Whether the Income Tax Act can be used as a tool to encourage good social policy with respect that addresses basic needs for elderly persons.
9. How the current tax laws that contemplate a RIF to be drawn upon by age 71, discriminate against the older adult who continues to be employed.
10. How to ensure adequate social supports for caregivers, and provide access for caregivers to comprehensive information about available services and how to obtain them.

***Question 7: What are the key legal issues related to the living environments of older adults?***

The key issues related to the living environment for the older adult include the means to protect maximum autonomy without compromising safety in the living environment; the right to live together with a spouse or partner who is at a different level of function; the right to live in premises that are accessible and user-friendly, and the right to have accessible services to remain at home. Family members who assume responsibility for care of the senior may need access to social and financial support to make their own premises more accessible or user-friendly. The principle of “aging in place” needs social and financial support.

Our group considered the following issues that impact the living environments of older adults:

Can, or should, the interface between the *Accessibility for Ontarians with Disabilities Act, 2005*, the *Ontario Building Code* and the *Condominium Act, 1998* be clarified or improved upon so as to benefit persons with disabilities who reside in condominiums and to provide clarity and predictability for their condo corporations, and to facilitate and encourage condo corporations to make their premises more accessible or user-friendly?

Condominium corporations may often be called upon to take a variety of steps when an owner is in distress. Does the *Condominium Act, 1998* provide condominium corporation management and board with sufficient power to take steps as necessary to protect and assist its residents where necessary, and sufficient protection as to recover its costs and to shield its directors and other owners from potential liabilities?

Does the operation of the *Human Rights Code* adversely affect the rights of older adults, or have the potential to do so, in the name of providing protection to other groups?

Are the procedures in the Landlord and Tenant Board sufficiently clear and accessible so as to meet the needs of older adults who rent their homes and who may find themselves subject to proceedings in that tribunal?

Seniors living in “Retirement Homes” are subject to Tenancy legislation are not the subject of specific, comprehensive, legislation with respect to care services.

The Department of Veterans Affairs (DVA)’s program for Veterans pays for some home-care services which enable veterans to remain in their homes.

A need for uniformity and needs-based approach to services, whether at home, in retirement facilities or on long-term care.

That families who assume caregiver roles in their own homes may need to make their homes accessible and user friendly, and require social and financial supports to assume this role.

That the WHO report found that most care giving is provided by informal systems, and that most countries allot their financial resources inversely, allotting the greatest share of expenditures to institutional care, and recognized the need to allot resources to the informal system – helping seniors in their homes, rather than having to have them institutionalized.

**OBA would urge the Law Commission to consider:**

1. Whether the interface between the *Accessibility for Ontarians with Disabilities Act, 2005*, the *Ontario Building Code* and the *Condominium Act, 1998* can be improved to establish or clarify basic obligations for existing condominium corporations to make their premises more accessible or user-friendly so as to accommodate older adults and persons with disabilities who reside there.
2. Whether the *Condominium Act, 1998* can provide condominium corporations with greater flexibility to take steps to protect and assist its residents where necessary, while affording sufficient protection as to recover its costs and to shield its directors and other owners from potential liabilities for steps taken in good faith.
3. The need for information about how to obtain support services: that home care and community services are also needed to assist informal caregivers; and that home care and community services need to be available to all and not just to those who know about them or can afford to pay for them.

***Question 8: Are there themes or issues other than those identified in this Paper that the LCO should examine as part of this project?***

OBA recognizes the following themes and issues to be relevant to the Law Commission of Ontario' project:

The requirement of older adults to care for their disabled children point to a group who deserve special attention and assistance, so that they are supported, and not alone in their efforts, and in the long-term planning processes.

With respect to the *SDA*, we are concerned that there is not sufficient monitoring of guardians once they are appointed.

A requirement that a guardian post security serves as a barrier to guardianship, given the challenges associated with getting a guardianship bond. The appointment of a guardian of property raises issues with respect to the security of the incapable person's property, the suitability and preparedness of the guardian and the accountability and monitoring of the guardian. All of the available options for addressing these issues need to be examined, given the challenges regarding bonds.

Clarification and transparency in the process by which statutory guardians are appointed pursuant to the *SDA*, and rights of appeal that include due process.

The courts have distinguished between the capacity to marry and the capacity to make a will. Given the effect of marrying on an existing will regardless of capacity (revocation), we believe that due consideration must be given to the interplay of these complex legal principles at this time of increased vulnerability and often competing moral and legal responsibilities and obligations.

The WHO report advocated a life-cycle perspective for health issues – and this also applies to the laws – and the need to have a holistic perspective as they affect the vulnerable, not just the aged. Citizens should be readily informed about the available social and legal services, regardless of age.

## SUMMARY

The Ontario Bar Association thanks the Law Commission of Ontario for this opportunity to respond to the Consultation Paper.

OBA submits that development and articulation of a sound social policy is critical, since it is such a policy that provides the road map for shaping the law and legal systems, and the directions for consistent and rational improvements in the law and legal services. Acceptance of that social policy framework is also a significant step in combating discrimination.

OBA believes that the guiding principles for law and social policy affecting the older adult mirror those for all citizens: a presumption of competence and ability to participate in all aspects of society; a right to self determination and autonomy unless such is proven by evidence to be a dangerous to the person or to others; and, that older adults have the right not to be discriminated against. OBA believes that these rights are not currently protected adequately or consistently under the current legal framework.

OBA respectfully submits that all of these are rights protected by the Canadian Charter of Rights and Freedoms.

## **Working Group Members**

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