LONG-AWAITED LONG TERM CARE HOMES ACT INTRODUCED

In follow up to its consultation paper released in November of 2004 entitled *Future Directions for Legislation Governing Long-Term Care Homes*, the Ontario government has introduced much anticipated legislation that will consolidate the three statutes that govern this sector. If passed, Bill 140, the *Long-Term Care Homes Act, 2006* (LTCHA), which received first reading on October 3, 2006, will replace the *Nursing Homes Act*, the *Charitable Institutions Act* and the *Homes for the Aged and Rest Homes Act*.

**Purpose of the Act:**

The government introduced Bill 140 with the stated purpose of enhancing the quality of life for residents of long-term care (LTC) homes by strengthening enforcement, improving care and increasing accountability. The LTCHA adds a preamble that highlights general principles for interpreting the Act. The fundamental principle to be applied in interpreting the Act is that a LTC home is the home of its residents and is to be operated in a manner where residents may live with dignity and in security, safety and comfort.

**Key Provisions of the Long-Term Care Homes Act, 2006:**

**Residents: Rights, Care and Services**

- The LTCHA sets out an expanded Residents' Bill of Rights which the LTC home must respect and promote. Further, the Bill of Rights can be enforced by a resident against a LTC home, as if it were a contract.
- Each LTC home is required to have a mission statement, and ensure that the home is a safe and secure environment.
- There must be a plan of care for each resident and the home must ensure that the resident is reassessed and the plan of care is reviewed and revised at least every three months. The LTC home has a duty to ensure that the care set out in the plan is provided.
- LTC homes must ensure that certain programs and services are provided including: nursing and personal support, restorative care, recreational and social activities, dietary and hydration, medical services, information and referral assistance, religious and spiritual practices and accommodation services. LTC homes are required to ensure there is an organized volunteer program in place including volunteers from community organizations.
As introduced by regulation in August of 2005, the LTCHA requires that a registered nurse be on duty in the home 24 hours a day, seven days a week.

Every LTC home must have a Residents’ Council and may have a Family Council. The LTCHA provides for the powers of these councils.

**Safeguards - Abuse, Neglect, Complaints, Mandatory Reporting, Inspections and Whistleblowing Protection**

- Each LTC home is required to protect residents from abuse by anyone and shall ensure that residents are not neglected by staff. To this end, every LTC home must ensure that there is a written policy to promote zero tolerance of abuse and neglect of residents and the proposed LTCHA sets out what must be included in such a policy.
- The proposed LTCHA contains broad reporting requirements. For example, every LTC home that receives a written complaint concerning the care of a resident or the operation of the home shall immediately forward it to the Director, along with required information.
- The LTC home must immediately investigate and take appropriate action for each alleged, suspected or witnessed incident of abuse of neglect.
- There are new mandatory reporting requirements under the Bill, similar to the language relating to the duty to report child abuse. A person who has reasonable grounds to suspect improper or incompetent treatment or care, abuse or neglect or unlawful conduct which results in harm or risk of harm to residents or misuse or misappropriation of a resident’s money or LTC home’s funding must immediately report the suspicion and the information upon which it is based to the Director. Specific inspection and investigation powers are set out in the Bill.
- Regulated health professionals are required to report such a suspicion to the Director even if the information is based on confidential or privileged information. Regulated health professionals are protected from liability in reporting as long as they act in good faith and upon reasonable grounds.
- It is an offence under the Act for an officer or director of a LTC home, a staff member, or someone who works in a professional capacity with the resident or LTC home to fail to report, or to encourage suppression of a report.
- Whistle-blowing protection is provided for all persons including staff, residents and volunteers who disclose information to the Director or inspector or give or refuse to give evidence in a proceeding or inquest. There is a prohibition against retaliation against such individuals.
- The Ministry must immediately visit the home if there is information of serious harm or risk of serious harm to a resident or if there is information of retaliation or threats of retaliation against a person who has made a report of abuse or neglect.
- Where there is a complaint by a staff member of retaliation, the individual has recourse to the Ontario Labour Relations Board.

**Use of Restraints**

- The proposed LTCHA contains extensive provisions relating to the use of restraint in LTC homes and requires every LTC home to ensure that there is a written policy to minimize the use of restraints. Where use of restraint is necessary, such use must comply with the policy and legislative requirements.
- A LTC home must ensure that residents are not restrained for reasons of convenience or discipline, and that specific types of restraint are used only as provided in the Act.
- The common law duty to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or others is preserved.
- There are special provisions dealing with admission or transfer to a secure or locked unit within a LTC home, both of which require consent of the resident. If a substitute decision maker provides consent on the incapable resident’s behalf, the resident is entitled to rights advice and has the ability to apply to the Consent and Capacity Board to review the decision.
Admission of Residents

- The proposed LTCHA contemplates a two step process for admission to a LTC home:
  - First, the person must apply to a placement coordinator for a determination that the person is eligible for LTC admission.
    - The Bill requires comprehensive assessments related to the applicant's physical and mental health and requirements for health care, functional capacity and requirements for personal care, current behaviour and behaviour during the year preceding the assessment and specifies who may undertake these assessments.
    - There are expanded requirements for providing information to applicants about the placement process, choices that the applicants have related to the process, and the implications of these choices for the applicants.
    - If the placement coordinator determines that a person is ineligible for LTC admission, the applicant may apply to the Consent and Capacity Board to review this decision.
  - Second, if found to be eligible, the person must apply to a placement coordinator for authorization of admission to a specific LTC home or homes, as selected by the individual. The placement coordinator must authorize admission to that specific home.
    - If the individual requests, the placement coordinator must assist the applicant in selecting LTC homes to which they will apply and will consider the applicant's preferences, based on ethnic, religious, spiritual, linguistic, familial and cultural factors.
    - There are limited criteria upon which a LTC home can withhold approval to admission, and in such cases, the LTC home must provide a detailed written notice setting out the grounds to the applicant, Director and placement coordinator.
    - There is a requirement for current assessment or reassessment information, made within the preceding three months, in order for a placement coordinator to authorize the admission, and such admission must be with the consent of the individual. The proposed LTCHA sets out the required elements of consent as well as the information necessary in order for such consent to be informed.
    - There are special provisions applicable to admission to a secure unit of a LTC home and as stated above, due process protections where a substitute decision maker consents to a secure admission on an incapable resident's behalf.

Operation of Homes

- There are onerous obligations for directors and officers of LTC homes that are corporations and for members of the Committee of Management or Board of Management for Municipal and First Nations homes under the proposed LTCHA. Each of these individuals has a duty to "take all reasonable care" to ensure that the home complies with all requirements under the Act. Further, it is an offence to fail to comply with this obligation.
- The Act requires that the Administrator and Director of Nursing and Personal Care work full-time except in very limited circumstances. The Bill sets out specific responsibilities for these positions, as well as those of the Medical Director.
- The Bill requires that the LTC home ensure that all staff, including senior administrative staff, have the proper skills and qualifications to perform their duties, including any qualifications provided for in the regulations.
♦ LTC homes must conduct criminal reference checks and other screening measures before hiring new staff or accepting new volunteers (except for persons under 18 years). They will not be required to conduct checks on their existing staff or volunteers.

♦ The use of agency or temporary staff is limited under the draft legislation, and must be in accordance with the regulations “in order to provide a stable and consistent workforce”.

♦ All staff, volunteers and persons who provide direct services to residents must receive extensive orientation, training and ongoing retraining. For example, direct care staff must receive training in areas such as palliative care, abuse recognition and prevention, behaviour management, caring for persons with dementia, minimization of restraints and any other area provided for in the regulation.

♦ An annual resident and family satisfaction survey must be conducted and the LTC home must act on the results of the survey to improve service.

♦ Each LTC home must have a quality management system, infection prevention and control program, and emergency plan in place that complies with legislative requirements.

Resident Agreements, Information and Charges

♦ LTC homes must provide residents, their substitute decision makers and family members with a comprehensive information package upon admission, containing prescribed information, and must provide updated information, as revised. Required information must also be posted.

♦ Residents cannot be charged for anything prohibited in the regulations, nor can they be charged more than the amount provided for in the regulations for all classes of accommodation.

♦ For preferred accommodation, a written agreement with the resident is required, otherwise only the basic accommodation rate can be charged. For anything other than accommodation, the resident can only be charged if there is a written agreement with the LTC home (i.e. television, telephone).

Funding

♦ The proposed LTCHA provides broad funding discretion for the Ontario Minister of Health and Long Term Care. The Minister may provide funding for a LTC home, and may attach conditions on the funding, including how it may be used. Conditions may also be set out by regulation.

Licensing

♦ The proposed legislation sets out an expanded “public interest” test to be applied by the Minister in determining whether there is a need for a LTC home, where LTC beds can be located and who can operate them. There is no appeal mechanism set out in the legislation in regard to the Minister’s discretion.

♦ The Bill sets out eligibility criteria to be issued a LTC home licence. If the Director determines that a person is ineligible to be issued a licence, there is an ability to appeal this decision.

♦ There is a public consultation process relating to the issuance of new licences or transfer of licences.

♦ The Bill provides that non-profit LTC homes cannot be transferred to the for-profit sector, except in limited circumstances.

♦ Licenses are issued for a fixed term of up to 25 years, with a three-year notice before the end of the term as to whether a new licence will be issued. Temporary licences can be issued for a fixed term of no more than 5 years.

♦ There are specific provisions related to Municipal homes and First Nations homes.
Compliance and Enforcement

♦ Inspections of LTC homes are generally required at least once a year, and are unannounced.
♦ A graduated system of sanctions will be taken against LTC homes that are not in compliance with a requirement under the legislation, including written notification, request for written plan of correction, compliance order, work/activity order, withholding of funding, mandatory management order and revocation of a licence.
♦ The Director may direct the placement co-ordinator to cease admissions to a LTC home at any time if there is concern about risk of harm to residents.

Consequential amendments to other legislation

♦ There are a number of proposed changes to other pieces of legislation. For example, additional provisions are proposed under the Health Care Consent Act, 1996 relating to consent given on an incapable person's behalf, admission to secure units, information and due process requirements.
♦ The Long-Term Care Act, 1994 would be renamed the Home Care and Community Services Act, 1994, with appropriate amendments.
♦ The Personal Health Information Protection Act, 2004 would be amended to include a service provider under the above Act, a LTC home within the meaning of the LTCHA, a placement coordinator or a care home within the Tenant Protection Act, 1997 within the definition of "health care custodian".

Implications

Without question, there is recognition that the legislation governing LTC homes requires a major overhaul and legislation that promotes lasting improvements to the current system is welcomed.

In introducing the proposed legislation, the Ontario government has focussed on the enforcement aspects, including promoting zero tolerance of abuse and neglect of LTC residents and whistle-blowing protection for staff who report, as well as standards of care for residents. While these are important issues to address, does the proposed legislation strike the right balance or does it create an overly restricted environment in its efforts to prescribe standards for care, service, staffing, training, operations and the like. In practical terms, will it be possible to comply with the requirements of the Act? Do LTC homes have the required resources to fulfill these obligations, especially in light of the potential liabilities for failing to meet these requirements. Finally, should it go farther to address systemic issues such as access to LTC beds and examining the role of LTC within the healthcare system?

We would be pleased to provide you with further analysis and specific advice on the potential implications of this draft legislation. We will be following the progress of this legislation closely and will keep you apprised of any new developments. Please feel free to contact our lawyers for assistance with submissions or policy papers or for assistance with educational efforts.

ABOUT THE AUTHOR:

Kathryn Frelick is a lawyer practicing in our Health Industry Practice Group and supervises the Legal Retainer Program. Kathryn provides advice to clients in areas of privacy, administrative law, regulatory law and health policy issues. Kathryn would like to acknowledge the assistance of Alia Karsan, Student-at-Law in preparing this overview.

Our National Health Industry Practice Group is dedicated to providing comprehensive and integrated legal services to health industry clients. For more information about our group, visit our website at www.millerthomson.com or contact one of our regional contacts.
Note:

This newsletter is provided as an information service to our clients and is a summary of current legal issues. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules. To be removed from our mailing list, please contact healthretainer@millerthomson.com

www.millerthomson.com