Whose Accountability Matters in Long-Term Care?

Qui est responsable des soins de longue durée?

MICHAELLA MILLER, MSc
PhD Candidate
School of Public Health Sciences
University of Waterloo
Waterloo, ON

ELLEN MACEACHEN, PHD
Professor and Director
School of Public Health Sciences
University of Waterloo
Waterloo, ON

Abstract

In response to quality issues within the long-term care (LTC) sector, the Government of Ontario implemented the *Fixing Long-Term Care Act*, 2021, and updated accountability and compliance measures, including doubling fines for non-compliance and investing in 193 new inspectors. However, enforcement tactics and inspection regimes may contribute to harm and neglect the root issues within the sector. Fines for non-compliance may create catch-22 situations in which homes lack the funds to fix the root issues. Governments also dictate and determine much of the resource allocation within the LTC sector. Accountability and quality improvement should involve addressing performance problems as a system.

Résumé

En réponse aux problèmes de qualité dans le secteur des soins de longue durée (SLD), le gouvernement de l'Ontario a mis en œuvre la Loi de 2001 sur le redressement des soins de longue durée tout en mettant à jour les mesures de responsabilisation et de conformité, y

compris le doublement des amendes pour non-conformité et l'investissement dans la formation de 193 nouveaux inspecteurs. Cependant, les tactiques d'application de la loi et les régimes d'inspection peuvent contribuer à nuire aux problèmes fondamentaux du secteur. Les amendes pour non-conformité peuvent mener à de véritables dilemmes où les foyers de soins ne disposent pas des fonds nécessaires pour régler les problèmes à la racine. Les gouvernements dictent et déterminent également une grande partie de l'allocation des ressources dans le secteur des SLD. La responsabilisation et l'amélioration de la qualité devraient comprendre le traitement des problèmes de rendement en tant que système.

Introduction

In April 2022, the Government of Ontario legislated a new *Act* to regulate the long-term care (LTC) sector, the *Fixing Long-Term Care Act*, 2021. This legislation, as stated by the Ontario Government, is transformative and impacts the care work that is provided in LTC homes in Ontario to residents and the structure and organization of how care is provided (*Fixing Long-Term Care Act*, 2021). However, the impact of this regulation and its related accountability measures could backfire based on its approach to focus on individual LTC homes. This paper examines the implications of the *Fixing Long Term Care Act*, 2021, and the consequences of increased compliance measures when supports and resources for LTC are under-addressed. We examine policy implications at the federal, provincial and institutional levels and make recommendations to address current needs in the LTC sector.

Compliance and Accountability at the Institutional Level

The *Fixing Long Term Care Act*, 2021, updated regulations to include emergency preparedness; defined "caregiver" to ensure access during outbreaks; updated palliative care, infection prevention and control information; defined mandatory increase targets for direct care hours; included protections for whistleblowers; increased monetary penalties for non-compliance; and increased transparency of the licensing process (*Fixing Long Term Care Act*, 2021). However, the impact of these changes is yet to be seen.

Accountability measures within LTC are often focused on a strict assessment of whether the home was able to follow specific regulatory requirements set out by the Ministry of Long-Term Care and are accompanied by stiff fines. However, these fines may have the effect of compounding rather than fixing problems within LTC homes, especially when regulatory requirements do not account for context and circumstances. A lack of consideration of context is evident in the blunt way that the Act uses disciplinary measures and compliance protocols. The Act stipulates in regulation 162 (1) that:

> The authority to make an order or issue a notice under sections 155 to 161 [and 169/170] against a licensee who has not complied with a requirement under this Act applied regardless of the following, and they shall not be considered in deciding whether to exercise authority:
>
> 1. Whether the licensee took all reasonable steps to prevent the non-compliance.
> 2. Whether, at the time of the non-compliance, the licensee had an honest and reasonable belief in a set of facts that, if true, would have resulted in there not being any non-compliance. (*Fixing Long-Term Care Act*, 2021: 74).

Financial penalties for the Act's non-compliance have doubled as part of the implementation of the new *Act* (Government of Ontario 2023), and the Ontario Government has invested in 193 new inspectors for LTC homes, doubling the number of inspectors in the province to enforce accountability measures. As stated on the Ontario Government's website, they intend to drive quality through "enforcing this accountability through a strong inspections regime coupled with new and updated enforcement tools" (Government of Ontario 2023). The Ontario Government states that they have one inspector per every two LTC homes and that they are a leading province in inspector-to-home ratios (Government of Ontario 2023). However, these increases in enforcement and inspection tactics may not be supportive in driving improvement in LTC homes in the sectors' current context and may unintentionally contribute to harm. There are consequences of increased compliance measures when supports and resources for LTC are under-addressed.

Advocates and professionals in the sector have raised concerns about the punishment-oriented practice of fines to individual homes. As far back as 2018, the *Canadian Medical Association Journal* (Vogel 2018) released an article highlighting that LTC sectors' fines posed a catch-22 situation for homes that lack resources to correct the issues. The article suggested that the LTC root problems with staffing are not addressed with fines and are often due to factors beyond the homes' control, which may require additional funds to improve (Vogel 2018).

Removing funding from homes can adversely affect the quality of the care provided to residents, remove needed resources from homes, create moral distress among workers and prompt structural violence in the homes. For example, Daly et al. (2011) revealed how a cost-saving practice in Canadian LTC homes led to harmful care practices regarding diaper allocation for residents. Cost-cutting policies prevented staff from changing diapers until a blue line appeared when it was three-quarters wet, and staff were told to put wet diapers back on until they were full (Daly et al. 2011). While fines are meant to stop these kinds of practices, it may instead prompt them as a cost-saving tactic. Where the funds come from to pay financial penalties is determined by the home. In some cases, it may be from profits, while in others, wages, employee benefits, services and operational funds may be used at the expense of the staff and residents.

Are funding models to blame?

Questions remain about whose accountability is required for ensuring quality of care in LTC. Funding models in the LTC sector complicate issues of accountability. LTC homes consist of different ownership types, including homes that are non-profit, for-profit and public (municipal). Significant research suggests that for-profit models create negative consequences to residents (Armstrong et al. 2021) and consistently have care quality problems. Public models may have more funding to provide higher levels of care, hire needed staff and offer more support and recreation options than not-for-profit homes (Wohlgemut 2022). An examination of organizational practices of different LTC model types could illuminate what causes care discrepancies between and within different profit models. For example, different types of for-profit configurations have not been explored in depth to discern the defining aspects of profit that specifically contribute to harm. Ethically managed for-profit homes, such as those that use profit to support research initiatives, may have better outcomes than homes focused on profit generation and optimization of shareholder wealth. Ontario's Long-Term Care COVID-19 Commission also makes a distinction between mission-driven and commercial-driven ownership models, indicating that for-profit homes that are mission driven can and do provide good care (Marrocco et al. 2021). While provincial governments determine and control the ownership mix within the province (how many for-profit homes, number of beds, etc.), it is also likely that we will continue to rely on for-profit homes because of lack of government funding to provide for the growing need for LTC homes. Policies restricting private equity firms from treating LTC as an asset class may be necessary to address harm when financialized ownership prioritizes increasing revenue over quality of care or work (August 2022).

Government protections and resource provision

Our governments must also be held accountable for determining much of the resource availability and regulatory requirements placed on LTC organizations, such as mandates for staffing levels, staff-to-resident ratios and protections within the health system. At the federal level, access to appropriate care is hindered by a lack of clear or explicit legal information regarding a right for health under the *Canadian Charter of Rights and Freedoms* (Government of Canada 2024). Previous interpretation of the *Charter* has precluded the enactment of the *Charter's* protection of life, liberty and security of the person under Section 7 for healthcare as a fundamental right. Interpretation of the *Charter* deemed that adequate care was not a focus and would only protect individual rights in situations of "active deprivation" (Windwick 1994: 4). When evidence of inadequate resources preventing appropriate care provision for individuals in LTC was presented to the Supreme Court, legislation outlining the minimum standards of care were used to deny legal action. As such, the current interpretation of the *Charter* enables degradation of healthcare delivery when public funding is reduced or through "de-legislating" services (Windwick 1994: 4). Consequentially, our right to adequate healthcare is not actively protected.

As a provincially held jurisdiction, LTC is funded and regulated in Ontario by the Ministry of Long-Term Care. On December 6, 2023, the Auditor General of Ontario released their *Value-for-Money Audit: Long-Term Care Homes: Delivery of Resident-Centred Care*, reviewing LTC's delivery of care (Office of the Auditor General of Ontario 2023). They found several quality issues stemming from the ministry and a failure to support LTC organizations. Their report highlights that a core problem impeding ability to care for residents is a lack of resources and supports (Office of the Auditor General of Ontario 2023). Despite the ministry reporting that they had achieved their direct hours of care mandate, this audit found that a quarter of Ontario LTC homes failed to provide this level of care hours due to systemic staffing shortages and that their reliance on agency staff to fill staffing vacancies was nearly double the cost of a full-time employee (Office of the Auditor General of Ontario 2023). The Long-Term Care COVID-19 Commission also directly indicated misleading data use from the province in their reported *direct hours of care* mandate:

> During its investigation, the Commission reviewed various calculations of the daily care rate. It was apparent that the data being used were inconsistent and differed depending on the source. The Commission was advised that the data collected by the province did not reflect actual hours of care provided but, instead, the scheduled hours of care. Staffing shortages, holidays and sick days were not factored into the calculation, which led to an over-counting of actual care hours. In addition, care-hour data are consistently presented as an average. This does not mean that all residents in all homes receive the same amount of care. The presentation of staffing data as an average is misleading; the danger lies in the extremes, where insufficient care is being provided. (Marrocco et al. 2021: 57).

Calls for increased funding within LTC are not new and are often met with arguments about the financial constraints of the provincial budget. Arguments about the lack of available funds to raise wages or increase care support have impacted adequate financial provisions to LTC organizations. However, it is important to remember that budget constraints are determined by the provincial government and are based on political interests and priorities.

What Can Be Addressed?

The focus of accountability on single institutions neglects the system-level barriers to care quality that exist at both the provincial and the federal levels. While accountability measures are necessary for individual homes, much of the power to address the root problems in the LTC sector require government-level interventions through adequate protections and resource distribution.

In the *Fixing Long-Term Care Act*, 2021, financial penalties for not meeting care requirements that are placed on the individual homes, both in for-profit and not-for-profit homes, would primarily affect the workers' ability to provide care and resident outcomes.

System-level support to improve the ability of organizations to comply with the *Fixing Long-Term Care Act*, 2021, need to be in place before enforcement measures, such as fines, can be effective in driving improvement.

Policy makers can improve regulations by using updated evidence bases or developing legal frameworks that address organizations' *ability* to provide good and sufficient care rather than punishment-oriented enforcement measures. Governments can:

- Develop standards and clear regulation for the operation of homes, such as registered nurse-to-resident ratios appropriate for care. Provinces can implement evidence-based staffing standards that address working conditions for staff, including conditions creating burnout. Such standards would then be included in funding calculations for provincial funding envelopes for LTC homes. Provincial regulation would make the staffing skill mix and ratios a provincial decision rather than an organizational one and could help dismantle some of the tension between wealth generation and quality of care.
- Conduct an assessment of resource needs to adequately support the care of residents *and* the needs of the workers. The current mandate for direct hours of care was recommended by research conducted over 22 years ago when resident needs were not as high as they are today (CMS 2001).
- Add definitions of "adequate care" to legal frameworks on minimum care standards to ensure that care needs are appropriately met and to protect the right to health in Canada. Establishing an appropriate level of care would prevent denial of resources to support the needs of those in the sector.
- Develop a legal framework to address exploitive practices for profit maximization in for-profit homes beyond financial penalties and pursue legal inquiry into malpractice in operation of homes at the ownership and "C-suite" level. While arguably part of institutional accountability, shifting the consequence to the owners reduces the burden on those who live and work in the individual homes and their ability to provide care. This shift would need to be part of the provincial-level regulatory schema. Legal frameworks could extend beyond the LTC sector given the Ontario government's current push for for-profit healthcare. Legal sanctions that limit profit generation may require significant leadership buy-in. Investors and organizations that benefit from a current lack of legal frameworks may create political upset and impact stakeholder investments. However, the priority of providing high-quality care and an ethical workplace are arguably morally more important than wealth generation.

Barriers to implementing these recommendations include adequate funding, organizational disruption and legal burden. Provinces would be required to fund appropriate staffing infrastructure. Current budgets would require adjustment to properly address funding needs. In the short term, this may require additional funds; however, having a safe and sufficient healthcare workforce might reduce injury and illness, minimize use of costly contracted

agency staff and ultimately reduce the economic costs associated with staffing. However, this requires political buy-in for long-term system-level solutions that go beyond the four-year government cycles.

Conclusion

Accountability and quality improvement for LTC sectors should involve addressing performance problems *as a system* rather than as independent entities. If we are to genuinely improve conditions within this sector, accountability needs to be assessed and monitored at all levels, including how funding is allocated and spent, what rights to care exist, how adequate provision of care is protected, how information is gatekept and how these conditions interact to create the current state of LTC. Developing staffing standards that address care needs and workplace quality are essential to address the quality of care within the sector.

Correspondence may be directed to Michaella Miller by e-mail at m29mille@uwaterloo.ca.

References

Armstrong, P., H. Armstrong, D. Buchanan, T. Dean, G. Donner, A. Donner et al. 2021. *Investing in Care, Not Profit: Recommendations to Transform Long-Term Care in Ontario*. Retrieved December 20, 2023. <https://policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2021/05/Investing%20in%20care%20not%20profit%20report.pdf>.

August, M. 2022. Securitising Seniors Housing: The Financialisation of Real Estate and Social Reproduction in Retirement and Long-Term Care Homes. *Antipode* 54(3): 653–80. doi:10.1111/anti.12795.

Centers for Medicare and Medicaid Services. (CMS) 2001. *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes*. Retrieved October 5, 2023. <https://www.justice.gov/sites/default/files/elderjustice/legacy/2015/07/12/Appropriateness_of_Minimum_Nurse_Staffing_Ratios_in_Nursing_Homes.pdf>.

Daly, T., A. Banerjee, P. Armstrong, H. Armstrong and M. Szebehely. 2011. Lifting the "Violence Veil": Examining Working Conditions in Long-Term Care Facilities Using Iterative Mixed Methods. *Canadian Journal on Aging / La Revue canadienne du vieillissement* 30(2): 271–84. doi:10.1017/S071498081100016X.

Fixing Long-Term Care Act, 2021, S.O. 2021, c. 39, Sched. 1. Government of Ontario. Retrieved January 17, 2025. <https://www.ontario.ca/laws/statute/21f39>.

Government of Ontario. 2023, February 15. Published Plans and Annual Reports 2022–2023: Ministry of Long-Term Care. Retrieved December 20, 2023. <https://www.ontario.ca/page/published-plans-and-annual-reports-2022-2023-ministry-long-term-care>.

Government of Canada. 2024, April 16. The Canadian Charter of Rights and Freedoms. Retrieved January 17, 2025. <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/>.

Marrocco, F.N., A. Coke and J. Kitts. 2021. *Ontario's Long-Term Care COVID-19 Commission: Final Report*. Retrevied September 3, 2024. <https://files.ontario.ca/mltc-ltcc-final-report-en-2021-04-30.pdf>.

Office of the Auditor General of Ontario. 2023, December. *Value-for-Money Audit: Long-Term Care Homes: Delivery of Resident-Centred Care*. Retrieved December 17, 2023. <https://auditor.on.ca/en/content/annualreports/arreports/en23/AR_LTCresidential_en23.pdf>.

Vogel, L. 2018. New Fines Pose Financial Catch-22 for Ontario Long-Term Care. *CMAJ* 190(20): E630–31. doi:10.1503/cmaj.109-5600.

Windwick, B.F. 1994. Health-Care and Section 7 of the Canadian Charter of Rights and Freedoms. *Health Law Review* 3(1): 1–5.

Wohlgemut, J. 2022. Leveling the Playing Field in Long-Term Care. *CMAJ* 194(13): E501. doi:10.1503/cmaj.81199.