



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Legal Capacity, Decision-Making and Guardianship

Interim Report: Appendices

October 2015





LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

INTERIM REPORT

APPENDICES

APPENDIX A

LIST OF DRAFT RECOMMENDATIONS

Chapter III: Applying the LCO Frameworks to Ontario's Legal Capacity, Decision-making and Guardianship Laws

- 1:** The Ontario Government include in reformed legal capacity, decision-making and guardianship laws provisions that are informed by the principles contained in the LCO *Frameworks* and which set out
- a) the purposes of the legislation; and
 - b) the principles to guide interpretation of the legislation.
- 2:** The Ontario Government accompany reforms to legal capacity, decision-making and guardianship law with a strategy for reviewing the effect of the reforms, within a designated period of time.

Chapter IV: Tests for Legal Capacity: Balancing Autonomy and Legal Accountability

- 3:** The current Ontario approach to legal capacity, based on a functional and cognitive approach, be retained.
- 4:** The Ontario Government amend the *Health Care Consent Act, 1996* and *Substitute Decisions Act, 1992* to clarify
- a) that legal capacity exists where the individual can meet the test with appropriate accommodations, and
 - b) the requirement that assessments of capacity be carried out with appropriate accommodations in accordance with the approach to accommodation developed under domestic human rights law, including for example, adjustments to timing, alternative forms of communication, or extra time.

Chapter V: Assessing Legal Capacity: Improving Quality and Consistency

- 5:** The Ontario Government update
- a) the *Substitute Decisions Act, 1992* to provide a clear statement as to the appropriate purposes of capacity assessment;
 - b) Form C under the *Substitute Decisions Act, 1992* to clarify that a Capacity Assessment with respect to property or personal care should only be conducted where there is

- i. valid cause for concern regarding the ability of the individual to make decisions and
 - ii. a need for decisions to be made,
- and that Assessors should know the reason that a Capacity Assessment has been requested.

6: The Ontario Government amend section 54 of the *Mental Health Act* to require physicians to conduct an examination of capacity to manage property where there are reasonable grounds to believe that the person may lack legal capacity to manage property and that the person may suffer negative consequences as a result.

7: The Ontario Government develop and implement a strategy for removing informational, navigational, communication and other barriers, and increasing access to Capacity Assessments under the *Substitute Decisions Act, 1992* for persons in remote and First Nation communities; newcomer communities; persons facing communications barriers, including among others those who are Deaf, deafened or hard of hearing and persons for whom English or French is a subsequent language; low-income individuals; and others identified as facing barriers.

8: The Government of Ontario create official *Guidelines* for assessments of capacity under the *Health Care Consent Act, 1996*, incorporating basic principles and procedural rights.

9: a) The Ontario Government amend sections 17, 47.1 and 62.1 of the *Health Care Consent Act, 1996* to include minimum standards for the provision of rights information to the individual who has been found to lack legal capacity, including that

- i. notice be provided of the determination of incapacity, the consequences of the incapacity, the identity of the substitute decision-maker who will be making the decision with respect to treatment, and the right to challenge the finding of incapacity;
 - ii. the information be provided in a manner that accommodates the needs of the affected individual, including alternative methods of communication; and
 - iii. the health practitioner provide the individual with information or referrals regarding the means of pursuing an application to the Consent and Capacity Board to challenge the finding of incapacity.
- b)** The health regulatory colleges continue to fulfil their role of supporting and educating their members about how to meet these minimum standards through guidelines and professional education as appropriate.
- c)** To assist in the implementation of this Recommendation, the Ontario Government amend the *Health Care Consent Act, 1996* to require health practitioners, upon a finding of

incapacity, to complete a simple regulated form, analogous to Form 33 “Notice to Patient” under the *Mental Health Act*.

10: The Ontario Government explore means of providing independent and expert advice on rights to persons found incapable under the *Health Care Consent Act, 1996*, for example by adapting and transforming some key elements of Health Justice partnerships to provide expert and accessible advocacy with health settings, or developing targeted programs for those who are most vulnerable or whose rights are most gravely at risk.

11: a) Within the scope of its mandate, Health Quality Ontario take the following steps to improve the quality of assessments of capacity in health care settings:

- i. encourage health care organizations to include issues related to assessment of capacity and the accompanying procedural right in their Quality Improvement Plans;
- ii. include issues related to the assessment of capacity and the accompanying procedural rights in their patient surveys;
- iii. assist partners in the health care sector in the development or dissemination of educational materials for health care organizations related to the assessment of capacity and the accompanying procedural rights; and
- iv. consider bringing specific focus to monitoring of the quality of consent and capacity issues in health care through the production of a dedicated report on this issue, and

b) Health Quality Ontario integrate into its initiatives as recommended by 11 (a) a concept of quality that includes respect for patient autonomy, a knowledge of the legal foundations of capacity and consent, and the promotion of patient rights.

12: The Ministry of Health and Long-Term Care encourage and support long-term care homes to better address their responsibilities under the Bill of Rights regarding consent, capacity and decision-making by:

- a) including information related to these issues in their annual resident and family satisfaction surveys;
- b) working with and strengthening the capacity of Residents and Family Councils to develop educational programs for residents and families on these issues; and
- c) developing a thorough and specific focus on issues related to consent, capacity and decision-making in the staff training that they provide to staff.

13: Within the scope of their mandates and objects, the Local Health Integration Networks use their roles in improving quality, setting standards and benchmarks and evaluating outcomes to

- a) support and encourage health services to improve information, education and training for professionals carrying out assessments of capacity;
- b) ensure effective provision of rights information; and
- c) support the provision of information and resources about their roles and responsibilities to persons identified as substitute decision-makers for treatment, admission to long-term care and personal assistance services.

14: Should the LCO's recommendations related to capacity and consent in the health care setting be implemented, the Government of Ontario actively monitor and evaluate their success in improving the administration of assessments of capacity and meaningful access to procedural rights, with a view to taking more wide-ranging initiatives should significant improvement not be apparent.

Chapter VI: Substitute Decision-making and Alternatives: Strengthening Decision-making Practices and Providing Options for Diverse Needs

15: The Government of Ontario implement a statutory process that provides for processes for consent to detention in long-term care or retirement homes for persons who lack legal capacity and for whom detention is required in order to address vital concerns for security or safety, and which addresses the needs for clarity and for procedural rights in dealing with fundamental liberty interests.

16: The Ontario Government amend the statutory requirements for decision-making practices related to property management to

- a) clarify that the purpose of substitute decision-making for persons with respect to property is to enable the necessary decisions to provide for the well-being and quality of life of the person and to meet the financial commitments necessary enable the person to meet those ends; and
- b) require that when resources are allocated to the individual's support, education and care, that consideration be given to prior capable wishes, or where these have not been expressed, to the values and wishes currently held regarding the individuals well-being and quality of life.

17: The Ontario Government amend the relevant legislation to replace the terms "substitute decision-maker" and "guardian" by the term "decision-making representative" so as to clarify that this individual is not intended to impose her or his own values in a pure best interests approach, but instead must take into account the values, preferences and life goals of the individual.

18: The Ontario Government take steps to clarify the scope and content of the human rights duty to accommodate as it applies to service providers with respect to legal capacity and decision-making, including by consulting with service providers and other key stakeholders.

19: The Ontario Government enact legislation or amend the *Substitute Decisions Act, 1992* to enable individuals to enter into support authorizations with the following purposes and characteristics:

- a) The purpose of the authorizations would be to enable persons who can make decisions with some help to appoint one or more persons to provide such assistance;
- b) The test for legal capacity to enter into these authorizations would require the grantor to have the ability to understand and appreciate the nature of the agreement;
- c) A standard and mandatory form should be created for these authorizations, to promote a minimum basis of universal understanding of these new instruments;
- d) Through a support authorization, the individual would be able to receive assistance with the routine decisions related to personal care and property (such as payment of bills, banking and purchasing goods or services for the individual);
- e) Decisions made through such an appointment would be the decision of the supported person; however, a third party may refuse to recognize a decision or decisions as being that of the supported person if there are reasonable grounds to believe that there has been fraud, misrepresentation or undue influence by the supporter;
- f) Support authorizations will only be valid if they include a monitor who is not a member of supported person's family and who is not in a position of conflict of interest, with duties and powers as set out in Chapter VII;
- g) The duties of persons appointed under such authorizations would include the following:
 - i. maintaining the confidentiality of information received through the support authorization;
 - ii. maintaining a personal relationship with the individual creating the authorization;
 - iii. keeping records with regards to their role;
 - iv. acting diligently, honestly and in good faith;
 - v. engaging with trusted family and friends; and
 - vi. acting in accordance with the aim of supporting the individual to make their own decisions,
- h) Persons appointed under such authorizations would have the following responsibilities:
 - i. gather information on behalf of the individual or to assist the individual in doing so;
 - ii. assist the individual in the decision-making process, including by providing relevant information and explanations;
 - iii. assist with the communication of decisions; and

iv. endeavour to ensure that the decision is implemented.

20: The Ontario Government examine the practicalities of a statutory legal framework for network decision-making which would permit formally established networks of multiple individuals, including non-family members, to work collectively to facilitate decision-making for individuals who may not meet the test for legal capacity, with a view to developing and implementing such a legal framework if feasible.

Chapter VII: Personal Appointment Processes: Enhancing Clarity and Accountability for Substitute Decision-making

21: a) Persons accepting appointment as a substitute decision-maker or supporter under the *Substitute Decisions Act, 1992*, sign, prior to acting under such an appointment, a statement of commitment, in a mandatory Statement of Commitment form created by the Ministry of the Attorney General that specifies:

- i. the statutory responsibilities of the appointee,
- ii. the consequences of failure to fulfil these responsibilities, and
- iii. acceptance by the appointee of these responsibilities and the accompanying consequences.

b) Where relevant, this will form part of the Notice of Attorney Acting described in Recommendation 22.

22: The Ontario Government amend the *Substitute Decisions Act, 1992* to require that at the time an attorney begins to exercise authority under a power of attorney created under that Act, he or she should be required to deliver a Notice of Attorney Acting, with the following characteristics:

a) the Notice must always be provided to the grantor;

b) the grantor may give express direction in the power of attorney that no Notice is to be delivered to persons other than the grantor or to certain specified individuals;

c) unless the grantor directs otherwise in the power of attorney, the Notice must be delivered to:

- i. the spouse or common law partner of the grantor;
- ii. the parents of the grantor;
- iii. the adult children of the grantor;
- iv. the adult siblings of the grantor; and
- v. any person named as monitor in the power of attorney, if not one of the above listed persons.

d) the Notice of Attorney Acting be in a standard and mandatory form as developed by the government, and be accompanied by the Statement of Commitment.

23: The Ontario Government amend *the Substitute Decisions Act, 1992* to

- a) identify the option of grantors of a power of attorney to name at least one monitor;
- b) require the naming of a monitor as part of a supportive decision-making arrangement; and
- c) specify the following duties of a monitor for either a POA or a support authorization
 - i. a responsibility to make reasonable efforts to determine whether the attorney or supporter is complying with the statutory requirements for that role;
 - ii. keep records of their activities in this role;
 - iii. maintain the confidentiality of the information accessed as part of this role, except as necessary to prevent or remedy abuse or misuse of the role by a person acting under a power of attorney or support authorization; and
 - iv. promptly report concerns to the Public Guardian and Trustee where there is reason to believe that:
 - the person appointed under a power of attorney or support authorization is failing to fulfil their duties or is misusing their role
 - the grantor of the power of attorney or creator of a support authorization is legally incapable; and
 - serious adverse effects as defined in the *Substitute Decisions Act, 1992* are resulting to the grantor or creator.
- d) give monitors the following rights:
 - i. visit and speak with the person who has appointed them as monitors; and
 - ii. to review accounts and records kept by the attorney or supporter.

Chapter VIII: Rights Enforcement and Dispute Resolution: Empowering Individuals

24: The Ontario Government amend the *Health Care Consent Act, 1996* and the *Substitute Decisions Act, 1992* to

- a) give the Consent and Capacity Board jurisdiction over the following matters that are currently within the jurisdiction of the Superior Court of Justice:
 - i. the creation, variance and termination of all appointments of guardians; and
 - ii. review of accounts and provision of directions with respect to powers of attorney and guardianships.
- b) provide the Consent and Capacity Board with the following remedial powers:
 - i. adjust compensation taken by a guardian, suspend or terminate a guardianship or power of attorney;

- ii. direct the Public Guardian and Trustee to apply for guardianship; and
- iii. temporarily appoint the Public Guardian and Trustee or other person as guardian.

25: In giving effect to Recommendation 24, the Ontario Government amend the *Health Care Consent Act, 1996* with respect to the composition and rules of procedure of the Consent and Capacity Board, to strengthen its expertise in these areas and enable it to tailor its processes to this area of jurisdiction.

26: The Ontario Government amend the jurisdiction of the Consent and Capacity Board under sections 35, 37, 52, 54, 67 and 69 of the *Health Care Consent Act, 1996* to i) provide directions with respect to the wishes of the person; and ii) determine compliance with the substitute decision-maker's decision-making obligations

- a) to include similar consideration of matters under the *Substitute Decisions Act, 1992*,
- b) to permit the individual under substitute decision-making to make an application regarding compliance with obligations, and
- c) in defined circumstances, to enable family or others with a trusting relationship with the individual under substitute decision-making to bring such applications.

27: The Ontario Government explore the benefit of giving the Public Guardian and Trustee the discretion, upon completion of an investigation that does not warrant an application for temporary guardianship, to forward a written report to the Consent and Capacity Board, which would be empowered, with appropriate processes, to order training, mediation, or regular reporting for a substitute decision-maker.

28: The Government of Ontario amend the *Substitute Decisions Act, 1992* to specify that it is an offence for a person to impede or interfere with the ability of counsel appointed under section 3 to carry out their statutory function, and to codify a right for Section 3 Counsel to meet privately with their clients.

29: The Ministry of the Attorney General designate responsibility for the development of clear qualification standards, including minimum training, for lawyers appointed as Section 3 counsel under the *Substitute Decisions Act, 1992*.

30: Legal Aid Ontario consider the following enhancements as part of its current new initiatives in this area:

- a) expanding funding of matters under the *Substitute Decisions Act, 1992* and in particular of additional supports to:

- i. enhance access to Section 3 Counsel;
 - ii. enhance access to legal representation for persons who wish to challenge the appointment or identity of a guardian and are not the subject of a section 3 appointment; and
 - iii. enable individuals to challenge the compliance of substitute decision-makers appointed under the *Substitute Decisions Act, 1992* with their responsibilities under that statute.
- b) providing additional supports to enhance the knowledge and skills of lawyers who provide Legal Aid funded services in this area of the law.

31: If the Ontario Government does not adopt the LCO's Recommendation 24 regarding an expanded and reformed administrative tribunal empowered to adjudicate issues under the *Substitute Decisions Act, 1992*, that it explore the expansion of access to mediation for these types of cases, subject to the following protocols:

- i. identification of matters that are appropriate for mediation, excluding issues of abuse and of legal capacity;
- ii. development of mediators with core competencies necessary to effective mediation in this area of the law, including knowledge and skills in capacity and guardianship law and any other specific law at issue; the principles and values underlying capacity and guardianship law and of human rights; the needs and circumstances of individuals who are affected by this area of the law; and alternatives to the use of guardianship or substitute decision-making; and
- iii. creation of a code of ethics and of standards for mediation in this area, including guidance on capacity and consent to engage in mediation.

32: In amending the *Health Care Consent Act, 1996* to prepare the Consent and Capacity Board to perform its new role, the Ontario Government consider whether the current time limits for adjudication should be maintained for all applications, or whether for some matters previously dealt with by the Superior Court of Justice, time limits should be more flexible to permit greater scope for alternative dispute resolution, including mediation.

33: The Consent and Capacity Board develop a pilot project to explore the possibilities of a specialized mediation program for selected types of applications, which would be subject to the following protocol:

- a) identification of matters that are appropriate for mediation, excluding issues of abuse and of legal capacity;
- b) development of mediators with core competencies necessary to effective mediation in this area of the law, including knowledge and skills in capacity and guardianship law; the

principles and values underlying capacity and guardianship law; the needs and circumstances of individuals who are affected by this area of the law; and alternatives to the use of guardianship or substitute decision-making; and

- c) creation of a code of ethics and of standards for mediation in this area, including guidance on capacity and consent to engage in mediation.

Chapter IX: External Appointment Processes: Increasing Flexibility and Reducing Unnecessary Intervention

34: The Ontario Government empower adjudicators considering the appointment of a guardian for matters related to property or personal care to request submissions from any of the parties to an application on the potential for a less restrictive alternative or a report from a relevant organization, such as the Public Guardian and Trustee, Adult Protective Services Worker, and Developmental Services staff, on the circumstances of the individual in question, including

- i. the nature of their needs for decision-making,
- ii. the supports already available to them, and
- iii. whether there are additional supports that could be made available to them that would obviate the need for guardianship,

and provide these institutions with appropriate powers and responsibilities for the preparation of such reports.

35: a) The Ontario Government repeal the statutory guardianship process under sections 15 and 16 of the *Substitute Decisions Act, 1992* and replace it by applications for appointments to the Consent and Capacity Board.

b) Consistent with the principle of progressive realization, this action be taken towards the goal of eliminating statutory guardianship completely.

36: The Ontario Government amend the *Substitute Decisions Act, 1992* to require the adjudicator, when appointing a guardian either of the person or of property, to determine whether:

- a) the appointment should be for a limited time,
- b) subject to a review at a designated time, or
- c) subject to a requirement for the guardian at specified intervals to submit an affidavit with particulars to all parties, indicating that the individual has not regained legal capacity, that the need for decision-making remains, and that there are no less restrictive alternatives available.

37: The Ontario Government amend the *Substitute Decisions Act, 1992* to require court-appointed guardians, upon request by the individual, to assist with the arrangement of assessments of capacity, no more frequently than every six months.

38: The Ontario Government amend the *Substitute Decisions Act, 1992* to require guardians, should they have reason to believe that the individual has regained legal capacity, to assist the individual to have the guardianship order terminated.

39: The Ontario Government amend the *Substitute Decisions Act, 1992* to permit adjudicators to make appointments for limited property guardianships, where an assessment of needs for decision-making indicates that a partial guardianship would meet the needs of the individual within the time limits of the order.

40: The Ontario Government amend the *Substitute Decisions Act, 1992* to permit an adjudicator to appoint a representative to make a single decision related to property or personal care.

Chapter X: Expanding Choice of Decision-making Representative

41: The Ontario Government amend the *Health Care Consent Act, 1996* to enable individuals who meet the standard for legal capacity to create a power of attorney for personal care to exclude a particular individual or individuals from appointment under the hierarchy set out in section 20 of that Act, through a written document meeting the same execution requirements as a revocation of a power of attorney for personal care under section 53 of the *Substitute Decisions Act, 1992*.

42: Government amend the *Substitute Decisions Act, 1992*, to clearly identify the role of the Public Guardian and Trustee providing expert, trustworthy, professional substitute decision-making for those who do not have access to options that will appropriately meet their decision-making needs, and to set out criteria and processes to enable the Public Guardian and Trustee to fulfil this mandate.

43: Provided that the safeguards identified below or their equivalents are implemented, the Government of Ontario explore the feasibility of establishing a licensing and regulatory system for professional representatives, with the following characteristics:

- a) Licensing and oversight focus on those providing these services as a core business, and acting for multiple individuals.

- b) Licensing and oversight be provided, at least during the development of the profession, from within government or through a government agency potentially funded through fees.
- c) Licensed professional representatives be permitted to make both property and personal care decisions, and to be appointed either personally or externally.
- d) The oversight regime include the following safeguards and assurances of quality:
 - i. Minimum requirements for skills and training;
 - ii. Ongoing professional development requirements;
 - iii. Requirements for credit and criminal records checks;
 - iv. A set of standards of conduct and quality, including prohibitions on specified conflict transactions;
 - v. Record keeping requirements;
 - vi. Annual filing requirements; and
 - vii. Requirements for bonds or insurance.

44: The Government of Ontario explore the viability of enabling community agencies to provide substitute decision-making for low-stakes, day-to-day decisions, such as basic budgeting, bill paying and accessing supports and services, including the creation of appropriate mechanisms for selecting, overseeing, setting standards and addressing conflicts of interest for this function.

Chapter XI: Education and Information: Understanding Rights and Responsibilities

45: The Ontario Government include in reformed legislation a statutory mandate for the coordination and development of education and information initiatives, strategies and materials regarding legal capacity and decision-making.

46: The institution allocated the statutory mandate identified in Draft Recommendation 45 develop, either independently or in cooperation with other institutions and structures, education and information strategies, initiatives and materials, to address the information and education needs of persons directly affected by the law; family members and substitute decision-makers and supporters; professionals who implement the law; and service providers who interact with the law.

47: In developing education and information strategies, and materials, responsible institutions

- a) take into account the needs of diverse communities affected by the law, including provision of materials in plain language, in multiple languages, in a variety of disability-accessible

formats, and in non-print formats (such as, for example, in-person or telephone information).

- b) give specific attention to the needs of persons living in settings such as long-term care homes, psychiatric facilities, hospitals and other settings where access to the broader community may be limited.
- c) consult persons directly affected by the law, families, and those who work with or represent these individuals.

48: a) As one element of a broader education and information strategy, the responsible institution create a central, coordinated clearinghouse of information for substitute decision-makers and supporters, in plain language and in a variety of languages and accessible formats, including print, online and interactive media.

b) Information include instruction on the legislation, statutory duties and the rights of the affected individual, good decision-making practices, tools (for example, for maintaining records) and resources where supports can be found.

49: The Ontario Government include in standard forms it creates in relation to personal appointments (such as the current forms for powers of attorney and proposed forms for support authorizations, statements of commitment and notices of attorney acting) information about how readers can access further information on the topic, such as through the proposed clearinghouse.

50: The Ontario Government amend the *Health Care Consent Act, 1996* to make explicit a clear and specific duty to health practitioners to provide information to substitute decision-makers regarding their roles and duties under the Act, as part of the process of seeking consent; the creation of a standard, statutorily mandated form may support health practitioners in carrying out this responsibility.

51: Adjudicators be empowered, in a matter before them with respect to the *Substitute Decisions Act, 1992*, to require a guardian or person acting under a power of attorney or support authorization to obtain education on specific aspects of her or his duties and responsibilities.

52: Professional educational institutions educating lawyers, health practitioners and social workers and other professions involved in applying these laws in the course of their professional duties re-examine their curriculum and consider strengthening coverage of issues related to legal capacity, decision-making and consent, particularly in the context of training in ethics and professionalism.

53: Health regulatory colleges falling under the *Regulated Health Professionals Act* include issues related to legal capacity and consent as a priority in their quality assurance programs, including identification and assessment of core competencies in this area.

54: The Ministry of Health and Long-term Care support and encourage the health regulatory colleges in developing legally sound and effective quality assurance programs related to legal capacity and consent.

APPENDIX B

LIST OF DRAFT RECOMMENDATIONS: SHORT, MEDIUM AND LONG-TERM TIMEFRAMES

In accordance with the concept of progressive realization, and recognizing both the challenges associated with some of the LCO's draft recommendations and the constraints on law reform in the current environment, the LCO has identified draft recommendations which can be implemented over short, medium and longer timeframes. In identifying time frames, consideration has been given to the complexity of implementation, the likely cost of the draft recommendation, and whether the reform requires legislative change or can be implemented at the level of policy or practice.

Short Term

Short-term draft recommendations are ones that could be implemented immediately, or very soon. They include recommendations that are relatively straightforward, for example, involving clarification of legislation. They can be implemented at a relatively low cost, and either do not require legislative amendments or the necessary amendments to the legislation could be made without significantly opening up the relevant statute.

- 1:** The Ontario Government include in reformed legal capacity, decision-making and guardianship laws provisions that are informed by the principles contained in the LCO *Frameworks* and which set out
 - a) the purposes of the legislation; and
 - b) the principles to guide interpretation of the legislation.

- 2:** The Ontario Government accompany reforms to legal capacity, decision-making and guardianship law with a strategy for reviewing the effect of the reforms, within a designated period of time.

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38: The Ontario Government amend the *Substitute Decisions Act, 1992* to require guardians, should they have reason to believe that the individual has regained legal capacity, to assist the individual to have the guardianship order terminated.

40: The Ontario Government amend the *Substitute Decisions Act, 1992* to permit an adjudicator to appoint a representative to make a single decision related to property or personal care.

41: The Ontario Government amend the *Health Care Consent Act, 1996* to enable individuals who meet the standard for legal capacity to create a power of attorney for personal care to exclude a particular individual or individuals from appointment under the hierarchy set out in section 20 of that Act, through a written document meeting the same execution requirements as a revocation of a power of attorney for personal care under section 53 of the *Substitute Decisions Act, 1992*.

50: The Ontario Government amend the *Health Care Consent Act, 1996* to make explicit a clear and specific duty to health practitioners to provide information to substitute decision-makers regarding their roles and duties under the Act, as part of the process of seeking consent; the creation of a standard, statutorily mandated form may support health practitioners in carrying out this responsibility.

Medium Term

Medium-term draft recommendations include those that either require some investment of resources, or involve sufficient complexity that some significant further work is required to draft effective legislative provisions. Medium-term draft recommendations therefore cannot be implemented immediately, but should be undertaken as soon as resources or time permit.

7: The Ontario Government develop and implement a strategy for removing informational, navigational, communication and other barriers, and increasing access to Capacity Assessments under the *Substitute Decisions Act, 1992* for persons in remote and First Nation communities; newcomer communities; persons facing communications barriers, including among others those who are Deaf, deafened or hard of hearing and persons for whom English or French is a subsequent language; low-income individuals; and others identified as facing barriers.

9: a) The Ontario Government amend sections 17, 47.1 and 62.1 of the *Health Care Consent Act, 1996* to include minimum standards for the provision of rights information to the individual who has been found to lack legal capacity, including that

- i. notice be provided of the determination of incapacity, the consequences of the incapacity, the identity of the substitute decision-maker who will be making the decision with respect to treatment, and the right to challenge the finding of incapacity;
 - ii. the information be provided in a manner that accommodates the needs of the affected individual, including alternative methods of communication; and
 - iii. the health practitioner provide the individual with information or referrals regarding the means of pursuing an application to the CCB to challenge the finding of incapacity.
- b) The health regulatory colleges continue to fulfil their role of supporting and educating their members about how to meet these minimum standards through guidelines and professional education as appropriate.
- c) To assist in the implementation of this Recommendation, the Ontario Government amend the *Health Care Consent Act, 1996* to require health practitioners, upon a finding of incapacity, to complete a simple regulated form, analogous to Form 33 “Notice to Patient” under the *Mental Health Act*.

14: Should the LCO’s recommendations related to capacity and consent in the health care setting be implemented, the Government of Ontario actively monitor and evaluate their success in improving the administration of assessments of capacity and meaningful access to procedural rights, with a view to taking more wide-ranging initiatives should significant improvement not be apparent.

18: The Ontario Government take steps to clarify the scope and content of the human rights duty to accommodate as it applies to service providers with respect to legal capacity and decision-making, including by consulting with service providers and other key stakeholders.

19: The Ontario Government enact legislation or amend the *Substitute Decisions Act, 1992* to enable individuals to enter into support authorizations with the following purposes and characteristics:

- a) The purpose of the authorizations would be to enable persons who can make decisions with some help to appoint one or more persons to provide such assistance;
- b) The test for legal capacity to enter into these authorizations would require the grantor to have the ability to understand and appreciate the nature of the agreement;
- c) A standard and mandatory form should be created for these authorizations, to promote a minimum basis of universal understanding of these new instruments;

- d) Through a support authorization, the individual would be able to receive assistance with the routine decisions related to personal care and property (such as payment of bills, banking and purchasing goods or services for the individual);
- e) Decisions made through such an appointment would be the decision of the supported person; however, a third party may refuse to recognize a decision or decisions as being that of the supported person if there are reasonable grounds to believe that there has been fraud, misrepresentation or undue influence by the supporter;
- f) Support authorizations will only be valid if they include a monitor who is not a member of supported person’s family and who is not in a position of conflict of interest, with duties and powers as set out in Chapter VII;
- g) The duties of persons appointed under such authorizations would include the following:
 - i. maintaining the confidentiality of information received through the support authorization;
 - ii. maintaining a personal relationship with the individual creating the authorization;
 - iii. keeping records with regards to their role;
 - iv. acting diligently, honestly and in good faith;
 - v. engaging with trusted family and friends; and
 - vi. acting in accordance with the aim of supporting the individual to make their own decisions,
- h) Persons appointed under such authorizations would have the following responsibilities:
 - i. gather information on behalf of the individual or to assist the individual in doing so;
 - ii. assist the individual in the decision-making process, including by providing relevant information and explanations;
 - iii. assist with the communication of decisions; and
 - iv. endeavour to ensure that the decision is implemented.

21: a) Persons accepting appointment as a substitute decision-maker or supporter under the *Substitute Decisions Act, 1992*, sign, prior to acting under such an appointment, a statement of commitment, in a mandatory Statement of Commitment form created by the Ministry of the Attorney General that specifies:

- i. the statutory responsibilities of the appointee,
 - ii. the consequences of failure to fulfil these responsibilities, and
 - iii. acceptance by the appointee of these responsibilities and the accompanying consequences.
- b) Where relevant, this will form part of the Notice of Attorney Acting described in Recommendation 22.

22: The Ontario Government amend the *Substitute Decisions Act, 1992* to require that at the time an attorney begins to exercise authority under a power of attorney created under that Act, he or she should be required to deliver a Notice of Attorney Acting, with the following characteristics:

- a) the Notice must always be provided to the grantor;
- b) the grantor may give express direction in the power of attorney that no Notice is to be delivered to persons other than the grantor or to certain specified individuals;
- c) unless the grantor directs otherwise in the power of attorney, the Notice must be delivered to:
 - i. the spouse or common law partner of the grantor;
 - ii. the parents of the grantor;
 - iii. the adult children of the grantor;
 - iv. the adult siblings of the grantor; and
 - v. any person named as monitor in the power of attorney, if not one of the above listed persons.
- d) the Notice of Attorney Acting be in a standard and mandatory form as developed by the government, and be accompanied by the Statement of Commitment.

23: The Ontario Government amend *the Substitute Decisions Act, 1992* to

- a) identify the option of grantors of a power of attorney to name at least one monitor;
- b) require the naming of a monitor as part of a supportive decision-making arrangement; and
- c) specify the following duties of a monitor for either a POA or a support authorization
 - i. a responsibility to make reasonable efforts to determine whether the attorney or supporter is complying with the statutory requirements for that role;
 - ii. keep records of their activities in this role;
 - iii. maintain the confidentiality of the information accessed as part of this role, except as necessary to prevent or remedy abuse or misuse of the role by a person acting under a power of attorney or support authorization; and
 - iv. to promptly report to the Public Guardian and Trustee where there is reason to believe that:
 - the person appointed under a power of attorney or support authorization is failing to fulfil their duties or is misusing their role,
 - the grantor of a power of attorney or creator of a support authorization is legally incapable, and
 - serious adverse effects as defined in the *Substitute Decisions Act, 1992* are resulting to the grantor or creator;

- d) give monitors the following rights, with appropriate recourse to adjudication in case of non-compliance:
- i. visit and speak with the person who has appointed them as monitors; and
 - ii. to review accounts and records kept by the attorney or supporter.

31: If the Ontario Government does not adopt the LCO's Recommendation 24 regarding an expanded and reformed administrative tribunal empowered to adjudicate issues under the *Substitute Decisions Act, 1992*, that it explore the expansion of access to mediation for these types of cases, subject to the following protocols:

- a) identification of matters that are appropriate for mediation, excluding issues of abuse and of legal capacity;
- b) development of mediators with core competencies necessary to effective mediation in this area of the law, including knowledge and skills in capacity and guardianship law and any other specific law at issue; the principles and values underlying capacity and guardianship law and of human rights; the needs and circumstances of individuals who are affected by this area of the law; and alternatives to the use of guardianship or substitute decision-making; and
- c) creation of a code of ethics and of standards for mediation in this area, including guidance on capacity and consent to engage in mediation.

33: The Consent and Capacity Board develop a pilot project to explore the possibilities of a specialized mediation program for selected types of applications, which would be subject to the following protocol:

- a) identification of matters that are appropriate for mediation, excluding issues of abuse and of legal capacity;
- b) development of mediators with core competencies necessary to effective mediation in this area of the law, including knowledge and skills in capacity and guardianship law; the principles and values underlying capacity and guardianship law; the needs and circumstances of individuals who are affected by this area of the law; and alternatives to the use of guardianship or substitute decision-making; and
- c) creation of a code of ethics and of standards for mediation in this area, including guidance on capacity and consent to engage in mediation.

34: The Ontario Government empower adjudicators considering the appointment of a guardian for matters related to property or personal care to request submissions from any of the parties to an application on the potential for a less restrictive alternative or a report from a relevant organization, such as the Public Guardian and Trustee, Adult Protective Services

Worker, and Developmental Services staff, on the circumstances of the individual in question, including

- i. the nature of their needs for decision-making,
- ii. the supports already available to them, and
- iii. whether there are additional supports that could be made available to them that would obviate the need for guardianship

and provide these institutions with appropriate powers and responsibilities for the preparation of such reports.

36: The Ontario Government amend the *Substitute Decisions Act, 1992* to require the adjudicator, when appointing a guardian either of the person or of property, to determine whether:

- a) the appointment should be for a limited time,
- b) subject to a review at a designated time, or
- c) subject to a requirement for the guardian at specified intervals to submit an affidavit with particulars to all parties, indicating that the individual has not regained legal capacity, that the need for decision-making remains, and that there are no less restrictive alternatives available.

39: The Ontario Government amend the *Substitute Decisions Act, 1992* to permit adjudicators to make appointments for limited property guardianships, where an assessment of needs for decision-making indicates that a partial guardianship would meet the needs of the individual within the time limits of the order.

45: The Ontario Government include in reformed legislation a statutory mandate for the coordination and development of education, information initiatives and strategies, and materials, regarding legal capacity and decision-making.

46: The institution allocated the statutory mandate identified in Draft Recommendation 45 develop, either independently or in cooperation with other institutions and structures, education and information strategies, initiatives and materials, to address the information and education needs of persons directly affected by the law; family members and substitute decision-makers and supporters; professionals who implement the law; and service providers who interact with the law.

47: In developing education and information strategies, and materials, responsible institutions

- a) take into account the needs of diverse communities affected by the law, including provision of materials in plain language, in multiple languages, in a variety of disability-accessible formats, and in non-print formats (such as, for example, in-person or telephone information).
- b) give specific attention to the needs of persons living in settings such as long-term care homes, psychiatric facilities, hospitals and other settings where access to the broader community may be limited.
- c) consult persons directly affected by the law, families, and those who work with or represent these individuals.

51: Adjudicators be empowered, in a matter before them with respect to the *Substitute Decisions Act, 1992*, to require a guardian or person acting under a power of attorney or support authorization to obtain education on specific aspects of her or his duties and responsibilities.

52: Professional educational institutions educating lawyers, health practitioners and social workers and other professions involved in applying these laws in the course of their professional duties re-examine their curriculum and consider strengthening coverage of issues related to legal capacity, decision-making and consent, particularly in the context of training in ethics and professionalism.

53: Health regulatory colleges falling under the *Regulated Health Professionals Act* include issues related to legal capacity and consent as a priority in their quality assurance programs, including identification and assessment of core competencies in this area.

54: The Ministry of Health and Long-term Care support and encourage the health regulatory colleges in developing legally sound and effective quality assurance programs related to legal capacity and consent.

Long Term

Long-term draft recommendations are those that involve complex or novel issues. Their implementation may be predicated on the prior implementation of other draft recommendations or may require further research or consultation. Work towards these draft recommendations should begin, but with the recognition that some time may be required to identify effective approaches to implementation.

10: The Ontario Government explore means of providing independent and expert advice on rights to persons found incapable under the *Health Care Consent Act, 1996*, for example by adapting and transforming some key elements of Health Justice partnerships to provide expert and accessible advocacy with health settings, or developing targeted programs for those who are most vulnerable or whose rights are most gravely at risk.

24: The Ontario Government amend the *Health Care Consent Act, 1996* and the *Substitute Decisions Act, 1992* to

- a) give the Consent and Capacity Board jurisdiction over the following matters that are currently within the jurisdiction of the Superior Court of Justice:
 - i. the creation, variance and termination of all appointments of guardians; and
 - ii. review of accounts and provision of directions with respect to powers of attorney and guardianships.
- b) provide the Consent and Capacity Board with the following remedial powers:
 - i. adjust compensation taken by a guardian, suspend or terminate a guardianship or power of attorney;
 - ii. direct the Public Guardian and Trustee to apply for guardianship; and
 - iii. temporarily appoint the Public Guardian and Trustee or other person as guardian.

25: In giving effect to Recommendation 24, the Ontario Government amend the *Health Care Consent Act, 1996* with respect to the composition and rules of procedure of the Consent and Capacity Board, to strengthen its expertise in these areas and enable it to tailor its processes to this area of jurisdiction.

26: The Ontario Government amend the jurisdiction of the Consent and Capacity Board under sections 35, 37, 52, 54, 67 and 69 of the *Health Care Consent Act, 1996* to i) provide directions with respect to the wishes of the person; and ii) determine compliance with the substitute decision-maker's decision-making obligations

- a) to include similar consideration of matters under the *Substitute Decisions Act, 1992*,
- b) to permit the individual under substitute decision-making to make an application regarding compliance with obligations, and
- c) in defined circumstances, to enable family or others with a trusting relationship with the individual under substitute decision-making to bring such applications.

27: The Ontario Government explore the benefit of giving the Public Guardian and Trustee the discretion, upon completion of an investigation that does not warrant an application for temporary guardianship, to forward a written report to the Consent and Capacity Board, which

would be empowered, with appropriate processes, to order training, mediation, or regular reporting for a substitute decision-maker.

32: In amending the *Health Care Consent Act, 1996* to prepare the Consent and Capacity Board to perform its new role, the Ontario Government consider whether the current time limits for adjudication should be maintained for all applications, or whether for some matters previously dealt with by the Superior Court of Justice, time limits should be more flexible to permit greater scope for alternative dispute resolution, including mediation.

35: a) The Ontario Government repeal the statutory guardianship process under sections 15 and 16 of the *Substitute Decisions Act, 1992* and replace it by applications for appointments to the Consent and Capacity Board.

b) Consistent with the principle of progressive realization, this action be taken towards the goal of eliminating statutory guardianship completely.

42: Government amend the *Substitute Decisions Act, 1992*, to clearly identify the role of the Public Guardian and Trustee providing expert, trustworthy, professional substitute decision-making for those who do not have access to options that will appropriately meet their decision-making needs, and to set out criteria and processes to enable the Public Guardian and Trustee to fulfil this mandate.

43: Provided that the safeguards identified below or their equivalents are implemented, the Government of Ontario explore the feasibility of establishing a licensing and regulatory system for professional representatives, with the following characteristics:

- a) Licensing and oversight focus on those providing these services as a core business, and acting for multiple individuals.
- b) Licensing and oversight be provided, at least during the development of the profession, from within government or through a government agency potentially funded through fees.
- c) Licensed professional representatives be permitted to make both property and personal care decisions, and to be appointed either personally or externally.
- d) The oversight regime include the following safeguards and assurances of quality:
 - i. Minimum requirements for skills and training;
 - ii. Ongoing professional development requirements;
 - iii. Requirements for credit and criminal records checks;
 - iv. A set of standards of conduct and quality, including prohibitions on specified conflict transactions;
 - v. Record keeping requirements;
 - vi. Annual filing requirements; and

vii. Requirements for bonds or insurance.

44: The Government of Ontario explore the viability of enabling community agencies to provide substitute decision-making for low-stakes, day-to-day decisions, such as basic budgeting, bill paying and accessing supports and services, including the creation of appropriate mechanisms for selecting, overseeing, setting standards and addressing conflicts of interest for this function.

48: a) As one element of a broader education and information strategy, the responsible institution create a central, coordinated clearinghouse of information for substitute decision-makers and supporters, in plain language and in a variety of languages and accessible formats, including print, online and interactive media.

b) Information include instruction on the legislation, statutory duties and the rights of the affected individual, good decision-making practices, tools (for example, for maintaining records) and resources where supports can be found.

49: The Ontario Government include in standard forms it creates in relation to personal appointments (such as the current forms for powers of attorney and proposed forms for support authorizations, statements of commitment and notices of attorney acting) information about how readers can access further information on the topic, such as through the proposed clearinghouse.

APPENDIX C

ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

A. Organizations and Experts

The LCO heard from close to 300 organizations and experts throughout the course of its consultations. The following list includes organizations and experts who:

- provided written submissions to the consultations (10),
- provided practical support to the Fall 2014 Public Consultations (17),
- attended one of the Fall 2014 Focus Groups (over 160)
- attended the Fall 2014 Consultation Forum (35), or
- were interviewed by LCO staff (94).

Some of the organizations and experts listed participated in multiple ways over the course of the project. The LCO would also like to thank all those who commented and asked questions during the LCO's many presentations on this topic since the inception of this project.

In addition to those listed below, the LCO heard, during its consultations, from several members of the judiciary and a wide range of government officials.

The Advisory Group for this project has been integral to its work. The members of the Advisory Group are listed at the front of this *Report*.

1. Melanie Abbey, Rights Adviser, Southwest Centre for Forensic Mental Health Care
2. Donna Abbink, Limestone District School Board
3. Teresa Acs, Scotia Private Client Group
4. Laura Addington, BMO Financial Group
5. Advocacy Centre for the Elderly
6. Ann Elise Alexander, CIBC Trust Corporation
7. Alisha Alladina, Toronto Central Community Care Access Centre
8. Dr. Federico Allodi, Psychiatrist
9. Alternative Dispute Resolution Institute
10. Tom Archer, Developmental Services Ontario, Niagara
11. Peggy Armstrong, Grey Flag Campaign
12. Michael Bach, Canadian Association for Community Living
13. David Baker, BakerLaw
14. Jan Barduzzi, Brain Injury Services
15. Deborah Barker, Alzheimer Society of Grey-Bruce
16. Janet Barry, Community Living Kingston and District
17. Sally Bean, Sunnybrook Health Sciences Centre
18. Jennifer Bell, Princess Margaret Cancer Centre
19. Beth Bentley, Ongwanada
20. Joanne Bertrand, Ontario Caregivers Coalition
21. Lise Betteridge, Ontario College of Social Workers and Social Service Workers
22. Dr. Raj Bhatla, Royal Ontario Hospital

23. Sharon Biecks-Hangrow, Westpark Health Care Centre
24. Elizabeth Birchall, Community Outreach Programs in Addictions
25. Carol Blake, Advocate, Providence Care Mental Health Services Kingston
26. Donna Broga, Lee Manor
27. Barbara Bryan, Jarlette Health Services
28. Kelley Bryan, Swadron Associates
29. Katharine Buchan, Autism Society of Ontario
30. Rob Buchanan, Legal Aid Ontario
31. Daniel Buchman, University Health Network
32. Charlotte Bumstead, Grey-Bruce Health Services
33. Chris Burton, RBC Wealth Management Estate and Trust Services
34. Dr. Clarissa Bush, Psychologist, Queensview Professional Services
35. Elaine Calvert, Registered Nurses Association of Ontario
36. Canadian Mental Health Association, Ontario Division, Executive Directors Network
37. Canadian Mental Health Association, Ontario Division, Human Services and Justice Coordinating Committee
38. Paul Cappuccio, Southlake Regional Health Services, ACTT/PACTT, Adult Outpatient Mental Health Services
39. Linda Carey, Advocate, St. Joseph's Health Care Hamilton
40. Alexandra Carling-Rowland, College of Audiologists and Speech Language Pathologists
41. Dr. Corine Carlisle, Centre for Addiction and Mental Health
42. Elizabeth Carlton, Ontario Hospital Association
43. Danielle Carnegie, Community Living Kingston and District
44. Kelly Caswell, Toronto Central Community Care Access Centre
45. Dr. Patricia Cavanagh, Centre for Addiction and Mental Health
46. Jennifer Chambers, Centre for Addiction and Mental Health, Empowerment Council
47. Dr. Ranjith Chandrasena, The Chatham-Kent Health Alliance
48. Paula Chidwick, William Osler Health Systems
49. Howard Chodos, Mental Health Commission of Canada
50. Bob Clark, Humber River Hospital
51. Georgie Clarke, Concerned Friends of Ontario Citizens in Care Facilities
52. John Clegg, Scotia Private Client Group
53. Coalition on Alternatives to Guardianship
54. Audrey Cole (advocate)
55. Barbara Collier, Communications Disabilities Access Canada
56. Nancy Cooper, Ontario Long-term Care Association
57. Barry Corbin, Corbin Estate Law Professional Cooperation
58. Jacques Côté, Barrister and Solicitor
59. Johanne Curodeau, Association pour l'intégration sociale d'Ottawa
60. Eytayo Dada, Barrister and Solicitor
61. Margaret Dain, Rights Adviser, Providence Care Mental Health Services Kingston
62. Carol Dalgado, CIBC Trust Corporation
63. Dr. Christopher De Bono, Toronto Central Community Care Access Centre
64. Pauline Diemert, Alzheimer Society Grey Bruce
65. Cathy DiFonte, Advocate, Waypoint Centre for Mental Health Care, Penetanguishene
66. Cynthia Dillon, Rights Adviser, Brockville Mental Health Centre
67. Lisa Douris, SRT Medstaff
68. Robin Rundle Drake, Advocate, Regional Mental Health Care London

69. Diane Dyson, WoodGreen Community Services
70. Dawn Eccles, Registered Nurse
71. Dr. Virginia Edwards, Psychiatrist
72. Duncan Embury, Neinstein & Associates
73. Orville Endicott, Community Living Ontario
74. Maureen Etkin, Elder Abuse Ontario
75. Phyllis Fabra, Rights Adviser, Centre for Addiction and Mental Health
76. Donna Fairley, Ontario Association of Residents Councils
77. Guy Farrell, Farrell Law Group
78. Dian Ferguson, CIBC Asset Management
79. Dr. Ian Ferguson, Providence Health Care
80. Anne Marie Fitzgerald, Ontario Works
81. Elana Fleischman, Social Justice Tribunals Ontario
82. Dr. Russell Fleming, Waypoint Centre for Mental Health Care
83. Dr. Jennifer Fogarty, Psychologist, St. Joseph Healthcare London
84. Dr. Jane Fogolin, Thunder Bay Regional Health Sciences Centre
85. Angie Fong, BMO Harris Private Banking
86. Andrea Foti, College of Physicians and Surgeons of Ontario
87. Cristel Francis, Barrister and Solicitor
88. Beth French, Brockville and District Association for Community Involvement
89. Ryan Fritsch, Legal Aid Ontario
90. Antonio Gallo, Joint Centre for Bioethics
91. Nimali Gamage, Goddard, Gamage and Stephens LLP
92. Meryl Zisman Gary, BakerLaw
93. Dr. Rose Geist, Trillium Health Centre
94. Dr. Maggie Gibson, Psychologist, St. Joseph Healthcare London
95. Dr. Joan Gilmour, Osgoode Hall Law School
96. Jan Goddard, Goddard, Gamage and Stephens
97. Dianne Godkin, Trillium Health Partners
98. Gabriella Golea, Centre for Addiction and Mental Health
99. Bruce Graham, WoodGreen Community Services
100. Angela Grant, Advocate, Centre for Addiction and Mental Health
101. Dr. Adrian Grek, Mount Sinai Hospital & University of Toronto
102. Tom Groziner, RBC Wealth Management Estate and Trust Services
103. Michelle Hagar, Ontario Works
104. Professor Margaret Hall, Thompson Rivers University
105. Dr. Karen Hand, London Psychiatric Hospital
106. Mark Handelman, Whaley Estate Litigation
107. Professor Lynne Hanson, Queen's University Law School
108. Louise Hanvey, Canadian Hospice Palliative Care Association
109. David Harvey, Alzheimer Society of Ontario
110. Alice Haveman, Counselling Services of Belleville and District
111. Ann Hester, Joint Centre for Bioethics
112. Rick Hill, Community Living Owen Sound and District
113. Ann Hilliard, Centre for Addiction and Mental Health
114. D'Arcy Hiltz, Hiltz LLP
115. Sandra Hood, Alzheimer Society Grey Bruce
116. Leah Hood, Grey-Bruce Health Services

117. Tracy Howell, PACE Independent Living
118. Elizabeth Hughes, Advocate, Brockville Mental Health Centre
119. Kimberley Ibarra, Joint Centre for Bioethics
120. Krista James, Canadian Centre for Elder Law
121. Colleen Kelly Jensen, Community Living Kingston and District
122. Danielle Joel, Borden Ladner Gervais
123. Kerri Joffe, ARCH Disability Law Centre
124. Deborah Johnston, Chartwell Seniors Housing
125. Carolyn Jones, Barrister and Solicitor
126. Michelle Jorge, Jewell, Radimisis Jorge
127. Horace Joseph, ARCH Disability Law Centre
128. Daria Kagan, Kagan Law Firm
129. Ellen Kampf, Ontario College of Social Workers and Social Service Workers
130. Anya Kater, Ontario Human Rights Commission
131. Teri Kay, Ontario Network for the Prevention of Elder Abuse
132. Lana Kerzner, Barrister and Solicitor
133. Nabila Khan, ARCH Disability Law Centre
134. Reema Khawja, Ontario Human Rights Commission
135. Christa Korens, Centre for Addiction and Mental Health
136. Julian Kusek, Advocate, Waypoint Centre for Mental Health Care, Penetanguishene
137. Gordon Kyle, Community Living Ontario
138. Hilary Laidlaw, McCarthy Tétrault LLP
139. Liz Laird, Palliative Pain and Symptom Management Consultation Program Southwestern Ontario
140. Alastair Lamb, Ongwanada
141. Margaret Lambert, Upper Canada Lodge, Long Term Care Home
142. Dr. Larry Leach, Psychologist, Baycrest
143. Dee Lender, Ontario Association of Residents Councils
144. Nina Lester, Barrister and Solicitor
145. Brian Loza, BMO Mutual Funds
146. Dr. Lynn MacDonald, National Initiative for the Care of the Elderly
147. Jane Mackenzie, Rights Adviser, Lakehead Psychiatric Hospital
148. Faith Malcolm, Rights Adviser, Ontario Shores Centre for Mental Health Sciences
149. Gary Malkowski, Canadian Hearing Society
150. Lisa Manuel, Family Service Toronto
151. Chrystal Marshall, Rights Adviser, North Bay Regional Health Centre
152. Andrée-Anne Martel, Association des jurists d'expression française de l'Ontario
153. Nyranne Martin, Centre for Addiction and Mental Health
154. Paul McGarvey, Extend a Family Kingston
155. Sally McMackin, Toronto Central Community Care Access Centre
156. Elizabeth McNab, Ontario Coalition (Society) of Senior Citizen's Organizations
157. Jane Meadus, Advocacy Centre for the Elderly
158. Douglas Melville, Ombudsman for Banking Services and Investments
159. Mental Health Legal Committee
160. Isfahan Merali, Consent and Capacity Board
161. Estrella Mercurio, ParaMed Home Health Care-Toronto Central
162. Suzanne Michaud, Royal Bank of Canada
163. Audrey Miller, Elder Caring

164. Anita Miller, Preferred Health Care Services
165. Edgar-Andre Montigny, ARCH Disability Law Centre
166. Dr. Elizabeth Moore, Psychologist, Providence Health Care
167. Dr. Rick Morris, College of Psychologists of Ontario
168. Katherine Mortimer, Ontario Seniors Secretariat
169. Rikin Morzaria, McLeish Orlando
170. Patricia Muldowney-Brook, Muldowney-Brooks Mediation Services
171. Kendra Naidoo, Centre for Addiction and Mental Health
172. Northumberland Community Legal Centre
173. Jordan Oelbaum, Schnurr Kirsh Schnurr Oelbaum Tator
174. Roy O'Leary, Investors Group Trust
175. Catherine Olsiak, SimpsonWigle Law LLP
176. Ontario Brain Injury Association
177. Robyn Ord, Toronto Central Community Care Access Centre
178. Mr. Justice Edward Ormston, Consent and Capacity Board
179. Diane Parsons, Barrister and Solicitor
180. Stanley Pasternak, Law Offices of Stanley Pasternak
181. Ruth Patterson, York Durham Aphasia Centre
182. Lora Patton, York University, Consent and Capacity Board
183. Professor Patricia Peppin, Queen's University Law School
184. Mercedes Peres, Mental Health Law Committee
185. Ivana Petricone, ARCH Disability Law Centre
186. Kathryn Pilkington, Ontario Association of Non-Profit Homes and Services for Seniors
187. Jeff Poirier, Ontario Human Rights Commission
188. Brendon Pooran, Barrister and Solicitor
189. Jennifer Pothier, Niagara North Legal Clinic
190. Steacey Powell, Community Living Kingston and District
191. Lisa Priolo, Advocate, Centre for Addiction and Mental Health
192. Alexander Procopé, Swadron Associates
193. Lorraine Purdon, Association of Family Councils
194. Sally Qi, Community Ethics Network
195. Archie Rabinowitz, Dentons Canada LLP
196. Steve Rastin, Rastin & Associates
197. Kevin Reel, Centre for Addiction and Mental Health
198. Anne Reynolds, BMO Harris Private Banking
199. Gail Riihimaki, Community Care Access Centre, Niagara Region
200. Margaret Rintoul, Blaney McMurtry LLP
201. Dr. Marcia Rioux, York University
202. Cherie Robertson, Ontario Human Rights Commission
203. Allan Rouben, Barrister and Solicitor
204. Carol Rudel, Seniors Community Programs, Niagara Region
205. Nancy Rushford, Alzheimer Society, Niagara Region
206. Barbara Russell, Centre for Addiction and Mental Health
207. Anna Ruto, Toronto Central Community Care Access Centre
208. Deb Ryckman, Community Living North Frontenac
209. Sheri Scott, Community Living Kingston and District
210. Greg Shaw, International Federation on Ageing
211. Jenny Shickluna, Niagara Region Seniors Services

- 212. Roslyn Shields, Centre for Addiction and Mental Health
- 213. Dr. Gerald Shugar, Centre for Mental Health and Addiction
- 214. Doreen Simenov, Canadian Mental Health Association
- 215. Ruth Sommers, St. Joseph's Health Care Hamilton
- 216. Dean Lorne Sossin, Osgoode Hall Law School
- 217. Margaret Spoelstra, Autism Ontario
- 218. Peter Sproul, Community Living Kingston and District
- 219. Wade Stevenson, Rights Adviser, Waypoint Centre for Mental Health Care,
Penetanguishene
- 220. Ebony St. Rose, Centre for Addiction and Mental Health
- 221. Laurel Stroz , Toronto Central Community Care Access Centre
- 222. Stanley Stylianos, Psychiatric Patient Advocacy Office
- 223. Myra Sugar, Kerry's Place
- 224. Professor Doug Surtees, University of Saskatchewan College of Law
- 225. Marshall Swadron, Swadron Associates
- 226. Georgia Swan, HGR Graham Partners LLP
- 227. Irina Sytcheva, Schizophrenia Society
- 228. Anita Szigeti, Anita Szigeti Advocates
- 229. Shaheynoor Talukder, Barrister and Solicitor
- 230. Marie Taylor, Advocate, Ontario Shores Centre for Mental Health Sciences
- 231. Kim Thompson, Rights Adviser, Regional Mental Health Care London
- 232. Rachel Thomson, Community Care Access Centre Southwest
- 233. Dr. Michele Tremblay, Northern Ontario Francophone Psychiatric Program
- 234. Matthew Trennum, Privacy by Design, Niagara Region
- 235. Kate Tschakovsky, Centre for Addiction and Mental Health
- 236. Tom Turner, Developmental Services of Leeds and Grenville
- 237. Mary Beth Valentine, Retirement Homes Regulatory Authority
- 238. Frank Wagner, Joint Centre for Bioethics
- 239. Judith Wahl, Advocacy Centre for the Elderly
- 240. Professor Shirley Wales, Humber College
- 241. Dean Walsh, Community Living North Frontenac
- 242. Laura Watts, Canadian Centre for Elder Law
- 243. Graham Webb , Advocacy Centre for the Elderly
- 244. Joanna Weiss, Anita Szigeti Advocates
- 245. Kimberly Whaley, Whaley Estate Litigation
- 246. Carla Whillier, Barrister and Solicitor
- 247. Krista Whittard, Niagara Region Mental Health
- 248. Ruth Wilcock, Ontario Brain Injury Association
- 249. Kim Wilson, Canadian Coalition for Seniors Mental Health
- 250. Dianne Wintermute, ARCH Disability Law Centre
- 251. Christine Wray, Toronto Central Community Care Access Centre
- 252. David Wright, Human Rights Tribunal of Ontario
- 253. Anna Zachariah , Ontario Coalition (Society) of Senior Citizen's Organizations
- 254. Joanna Zymont, Centre for Addiction and Mental Health

B. Private Individuals

In accordance with our mandate, and reflecting the nature of this project, the LCO made efforts throughout to not only make participation accessible to individual older adults, but to actively encourage their participation.

The LCO received input from over **300** individuals over the course of this project. This includes:

- **212** responses to the survey questionnaires: 109 from individuals directly affected and 103 from persons providing decision-making assistance,
- **close to 100** individuals participating in the LCO's eleven focus groups for persons directly affected or family members,
- several formal interviews conducted by LCO staff,
- several individuals who contacted us via phone calls, emails, written submissions or online comments.

In accordance with the LCO's *Privacy Policy*, the names of contributing individuals are not listed here. However, the participation of these individuals fundamentally shaped this project throughout, and the LCO wishes to express our gratitude to them for sharing their expertise and experiences with us.

C. Commissioned Research Papers

The LCO issues a call of the preparation of research papers in particular subjects relevant to a project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views.

Advocacy Centre for the Elderly and Dykeman Dewhirst O'Brien LLP: *Health Care Consent and Advance Care Planning: Standards and Supports*, online at: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-ace-ddo>.

ARCH Disability Law Centre: *Decisions, Decisions: Promoting And Protecting The Rights Of Persons With Disabilities Who Are Subject To Guardianship*, online at: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-arch>.

Canadian Centre for Elder Law: *Understanding the Lived Experience of Assisted and Supported Decision-making in Canada*, online at: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-ccel>.

Dr. Bonnie Lashewicz: *Understanding and Addressing Voices of Adults with Disabilities Within Their Family Caregiving Contexts: Implications for Legal Capacity, Decision-making and Guardians* online: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-lashewicz>.

The following papers were also of assistance to the LCO:

Dr. Vahe Kehyayan and Dr. John P. Hirdes: *Socio-Demographic, Clinical and Functional Characteristics of Persons Lacking Legal Capacity Across the Continuum of Health Care Settings in Ontario*, Interim Paper, November 2013, unpublished.

Lana Kerzner and Michael Bach: *Fulfilling the Promise: 'Alternative Courses of Action' under the Substitute Decisions Act*, Interim Paper, March 2014, unpublished.

APPENDIX D

CONSULTATION QUESTIONNAIRES

CONSULTATION QUESTIONNAIRE FOR INDIVIDUALS RECEIVING ASSISTANCE WITH DECISIONS

About This Questionnaire

The Law Commission of Ontario (LCO) is an independent organization that studies laws and makes recommendations to the government about how to make laws fairer, easier to use, and more effective. You can find more information about us on our website, here: www.lco-cdo.org.

We are studying the laws about what happens when people need assistance in making important decisions. This includes laws about, for example, powers of attorney and guardians. We are looking at how people who need it get assistance with decision-making, what kind of help they can get, and what happens when things go wrong. We want to know how well the law is working for people now, if changes are needed, and if so, what kinds of changes would be helpful. We would like to hear from you about your experiences as someone who receives help with decision-making.

We will use your answers to our questions to help us understand how the law is working, and to make recommendations for change. We will not use your answers for any other purpose. No one except the people at the LCO will be allowed to see the answers to your questions. We will never give out your name or personal information. If we write about your experiences in our reports, we will do it in a way that others cannot identify you.

Completing This Questionnaire

You can answer our questions in the way that is easiest for you. You can

- write the answers to our questions on this form and mail it back to us at the address below.
- fill out this form on your computer, and email it back to us as an attachment.
- fill out the answers on our website, here: <http://www.lco-cdo.org/en/capacity-guardianship-consultation-questionnaire-individuals> [Questionnaire no longer available].
- call us using our local or toll-free telephone numbers, and we will write the answers down for you.

You do not need to answer all of the questions. You can answer only the ones that are important to you.

To contact us

Law Commission of Ontario
2032 Ignat Kaneff Building, Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

Toronto : (416) 650-8406
Toll-free : 1 (866) 950-8406
TTY : (416) 650-8082

Background Information

1. Is there a person (or more than one person) who helps you to make important decisions, for example by helping you to understand information or speaking on your behalf to others?

- Yes
- No

If yes, how does this person(s) provide assistance?

- As a family member or friend
- On the basis of a legal document

If the person(s) has a legal document, what is it called?

- Power of attorney for property
- Power of attorney for personal care
- Statutory guardianship
- Court appointed guardian of property
- Court appointed guardian of the person
- Appointment by the Consent and Capacity Board
- Other (please tell us what it is) _____
- Don't know

2. The person (or persons) who help me is my: (check all that apply)

- Spouse (e.g., husband, wife, common-law partner)
- Parent (e.g., mother, father, stepfather, stepmother, foster parent)
- Adult child (including a step or foster child)
- Brother or sister (including step or foster brothers or sisters)
- Other relative (such as an aunt or uncle, cousin, niece or nephew)
- Friend
- Other (please tell us who) _____

This person or persons helps me with: (check all that apply)

- Decisions about my health (such as medical treatments, dental care, physiotherapy and similar decisions)
- Decisions about my money or property (such as banking, investments or daily spending)
- Decisions about where to live (such as whether to move to long-term care or to stay in the community)
- Personal decisions about issues such as education, employment, support services or daily activities)

3. Have you ever had your ability to make decisions assessed by a professional, such as a doctor or a "capacity assessor"?

- Yes

No

How did this come about? What happened?

Your Experiences With Decision-making

4. If someone is helping with your decision-making, do you agree that you need that help?

Yes

No

5. Have you ever tried to challenge a decision that you needed help with decision-making?

Yes

No

If yes, how did you do that? What happened?

6. When someone started helping me with decision-making, I received an explanation of my rights under the law.

Yes

No

If yes, I received information from (check all that apply):

A lawyer

A community agency

- A health professional, such as a doctor, nurse, occupational therapist or other professional
- The person helping me with decisions
- A family member or friend
- A government official
- Written materials or the internet
- Other (please tell us who): _____

If you received information, was it helpful?

For the following statements, please tell us whether you agree or disagree that this is true for you.

7. I have a good understanding of my legal rights when someone is helping me with decision-making.
- Strongly agree
 - Agree
 - Neither agree nor disagree
 - Disagree
 - Strongly disagree

If you disagree, what do you need to help you understand your rights?

8. The person who is supposed to help with my decision-making provides the kind of help that I need.
- Strongly agree
 - Agree
 - Neither agree nor disagree
 - Disagree
 - Strongly disagree

What kind of help do you need with making decisions?

9. The person who is supposed to help with my decision-making treats me with respect.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you would like to tell us more about the way that you are treated by the person who helps with your decision-making, please do so here.

10. The person who is supposed to help with my decision-making supports me to make my own decisions as much as possible and to be independent.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you would like to tell us more about the ways in which this person does or doesn't help you to be independent and make the decisions that you can, please do so here.

11. I know where I could go for help if the person who is supposed to help with my decision-making was not following the law or treating me the way they should.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you would like to tell us more about where you could go for help if you were being abused or treated in a way that wasn't right, please do so here.

The people who provide services to me, like banks or doctors, accept the person who helps me to make decisions and lets them help me the way that I need.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you have had difficulty with service providers because of your decision-making arrangements, you can tell us what happened here.

12. Did someone help you to fill out this form?

- Yes
- No

If yes, who helped you? _____

13. Please tell us anything else you'd like to about your experiences with making decisions and the law.

Some Information about You

The LCO would like to ask some questions about you. These will help us understand the different kinds of experiences that people have with decision-making laws, and to make sure that we are hearing from people with lots of different experiences. However, as with the remainder of the questionnaire, you do not have to answer these questions if you do not want to.

14. What is your age?

- Under age 25
- Age 25 – 44
- Age 45 – 64
- Age 65 – 84
- Age 85 or older

15. Are you a person with a disability or disabilities?

- Yes
- No

Please identify your disability or disabilities: _____

16. What is your gender? _____
17. How would you describe your race or ethnicity? _____
18. Do you identify as an Aboriginal person? If so, with which Aboriginal nation(s) or community(ies) do you identify? _____

19. What language do you mostly speak at home? _____

20. How do you self-identify in terms of your sexual orientation? _____

21. With whom do you live? Please check all that apply:

- On my own
- With my parents
- With a spouse or partner
- With my children
- With extended family
- In a group setting (e.g., a retirement home, a group home)
- Other (please tell us where) _____

Do you live with the person or people who help you with making decisions?

- Yes
- No

If no, how far away does the person or people helping you live?

22. Have you been living in Canada for less than 10 years?

- Yes
- No

Your Contact Information

Would you like to be added to our mailing list for this project, so we can send you information about other consultations or future reports and recommendations?

- Yes, please add me to your mailing list
- No, please do not contact me

If you would like to be added to our mailing list, please give us your contact information:

Name:

Address:

E-mail address:

Telephone Number (optional):

CONSULTATION QUESTIONNAIRE FOR FAMILIES, FRIENDS, SUPPORTERS AND SUBSTITUTE DECISION-MAKERS

About This Questionnaire

The Law Commission of Ontario (LCO) is an independent organization that studies laws and makes recommendations to the government about how to make laws fairer, easier to use, and more effective. You can find more information about us on our website, here: www.lco-cdo.org.

We are studying the laws about what happens when people need assistance in making important decisions. This includes laws about, for example, powers of attorney and guardians. We are looking at how people who need it get assistance with decision-making, what kind of help they can get, and what happens when things go wrong. We want to know how well the law is working for people now, if changes are needed, and if so, what kinds of changes would be helpful. We would like to hear from you about your experiences in providing assistance with decision-making. Understanding your experiences is important for us to make good recommendations for changes to the law.

We will use your answers to help us understand how the law is working, and to make recommendations for change. We will not use your answers for any other purpose. No one except the people at the LCO will be allowed to see the answers to your questions. We will never give out your name or personal information. If we write about your experiences in our reports, we will do it in a way that others cannot identify you.

Completing This Questionnaire

You can answer our questions in the way that is easiest for you. You can

- write the answers to our questions on this form and mail it back to us at the address below.
- fill out this form on your computer, and email it back to us as an attachment.
- fill out the form on our website, here: <http://lco-cdo.org/en/capacity-guardianship-consultation-questionnaire-form-supporters> [Questionnaire no longer available]
- or call us using our local or toll-free telephone numbers, and we will write the answers down for you.

You do not need to answer all of the questions. You can answer only the ones that are important to you.

To contact Us

Law Commission of Ontario
2032 Ignat Kaneff Building, Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

Toronto : (416) 650-8406
Toll-free : 1 (866) 950-8406
TTY : (416) 650-8082

Background Information

5. Do you assist another adult with making decisions?

- Yes
- No

If yes, how do you provide assistance?

- As a family member or a friend
- On the basis of a legal document

If you have a legal document, what is it called? (if more than one, check all that apply)

- Power of attorney for property
- Power of attorney for personal care
- Statutory guardianship
- Court appointed guardian of property
- Court appointed guardian of the person
- Appointment by the Consent and Capacity Board
- Other (please tell us what it is) _____
- Don't know

6. The person I assist with decisions is my:

- Spouse (e.g., husband, wife, common-law partner)
- Parent (e.g., mother, father, stepfather, stepmother, foster parent)
- Adult child (including a step or foster child)
- Brother or sister (including step or foster brothers or sisters)
- Other relative (such as an aunt or uncle, cousin, niece or nephew)
- Friend
- Other (please tell us who) _____

7. What types of decisions do you assist this person with?

- Decisions related to health (such as medical treatments, dental care, physiotherapy and similar issues)
- Decisions related to money or property (such as banking, investments or daily expenditures)
- Decisions about where to live (such as whether to move to long-term care or to remain in the community)
- Personal decisions (such as decisions about education, employment or daily activities)

8. Are you the sole person assisting with decision-making, or are you acting with one or more other individuals?

- Acting on my own
- Acting with others

If you are acting with others, are you required to do so by a legal document?

- Yes

No

If you are acting with others, how are those others related to the person being assisted and to you?

If you are acting with others, how far do you live from the other person(s) who assist with decision-making?

Your Experiences With Decision-making

9. Were you the person who decided that the assistance with decision-making was needed (for example, that the power of attorney should be used, or that an application for guardianship should be made)?

Yes

No

If yes, what made you decide that?

If not, who did decide? _____

How was the individual whom you are helping involved in this process?

10. Did a lawyer help you with this process?

Yes

No

How easy or difficult did you find this process? If it was difficult, what would have made it easier?

11. How would you describe your decision-making role? For example, what do you do for the person you are assisting?

How are decisions made? If there are disagreements between you and the person you assist, how are they resolved?

Please include any information that would help us in understanding your role.

12. If you are acting together with one or more other persons to assist with decisions, how do you work together? If there are disagreements, how are they resolved?

13. Have service providers, such as financial institutions or health care providers, accepted your role in assisting with decisions?

- Yes
- No

If you would like to tell us more about your experiences with service providers, please do so here.

For the following statements, please tell us whether you agree or disagree that this is true for you.

14. I received an explanation of my roles and responsibilities under the law when I began providing decision-making assistance.

- Yes
- No

If yes, I received information from:

- A lawyer
- A community agency
- A health professional, such as a doctor, nurse, occupational therapist or other professional
- A family member or friend
- A government official
- Written materials or the internet
- Other (please tell us who): _____

I have a good understanding of my legal role and responsibilities as someone who is providing assistance with decision-making needs.

- Strongly agree
- Agree

- Neither agree nor disagree
- Disagree
- Strongly disagree

If you would like to tell us more about the information you received or how you received it, please do so here.

15. I have the supports I need to fulfil my decision-making role well.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you would like to tell us what supports you receive, if any, and what supports you would find helpful, if any, please do so here.

16. I believe that the person that I am assisting has a good understanding of their rights under the law, including an understanding of my role.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Would you like to tell us more about how this person was informed about their rights?

17. I think the law as it exists now does a good job of making sure that people like me carry out our decision-making responsibilities in the right way.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

If you disagree, what could be improved? If you agree, why do you agree?

18. Please tell us anything else that you would like to about your experiences with decision-making and the law.

Some Information About You

The LCO would like to ask some questions about you. These will help us understand the different kinds of experiences that people have with decision-making laws, and to make sure that we are hearing from people with many different experiences. However, as with the remainder of the questionnaire, you do not have to answer these questions if you do not want to.

19. What is your age?

- Under age 25
- Age 25 – 44
- Age 45 – 64
- Age 65 – 84
- Age 85 or older

20. Are you a person with a disability or disabilities?

- Yes
- No

Please identify your disability or disabilities: _____

21. What is your gender? _____
18. How would you describe your race or ethnicity? _____
19. Do you identify as an Aboriginal person? If so, with which Aboriginal nation(s) or community(ies) do you identify? _____
20. What is the primary language of the person you help? _____
21. How do you self-identify with respect to your sexual orientation? _____
22. What is the highest level of education that you have attained?
- Some high school
 - High school diploma
 - Some college or university
 - College or university diploma
 - Graduate or professional schooling
23. With whom do you live? Please check all that apply:
- On my own
 - With my parents
 - With a spouse or partner
 - With my children
 - With extended family
 - In a group setting (e.g., a retirement home, a group home)
 - Other (please tell us where) _____
- Do you live with the person you help?
- Yes
 - No
- If no, how far away from that person do you live? _____
24. Have you been living in Canada for less than 10 years?
- Yes
 - No

Your Contact Information

Would you like to be added to our mailing list for this project, so we can send you information about other consultations or future reports and recommendations?

- Yes, please add me to your mailing list

No, please do not contact me

If you would like to be added to our mailing list, please provide us with your contact information, depending on how you prefer to be contacted:

Name:

Address :

E-mail address:

Telephone Number (optional):

APPENDIX E

FOCUS GROUPS, 2014 PUBLIC CONSULTATIONS

1. **Individuals with Mental Health Disabilities**, in partnership with the Empowerment Council (August 21, 2014).
2. **Clinicians**, in partnership with the Centre for Addiction and Mental Health (September 12, 2014)
3. **Mental Health Bar**, in partnership with the Mental Health Legal Committee (September 17, 2014)
4. **Family Caregivers**, in partnership with the Ontario Caregiver Coalition (September 22, 2014).
5. **Dementia Workforce**, in partnership with the Alzheimer Society of Ontario (September 23, 2014)
6. **Service Providers, Niagara Region**, in partnership with Niagara Region Senior Support Services (September 24, 2014)
7. **Rights Advisers and Advocates**, in partnership with the Psychiatric Patient Advocate Office (September 25, 2014).
8. **Community Health and Social Service Providers**, in partnership with the Community Ethics Network (September 26, 2014)
9. **Ontario Government Officials 1** (September 29, 2014)
10. **Personal Injury Bar** (September 30, 2014)
11. **Ethicists**, in partnership with the Joint Centre for Bioethics (October 1, 2014)
12. **Advocacy and Service Organizations Toronto**, in partnership with ARCH Disability Law Centre (October 2, 2014)
13. **Trusts and Estates Bar 1** (October 14, 2014)
14. **Trusts and Estates Bar 2** (October 15, 2014)
15. **Persons with Intellectual Disabilities Kingston**, in partnership with Community Living Kingston (October 16, 2014)
16. **Family Members of Persons with Intellectual Disabilities, Kingston**, in partnership with Community Living Kingston (October 16, 2014)
17. **Developmental Services Sector, Kingston**, in partnership with Community Living Kingston (October 17, 2014)
18. **Ontario Government Officials 2** (October 20, 2014)
19. **Service Providers for Individuals Living with Dementia, Owen Sound**, in partnership with Alzheimer Society Grey – Bruce (October 21, 2014)
20. **Persons with Dementia, Owen Sound**, in partnership with Alzheimer Society Grey – Bruce (October 21, 2014)
21. **Family Members of Persons Living with Dementia, Owen Sound**, in partnership with Alzheimer Society Grey – Bruce (October 21, 2014)

22. **Psychiatrists and Consent and Capacity Board Vice Chairs**, in partnership with the Consent and Capacity Board (October 23, 2014)
23. **Judiciary** (November 3, 2014)
24. **Toronto Community Care Access Centre Staff**, in partnership with Toronto Community Care Access Centre (November 4, 2014)
25. **Persons with Acquired Brain Injuries**, in partnership with the Ontario Brain Injury Association (November 7, 2014)
26. **Persons Living in Long-Term Care**, in partnership with the Ontario Association of Residents Councils (November 11, 2014)
27. **Persons with Aphasia**, in partnership with the March of Dimes York Aphasia Centre (November 19, 2014)
28. **Seniors Organizations**, in partnership with Ontario Seniors Secretariat Liaison Group (November 26, 2014)
29. **Families of Persons with Developmental Disabilities**, in partnership with WoodGreen Community Services Development Disability Program (December 3, 2014)
30. **Seniors Living in the Community**, in partnership with WoodGreen Community Services (January 14, 2015)

APPENDIX F

THE LCO'S FRAMEWORK PRINCIPLES

Appended below are excerpts from the LCO's *Framework for the Law as It Affects Persons with Disabilities* and *Framework for the Law as It Affects Older Adults*. The originals can be consulted in the final reports for those projects.

Excerpt from *A Framework for the Law as It Affects Persons with Disabilities*

Principles for the Law as It Affects Persons with Disabilities

In order to counteract negative stereotypes and assumptions about persons with disabilities, reaffirm the status of persons with disabilities as equal members of society and bearers of both rights and responsibilities, and encourage government to take positive steps to secure the wellbeing of persons with disabilities, this *Framework* centres on a set of principles for the law as it affects persons with disabilities.

Each of the six principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. The concept of equality is central to both the *Charter* and the *Code*. The Supreme Court has recognized that governments, in providing services, must respect the equality rights of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality.

There is no hierarchy among the principles, and the principles must be understood in relationship with each other. Although identified separately, the principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting the Dignity and Worth of Persons with Disabilities:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every person with a disability. All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
2. **Responding to Diversity in Human Abilities and Other Characteristics:** This principle requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.

3. **Fostering Autonomy and Independence:** This principle requires the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
4. **Promoting Social Inclusion and Participation:** This principle refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.
5. **Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
6. **Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.

➤ *For more information on the principles, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.C*

Implementing the Principles

As principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all of the principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors to be taken into account in the application of the principles.

Taking the Circumstances of Persons with Disabilities into Account: While it is generally recognized that persons with disabilities make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from their non-disabled peers, laws and policies do not always systematically and appropriately take these into account. As a result, laws and policies may have unintended negative effects on persons with disabilities, may work at cross-purposes with each other, or may fail to achieve their intended goals. In some cases, stereotypes or negative assumptions about persons with disabilities may shape the degree to which or the way in which persons with disabilities are taken into account. In this way, the law may be ableist in its impact. As part of respecting and implementing the principles, the circumstances of persons with disabilities must be taken into account in the development and implementation of all laws, policies and programs that may affect them. This includes the recognition that persons with disabilities are themselves a highly diverse group, with widely varying perspectives, circumstances and experiences. The LCO's *Final Report*, which is a companion to this *Framework*, along with the resources linked to

throughout the *Framework*, may provide assistance in understanding the circumstances of persons with disabilities.

Life Course Analysis: Following from the above, in applying the principles, it is important to consider the full life course of persons with disabilities. The life experiences of each of us will profoundly shape the resources and perspectives we bring to each stage of life. Barriers or opportunities experienced at one stage of life will have consequences that will reverberate throughout the course of life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of individuals. That is, the impact of laws must be understood in the context of every stage of the life of persons with disabilities, from birth to death, and how these stages relate to each other.

Treating Law as Person-Centred Approaches: Law is often developed, implemented and analyzed as a set of separate and largely independent systems. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of fragmented systems – and requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. This requires law to respond to individuals as whole persons with unique needs and identities, and to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of persons with disabilities, in many cases an inclusive design approach that incorporates from the outset the needs of persons with disabilities as well as others into the overall design of a law of general application will be the most effective approach. Persons with and without disabilities will benefit from a focus on dignity, autonomy, inclusion, safety and diversity in the design of laws. Many of the measures required to fulfill the principles and to make the law more fair, accessible and just for persons with disabilities will also make the law more fair, accessible and just for others. Designing laws, policies and programs of general application to include persons with disabilities from the outset can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of persons with disabilities and aim to promote positive principles, their implementation may fall far short of their goals. This is a common phenomenon. There are two aspects to this “implementation gap”: implementation strategies for the law, and mechanisms for ensuring that persons with disabilities are adequately able to access and enforce their rights. In developing and analyzing laws, as much attention must be paid to the implementation of laws as to their substance.

Progressive Realization: The fulfillment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of the experiences of persons with disabilities evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles should be undertaken, such that the changes to law and policy respect and advance the principles, principles are realized to the greatest extent possible at the current time, there is a focus on continuous advancement while regression is avoided, and concrete steps for future improvements are continually identified and planned.

Respect, Protect, Fulfill: In the realm of international human rights law, the concept of “respect, protect, fulfill” is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must take immediate steps to prevent violations of these rights by third parties and provide access to legal remedies for when violations do occur.
3. The obligation to fulfill – States parties must take appropriate legislative, administrative, budgetary, judicial, promotional and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects persons with disabilities, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- *For more information, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.D*

Excerpt from *A Framework for the Law as It Affects Older Adults*

Principles for the Law as It Affects Older Adults

In order to counteract negative stereotypes and assumptions about older adults, reaffirm the status of older adults as equal members of society and bearers of both rights and

responsibilities, and encourage government to take positive steps to secure the wellbeing of older adults, this *Framework* centres on a set of principles to be considered for the law as it affects older adults.

Each of the six principles contributes to an overarching goal of promoting substantive equality for older adults. The concept of equality is central to both the *Charter of Rights and Freedoms* and the Ontario Human Rights Code, The Supreme Court has recognized that governments may have a positive duty to promote the equality of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality. Substantive equality is about more than simple non-discrimination, and includes values of dignity and worth, the opportunity to participate, and the necessity of taking needs into account. It aims towards a society whose structures and organizations include marginalized groups and do not leave them outside mainstream society

There is no hierarchy among the principles, and although they are identified separately, the principles must be understood in relationship with each other. The principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting Dignity and Worth:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family are full persons, unique and irreplaceable. The principle therefore includes the right to be valued, respected and considered; to have both one's contributions and one's needs recognized; and to be treated as an individual. It includes a right to be treated equally and without discrimination.
2. **Fostering Autonomy and Independence:** This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.
3. **Promoting Participation and Inclusion:** This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. An important aspect of participation is the right of older adults to be meaningfully consulted on issues that affect them, whether at the individual or the group level.

4. **Recognizing the Importance of Security:** This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access basic supports such as health, legal and social services.
5. **Responding to Diversity and Individuality:** This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal identity, immigration or citizenship status, disability or health status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.
6. **Understanding Membership in the Broader Community:** This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and obligation and work towards a society that is inclusive for all ages.
 - *For more information on the LCO's Principles for the Law as It Affects Older Adults, see the Final Report, Chapter III.B.*

Implementing the Principles

As the principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors be taken into account in the application of the principles.

Taking the Circumstances of Older Adults into Account: While it is generally recognized that older adults make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from those of younger members of society, laws do not always systematically and appropriately take these needs and circumstances into account. As a result, laws may have unintended negative effects on older adults. In some cases, stereotypes or negative assumptions about older persons may shape the degree to which or the way in which older adults are taken into account. As a result, the law may be ageist in its impact. As part of respecting and implementing the principles, the circumstances of older persons must be taken into account in the development, implementation and review of all laws, policies and practices that may affect them.

While aging is often popularly viewed as an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about growing older and about older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have

lived prior to entering “old age”. Any description of aging and older adults is therefore necessarily complex, as is the case for all life stages.

Life Course Analysis: In applying the principles, it is important to consider older adults as in a phase of “the life course”. Older adults have complex needs and circumstances that are based on a lifetime of experiences and relationships that helped to shape who they are and the choices available to them. Barriers or opportunities experienced at earlier stages of life will have had consequences that reverberate throughout life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of that individual. That is, the impact of laws on older persons must be understood in the context of every stage of their lives, and how these stages relate to each other.

Gender Based Analysis: It is particularly important to consider the experience of aging and older age through a gender lens. Demographic patterns globally indicate a longer life for women, and give rise to gender-specific issues. For example, because of longer life expectancies and because women tend to marry older men, women are more likely than men to be widowed and living alone, which has a number of implications for income, caregiving and living arrangements. Older women also face particular negative stereotypes and dismissive treatment related to their age and gender.

Treating Law as Person-Centred: Law is often developed, implemented and analyzed as a set of separate and largely independent areas, such as family, criminal and real estate law. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of complex and fragmented systems. This approach requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. It requires law to respond to individuals as persons with diverse needs and identities, and therefore to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of older adults, in most cases an approach that is responsive to individuals at various stages of the life course and incorporates older adults into the overall design of the law will be most effective. Younger as well as older adults will benefit from a focus on dignity, autonomy, inclusion, security, diversity and membership in the broader community in the design of laws. Many, if not most of the measures required to fulfil the principles and to make the law more fair, accessible and just for older adults will also make the law more fair, accessible and just for others. An inclusive design approach to laws, policies and practices can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of older adults and aim to promote positive principles, their implementation may fall far short of their goals. This phenomenon, sometimes referred to as the problem of “good law, bad practice”, is not uncommon in the law as it affects older adults. The *Report of the United Nations Expert Group Meeting on the Rights of Older Persons* specifically urges governments to “close the gap between law and implementation of the law”. There are two aspects to this issue: implementation strategies for the law, and mechanisms for ensuring that older adults are adequately able to access and enforce their rights.

Progressive Realization: The fulfilment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of older persons and the aging process evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles may be undertaken, and should ensure that there is a focus on continuous advancement, principles are realized to the greatest extent possible at the current time while regression is avoided, and concrete steps for future improvement are continually identified and planned.

Applying the Concept of “Respect, Protect, Fulfil”: In the realm of international human rights law, the concept of “respect, protect, fulfil” is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must prevent violations of these rights by third parties.
3. The obligation to fulfil– States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects older adults, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- *For information on implementation of the principles see the Final Report, Chapter III.B.5 - 7, and on the circumstances of older adults see Chapter II.*