

# ACE NEWSLETTER

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ACE is a Legal Clinic Serving Low-Income Seniors

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## SEXUALITY IN LONG-TERM CARE

*By Judith Wahl, Executive Director & Staff Lawyer*

**\*\*This article is the first in a short series of articles about sexuality in long-term care homes\*\***

Do residents of long-term care homes, who are primarily older adults, have the right to engage in sexual expression, if they so choose? The simple answer is “yes” although there may be challenges in long-term care homes to find appropriate privacy. Residents should also have the expectation that if they do not want to engage in such activities, or if they are not mentally capable to consent or refuse consent to such activities, they will be protected from sexual exploitation and sexual assault as the long-term care home operator has a duty of care to protect residents. The challenge is how to support sexuality in this type of group living environment while ensuring protection for residents from unwanted activities, since a large proportion of the residents have a degree of dementia and may not be able to provide consent.

Lawyers at ACE started looking at these issues after we were asked to review a sexuality policy that had been developed at a long-term care home. As well, ACE has been contacted by clients with respect to allegations of sexual assault of residents in long-term care homes. Since the new *Long-Term Care Homes Act* (not yet in force) specifically defines “abuse” as including sexual abuse (section 2(1)) and places obligations on

*(Continued on page 12)*

## HOSPITAL ASSESSMENTS

*By Jane Meadus, Institutional Advocate & Staff Lawyer*

At the Advocacy Centre for the Elderly, we often get calls about the rules regarding resident hospitalizations and the return to long-term care homes. This article will attempt to answer some of the most frequent questions.

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# CHANGES TO THE HUMAN RIGHTS SYSTEM

*By Lisa Romano, Staff Lawyer*

On June 30, 2008, the *Human Rights Code Amendment Act, 2006* (Bill 107) came into force, resulting in significant changes to the Ontario human rights regime.

The biggest change is the introduction of a new “direct access” model. Previously, individuals who alleged that their rights were violated under the *Human Rights Code* made their complaints to the Ontario Human Rights Commission and the complaints were investigated by Commission staff. If a settlement could not be reached and there was sufficient evidence to support a case, the Commission could refer complaints to the Human Rights Tribunal of Ontario for a hearing. Due to the backlog of cases waiting to be investigated by the Commission, it could take several years for complaints to be resolved or referred to the Tribunal.

Under the new system, complaints are no longer made to the Commission and the Commission does not investigate complaints. Instead, individuals lodge their complaints directly with the Tribunal. The government hopes that this direct access will allow for the quicker resolution of cases.

The Commission continues to play an important role in protecting and advancing the human rights of Ontarians. Its main focus is to address systemic issues of discrimination via public education, policy development, research and monitoring and training. The Commission can also initiate applications or intervene in important cases before the Tribunal.

The new Human Rights Legal Support Centre offers independent legal assistance to individuals who make discrimination complaints. Staff at the Centre will help individuals understand how the law applies to their situation, assist them to complete their application forms and offer substantive legal advice and assistance at the mediation and adjudication stages of the Tribunal process. The

services of the Centre are free to individual complainants who need them. Although the Centre is located in downtown Toronto, its services are available to people across the province. The Centre is establishing partnerships with lawyers, legal clinics and other community-based service partners in communities across Ontario in order to provide this assistance.



For more information, contact:

## **Ontario Human Rights Commission**

180 Dundas Street West, 7<sup>th</sup> Floor  
Toronto, ON M7A 2R9  
Tel: (416) 326-9511  
TTY: (416) 314-6526  
Tel (Toll Free): (416) 314-6526  
TTY (Toll Free): 1-800-387-9080  
[www.ohrc.on.ca](http://www.ohrc.on.ca)

## **Human Rights Tribunal of Ontario**

655 Bay Street, 14<sup>th</sup> Floor  
Toronto, ON M7A 2A3  
Tel: (416) 326-1312  
TTY: (416) 326-2027  
Tel (Toll Free): 1-866-598-0322  
TTY (Toll Free): 1-866-607-1240  
[www.hrto.ca](http://www.hrto.ca)

## **Human Rights Support Legal Centre**

400 University Avenue, 7<sup>th</sup> Floor  
Toronto, ON M7A 1T7  
Tel: (416) 314-6266  
Toll Free: 1-866-625-5179  
TTY: (416) 314-6651  
TTY (Toll Free): 1-866-612-8627  
[www.hrlsc.on.ca](http://www.hrlsc.on.ca)

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## MESSAGE FROM THE CHAIR

*By Paula Psyllakis, Chair, Board of Directors*

You have likely heard it said that Canada's population is aging. The proportion of seniors is increasing more quickly than any other age group. According to Statistics Canada, in 2001, one in eight Canadians was aged 65 years or over. By 2026, it is estimated that one in five Canadians will have reached age 65.

The issues around population aging are complex and concern not only the health and well-being of older adults, but also financial security, sustained independence, the availability of quality long-term care, and access to social support systems. While the majority of Canadians live happily, healthily, and independently into their senior years, many are faced with challenges for which they have neither the resources nor the information to cope. Organizations such as the Advocacy Centre for the Elderly (ACE) help to ensure that the rights and freedoms of Ontario's older adults are not forgotten and, in so doing, help to make Ontario a better place for all seniors.

The work done by the lawyers and staff at ACE is vitally important. From the Supreme Court of Canada cases to protect the rights and freedoms of all Canadians, to the five minute phone call to offer advice about a landlord-tenant matter, ACE provides older adults, who may not otherwise have a voice, with essential representation. Until we create a society in which older adults are valued and respected, we will need organizations like ACE to uphold the rights of older adults.

In addition to the staff, ACE is governed by a Board of Directors which is comprised of concerned citizens, many of whom are older adults themselves. The Board works to

ensure that ACE's policies and processes are efficient, effective and measurable.

Being accountable to our stakeholders is an underlying tenet in all of ACE's work. Not only do we have professional duties to our clients, but we also have responsibilities to our funder – Legal Aid Ontario (LAO). Recently, LAO has undergone significant changes and reorganization, which have left many in the community legal clinic system feeling unsettled. In a recent communication to the clinic Boards of Directors, LAO stated that "a functional, co-operative relationship in which all parties work together to innovate and create efficiencies that ultimately improve client service remains elusive." These ominous words speak to the ongoing tensions between the clinics and LAO.

The Board of Directors at ACE hopes that as LAO embarks on their upcoming consultation process with clinic stakeholders in to "inform their decisions with regard to making changes in the relationship between LAO as funder and community legal clinics," that they pay careful attention to the important work done by the clinics. The Board and staff of ACE share LAO's goals of improved relations and greater accountability and it is our sincere hope that LAO use this consultation process to better understand the nature of the work we do and its value to Ontarians of all ages.



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# MOVING OUT OF CARE HOMES

By Rita Chrolavicius, Staff Lawyer



Care homes are governed by the *Residential Tenancies Act*, which is the same legislation that governs residential rental units. The *Residential Tenancies Act* is relatively new as it came into effect on January 31, 2007. It introduced a shortened ten day notice requirement for the termination of care services and meals for tenants who are moving out of care home premises.

A care home is defined as a residential complex that is intended to be occupied by persons for the purpose of receiving care services. The term “care service” includes the following: nursing care; administration and supervision of medication prescribed by a medical doctor; assistance with feeding; bathing assistance; incontinence care; dressing assistance; assistance with personal hygiene; ambulatory assistance; and personal emergency response services.

Care homes must have written tenancy agreements with each resident which set out what has been agreed to with respect to care services and meals and the charges for them. The total cost must be divided into at least two parts. The rental portion is subject to rent control. The care service and meals portion is not subject to rent control and can be increased if proper written notice is provided. There may be additional charges, such as charges for telephone and cable television.

Care homes have special rules about the notice tenants must give to the landlord to end their tenancy. A tenant must give at least 30 days written notice of termination to the landlord. The written notice can be given on any day of the month, and a tenancy can be terminated mid-month. A tenant who is terminating the tenancy may give the landlord a ten day written notice requiring the landlord to stop the provision of care services and meals. The tenant does not have to pay for care services and meals after that ten day notice. This is helpful for residents who are waiting for admission to a long-term care facility and who must decide whether to accept a long-term bed offer on a very short notice.

If a tenant passes away, the estates has no obligation to pay for care services and meals more than ten days after the death of the tenant.

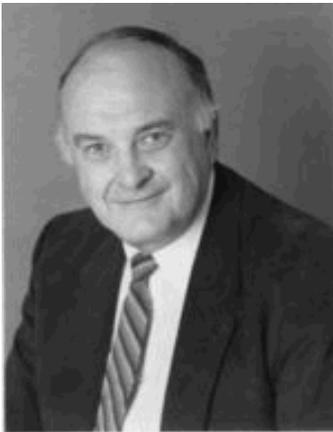
The Landlord and Tenant Board website – [www.ltb.gov.on.ca/](http://www.ltb.gov.on.ca/) – contains information about the legislation, as well as copies of forms and answers to frequently asked questions.



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# ANNUAL GENERAL MEETING & SPECIAL LECTURE SERIES

The [Annual General Meeting](#) of the Advocacy Centre for the Elderly will be held on Monday, October 6, 2008. Following the AGM, everyone is invited to attend the [Third Biennial Special Lecture Series](#). The keynote address will be given by the Honourable Howard Pawley on the topic of:



*The Honourable Howard Pawley is a former Premier of Manitoba and an Officer of the Order of Canada. He is currently a Professor Emeritus at the University of Windsor.*

## *Advocacy and Strategies to Pursue in Challenging Times: The Impact on Seniors and the Legal Aid System in an Elder Law Practice*

**Date:** Monday, October 6, 2008

**Location:** Osgoode Hall Law School,  
Professional Development Centre

**Address:** 1 Dundas Street West, Suite 2600, Toronto

**Time:** 7:00 p.m.

Please contact Tammy Gillard at (416) 598-2656 to register, for further details or to be added to our mailing list for future notices.

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# WHAT YOU NEED TO KNOW ABOUT POWERS OF ATTORNEY IN ONTARIO

*By Navneet Johal, Articling Student*

A Power of Attorney is a legal document that gives someone else the power to act on your behalf.

A valid Power of Attorney must name the person you have chosen to act on your behalf should you become mentally incapable, must be signed and dated by yourself, and must be signed and dated by two witnesses who saw you signing the document. The two witnesses **cannot include**:

- your spouse, partner, child, or someone you treat as your child,
- your attorney or your attorney's spouse or partner,
- anyone under 18 years of age, or
- anyone who is incapable of making their own property or personal care decisions.

In Ontario, there are two types of Power of Attorney that can be used if you become mentally incapable: (1) Power of Attorney for Personal Care, and (2) Power of Attorney for Property.

## **Power of Attorney for Personal Care**

### **1. What Is A Power of Attorney for Personal Care?**

A Power of Attorney for Personal Care (POAPC) is a document where you name someone to become your attorney to make personal care decisions on your behalf if you become mentally incapable of making those decisions yourself. Having a POAPC is one way to ensure your personal care decisions will be respected if you are found to be mentally incapable.

### **2. What Are Personal Care Decisions?**

Personal care decisions refer to decisions about your health care and medical treatment, diet, housing, clothing, hygiene, and safety. A POAPC lets you state what you want and what you do not want with respect to your personal care decisions. For example, if there are certain medical procedures you would not wish to receive, such as blood transfusions, you would specifically state that in your POAPC.

### **3. Who Can I Name As My Attorney?**

You can name almost anyone as your attorney, including a family member or a personal friend. However, it is extremely important that you choose someone you **trust**.

If you do not name someone specifically, your mental incapacity will be confirmed by a "capacity assessor" who is someone trained and approved to determine mental incapacity.

You **cannot** name someone who is paid to give you health care or residential, social, training, or support services, as your attorney (unless the person is your spouse, partner or relative). Also, those under the age of 16 and those who are mentally incapable themselves cannot be named as your attorney.

### **4. When Does a Power of Attorney for Personal Care take Effect?**

A POAPC only takes effect if you become mentally incapable of making your own personal care decisions.

Unless you say otherwise in your POAPC, your attorney decides that you are mentally incapable of making personal care decisions. If you want someone besides your attorney to make this decision, you can name someone else to confirm that you are mentally incapable.

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## POWERS OF ATTORNEY IN ONTARIO *(Continued from page 6)*



With respect to your health treatment, admission to a long-term care facility, or need for personal assistance services, the rules about determining your mental capacity are a bit different:

- Your attorney cannot make health treatment decisions for you unless the health practitioner proposing the treatment decides that you are incapable of making them yourself.
- Your attorney cannot make decisions about you entering a long-term care facility unless an “evaluator” finds that you are incapable of making that decision yourself.

Evaluators are nurses, doctors, occupational therapists, physiotherapists, psychologists, some social workers, speech language therapists, audiologists, or anyone else prescribed by regulation.

### 5. Can I Dispute a Finding of Incapacity?

If you are found to be incapable of making a decision about your capacity respecting health treatment, personal assistance services, or admission to a long-term care facility but you or your attorney disagree, you or your attorney can apply to the Consent and Capacity Board to review the finding of incapacity.

### 6. When Does my Power of Attorney for Personal Care End?

Your POAPC ends:

- when you die,
- when your attorney dies, becomes incapable, or resigns (however, this can be prevented if you name more than one attorney or if you name a substitute attorney),
- when a court appoints a Guardian of the Person for you,
- when you sign a new POAPC, or
- when you revoke the Power of Attorney while you are still mentally capable.

### Power of Attorney for Property

There are two kinds of Power of Attorney for Property in Ontario: (1) General Power of Attorney for Property, and (2) Continuing Power of Attorney for Property.

#### 1. What Is A General Power of Attorney for Property?

A General Power of Attorney for Property is a legal document that lets your attorney manage your finances and property **only while you are mentally capable**. For example, your attorney can act for you in financial and bank-related dealings, by signing cheques, and buying or selling real estate and consumer goods.

This type of Power of Attorney is usually used in business, or for short-term temporary reasons. If you become mentally incapable of managing your property or finances, the General Power of Attorney for Property ends, and your attorney can no longer act on your behalf.

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## POWERS OF ATTORNEY IN ONTARIO *(Continued from page 7)*

### 2. What Is A Continuing Power of Attorney for Property?

A Continuing Power of Attorney for Property (CPOAP) is a legal document that lets your attorney continue to act for you if you become mentally incapable of managing your property and/or finances. In order to ensure the validity of this Power of Attorney, it must either be called a "Continuing Power of Attorney for Property" or it must specifically state that your attorney has been given the right to continue acting for you if you become mentally incapable.

### 3. Who Can I Name As My Attorney?

The person you appoint as your attorney must be 18 years of age or older.

When choosing your SDM, you should pay careful consideration to many factors, including whether the person you choose is **trustworthy** and whether they are good at handling money.

### 4. When Does a Continuing Power of Attorney for Property take Effect?

A CPOAP takes effect immediately upon being signed and witnessed, unless otherwise stated in the document. For example, if you want it to take effect only after you have become incapable of managing your finances, you must make this clear in the document.

In order to give a valid CPOAP, you must be at least 18 years old and mentally capable. Mental capacity for the purpose of property means you must:

- know what you are giving your attorney the authority to do,
- know what property you have and its approximate value,
- know that your attorney is required to account for the decisions they make about your property,

- understand that if your attorney does not manage your property well, its value may decrease,
- understand that there is always a chance that your attorney could misuse their authority, and
- know that as long as you are mentally capable, you can revoke the Power of Attorney.

### 5. When Does my Continuing Power of Attorney for Property End?

Your CPOAP ends:

- when your attorney dies, becomes mentally incapable, or resigns (however, this can be prevented if you name more than one attorney or if you name a substitute attorney),
- when a court appoints a Guardian of the Property for you,
- when you sign a new CPOAP,
- when you revoke the Power of Attorney while you are still mentally capable, or
- when you die.

For more information on Powers of Attorney, contact the Ontario Office of the Public Guardian and Trustee toll-free at 1-800-366-0335 or online at [www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca) or contact your lawyer or local community legal clinic.



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## ACCESS TO OLDER ADULTS

*By Graham Webb, Staff Lawyer*

Presently, there is no comprehensive legislation dealing with the issue of access to seniors. The Advocacy Centre for the Elderly often gets calls from individuals complaining that they are unable to access a parent, spouse or friend because a family member, caregiver or other individual is prohibiting access.

### **Capacity**

The fundamental principle in dealing with issues of personal contact – whether it be telephone calls, mail, e-mails or visits – is that every capable adult has the legal right to choose whether or not he or she wishes to communicate with family members. A mentally capable older adult has no legal obligation to have any form of communication with friends and family members, and is legally entitled to refuse to communicate with them. The perplexing quandary in an individual case can be in knowing whether the right to refuse contact is exercised capably and of the person's own free will.

#### *a) Capable Older Persons*

In situations respecting personal contact, "capable" refers to the mental capacity to understand information that is relevant to making a decision, and to appreciate the reasonably foreseeable consequences of making or not making a decision. Capacity is situational to the decision in question; in this case, it means whether or not to receive visitors or have other communication with friends and family members. Even if the older person has been found to be incapable for other purposes (such as managing finances or deciding about admission to a long-term care home), he or she might still be able to understand information and appreciate the reasonable foreseeable consequences of decisions about visitors. This is a very low

level of capacity. It is not reasonable to assume that because the person is incapable of something else, he or she can also not make capable decisions about visits and personal communications. Similarly, the presence of dementia does not necessarily mean that the person is incapable of this type of decision.

Persons who are competent to decide who they want to visit may have trouble exercising this right. They may have physical limitations, (such as the inability to use a telephone or to ambulate) or they may have mental limitations. Even if an individual has no physical or mental limitations, it could be that their access is limited because they are in a setting where access is controlled by another individual.

#### *b) Incapable Older Persons*

An older adult may continue to enjoy contact with relatives and acquaintances long after he or she has stopped being able to manage property or to make treatment decisions, for example. The comfort derived from human contact is a very basic comfort which affects an individual's quality of life.

If an older adult is mentally incapable of making personal care decisions and has a guardian of the person or an attorney for personal care, there are principles of substitute decision-making that the guardian or attorney must follow. These include encouraging the incapable person, to the best of his or her abilities, to participate in the guardian's decisions, as well as fostering regular personal contact between the incapable person and supportive family members and friends. The guardian or attorney must consult from time to time with supportive family members and friends of the incapable

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## ACCESS TO OLDER ADULTS *(Continued from page 9)*

person, and with persons from whom the incapable person receives personal care. Further, the guardian or attorney is required to foster the person's independence, and to take the least restrictive and intrusive course of action that is available and appropriate in the circumstances.

All of these principles suggest that the denial of access between an incapable older adult and his or her supportive friends and family members is harmful and goes against the principles of substitute decision-making. Good communications should be fostered. Even if there are circumstances where personal contact is not appropriate, such contact should be denied only in the clearest cases. Where communications completely break down, the results can be harmful, intrusive, and expensive to the older adult and his or her friends and family.



### Settings

The setting for disputes over access to an older adult can arise almost anywhere. Sometimes, the older adult lives in his or her own home, or the home of another person, where a live-in spouse, family member, or caregiver comes to dominate the older person's life. The older adult may be extremely vulnerable, as the care provider may in fact be the abuser who controls all contact with the outside world. Access problems in this type of setting may be the

most intractable, as the owner of the home may issue a "no trespass order."

Disputes over access to older adults most frequently involve a long-standing family disagreement. Financial matters are the most common source of discord. There may be issues of perceived favoritism on the part of the older adult between his or her offspring or other family members. New friends might be suspected of "gold digging." Family members are sometimes worried about their estate interests so they will attempt to exert control over who has access to the older person in an effort to preserve their future inheritance. At other times, there are issues of perceived financial abuse, to the detriment of the older person and his or her estate. In all of these cases, the control of older persons is necessary to gain control of his or her estate.

Other times, the older person may reside in a long-term care home, a retirement home or other place where another person may have been instrumental in arranging the admission. In these cases, access may be wrongly prohibited by the care providers on the instructions of the attorney for property, the attorney for personal care, or the person who controls the older adult's finances. On occasion, the care providers may prohibit or limit access to an older person because the visitor is deemed too demanding, troublesome or interfering. Access may also be limited because of legitimate concerns such as elder abuse.

### Options to Facilitate Contact

#### *a) Non-Confrontational Communications*

The key to resolving issues is to foster non-confrontational communications that worked in the past with the older adult and the other person under whose control he or she is living.

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## ACCESS TO OLDER ADULTS *(Continued from page 10)*

### *b) The Police and the Criminal Code of Canada*

If all avenues of communications are closed, it might be possible to ask the local police to visit the older person and make inquiries about whether he or she wishes to live in the present situation, and to have contact with friends and other family members. Forcible confinement is a criminal offence under section 279(2) of the *Criminal Code of Canada*, but an investigation and charge of this type would be extremely unlikely.

More often, if involved, the police would merely try to meet with the older person to ask about his or her wishes. If it turns out that the older person appears to be mentally capable and unwilling to have communication with the friends or family members in question, those wishes must be respected. If the older person appears to be incapable, and unwilling to have communication, then those incapable wishes might also be respected unless there is a strong reason to disregard them.

### *c) Court Appointed Guardians*

As a last resort, if the older person appears to be incapable of making his or her own personal care decisions, a friend or family member could bring an application to the Superior Court of Justice to be appointed as the older person's guardian. This is a very expensive and complex legal procedure so it is beneficial for the person applying for guardianship to retain a lawyer. Legal fees would need to be paid, which may eventually be reimbursed from the older person's estate if the application succeeds and there is enough money in the estate to allow reimbursement. Further, court proceedings are usually highly confrontational resulting in the division of families and the destruction of relationships. It is also very intrusive into the life of the older person who, capable or not, may be hostile to

being placed under guardianship. However, where an incapable older adult is placed in a position of harm by the denial of access to friends and family, a guardianship application may be the only legal recourse.

### *d) Investigations by the Public Guardian and Trustee*

The Office of the Public Guardian and Trustee has a Guardianship Investigations Unit that can investigate allegations where a person incapable of personal care decisions is suffering or is at risk of suffering serious adverse effects. The investigation may result in the court appointing the Public Guardian and Trustee as the person's guardian on a temporary basis. The Public Guardian and Trustee can be contacted at 416-327-6348 or 1-800-366-0335.

## **Conclusion**

Friends and family of older adults, either living independently or in settings where another person has control over access to the older adult, frequently report difficulty and confrontation in arranging personal contact with their loved one. In cases where personal contact between the older person and somebody important in his or her life is denied, the issue of choice should be front and centre. It is important to know whether the older person is voluntarily choosing to avoid contact or whether there is some other reason beyond the person's control.



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## SEXUALITY IN LONG-TERM CARE *(Continued from page 1)*



operators to develop written policies on abuse prevention, it seemed prudent to do legal research on this issue so that ACE would be in a position to review these new policies for the benefit of our clients who reside in long-term care and their families. The new *Long-Term Care Homes Act* is expected to be proclaimed into effect some time in 2009 after its regulations have been finalized.

Credit must be given to many long-term care home operators who are trying to create a “normal” home environment although these homes are regulated health facilities. This is reflected in everything from changes in the physical environment at the homes to include coffee shops, garden areas and internet café areas, to the presence of home “pets” (usually cats and birds), the dress of staff and encouraging residents to decorate their own rooms with pictures and personal mementos. There is also an increasing recognition of sexuality as a part of life of residents in long-term care and efforts to appreciate the individuality of residents with regards to their diversity in sexual orientation and gender identity. The privacy rights of residents are also acknowledged although they are living in a group environment.

To address sexuality and to comply with the legislative requirements for written policies about abuse prevention, some home operators are looking to develop policies, as well as training and support for staff, to help them respond to the issue

of sexuality with professionalism and acceptance. They also want to be able to identify and prevent possible sexual abuse or actions that may, if not addressed, develop into abuse.

While conducting our own legal research into these issues, it became clear that there are many “thorny” issues related to sexuality and the legal framework related to sexuality.

It is easy, or easier, to find answers for some questions about sexuality than others. Home policies should state that there must be no sexual relations between staff and residents, as differentiated from “appropriate” touching and expressions of affection that are non-sexual. As well, it is clear that home operators have a duty of care to its residents, which includes keeping residents safe from sexual exploitation, sexual assault and sexual abuse.

As well, it is easy to say that mentally capable residents in long-term care who so consent have the right to engage in sexual expression, including intimate sexual relationships. Family members of these residents cannot determine what mentally capable and consenting residents can or cannot do in way of sexual expression.

The law also does not allow people to “preconsent” to sexual activity. A person must give consent at the time of the activity. Therefore, it is not possible to express in a power of attorney for personal care that if a person should become mentally incapable to give consent to sexual intimacy, he or she would still want to engage in such activities.

Likewise, a “substitute decision maker,” such as an attorney named in a power of attorney for personal care or a family member who is the health decision maker for an incapable person by reason of the *Health Care Consent Act*, cannot “consent” on behalf of the resident to sexual activity by that resident. There does not appear to

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## SEXUALITY IN LONG-TERM CARE

(Continued from page 12)

be any “substitute consent” to sexual activity in the law.

Many issues related to sexuality, however, are more difficult and challenging. As consent is required, what is mental capacity to consent to sexual activity? Who determines this capacity? How is capacity determined? When does someone have the obligation to determine capacity for this purpose? Is there an obligation to determine capacity for sexuality in the long-term care home and why?

As a large number of people living in long-term care homes have dementia, can they consent to intimate sexual activity? Just because a person has dementia does not mean that person is “mentally incapable” for all purposes or at all times. How does this impact on intimacy and, from a legal perspective, on consent?

What are the obligations of staff in long-term care homes to foster or discourage the sexuality of residents? When and how should staff intervene to support a relationship by providing privacy for two residents? How can staff divert incapable residents into safe expressions of sexuality or stop residents from particular sexual activities if they lack capacity to consent?

Sexual expression is a normal part of a healthy life. People that live in long-term care homes should be able to engage in and participate in “normal” living which includes the right to sexual expression. What is the legal framework related to sexuality that will ensure that those persons who can consent to engage in intimate sexual relationships are provided with privacy and the appropriate supports? Conversely, what is the legal framework for those persons who cannot consent in order to protect them from sexual exploitation and abuse? Through our legal research, ACE hopes to understand and find a way to articulate a legal framework that can be used to strike this important balance.

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## NEW STAFF

**Lisa Romano** started (at the end of May) as the new research lawyer at ACE. Lisa completed her undergraduate studies at Wilfrid Laurier University and she received her law degree from Dalhousie University. After her call to the Bar, Lisa worked at a civil litigation firm dedicated to social justice issues, including mental health law. She comes to ACE from the Psychiatric Patient Advocate Office, a provincial organization dedicated to promoting the rights of patients and consumer-survivors. In her spare time, Lisa co-instructs a seminar class in mental health law and is completing a part-time masters of law at Osgoode Hall Law School. Her position at ACE includes client work and acting as the lead on research projects, including briefs to government on law reform issues. She is also taking over as the Editor of the ACE Newsletter.



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# NEWS ANNOUNCEMENTS

## Ontario has a New Minister of Health



On June 20, 2008, David Caplan became the new Minister of Health and Long-Term Care. He replaced George Smitherman, who is now the Minister of Energy and Infrastructure.

First elected to the provincial legislature in 1997, Minister Caplan served as the Minister of Public Infrastructure Renewal for the past five years. In this previous position, Minister Caplan had oversight over organizations such as the Ontario Realty Corporation, the Liquor Control Board of Ontario and the Ontario Lottery and Gaming Corporation.

Minister Caplan will oversee of the largest budgets in the country (approximately \$40 billion dollars this year) which accounts for almost half of every dollar the province spends on programs.

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## Ombudsman to Review Monitoring of Long-Term Care Facilities

Ontario Ombudsman André Marin announced on July 16, 2008 that he will conduct a systemic investigation into the province's monitoring of long-term care home and its effectiveness in ensuring that nursing homes meet government standards.

The Ombudsman's Office reports that it has received numerous complaints about long-term care. "Clearly, there are unhappy people throughout the system – residents, their families and staff complain about conditions in long-term care homes, but there are also operators who say the standards are too bureaucratic," the Ombudsman said. "If the monitoring system isn't working, an independent investigation is the best way to get to the root of the problem and find solutions."

As the Ombudsman does not have jurisdiction over long-term care homes themselves, the investigation will focus on the Ministry of Health and Long-Term Care's monitoring of long-term care homes. The investigation is expected to take about six months.

Members of the public are invited to come forward to the Ombudsman's office with their experiences with long-term care and/or the province's monitoring system.

Complaints can be filed by calling 1-800-263-1830, or online at the Ombudsman's website, [www.ombudsman.on.ca](http://www.ombudsman.on.ca), as well as by mail or fax. The Ombudsman's investigations are impartial and independent of government or any long-term care authority.



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## HOSPITAL ASSESSMENTS *(Continued from page 1)*

### **1. The long-term care home wants to send my father to hospital on a “Form 1” because he assaulted another resident. He is incapable of making treatment decisions and I am his substitute decision-maker. Can I stop the home?**

No. A Form 1 is an application made by a physician for a 72 hour psychiatric assessment of your father. It does not require either your father’s consent or your consent, as his substitute decision-maker.

The Form 1 authorizes anyone to transport the person to a psychiatric facility within seven days of the Form being signed by the physician. The physician has to personally examine the patient and determine that they meet the requirements under section 15 of the *Mental Health Act*. Once the person is taken to the psychiatric facility, the hospital may detain the person for up to 72 hours. The person must be advised in writing that they have the right to retain and instruct a lawyer; however, there is no right to a hearing before the Consent and Capacity Board.

It is very difficult to interfere with a Form 1 given the short time-frame involved. However, if there is no basis for the Form 1, the hospital emergency room physician will often return the person to the home immediately after examination.

An improperly completed Form 1 can also be the basis for a complaint to the College of Physicians and Surgeons of Ontario, a prosecution under the *Mental Health Act* or an action for wrongful imprisonment if, for example, the physician who signed the document did not personally examine the person or they lied on the Form 1.

It is also possible to bring an application for *habeus corpus* to have a person released from

the hospital immediately; however, given the short notice frame of the detention under the Form 1, this rarely occurs.

At the end of the 72 hours, one of the following **must** occur: (1) the person must be released from the hospital if they do not require treatment; (2) the person shall be admitted as an informal or voluntary patient; or (3) the person shall be admitted as an involuntary patient (Form 3).

If the person stays in hospital, they are considered to be a psychiatric patient and they have all of the rights of a psychiatric patient. The person must be given rights advice by a rights adviser if they are involuntarily detained, found incapable for treatment of a mental disorder or found incapable of making property decisions. As well, if the person is discharged from the long-term care home and the hospital deems them to be “alternative level of care” or “ALC,” the hospital cannot charge the chronic care co-payment since this is not authorized under the *Health Insurance Act*.

### **2. Can the long-term care home refuse to allow my father to return to the long-term care home if he goes to hospital under the *Mental Health Act*?**

No. The long-term care home cannot refuse to allow your father to return to the home simply because he was sent to the hospital pursuant to the *Mental Health Act*.

### **3. If my father is sent to hospital by the long-term care home, when can the home discharge him?**

The *Nursing Homes Act* is very strict with respect to when a person can be discharged from a long-term care home. Those requirements are as follows:

*(Continued on page 16)*

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## HOSPITAL ASSESSMENTS *(Continued from page 15)*

- (i) The home **shall** discharge the resident if they exceed legislated absence periods as set out in the regulations (see Question #5 below).
- (ii) The home **may** discharge the resident if:
  - (a) the home cannot provide a sufficiently secure environment to ensure the safety of the resident or the safety of persons who come into contact with the resident, **and**
  - (b) other arrangements are made to provide the accommodation, care and secure environment required by the resident.
- (iii) The home **shall** discharge a resident from a long-term care home if the resident dies.
- (iv) A home **may** discharge a short-stay resident at the end of the period for which the resident was admitted to the home. (emphasis added)

Unless your father meets one of the legal criteria for discharge, the home cannot discharge him. If they try to do so unlawfully, you should immediately contact the compliance advisor at the Ministry of Health and Long-Term Care who is responsible for that home. If they are not helpful, seek legal advice.

### **4. How long can my father stay in hospital before he must be discharged from the long-term care home?**

The home **must** discharge your father if he is in hospital longer than 21 days for a medical absence or 45 days for a psychiatric absence.

This period of time can be extended by 30 days for a medical absence and 15 days for a psychiatric absence if you are willing to pay an additional bed-holding fee. This fee is currently set at \$53 per day and it must be paid on top of the regular accommodation rate you are already paying. The agreement to pay this fee must be in writing.

There is no maximum or cumulative annual time that your father may be absent from a home for either a medical or psychiatric absence. The “clock” starts again if he returns to the home.

Different rules would apply if your dad were a

short stay resident, for example, in respite care. These rules are beyond the scope of this article.

### **5. I have consented to my father going to hospital for a 45 day psycho-geriatric assessment. If he is not ready to return at the end of that time, can they refuse his readmission?**

If your father does not return to the home at the end of the 45 days and you have not agreed to pay the bed-holding fee, then the home **must** discharge him. However, if he wishes to return to the long-term care home to maintain his bed, the home cannot refuse him.

Most hospitals which perform psycho-geriatric assessments require the referring facility to sign an agreement that they will accept the person back at the end of the 45 days. If they renege on that agreement, the hospital would be less likely to accept future referrals from that facility. Therefore, homes will generally, albeit sometimes reluctantly, accept the return of residents after the 45 day period, although they may attempt to either have the person readmitted for another 45 days or send them to hospital under the *Mental Health Act* if they consider them to be a “difficult patient.”

### **6. The home has told me that they cannot care for my father any more. Can they discharge him?**

The only way that the home can discharge your father is if they are unable to provide him with a sufficiently secure environment to ensure his safety or the safety of those who come into contact with him.

The interdisciplinary team at the home will normally make this decision before bringing the matter to the appropriate managing body. If your father was absent from the home, the decision will be made by his physician or attending registered nurse (extended class).

*(Continued on page 17)*

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## HOSPITAL ASSESSMENTS *(Continued from page 16)*

The home must notify you of their decision as soon as possible. They must also assist you in identifying appropriate alternative accommodation and to plan for and assist you with your father's discharge.

### **7. I disagree with the long-term care home and believe they can care safely for my father. He is incapable with respect to admission to a care home and I am his substitute decision-maker. Can the home discharge him without my consent?**

If this is the only criteria for his discharge, we do not believe that they can discharge your father without your consent. This is because the discharge must be an appropriate alternative accommodation. Appropriate alternative accommodation would always require consent for the admission. An emergency room or hospital bed is not considered "accommodation."

If the long-term care home is suggesting your father should go to another long-term care facility, you would have to apply for admission through the Community Care Access Centre, which would require your consent. Admission to a complex continuing care facility (chronic care) is done directly through the hospital, but also requires your consent.

Sometimes the home will claim that the Ministry of Health and Long-Term Care has authorized them to discharge a resident or refuse readmission after the person has been sent to hospital. We do not believe that the Ministry has such authority. If a discharge or refusal to readmit is threatened or it happens, we suggest you obtain legal advice.

### **8. My father is in hospital due to severe bed-sores which I believe were caused by poor care at the home. Can we discharge him from the home while in hospital and reapply for a new home from hospital?**

Yes. You are entitled to advise the home that he is not returning. However, you should be very careful in doing this. Due to a severe bed shortage, it may take a long time for your father to be admitted to a long-term care home of your choice. Hospitals do not want to get "stuck" with patients who are awaiting placement and may attempt to enforce discharge or other hospital policies in this regard. (For a discussion about hospital discharge policies generally, see "Seniors are Not Bed Blockers" by Judith Wahl, *ACE Newsletter*, Spring 2004, Vol. 3, No. 9 at page 7, available at [www.ancelaw.ca](http://www.ancelaw.ca))

You need to have a concrete reason for your decision to discharge your father and to be able to support your reasoning with evidence. Be sure to advise the appropriate hospital personnel of the reasons for the discharge. Also, you should immediately contact the Community Care Access Centre associated with the hospital to apply for admission to another home and to explain why your father cannot return to the originating long-term care home.

### **9. I am being asked to sign a "level of care" form on behalf of my incapable father. One of the issues is whether or not I would want my father to be hospitalized if he becomes ill. I don't know whether to sign the form or not.**

"Level of care" forms are a type of advance directive. Substitute decision-makers cannot legally sign such a document. While capable residents can sign them, we do not advise them to do so and recommend that they obtain legal advice as these documents can be misinterpreted and misused.

For a complete discussion on advance care planning, please see "Advance Care Planning" by Judith Wahl, *ACE Newsletter*, Spring 2001, Vol. 3, No. 3 at page 4, available at [www.ancelaw.ca](http://www.ancelaw.ca).

# FREE FOR THE ASKING

**CLEO (Community Legal Education Ontario)** is a community legal clinic funded by Legal Aid Ontario. CLEO produces and distributes legal information to the public, most of which are free. These publications are written in clear, concise language. CLEO distributes brochures on many topics, including the following:

- *Elder Abuse: The Hidden Crime;*
- *Power of Attorney for Personal Care;*
- *Home Care Bill of Rights;*
- *Continuing Power of Attorney for Property; and*
- *Every Resident: Bill of Rights for People who Live in Ontario Long-Term Care Homes.*



A copy of CLEO's current order form can be found at [www.cleo.on.ca](http://www.cleo.on.ca) or by calling 416-408-4420, extension 33.

## New Website Address



Please note that  
our website address  
is now:

[www.ancelaw.ca](http://www.ancelaw.ca)

## Calling 211: A Directory of Community Services in Toronto

**211** counsellors answer over 1,000 calls every day to help people find the community, social, health and related government services they need. **211** is available 24 hours a day, 7 days a week. **211** is also available online at [www.211toronto.ca](http://www.211toronto.ca).



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# APPLICATION FOR MEMBERSHIP

## Advocacy Centre for the Elderly\*

2 Carlton Street, Suite 701, Toronto, Ontario M5B 1J3

*Please feel free to photocopy this page and send it to ACE to become a member!*

NAME: \_\_\_\_\_  
(Individual/Corporate) *Please Print*

CORPORATE CONTACT (if applicable): \_\_\_\_\_

ADDRESS: \_\_\_\_\_ APT. \_\_\_\_\_

CITY: \_\_\_\_\_ POSTAL CODE: \_\_\_\_\_

TELEPHONE: (Home) \_\_\_\_\_ (Business) \_\_\_\_\_

EMAIL ADDRESS: \_\_\_\_\_

(complete email address if you would like your newsletter via email instead of regular mail)

### MEMBERSHIP FEE:

(a) Individual \_\_\_\_\_ \$10.00 Enclosed

(b) Corporate (agency, group) \_\_\_\_\_ \$25.00 Enclosed

In addition to my membership fee, a donation of \$\_\_\_\_\_ is enclosed.\*\*

\_\_\_\_\_  
Signature

**Your membership is important.** If the fee presents financial difficulties, please feel free to join anyway.

**Committee Membership:** I am interested in seniors' issues and would consider membership on an ACE Committee. Yes \_\_\_\_ No \_\_\_\_

### Membership Expiry Date: Annual General Meeting, Fall 2009.

By-Law No.1, 14.9 states: No owner or management official of a long term care facility, or employee of any organization representing long term care facilities shall be eligible to be elected to the Board of Directors of the Advocacy Centre for the Elderly.

\* Holly Street Advocacy Centre for the Elderly Inc.

\*\* A tax receipt will be issued for donations over \$10.00.

ACE's [Annual General Meeting](#) will be held on **Monday, October 6, 2008** at the Osgoode Hall Law School Professional Development Centre in downtown Toronto.

Following the AGM will be ACE's [Third Biennial Special Lecture Series](#). Plan to attend to hear the Honourable Howard Pawley speak about:

***Advocacy and Strategies to Pursue in Challenging Times: The Impact on Seniors and the Legal Aid System in an Elder Law Practice***

See page 5 for more details!



## Advocacy Centre for the Elderly



**2 Carlton Street  
Suite 701  
Toronto, Ontario  
M5B 1J3**

**Phone: (416) 598-2656  
Fax: (416) 598-7924**

**Website: [www.ancelaw.ca](http://www.ancelaw.ca)**

**Newsletter Editor:**  
Lisa Romano

**Contributors:**  
Judith A. Wahl  
Rita Chrolavicius  
Graham Webb  
Jane Meadus  
Navneet Johal  
Lisa Romano

**Layout:**  
Maleksultan Kaba

### ABOUT THE CLINIC

ACE is a community-based legal clinic for low-income senior citizens in and around Toronto. It is the first clinic in Canada to specialize in the legal problems of seniors.

ACE is funded by Legal Aid Ontario to provide a range of legal services including direct client assistance, public legal education, law reform, community development, and referral.

ACE is incorporated as a non-profit corporation under the name "Holly Street Advocacy Centre for the Elderly Inc."

**Charitable Registration No. 106686728 RR 0001**

### HOURS OF SERVICE

Office Hours:

Monday - Wednesday and Friday: 9 a.m. - 5 p.m.

Thursdays: 1 p.m. - 5 p.m.

**Executive Director:** Judith A. Wahl

**Board of Directors:** Paula Psyllakis, *Chair*  
Kathleen Fairbarns and Jennifer Young, *Vice Chairs*  
Alex Henderson, *Secretary* Jane Miller, *Treasurer*  
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