

SEXUALITY IN LONG-TERM CARE

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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 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 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.