Abstract

This is part of a larger research project that is intended to contribute to the debate about social regulation by focusing on recent changes to law governing long-term care (LTC) homes (also known as nursing homes) in Ontario, Canada. The research topic is grounded in the debate about the relationship between the welfare state and the regulatory state. The first part of the paper uses the contributions of feminist political economy as a useful introduction to critiques about the regulation of LTC homes. I then introduce the concept of “legal complexity” to provide an additional lens to explain why the regulatory framework is the way it is. The main part of the paper will offer an empirical account of changes to regulation by focusing on the following examples: 1) Residents’ Bill of Rights; 2) safety and security of residents and 3) compliance and enforcement. I mainly rely on legal research and review of government documents released between 2004 and 2010. The last part of the paper will offer my preliminary observations about the regulation of the LTC sector in Ontario. Based on my review of a small set of changes, I suggest that law is used to provide guidance and certainty to LTC home residents about their rights and entitlements. Equally important, law is used to address the diverse needs and circumstances of those who are subject to it. The changes to law should be interpreted as attempts to conform law to the evolving understanding of the state’s actions / involvements in the LTC sector.

Acknowledgement

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The views expressed in this paper do not represent the views of the Government of Ontario.
Introduction

This paper extends a regulatory perspective into one of the functions of the welfare state - the provision of care - in order to contribute to the debate about the role of regulation in social policies. By welfare state, I mean an ideal - or at least acceptable - political and social compromise by proponents of egalitarian social policies. The term is also used as an indication of the growth of the functions and capacities of the state in the social policy realm (Levi-Faur, 2014: 602; Taggart, 2005: 101). The welfare state is frequently associated with fiscal transfer, for example taxing and spending, as its choice of instrument (Levi-Faur, 2014: 599). More recently, one could speak of the rise of the regulatory state (for example, see Yeung, 2010) which is identified with the “application of informal and formal bureaucratic rule making, rule monitoring, and rule enforcement” (Levi-Faur, 2013: 30). The rise of regulation and the regulatory state reflects the tendency to deploy and privilege regulation. In a nutshell, the regulatory state is a state that specializes in control via rules (rather than only in taxing and service provision) (Levi-Faur, 2013: 30).

One of the interesting issues that have emerged is the relations between the regulatory state and the welfare state. One influential view (as championed by Majone in the 1990s) is that the regulatory state and the ‘positive’ state stand as two alternative monomorphic forms of state; they are routinely presented as “trade-offs” (Levi-Faur, 2014) or as “opposing pairs of policy and politics” (Mabbett, 2011: 216). Another view is that the regulatory state and the welfare state can coexist and that the regulatory state may strengthen the welfare state (Levi-Faur, 2014: 599-600). It makes more sense to describe welfare as a desired aim and regulation as an instrument. They should be brought together, not as a trade-off but as mutually constitutive (Levi-Faur, 2014: 611). As such, the application of regulatory instruments and fiscal transfer are political options rather than a guarantee for a certain policy outcome (Levi-Faur, 2014: 599-600).

Following Levi-Faur, I hope to show how the co-existence of regulatory state and the welfare state is possible and demonstrate how regulatory instruments are utilized to respond to some of the perceived problems about a public benefit scheme. While regulatory instruments may exist in many forms, the focus of this paper is those instruments formally enshrined in law (on centrality of law to the field of regulation see Cohn, 2011). This is an important area to focus on because law is frequently seen as a way to achieve directly the goals of social engineering (Bogart, 2002: 13-14). To be more specific, law is frequently used to regulate rights, entitlement, access and processes associated with social policies (for example see Haber, 2015; Bach, 2012). In contrast to fiscal transfer, how regulatory instruments work and what aims they serve outside of economic policy context are less obvious, not to mention the difficulties with ascertaining their effects empirically. But this is indeed a pressing research problem to address if we come to terms with the fact that the state may no longer assume the role of direct welfare provider (Yeung, 2010: 81) or primary funder of services and require new ways to control (or at least influence) the achievement of important social objectives.

My starting point is that it is not possible to address this broader problem about how regulatory instruments work without first asking what law is being used to do and why. To answer this question, my research focuses on the development and implementation of a new legal framework for long-term care homes (also known as nursing homes or institutional care) in
Ontario, Canada between 2004 and 2010. By highlighting the less visible regulatory layer (Levi-Faur, 2014: 600), I try to explain how law gives meaning to the perceived public policy problems and solutions during that period. Despite criticisms (scholarly and otherwise) about the regulation of LTC homes, mainly around increased regulation, I offer a more favourable view of the examples of changes to law. Based on my review of a small set of changes, I suggest that law is used to provide guidance and certainty to residents about their rights and entitlements. Equally important, law is used to address the diverse needs and circumstances of those who are subject to it. The changes should be interpreted as attempts to conform the law to the evolving understanding of the state’s actions / involvements in LTC homes, which are homes for residents; at the same time, the homes constitute part of a public benefit scheme and function as workplaces for caregivers.

This paper will proceed as follows: It will start by offering a definition of and assumptions about regulation, after which I will present the theories that I rely on to explain the regulation of LTC homes. The main part of the paper will offer an empirical account of changes to law by focusing on the following examples: 1) Residents’ Bill of Rights; 2) safety and security of residents; and 3) compliance and enforcement. The last part of the paper will offer my preliminary observations about the regulation of the LTC sector in Ontario and explore what these observations may mean for the debate about co-existence of the regulatory state and welfare state.

Definition of and Assumptions about Regulation

Since regulation is the focus of my research, I should explain how I use the concept of regulation in this paper. Here regulation is defined as an instrument of control (Levi-Faur, 2013: 46). I adopt Julia Black’s articulation of the concept of regulation, which places emphasis on what the concept is intended to do: “regulation is a process involving the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly defined outcome or outcomes” (Black, 2001: 142).

Another point about regulation that is relevant for this research is that regulation should not be treated as an undifferentiated whole and can be distinguished according to function (Sunstein, 1990: 48). The inquiry into regulatory functions is a normative inquiry into “what sort of problem the statute is most sensibly understood as addressing, and how the problem can most sensibly be resolved” (Sunstein, 1990: 73). Sunstein proposes that statutes may be categorized as responses to the following: market failures, public-interested redistribution, collective desires and aspirations, diverse expectations and preference formations, social subordination, endogenous preferences, the problem of irreversibility, and finally interest group transfers and rent-seeking (Sunstein, 1990).

Finally, I understand regulation in a substantive sense (Levi-Faur, 2014: 603), and therefore, adopt the position that the content of regulation has distributive and redistributive implications (Levi-Faur, 2013: 46). More specifically, regulation is not necessarily regressive nor the opposite of equalitarian: it all depends on the ways regulation is applied, its substance and timing (Levi-Faur, 2013: 45; Haber, 2015). This invites us to study how regulatory effects occur and why they succeed or fail empirically. As such, any endorsement or defense of
government regulation should be balanced with a discussion of the instances in which regulation has failed (Griffin, 1993; Sunstein, 1993).

Theorizing Care and the Regulation of Care

To theorize why long term care is increasingly regulated, I focus on the points of contention related to explaining regulatory expansion and its consequences. This section will begin by presenting the contributions of feminist political economy to the study of care within the context of privatization. Although the “trade-off” of welfare state vs. regulatory state is never made explicit in the feminist political economy work discussed below, it is reasonable to conclude that the main arguments exemplify the notion that the rise of regulation requires, or is the result of, the decline or stagnation of fiscal transfers (Levi-Faur, 2014). I contend that the insights of feminist political economy provide only partial answer to the question of regulatory expansion. The causes of regulatory expansion can also be traced to trends in the use and form of law. The concept of legal complexity provides a vantage point to explain regulatory expansion in social policy.

Contributions of feminist political economy literature

Feminist political economy is concerned with the material practices of power and the distribution of social resources. Gender and class are interrelated systems of power that work through and are continuously (re)constituted by social relations of production and reproduction (Jackson, 2012: 18-19). It has now expanded to exploring the multiple intersections of gender, race, and class (as well as other social locations, such as immigration, geography, sexuality, and age), and the complex power relationships enacted through them (Jackson, 2012: 20-21; Armstrong et al., 2012: 65-66). Three key concerns are addressed by feminist political economy: the sexual division of labour, the role of the state, and the construction and relationship between the public and private spheres (Vosko, 2002).

One important contribution of the feminist political economy literature to understanding the LTC sector is its attention to the issue of private sector involvement in health service delivery. It is argued that for neoliberal governments, regulations have become policy tools of choice to ensure safety for vulnerable people and those who care for them. Accordingly, many regulations have been enacted on the assumption that they would improve efficiency and choice through market innovations (Bradley and Warskett, 2015: 3). But for feminist political economy scholars, current regulation is actually eroding public services and the consequences of regulation densification are negative for working conditions of the mostly female workforce and quality of care (Bradley and Warskett, 2015).

Pat Armstrong’s claim about the regulation of LTC homes in Ontario serves as a useful starting point to illuminate the current regulatory regime. Her main argument is that while some regulation is necessary, especially at the policy level, the increasingly detailed regulations prompted by scandals have not served to create the conditions for accessible, quality care (Armstrong, 2013: 217). Furthermore, Armstrong argues that regulation cannot solve the problems created by the search for profit and for-profit methods in care (Armstrong, 2013: 217). She provides four reasons. The first is that the detailed regulations fail to take context into
account (Armstrong, 2013: 222; see also Banerjee and Armstrong, 2015: 24). The second is that regulations, especially when responding to scandals, can significantly alter plans and preferences developed within a facility (Armstrong, 2013: 223; Banerjee and Armstrong, 2015). The third is that detailed regulations require a great deal of reporting, with counting and recording construed as accountability (Armstrong, 2013: 223). And the fourth is that complaints do not result in significant changes in quality (Armstrong, 2013: 223-224).

Similar to Armstrong, Albert Banerjee is critical of the current state of regulation of LTC homes in Canada (focusing on Ontario), and traces its origin to the place of for-profit corporations in the provision of welfare services. He rejects reliance on the regulation and documentation of care work as a means of ensuring quality, because regulations tend to change the organization of caring work, constituting it as the completion of predetermined, standardized and documented tasks (Banerjee, 2013: 205-206). Regulation has become ideological, in the sense of a seemingly natural and accepted way of thinking about and responding to problems around quality of care — one that leaves resources, structures and political issues unaddressed (Banerjee, 2013: 206-207). These political issues concern for-profit ownership, resources and the role of the state (Banerjee, 2013: 213). The result is that the regulation of care work can detract from quality, paradoxically resulting in calls for further regulation (Banerjee, 2013: 213).

One way of interpreting Armstrong’s and Banerjee’s work is to align it with the argument that the rise of regulatory state signifies the rise of neoliberalism and the belief of markets as superior mechanisms for maximizing the public good (Levi-Faur, 2014, 603; see also Taggart, 2005). Their work supports the claim that the growth and complexity of the mix of private and public provisions of welfare serves as a source of regulatory expansion (Levi-Faur, 2014, 600). Their work makes a persuasive case for tackling the more fundamental political questions about the LTC sector, including the government’s role in providing care. One premise implied in their work is that if those political questions are not avoided, the state’s role will be reaffirmed and the non-profit sector’s prominence will be restored. However, it is also plausible that the opposite would be true: there could be a firm rejection of both the (welfare) state’s role and the non-profit model in the delivery of care. As Levi-Faur observes, the state can retrench, stagnate, and expand with the retrenchment, stagnation, and expansion of each of the instruments (i.e., regulation and fiscal transfers) independently (Levi-Faur, 2014, 604).

Furthermore, the claims made by Armstrong and Banerjee may be too general. For instance, it is not clear if there are parts of the regulatory regime that require more detailed rules (or standards). The authors make a strong case regarding the contribution of under-resourcing the provision of care to the growth of detailed rules, especially facility-level regulation (Banerjee and Armstrong, 2015: 24-25). This does not necessarily support a more simplified regulatory regime. Indeed, one could ask what an alternative — presumably more simplified — regulatory framework would look like. Banerjee and Armstrong support a principled and dialogical approach to facility regulation, which should guide an inspection process that relies on dialogue with residents and care workers, rather than on documentation for verification (Banerjee and Armstrong, 2015). It is not immediately clear why an adequately resourced LTC sector would negate the need to regulate certain aspects of care work. This underscores the need for future work to identify more detailed criteria or guidelines that distinguish the content of justified complexity from unnecessarily detailed rules that could be detrimental to a particular policy.
objective (for example, quality care).

**Law’s complexity**

The explanation of what Banerjee called the “regulatory trap” will be more complete if one takes into account certain trends and themes in law. The topic of legal complexity (which will be defined later) has generated interests from practicing lawyers as well as legal scholars. Scholars are interested in the causes or origins of complexity, its consequences and how to reduce it. At one end of the spectrum, scholars integrate the notion of complexity into a very specific existing legal debate, for example, rules vs. standards (Kaplow, 1990 and 1995). At the other end, scholars address complexity at a more abstract level, for example, analysis of the legal system using “complexity theory” (Harris, 2013: 30; see also Ruhl, 2008). Using the concept of complexity provides an alternative lens with which to view the regulatory regime in the LTC sector.

Peter Schuck’s definition of legal complexity helps us to describe the phenomenon of “increasingly detailed regulation” beyond quantity. He correctly points out that legal complexity can only be located on a continuum that ranges from extreme simplicity at one end to extreme complexity at the other. Thus, a legal rule, process, or institution is only more or less simple or complex compared to some other actual or ideal one (Schuck, 1992: 5). The definition is a composite of four variables: “a legal system is complex to the extent that its rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty” (Schuck, 1992: 3).

Although Schuck’s main argument centres on the claim that legal complexity is increasing and this is problematic for a system of justice, his work also provides an important caveat about simplicity and simplification. Simpler law is not always better law; complexity can be both a weakness and a strength (Schuck, 1992: 8). Indeed, legal complexity sometimes creates fairer, more refined, more efficient, even more certain forms of social control (Schuck, 1992: 8). The critical question that one must ask is: All things considered, are the benefits of a given level of complexity worth the costs (Schuck, 1992: 8)? Generally speaking, complexity-induced costs can be both inefficient and unfair (Schuck, 1992: 19), and more importantly, can stultify a society that often depends on vigorous action in problem-solving because complexity promotes passivity and entrenches the status quo (Schuck, 1992: 19). Last but not least, complexity is not neutral in its effects; it advantages some groups and disadvantages others. Once citizens begin to suspect that these advantages and disadvantages are unfairly distributed, and that this distribution is purposeful, it may result in profound cynicism about and alienation from the legal system (Schuck, 1992: 23).

**Law and the welfare state**

The proliferation of rules in the LTC sector can also be explained by the more general trend of greater complexity of law governing the welfare state. Neville Harris explores complexity as a dominant characteristic of the modern welfare system in the United Kingdom and elsewhere, including Australia, New Zealand, Germany and Sweden (Harris, 2013: 3). He concludes that law and structure of the modern welfare state must continue to reflect the welfare
system’s role in identifying and responding to diverse social circumstances and individual needs while also advancing various social and economic policy agendas. As a result, the complexities are inevitable and they can only be reduced, not eliminated (Harris, 2013: 236). But simplification is a worthy goal, particularly if it helps ensure that individuals have access to their proper entitlement, and if it supports the accepted value of the benefit system and its rules (Harris, 2013: 245).

The range of theoretical and practical considerations that one may take into account when assessing complexity will prove to be helpful in distinguishing regulation that can be justified from those that does not serve any useful purpose. Harris considers the question of whether complexity is also defensible. One of the main supporting arguments for complexity rests on the desirability of ensuring that entitlement closely matches the diverse requirements of each individual or family unit that the welfare system seeks to support (Harris, 2013: 236). By contrast, rules that apply relatively simple criteria to entitlement may offer a somewhat crude response to social needs. For example, simpler rules (age thresholds for certain entitlements) may be predicated on broad and simplistic assumptions about how people do or should live their lives; unfairness may result from such rules (Harris, 2013: 238-239).

Another way of defending complexity is to attend to the need for continual adjustments in the face of social and economic trends, policy shifts, and the impact of judicial decisions (Harris, 2013: 244). Within the British welfare system, there are a range of programmes designed to respond to the transitions in people's lives that affect their capacity for self-reliance. It is assumed that citizens want the welfare system to help insulate individuals from the financial effects of various circumstances, such as living with disability, raising children without employment income, or reaching the end of working life due to old age or infirmity. At the same time, citizens expect benefits to be targeted only on those considered to have real needs, and they want consistent treatment. Equally important, citizens want decisions to be accurate, with an effective process for correcting erroneous decisions. A system designed to meet all these objectives is not going to be simple (Harris, 2013: 244). To complicate this further, law is used to establish control and certainty, but it is also expected to be adaptive as new or unpredicted situations arise. As a result, frequent limited amendments are made to the law to reflect minor policy shifts and to respond to loopholes or unpredicted outcomes that arise during application (Harris, 2013: 32).

In sum, the complexity literature can extend the debate about the regulation of LTC homes by situating the issue of care within the context of legal developments, especially in relation to changes within the welfare state. Understanding the broader question of what law is being used to do is important in terms of explaining the changes or shifts in law. The insights about the pros and cons of complexity of law provide us with the language to discuss regulation in a more precise manner. In the next section, I will shift from a theoretical perspective to an empirical account.
Case study: A New Legal Regime for LTC Homes in Ontario

This section will illustrate how the law has changed by examining three examples of “new” requirements. I will first explain my methodology, followed by a brief background on the LTC sector in Ontario. In each example, I will highlight the key changes in law and the perceived problems that these changes are intended to solve. In particular, I will briefly describe the previous legal regime (the repealed Nursing Homes Act), the perceived policy problems as explained in government reports, and the current legal regime (Long-Term Care Home Act or LTCHA).

Methodology

Legal research was conducted to find out the changes to law that are relevant to LTC care homes. I compared the repealed Nursing Homes Act with the new LTCHA. It is acknowledged that this comparison has its limitations because the requirements in the Program Manual (as part of the former regulatory regime) are not addressed here. The reason is that the Program Manual was eliminated completely in 2010 and the new guideline is to assist interpretation of the LTCHA so it would not be possible to do a comparison of “before” and “after” the transition to the new regime. I note that there was overlap between the Program Manual and the Nursing Homes Act and its regulations. Further, the LTCHA also adopts or builds on some of the requirements in the Program Manual.

This paper likewise relies on the review of government documents to ascertain the specific policy questions that were asked during transition to the new legal framework. This will help to contextualize and explain the legislative and regulatory changes that have taken place. To locate publicly available documents, I searched for reports related to LTC homes on the websites of the Ministry of Health and Long-Term Care, the Auditor General, the Standing Committee on Public Accounts, and the Ombudsman. My analysis of government documents was mostly inductive, as it took place at the beginning of the research project, when I was in the exploratory and discovery stage. The purpose of this stage was to allow understanding of critical themes and issues to emerge from the close study of texts (Bernard, 2013: 524-525). The review was done in two stages: each report was reviewed and analyzed separately, and then all the analyses were summarized to identify common themes. This paper does not address all the themes that appeared in the analysis of the reports.

Background: LTC sector in Ontario

LTC homes provide publicly-funded care, services and accommodation to people who need to have 24-hour nursing care available, supervision in a secure setting, or frequent assistance with activities of daily living, such as dressing and bathing. In Ontario, the 734 LTC homes may be for-profit, not-for-profit, or municipally run organizations, and regardless of ownership type, receive government funding for raw food, nursing care, social programs and so forth (Lai, 2015). LTC home residents also have to pay a co-payment of $1,775 to $2,535 per month (set by the Ontario Ministry of Health and Long-Term Care or MOHLTC), depending on the type of accommodations (single room vs. shared room). Residents may also elect to pay for extra services, such as hairdressing, cable TV and telephone services (MOHLTC, 2015).
The MOHLTC is both the primary funder and regulator of the LTC sector. MOHLTC transfers funding to regional health authorities (called Local Health Integration Networks), which in turn establish accountability agreements with the LTC homes in their regions and provide funding in accordance with such agreements. MOHLTC is responsible for regulating the sector mainly through the following ways. Through its enforcement and compliance program, MOHLTC ensures LTC homes are compliant with the applicable law. MOHLTC also influences the delivery of care through its agency in charge of quality of the health care system (called Health Quality Ontario) (see Excellent Care for All Act).

The Ontario LTC sector has gone through a phase of rapid expansion.iii One way of describing the expansion is to assess the capacity of the sector in terms of quantity of care. The number of beds increased from 57,000 in 1998 to 74,000 in 2005 (Standing Committee on Public Accounts, 2005a: P-379), and to 76,000 in 2014. This increase inevitably required corresponding year-over-year increases to the budget of the Ministry of Health and Long-Term Care (Standing Committee on Public Accounts, 2005a: P-389). The increase in funding pays not only for the operating costs of those beds, but also for other initiatives intended to improve the experiences of residents, such as increased funding for resident and family councils (Standing Committee on Public Accounts, 2005: P-380).

The parallel changes in law governing the sector and the corresponding compliance system are also significant. Since 2004, the government has identified “uniform standards, uniform enforcement and uniform penalties” (MOHLTC, 2004a: 25) as one of the objectives in reforming the sector. To initiate reforms in the sector, the former Parliamentary Assistant to the Minister of Health and Long-Term Care, Monique Smith, conducted a review of the sector, releasing her report in Spring 2004 (MOHLTC, 2004a). A discussion paper indicating the government’s legislative priorities and soliciting feedback followed in November 2004 (MOHLTC, 2004d). While preparing a new statute, which was tabled in 2006, the government continued to implement non-legislative measures, such as additional funding to improve the delivery of care (MOHLTC, 2004b and 2004c). Prior to the proclamation of the LTCHA and its regulation, the Ombudsman reviewed the compliance system between 2008 and 2010 (Ombudsman, 2008, 2010 and 2013). In 2008, the government also released a vision for quality in the LTC sector (MOHLTC, 2008).

At first glance, it appeared that the government delivered its promise by repealing three similar statutes (Nursing Homes Act, Homes for the Aged and Rest Homes Act and Charitable Institutions Act) and the program manual, and implementing the LTCHA and its Regulation in July 2010. This brought all LTC homes under the same legal framework. However, the legal picture is less clear when one takes into account the various reporting obligations originating from multiple statutes, the best practices from guidelines (soft law), and the efforts required to demonstrate compliance.
Three examples of changes in law

Due to space constraints, it is not possible to describe all the changes implemented by the LTCHA. Instead, I will describe three examples related to residents’ rights and entitlement: Residents’ Bill of Rights, Safety and Security of Residents, and Compliance and Enforcement. These examples were chosen so we can identify changes during the period between 2004 (the first full year of the current Liberal government) and 2010 (when the Act and Regulation were proclaimed).

Example 1: Residents’ Bill of Rights

The *Nursing Homes Act* contained a Residents’ Bill of Rights that included 19 rights (clauses). The rights related to the care, treatment, living circumstances and participation of residents in homes. They ranged from very tangible entitlement (such as the right to live in a safe and clean environment in s.2(2)18) to more intangible (but no less important) rights (such as the right to form friendships and enjoy relationships in s.2(2)13). Some rights were procedural (such as the right to be informed of any law, rule or policy affecting the operation of the home in s.2(2)16), while others were substantial in nature (such as the right to be properly sheltered, fed, clothed, groomed and cared for in s.2(2)2). The *Nursing Homes Act* also enshrined the ability of residents to enforce their rights; these rights could be enforced as if a contract had been entered into between the resident and the home (s.2(4)).

The notion of rights appeared in government documents but it was not apparent what exactly the government was trying to accomplish. In the 2004 discussion paper, there were a few references to acknowledge residents’ rights. The government identified “residents’ rights and safeguards to combat abuse and neglect” as one of the five major areas that would be addressed in the proposed new legislation (MOHLTC, 2004d: 4). The discussion paper also suggested that the Ministry would propose changes in the new legislation to strengthen residents’ rights and make residents’ rights and safeguards more enforceable (MOHLTC, 2004d: 13). However, there was no discussion as to why the existing Bill of Rights needed to be strengthened or which rights should be expanded or modified. In the 2008 report, the only reference to residents’ rights is regarding the trade-offs between empowering individual interests and competing collective interests or individual safety (MOHLTC: 2008, 5).

In the LTCHA, the Residents’ Bill of Rights contains 27 rights (clauses). However, this should not be interpreted as an additional eight rights for residents. In general, the majority of these additional rights are wording clarifications and expansions of the scope of existing rights. Rights which are new or amended are summarized in the table below:
<table>
<thead>
<tr>
<th>Changes</th>
<th>Nursing Homes Act</th>
<th>LTCHA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to receive care and assistance towards independence</td>
<td>Consistent with individual’s requirements</td>
<td>Based on a restorative care philosophy</td>
</tr>
<tr>
<td>Right to meet privately in a room that assures privacy</td>
<td>With spouse</td>
<td>With spouse or anybody</td>
</tr>
<tr>
<td>Right to have family members present</td>
<td>When death is imminent</td>
<td>When dying or very ill</td>
</tr>
<tr>
<td>Personal health information</td>
<td>Kept confidential in accordance with law</td>
<td>Kept confidential Have access to their records in accordance with law</td>
</tr>
<tr>
<td>Right to have any friend or family member or other person to attend any meeting with the home or staff of the home</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Right of individuals to have their lifestyles and choices respected</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Use of restraints</td>
<td>Right to be fully informed about the procedure and the consequences of receiving or refusing them.</td>
<td>Rights not to be restrained (except as allowed by law)</td>
</tr>
</tbody>
</table>

Source: Author. Also see Advocacy Centre for the Elderly, 2010.

Example 2: Physical safety and security of residents

A recurring theme in the government reports surveyed was the vulnerability of LTC home residents, usually linked to harm — actual or potential — they may suffer as a result of the care (or lack thereof) received in homes. For example, in 2004, the former Parliamentary Assistant, Monique Smith, stated: “Ontarians need to have confidence that our most vulnerable seniors are protected from harm.” (MOHLTC, 2004a: 13). In 2005, the former Deputy Minister Ron Sapsford remarked: “This is a very sensitive and very vulnerable population of Ontario residents. Certainly we’re very engaged in ensuring that the framework around how care is given and the standards we would all expect are in fact achieved and maintained” (Standing Committee on Public Accounts, 2005: P-385). To prevent harm from being inflicted on residents, two areas of improvements have been made in the law: prevention of abuse and neglect, and use of restraints.

Prevention of abuse and neglect of residents

The Nursing Homes Act and its regulation contained very few references to abuse and neglect, and contained no definitions of “abuse” or “neglect.” However, every resident had the right to be free from mental and physical abuse (s.2(2)1). The Nursing Homes Act also outlined a reporting duty imposed on persons other than residents to report to the Ministry when there are reasonable grounds to suspect that a resident has suffered or may suffer harm as a result of
unlawful conduct, improper or incompetent treatment or care, or neglect (s.25(1)). Finally, it stated that no person shall dismiss, discipline or penalize another person because a report has been made to the Ministry (s.25(2)(a)).

Prior to the development of the new LTCHA, the government communicated its priority for addressing “elder abuse” without specifying the frequency, types, or causes of abuse and neglect in LTC homes. Although the problem was not clearly defined, the solution was evident: zero tolerance of abuse and neglect. Specifically, “[t]he government has zero tolerance for abuse and neglect in the long-term care system” (MOHLTC, 2004a: 16). This position was reinforced in the 2004 discussion paper: “The public must be confident that all residents in all LTC homes are protected from any and all forms of abuse and neglect and their rights are respected” (MOHLTC, 2004d: 13). This was to be accomplished by the following: expanded reporting duty, more training and education about abuse (recognition and prevention) for staff, enhanced whistleblower protection and strengthened residents’ rights (MOHLTC, 2004a: 16, 18, 23 and 25; MOHLTC, 2004d: 13-16). In contrast, the 2008 report did not refer to abuse and neglect.

The LTCHA reflects the recommendations from earlier reports. The key provisions about abuse and neglect are as follow: the LTCHA and its regulation include definitions for “abuse”, “emotional abuse”, “physical abuse”, “financial abuse”, “sexual abuse”, “verbal abuse” and “neglect” (s.2(1) of the LTCHA, and s.2(1) of the Regulation). Every home must have a written policy to promote zero tolerance of abuse and neglect of residents, and must ensure that the policy is complied with (s.20(1)). The LTCHA also specifies the content of such policy (for example, setting out the consequences for those who abuse or neglect residents) (s.20(2)). Further, a home must ensure that every incident of abuse or neglect is immediately investigated (s.23(1)(a)) and appropriate action is taken (s.23(1)(b)). The results of every investigation and every action taken must be reported to the Ministry (s.23(2)). Equally important, anyone (other than a resident) who has reasonable grounds to suspect abuse or neglect that resulted in harm or a risk of harm to the resident must immediately report to the Ministry (s.24(1)). The LTCHA also provides enhanced protection for those who make reports by making it an offence to suppress reports (s.24(6)). Last but not least, there are penalties for certain persons (for example, homes, staff and health care providers) who fail to make a report (s.24(5)).

Use of restraints

The Nursing Homes Act provided very limited guidance with respect to the use of restraints. In fact, there was no definition of “restraint” in the Act. Pursuant to the Residents’ Bill of Rights, “[e]very resident who is being considered for restraints has the right to be fully informed about the procedures and the consequences of receiving or refusing them” (s.2(2)8). The Regulation only required the use of physical restraints, including permissible situations where such restraints could be used, authorization, duration, regular assessment/monitoring, minimal conditions (not to cause harm or the least amount of discomfort), and written policies and procedures on the use of restraints (s.55, Regulation).

The use of restraints was referenced in the 2004 documents, but it was not immediately apparent what the perceived problems around the use of restraints were at that time. As noted above, the use of restraints was not necessarily unlawful, as long as certain minimum conditions
were met. However, there was no discussion about potential alternatives to restraints. It appears that the Nursing Homes Act did not provide sufficient details to clearly communicate the expectations around different types of restraints and proper safeguards. For example, “. . . there is currently a wide interpretation of the term ‘restraints.’ Some Compliance Advisors consider trays and recliners to be restraints while others do not.” (MOHLTC, 2004a: 18) The 2004 discussion paper simply stated that “Residents in LTC homes must be protected from improper use of restraints. Staff in LTC homes sometimes restrain residents for safety reasons using physical devices, medication, or by limiting where residents can go. There are concerns about how these physical, chemical and environmental restraints are used in LTC homes.” (MOHLTC, 2004d: 13) These concerns could be addressed by clear definitions of different types of restraints, conditions that must be met prior to their use, rules governing their use, requirements for authorizing, regular monitoring and documentation (MOHLTC, 2004d: 11-13).

The LTCHA offers more protection than the Nursing Homes Act and makes it clear of the objective of minimizing the use of restraints. The LTCHA contains more prescriptive requirements around the use of different types of restraints. The threshold for the lawful use of restraints is higher than the previous regime. First and foremost, the LTCHA states that every home must ensure there is a written policy to minimize the restraining of residents, and to ensure that any restraining that is necessary is done in accordance with the law (s.29(1) and (2)). Some of the new conditions that have to be met are as follow:

- There is a significant risk serious bodily harm suffered by the resident or another person;
- Alternatives have been considered, and tried where appropriate, but would not be, or have not been, effective;
- The method of restraining is reasonable, in light of the resident’s physical and mental condition and personal history, and is the least restrictive. (s.31(2))

Once a resident is restrained, there are additional requirements that LTC homes must comply with, such as periodic release and repositioning, regular assessment, documentation, and post-restraining care (s.110(5), Regulation). The LTCHA also specifies what homes cannot do: no resident can be restrained, in any way, for the convenience of the home or staff or, as a disciplinary measure (s.30(1)1 and 2). A list of prohibited devices that limit movement (for example, vest or jacket restraints) is also prescribed in the Regulation (s.112).

Example 3: Compliance and enforcement

The Nursing Homes Act and its Regulation provided little specific guidance with respect to compliance and enforcement. The Nursing Homes Act specified the powers of inspectors (s.24(4)), the obligation to produce and assist an inspector’s request for records (s.24(11)), and the prohibition of obstruction to any inspection (s.24(12)). The Regulation also prescribed requirements about distribution, posting and sharing of inspection reports (s.98), and steps to be taken by homes when they receive notices of non-compliance from inspectors (s.97).

The issue of compliance and enforcement is a recurring theme in the reports. One could identify a shift in the government’s approach to defining and enforcing compliance from strict compliance with law to more flexibility for homes in determining how best to deliver care. In the earlier reports, the policy problem was perceived to be a lack of or under-enforcement of
standards, which were inconsistent to begin with. “There must be clear, measurable, enforceable, resident-focused standards with enforceability of standards being key” (MOHLTC, 2004a: 5). It was explained that “[t]he public expects tougher enforcement and swift compliance” (MOHLTC, 2004a: 5), but “the current compliance system is not meeting public expectations for ensuring the safety and well-being of our seniors” (MOHLTC, 2004a: 5). This position was probably influenced by two earlier Auditor General Reports (2002 and the follow-up report in 2004) and the 2005 Standing Committee on Public Account Report on the 2004 Auditor General Report.

Accordingly, “developing clear enforceable standards with tougher inspection and enforcement” was identified as one of the five main areas for government action (MOHLTC, 2004a: 4). Similarly, the 2004 discussion paper indicated that the new act would focus on “compliance, inspection and enforcement programs in long-term care homes” as one of its five major areas (MOHLTC, 2004d: 3). The objective was “to make operators fully accountable for care standards and for the proper use of Ministry funds” (MOHLTC, 2004d: 16). This would build on the non-legislative or regulatory changes already underway to improve the compliance system, including more resources (in terms of ministry staffing and budget) and increased transparency through the enhancement of internal tracking and public reporting of information about homes (MOHLTC, 2004a and 2004d).

However, one could also identify tension between “strict compliance” with the law and greater flexibility in targeting compliance. In earlier reports, it was acknowledged that there could be more nuances with respect to compliance than just “going by the books.” More specifically, it was believed that LTC homes do not necessarily constitute a homogenous sector. For instance, it was suggested that homes with a record of good performance should be inspected once every two years, and more resources should be devoted to homes with a poor track record or chronic non-compliance (that is, a risk-based approach) (MOHLTC, 2004a: 19). The 2008 report that summarized consultation on quality vision in the LTC sector noted that there was interest in associating compliance process with more positive change and less punitive action (MOHLTC, 2008: 12). Some participants identified that having to meet inflexible compliance requirements took time away from meeting the needs of residents (MOHLTC, 2008: 4). In addition, it was recommended that compliance advisors should become enablers rather than enforcers of standards (MOHLTC, 2008: 12). These tensions also appeared in the 2008-2010 Ombudsman review of the LTC sector. For example, one identified issue was that different regional offices fostered divergent enforcement approaches; some placed emphasis on cultivating an advisory relationship with homes, while others pursued an enforcement approach (Ombudsman, 2010: 2).

The LTCHA defines a more prescriptive compliance and enforcement system (Part IX of the LTCHA). The Preamble of the LTCHA states:

“The people of Ontario and their Government:

...Firmly believe in clear and consistent standards of care and services, supported by a strong compliance, inspection and enforcement system;
Recognize the responsibility to take action where standards or requirements under this Act are not being met, or where the care, safety, security and rights of residents might be
compromised;” (Preamble, LTCHA)

It should be noted that not all of the legal requirements are new, in the sense that they have never been implemented. Indeed, some legal requirements simply formalize existing Ministry policies or approaches. For example, prior to the LTCHA, the Ministry adopted the practice of unannounced visits to homes and annual inspections (MOHLTC, 2004d: 4). The LTCHA includes provisions that mandate annual inspections of homes and no prior notice should be given of such inspections (s.143 and s.144). Some requirements are new, in the sense that they are strengthened requirements or represent more clearly articulated expectations. The LTCHA specifies the action(s) that an inspector must take if a home has not complied with the LTCHA, the types of orders that can be issued against the home (for example, order a home to prepare, submit and implement a plan for achieving compliance), and the recovery of costs from the home (s.152 and s.153). Furthermore, where there has been a finding of non-compliance, the criteria to be considered in determining what actions to take or orders to make are: severity, scope and history of non-compliance (s.299, Regulation).

The legal framework also enables the new compliance program: Long-Term Care Home Quality Inspection Program (LQIP) (generally see Banerjee, 2013; Lai, 2015). It should be noted that the details of this program are in the form of inspection guidelines (31 in total). These guidelines explain how government inspectors intend to determine the meaning of compliance, such as what types of documents they have to check, who they have to talk to, and which questions they have to ask.iv

Discussion

In this section, I consider the tentative observations regarding the complexity of law that can be drawn from the above examples. Then I will explore what these observations may tell us about a more fruitful way to engage the debate about extension of the regulatory state in social policy.

First, law is used to provide guidance and certainty to residents about their rights and entitlements. Some level of legal complexity is necessary and justifiable; in fact, it is desirable to a certain extent. One could argue that law is in the business of telling people what to do (Priel, 2012); this inevitably leads to considerations about whether the law can provide sufficient details so that people know what to do or what to expect in specific situations (for example, see Kaplow on the debate about rules vs. standards in terms of providing guidance to individuals for future behaviour). In the social policy context, it is more apt to explore how law may serve different purposes for different actors (service delivery agents, regulator and beneficiaries or clients). In particular, “the regulated” actually includes LTC homes and their employees, residents, their families and friends.

In the LTC sector, requirements are indeed highly prescriptive and entail much documentation (for example, checklists). However, rules exist not just for those who must comply with them; they are also intended to provide certainty to those who may potentially benefit from the protection afforded by those rules. Consider the example of the use of restraints. The previous legal regime did not prescribe many rules about the use of restraints, and
the rules they did provide did not reflect the types of restraints being used in real life. There is no doubt that the new regime under the LTCHA could be considered onerous for homes and their staff. The issue is that perceptions of complexity may vary in accordance with individuals’ backgrounds and perspectives (Harris, 2013: 15). From the perspectives of residents and their families and friends, it might be more helpful to know exactly what is involved when a resident is restrained, including the assurance that the resident is being checked on every 15 minutes (at least that’s the legal requirement). This paper takes no position with respect to the factual correctness of those standards; the point is that when we consider the prescriptive nature of law, the perspective of those who are supposed to be protected by law should be factored in.

Second, law becomes more complex because it attempts to address the diverse needs and circumstances of those who are subject to it. The changes to the Bill of Rights may be interpreted as the law slowly catching up with the changing circumstances of residents. For example, the Nursing Homes Act contemplated residents meeting with their spouses in private (s.2(2)14), but the LTCHA contemplates residents meeting with their spouses or other persons in private (s.3(1)21). Similarly, the Nursing Homes Act did not contemplate friends being present when a resident was dying or very ill. These examples are indicative of law’s ability to encompass specific scenarios of how rules may be applied (in our case, how rights may be exercised) in order to avoid being under-inclusive. But it is hard to argue with the observation that by being more inclusive, the law could also become more complex. In fact, the law could become so complex that it can no longer do what it is intended to do. Sometimes, more complex law is used to acknowledge diverse needs; whether this will lead to the satisfaction of those needs is a question that can only be addressed empirically.

Third, law’s complexity may result from the government’s attempts to make law appear to be legitimate in the eyes of homes, residents, their families and friends, and the general public. Arguably, in a policy setting where the government cannot rely on hierarchical control, it is even more difficult to define and claim legitimacy as the government may be more removed from policy output as well as outcome. For instance, there is a tension between creating uniformity of standards (and their consistent application) and giving homes and staff the flexibility to respond to the individual needs of residents within a local context. If inspectors have too much discretion in determining whether a home is complying with the law, homes may eventually question the legitimacy of the government’s role in regulating the sector. Similarly, if homes have too much discretion in determining the rights and entitlements (for example, number of meals per day) or preventing harm, residents and families may question the legitimacy of decisions made at the local home level. The result is that there have to be more rules in order to limit the discretion of decision makers (including front line care providers).

Fourth, law’s complexity results from the difficulties associated with setting appropriate boundaries or limits about the role of the state in regulating an area where the public/private divide is less well-defined and may be shifting. Residents, their families and politicians alike continue to insist that LTC homes are primarily residents’ homes. Indeed, the “home” principle is enshrined in s.2 of the LTCHA: “... a long-term care home is primarily the home of its residents...” Here law is used as an “embodiment of collective desires and aspirations” (Sunstein, 1990: 57). However, this is also a public benefit scheme, which — rightly or wrongly — entails detailed requirements around the state’s responsibilities towards its citizens,
entitlement, and roles and responsibilities of delivery agents, especially with respect to financial management. It is acknowledged that fragmentation of service provision possibly led to greater reliance on formalised, rigid forms of control (Yeung, 2010: 67) such as systems of monitoring, benchmarking and auditing (Mabbett, 2011: 217; Bradley and Warskett, 2015). One could argue that some of these requirements, if they are outdated, unclear, not adequately communicated or too numerous (see Ombudsman, 2010), would not necessarily contribute to the quality of care (Bradley and Warskett, 2015). Finally, a home is also a place of employment for the care givers. This means there must be (or should be) economic regulation, including protections for workers in terms of employment standards and occupational health and safety.

Accordingly, law has to embody the state’s role in a private domain, a public benefit scheme, and a workplace. The appropriate scope of the state’s actions/involvements may be different in each of these areas and will continue to evolve over time. The changes in law should be interpreted as attempts to change the law to conform to the evolving understanding of the state’s actions/involvements in these different areas. It is understandable that law has to be more complex in order to reflect and reconcile these conflicting roles. This is a healthy tension for the purpose of theorizing regulation as it calls for a more detailed differentiation of the features and functions of the state – regulatory and welfare - in order to move away from the pure “trade-off” thesis. It may well be that we have to dislodge any attempt to speak of the role of the state; rather, it may be more accurate to speak of roles at different points in time.

This takes us back to the debate about whether the rise of the regulatory state means the decline of the welfare state. In this case study, the regulatory state comes to rescue of the welfare state (to borrow Mabbett’s and Levi-Faur’s expression) in the sense that regulation (through law) is used by government to reform the provision of care gradually and incrementally without completely relying on market mechanisms or traditional hierarchical control. The Ontario government’s policy about LTC is in part reconstituted as a domain for responding to the diversity and needs of “the regulated”, in particular residents and their families and friends. Rather than succumbing to fiscal pressure and logic of the market completely, the Ontario government attempts to control entitlement and access to the LTC program by framing provision of care in the language of rights. This provides an alternative way to justify the on-going existence of the program and its budgetary increases as the government appears to be merely trying to meet its legal obligations with respect to residents and their families and friends.

By demonstrating how perceived problems in the LTC sector can be addressed by legal solutions, the government attempts to use fiscal transfers more effectively and strategically in the sense of transforming how law creates and maintains the relationships between the regulator and the regulated and among the regulated. This is because those fiscal transfers can now be linked to attempts to control the behaviour of the regulated: duties as part of a regulatory scheme must be supported financially at least in part by government. But the issue of control is more difficult to address when the LTC homes are not owned and operated by the government and the for-profit LTC homes have to be accountable to their shareholders. A more formal and comprehensive system of compliance is used to defend and justify the government’s role in the sector as the government cannot rely on hierarchical control over disperse LTC homes and health care providers.
This is not to say those regulatory measures have succeeded in making LTC policy immune from fiscal and political pressures generally directed towards the welfare state. This paper addresses only what law is being used to do by focusing on what the law says on the books and why; the practical implications of law should be investigated empirically. It would be premature to declare the resilience of the welfare state if only the right regulatory measures are introduced to shape the objectives and mechanisms of social policy. However, by incorporating a regulatory perspective into the study of social policy, this paper brings a sharper focus into the analysis about the interaction and relationships of regulatory measures and fiscal measures. This contributes to advancing our understanding of how regulation is driven by motivations of the state in addition to long-standing concerns such as economic efficiency.

Conclusion

In this paper, my research question is grounded in the debate about the relationship between the regulatory state and the welfare state. I started with the definition of regulation and then described the theories I used to explain the regulation of LTC homes in Ontario. From the feminist political economy perspective, the current diagnosis of the LTC sector is that regulation is both a technical fix to a problem created by search for profit and a source of problems itself. I used the concept of legal complexity to identify questions emerged from the feminist political economy literature. The insights about the pros and cons of complexity of law provide us with the language to discuss regulation in a more precise manner. The paper then moved on to discuss three examples of changes to regulation drawn from the LTC sector: 1) Residents’ Bill of Rights; 2) safety and security of residents and 3) enforcement and compliance. The last section of the paper outlined my preliminary observations drawn from these examples. I concluded by returning to the issue of whether the rise of the regulatory state means the decline of the welfare state.
End Notes

i The three previous Acts are similar but not identical, but a comparison of all three previous Acts with the new LTCHA will be repetitive. The *Nursing Homes Act* was chosen because, at the time of transition to the new legal framework, more than half of the beds were delivered by the private sector and subject to the *Nursing Homes Act*. The *Homes for the Aged and Rest Homes Act* was for municipal homes and the *Charitable Institutions Act* was for non-profit homes. James Struthers provided an account of the origin of the *Nursing Homes Act* (Struthers, 1997).

ii *A Guide to the Long-Term Care Homes Act, 2007 and Regulation 79/10* provides a general overview of the LTCHA and the Regulation. The Guide does not address all aspects of the LTCHA and the Regulation and is made available for convenient reference only. In fact, the Guide only addresses Part 1 to Part IV of the LTCHA (the LCTHA is divided into ten parts).

iii In 1998, the Conservative government announced an eight-year plan to provide 20,000 new long-term care beds and to renovate non-compliant homes containing 13,583 beds. In March 1999, it announced that the new beds would be completed by 2004. The number of beds to be renovated by 2006 was later revised to 15,835 (Standing Committee on Public Accounts, 2005).

iv The 31 protocols are divided into the following categories: 1) Home-Related Mandatory; 2) Inspector-Initiated; 3) Home-Related Triggered; and 4) Resident-Related Triggered (MOHLTC, 2013).

v This is not a new observation about the long-term care home sector as Braithwaite & Braithwaite also noted this problem in a 1995 article. In the U.S., homes complained to their industry association about the vagueness of the standard leading to “subjective” and “unfair” judgements by inspectors. The industry association representing these member grievances pleaded for the standards to be “tightened up.” Consumer groups also agreed that the standards should be made more specific because they were concerned that vague standards are unenforceable (Braithwaite & Braithwaite, 1995: 319).
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