




RESEARCH ARTICLE / ARTICLE DE RECHERCHE

How enforcement shapes compliance with legal rules: the case of long-term care homes in Ontario

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Abstract

This paper contributes to the legal and socio-legal literature on long-term care (LTC) facilities (also known as nursing homes) by drawing from the responsive regulation literature and empirical research conducted in 2021 and 2022. Enforcement is an under-explored aspect in the legal and socio-legal literature on LTC. This research asks how the regulator's enforcement activities shape compliance of LTC homes in Ontario. This paper reports the results from eleven semi-structured key informant interviews with associations that represent LTC facilities, advocacy organizations, unions, and professionals, such as lawyers. The current enforcement activities do not appear to evoke responsiveness in at least some of the LTC homes because the regulator's approach is not dynamic: the regulator does not change its mix of "persuasion" and "coercion" in order to respond to the motivations and behaviours of homes. Inspection and enforcement activities have had little impact on how homes respond to rules.

Keywords: Compliance; Responsive regulation; Deterrence; Long-term care; Enforcement; Nursing homes; Smart regulation

Résumé

Cet article contribue à la littérature juridique et sociojuridique sur les centres de soins de longue durée (SLD), aussi appelés « maisons des aînés ». Pour ce faire, cet article examine les écrits relatifs à la réglementation réactive (*responsive regulation*) et se fonde sur des recherches empiriques menées en 2021 et 2022 afin de montrer que l'application de la

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réglementation est un aspect sous-exploré dans la littérature juridique et sociojuridique sur les centres de SLD. Par une telle approche, cette étude cherche à examiner comment les activités d'application de la loi de l'organisme de réglementation peuvent façonner la conformité des centres de SLD en Ontario. Cet article présente les résultats de onze entretiens semi-structurés avec des informateurs clés tels que des associations qui représentent les centres de SLD, des organismes de défense des droits, des syndicats, des avocats, etc. Les activités d'application actuelles ne semblent pas susciter de réactivité dans la plupart des centres de SLD puisque l'approche du régulateur n'est pas dynamique : il n'y a pas de changement dans les pratiques de « persuasion » et de « coercition » afin de répondre aux motivations et aux comportements des centres. Les activités d'inspection et de mise en application n'ont donc que peu d'impacts sur la façon dont les centres répondent aux règles.

Mots clés: conformité; réglementation réactive; dissuasion; soins de longue durée; application de la loi; maisons des aînés; réglementation intelligente

Introduction

There is continuing interest in how to reform the funding and regulation of long-term care (LTC) (nursing homes) given the harms suffered by LTC residents around the world during the COVID-19 pandemic. This article reports on a project which found that the enforcement of regulatory requirements has been ineffective in changing the behaviours of LTC homes in Ontario. In Ontario, LTC is commonly understood as institutional or facility-based care that is regulated and (at least in part) funded by the provincial government. Residents require access to twenty-four-hour nursing and personal care, and assistance with most of or all daily activities such as eating, bathing, and dressing (Auditor General of Ontario 2021). In contrast, other facilities such as retirement homes (which are not publicly funded) are for individuals who are more independent than those in LTC homes, and medical and personal care is limited (Estabrooks et al. 2023).

This article contributes to the legal and socio-legal literature on LTC by exploring the role of enforcement in identifying and preventing harmful practices or deficiencies in care. The legal and socio-legal literature sheds light on harmful practices in LTC, such as involuntary confinement or segregation (Steele et al. 2020) and abuse (Harding 2021), as well as broader structural issues that exacerbate these problems, such as funding (Harding 2021) and institutional risk management culture (Steele et al. 2020). Regulation, sometimes in the form of top-down command and control, is used to prevent or control harmful practices. However, despite detailed legal rules (e.g., see Daly 2015), scandals and tragedies continue to occur in LTC around the world.

A gap in the legal and socio-legal literature on LTC is that it rarely addresses two important questions: 1) What is it that LTC homes should be asked to comply with? and 2) What kinds of strategies are used to enforce compliance? The importance of enforcement cannot be underestimated (Meenan, Rees, and Doron 2016). As Kohn (2021) explained, under-enforcement of federal regulations contributed to the shocking death rates in US nursing homes during the

COVID-19 pandemic. In the Canadian context, Flood, Thomas, and White (2021) identified direct regulation by provincial governments, particularly in relation to for-profit providers, as often too weak or under-enforced (30–31). While existing studies have identified weak or infrequent enforcement as one of the problems that contribute to poor care, few have looked at the logics of enforcement strategies on the one hand, and the motives and reactions of LTC homes to such strategies on the other. It is important to recognize the effectiveness of inspection as an integral part of enforcement because it is one tool that can be used to support government oversight of LTC homes.

As the role of regulatory enforcement in preventing harm to residents remains under-explored in legal and socio-legal work on LTC, this article addresses this limitation by connecting compliance theories with experience of participants in the LTC sector in Ontario. The field of compliance examines the interaction between rules and conduct of individuals and organizations (van Rooij and Sokol 2021), and specifically how compliance develops both in everyday and corporate environments (Kuiper et al. 2023). Studies explore how factors such as motives, organizational capacities (e.g., human resources) and characteristics (e.g., size) of regulatees, regulation and enforcement, and social and economic environments (or institutions) drive compliance (Nielsen and Parker 2011). One of the most widely applied regulatory theories (Braithwaite 2011), namely responsive regulation, helps to explain why current regulatory approaches in Ontario are not working. The experience of industry participants can help inform what works and what does not work.

This article applies lessons from responsive regulation, along with results from key informant interviews, to explain why the regulator's approach in Ontario has been having little impact on homes. First, the article reviews the regulatory framework under the *Fixing Long-Term Care Act, 2021* (FLTCA) governing all LTC homes. The ministry is mandated to monitor regulatory compliance. However, it should not be assumed that all incidents of noncompliance impact resident care because the FLTCA also contains numerous procedural requirements. Next, the article introduces responsive regulation to identify ways regulatees may respond to enforcement. The methodology section sets out how information about the experiences of associations that represent LTC facilities, advocacy organizations, unions, and professionals, such as lawyers, was collected for the purposes of the present study. The findings section presents the interviewees' understanding of the shortcomings of the regulator's approach and their implications. Two consistent themes among responses were that, although regulatory interventions are made, little seems to change, and, moreover, the regulator's approach tends to be the same even when performance varies across the sector. Building on the responsive regulation perspective, it is argued that the regulator's approach is not dynamic: the regulator does not change its mix of "persuasion" and "coercion" to respond to the motivations and behaviours of homes. The reasons why this approach does not work are multiple. While it is recommended to start with measures at the bottom of the regulatory pyramid, it is evident that the

regulator does not hand out progressively more severe measures when problems persist. Further, because the majority of inspections are triggered by complaints from residents and their family members or by critical incidents reported by homes, inspections can only identify a portion of incidents of noncompliance. Without more inspections, the chances of breaches being detected remain low; therefore, homes know that the imposition of any consequences, not just escalation up the pyramid of sanctions, is extremely unlikely. Finally, pressures from residents and their family members are unlikely to lead to more compliant behaviours among homes because residents have nowhere else to go.

Context

LTC Sector in Ontario

In Canada, provinces and territories have developed their own LTC arrangements (Estabrooks et al. 2023). In Ontario, many provincial and local bodies are involved in the regulation and governance of the LTC sector. This article focuses on the Ministry of Long-Term Care (previously the Ministry of Health and Long-Term Care), which performs a policy development, funding, and inspections/compliance role for the sector (Ontario's Long-Term Care COVID-19 Commission 2021, 344).

To regulate and govern the sector, the provincial government relies on formal legal rules: the FLTCA (or its predecessor, the *Long-Term Care Homes Act, 2007* [LTCHA]). A plethora of policies on matters such as staffing, funding, redevelopment, and construction are applicable to homes (Ontario's Long-Term Care COVID-19 Commission 2021, 344). In addition, the government (sometimes through its agencies) enters various funding agreements with homes (Ontario's Long-Term Care COVID-19 Commission 2021, 36). Employees are subject to additional guidelines and directives (such as those issued by Accreditation Canada and Accreditation of Rehabilitation Facilities Canada if their homes are accredited by these agencies) but they are outside the scope of this study because ministry inspections are not intended to check compliance with other guidelines or directives.

Ontario's LTC sector includes 626 homes (approximately 78,000 beds): 58 percent are for-profit, 24 percent are not-for-profit (e.g., charities, community organizations, hospitals), and 16 percent are municipal (i.e., established and maintained by municipalities) (Ontario's Long-Term Care COVID-19 Commission 2021, 38). All homes are subject to the FLTCA but some requirements vary depending on the corporate status of the facility. For example, the maximum fine for a nonprofit home director or officer convicted of an offence is lower than the maximum fine for an individual in a for-profit home (s 192[3], FLTCA).

LTC is financed by public funding and private contributions. Even for-profit homes receive a certain level of public funding. All LTC beds receive the same base rate for programme and support services, nutritional support, and other services (e.g., laundry). Funding for nursing and personal care varies depending

on the complexity of residents' medical needs. As of April 1, 2023, the base funding was \$195.69 per bed per day (Ministry of Long-Term Care 2023). Municipalities also contribute funding to their municipal LTC homes over and above the provincial funding (Ontario's Long-Term Care COVID-19 Commission 2021, 80–81). The maximum fees that homes, including for-profit homes, can charge residents are prescribed in regulation (ss 290–311, O. Reg. 246/22: General).

Recent Developments

In response to various scandals and reviews of the LTC sector, the government has been trying to “fix” the sector since long before the COVID-19 pandemic. In addition to amending the LTCHA between 2010 and 2020 to address resident safety problems (Lai 2022, 43–44), the government also adopted a “risk-based approach” to compliance in its internal procedures and policies (e.g., see Ombudsman of Ontario 2023, 34, 113–14). Over time, the backlog of critical incidents and complaints continued to grow and the ministry did not have the capacity to tackle it (Auditor General of Ontario 2021, 68–69). The ministry developed methods to identify homes that were at risk and allocated resources accordingly (Auditor General of Ontario 2021, 71–72). The result was a shift to a complaint-based or critical incident-driven system—that is, most inspections are triggered by complaints or critical incidents. Nearly all homes received an annual comprehensive inspection in 2015, 2016, and 2017. In 2018, only 329 homes received a comprehensive inspection. In 2019, that number dropped to twenty-seven homes, and 97 percent of the inspections were reactive (Ontario's Long-Term Care COVID-19 Commission 2021, 69–70).

More recently, the government once again implemented a range of measures to “fix” LTC following various COVID-19-related reports and mounting public pressure. The FLTCA and its regulation (O. Reg. 246/22: General) became effective in April 2022. The FLTCA is similar to the LTCHA (now repealed) because it is intended to implement incremental changes related to various reviews' recommendations issued during the pandemic. The FLTCA permits additional sanctions (e.g., larger fines on conviction) and removes some of the less punitive measures (e.g., voluntary written plan of correction). In February 2023, the government announced that it had hired 193 additional LTC inspection staff, including 156 inspectors (Ombudsman of Ontario 2023, 79).

Enforcement and Compliance Activities

The FLTCA specifies that the responsibility for complying with the Act falls on the licensee of a home. For example, “Every licensee of a long-term care home shall ensure that the home is a safe and secure environment for its residents” (s 5, FLTCA). The “licensee” is the entity provided with government approval to operate an LTC home; that is, the for-profit or not-for-profit corporation, the municipality, or the First Nation responsible for the facility (Ontario's Long-Term Care COVID-19 Commission 2021, 333). A licensee's employees in turn must comply with the regulatory requirements.

Inspections are conducted primarily to ensure compliance with requirements under the FLTCA (see s 145) including directives issued under the Act (s 184). From the government's perspective, it is through compliance that residents' rights, safety, and quality of care are safeguarded (Ministry of Long-Term Care 2020). The preamble explains how inspections are intended to support broader administrative principles of public accountability and transparency (FLTCA, Preamble). Redress or resolution of individual complaints is not the main intended result of an inspection, although it might trigger improvements in a home.

There are two main categories of inspections: reactive and proactive. Reactive inspections include complaint inspections, critical incident (such as fire, sudden or unexpected death of residents, or residents missing for more than three hours) inspections, and follow-up inspections. Proactive inspections include annual unannounced comprehensive inspections and inspections of specific areas of concern as identified by the ministry (Ministry of Long-Term Care 2020). It should be noted that whistleblower protection is available to employees, residents, and family members (s 30, FLTCA).

Inspections may uncover incidents of noncompliance with the FLTCA. Some may relate to harm experienced by specific residents, such as failure to provide treatment or care, failure to attend to or assist residents, or failure to investigate allegations (Crea-Arsenio, Baumann, and Smith 2022). Others may relate to general care conditions within a home. For example, in *AXR Operating (National) LP v Director, Long-term Care Inspections Branch*, the home asked the Health Services Appeal and Review Board to rescind a compliance order that was issued by an inspector because the home did not comply with the regulatory requirement to have a registered nurse in the home at all times.

The law specifies a range of potential actions that an inspector must take if a home is noncompliant, such as compliance orders that can be issued against the home (ss 154–155, FLTCA). The factors to be considered in determining what actions to take are: severity, scope, and history of noncompliance (s 347, O. Reg. 246/22). More severe sanctions available to the ministry include administrative monetary penalties (fines imposed by inspectors or the ministry's LTC programme director), financial sanctions (direction to return or decision to withhold funding), a mandatory management order (retain a temporary manager to assist in managing the home), and the revocation of the home's licence (ss 156–61, FLTCA). With respect to transparency, all inspection reports and orders issued by inspectors are posted on the ministry's website. The performance indicators of homes (in terms of quality of resident care) are also posted on a government website (Health Quality Ontario 2023).

In sum, the current enforcement and compliance activities are neither designed, nor do they operate, to directly remedy a complaint that an individual resident or family has made. The ultimate goal is not to provide redress to complainants, but to get noncompliant homes to comply with the regulatory framework. There are other ad hoc regulatory requirements that support redress. Residents and families can also use reporting and complaint procedures within a home to complain, for example, about issues related to diet, activities, or care (ss 26–32, FLTCA). Furthermore, other parts of the justice system may play a

limited or indirect role in providing remedy or redress. For example, the FLTCA requires that the appropriate police service is immediately notified of any alleged, suspected, or witnessed abuse or neglect of a resident that the licensee suspects may constitute a criminal offence (s 105, O. Reg. 246/22). In addition, the coroner may investigate certain deaths in LTC homes (s 10[2.1], *Coroners Act*). Residents and their family members may also turn to other avenues such as the Human Rights Tribunal of Ontario, Patient Ombudsman, health regulatory colleges, or filing civil claims. A number of class actions related to COVID-19 are in various stages of certification (e.g., see *Nisbet v Ontario*). In a few years, these class actions will tell us more about justice for LTC residents.

Theoretical Perspectives

Before probing the enforcement of regulatory requirements, it is important to define regulation. Regulation is not limited to the use of legislative instruments to impose “command and control” behavioural constraints (Macdonald 1985, 82). Regulation may be reflected in the common law, social structures (such as religious institutions), and the market (Macdonald 1985, 136–37). This article brings together responsive regulation and complaints literature to help explain why the ministry’s formal regulatory approach has been ineffective in driving LTC homes to comply with regulatory requirements to prevent harm in LTC.

Responsive Regulation

The basic idea of responsive regulation is deceptively simple: “governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed” (Braithwaite 2002, 29). At its core, responsive regulation asks how regulators should deploy a variety of sanctions and supports to address the conduct of regulatees, which implies that punishment alone is not enough to ensure law-abiding behaviour. The foundation of deterrence theories is that increasing the likelihood and severity of punishment reduces the likelihood that the crime or offending behaviour will occur (Kuiper et al. 2023, 482). Scholars have theorized, however, why deterrence might not work well on its own (van Rooij and Sokol 2021). For example, deterrence may prompt firms and individuals to develop a “culture of regulatory resistance,” such as obfuscation and cover-ups (Gunningham 2011, 201; Hardy 2021, 137). Three aspects of responsive regulation are particularly useful in analyzing this case study: regulatory pyramids of sanctions, strengths-based pyramids of supports, and involvement of third parties, including civil society actors.

Although responsive regulation is a general regulation theory, its development was informed by regulatory failures in LTC (and other industries). In *Regulating Aged Care: Ritualism and the New Pyramid*, Braithwaite, Makkai, and Braithwaite (2007) exposed the shortcomings and accomplishments of the US, English, and Australian aged care regulatory systems. The authors observed a wide range of systemic ritualistic behaviours that did not improve the quality of care in nursing homes, but simply created the appearance that something was

being done. One example is rule ritualism, whereby the reflex is to write a rule instead of actually solve the problem (Braithwaite, Makkai, and Braithwaite 2007, 221). To transcend ritualism, the authors presented a dual-pyramid response: a regulatory pyramid of enforcement strategies and a strengths-based pyramid (Braithwaite, Makkai, and Braithwaite 2007, 315).

The regulatory pyramid of enforcement strategies can be described as a way of sequencing regulatory strategies. The pyramid matches a regulator's response to the regulatee's willingness and capability to comply. At the bottom of the pyramid is "the most restorative, dialogue-based approach for securing compliance with a just law" (Braithwaite, Makkai, and Braithwaite 2007, 276) such as education and persuasion about a problem. When the more modest forms of intervention fail, the regulator escalates to more punitive approaches such as criminal prosecution (Braithwaite, Makkai, and Braithwaite 2007, 276–77), signaling to the regulatee that the regulator will not go away until the problem is solved (Braithwaite, Braithwaite, and Burford 2019, 35). If the regulatee complies, then the regulator de-escalates down the pyramid (Hong and You 2018, 416).

It is important not only to pick problems and fix them, but also to pick strengths and expand them. In other words, pyramids of sanctions exist in parallel with pyramids of supports (strengths-based), such as praise and awards. If regulatory enforcement pyramids are about fear of sanctions, then pyramids of supports are about building hope and empowering communities to solve their own problems (Braithwaite, Braithwaite, and Burford 2019, 31). Using strengths-based pyramids helps regulators to focus on excellence, recognizing the accomplishments of the high performers and using these high performers as a benchmark to pull everyone's standards up. If regulators only use pyramids of sanctions, they are only focusing on the poor performers (Braithwaite, Braithwaite, and Burford 2019, 31–33).

Responsive regulation also presumes participation of market, state, and civil society stakeholders (in addition to the regulator and regulatees). Influence and pressure from various third parties—neither official regulators nor businesses themselves—might be harnessed or "enrolled" to drive business compliance with the law (Parker 2021). Third parties may contribute to the information-gathering, standard-setting, and behaviour-modification aspects of regulatory control (Hutter 2006, 1). For example, third parties may operate within a regulatory system by reporting to the regulator (Hardy 2021) or outside of a regulatory system by being part of a social movement (Braithwaite, Makkai, and Braithwaite 2007, 81–87). Even where regular inspection by a government agency may not be possible, "social stakeholders" (such as neighbours, activist organizations, and the general public) may fill the vacuum, bringing complaints or acting to shame recalcitrant businesses into compliance (Parker 2021, 42).

Complaints and Complaint Mechanisms

Complaint mechanisms can be conceptualized as a means to respond to the concerns of third parties, such as workers, service users, consumers, and their advocates. Complaints can serve two different purposes: to rationalize scarce enforcement resources or to bring justice to complainants. The ministry's

complaint-driven approach (i.e., inspections are triggered by complaints) is an example of regulators using complaints to determine when and where to inspect (Hardy 2021; Noack et al. 2020). But some argue that complaint handling should be justice-focused or that justice for complainants should be one of the purposes (e.g., see Wadiwel, Spivakovsky, and Steele 2022). Certain groups are underrepresented in formal complaints (Carney et al. 2016), such as people with disabilities (Wadiwel, Spivakovsky, and Steele 2022), people with dementia and their carers (Harding 2017, 134–69), older people (Doron et al. 2011), and care users such as care home residents (Preston-Shoot 2001). Underutilization is a serious concern because it can reflect disempowerment and lack of knowledge or confidence in the complaint system (Carney et al. 2016, 657). A lack of knowledge about the procedures, ignorance of their rights, and uncertainty about how to proceed deter potential complainants. Users may be skeptical about outcomes (i.e., feeling that complaints made little difference) and afraid of losing services or having them changed (Preston-Shoot 2001, 707). Previous findings about underutilization of complaint mechanisms help to explain why LTC residents and their families may not complain to the regulator in order to force their homes to change.

Regulatory studies assume that citizens are able to act as regulators to supplement or correct state and market forms of regulation. There is a growing literature that shows that citizens may fail to be effective regulators (Gray and van Rooij 2021). The research contributes to the responsive regulation literature by challenging assumptions as to the feasibility of enrolling third parties in enforcing compliance.

Methods

This article reports on the results from eleven semi-structured key informant interviews (Gilchrist and Williams 1999) with associations, advocacy organizations, unions, and professionals, such as lawyers. Key informants have access to perspectives and observations that would otherwise be denied to the researcher (Gilchrist and Williams 1999, 72). The potential participants were chosen using purposive sampling (Gilchrist and Williams 1999, 75). I reviewed publicly available information, such as witness lists from reviews and public inquiries, newspaper articles, and legal conference agendas, to identify potential interviewees.

Through the key informant interviews, I sought to understand how factors that are known to influence compliance and noncompliance in compliance studies affect the compliant and noncompliant behaviour of homes. I asked interviewees questions about:

- the motives of homes in complying with regulatory obligations and their internal characteristics and capacities that might affect compliant behaviour, such as availability of human resources; and
- how homes respond to regulatory interventions, such as deterrence.

Reforming LTC will require an assessment of existing interventions based on experience. The interviewees provided experience that illustrates why existing

interventions do not work and highlights some of the shortcomings in the regulatory framework.

Seven interviews were completed between July and August 2021, and four were conducted between January and May 2022. I received research ethics approval from my university, and all interviewees provided informed consent. Table 1 presents the interviewees captured in this article.

Each semi-structured interview lasted about one hour and was conducted over Zoom or by phone. Four interviews were conducted on a “with attribution” basis and seven were conducted on a “without attribution” (anonymous) basis. With the interviewees’ permission, I used the audio transcript function in Zoom to automatically transcribe the interviews, then I listened to the videos and corrected any inaccuracies in the transcripts. To identify patterns in the interview transcripts, I began with a list of codes and their descriptions based on the concepts in the compliance literature (e.g., deterrence) (Ayres 2008; Ryan and Bernard 2003). I also looked for repetitions of topics (Ryan and Bernard 2003, 89). As coding of the interviews progressed, some codes were merged or modified. The transcripts were organized into four themes: 1) motives of homes and employees to comply with regulation; 2) the capacities and characteristics of homes (such as size or geographic location) in relation to compliance; 3) the influence of regulator and regulatory enforcement on compliance; and 4) the broader social, political, and economic environments.

With respect to the trustworthiness and rigour of the data collection, I compared the interviewees’ views with observations and conclusions from other sources, such

Table 1 List of Interviewees

Interviewee	Description
1	Litigator representing LTC homes (anonymous)
2	Health law lawyer (anonymous)
3	Melissa Miller, litigator representing families of LTC residents
4	Dr. Amit Arya, palliative care doctor who works in LTC and other health-care settings
5	Union representatives (anonymous)
6	Natalie Mehra, Executive Director, Ontario Health Coalition (a provincial advocacy organization)
7	Industry representative (anonymous)
8	Laura Tamblyn Watts, President and CEO, CanAge (Canada’s National Seniors’ Advocacy Organization)
9	Legal nurse consultant (registered nurse qualified to provide expert opinion in legal proceedings) (anonymous)
10	Retired LTC home administrator (anonymous)
11	Elder law lawyer (anonymous)

as reports issued by various COVID-19-related inquiries. I also excluded content that could not be triangulated (e.g., if only one interviewee raised a particular issue).

Although the interviews did not include LTC residents or family members—for practical reasons related to the pandemic—some of their issues or challenges were reflected in the interviews with advocates. Likewise, no inspectors were interviewed. However, I consulted presentations and affidavits filed by the government during various public inquiries and reviews in order to shed light on the regulator’s perspective. These documents informed my understanding of the regulator’s inspection and enforcement activities and their rationale. Despite these acknowledged limitations, and the small number of interviews conducted, there was a rich diversity of perspectives represented. On the basis of the interviews alone, the findings are grouped into the following four themes: 1) perceived impact of the regulator’s activities, 2) shortcomings of regulatory oversight and enforcement, 3) plural motives for compliance, and 4) limited influence of users and third parties.

Findings

Perceived Impact of the Regulator’s Activities

Consistently, the majority of participants pointed to how limited an impact the regulator’s inspection and enforcement activities appeared to have on the way in which LTC homes responded to legal rules. A common impression among interviewees was that noncompliance with regulatory requirements would entail little or no consequences for the homes (Interviewees 2, 3, 4, 5, 6, 8, 9, and 11). The representative from the Ontario Health Coalition commented that the current approach was not a deterrent approach, but more of a cooperative or voluntary approach: “most of the time, the homes get voluntary correction, agreements with the inspector is the first step. And then they only get stepped up to a compliance order if they don’t do that” (Interviewee 6). Interviewees said that the current actions taken by inspectors have no teeth. There is nothing to really deter homes from noncompliance. In general, interviewees supported more severe sanctions for homes, such as financial penalties (Interviewees 3, 4, 5, 6, and 11). The elder law lawyer pointed out that the problem is how the FLTCA (or its predecessor) is applied: the authority to impose fines has always existed, it’s just never exercised (Interviewee 11). However, two interviewees stressed that there is more to it than simply deploying sanctions; they expressed the need for the government and homes to work together to improve performance (Interviewees 7 and 8). And one interviewee noted that meting out punishment would not support compliance; it would simply put more pressure on LTC home administrators (Interviewee 10).

Moreover, the government did not appear to use all the tools at their disposal to respond to the weaknesses or to build the strengths of LTC homes. In addition to the sanctions specified in the FLTCA, the government could use the award of new beds to encourage homes to improve their performance, but have not done so. According to the union representatives, “the inspection branch did shift away

from an enforcement model and towards a more collaborative supportive model in homes to help them get through the pandemic, and what you saw out of that was thousands of people dead as a result” (Interviewee 5). A few interviewees also discussed some of the government’s initiatives during the pandemic as being counterintuitive from a compliance perspective, and even described them as “rewards” for homes with questionable records. The litigator representing families of LTC residents stated: “Orchard Villa is one of the worst offenders. Even before the COVID-19 pandemic, they had repeated infractions ... there hasn’t been a single fine. There’s no threat to revoke their licence. Instead, our government is granting them an additional 30-year licence and an expansion approval for 87 beds” (Interviewee 3). The palliative care doctor also expressed concerns: “homes that had empty beds got funding for 100% of the beds. We can correlate that the homes which had more empty beds would be the homes that actually lost the most lives ... and it seems that we are rewarding bad behaviour” (Interviewee 4).

Responsive regulation argues that a regulator should be responsive to the conduct of the regulatee when deciding whether to use more or less coercive means or provide support such as awards. However, the interviewees’ comments show that not only did homes with poor records not receive more serious sanctions for repeated infractions, but they also benefitted from new beds (i.e., future revenues) or unreduced revenues during COVID-19. The regulator’s approach can be described as nonresponsive to the conduct of homes.

Shortcomings of Regulatory Oversight and Enforcement

Three main shortcomings were identified in the interviews. The first is that regulators and regulatees have few repeated or ongoing interactions due to the ministry’s complaint-driven approach to inspections. A home would only get an inspection as a result of a complaint and the inspection is relatively focused in its scope to the nature of the complaint. The ministry suspended annual comprehensive inspections and focused on inspections triggered by complaints or critical incidents (e.g., those reported to the ministry by LTC homes because of mandatory reporting requirements) (Interviewees 3, 5, and 6). The limitation of a complaint-driven approach was captured in a comment made by the litigator representing families of LTC residents: “the inspector is there for one complaint and one complaint only, and they are not going to go outside the boundaries of that complaint. They’re not going to look at anything else” (Interviewee 3). The union representatives also agreed that this complaint-driven approach would not give homes the necessary incentives to establish and maintain compliance. The union representatives cited the example of Infection and Control Measures to show why proactive inspections serve the function of giving the ministry ongoing knowledge of what is occurring in the homes (Interviewee 5). The one-off, scattershot approach to complaint investigation and enforcement does not ensure that the regulator is well informed about the impact of its regulatory efforts. Regular, iterative interactions are needed to make responsive regulation work (Braithwaite 2011, 520).

The second shortcoming is that regulator–home interactions do not always resolve problems in a home. If initiating a complaint does not result in improvements in care conditions or removal of a risk to quality of care, then residents and families are unlikely to see any reason to exercise their right to complain. The Ontario Health Coalition communicates with residents and family members and therefore was in a position to describe what they have heard. The representative from the Ontario Health Coalition agreed that the ministry indeed received many complaints, but this complaint-driven approach has not been effective in resolving issues raised by families. For example, it could take weeks or months for the ministry to respond to a complaint. Care in a home might improve for a few weeks after an inspector’s visit but then go back to the way it was (Interviewee 6). The elder law lawyer also remarked that there is a disconnect between what families think the ministry is going to do versus what the ministry is actually able to do. The inspection process may not resolve issues for individual residents and simply creates more ministry orders (Interviewee 11). Interestingly, the industry representative also noted that the current system is not designed to resolve complaints for residents and families or provide satisfaction because ministry intervention is simply to check up on whether or not the home has complied with the legislation (Interviewee 7).

The third shortcoming is in the deployment of government inspection and enforcement resources. Interviewees identified the problem of not having enough inspectors (Interviewees 3, 5, and 6). And this affected how inspectors conduct inspections: “part of the challenge is also—in fairness to the inspectors—what they have to work within the amount of time that they have to work with it and so frequently they can verify that there are policies in place, they don’t have the time to be able to verify that the policies are being followed” (Interviewee 5). This resource problem should also be considered within the context of challenges associated with setting up a new ministry exclusively for LTC (Interviewee 5). However, the CanAge representative provided an important caveat: “just because you have more people doesn’t mean that inspections are going to happen more, or better The value proposition of inspections has to be connected to quality improvement, not just getting a laundry list of things you’ve done wrong, which then you can ignore or not, depending on what you feel like” (Interviewee 8). The retired administrator interviewee also questioned whether hiring more inspectors would change the behaviours of homes. A more fundamental issue with inspections was that inspectors focused on the weaknesses of homes and did not consider innovations or other contributions of homes to their communities (Interviewee 10).

Beyond the problem of failing to deter noncompliant homes, the absence of firm actions against these homes will erode the willingness of other homes to comply. The more people see others violating rules, the more likely they are to do so themselves (Kuiper et al. 2023, 482). One litigator representing families of LTC residents commented:

Everyone has been watching with bated breath to see what our government was going to do with Orchard Villa. Everyone has been waiting to see what some of these coroner investigations are going to reveal, whether York

region or Durham region police was going to press any charges. None of that happened. They were waiting to see if fines are going to be charged or licences revoked And everybody else is looking at Orchard Villa getting away with it and being approved for more beds. Naturally that has a ripple effect. (Interviewee 3)

The representative from the Ontario Health Coalition went further: “Oh, totally, I mean the homes are more organized than that ... the Ontario Long-Term Care Association [industry association] lobbied against compliance enforcement, penalties, and annual unannounced inspections So they absolutely know what they can and can’t get away with, and it doesn’t happen incidentally” (Interviewee 6). For the Ontario Long-Term Care Association (2020), one of the key challenges pre-COVID was “red tape”: “Staff report they spend close to 3 hours per day managing redundant compliance requirements which remove staff from bedside care” (9).

Finally, the perception that the regulatory framework does not focus on priorities that are most relevant to resident care or safety will further erode willingness to comply. “People’s responses to legal rules are associated with their perceptions of those rules, and of the authorities that adopt and enforce them” (Kuiper et al. 2023, 482). According to Ontario’s Long-Term Care COVID-19 Commission (2021), some industry participants indicated that there is a culture in the sector that focuses on adherence to rules and overreporting but not necessarily related to the priorities most relevant to residents’ health, safety, and well-being (72). Following this line of logic, improving the techniques of inspecting or enforcing may not be sufficient to influence behaviour; there is a broader question about whether the current regulatory framework is suitable for LTC at this juncture. The industry representative commented that “obviously regulation exists to protect the public,” but “the current process is very, very cookie cutter ... the assumption is that every single home is identical and has to conform to what’s in the legislation” (Interviewee 7). Further, the legislation is very top-down and command-and-control (Interviewee 7). The CanAge representative also expressed reservations about the prescriptive nature of the LTCHA: “I understand why people are trying to defend that 2007 legislation because they fought tooth and nail to get it ... the other alternative is you trust homes a bit more, and you have less narrow box ticking” (Interviewee 8).

The interview results reveal that infrequent inspections triggered by complaints are not conducive to compliance. The perception that the regulatory framework does not focus on the right priorities also undermines the regulatees’ willingness to comply. Despite their shortcomings, enforcement and compliance activities cannot completely explain noncompliance.

Plural Motives for Compliance

The potential implications of these shortcomings should be explored in relation to the motivation of industry participants. Not surprisingly, the majority of interviewees approached the issue of motivation by referring to the profit motives of the for-profit homes (i.e., homes that are not municipal or nonprofit) (Interviewees 3, 4, 5, 6, 8, 9, and 11). The litigator representing families of LTC

residents added some nuance to the issue of profit: “that is not to say that every administrator and every manager is putting profit intentionally before care and purposely violating rules. If they’re making a business case and they know there’s no financial cost of violating some of the regulations, and they are allowed to cut corners without consequences, then that will put more dollars in shareholders’ pocket” (Interviewee 3). The representative from CanAge reflected on what could be done about the profit motive: “I think a more charitable motive is important here, I just don’t think that we can get there ... to the degree that we do have for-profit motives ... those should be circumscribed in a way that ensures the profit aspect does not affect the care aspect” (Interviewee 8).

Some of the interviewees also highlighted the social motives of homes and/or their employees (Interviewees 1, 4, and 5). Nielsen and Parker (2011) use “social motive” to describe the desire to earn the approval and respect of others, such as customers, local communities, and the wider public (11). The litigator representing LTC homes discussed her own experience: “the motivation that I see from my clients is genuine concern to provide excellent care for their clients ... they are highly motivated to comply with the regulations and to do a good job and to keep the residents happy” (Interviewee 1). The union representatives talked about personal motivation of employees: “Every home has rooms in the basement that are like quiet places where people go to cry because they are just so stretched. I think the knowledge of what they need to be doing is quite clear. What really tears them up is their inability to do some of those things” (Interviewee 5). The palliative care doctor explained the significant variability across the sector: “in some homes there is a personal motivation to engage with health workers, family members, and the residents. They try to continuously innovate and improve the quality of care. In other homes that motivation definitely does not exist. There’s actually no motivation sometimes to do any of these things and sort of just trying to do the bare minimum” (Interviewee 4).

Noncompliance may flow from conflicting motives as homes are made up of many actors with different motives. The important thing is how the different motives are weighted relative to one another (Nielsen and Parker 2012, 446–47). One important observation was how the motives of different parties may collide, as the palliative care doctor explained: “sometimes there’s a conflict between what the corporate head office wants to achieve versus what management is trying to achieve. I’ve been in situations where sometimes the management wanted more funding, but that’s not provided” (Interviewee 4). The litigator representing families of LTC residents explained a different type of conflicting motives: “employees are also scared ... even if they are aware of their obligations, they don’t do anything to enforce their obligations under the regulations if it means crossing management’s path” (Interviewee 3). That is not to say that employees are always motivated by altruistic reasons. Nonetheless, it is evident that some homes (and some individuals in them) can be motivated by a sense of social responsibility to be agents for reform.

However, even responsible actors may be subject to factors that are not conducive to compliance. Motivation to comply is less important if a regulatee does not possess the capacity to comply (Nielsen and Parker 2011). The capacities of LTC homes to meet the cost of compliance is an important factor that is shaped

by broader structural issues in the sector, which are perceived to be outside the control of homes to a certain extent. In terms of the capacities of LTC homes to deliver care as required by law, interviewees referred directly or indirectly to the ongoing underfunding of the LTC system (Interviewees 3, 4, 5, 6, 8, and 10). The union representatives suggested: “with the staffing levels that they’re currently funded for, I think it is next to impossible to meet the standards ... if you have adequate staffing levels in the home, and if, as a sector, people are paid appropriately so that they actually stick around, I think a lot of those issues self-correct” (Interviewee 5). But the industry representative suggested that adding more staff alone would not make a difference unless the role of LTC in an integrated health system is clearly defined. The system needs to be reengineered with the right funding and accountability mechanisms (Interviewee 7). The lack of LTC integration within the health and social systems (Estabrooks et al. 2023) undermines the capacities of some of the homes as they cannot access resources in other parts of the health-care system.

Businesses typically hold a range of potentially conflicting motives relevant to compliance (Nielsen and Parker 2012) and enforcement strategies should be designed to speak to those motives. In LTC, the need to contain the cost of compliance coexists and may conflict with a commitment to provide quality care. Further, the motivation to comply is secondary if a home does not have sufficient capacity (i.e., staffing required to deliver care) to comply.

Limited Influence of Users and Third Parties

If a regulator cannot rely solely on official resources or influence to punish or persuade, then the question is whether a plurality of actors (public and private) can activate the different motivations that businesses might have for complying with regulation (Parker 2021). The interviewees provided insight into opportunities for all those affected to participate as “surrogate regulators” (Parker 2021, 42) and how they might want to hold the regulator and the homes accountable.

From a pragmatic perspective, the viability of a complaint-driven approach depends on complainants coming forward with valuable information about potential wrongdoing. Harding (2017) explains that “complaining ... requires the person who makes a complaint to have the personal strength to do so, but also other self-resources such as time, self-confidence, and a certain level of social and material capital” (136). In this case study, there are inherent disincentives for families and/or employees to report any potential problems in LTC homes to the ministry for fear of reprisals (Interviewees 3, 4, 5, 6, and 11). The litigator representing families of residents discussed the potential for retribution towards residents when family members complained:

If you have made a complaint and made the person whose job it is to provide that care more difficult, how do you possibly know that they’re not taking it out on your family member? ... I have actually seen it with my own eyes [via a nanny cam] ... the PSWs [personal support workers] were yelling at the resident. Why are you talking to your daughter? We told you not to

complain to your daughter. Why are you always complaining. She keeps calling here telling us we're not doing our job. (Interviewee 3)

The elder law lawyer also noted that she had encountered family members who hesitated to contact the ministry or a lawyer. While targeted attacks against particular residents may not occur because of their family members' complaints, their LTC homes may become less responsive or unwilling to work with family members (Interviewee 11). Even when family members are willing to speak up, the union representatives explained that "they will know that something's not right, but they won't know where the areas of non-compliance are, be able to be specific in any kind of a complaint" (Interviewee 5). These comments demonstrate some of the practical difficulties of leveraging any informal influence of third parties.

If family members and residents (or at least some of them) hesitate to use official complaint channels, then the next question is whether there are other channels or mechanisms they can use to influence the behaviour of LTC homes. The elder law lawyer thought that the risk of bad press had the potential to motivate LTC homes to comply. However, naming and shaming on social media may prompt a home to issue a No Trespass notice or refuse to communicate further. A more effective way is to threaten legal action (Interviewee 11). Indeed, the issue of family members receiving trespass notices has been described in media reports (Nicholson 2022). The legal nurse consultant interviewee noted that naming and shaming would not affect underperforming homes because the ministry continued to allow admission of new residents to these homes (Interviewee 9). The CanAge representative added that the majority of LTC homes that were horrific were well known to be horrific—even before COVID-19 (Interviewee 8). The comments show that, in the absence of care options, residents and their families have to accept poor care.

More intense media scrutiny of LTC homes during the COVID-19 pandemic provided an opportunity to explore how third parties may influence the behaviour of homes in order to hold them accountable. The question of how reputational risk might affect the inclination of LTC homes to seek help when they were struggling with the COVID-19 pandemic came up during the interviews. For example, the palliative care doctor reflected on his experience working in various LTC homes, including those with serious outbreaks and commented:

corporate head office and management are worried that if hospital rapid response teams go into the home to help, this is going to look bad in the media, this is going to affect business image ... I mean it's still contrary in my mind ... if you don't want to look bad in the media, you should call us in first and then say we asked for the help and we were the most willing to get help. (Interviewee 4)

The union representatives also agreed that, at the beginning of the first wave, some homes were far more concerned with not being the home on the news to the point that they would delay putting residents who were symptomatic in isolation until the tests came back, which could be a week later (Interviewee 5).

For responsive regulation theorists, enlisting a range of third parties to monitor and enforce compliance can enhance the impact of (weak or under-resourced) regulators. In LTC, residents and their families face many barriers as citizen regulators. Without other care and housing options, residents (or their families) cannot threaten to leave their homes and are unlikely to have much influence over home compliance by exercising their right to complain or resorting to naming and shaming (e.g., social media).

Discussion

Strengths and Weaknesses of Ontario's Approach

From a responsive regulation perspective, the inspection and enforcement regime as prescribed in statute includes some positive features. The actions that can be taken by inspectors where there has been a finding of noncompliance resemble the regulatory pyramid. Inspectors can start with less punitive measures, such as written notification to the licensee. At the top of the pyramid are more punitive measures such as fines and revocation of licences. Any escalation up the pyramid is meant to be nonarbitrary because the statute provides procedural protections. Appeal mechanisms are available if a home disagrees with the inspector's or director's decision. The law also specifies the factors that inspectors must consider when determining which action to take. These processes as mandated by statute are expected to promote voluntary compliance by homes because compliance with the law is more likely when regulation is viewed as more legitimate and more procedurally fair (Braithwaite 2002, 33).

However, we can also theorize how the shortcomings of the regulator's approach (as revealed in the interviews) shape the behaviour of homes. Ontario's lack of escalation up the pyramid in practice means deterrence is rarely achieved. It is likely evident to industry participants that, in recent years, the ministry has lacked the capacity to enforce regulatory compliance or, to use Braithwaite's (2002) expression, inspection and enforcement resources are spread around thinly and weakly (33). One could argue that, without more inspections (and increasing the likelihood of being detected), escalation up the pyramid is merely a theoretical possibility. At best, the current measures at the bottom of the pyramid (e.g., written notifications) may only have the effect of informing homes about what they did wrong in the past; these measures cannot challenge homes—at least some of them—to take responsibility for making things right into the future (Braithwaite, Braithwaite, and Burford 2019). At worst, repeated sanctions at the bottom (without escalating up the pyramid or getting to the root of the problem of noncompliance) are likely to create a “negative spiral” (Nielsen 2006). That means that focusing on past performance (including breaches) may lead to more inspections (e.g., follow-up inspections), which may in turn result in more noncooperative behaviour and/or attitude from the regulatee. Having said that, some homes may not behave like rational actors and their perceptions of the ministry's capacity may not have any positive or negative effect on their compliance efforts. On this basis, addressing some of the weaknesses of the regulator's strategies is necessary, but it cannot be the fix-all solution.

Possibilities and Limits of Responsive Regulation

Responsive regulation provides a theoretical vantage point from which to review the range of actions and inactions of both the regulator and LTC homes in Ontario. While the command-and-control model of regulation fails to capture what is happening on the ground, responsive regulation calls for greater attention to other actors and logics that are at work. The interviews showed that formal complaint mechanisms (including whistleblower protection), negative press coverage, and social media “naming and shaming” can prove futile if the regulator fails to address—or even rewards—bad behaviour. Responsive regulation emphasizes participation of third parties in regulation in order to hold the regulator and regulatees accountable. The question of barriers to participation must be addressed in order to advance our understanding of enrolment of third parties. As Harding and others have shown, family members face numerous barriers in the health-care system when they attempt to complain. In LTC, third parties such as residents and family members may not be able to function effectively as “surrogate regulators” because they rarely have the option of leaving due to the shortage of LTC beds.

Relationship between Regulation of Service Provision and Justice for Individuals

Even if the government can regulate service provisions in a more responsive manner, one question remains: What is the role of the government in delivering justice to individual residents who have been harmed? Court remedies can rarely address the scope and complexity of harm in aged care. Harms occur over long periods, are perpetrated by multiple individuals, and have complex causes (Steele and Swaffer 2022, 76). Steele and Swaffer call for reparations through which governments, home operators, professionals, and civil society can contribute to righting individual and collective wrongs suffered by LTC residents and prevent recurrence. These actions may include compensation, rehabilitation, restitution, and collective reparations, including apologies and public education. For example, helping people walk again after being restrained for long periods of time is a form of reparation (Steele and Swaffer 2022, 76–77).

Future research should investigate how the regulatory pyramid can incorporate reparations in order to make a regulator more responsive to both the conduct of regulatees and the needs of people whom a regulation affects. For Braithwaite (2011), privileging restorative justice at the base of the pyramid builds legitimacy of regulation and therefore promotes compliance (487). In LTC, reparation in the form of public acknowledgement of harm and its impacts on residents and their families (Steele and Swaffer 2022) aligns with the more dialogical forms of intervention at the bottom of the pyramid. Future research should consider how reparations might be incorporated into strategies further up in the pyramid. Deterrence (such as criminal prosecution) is intended to sway the rational actors. Will rational actors attempt to avoid the more severe punishments by providing reparations to residents without changing how residents are treated? Or will reparation prompt the rational actors to commit to prevention of harm by learning from past experiences and therefore justify de-escalation down the pyramid? Investigating how inspectors should factor in

reparations when deciding whether to escalate up or down the regulatory pyramid once the deterrence stage has been reached will make application of the regulatory pyramid more relevant to residents who have been harmed.

Conclusion

This article identified enforcement of regulatory requirements as an overlooked aspect in the legal and socio-legal literature on LTC. The research findings illustrated what does not work in Ontario's enforcement regime and why. The ministry does not escalate up the regulatory pyramid even when problems persist in a home. Infrequent inspections triggered by complaints and critical incidents have been ineffective in detecting noncompliance. Residents and family members may not be able to apply much pressure on homes as they lack care options. Although focused on Ontario, this article has broader relevance. The experiences of participants in Ontario's LTC sector provide an empirical evidence base for reform in other jurisdictions. The strengths and weaknesses of Ontario's approach can help other jurisdictions to identify gaps in their respective regulatory frameworks.

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