



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Legal Capacity, Decision-Making and Guardianship

Interim Report

October 2015





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The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. The LCO is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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EXECUTIVE SUMMARY

BACKGROUND

The Law Commission of Ontario (LCO) has undertaken a project to review Ontario's statutory framework related to legal capacity, decision-making and guardianship, to develop recommendations for reform to law, policy and practice in this area. This project has its roots in two of the LCO's completed projects: the *Framework for the Law as It Affects Older Adults* and the *Framework for the Law as It Affects Persons with Disabilities*. It is also linked to the LCO's recently completed project, *Capacity and Legal Representation for the Federal RDSP*.

During the course of those projects, the LCO heard considerable concern about how the laws in this area were operating in practice, and their impact on the autonomy, security, dignity and inclusion of older adults and persons with disabilities. This project applies the LCO *Frameworks* to this area of the law. This means that the project uses a principles-based analysis, takes as an ultimate goal advancing towards substantive equality for older persons and persons with disabilities, and pays close attention to the particular needs and circumstances of those directly affected by this area of the law.

The project focuses on the core statutory framework of the *Substitute Decisions Act* (SDA) and *Health Care Consent Act* (HCCA), as well as the provisions of Part III of the *Mental Health Act* (MHA) related to assessment of legal capacity to manage property. It does not address the common-law, other statutes that touch upon consent and capacity issues, or the broader provisions of the MHA. Within this scope, it concentrates on the following broad issues:

1. The **standard for capacity**, including tests for capacity and the various avenues and mechanisms for assessing capacity under the SDA, HCCA and MHA;
2. **Decision-making models**, including an examination of the desirability and practical implications of alternatives to substitute decision-making, including supported and co-decision-making;
3. **Processes for appointments** (for example of substitute decision-makers), whether through personal appointments or a public process, with a focus on appropriate use and on improving efficiency and accessibility;
4. The **roles and responsibilities of guardians and other substitute decision-makers**, including potential for more limited forms of guardianship and consideration of options for those who do not have family or friends to assist them;
5. **Monitoring, accountability and prevention of abuse** for substitute decision-makers or supporters, however appointed, and of misuse by third party service providers,

including mechanisms for increasing transparency, identifying potential abuse and ensuring compliance with the requirements of the law; and

6. **Dispute resolution**, including reforms to increase the accessibility, effectiveness and efficiency of current mechanisms.

This *Interim Report* is the penultimate stage of this project. It sets out the LCO's draft analysis of the issues and recommendations for reform to law, policy and practice, as a basis for comment. It will be circulated widely, and responses will be taken into account in the preparation of the *Final Report*.

The draft analysis and recommendations in this *Interim Report* are based on intensive research, including the commissioning of several expert papers on a range of topics. As well, the LCO conducted extensive consultations, both at the preliminary stage, and following the release of a comprehensive *Discussion Paper* during the summer of 2014. The LCO has heard from a wide array of professional and institutional stakeholders, as well as family members and those directly affected by the law. As well, the LCO has benefitted throughout the course of this project from the expertise of a hard-working project Advisory Group.

The LCO's proposed recommendations for reforms to law, policy and practice in this area fall into six broad themes:

1. Improving access to the law;
2. Promoting understanding of the law;
3. Strengthening the protection of rights under the *Health Care Consent Act*;
4. Reducing inappropriate intervention;
5. Increasing accountability and transparency for personal appointments; and
6. Enabling greater choice of substitute decision-makers.

Each of these will be addressed separately below.

CONTEXTS AND CHALLENGES FOR REFORM

While legal capacity, decision-making and guardianship legislation does not refer to specific classes of persons, some persons are more likely to be found legally incapable or to be assumed to be legally incapable, including persons with developmental, intellectual, neurological, mental health or cognitive disabilities. It would be difficult to overstate the diversity among those directly affected by legal capacity and decision-making laws. Differences in the nature of the impairment in decision-making abilities may significantly affect needs, so that a person whose impairment is episodic will have quite different needs from the law from those of a person

whose abilities are stable or declining. The stage of life at which needs for assistance arise has considerable implications for the nature and extent of the social and economic supports available. As well, gender, culture, family structures, geographical location and many other factors will affect how this legislation is experienced.

Ontario's current statutory regime for legal capacity, decision-making and guardianship took shape as a result of a monumental reform effort spanning the late 1980s and early 1990s. Three separate law reform initiatives undertaken during this time – the Committee on the Enquiry on Mental Competency, the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons and the Review of Advocacy for Vulnerable Adults – profoundly influenced Ontario's current laws. Ontario's resulting statutory framework for legal capacity, decision-making and guardianship is extensive, intricate and nuanced. Its underlying values of freedom from unnecessary intervention and self-determination continue to be seen as appropriate foundations for this area of the law.

However, it has been widely acknowledged that these laws have encountered significant implementation issues, whether because of the confusion that arises within a complex system, lack of knowledge and understanding of the law, shortfalls in dispute resolution and rights enforcement mechanisms, inadequate oversight and monitoring mechanisms for substitute decision-makers (SDMs) or other issues.

Reform to this area of the law must be designed with sensitivity to its evolving context, including:

1. **Demographic and social trends and pressures**, including the aging of Ontario's population, changing family structures, and growing cultural and linguistic diversity;
2. **The family context**, including ongoing debates about the appropriate roles of family and government, the increasing strain on family caregiving, and the challenges associated with assisting another individual with decision-making needs;
3. **Social isolation and marginalization**, which tends to disproportionately impact those directly affected by these laws, and which may increase vulnerability to abuse and decrease the options available for decision-making assistance;
4. **Trend towards formal processes** in the delivery of financial and social services may make the informal arrangements with which families have frequently operated in the past untenable; and
5. **The delivery of social, health and financial services** is inextricably tied to the ways in which issues related to legal capacity and decision-making arise and are resolved.

THEME 1: IMPROVING ACCESS TO THE LAW

Throughout this project, one of the dominant areas of concern has been access to the law, particularly in relation to the processes and dispute resolution mechanisms under the SDA. While there are concerns with the operations of the Consent and Capacity Board (CCB) with respect to the HCCA, overall, the CCB is seen as an appropriate forum for addressing these issues, and as providing relatively accessible and timely adjudication.

Effective access to the law affects every other aspect of legal capacity, decision-making and guardianship laws. Lack of accessibility may create incentives for families to adopt riskier informal approaches or to attempt to solve their problems in creative ways that are not in harmony with the intent of the legislation, for individuals to abandon attempts to enforce their rights, or for parties with superior access to resources necessary to navigate the system to misuse it for their own ends.

In particular, the court-based adjudicative mechanism under the SDA has been critiqued as complex and difficult to navigate, as having limited ability to tailor its processes to the specialized needs of those affected by this area of the law, and by reason of its relative inaccessibility, lacking in the flexibility needed to address the fluctuating or evolving nature of legal capacity. As well, most disputes in this area of the law involve parties who have had and may continue to have ongoing relationships: a number of participants in the LCO's consultations expressed a desire for greater use of less adversarial approaches in appropriate contexts.

The LCO considered a number of potential approaches to improving the accessibility of the law under the SDA, including expansion of the Public Guardian and Trustee's (PGT) investigative mandate, the creation of a specialty court, and the provision of expanded advocacy and navigational supports to those directly affected by these laws.

The LCO proposes the following reforms to improve access to the law:

1. Transfer of jurisdiction over matters under the SDA to a reformed and expanded CCB;
 - *See Recommendations 24, 25, 32*
2. Provision of additional powers for the CCB, including enabling the CCB to provide directions with respect to the wishes of the person and to determine compliance of substitute decision-makers (SDM) with obligations under the SDA;
 - *See Recommendation 26*
3. Strengthening the supports currently provided to persons affected by this area of the law by "section 3 counsel" and by Legal Aid Ontario;

- *See Recommendations 28-30*
- 4. Exploring possibilities for specialized mediation programs;
 - *See Recommendations 31, 33*
- 5. Exploring the potential for the PGT, upon completion of an investigation that does not warrant an application for temporary guardianship, to forward a written report to the CCB for action.
 - *See Recommendation 27*

THEME 2: PROMOTING UNDERSTANDING OF THE LAW

It is clear to the LCO, both from its own research and consultations, and from concerns expressed by key stakeholders, that there is widespread ignorance and misunderstanding of this area of the law, and that this substantially contributes to shortfalls in implementation. This lack of understanding is not limited to those directly affected by the law, who experience many barriers to obtaining information about their rights under the law, but also to those carrying out responsibilities as SDMs, and to the service providers and professionals who provide services to those affected by the law or conduct assessments of legal capacity.

Reflecting the nature of the issues at stake and the diversity of those affected, this is a highly complicated and multifaceted area of the law: misunderstandings are not surprising, but given the fundamental rights at issue, the consequences of ignorance or misunderstandings may be grave.

There are numerous organizations that provide information on various aspects of Ontario's legal capacity and decision-making laws, including the Ontario Seniors Secretariat, the Public Guardian and Trustee, the Consent and Capacity Board, legal clinics such as the Advocacy Centre for the Elderly and ARCH Disability Law Centre, and others. However, there is no central, authoritative source for information. Organizations create and provide information relevant to their particular mandates and the needs of the specific groups they serve. It is not clear to those seeking information where they should look, or whether the information they find is accurate or appropriate to their needs: there is, for example, considerable mistaken application of information based on laws from other jurisdictions. Nor is there any comprehensive strategic focus to the development and dissemination of information, so that efforts may be replicated or the needs of some groups overlooked. There are no required proactive means of informing SDMs about their duties and responsibilities: unless they take the initiative to research the law, they are unlikely to be aware of all of their obligations, or to have access to guidance in carrying out their significant responsibilities.

The LCO's proposed recommendations aim to make more effective use of existing resources and expertise, by promoting the accessibility and trustworthiness of the information available, supporting a collaborative approach to the development of resources, and increasing the coordination of the provision of education and information.

The LCO proposes the following reforms to promote understanding of the law:

1. Allocation of a clear statutory mandate for coordination and strategic development of information and education;
 - *See Recommendations 45 - 47*
2. Creation of a central clearinghouse for information for SDMs and persons directly affected by the law;
 - *See Recommendations 48, 49*
3. Strengthening the provision of information under the HCCA to both SDMs and those directly affected;
 - *See Recommendations 9 – 14, 50*
4. Enabling adjudicators to require SDMs to obtain education;
 - *See Recommendation 51*
5. Strengthening the role in this area of professional educational institutions and of the health regulatory colleges in providing training and education, as part of their quality assurance initiatives;
 - *See Recommendations 52, 53*
6. Clarifying the law where there are areas of persistent confusion.
 - *See Recommendations 1, 4, 5, 16, 17, 18, 50*

THEME 3: STRENGTHENING RIGHTS PROTECTIONS UNDER THE *HEALTH CARE CONSENT ACT*

While most commentators felt that the statutory provisions of the HCCA governing legal capacity and decision-making with respect to treatment, admission to long-term care and personal assistance services generally strike an appropriate balance between competing needs for protecting autonomy and providing effective means for decisions to be made in short-time frames, there were widespread and grave concerns that in practice, many aspects of this legislation are not being implemented as intended, and that as a result, rights are being abrogated.

Assessments of capacity under the HCCA are carried out by the treating professional, in the case of treatment decisions, or by a capacity evaluator in the case of admission to long-term care or personal assistance services. In neither case are there standardized guidelines,

processes or tools for those carrying out the assessments: in the case of capacity evaluators, organizations such as the Community Care Access Centres have developed materials, but it is difficult to tell how widespread the usage of such materials has been, and in the case of treatment decisions, this is currently a matter for the health regulatory colleges, which vary considerably in the extent and content of the guidance and training that they provide. As a result, the quality of assessments under the HCCA varies widely. Those assessing for treatment may not understand, for example, that legal capacity is decision-specific and time-specific, so that a person may be capable to make one decision independently and not other, or may be able to make a decision at one time that she or he could not make at another. As a result, individuals may be inappropriately deprived of their right to decide for themselves.

Similar issues arise with respect to the provision of “rights information” upon a finding of legal incapacity. Under the MHA, when a person is found incapable, an independent and expert rights adviser provides information and assistance with respect to the consequences of that determination and the options available to the individual. Under the HCCA, that is the responsibility of the professional who has made the determination of incapacity. The LCO has heard that there are widespread systemic failures in the provision of rights information, so that individuals found legally incapable may not have any meaningful access to the procedural rights found in the HCCA.

The LCO proposes the following reforms to strengthen the implementation of the HCCA:

1. Creation of official *Guidelines* for the conduct of assessments of capacity under the HCCA;
 - *See Recommendation 8*
2. Development of statutory minimum standards for the provision of rights information;
 - *See Recommendation 9*
3. Exploration of means of targeted provision of independent and expert rights advice;
 - *See Recommendation 10*
4. Building on existing oversight and quality assurance institutions and mechanisms to increase monitoring of the implementation of these provisions and improve quality;
 - *See Recommendations 11 - 13*
5. Monitoring and evaluation of these initiatives, with a view to taking more far-reaching steps if necessary.
 - *See Recommendation 14*

THEME 4: REDUCING INAPPROPRIATE INTERVENTION

The influential report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (often referred to as the “Fram Report”) proposed as underlying values for this area of the law, self-determination, freedom from unnecessary intervention, and community living through access to support. These values continue to be widely embraced; however, there are concerns that despite the many positive elements of the current statutory framework, unnecessary intervention continues to occur, and that self-determination remains unnecessarily limited.

Some concerns are related to the implementation of the law, including inappropriate exercise of power by SDMs, misapplication of the legal capacity test, and inflexible appointment mechanisms. From other perspectives, fundamental elements of the law, most particularly the use of a functional and cognitive legal capacity test as a threshold for independent decision-making and the use of substitute, rather than supported, decision-making, inappropriately undermine the autonomy of individuals with disabilities and must be re-examined.

The concept of legal capacity, as it is applied in Ontario, is complex and often difficult to operationalize. As an alternative, it has been proposed, most explicitly in the *General Comment* to Article 12 of the *Convention on the Rights of Persons with Disabilities*, that this area of the law be fundamentally re-conceived, such that legal capacity both to hold rights and to act is understood as a universal attribute inherent in all individuals by reason of their humanity, that all individuals be provided with the supports that they need to exercise this legal capacity, that appointments cannot be made against an individual’s will, and that all forms of substitute decision-making are abolished and actively combatted.

This area of the law raises profound and challenging philosophical, ethical and practical challenges. Autonomy can be understood in multiple ways, and in any conception, is not without limits, whether practical or in service of other values or of broad societal needs. Along with the value of promoting autonomy, consideration must be given to the appropriate allocation of legal accountability for decision-making: this raises questions not only of abuse, exploitation and undue influence, but also of the fundamental fairness of allocating sole legal responsibility for a decision to a person who did not understand its consequences. The legitimate needs of those who serve or enter into contracts with persons whose decision-making abilities are impaired must also be considered: decision-making is not only about self-determination, but also about clarity, certainty and accountability in our agreements with others.

The LCO proposes a number of recommendations aimed at better promoting and protecting the autonomy and self-determination of those directly affected by these laws, while also recognizing other values and the legitimate needs of other parties.

The LCO proposes the following reforms to reduce inappropriate intervention:

1. The current functional and cognitive approach to legal capacity be retained, but with a clear emphasis on the human rights concept of accommodation in both assessments of legal capacity and the provision of services;
 - *See Recommendations 3, 4, 18*
2. Legislation be strengthened to reduce inappropriate or unnecessary assessments of capacity;
 - *See Recommendations 5, 6*
3. Statutory requirements for substitute decision-making be clarified to ensure a focus on the prior capable wishes of individuals for whom substitute decision-making is being provided, or on their current values and wishes;
 - *See Recommendations 16, 17*
4. A statutory scheme for personal support authorizations be enacted, enabling individuals to appoint trusted others to assist them with day-to-day decisions related to personal care and property;
 - *See Recommendation 19*
5. Government explore the potential for a statutory 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;
 - *See Recommendation 20*
6. Strengthening opportunities to divert individuals from guardianship, through the phase-out of statutory guardianship and the enhancement of the current provisions of the SDA related to exploration of less restrictive alternatives;
 - *See Recommendations 34, 35*
7. Expanding opportunities for more limited guardianship, including time-limited appointments, partial appointments and appointments for single decisions;
 - *See Recommendations 36, 39, 40*
8. Strengthening opportunities for review of guardianships which are no longer necessary.
 - *See Recommendations 36 - 38*

THEME 5: INCREASING ACCOUNTABILITY AND TRANSPARENCY FOR PERSONAL APPOINTMENTS

Powers of attorney (POAs) are highly valued tools, in that they allow individuals to choose for themselves who will make decisions for them if necessary, and to create tailored instructions or restrictions for those decision-makers. However, the flexibility and accessibility that make POAs so appealing and valuable also make these instruments vulnerable to abuse and misuse. Indeed, the LCO heard widespread concern about the abuse of POAs.

Powers of attorney rely on the individual to screen potential appointees to ensure that they are capable of undertaking the associated duties, and are willing and suitable to do so. Attorneys, particularly family members, may accept the role out of a sense of duty, without any sense of the extent or nature of the obligations that it entails. Because Ontario's legislation regarding POAs aims to make these tools widely accessible, there are relatively few practical or procedural barriers to their creation. The resultant risk is that those creating POAs may not fully understand the potential implications of doing so, and may put themselves at risk of abuse, neglect or exploitation by their attorneys. As well, as private appointments, these powerful documents are amenable to very little scrutiny, so that abuse or misuse may be difficult to detect. Further, the very impairments in memory, ability to receive or assess information or to evaluate the intentions of others that are reasons to activate substitute decision-making arrangements also make it harder for those individuals to monitor the activities of the persons acting under a personal appointment or to identify or seek help regarding inappropriate or abusive behaviour.

In developing proposed recommendations to address concerns about misuse and abuse of personal appointments, the LCO aimed to maintain reasonably straightforward and low-cost access to these tools, while promoting better understanding of these appointments among both grantors and those exercising powers, and increasing transparency and accountability in relation to their use. As resources are limited at all levels, the LCO has given preference to reforms that are not unduly complicated, burdensome or costly, either for government or for individuals and families.

The LCO proposes the following reforms to increase accountability and transparency for personal appointments:

1. Requiring persons accepting appointment under a personal appointment within the SDA to sign, prior to acting under the appointment, a Statement of Commitment that specifies the statutory responsibilities of the appointee, the consequences of failure to

fulfil those responsibilities, and acceptance by the appointee of these responsibilities and the accompanying consequences;

➤ *See Recommendation 21*

2. Requiring persons acting under a POA to deliver, at the time she or he begins to exercise authority under the document, a Notice of Attorney Acting to persons specified in the POA, unless the grantor has opted out of the Notice of Attorney Acting provisions;

➤ *See Recommendation 22*

3. Creation in the SDA of a specified role of “Monitor”, with powers to review records and to visit and speak with the person in question, and responsibilities to make reasonable efforts to ensure that statutory responsibilities are being complied with: this role would be optional for a POA, but mandatory for a personal support authorization.

➤ *See Recommendation 23*

THEME 6: ENABLING GREATER CHOICE OF SUBSTITUTE DECISION-MAKERS

Currently, the vast majority of those who act as substitute decision-makers under Ontario law are family members or close friends of those receiving assistance. There are a relatively small number of individuals who have as their SDMs a professional (such as a lawyer), an organization (such as a trust company) or the PGT. Changes in demographics and family structure have left growing numbers of individuals without family or close friends who are willing and able to act: trends indicate that these numbers are likely to continue to grow. As well, the challenges and burdens of the role of an SDM mean that for some Ontarians, choosing among family or friends leaves them choosing the “least bad option”, as lack of necessary skills or family dynamics leave them without good choices. Finally, the current system of statutory guardianship leaves Ontario’s PGT as often the guardian of first, rather than last, resort, a system which has been critiqued by some families and which may not make the most effective use of the PGT’s expertise and resources.

The LCO has proposed as goals for reform in this area, ensuring that all those who lack legal capacity and require an SDM to make necessary decisions should have meaningful access to assistance; that a range of options with appropriate safeguards be available to address the diverse needs of those who lack or may lack legal capacity, including a broader range of options beyond the family; and a identifying a more effective focus for the vital role of the PGT.

The LCO proposes the following reforms to enable greater choice of substitute decision-makers:

1. Amending the HCCA to allow individuals to exclude a particular individual or individuals from appointment under the hierarchy set out in that statute;

- *See Recommendation 41*
- 2. Government explore the feasibility of establishing a licensing and regulatory system for professional decision-making representatives, as a means of offering a greater range of trustworthy options for those who prefer expert and professional SDM services and have the means to pay for such services, contingent on the inclusion of appropriate safeguards and oversight;
 - *See Recommendation 43*
- 3. Government explore the potential for community organizations to play a greater role in low-stakes, day-to-day decision-making, again with appropriate criteria and oversight;
 - *See Recommendation 44*
- 4. Focussing the role of the PGT on providing expert services for those who cannot be appropriately served by other options, whether because of their social isolation or family dynamics, or because their needs are so challenging that the expertise and professionalism of the PGT is required: this will require the implementation of a number of the other proposed recommendations.
 - *See Recommendation 42*

IMPLEMENTING REFORM: A PROGRESSIVE REALIZATION APPROACH

Legal capacity, decision-making and guardianship laws raise issues of fundamental rights for individuals who are very frequently vulnerable or marginalized. Consultees have emphasized to the LCO the gravity of the issues at stake in reforming these laws, and the seriousness of society's responsibility to those affected. The LCO has taken this message to heart, and has attempted to craft recommendations that respond to the circumstances of those affected and that respect and promote their rights and wellbeing. At the same time, the LCO has recognized the constraints surrounding reform of these laws, including fiscal restraints for government and key institutions, competing needs among stakeholders, and, in a number of areas, a lack of a clear evidentiary base on which to proceed.

In crafting approaches to implementing reform, the LCO has relied on the concept of progressive realization, which recognizes that fulfilment of the principles of substantive equality is an ongoing process, as resources, circumstances and understandings develop. Reform proposals must respect and advance the principles, principles must be realized to the greatest extent possible at the current time, and there must be a focus on continuous advancement.

There are two ways of approaching the implementation of the proposed reforms in this *Interim Report*. The first approach addresses the comprehensive impact and ultimate goals of the draft recommendations. As an aid to implementation and as part of its progressive realization

approach to law reform in this area, the LCO has identified key priorities for reform, those draft recommendations which have the greatest potential to substantially transform this area of the law and address the most serious, systemic issues.

The LCO's key priorities for reform have been identified as:

1. Expansion and reform of the Consent and Capacity Board to create an expert, independent, specialized administrative tribunal able to provide flexible, accessible and timely adjudication with respect to appointments of substitute decision-makers, resolve disputes related to the roles of these decision-makers, and enforce the rights under the legislation.
2. Strengthening information and education for individuals affected, families, and professionals and service providers involved with legal capacity and decision-making law.
3. Improving the quality of assessments of capacity and promoting access to basic procedural rights for those found legally incapable under the HCCA.

A second approach provides a practical framework for how to achieve this comprehensive reform over time. For this purpose, the LCO has identified draft recommendations which are relatively straightforward to implement, and so can be addressed in a shorter time frame, as well as those which require more time, thought or resources for implementation. The LCO's identified priorities are not necessarily among those draft recommendations that are simplest to implement: the timeframes are not a reflection of priorities, but an acknowledgement of the challenges of reform. Institutions which are the subject of the LCO's draft recommendations might choose to focus first on priority recommendations, or on first addressing more straightforward changes while working towards more challenging reforms.

GLOSSARY OF TERMS

Assessments of capacity: In this document, this term refers to all of the formal mechanisms for assessing capacity in Ontario, including examinations for capacity to manage property under the *Mental Health Act*, Capacity Assessments with respect to property and personal care that are carried out by designated Capacity Assessors under the *Substitute Decisions Act*, assessments with respect to capacity to consent to treatment under the *Health Care Consent Act* and evaluations of capacity to consent to admission to long-term care or to personal assistance services that are carried out by capacity evaluators under the *Health Care Consent Act*.

Assistance with decision-making: This term refers to the wide range of ways in which persons with impaired decision-making abilities may receive the help necessary to make decisions that are required, whether through informal arrangements, substitute decision-making or formalized supported decision-making.

Attorney: In this document, this term is used to refer to persons who are appointed under a power of attorney for property or personal care to make decisions on behalf of the person creating the power of attorney.

Capacity Assessor: In Ontario, Capacity Assessors are professionals who are designated as qualified to carry out Capacity Assessments for property and personal care under the *Substitute Decisions Act*. They are subject to training and oversight through the Capacity Assessment Office.

Capacity Assessments: In this document, “Capacity Assessment” refers specifically to assessments of capacity to manage property or personal care carried out by designated Capacity Assessors under the *Substitute Decisions Act*. These Assessments must be carried out in accordance with the *Guidelines for Conducting Assessments of Capacity*, which were developed by the Ministry of the Attorney General.

Capacity evaluators: Capacity evaluators are persons from specific professions who are able to carry out evaluations of capacity to consent to admission to long-term care or to personal assistance services under the *Health Care Consent Act*. Unlike Capacity Assessors, there are no standard requirements for training or oversight for capacity evaluators.

Evaluations of capacity: Under the *Health Care Consent Act*, capacity evaluators may carry out evaluations of an individual’s capacity to consent to admission to long-term care or the

provision of personal assistance services. There are no standard guidelines for the conduct of evaluations of capacity, although institutions employing capacity evaluators may have their own training or standards.

Examinations of capacity: Under the *Mental Health Act*, when a person is admitted to a psychiatric facility, an examination of capacity to manage property must be carried out by a treating physician, unless the person's property is already under the management of a guardian under the *Substitute Decisions Act* or the physician has reasonable grounds to believe that the person has a continuing power of attorney that provides for the management of property.

Grantor: a person who creates a power of attorney for property or personal care, thereby appointing another person to make decisions on his or her behalf.

Guardian: Guardians may be appointed under the *Substitute Decisions Act*, through either the Superior Court of Justice or a statutory process, to make decisions on behalf of another with respect to property or personal care.

Legal capacity: Legal capacity is a socio-legal concept that determines whether a person is entitled to make decisions for her or himself and be held responsible for the consequences. In Ontario, where an individual lacks legal capacity and a decision must be made, a substitute decision-maker will be appointed to do so in his or her place. "Legal capacity" should be distinguished from "mental capacity": the former references the ability to hold and exercise certain legal rights, while the latter describes specific mental or cognitive abilities that have been identified as pre-requisites to the exercise of legal capacity.

Personal appointment: refers to both powers of attorney and support authorizations, as formal methods of identifying individuals who will assist with decision-making needs that are created by the individual who requires, or anticipates requiring assistance with decisions, without the need for involvement of the courts or government.

Power of attorney: a legal document whereby an individual can appoint another person to make decisions on her or his behalf, either for property or personal care. A power of attorney for personal care comes into effect only if the individual becomes legally incapable of making decisions independently. A power of attorney for property may come into effect immediately and be drafted to continue when the grantor is legally incapable, or may be drafted to come into effect when the person is legally incapable of making decisions independently.

Section 3 Counsel: Under section 3 of the *Substitute Decisions Act, 1992* (and therefore, for the purposes of capacity to manage property or to make decisions about personal care), where the legal capacity of an individual is in issue in a proceeding under the *Substitute Decisions Act, 1992* and that person does not have legal representation, the court may arrange for legal representation to be provided, and the person will be deemed to have capacity to retain and instruct counsel for that purpose.

Substitute decision-maker: a person appointed under current legislation to make decisions on behalf of another, including guardians, persons acting under a power of attorney and persons appointed to make decisions under the *Health Care Consent Act*.

Substitute decision-making: while there are variances across jurisdictions, in general substitute decision-making allows for the appointment, where there has been a finding of incapacity, of another individual to make necessary decisions on behalf of another. In Ontario, this includes individuals appointed through a power of attorney, through the hierarchical list under the *Health Care Consent Act*, as representatives by the Consent and Capacity Board, or as guardians under the *Substitute Decisions Act*.

Supported decision-making: Supported decision-making refers to a range of concepts and models of decision-making proposed as an alternative to the current dominant approach of substitute decision-making. There are a wide range of approaches to supported decision-making, but in general, it involves mechanisms that do not require a finding of legal incapacity, and that enable the appointment of persons to provide assistance with decision-making, rather than to make a decision on behalf of another person.

Third party service providers: in this document, this term refers to the wide range of professionals and organizations that may provide services to persons who lack or may lack legal capacity, and may therefore be required to determine legal capacity in order to obtain consent to a service or enter into a contract. Third party service providers may include government, financial institutions, retail service providers, professional service providers or others. “Professionals” who are conducting assessments of capacity or providing expert opinions are not considered as service providers when acting in these roles, but may be acting as service providers in other circumstances.

LIST OF ACRONYMS

ACE	Advocacy Centre for the Elderly
ARCH	ARCH Disability Law Centre
CAO	Capacity Assessment Office
CCAC	Community Care Access Centre
CCB	Consent and Capacity Board
COP	Court of Protection of England and Wales
CPP	Canada Pension Plan
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
DDO	Dykeman Dewhirst O’Brien LLP
HCCA	<i>Health Care Consent Act, 1996</i>
HQO	Health Quality Ontario
HRTO	Human Rights Tribunal of Ontario
LAO	Legal Aid Ontario
LCO	Law Commission of Ontario
LHSIA	<i>Local Health System Integration Act, 2006</i>
LHIN	Local Health Integration Network
LRC	Law Reform Commission
LTCHA	<i>Long-Term Care Homes Act, 2007</i>
MAG	Ministry of the Attorney General
MCA	<i>Mental Capacity Act, 2005, England and Wales</i>
MHA	<i>Mental Health Act</i>
MLP	Medico-Legal Partnership
MOHLTC	Ministry of Health and Long-Term Care
NICE	National Initiative for the Care of the Elderly
OAS	Old Age Security
ODSP	Ontario Disability Support Program
OHRC	Ontario Human Rights Commission
PBLO	Pro Bono Law Ontario

PGT	Office of the Public Guardian and Trustee
PHIPA	<i>Personal Health Information Protection Act, 2004</i>
POA	Power of attorney
POAPC	Power of attorney for personal care
RDSP	Registered Disability Savings Plan
RHPA	<i>Regulated Health Professions Act</i>
SDA	<i>Substitute Decisions Act, 1992</i>
SDM	Substitute decision-maker
SPGO	Statewide Public Guardianship Office
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission

I. INTRODUCTION TO THE PROJECT

A. Introduction

Decision-making is part of our daily lives. The decisions that we make may be large or small, routine or life-changing, complicated or straightforward, but regardless they are important as expressions of our values and identity, as opportunities to learn from both our successes and mistakes, and as the fundamental means through which we shape our lives. Decision-making is therefore a highly personal endeavor, and the ability to exercise control over our choices is widely viewed as a fundamental right. Generally, people's decisions about their private lives are controlled by the law only when we have concerns about, for example, safety, but otherwise, while others may think our decisions foolish, they are "our decisions".

At the same time, decision-making also often has a public aspect. When we are interacting with other individuals or organizations, clarity, certainty and accountability become important considerations. When others are being asked to rely on or implement our decisions, it is important for them to be sure that they understand the decision that has been made, that they can rely on the finality of that decision, and that all parties can be held to account to uphold their part of the decision. In this public realm, law plays a major role, for example in determining when an agreement is valid and we are entitled to rely on it, and when a party is liable for a breach of the agreement.

Regardless of whether the decisions are in the public or purely in the private sphere, however, the law does intervene when there is concern about whether an individual has the legal capacity to make these decisions. Laws regarding legal capacity, decision-making and guardianship must take into account both the personal and the public aspects of the decision-making, and so raise difficult and important ethical and practical issues. And here, our assessment – and the law's view – of whether an individual should have sole control over her or his decisions regardless of the "wisdom" of those decisions takes on a far more ambiguous appearance.

These laws affect a substantial portion of Ontario's population, including persons with significant temporary or chronic illnesses, with aging related disabilities such as dementia, with mental health disabilities, acquired brain injuries or developmental disabilities. These laws of course also have a major impact on families and caregivers, as well as on a wide array of professionals and service providers. Most Ontarians will, at some point in their personal or professional lives, encounter this area of the law.

This project arose from the Law Commission of Ontario's (LCO) two *Framework* projects on the law as it affects persons with disabilities and the law as it affects older adults.¹ Ontario has a comprehensive and relatively coordinated statutory scheme related to legal capacity and decision-making, resulting from a thorough and thoughtful law reform process in the late 1980s and early 1990s.² However, in both *Framework* projects, a wide array of individuals and stakeholders raised concerns about Ontario's laws in these areas and urged the LCO to undertake a thorough review. This project applies the *Frameworks* to this area of the law.

The LCO's review of Ontario's statutory regime for legal capacity, decision-making and guardianship has raised many challenging issues, for which there are no straightforward solutions. The onus on us is to make every effort to ensure that these laws are effective and fair, and that they respect and promote the substantive equality of older persons and persons with disabilities.

This *Interim Report* sets out the LCO's analysis and draft recommendations for reform of Ontario's legal framework relating to legal capacity and decision-making. It follows the June 2014 release of a comprehensive *Discussion Paper*³ and *Summary of Consultation Issues*,⁴ and the subsequent public consultations. The LCO is seeking feedback on this *Interim Report*, and will be releasing a *Final Report* in 2016.

B. The Project Process

Concentrated work on this project began very early in 2013, with a process of preliminary consultations and research. During this phase, the LCO spoke with approximately 70 individuals and organizations, so as to understand how the law was currently operating, the priorities for reform, and other projects underway which might affect this project. Through this work, the LCO developed the project scope and created a project Advisory Group, which has provided expertise on the subject matter of this project, as well as extensive assistance with outreach and public consultation strategies and execution. The work of the project Advisory Group has been extremely valuable, and the LCO is very grateful for the considerable time and thoughtfulness that these individuals have devoted to this project. The members of the project Advisory Group are listed in the front matter of this *Interim Report*.

During 2013, the LCO conducted wide-ranging research, as well as commissioning a number of expert papers on a variety of topics that are listed in Appendix C. Based on this research and the preliminary consultations, and with the input of the Advisory Group, the LCO developed a comprehensive *Discussion Paper*, which was released in late June 2014. This was accompanied

by a much shorter and simplified *Summary of Consultation Issues*. These documents are available at <http://www.lco-cdo.org/en/capacity-guardianship>.

Through the late summer and fall of 2014, the LCO conducted extensive public consultations on the issues raised in the *Discussion Paper* and *Summary*.

Written Submissions: The LCO received 16 formal written submissions, most of which were lengthy documents dealing in-depth with particular reform options. The LCO also received a significant number of written communications from individuals with personal experience, whether as persons directly affected by or family members navigating the law.

Consultation Questionnaires: The LCO developed two consultation questionnaires as a way to provide additional opportunities for individuals to share their experiences and aspirations for change. It must be emphasized that these questionnaires were not intended as social science research, but as a means of input for those affected by the relevant laws. There were two questionnaires: one for individuals who receive assistance with decision-making, and another for family members, friends and others who provide assistance with decision-making. Copies of the consultation questionnaires are included in Appendix D. These questionnaires were available on the LCO website and in multiple formats, and the LCO worked with a wide range of community partners to distribute them to interested communities.

The LCO received 109 questionnaires from those receiving assistance of some form with their decision-making needs. Of this group, most were older adults, with 36 per cent of respondents age 85 or older, 45 per cent between the ages of 65 and 84, and the remaining 19 per cent under the age of 65. Women made up 67 per cent of the respondents. While the LCO heard in this way from persons operating under a variety of legal or informal arrangements, including persons under statutory or court-appointed guardianships, by far the majority of respondents were receiving assistance through a power of attorney, and in most cases, the person(s) with authority under the POA was exercising plenary powers (that is, in relation to all decision-making). Because confusion over legal documentation was evident in the responses, it is difficult to tell whether the broad powers being exercised were appropriately legally authorized. Only 30 per cent of individuals recollected any formal assessment of their legal capacity taking place.

The LCO received 103 questionnaires from individuals providing assistance with respect to decision-making. Of this group, the majority at 55 per cent either did not have a legal document or could not identify it if they had it. Of those that did have a legal document and could identify it, almost half had a power of attorney (48 per cent). The vast majority of respondents to this

survey - 78 per cent - were female, and a slight majority of 54 per cent were living with the person for whom they provided decision-making assistance. Most (62 per cent) were acting for an adult child. That is, this survey tended to reflect the experiences of those providing decision-making assistance to persons who had disabilities from birth or developed them at a young age within Ontario's legal capacity and decision-making laws, while the group completing the survey related to receiving assistance reflected the experiences of that group of Ontarians who age into disability.

Focus Groups: Thirty focus groups were held in a number of locations in Ontario. Most were developed through partnerships with a wide range of institutions and professional and community organizations. These focus groups brought together small groups of individuals (up to 15 participants per session) with a shared experience or expertise for in-depth discussions of experiences with the law and options for reform. The LCO heard from distinct and divergent perspectives and experiences through the focus groups, including from individuals directly affected by the law, family members, and professionals, experts and service providers, including ethicists, Community Care Access Centre staff, government, judiciary, community and advocacy organizations, clinicians, lawyers, social service providers and others. A complete list of the focus groups can be found in Appendix E.

Consultation Interviews: In the late fall and early winter, the LCO conducted a series of 24 in-depth interviews. These included interviews with long-term care home providers, service providers, francophones, northerners, experts and others.

Consultation Forum: On October 31, 2014, the LCO hosted a full-day consultation forum, bringing together persons with diverse experiences and expertise to work in small groups to identify principles, purposes and priorities for reform, and to consider how law reform in this area can accommodate widely differing experiences and needs.

All told, the LCO has heard from close to 600 individuals and organizations. A list of professionals and organizations consulted can be found in Appendix C.

It is not possible within the span of this *Interim Report* to explicitly reflect all that has been heard through this extensive process, although we have provided illustrations of what we have heard. We have given careful consideration to all the perspectives brought forward, and our analysis and draft recommendations have been fundamentally shaped by this process. The LCO thanks all those who generously gave of their time to assist us in understanding how the law currently works, challenges in the law and its implementation, the priorities and principles for change, and the options for reforms. These issues are difficult, and as they profoundly shape

the lives they affect, they are also often painful. The LCO appreciates the willingness of so many individuals to share their struggles with us. We are deeply aware of that this area of the law it often affects individuals who are often already facing many challenges.

C. Project Scope and Themes

The scope of this project was determined through the LCO's preliminary research and consultations. The focus is on the provisions of the *Health Care Consent Act, 1996* (HCCA),⁵ *Substitute Decisions Act, 1992* (SDA)⁶ and Part III of the *Mental Health Act* (MHA)⁷ dealing with examinations of capacity to manage property upon admission to a psychiatric facility. The LCO will not be making recommendations about the common law of capacity and consent,⁸ capacity to consent under privacy law⁹ or consent to research, or broader aspects of the MHA such as community treatment orders.

Even within Ontario's statutory consent and capacity laws, there are many issues that the LCO will not be addressing in this project, including extra-judicial recognition of powers of attorney, and the ability of an attorney under a power of attorney to make a beneficiary designation.

This is not a reflection on the importance of the issues not addressed: they are of considerable practical significance to many Ontarians. Given the breadth of the issues, the LCO has focussed on those with broad general implications for the statutory scheme as a whole, which were also pressingly identified by stakeholders. In some cases, such as the issues related to extra-judicial recognition,¹⁰ significant work is being done by other bodies; therefore, it is consistent with the LCO's criteria for undertaking projects for the LCO to focus its efforts elsewhere.

As was outlined in the *Discussion Paper*, the scope of this project has been defined to include:

1. The **standard for legal capacity**, including tests for capacity and the various avenues and mechanisms for assessing capacity under the SDA, HCCA and MHA;
2. **Decision-making models**, including an examination of the desirability and practical implications of alternatives to substitute decision-making, including supported and co-decision-making;
3. **Processes for appointments** (for example of substitute decision-makers), whether through personal appointments or a public process, with a focus on appropriate use and on improving efficiency and accessibility;
4. The **roles and responsibilities of guardians and other substitute decision-makers**, including potential for more limited forms of guardianship and consideration of options for those who do not have family or friends to assist them;

5. **Monitoring, accountability and prevention of abuse** for substitute decision-makers or supporters, however appointed, and of misuse by third party service providers, including mechanisms for increasing transparency, identifying potential abuse and ensuring compliance with the requirements of the law; and
6. **Dispute resolution**, including reforms to increase the accessibility, effectiveness and efficiency of current mechanisms.

Importantly, as was briefly noted above, this project grew out of the LCO's two *Framework* projects on the law as it affects older persons and the law as it affects persons with disabilities, which were completed in 2012,¹¹ and applies these *Frameworks* to the issues and through the themes identified below. The adoption of the *Frameworks* as the starting point of this project and as its analytical foundation has substantially shaped the approach to and results of this project. Chapter III will discuss the implications of the *Frameworks* for this project and for this area of the law.

Within the broad outlines of the project scope, the LCO's public consultations, together with internal and commissioned research, identified key themes and priorities for reform.

The LCO's research and consultations indicate that the values and priorities that underlay the law reform efforts of the 1990s resulting in the current laws retain broad appeal and support. The concerns which the LCO heard focused on how the current statutory regime falls short of its original goals and thereby fails to promote its underlying values and whether, in light of advances in understanding, the values of autonomy and self-determination should find new forms and protections. Three key themes emerged, each giving rise to several priorities for reform.

1. **Reducing unnecessary and inappropriate intervention:** Building on the influential recommendations in the *Fram Report*,¹² which is briefly discussed in Chapter II, the current legislation contains many provisions specifically intended to advance the autonomy and self-determination of those who fall within its scope, including specific presumptions of capacity, and an emphasis on decision-specific approaches to capacity; the provision of procedural rights to persons affected, such as rights advice and information and the right to refuse an assessment under the SDA; the inclusion of requirements to consider the least restrictive alternative in court-appointed guardianships; and others.

However, concerns were raised that for a variety of reasons, individuals continue to be subject to unnecessary restrictions on their autonomy. Issues include lack of

understanding of the law on the part of individuals, families and service providers; inflexibility of guardianship processes; challenges in implementation of existing safeguards against unnecessary intervention; lack of accessible means of asserting rights under the SDA; and an approach to legal capacity and decision-making that is at times overly binary.

The LCO has identified a number of specific priorities for reducing unnecessary interventions, including:

- clarifying the application of a duty to accommodate to legal capacity and decision-making;
- providing options beyond substitute decision-making in appropriate circumstances;
- clarifying the duties of substitute decision-makers to consider the values and life goals of those for whom they make decisions, and providing them with better information about their responsibilities;
- increasing the powers of adjudicators to explore less restrictive alternatives and to tailor guardianship orders to the needs of the affected individuals; and
- increasing the accessibility and responsiveness of the external appointments processes.

2. Improving access to the law: During the LCO's public consultations, there was broad concern that many positive aspects of the current law are having only limited benefit, as a result of shortfalls in access to the law. Individuals who are directly affected by the law and their families may face significant difficulties in understanding, accessing and enforcing their rights. Problems include a lack of awareness of the law among those directly affected and their families; a lack of meaningful oversight and monitoring mechanisms; and inaccessible or inadequate dispute resolution and rights enforcement mechanisms.

Priorities for improving access to the law for individuals directly affected and for families include:

- strengthening rights information provisions under the HCCA, to provide greater assurance that individuals who are found to be legally incapable under this Act are informed about their legal status and the available remedies;
- improving oversight and monitoring of assessments of capacity and rights information processes under the HCCA;

- improving access to reliable and consistent information about rights and recourse for all stakeholders;
- increasing monitoring of the activities of those acting under personal appointments;
- reforming the mechanisms for enforcing rights and resolving disputes under the SDA; and
- monitoring the effectiveness of any reforms that the government enacts.

3. Enhancing the clarity and coordination of the law: As the brief overview of Ontario's laws respecting legal capacity and decision-making in Chapter II indicates, Ontario's laws are highly complex, and are implemented through many different institutions and systems. There are, for example, multiple mechanisms for assessing legal capacity, depending on the type of decision and the context, with the result that not only individuals but even service providers and professionals carrying out assessments may be confused as to the correct route in a particular circumstance. Further, the purposes and standards for implementing the law are unclear in a number of areas, so that those who must apply the law may be confused as to their responsibilities, and implementation may vary considerably between contexts or service providers. Finally, while responsibility for implementing the legislation is dispersed among multiple ministries, institutions and professions, there is no body or mechanism that has the responsibility or the capacity to coordinate these various activities to ensure that they operate effectively and as intended. For example, the legislation does not confer any particular institution with responsibility for providing information and education about the law: while many organizations have undertaken considerable efforts to address the needs, there is no means of tracking what has been done and where needs remain, providing that information and education is accurate and appropriate, or identifying and building on good programs and practices in this area. Priorities for enhancing clarity and navigability include the following:

- developing clear basic standards and principles for assessments of capacity and rights information under the HCCA;
- identifying statutory responsibility for the provision of specified elements of education and information in this area, together with the development of centralized, accessible and reliable resources for those affected by this area of the law; and
- clarifying principles, purposes and terminology for this area of the law.

D. The LCO's Project on Capacity and Legal Representation for the Federal RDSP

The Ontario government asked the LCO to undertake a review of how adults with disabilities might be better enabled to participate in the federal Registered Disability Savings Plan (RDSP), and the LCO's Board of Governors approved its project, *Capacity and Legal Representation for the Federal RDSP* in April 2013.¹³

A review of the federal RDSP program in 2011 had revealed concerns about processes within provincial jurisdictions for designating an RDSP plan holder. In response, the federal government put in place a provisional remedy, which was designated to expire at the end of 2016. The purpose of the LCO's project was to recommend the creation of a streamlined Ontario process to appoint a legal representative for adults who are eligible for an RDSP but who are unable to establish a plan due to concerns about their legal capacity.

The *Capacity and Legal Representation for the Federal RDSP* project was initiated in the context of the comprehensive, multi-year project on legal capacity, decision-making and guardianship that is the subject of this *Interim Report*. The more focussed project was undertaken as a priority, because of the imminent expiry of the federal government's provisional remedy. The scope of the RDSP project was defined narrowly to address a specific barrier to accessing the RDSP: the appointment of an RDSP legal representative for beneficiaries who require another person to make decisions about their RDSP in Ontario. The LCO sought, in the RDSP project, to limit recommendations in areas that overlapped with this larger project, in order to avoid precluding options. The shorter timelines of the RDSP project were less amenable to addressing contentious issues or those with potentially broad impacts on the system currently in place under the SDA.

The *Final Report* in the RDSP project recommended the institution of a process enabling adults whose legal capacity is lacking or in doubt and who do not have a guardian or a power of attorney to personally appoint an RDSP legal representative to open and manage funds in an RDSP (but not to manage funds withdrawn from an RDSP). The criteria for creation of such an appointment would be based on the common law criteria for capacity to create a power of attorney, and the appointee would have the same duties as an attorney for property under the SDA.

Like this project, the RDSP project drew on the *Framework* principles, and took as essential considerations promoting meaningful participation and inclusion for persons with disabilities, ensuring necessary protections, taking into account the needs of third parties, and identifying practical solutions.

In developing the analysis and draft recommendations for the *Interim Report* for this broader project, the LCO has taken into account the learnings and recommendations from the RDSP project, particularly the concern to avoid the unnecessary imposition of broad substitute decision-making as a solution to much more specific needs for assistance with decision-making, the barriers created by expensive and complicated appointment mechanisms, and the need for flexible solutions. In particular, the recommendations in Chapter VI.F to enable personal support authorizations and to explore network decision-making, and in Chapter IX.F.4 to allow for much more limited and flexible appointments, together with the recommendations in Chapter VIII to create more accessible appointment processes, should do much to address the barriers underlying the need for the RDSP project.

E. This *Interim Report*

1. Purpose of the Interim Report

The *Discussion Paper* identified key issues in the laws affecting legal capacity, decision-making and guardianship, provided a general analysis and set out potential directions for reform. It also included questions to guide discussions. This *Interim Report* is not intended to repeat the material set out in the *Discussion Paper*. For those looking for a description of the current law, or a broad survey of comparable laws, for example, such material may be found in the *Discussion Paper*. The *Interim Report* sets out the LCO's analysis of the issues, based on public consultations and research, together with draft recommendations for changes to law, policy and practice to address the identified priorities for reform. It was approved by the LCO Board of Governors on October 8, 2015

The *Interim Report* has been widely circulated for feedback. Based on this feedback and the LCO's ongoing research, the LCO will develop a *Final Report* with recommendations, which will be shared with all those who have participated in the development of this project, as well as with all key stakeholders, and distributed publicly.

For those wishing to provide feedback on the LCO's analysis and recommendations, Chapter XIII, "Next Steps", sets out timelines and other useful information.

2. Structure of the Interim Report

The *Interim Report* is structured around key issues for reform, rather than according to the existing statutory framework.

Chapter II provides a brief overview of Ontario’s approach to legal capacity, decision-making and guardianship, including highlighting the strengths and weaknesses of Ontario’s laws.

Chapter III briefly describes the LCO’s *Frameworks* and considers their application to this area of the law.

Chapter IV considers Ontario’s functional and cognitive approach to the concept of legal capacity, and in particular discusses the alternative approach set out in the *General Comment* to Article 12 of the *Convention on the Rights of Persons with Disabilities*.

Chapter V examines Ontario’s four formal mechanisms for assessing legal capacity: assessments of capacity to consent to treatment, evaluations of capacity to consent to admission to long-term care or for personal assistance services, examinations of capacity to manage property under the MHA, and Capacity Assessments for property management and personal care under the SDA.

Chapter VI considers substitute decision-making and proposed alternatives, such as supported decision-making and co-decision-making.

Chapter VII reviews concerns related to lack of accountability and transparency in appointment processes for powers of attorney and proposes reforms.

Chapter VIII addresses shortcomings in Ontario’s available mechanisms for enforcing rights and resolving disputes in this area of the law.

Chapter IX sets out reforms to guardianship appointment processes aimed to increase the flexibility of these processes and reduce unnecessary intervention.

Chapter X considers possibilities for expanding access to professional representatives.

Chapter XI highlights the importance of education and information in the functioning of Ontario’s laws for legal capacity, decision-making and guardianship, and identifies reforms to strengthen understanding of the law and develop skills for its appropriate implementation.

Chapter XII briefly discusses priorities and timeframes for implementation of the draft recommendations.

Each of Chapters III through XI provides a brief overview of the key elements of the current law, outlines areas of concern identified through research and public consultation, considers the application of the *Frameworks* to these concerns, highlights the LCO's approach to reform, and proposes draft recommendations for reform. At the end of each Chapter, a brief summary of the draft recommendations is provided.

II. OVERVIEW OF THE ONTARIO SYSTEMS FOR LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

This Chapter provides a very brief overview of the key elements of Ontario's systems for legal capacity, decision-making and guardianship. It is not intended as a guide to the system, but rather to orient readers who may not be as familiar with this area of the law to the key elements of Ontario's approach and how each aspect fits into the entire scheme, as well as some of its core strengths and shortcomings. Further details of key provisions are set out in the relevant chapters.

A. Description of Ontario's Legal Capacity and Decision-making Laws

Ontario's current statutory regime for legal capacity, decision-making and guardianship took shape as a result of a monumental reform effort spanning the late 1980s and early 1990s. Three separate law reform initiatives undertaken during this time profoundly influenced Ontario's current laws. The Committee on the Enquiry on Mental Competency ("*Weisstub Enquiry*") was given the task of developing a set of recommended standards for determining the mental competence of individuals to make decisions about health care, management of financial affairs and appointment of a substitute decision-maker: the Final Report concluded that the process for testing legal capacity must respect both the principle of autonomy and that of best interests, as well as reflecting the importance of proportionality, administrative simplicity and relevance.¹⁴ The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons ("*Fram Committee*") was appointed by the Attorney General to "review all aspects of the law governing, and related to, substitute decision making for mentally incapacitated persons and to recommend revision of this law where appropriate",¹⁵ and its Final Report ("*the Fram Report*") identified as underlying values for this area of the law freedom from unnecessary intervention; self-determination; and community living through access to support.¹⁶ The Review of Advocacy for Vulnerable Adults ("*the O'Sullivan Report*"), while ultimately having a more limited legislative impact, identified a number of important goals associated with this area of the law, including, among others, providing safeguards against unnecessary guardianship; promoting independence; encouraging self-advocacy (self-determination) where possible; enhancing the role of family and friends; and educating, delabeling and destigmatizing.¹⁷

Ontario's resulting statutory framework for legal capacity, decision-making and guardianship is extensive, intricate and nuanced. At its core are two statutes: the *Substitute Decisions Act* (SDA), which addresses decisions related to property management and personal care, and

identifies the appointment processes and the duties of guardians and those acting under powers of attorney (POA); and the *Health Care Consent Act, 1996* (HCCA), which addresses consent to treatment, admission to long-term care homes and personal assistance services for residents of long-term care homes. In addition, the *Mental Health Act* (MHA) addresses examinations of capacity to manage property upon admission to or discharge from a psychiatric facility. There are other laws related to legal capacity, including those related to access to personal health information, and the common law, which are not addressed in this project. Although the project focuses on this particular area of the law, of course laws related to legal capacity and decision-making must be understood within the broader context of laws related to health services, long-term and community care, elder abuse, income support programs and others.

To understand the actual implementation of these laws, it is important to keep in mind that they are delivered through multiple ministries and organizations in a very wide range of contexts. The Ministry of the Attorney General, the Ministry of Health and Long-Term Care, the Ontario Seniors Secretariat, the Ministry of Community and Social Services, and the Public Guardian and Trustee (PGT) all play important roles in the delivery of this legislation. Persons directly affected by these laws may be living in long-term care homes, retirement homes, group homes, hospitals, psychiatric facilities or the community. Those affected may have temporary acute illnesses or chronic conditions. They may be living with addictions, mental health disabilities, acquired brain injuries, dementia, aphasia, developmental or intellectual disabilities, or many other types of disabilities. The complexity of implementation adds immensely to the complexity of the laws themselves.

Approach to Legal Capacity

In Ontario, the approach to legal capacity is functional and cognitive. The focus is on the functional requirements of a particular decision, not a medical diagnosis, the probable outcome of the person's decisions, or an abstract assessment of abilities. Tests for legal capacity are based on the ability to understand and appreciate the information relevant to a particular decision or type of decision, and the consequences of making that decision (or of not making a decision).

Determinations of legal capacity are domain or decision-specific, recognizing that a person can have the ability to make some decisions and not others. There are specific tests of capacity for different types of decisions. It is also understood that the ability to understand and appreciate may vary over time.

Because determinations of legal capacity affect the autonomy interests of individuals, the legislation codifies a clear presumption of capacity for the ability to contract, make decisions about personal care, and to make decisions about treatment, admission to long-term care and personal assistance services.¹⁸ Legal capacity in these areas can only be removed through specific mechanisms outlined in the legislation: these mechanisms differ for these decision-making areas, in part because treatment and admission to long-term care involve the provision of necessary services for which the provider has an affirmative duty to obtain consent.¹⁹

Assessing Legal Capacity

Ontario has an extremely elaborate system for assessing legal capacity, in part deriving from its domain specific approach to capacity. The type of assessment of capacity carried out depends on the nature of the decision at issue. In addition to the informal assessments of capacity that are carried out by service providers, there are four formal, statutorily regulated mechanisms:

1. **Examinations of capacity to manage property upon admission to or discharge from a psychiatric facility:** under the MHA, when a person is admitted to a psychiatric facility, an examination of capacity to manage property is mandatory, unless the person's property is already under someone else's management through a guardianship for property under the SDA or there are reasonable grounds to believe that there is a continuing power of attorney which provides for the management of property. These examinations are carried out by a physician. While individuals do not have the ability to refuse an examination, there are a number of important procedural protections, such as access to independent, specialized rights advice upon a finding of incapacity.
2. **Assessments of capacity to manage property or personal care:** under the SDA, assessments of legal capacity to manage property or personal care may be carried out for a variety of reasons, such as to trigger statutory guardianship for property or to activate a continuing power of attorney for property or personal care. To trigger a statutory guardianship for property, a Capacity Assessment by a designated Capacity Assessor is required. If a continuing power of attorney for property is one that comes into effect upon the grantor's incapacity, if the power of attorney does not specify otherwise, the determination of incapacity must be made under the MHA, as described above, or by a designated Capacity Assessor. For a power of attorney for personal care, the assessment is that of the appointed attorney, unless the document requires otherwise. A professional designated as a Capacity Assessor under the SDA must meet particular requirements related to education and training and comply with guidelines developed under the statute. A list of Capacity Assessors is maintained by the Capacity

Assessment Office: it is the responsibility of those seeking a Capacity Assessment to select and pay for this service.

3. **Assessments of capacity to make treatment decisions:** under the HCCA, these assessments are carried out by the health practitioner who is proposing the treatment, as part of the process of obtaining valid consent to treatment. Guidelines for these assessments are provided by the health regulatory college for the various professions. Patients found to be incapable are entitled to the provision of basic rights information by the treating practitioner.
4. **Evaluations of capacity to make decisions regarding admission to long-term care:** Capacity evaluators are responsible for assessing legal capacity to make decisions regarding consent to admission to long-term care and personal assistance services. Capacity evaluators must be members of a limited number of health regulatory colleges, but do not have any statutorily mandated training or guidelines related to their activities. As with assessments related to treatment, rights information (rather than independent rights advice) must be provided to a person who is found incapable following an evaluation.

Substitute Decision-making

Where a decision is necessary and an individual has been found legally incapable with respect to that decision or that type of decision, a substitute decision-maker (SDM) will be appointed to make that decision. The methods of appointment are described in the following sections.

Once appointed, the SDM is held responsible at law for his or her actions in this role, and may be liable for damages for breach of duties. The SDM is to act on the individual's behalf and for that person's benefit. An SDM for property is a fiduciary, and must carry out his or her duties diligently, with honesty and integrity, and in good faith, for the benefit of the individual.²⁰

The legislation sets out criteria for decisions made by SDMs. In managing the property, the SDM shall make those expenditures that are reasonably necessary, in order of priority,

- for the individual's support, education and care;
- for the support, education and care of the individual's dependents; and
- that are necessary to satisfy the individual's legal obligations.

For personal care and treatment decisions, the SDM must respect the prior capable wishes of the individual. If no prior wishes or instructions were expressed, the SDM is to be guided by the best interests of the individual, taking into consideration the following variables:

- the individual's values and beliefs held while capable, and that the SDM believes the individual would still act on if capable;
- the individual's current wishes, if they can be ascertained; and
- whether the decision is likely to improve the individual's quality of life, prevent its deterioration, or reduce the extent or rate of any deterioration; and whether the benefits of the decision will outweigh the risk of harm from an alternative decision.²¹

In general, the SDM must choose the least intrusive and restrictive course of action available and appropriate in the circumstances.

SDMs for property and personal care must keep records of their activities, and have a number of important procedural duties, such as:

- explaining their powers and duties to the individual;
- encouraging the participation of the individual in decisions related to property;
- fostering regular personal contact between the individual and her or his supportive family members and friends; and
- consulting from time to time with supportive family members and friends who are in regular personal contact with the individual, as well as those from whom the individual receives personal care.²²

Powers of Attorney

In Ontario, individuals may use a power of attorney (POA) to personally appoint a continuing SDM for property. Such a POA for property may be drafted to come into effect immediately upon the creation of the document, or at the time when the grantor loses legal capacity. As well, a POA for personal care (POAPC) may be created: these only come into effect upon the grantor's incapacity.

POAs are extremely powerful instruments. A POA for property, for example, enables the holder to do anything that the grantor could do, except to make a will. A person exercising a POA for property can make or cash-out investments, buy or sell property (including the grantor's home), make purchases both large and small, and transfer financial assets between accounts. The holder of a POAPC has considerable control over the most intimate details of daily life, including where the grantor lives, what kind of health care he or she receives, as well as decisions about

hygiene, nutrition and safety. This flexibility allows the attorney to act effectively on behalf of the grantor. It also gives the attorney considerable control over the well-being of the grantor. That is, the POA can be exercised either for good or for ill; the quality of the attorney will have a considerable impact on the life of the grantor. Notably, once an individual has lost legal capacity, she or he may also lose the ability to revoke the POA.

The tests for capacity to create powers of attorney for property or personal care are set out in the SDA. The test for capacity to create a POA for property is relatively rigorous, while that for a POAPC is much more accessible.

There is no required form for these POAs, although individuals may use the form that has been made available through the Ministry of the Attorney General. Two witnesses to the execution of the POA are required. The SDA lists a number of types of individuals excluded from acting as witnesses, including persons under age 18, spouses or partners of either the attorney or the grantor, the attorney, a child of the grantor, or a person who has a guardian for property or of the person.

Guardians

SDMs may also be externally appointed through two means: a statutory guardianship or a court appointment.

Statutory guardianship is intended to provide an expeditious, relatively low-cost administrative process for entering guardianship. It is available only in relation to property management decisions. Statutory guardianships are triggered automatically through a finding of a lack of capacity, either through an Examination for Capacity under the MHA, or through a Capacity Assessment under the SDA, as described above.

Initially, the statutory guardian for property is the PGT. However, designated individuals (family members) may apply to the PGT to become replacement guardians of property, and where the applicant is suitable and has submitted an appropriate management plan, the PGT may appoint the person. If the PGT refuses an application to act as a replacement statutory guardian, it must give reasons in writing for its decision. If the applicant contests the decision of the PGT in writing, the PGT must apply to the Court to resolve the matter. If it is found that the individual under statutory guardianship had previously created a POA for property which provides authority over all of the individual's property, the statutory guardianship is terminated.

Any person may apply to the Superior Court of Justice to be appointed as guardian either of property or the person. Guardianship of the person may be either full or partial, and a full guardianship may be ordered only if the court finds the person incapable with respect to all issues related to personal care, including health care, nutrition, hygiene, safety, shelter and clothing. The court may only appoint a guardian where the individual has been determined to lack capacity to make decisions for property or personal care and as a result needs decisions made on her or his behalf, and the court is satisfied that there is no alternative course of action that would not require a finding of incapacity and would be less restrictive of the person's decision-making rights.

Appointments under the *Health Care Consent Act*

Under the HCCA, where a decision is required with respect to treatment, admission to long-term care or personal assistance services, and the individual does not have the legal capacity to give consent, an SDM for that decision is automatically appointed, according to a hierarchical list which prioritizes existing appointments such as a guardianship or POA for personal care, and then members of the individual's family, such as the spouse, children, parents or siblings. SDMs appointed in this way must be at least 16 years old, themselves legally capable to make the decision, available and willing to assume the responsibility. If no SDM can be identified through the hierarchical list, then the PGT will make the decision.

The HCCA also makes provision for an individual to apply to the Consent and Capacity Board (CCB) to be appointed as a "representative" to make a decision or set of decisions for an individual under the Act.

Advance Care Planning

Issues related to advance care planning and the final stages of life are currently the subject of considerable discussion and debate.²³ The HCCA strikes a careful balance on these issues. In brief, except for emergencies,²⁴ informed consent to treatment must always be obtained from a patient or his or her SDM. Consent to treatments must relate to the patient's current health condition. Where a patient is legally incapable, an SDM is required to determine whether the patient has expressed applicable prior capable wishes and where they exist, to follow them. If no prior capable wishes can be ascertained, the SDM must consider other wishes, values, and beliefs in giving or refusing informed consent. This emphasis on the role of the SDM in conveying and interpreting the prior capable wishes and in providing consent as particular issues arise differs in important ways from the status in other jurisdictions where "advance directives" may bindingly speak directly to the treating health practitioner.

The Role of the Public Guardian and Trustee

Responsibility for the administration of Ontario's legal capacity and decision-making legislation falls under multiple statutes and government ministries. There is no single, central body with responsibility for all aspects of these laws. However, the PGT plays a very important role in this area of the law, performing the following statutory functions:

- acting as a decision-maker of last resort under both the SDA and HCCA, and as statutory guardian for property;
- appointing replacement guardians for property;
- conducting "serious adverse effects" investigations and applying to the court for temporary guardianships as appropriate, as is briefly described below;
- reviewing applications for court appointments of guardians, and making submissions or appearances as appropriate;
- reviewing accounts of guardians for property when they are submitted to the Court for approval;
- maintaining the registry of guardians; and
- at the request of the court, arranging for counsel (generally referred to as "section 3 counsel") for individuals whose legal capacity is at issue in a proceeding under the SDA and who do not have legal representation.

Dispute Resolution and Rights Enforcement

There are three venues through which abuses of the law, violations of the provisions of the statutes or disputes may be addressed.

Serious adverse effect investigations: One of the responsibilities of the PGT is to undertake an investigation where there is an allegation that a person is incapable of managing either property or personal care, and that incapacity is resulting or may result in serious adverse effects. Notably, this provision is not restricted by whether or not a substitute decision-making arrangement is already in place. The PGT has broad investigative powers within this mandate. Where a PGT investigation provides the PGT with reasonable grounds to believe that a person is legally incapable and that prompt action is necessary to prevent serious adverse effects, the PGT must apply to the court for temporary guardianship. The court may appoint the PGT as guardian for a period of not more than 90 days, and may suspend the powers of an attorney under a POA during the period of the temporary guardianship. At the end of the period of temporary guardianship, the PGT may allow the guardianship to lapse, request the court to

provide an extension or apply for a permanent guardianship order (thereby terminating any existing power of attorney in that area).

Consent and Capacity Board: The Consent and Capacity Board (CCB) is established under the HCCA as an independent, expert administrative tribunal, with jurisdiction over issues raised by the HCCA, the MHA and determinations of capacity under the SDA. In particular, the CCB may hear applications:

- to review a finding of incapacity, whether by a health professional with respect to treatment, an evaluator with respect to admission to care facilities or consent to personal assistance services provided in a long-term care home, or by a Capacity Assessor with respect to property;
- to appoint a decision-making representative with respect to decisions to be made under the HCCA;
- for permission for an SDM to depart from the prior capable wishes of a person who lacks capacity;
- to determine whether an SDM is acting in compliance with the requirements of the HCCA as to how decisions are to be made;
- for directions when the appropriate application of the HCCA with respect to a required decision is not clear; and
- for review of certain specified decisions that have significant impacts on the rights of the person, such as admission to a treatment facility.

Superior Court of Justice: In addition to its duties with respect to the appointment, variance and termination of guardianships, the Superior Court of Justice also has an important role in providing oversight of the activities of SDMs and resolving questions of interpretation. Notably, the Court may hear applications for the passing of all or part of the accounts of either a guardian or attorney for property. The Court also has broad powers to “give directions on *any question* arising in connection with the guardianship or power of attorney” [emphasis added] for either property or personal care. The Court has broad remedial powers when addressing applications for directions or for the passing of accounts. For example, upon the passing of accounts of an attorney, the Court may direct the PGT to apply for guardianship or temporarily appoint the PGT pending the determination of the application, suspend the POA pending the determination of the application, order a capacity assessment for the grantor, or order the termination of the POA. Similarly, with an application to pass the accounts of a guardian, the Court may suspend the guardianship pending the disposition of the application, temporarily appoint the PGT or another person to act as guardian pending the disposition of the application, adjust the compensation taken by the guardian, or terminate the guardianship.

In understanding Ontario's current systems in this area, it is important to know that they were originally designed in the context of an elaborate system of advocacy supports for persons who were affected by these laws. The *Advocacy Act* was intended to provide advocacy services to assist vulnerable individuals to express and act on their wishes, ascertain and exercise their rights, and speak on their own behalf. These advocacy supports would have acted as counterbalance to the relatively easy entry to substitute decision-making through powers of attorney, statutory guardianships, and automatic appointments under the *Health Care Consent Act, 1996*, assisting individuals to access the otherwise largely passive statutory mechanisms for asserting rights and reducing needs for monitoring and oversight functions.

B. Core Strengths and Shortcomings

The core strengths and shortcomings of Ontario's laws are discussed in greater depth in each of the Chapters of this *Interim Report*, but are briefly summarized here to provide a sense of the overall functioning of these systems.

1. Strengths of the Ontario Approach

As is described briefly in the introduction to this Chapter, Ontario's current law related to legal capacity, decision-making and guardianship is the result of an extensive and thoughtful law reform process spanning a number of years during the late 1980s and early 1990s. The result was legislation which was progressive and innovative in its approach to the issues, largely philosophically consistent and reasonably well coordinated. There are a number of aspects of Ontario's current law which were far-sighted at the time, continue to be valuable, and should be preserved in any reforms.

Nuanced approaches to legal capacity: As noted above, Ontario has adopted a nuanced concept of legal capacity, with a domain and time-specific approach, and a presumption of capacity to contract as well as with respect to treatment, admission to long-term care and personal assistance services.

Emphasis on the importance of self-determination: Underlying the legislation as a whole is an effort to avoid unnecessary intervention in the lives of individuals, and to respect the right of individuals to make choices that others disagree with or that may be risky or unwise.

Accessible powers of attorney: In Ontario, powers of attorney are very simple and low-cost to create, making them a very easily accessible planning tool for Ontarians. They allow individuals

to plan ahead, choose their own SDMs, and limit or direct how substitute decision-making powers are exercised.

Clear and appropriate duties for substitute decision-makers: Ontario's approach to substitute decision-making is based for the most part in a "substituted judgment" approach, in which the SDM is required to stand in the shoes of the individual and to take into account their goals and values when making decisions. SDMs are required to support participation in decision-making by the individuals on whose behalf they act, and to encourage support from others who care for individuals. This approach attempts to avoid paternalism and to respect the individuality and goals of the individual to the greatest degree possible in the circumstances.

Balanced approach to advance care planning: As was noted above, Ontario's approach to advance care planning differs in some important respects from that adopted in other jurisdictions. While these differences are sometimes a source of confusion, the balance struck in the Ontario regime between the importance of allowing individuals to express their values, beliefs and wishes and the risk of inflexibly binding individuals to poorly expressed or inapplicable directives had general (though not universal) support during the LCO's public consultations, and appears to the LCO to appropriately address the competing needs of various stakeholders and on a sound principled basis.

Attention to procedural rights for persons lacking or perceived to be lacking legal capacity: The legislation makes provision for procedural rights whenever legal capacity is removed, a recognition that removal of the right to make one's own decisions is a serious infringement on autonomy and an attempt to ensure that rights are removed only where justified and only where the individual has had an opportunity to challenge that decision.

Accessible adjudication by the Consent and Capacity Board: The CCB is unique in Canada, and overall provides accessible, timely and expert adjudication that attempts to balance the competing needs in this area of the law.

Important roles performed by the Public Guardian and Trustee: The PGT performs a range of important functions in the legal capacity and decision-making system, including its investigative powers in situations raising concerns of serious adverse effects, its role as a last-resort decision-maker, its review of guardianship applications and the maintenance of a register of guardians.

2. Shortfalls in the Current Ontario Approach

The LCO's research and consultations also revealed a number of challenges in the Ontario approach to legal capacity and decision-making laws. In some cases, these result from implementation challenges; in others, they are shortfalls in design.

Confusion within a complex system: As the brief description above reveals, Ontario's legal capacity, decision-making and guardianship regime is extremely complicated, with multiple layers, pathways, tests and institutions. Tests for capacity and mechanisms for assessment vary depending on the type of decision to be made, as do procedural protections and avenues for recourse. There are multiple types of appointment mechanisms, and considerable variance even within the processes for the appointment of a guardian. There is no central repository for knowledge about the system, and relatively little in the way of navigational supports. As a result, not only individuals and families but also service providers often find the system extremely confusing and difficult to navigate.

Misunderstandings and lack of knowledge about the law: Connected to the previous point, misunderstandings of the law are widespread among all sectors, and have a significant effect on the implementation of the law. Despite the important role played by SDMs, there is little in the way of structured information, tools or supports easily accessible to this group. Stakeholders have reported that misunderstandings of the law are widespread among health practitioners, and that there are shortfalls in assessments of capacity under the HCCA as a result.

Lack of clarity and standardization with respect to assessments of capacity: The nuanced approach to legal capacity that is foundational to this legislation means that assessments of capacity will necessarily differ somewhat depending on the nature of the decision to be made. However, the very different training and standards applicable to the different types of assessments result in the processes and quality that vary greatly, both between and even within a particular decision-making domain, adding to the confusion for people accessing the system and in the operation of the system.

Lack of oversight and monitoring mechanisms for substitute decision-makers: There are few means of monitoring the activities of SDMs once they are appointed. This is true for all SDMs, but particularly for those acting under a POA, who may be exercising a broad range of powers over a long term, with effectively no supervision. Combined with the lack of understanding of the law, this creates a situation where misuse of SDM powers or even abuse may be undetected, with negative effects on the lives of those individuals whom they are meant to assist.

Barriers to Capacity Assessments under the *Substitute Decisions Act, 1992*: In certain circumstances, the creation of or challenge to a guardianship under the SDA, requires a Capacity Assessment by a designated Capacity Assessor. These Capacity Assessments are provided on a consumer model, in which individuals seeking an assessment must locate and pay for an appropriate Capacity Assessor. This approach can result in considerable barriers either to entering guardianship or to exiting it, whether because individuals have difficulty in navigation, or because of cost.

Lack of meaningful procedural protections under the *Health Care Consent Act, 1996*: While the HCCA contains procedural protections for persons found to lack legal capacity with respect to treatment or admission to long-term care, these protections are largely ineffective. Provisions regarding rights information are poorly understood and unevenly implemented, so that individuals may have their rights to decide for themselves removed without being informed or having any meaningful recourse.

Inflexible appointment mechanisms under the *Substitute Decisions Act, 1992*, resulting in overly intrusive measures: While the underlying intent of the SDA appears to be to ensure that guardianship, as a very intrusive measure, is applied only where no less restrictive alternative exists, in practice the costly and relatively inflexible mechanisms surrounding guardianship mean that this goal is not consistently achieved: to avoid subsequent applications, guardianships sought and granted may be broader than actually needed.

Inaccessible rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992*: Most of the remedies available under the SDA to access rights or resolve disputes require application to the Superior Court of Justice, a costly, complicated and intimidating process that is practically inaccessible to many individuals and their families, so that the rights under the legislation often go unfulfilled.

The role of families: The current legislation gives priority to family members as the most appropriate substitute decision-makers, for example through the HCCA automatic appointment list, or the provisions regarding replacement statutory guardians. The requirements of this challenging role may be seen in many ways as naturally suited to the family, particularly since most substitute decision-makers carry out this role without compensation. However, as families change, decrease in size and become more geographically dispersed, the assumption that families can be consistently available or appropriate for this role increasingly comes into question. Further, despite the many challenges of the role, the current system provides very little information or supports to the family members who are expected to carry it out.

III. APPLYING THE LCO *FRAMEWORKS* TO ONTARIO'S LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP LAWS

A. Introduction: the *Frameworks* for the Law as It Affects Older Adults and Persons with Disabilities

As was highlighted in Chapter I, this project grew out of the LCO's two *Framework* projects on the law as it affects older persons and the law as it affects persons with disabilities, which were completed in 2012.²⁵ These two sister projects aimed, not to create specific recommendations for changes to particular laws, but to develop approaches to law reform relating to these two communities. They were undertaken contemporaneously to better appreciate their overlap, but separately in order not to conflate the experiences of aging and of living with a disability. Both projects also incorporated consideration of the heterogeneity within these communities. These projects resulted in comprehensive *Reports* as well as the *Frameworks*, which set out step-by-step approaches to evaluating laws, policies, practices and law reform proposals related to the two groups, based on a set of principles and considerations. From its inception, this project was intended to apply the considerations and principles that underpin the *Frameworks* to the law of legal capacity, decision-making and guardianship, to develop recommendations for reform to law, policy and practice.

Appendix F of this *Paper* sets out the Principles and Considerations for Implementation of each of the *Frameworks* for easy reference. The full *Frameworks* also contain a step-by-step process for evaluating laws, policies and practices, including a set of questions that assist in identifying and analyzing the application of the principles and considerations to the law. The full *Frameworks* and their accompanying Reports can be accessed online through the LCO's website at <http://www.lco-cdo.org/en>.

This grounding of the project in the *Frameworks* has had implications for its every aspect, including the following:

Focus on substantive equality for persons with disabilities and older adults: Most profoundly, adopting a *Framework* analysis means that the LCO's analysis of the impact of the law and of its effectiveness has focused on the experiences of persons with disabilities and older adults who are affected by these laws, and that the ultimate intent of the recommendations is to advance the substantive equality of these individuals. It also means that the analysis is rooted in the *Framework* principles, which are themselves derived from foundational laws, such as the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, and from international

instruments such as the *International Principles for Older Persons* and the *Convention on the Rights of Persons with Disabilities* (CRPD).

Emphasizing an inclusive law reform process: As well as the substance of the analysis and draft recommendations, the *Frameworks* have shaped the project process. Step 2 of each of the *Frameworks* sets out considerations for reviewing or developing new legislation. These focus on the meaningful inclusion of older adults and persons with disabilities in the process of review, including processes for research, public consultation, communications and analysis.

Considering the implementation gap: The problem of the “implementation gap” plays a central role in both *Frameworks*. Even where laws are based on a thorough and nuanced understanding of the circumstances of older adults or persons with disabilities and aim to promote positive principles, their implementation may fall far short of their goals. There may be many reasons for the implementation gap: problems with misunderstandings of the law, negative or paternalistic attitudes on the part of those responsible for implementing it, and shortfalls in mechanisms for access to the law, including systems for rights enforcement and dispute resolution. The *Frameworks* therefore focus not only on the substance of the law, but also on how it is applied in practice, and encourage users to consider shortfalls not only in the law itself, but in the policies and practices that accompany it. The implementation gap plays a significant role in critiques of Ontario’s legal capacity, decision-making and guardianship laws.

This Chapter provides an overview of the *Frameworks*, and of how the principles and considerations have been applied in this project. As well, each Chapter explicitly considers the application of the *Frameworks* to the particular issues raised in that Chapter.

B. Applying the *Frameworks*: Considering the Contexts in Which the Law Operates

Step 1 of the *Frameworks* asks users to consider the context of the particular law being evaluated, including how that context may relate to or affect the attainment of the principles, and the challenges or constraints implicit in that context.

There are a number of contexts that were brought to the LCO’s attention during research and consultations as crucial to take into account in developing recommendations for improvements to law, policy and practice in the area of legal capacity, decision-making and guardianship.

Connecting the issues to broader issues of disability and elder rights: Issues related to legal capacity and decision-making cannot be separated from broader issues of disability and elder

rights. The application of the LCO's *Frameworks* to this area makes this broader connection clear. It is also highlighted by the significant role of Article 12 of the United Nations CRPD.²⁶ Persons with disabilities and older persons, as well as their advocates, have framed issues related to legal capacity and decision-making as central to the achievement of equality, dignity and autonomy for these groups. For example, ARCH Disability Law Centre has stated,

Due to the manner in which guardianships are created, and the broad-reaching nature of guardians' power and obligations, guardianships have the potential to significantly impact the rights of persons with disabilities who have capacity issues. These are fundamental human rights, including the right to legal capacity, the right to self-determination, and the right to substantive equality.²⁷

Demographic and social trends and pressures: The *Discussion Paper* briefly highlighted some of the key demographic and social trends affecting this area of the law, including the aging of Ontario's (and Canada's) population, and changes in family structures. Because cognitive impairments resulting from stroke or dementia are more likely with age, the aging of Ontario's population is bringing issues related to legal capacity and decision-making into greater prominence and placing increasing pressure on existing supports and services. The trend towards smaller and more geographically dispersed families means that fewer Ontarians who are unable to make decisions independently will have a family member who is both willing and available to provide these important supports.

Also important to consider is the growing cultural and linguistic diversity of Ontario. Looking at Toronto alone, over 140 languages and dialects are spoken in the city, and over 30 per cent of the population speaks a language other than English or French at home. Half of Toronto's population was born outside of Canada.²⁸ There is a significant population of Franco-Ontarians, particularly in Eastern and Northeastern Ontario, and despite their linguistic rights, they may face challenges in accessing information and services in their own language, as the LCO heard during the course of its consultations. As well, attention must be paid to the cultural, linguistic and other needs of Aboriginal Ontarians. This diversity requires knowledge and sensitivity in the provision of information and education about this area of the law, in the provision of supports for navigating the law, and in the assessment of legal capacity, where linguistic or cultural barriers may affect the outcome of the assessment. In translating from one language to another, simple transcription or rendering of words may not be sufficient. Words and concepts are embedded in a cultural context involving historical, social, religious and other factors. The literal meaning of a word or concept in another language may not reflect how it is actually understood in another language. Therefore, to the extent possible, we need to provide not only translation, but cultural translation; this may require that written or oral supports be prepared not first in English or French but in the relevant other language.

The impact of social isolation and marginalization: Consultations widely emphasized the social isolation and marginalization affecting those most deeply affected by this area of the law, and the significant implications of this for any approach to law reform. Older persons will often have outlived their families and social networks, or family members or friends who remain may themselves be frail or in need of assistance. Parents of adults with intellectual or developmental disabilities stressed the significant efforts that they had put into developing networks for their adult children, how difficult it was, and how limited the results of this effort had often been. Persons with significant mental health disabilities often find themselves very socially isolated. The lack of strong social networks around persons who require assistance with decision-making limits the options for who provides assistance – the only people who are available and willing may not be truly appropriate – as well as creating greater opportunities for abuse and limiting the ability to access redress. That is, broader societal challenges related to the principle of promoting social inclusion and participation for persons with disabilities and older adults are an important context for this project and a challenge for law reform.

The connection to social, health and financial services: Legal capacity and decision-making issues do not, for the most part, arise in a vacuum, but in the context of the delivery of particular services and supports to specific communities. The implementation of legal capacity and decision-making laws is inextricably tied to how those services and supports are structured and delivered, and they are delivered through different Ministries and regulatory regimes, to different populations in different contexts, and based on different assumptions. The particular ways in which these laws play out is quite different for persons living in long-term care, for example, than it is for persons living in group homes.

The family context: The laws in this area are implicitly premised on the ability and willingness of family members to provide supports and assistance as necessary. For the most part, those acting formally or informally with or on behalf of persons who face challenges in making decisions are family members (or otherwise have a personal and intimate relationship with the person). They provide this assistance as part of their understanding of their family roles and responsibilities, and for the most part they provide it with little in the way of formal supports. This role is often extraordinarily challenging, and families may make significant financial, emotional and personal sacrifices in order to carry it out to the best of their abilities. It is difficult to see how these roles could be effectively fulfilled if family members did not so often voluntarily assume them.

However, it is important to acknowledge that family members may not always be well-equipped to take on this role, which may require them to act as navigators, problem-solvers and advocates in very confusing systems involving large and powerful institutions. Persons with mental health disabilities pointed out to the LCO that their family members might not have the knowledge to be their advocates and supporters within the mental health system, or might be intimidated by the expertise of psychiatrists and other professionals and instinctively defer to them. A brain injury survivor told the LCO how his spouse became statutory guardian of property following his accident: while she was motivated to do the best she could, she did not have the skills or knowledge to manage this role well.

And while it is often the expectation that family members will act in a selfless way to maximize the wellbeing of the individual who needs assistance, this expectation overlooks that family members will have needs, rights and interests of their own that may conflict with those of the individual who requires assistance. The ongoing nature of family relationships creates tangled webs of dependencies and expectations which may at times sit uneasily with the needs of the individual. There are situations where family members have clearly exploited a vulnerable individual for their own benefit, but there also situations where meeting the needs of the individual will create considerable hardship for other family members. There are also situations where it is less clear as to what might be reasonable expectations or arrangements within the family context. For example, several consultation participants raised the scenario where a family member who provides substantial care and support to a person with a disability may also be dependent on his or her ODSP benefits and allocate those benefits to the use of the family unit and not the individual. The complexities of family dynamics are inescapably part of the operation of capacity and decision-making laws.

Family interactions are also deeply grounded in gender and culture. There may be inherent assumptions about how decisions get made and who carries them out that may affect how capacity and decision-making laws are implemented. There may be assumptions, for example, about who manages financial issues or who makes the final decision in an emergency or a dispute that fit uneasily with the requirements in Ontario's legislation.

The trend towards formalization: The consultations revealed an underlying debate about the degree of formality appropriate in this area of the law. A less formal system is simpler and less intimidating for families to access, and reflects the daily and personal nature of the issues. It avoids labelling and stigmatizing the person who requires assistance. However, as informal systems are by their nature less amenable to education and oversight, they also carry with them enhanced risks of misuse and abuse.

There is no clear correct level of formality for this area of the law: inevitably, stakeholders and those affected will have a wide range of opinions on this point. The LCO has attempted to be mindful of the competing benefits of formality and informality in crafting draft recommendations for consideration. In general, there is a trend towards greater formality in the provision of services, whether social, health or financial. There are a variety of reasons for this, including the implementation of privacy laws, money laundering requirements for financial services providers, and a perception that we live in an increasingly litigious society (with the accompanying tendency to seek clear protocols and documentation). As a result, the informal arrangements that many families rely on in this area are declining. This has significant implications for the LCO's recommendations in a number of areas.

While these contexts must be taken into account in making recommendations, they also highlight the inherent limitations of the law and law reform in this area. While supportive communities of caring individuals around persons who need assistance with decision-making can be the best protectors against abuse or mistreatment, as well as the best providers of supports and assistance to these individuals, no law can, on its own, create such communities. The law is a very blunt and often ineffective tool for shaping family dynamics. There are inherent ethical challenges in this area that no law can completely resolve. And it is not the role of the LCO in this project, nor does the LCO have the expertise, to make recommendations for sweeping reforms to the way Ontario provides health, social or long-term care services. Even the most effective possible law reform in this area would not remove all the many challenges in dealing with these issues. However, law can provide a clear and meaningful framework within which many of these issues can be worked out, and effective law reform in this area would go some significant way to reducing the challenges.

C. Applying the *Frameworks*: Understanding the Groups Affected

Understanding the lived experience of those who are directly affected by the law requires attention to factors such as low-income, gender, cultural differences, racialization or Aboriginal status, geographical location, family or marital status, sexual orientation, gender identity and expression, or other aspects of identity. As well, the application of both *Frameworks* focusses attention on how the law in this area is experienced differently by affected individuals depending on the nature of the disability and the point along the life-course at which it is incurred, reflecting the importance of a life-course analysis.

Neither the *Substitute Decisions Act, 1992* (SDA) nor the *Health Care Consent Act, 1996* (HCCA) specifically refers to any particular class of persons. The SDA provides mechanisms for the appointment for an SDM for any person who is or may be determined to be legally incapable

within its provisions and with respect to whom particular types of decisions are required. The HCCA applies very broadly to any person whose consent is required for treatment, admission to a care facility or with respect to personal assistance matters. Particularly with respect to treatment matters, any citizen of Ontario who falls ill may potentially find themselves not meeting the standard of legal capacity for consent to treatment: in such circumstances the HCCA provides mechanisms for the appointment of and guidance for the decisions by SDMs.

However, it is clear that some persons will be more likely to be found legally incapable under one or the other of these statutes. Persons with developmental, intellectual, neurological, mental health or cognitive disabilities are both more likely to be found legally incapable to make specific decisions within the definitions of these statutes, and to be informally *assumed* to be incapable and therefore subject to assessments and other provisions of the statutes. Because older persons are disproportionately affected by some types of cognitive disabilities, older persons may also be disproportionately affected by this area of the law; in addition, older adults may be *treated* as lacking capacity even though this is not the case, merely by virtue of age.

It would be difficult to overstate the diversity among those directly affected by capacity and decision-making laws. Interested readers can find background information on demographic and other characteristics of groups most often affected by this area of the law in Part I, Chapter I of the *Discussion Paper*.

The impact of the law differs greatly for those whose challenges with decision-making are episodic or increasing, as compared to persons whose needs are stable. The predictability of how much assistance with decision-making is needed has a significant effect on the practical ability of family or friends to provide supports, of third parties to accommodate needs for supports, and of the law to ensure that supports and accommodations are provided as appropriate. During the consultations, the LCO frequently heard of the importance of clarity and certainty in the law; we also as frequently heard of the importance of flexibility and nuance. It is not unusual for an individual to be able to independently make a particular decision in the morning and be unable to do so in the afternoon, or to be unable to independently make a decision this week that could be made last week. While there was broad agreement that individuals should be able to make decisions independently whenever they are able to do so, there was also acknowledgement that the practicalities of this may be particularly daunting for those with fluctuating levels of decision-making ability.

The stage of life at which needs for assistance with decision-making arise has considerable implications for the nature and extent of social and economic supports available to the affected

individual. For example, an older person who has recently developed dementia or had a stroke may have much more extensive financial assets than a younger person who has experienced life-long economic marginalization resulting from disability. These more significant assets may be of assistance in purchasing supports, but they may also create a substantial temptation to abuse and exploitation. The stage of life may also shape the extent and nature of personal supports and type of services available, how they are provided, as well as the needs and aspirations of the individual receiving assistance.

As well, a person who has lived with a disability affecting decision-making throughout his or her life may have a significantly different idea of what autonomy or risk means than a person who has developed a disability later in life. Older persons developing disabilities later in life tended, during the consultations, to focus their aspirations on preserving the identity and values that had informed their lives prior to the development of disability – in some sense, on binding their future selves so as to create a continuous and coherent narrative with the life that they have previously lived. Younger persons with disabilities affecting their decision-making expressed more interest in having the opportunity to change and grow, to discover a new future self, and to having their present decisions respected. This has implications for the nature of the assistance they are interested in receiving, and for the kind of process that is appropriate.

Cultural diversity, economic disparities, and gender roles and assumptions must also be taken into account. Gender and culture may affect the personal supports available, who will provide them, and how they are provided. For example, the LCO heard that the hierarchical list of substitute decision-makers in the HCCA may conflict with cultural expectations that the eldest son makes decisions, causing practical difficulties for healthcare staff. Traditional gender roles within marriage may affect the abilities and expectation of spouses in relation to decisions about finances or personal care, particularly where a spouse is expected to take on decision-making in an area that falls outside of traditional roles.

While many of the groups frequently affected by this area of the law experience stigma and marginalization, the particular negative attitudes and how they are expressed differ from group to group. For example, both persons with mental health disabilities and older persons experience negative assumptions about their capabilities and a tendency towards paternalism, but how those assumptions and tendencies are expressed tends to differ considerably between the two groups: paternalism towards persons with mental health disabilities may focus on the desire to “fix” them, while for older persons, attitudes may be more infantilizing.

It is not surprising, therefore, that during the consultations the LCO observed significant differences in what various groups hoped for from the law and identified as goals for law

reform. However, it is also important to emphasize what is widely shared among groups directly affected by these laws: concerns regarding social isolation, stigmatization and marginalization, and a profound desire for inclusion, freedom from abuse and mistreatment, and for respect for them as individuals and for their values and aspirations.

D. The LCO's *Framework* Principles and This Area of the Law

This section briefly outlines the six *Framework* principles and their general application to legal capacity, decision-making and guardianship laws.

1. *Respecting Dignity and Worth*

The Law as It Affects Older Adults

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.

The Law as It Affects 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.

The pervasive negative stereotypes and attitudes about persons with disabilities and older persons described in the *Framework* Reports²⁹ inevitably influence how this area of the law is interpreted and applied. Reactions to the law, and its practical implementation, must be understood in the context of a society where worth is often perceived as synonymous with intelligence, ambition and the ability to successfully compete according to preconceived standards. Too often, persons with disabilities and the very old may be implicitly assumed to be less worthy of attention and concern than others, and seen as burdens with little to contribute. They may be presumed to have fewer abilities than they actually have, or it may be assumed that their feelings and wishes are not sufficiently meaningful to take into account in decision-making.

As discussed in Chapter II, the current legislation codifies a presumption of capacity to contract, and for matters falling within the HCCA. It also takes an approach to the concept of legal capacity which is based, not on age or a particular medical diagnosis, but on the abilities of the individual to carry out the task in question – that is the making of a particular decision or type of decision – in a specific context. These approaches were intended to guard against the unwarranted removal of rights based on assumptions and biases. In practice, of course, because we live in a society where older adults and persons with disabilities are commonly the subject of negative assumptions, these assumptions may also affect the implementation of the legal capacity, decision-making and guardianship law.

While it was of course not intended that the designation of an individual as “legally incapable” be stigmatizing, in practice, that is how it may be experienced. In particular, parents of adult children with disabilities told the LCO that they had put considerable effort as parents into emphasizing their children’s abilities and potential rather than their deficits, so that a designation of their adult child as “incapable” seems to run counter to the entire philosophy with which they had approached their children, and with which they hoped society could learn to approach them.

2. Promoting Inclusion and Participation

The Law as It Affects Older Adults

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.

The Law as It Affects Persons with Disabilities

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.

Stakeholders emphasized during the consultations that many of the groups most profoundly affected by this area of the law, including persons with cognitive, neurological, mental health or

intellectual disabilities, the very old and persons living in long-term care, are disproportionately likely to be socially isolated. This may be for several reasons: they have outlived their social networks, or stigma and marginalization associated with their disability has inhibited their ability to develop networks, or the barriers naturally associated with living in a congregate setting, for example. Many people without disabilities are also socially isolated – families are smaller than in the past and increasingly geographically dispersed, not all families are supportive, and not every person is drawn to large social networks.

This tendency towards social isolation for those most affected has many implications for law reform in this area. Current legislation assumes that the first, most favoured and predominant source for decision-making assistance will be family and close friends. This assumption makes sense on many levels: it is those with close personal relationships with us who can best understand and convey our wishes and values; these are also the people who are most likely to be willing to take on what is a very challenging and consuming responsibility, and to try to do so in a way that supports and respects us. However, many individuals do not have such relationships, or the relationships they do have may be negative or exploitive. Ontario currently provides the Public Guardian and Trustee as a decision-maker for those who find themselves without family or close friends who are willing and available to act.

The lack of intimate and supportive personal relationships among a significant number of persons who require assistance with decision-making poses particular challenges for the “supported decision-making” approach discussed in Chapter VI, as this approach sees these intimate relationships as essential to providing assistance in a way that preserves the legal capacity of the person in question. Thus, some proponents of supported decision-making have proposed that government should have a role to play in fostering such relationships or (for some proponents) in providing paid supports that can approximate this kind of intimate and trusting relationship.³⁰

3. Fostering Autonomy and Independence

The Law as It Affects Older Adults

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 rights 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.

The Law as It Affects Persons with Disabilities

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 they desire, with appropriate and adequate supports as required.

The principle of fostering autonomy and independence is very clearly linked to issues of legal capacity and decision-making, to the extent that legal capacity has sometimes been conceptualized as “the effective threshold of autonomy, dividing the autonomous, on the one hand, from the non-autonomous, on the other, on the basis of an individual’s ability to engage in the process of rational (and therefore autonomous) thought”.³¹ In practical terms, a determination of incapacity may legitimate unwanted intervention in the life of an individual who has been so identified.

Current legal capacity and decision-making laws implicitly place limits on the ability to make unwise choices or to take risks based on the standard for capacity: if you are able to understand the decision that you are making and appreciate its risks and benefits, your choices will not be interfered with, no matter how unwise, unless they interfere with some more general rule or law. That is, for a person to assume the risks of a negative outcome, that person must be able to understand that such an outcome may occur, and to factor that into the decision. If a person is unable to understand the relevant information and appreciate the risks and benefits, his or her substitute decision-maker may, based on the individual’s values and preferences and within the restrictions of the legislation, make that risky decision on the person’s behalf.

However, the relationship of this area of the law to autonomy and independence is not simple. As was highlighted in Chapter II, the current legislative framework was designed with the goals of minimizing unwarranted interference and enhancing self-determination. The presumption of capacity for certain types of decisions, the various procedural protections (such as the right to refuse a capacity assessment under the *Substitute Decisions Act, 1992* (SDA),³² or the entitlement to rights advice under the *Mental Health Act* (MHA),³³ as just two of many examples), the provisions requiring the exploration of least restrictive alternatives prior to a guardianship order by the court³⁴ – all these are designed to ensure that limitations on autonomy are only applied where necessary.

As well, the law is, or attempts to be, nuanced in its approach to individual autonomy. For both personal and external appointments, the substitute decision-maker is directed to encourage the participation of the individual and to pay attention to their values and wishes.³⁵ Powers of attorney allow individuals to direct when they wish to receive assistance with decision-making, from whom, and potentially the limits or conditions of that assistance. These examples

highlight the way in which the legislation acknowledges as valid exercises of autonomy both the use of planning documents that may bind the future self (such as through powers of attorney, advance care planning and “Ulysses agreements”³⁶), and the expression of currently held values, preferences and choices. As was briefly noted in the previous section, these different exercises of autonomy will have greater or less importance for different populations or at various life stages, something which was very apparent during the LCO’s consultations with persons directly affected by legal capacity and decision-making laws.

Further, to a significant degree, this legislation is intended to *safeguard* autonomy and independence, by protecting individuals who are vulnerable due to illness or disability from being pressured or manipulated, or having their own goals and wishes outright overridden or ignored, to the benefit of an unscrupulous other.

However, the LCO has heard, from many perspectives, that there are ways in which the current law fails to sufficiently protect and promote autonomy and independence. The shortfalls may be in the wording of the law, or in its implementation. There may be insufficient mechanisms to “divert” individuals from substitute decision-making when appropriate assistance can be provided in another way. Persons under guardianship who no longer require such assistance may well have difficulty in challenging the guardianship, given that their guardian will generally have considerable control over their access to funds and supports. Lack of monitoring of substitute decision-makers together with lack of understanding of the requirements of the law may mean that family members or others may seriously overstep the limits of their responsibilities and exert an inappropriate level of control over the life of the person requiring assistance. Lack of resources and of understanding of the law, together with assumptions about the abilities of older persons or persons with disabilities may lead service providers to disregard the presumption of capacity, the decision-specific nature of capacity or the procedural rights of individuals. These and other issues affecting autonomy and independence are discussed throughout this *Interim Report*. In summary, the current approach is not sufficiently effective in ensuring that individuals retain control over their choices and their lives to the greatest degree possible.

In any discussion of autonomy, consideration must also be given to issues related to risk. Choice is not really choice if there is only a single standard for permissible decisions. That is, if we are to respect autonomy and independence, we must accept that individuals will make choices that others consider unwise or that involve some degree of risk. We cannot promote autonomy without accepting that sometimes things will end up badly for the individual making the decisions. It was evident during the consultations that for at least some stakeholders, the discussion of legal capacity and decision-making is at its heart a discussion about what kinds of

negative outcomes we as a society are willing to tolerate. The question becomes especially acute when we are dealing with individuals who may already be living in very challenging circumstances, who are marginalized and have reduced resources, and who may be particularly vulnerable to exploitation or abuse. The challenges cannot be simply waived away. Service providers can find themselves facing very painful moral and ethical dilemmas.

As part of the recognition of persons with disabilities and older adults as full and equal persons, their ability to take risks must be respected. As was detailed at length in the *Framework Reports*, there is a lengthy history of paternalism towards both persons with disabilities and older adults, a tendency which has unduly restricted the lives of many individuals and led to negative results. During the consultations towards the development of the *Frameworks*, many older adults and persons with disabilities spoke of the importance of respecting their right to make choices about their own lives and in accordance with their own values, even where others disagreed. Older adults and persons with disabilities, like others, must have the ability to take risks and make mistakes. It is through this ability that we learn and grow, express our individuality and shape our own lives.

However, it is necessary to acknowledge that while we as a society place a very high value on autonomy and self-determination, we also accept many limitations on autonomy to reduce risk or harm (whether to the individual making the decision or to others), such as seatbelt and helmet laws, restrictions on smoking or regulation of the sale of alcohol, as only a few examples. To recognize the importance of autonomy is not to end the discussion about the assumption of risk.

The concept of “dignity of risk” highlights the close connection often made between autonomy – the right to choose for oneself in one’s own way, even if others disagree and even if significant negative consequences may result – and the notion of what it is to be human and to be respected as such. There are approaches to the concept of human dignity that rely very heavily on the concept of autonomy as an essential attribute of the human. Such approaches are discussed in the *Framework Reports*. In identifying its principles, the LCO clearly separated the principles of dignity and autonomy. It is not uncommon for humans to encounter situations in which their autonomy is limited, and it is the view of the LCO that such limitations should not affect the recognition of an individual’s fundamental humanity and right to be treated with respect.³⁷

Autonomy is also limited by individual circumstance and social context. We all of us must make decisions within the limits of existing social and personal limitations. This is particularly true for individuals who are more reliant on social and familial resources: the options available may be

quite narrow. The Northumberland Community Legal Centre's submission emphasized this point.

What the abovementioned assertions about individuals living in poverty and/or living with disability are meant to portray is that the possession of capacity, the ability to assert agency and to make choices for oneself, to be able to meaningfully participate, is dependent on the kinds of choices that are actually possible within a society. In a society where choice is quite often limited to what an individual can pay for, be it food, shelter, accessibility or otherwise, there will always be a significant segment of the population that falls through the cracks and, sadly, that significant segment will be our most vulnerable. Homelessness, income insecurity and mental health issues all lead to possible incapacity issues.

As is further discussed in relation to the principle of security or safety, there is a general understanding that there are circumstances where a decision is not truly "our own". For example, where a decision has been entered into through fraud, manipulation or threats, we may not be held to its consequences: the doctrine of undue influence is one way in which the law recognizes this. Because persons with impaired decision-making abilities may be especially vulnerable to manipulation or pressure, concerns about abuse and how this may undermine self-determination are particularly important in legal capacity and decision-making laws.

The current standard for legal capacity – the requirement that an individual have the ability to understand and appreciate the relevant information – highlights the idea that individuals cannot be asked to assume the risks or negative consequences of a decision unless they have the ability to know of those risks or negative consequences and freely accept them.

In summary, while the principle of autonomy is central to this area of the law, it cannot be understood as having a single meaning for all those affected by issues of legal capacity and decision-making: individuals may understand and seek to achieve autonomy in different ways, depending on their circumstances and identities. Autonomy must be understood as shaped in multiple ways by our relationships with others. Autonomy must also be understood as having limits for everyone, not only because it must co-exist with other principles, such as those of membership in the broader community and of safety and security, but also because we all exist in contexts of personal constraints and limited choices. In seeking to reform this area of the law to better protect and promote autonomy, it is important to understand the inherent challenges and limitations of seeking to do so.

4. Respecting the Importance of Security/Facilitating the Right to Live in Safety

The Law as It Affects Older Adults

(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.*

The Law as It Affects Persons with Disabilities

(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.*

The principle of fostering autonomy and independence is often juxtaposed with that of respecting the importance of security or of facilitating the right to live in safety, with the two seen as being frequently in conflict, particularly in this area of the law.

Concerns about abuse of persons who have impaired decision-making abilities have been frequently raised throughout this project, and were a significant and recurring theme during the 2014 consultations. It is difficult to know how common abuse of persons lacking legal capacity is, as there is no means of gathering meaningful numbers at the present time. Anecdotally, it is a significant concern: during consultations, service providers indicated that they saw these types of issues on a regular basis. The available research on the nature and prevalence of abuse of persons affected by legal capacity and decision-making laws was reviewed in the *Discussion Paper*, Part IV, Ch. 1B. Access to finances appears to be a common motivator for abuse: even small amounts of money may pose a temptation to desperate or unscrupulous individuals. Dysfunctional family dynamics may also play a significant role. Certainly, the vulnerability of these individuals and the relatively low risk of consequences for abuse are important factors.

There is therefore reality to the often identified tension in this area between autonomy and security: legal capacity and decision-making law is often invoked to prevent or address abuse or exploitation, or to prevent an individual from taking or continuing on a course of action that will pose extreme risks or negative consequences for safety or wellbeing. For example, sections 27 and 62 of the SDA give the Public Guardian and Trustee the power to investigate and ultimately to apply for temporary guardianship where a person lacks legal capacity and “serious adverse effects” are occurring or may occur as a result. The imposition of substitute decision-making in

response to abuse or negative living conditions does restrict that individual's ability to make decisions for him or herself.

However, a person who is experiencing abuse or exploitation is already in a situation where their autonomy and independence is being restricted. Intervention may therefore in some situations create opportunities for greater choice and self-determination, as well as contributing towards the realization of other principles.

As part of the context that shapes this dynamic between autonomy and safety or security, it is helpful to keep in mind that, given the pressures on resources and supports available for individuals who are low-income or marginalized, the choices available to the individual may be, practically speaking, already very restricted. A lack of supports may place an individual in a condition of dependency on the abuser. Intervention, including imposition of a guardianship, may not be able to resolve the fundamental issues that are creating a vulnerability to abuse or exploitation.

A number of stakeholders suggested that the LCO explore a broader approach to addressing abuse of vulnerable adults, including older adults and persons with disabilities, which would not be restricted to persons lacking legal capacity. A few pointed to the adult protection legislation that exists in other jurisdictions in Canada and the United States.³⁸ This type of broad adult protection legislation raises many issues and lies beyond the scope of this project, and it is not the LCO's intention to make recommendations about adult protection laws.

Many of those consulted felt that the current law and policy is relatively weak in addressing abuse of persons lacking legal capacity and misuse of decision-making powers. There was a broad perception that current systems provide insufficient monitoring and oversight for those who act for persons whose decision-making abilities are impaired. Service providers expressed confusion and frustration as to how to address concerns about abuse, particularly those cases where there are reasons for concern, but no clear proof. Existing legal options, such as bringing an application for guardianship or for a passing of accounts, are often seen as confusing, intimidating and costly, and so not a realistic option for family or concerned friends, let alone third parties. Of course, the individuals themselves may not be at all in a position to identify concerns or seek assistance.

5. Responding to Diversity

The Law as It Affects Older Adults

(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.*³⁹

The Law as It Affects Persons with Disabilities

(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.*

As was discussed earlier in this Chapter, the groups directly affected by this area of the law are very diverse in their circumstances and needs. Gender, culture, language, sexual orientation and other aspects of identity further complicate the picture. And within any particular group, there remains a wide spectrum of needs and circumstances. For example, the nature and level of social and economic resources available to an individual will radically affect how he or she encounters the law in this area. Culturally influenced behaviour may be misunderstood by those who assess legal capacity if they are not trained or do not have access to culturally appropriate resources. Those who speak English or French as a subsequent language may have difficulty in accessing information about their rights, or in navigating this multifaceted area of the law. As understandings of diversity evolve, new needs for respect and responsiveness may continue to be identified.

Consultees emphasized the importance of flexibility and nuance in this area of the law, in order to address the individuality and diversity of needs for support and assistance. The need for clarity, simplicity and certainty in applying the law is frequently in tension with the need for approaches tailored to individual circumstances, including different manifestations of heterogeneity. This is one of the frequently raised critiques of the concept of “capacity” as something that one either has or does not have with respect to a particular decision or type of

decision: many service providers and experts discussed the challenges of addressing those many individuals who fall within a “grey area” where the ability to make decisions independently is unclear or fluctuating.

6. *Understanding Membership in the Broader Community/Recognizing That We All Live in Society*

The Law as It Affects Older Adults

(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.*

The Law as It Affects Persons with Disabilities

(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.*

The principles of membership in the broader community and of recognizing that we all live in society recognize that older adults and persons with disabilities are bearers of responsibilities as well as rights; that none of us lives in isolation and that we must take into account the needs of the broader collective as well as those of particular groups; and that laws that affect older adults and persons with disabilities will also have implications, sometimes very significant ones, for others and that these implications must be taken into account.

In designing laws related to legal capacity and decision-making, there are two groups of stakeholders beyond those most directly affected whose needs must be given particular consideration. One group is family members and others who take on the responsibility of assisting with decision-making needs. The other group consists of institutions and individuals who enter into contractual or other legal arrangements with persons with impaired decision-making abilities, most prominently the third party service providers who are expected to effectively implement any legislation. While laws related to legal capacity must respect the rights of older persons and persons with disabilities and advance their substantive equality, they must also take into account the valid needs of these other groups.

It is important to recognize that family members, for the most part, take on their responsibilities to other family members willingly and out of love, that they find their roles meaningful, and that their relationships with the loved ones that they assist are reciprocal and

interdependent. Persons who are unable to make decisions independently are not merely care recipients and those who provide assistance with decision-making are not simply care providers: those who receive support may also provide it in different ways, and *vice versa*. It is also important to acknowledge that those acting as substitute decision-makers or otherwise providing informal assistance to meet such needs are carrying out a resource-intensive and challenging role that may have significant economic, emotional and personal costs. They often feel that they receive little financial or practical support in these roles. They may not feel that they have the resources or skills for this role, but may take it on because they see no other alternative.

Most family members participating in the consultations acknowledged the importance of meaningful checks and balances to prevent and address abuse. Many commented, particularly in relation to adult children with disabilities affecting their decision-making abilities, that “I am not going to live forever”: recognizing that they would not always be around to carry out responsibilities appropriately and to prevent abuse, they understand the need for effective mechanisms to prevent abuse or misuse of powers by whoever ultimately steps into their role. However, they also emphasized that families could not reasonably be expected to take on too much more in the way of costs, paperwork and administration given the already considerable burdens and responsibilities that they carry.

Third party service providers often emphasized that they also have needs that must be considered in the design of these laws, particularly since they are to a significant degree responsible for its implementation. Service providers such as financial institutions, long-term care homes and developmental services providers are subject to extensive and often complicated regulation and oversight: these are not the only laws with which they must comply, and it is important that legal capacity and decision-making laws take into account these other obligations. Issues related to legal capacity and decision-making may fall outside the core areas of expertise of front line service providers, especially in financial institutions: yet they are by necessity taking on very challenging ethical, social and interpersonal issues, and risking liability in doing so. Health and social service providers in particular are often operating in situations of considerable time and resource pressure. Many service providers described themselves as stepping into a gap to provide vital services or supports that appeared to be beyond their understanding of their own roles and expertise, simply because there appeared to be no other mechanism to fill the need. Many service providers emphasized the need for greater clarity and certainty in law and policy, to ease their ability to effectively comply and fill their roles; several argued for clearer limitations on their responsibilities and liability in this area.

E. Realizing the Principles in the Context of this Area of the Law

1. Interpreting and Applying the Law in the Context of the Principles

The principles should be considered in the design of the law and of the policies and practices through which it is implemented. The law as designed should at minimum not be in direct contradiction of the principles and the law should protect against interference with the attainment of the principles by individuals. Ideally, the law promotes the fulfillment of the principles for individuals directly affected. The question of the consistency of the current law or of particular options for reform with the principles will be considered throughout this *Interim Report*.

Even where the law as drafted is consistent with the principles, there may be challenges in its interpretation or application. The understandings and attitudes of individuals or organizations who apply the law day-to-day may not be consistent with those which underlie the legislation. This is particularly so because legal capacity, decision-making and guardianship law is deeply embedded in existing attitudes, contexts and institutions surrounding persons with disabilities and older persons. For example, the strong tendency towards paternalism with respect to older persons and persons with disabilities may consciously or unconsciously affect assessments of capacity or how substitute decision-making powers are exercised.

For this reason, it is important to be very clear about the purposes of the legislation and about the particular functions exercised under the law, such as assessments of capacity and substitute decision-making. For example, the LCO has heard that assessments of capacity may be triggered for a wide range of reasons that are not consistent with more limited focus of this legislation on legal capacity and decision-making. There are widespread concerns that the SDA is being misused as a mechanism for estate planning, so that substitute decision-makers are using their powers, not to respect the life goals of the individual affected or to improve their quality of life, but to reduce probate fees, preserve assets for distribution upon death, and manage tax implications. It was noticeable to the LCO during consultations that some service providers tend to confuse Ontario's legal capacity, decision-making and guardianship legislation with adult protection legislation, which Ontario does not have, and may be attempting to apply the legal capacity and decision-making laws to implement goals which are not part of its intent. These types of misunderstandings or misuses distort the law and ultimately have a negative effect on those individuals who are intended to be the focus of the legislation. It is, in the view of the LCO, not appropriate and likely not effective to attempt to use this area of the law as a tool to resolve broader social or legal issues: legal capacity and decision-making laws are "high

stakes” in their impact on the rights and wellbeing of those affected and their use should be carefully confined to what is truly necessary.

One means of providing greater clarity may be to include in the legislation a statement of purposes. The HCCA already includes such a provision in section 1:

The purposes of this Act are,

- (a) to provide rules with respect to consent to treatment that apply consistently in all settings;
- (b) to facilitate treatment, admission to care facilities, and personal assistance services, for persons lacking the capacity to make decisions about such matters;
- (c) to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services by,
 - (i) allowing those who have been found to be incapable to apply to a tribunal for a review of the finding,
 - (ii) allowing incapable persons to request that a representative of their choice be appointed by the tribunal for the purpose of making decisions on their behalf concerning treatment, admission to a care facility or personal assistance services, and
 - (iii) requiring that wishes with respect to treatment, admission to a care facility or personal assistance services, expressed by persons while capable and after attaining 16 years of age, be adhered to;
- (d) to promote communication and understanding between health practitioners and their patients or clients;
- (e) to ensure a significant role for supportive family members when a person lacks the capacity to make a decision about a treatment, admission to a care facility or a personal assistance service; and
- (f) to permit intervention by the Public Guardian and Trustee only as a last resort in decisions on behalf of incapable persons concerning treatment, admission to a care facility or personal assistance services⁴⁰.

Another approach, adopted in the Yukon’s *Adult Protection and Decision-making Act*, is to specify purposes for particular aspects of the legislation, such as adult protection, guardianship, supported decision-making arrangements or representation agreements. For example, the statute specifies the purpose of supported decision-making agreements as follows:

4 The purpose of this Part is

- (a) to enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired;

(b) to give persons providing support to adults under paragraph (a) legal status to be with the adult and participate in discussions with others when the adult is making decisions attempting to obtain information.⁴¹

The LCO has recommended, in a number of specific areas, statutory amendments to clarify the purpose of the legislation, to reduce the problems arising from these common misapprehensions. The LCO believes that it may also be valuable to include in the *Substitute Decisions Act, 1992* a statement as to its general purposes, with the aim of clarifying that this legislation is intended to serve the following functions:

- provide for decision-making for persons who lack legal capacity and require decisions to be made;
- to do so in a manner that:
 - is the least restrictive appropriate in the circumstances of the individual,
 - is respectful of the values, culture, religious beliefs, and life goals of the individual,
 - is respectful of the dignity of the individual,
 - encourages their participation in decision-making to the greatest extent possible, and
 - includes safeguards against abuse or misuse of those decision-making powers;
- provide procedural protections for individuals whose legal capacity is lacking or in doubt; and
- to provide clarity regarding the roles and responsibilities of substitute decision-makers.

Many jurisdictions have included, as part of the modernization of their legal capacity, decision-making and guardianship legislation, statements of principle to guide the interpretation and application of the legislation. This includes the provinces of Alberta, Saskatchewan, Yukon Territory (that is, most of the Canadian jurisdictions that have recently reformed their laws in this area), the influential *Mental Capacity Act, 2005* of England and Wales, and Ireland's proposed legislation.⁴² The Victorian Law Reform Commission, in recommending the inclusion of a principles section in reformed legislation, commented,

Modern legislation often starts with a statement of principles. These principles serve two broad purposes: they provide parliament with an opportunity to highlight policies that the legislation seeks to apply and they provide guidance to those who exercise power under the legislation.

Because of the challenges in balancing, and sometimes prioritising between, the fundamental values of autonomy and beneficence, guardianship legislation should include principles that clearly explain the policies implemented by the law. Those principles would also guide people—such as tribunal

members, the Public Advocate, State Trustees, and guardians and administrators—when applying that legislation and exercising power over the lives of others.⁴³

Legislative statements of principles may in some cases have a powerful effect: for example, some consultees have pointed to the statement in Ontario's *Long-Term Care Homes Act, 2007* that the fundamental principle underpinning that statute is that "a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met",⁴⁴ as having contributed to a fundamental shift in the approach to that area of the law.

The statements of interpretive principles in various jurisdictions differ, depending on the structure and scope of the legislation, as well as that jurisdiction's approach to that area of the law. Some of the concepts included as principles in other legislation or proposed legislation are in Ontario already incorporated into the substance of the statute; others are not. Principles commonly included in these other jurisdictions include:

- individuals are to be presumed capable until the contrary is demonstrated;
- the means by which an individual communicates should not affect a determination of capacity;
- where a person is not able to make decisions independently, the person's autonomy should be preserved by choosing the least intrusive and least restrictive course of action available;
- individuals are entitled to choose the manner in which they live and to accept or refuse support or protection, so long as they have the capacity to make decisions about these matters and do not harm others;
- individuals are entitled to be informed about and to the best of their ability to participate in decisions affecting them;
- a person should not be treated as unable to make a decision unless all practicable steps have been taken to help him or her do so, without success; and
- an act done or decision made for or on behalf of a person who lacks capacity must be made in her or his best interests, which includes not only the quality of life of the individual, but the furtherance of the individual's values, beliefs and wishes.

The LCO believes that a principles provision could be of assistance in the application of reformed legislation. A principles section should draw upon the *Framework* principles, be focused within the scope of the legislation, rather than broad aspirational statements, and on

providing clarity as to interpretation, rather than identifying duties and responsibilities that would be better incorporated directly into the statute.

DRAFT RECOMMENDATION 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. Progressive Realization

The LCO *Frameworks* incorporate the concept of progressive realization, the recognition that the fulfilment of the principles of substantive equality is an ongoing process, as resources, circumstances and understandings develop. As the *Final Report* accompanying the *Framework for the Law as It Affects Older Adults* states,

[O]ne must recognize that even where one would aspire to implement all the principles to the fullest extent possible, there may be other constraints that might limit the ability of law and policy makers to do so. These constraints may include policy priorities or funding limitations among others. That is, it may be necessary to take a progressive realization approach to the full implementation of the principles. A progressive realization approach involves concrete, deliberate and targeted steps implemented within a relatively short period of time with a view to ultimately meeting the goal of full implementation of the principles.⁴⁵

Recommendations must respect and advance the principles, principles must be realized to the greatest extent possible at the current time, and there must be a focus on continuous advancement.

As is discussed at length in Chapter VI, there is a strong desire in some communities to find alternatives to substitute decision-making that will better promote the autonomy of affected individuals. Some of these alternatives, referred to by some as “supported decision-making”, involve novel approaches to the law, potentially involving significant reworking of current understandings and raising wide ranging and challenging practical and ethical issues. A progressive realization approach to alternatives to substitute decision-making may allow for new approaches to be explored while avoiding widespread implementation issues or undue risks to individuals who are vulnerable or at risk.

During consultations, many stakeholders identified resource pressures as a concern affecting the appropriate implementation of laws and policies in this area. Pressures on the health, long-term care and social service sectors may distort the ways in which laws and policies are

implemented. As one interviewee from the long-term care setting identified, effectively assessing legal capacity to make decisions, providing information about laws and rights, identifying supports to assist an individual with decision-making – all of these take time to execute properly, and time is often just what professionals in these areas lack.

Fiscal constraints at the provincial level may make it more difficult to allocate significant resources for new programs, policies or institutions to meet the priorities for reform. The LCO is well aware of the need for fiscal prudence and the importance of ensuring best value for resources allocated, and has carefully assessed potential recommendations for reform in this light.

However, the LCO is also well aware that this area of the law has a fundamental impact on the rights and wellbeing of many Ontario residents, and that it is crucial that the law respect those rights and support wellbeing. Where new structures or supports are necessary in order for the fundamental rights of Ontarians to be effectively respected, the LCO has recommended the creation of such structures and supports for government consideration as it determines the allocation of resources on an ongoing basis.

The LCO has therefore aimed to identify reforms that can serve as the foundation for further advancement in this area as resources are available and understandings develop, in the same way that the reforms to this area of the law in the 1990s provided a significant advance over what came before, and provided a solid basis for further improvements.

Recognizing the limitations of the current situation, the LCO has also indicated in Chapter XII priorities for reform, balancing out the impact that proposed reforms may have on advancing the rights and wellbeing of affected groups with the costs and practical challenges of implementing them. As well, Appendix B proposes timeframes for the implementation of the draft recommendations, recognizing that while some draft recommendations could be implemented in the short-term, others involve greater complexity or investment of resources.

The LCO has also indicated at various points in the text, where government is unable to undertake in the short-term reforms that the LCO has assessed as the most desirable, steps that may be taken in the alternative or in the short-term to make some incremental improvement prior to more thorough reform.

3. Monitoring

Acknowledging the challenges posed by the implementation gap, and the necessity of a progressive realization approach highlights the importance of actively monitoring the outcome of reforms to law, policy and practice. The *Frameworks* recommend that law and policy-makers regularly review laws to determine whether their goals are still meaningful and relevant, and whether their aims are being achieved; and if the law was crafted as a partial response to an issue due to constraints, whether progress is being made towards better fulfilment of the principles. The *Frameworks* include a number of questions related to monitoring of the law, including the following:

1. What mechanisms does the law include to allow those affected, including persons with disabilities (or older adults), to provide feedback on the effectiveness of the law and on any unanticipated negative consequences for persons with disabilities (or older adults)?
2. How does the law require meaningful information about its impact and effectiveness to be systematically gathered and documented?
3. How does the law require that information about its operation and effectiveness be made publicly available?
4. How does the law ensure that those charged with implementing and overseeing the law regularly report on their activities and the effectiveness with which the law, program or policy is administered?
5. Where the law provides significant discretion to those charged with its implementation, what additional reporting and monitoring mechanisms does it include to ensure that this discretion is exercised consistently, fairly, transparently and in a principled manner?

One of the challenges in law reform in this area, referenced throughout this *Interim Report*, is the lack of relevant and worthwhile data about many key aspects of these laws, including assessments of capacity, the operation of powers of attorney (POAs), or even the delivery of education and information. Without such data, it is difficult to meaningfully assess whether the reforms of the 1990s have met their goals; or whether any shortfalls in doing so are the result of faulty assumptions and strategies underlying the laws or with their implementation.

An approach that enables active monitoring and collection of data regarding the impact of legislation and public policy is in harmony with the current emphasis in government on evidence-based policy, an approach that aims to employ “the best available objective evidence from research to identify and understand issues so that policies can be crafted by decision makers that will deliver desired outcomes effectively, with a minimal margin of error and reduced risk of unintended consequences”.⁴⁶ A commitment to monitoring entails also a

commitment to identifying, pursuing and evaluating the best available evidence as a basis for creating and assessing law reform initiatives. That is, “enhancing the information basis of policy decisions will improve the results flowing from implementation, while iterative monitoring and evaluation of results in the field will allow errors to be caught and corrected”.⁴⁷

Given the significant impact of these laws on fundamental rights, the challenges inherent in their implementation, and the progressive realization approach recommended here, the LCO believes that, should government implement significant reforms, these should be accompanied by a strategy for monitoring the effect of these reforms. Such a strategy may take a variety of forms. For example, both the *Accessibility for Ontarians with Disabilities Act* and *Human Rights Code Amendment Act* contain provisions requiring a review after a certain period of time of the reforms they enacted. Section 57 of the *Human Rights Code Amendment Act* required a review of the implementation and effectiveness of the changes resulting from the enactment of that statute, three years after the effective date, including public consultations, and a report to the responsible Minister.⁴⁸ This review was completed in 2012.⁴⁹ The *Accessibility for Ontarians with Disabilities Act* contains more comprehensive review requirements. A first review was required within four years of the coming into force of the AODA, with further reviews to take place every three years. The Lieutenant Governor, after consultation with the Minister, must appoint a person to undertake a “comprehensive review of the effectiveness of th[e] Act and the regulations”, including public consultation. The person appointed must submit a report on that review that may include recommendations for improving the effectiveness of the Act and regulations.⁵⁰ Simpler forms of monitoring may take the form of examining and strengthening existing mechanisms for gathering data about the system, including as volumes of complaints or calls to the various government agencies that apply the law or oversight mechanisms under related legislation such as the *Long-Term Care Homes Act, 2007*. The determination of the appropriate form and timing of a monitoring strategy depends on the nature and extent of any reforms that government determines to undertake; however, the institution of an appropriate monitoring mechanism is an important element of effective reform in this area.

DRAFT RECOMMENDATION 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.

F. Summary

The principles, considerations and approaches developed through the LCO’s *Frameworks* for the law as it affects older adults and the law as it affects persons with disabilities form the foundation of the LCO’s approach to the reform of legal capacity, decision-making and

guardianship law. In analyzing issues and considering proposals for reform, the project has focused on substantive equality for persons with disabilities and older adults, and whether current law and proposals for reform comply with or contribute to the principles that promote such equality. The LCO believes that the principles identified in the *Frameworks*, together with a nuanced understanding of the individuals directly affected by this area of the law, should underlie the purposes and principles of Ontario's legal capacity, decision-making and guardianship laws.

At the same time, the LCO recognizes that principles are, by their nature, aspirational, and that law, and law reform, must grapple with practical realities, including competing needs, evolving understandings, and constrained resources. The principles assist us in identifying the ultimate goals of the law: in some situations, there may be steps along the way to the realization of those ultimate goals. The LCO has aimed to identify reforms that are both practical and contribute to the realization of the principles. Some reforms may take longer to put into place than others. It is important, however, to always keep in view the ultimate goals of reform: to this purpose, active monitoring of the effects of reform in this area is a vital element of the LCO's proposals.

This Chapter set out the core elements of the LCO's approach to applying the *Frameworks* to this area of the law, including a general analysis of the principles, some of the relevant circumstances of the different communities of persons with disabilities and older persons affected by these laws, and the impact of progressive realization on the development and implementation of recommendations for reform. In each of the following Chapters, these core elements are more specifically applied to the particular issues considered in that section.

IV. TESTS FOR LEGAL CAPACITY: BALANCING AUTONOMY AND LEGAL ACCOUNTABILITY

A. Introduction

The legal concept of “capacity” is central to the law related to decision-making, serving as both its rationale and the threshold for its application. Generally, persons who are considered to have legal capacity are entitled to make decisions for themselves and are held responsible for those decisions, including decisions that others may consider reckless or unwise. On the other hand, persons who have been determined to lack legal capacity in a particular domain or for a particular decision may lose the right to make decisions for themselves independently in that area: others will be responsible for making decisions on their behalf, and can in law be held accountable for how those decisions are made.

Legal capacity has been defined in different ways at different times and for different purposes. At some times and in some jurisdictions, it has been tied to the diagnosis of particular disabilities, in what has been referred to as the “status” approach to defining capacity. At other times, an “outcome” approach has been taken, which focusses on whether the individual in question is making “good” decisions – that is, whether the decisions that the individual is making are within the bounds of what might be considered reasonable.⁵¹ Ontario’s approach, like that of many other common law jurisdictions, is based on a cognitive and functional approach, which emphasizes the ability to make a specific decision or type of decision at a particular time, evaluating the abilities of the individual to understand, retain and evaluate information relevant to a decision. This approach was adopted following the extensive work resulting in the 1990 Report in the *Enquiry on Mental Competency*, chaired by David Weisstub.⁵²

Because the test for legal capacity determines the threshold for the application of the law, and because the consequences of a determination regarding legal capacity may be momentous, approaches to legal capacity are highly contested. The relatively abstract nature of the concept of capacity, embedded as it is in multiple intersecting legal, ethical, medical and social concepts and realities, makes these debates challenging.

Adding to the challenge is the difficulty of operationalizing the concept of legal capacity, particularly the nuanced approach adopted in Ontario’s laws. It may be difficult to disentangle implementation issues from shortfalls in the conception itself. In this *Interim Report*, Ontario’s systems for assessing legal capacity are dealt with in Chapter V.

Finally, the concept of legal capacity and the critiques of it are closely tied to the ongoing debate regarding the concept of “supported decision-making” as an alternative to substitute decision-making, in that some models of supported decision-making are grounded in a proposed fundamental shift in the approach to legal capacity. Issues related to alternatives to substitute decision-making are dealt with in Chapter VI of this *Interim Report*.

B. Current Ontario Law

The following elements are fundamental to Ontario’s approach to legal capacity:

1. **Legislative presumption of capacity:** the *Health Care Consent Act, 1996* (HCCA) makes explicit a presumption of capacity for decisions within its ambit: this presumption prevails unless the health practitioner has “reasonable grounds” to believe the person is legally incapable with respect to the decision to be made.⁵³ The *Substitute Decisions Act* (SDA) sets out a presumption of capacity to contract, though not for other areas falling within the scope of that legislation. The Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity* which bind designated Capacity Assessors conducting Capacity Assessments under the SDA emphasize that when Capacity Assessors assess legal capacity, “in every case there is a presumption of capacity and there should be reasonable grounds that prompt the request for a formal capacity assessment”.⁵⁴
2. **Functional and cognitive basis for assessment of capacity:** basing the assessment of decisional capacity on the *specific functional requirements of that particular decision*, rather than on the assessment of an individual’s abilities in the abstract, the individual’s status or the probable outcome of the individual’s choice.
3. **The “ability to understand and appreciate” test:** tests for capacity are based on the individual’s ability to understand the particular information relevant to that decision, and to appreciate the consequences of making that decision:⁵⁵ it is the ability that is most important, rather than the actual understanding or appreciation. While this subtle difference can be difficult to apply in practice, it allows for more individuals to meet the test, as they must only display the potential for understanding and appreciation, rather than actual understanding and appreciation: for example, while communication barriers might thwart actual understanding, they would not impair the ability to understand.
4. **Domain or decision-specific capacity:** avoiding a global approach to capacity, so that determinations of capacity are restricted to the assessment of capacity to make a specific decision or type of decision. The SDA and HCCA provide specific tests of capacity for property management, personal care, creation of powers of attorney for property

and for personal care, consent to treatment, personal assistance services provided in a long-term care home and admission to long-term care.

5. **Time limited determinations of capacity:** since capacity may vary or fluctuate over time, the validity of any one determination of incapacity is limited to the period during which, on clinical assessment, no significant change in capacity is likely to occur.

The SDA and HCCA include multiple tests for capacity, reflecting the domain/decision specific approach advocated in the *Weisstub Report*. While all are variants on the “understand and appreciate” test, in practice the requirements for meeting the test may be substantially different: for example, the information that must be understood and appreciated to create a power of attorney for personal care is substantially different (and less rigorous) from what must be understood and appreciated for the capacity to manage property. In this way, the “understand and appreciate test” can operate with great flexibility, responding to its application in different contexts and for different purposes. However, the underlying basis for the test – the requirement to have the ability to understand and appreciate particular information – is consistent across the various areas.

It should be noted, however, that some statutory provisions refer to capacity, while others refer to *incapacity*, reflecting differences in context between the various domains in which legal capacity is assessed. Health care practitioners, for example, have an affirmative duty to take reasonable steps to ensure that the person *is capable* and has given consent. The HCCA therefore defines “capacity”. Similarly, under the SDA, grantors must *have capacity* in order to create a valid POA. On the other hand, for the management of property and personal care, statutory guardianship and POAPCs take effect only when the person is assessed as *incapable* (the requirements as to who makes this assessment varies) and the definitions in the statute are for incapacity. A person who might be incapable with respect to property management if assessed might in reality not need to make any significant decisions with respect to property or might have informal supports that make a formal finding of incapacity and an appointment of a substitute decision-maker unnecessary.

C. Areas of Concern

1. *Article 12 of the Convention on the Rights of Persons with Disabilities*

The most fundamental critique of Ontario’s functional and cognitive approach to legal capacity takes as its starting point the rights enunciated in Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).⁵⁶ The CRPD codified the commitments of the international community with respect to the rights of persons with disabilities, detailing the

rights that all persons with disabilities enjoy and outlining the obligations of States Parties to protect those rights. Its purpose is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.⁵⁷ It reflects social and human rights models of disability and therefore highlights the need for society to adapt to the specific circumstances and realities of persons with disabilities in order to ensure respect and inclusion.

Article 12 requires States Parties to take certain actions, specifically to:

- recognize persons with disabilities as persons before the law;
- recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- take appropriate measures to provide access for persons with disabilities to the supports they may require in exercising their legal capacity;
- ensure that all measures related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. These safeguards must ensure that measures related to the exercise of legal capacity respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person’s circumstances; apply for the shortest time possible; and are subject to regular review by a competent, independent and impartial authority or judicial body.
- take all appropriate and effective measures, subject to the provisions of the Article, to ensure the equal rights of persons with disabilities in a range of areas, including owning or inheriting property; controlling their own financial affairs; having equal access to bank loans, mortgages and other forms of financial credit; and ensuring that persons with disabilities are not arbitrarily deprived of their property.⁵⁸

There has been considerable debate about the implications of Article 12 for approaches to decision-making. In brief, some commentators view Article 12 as protecting individuals from discriminatory determinations of incapacity based on disability status. Other commentators view Article 12 as creating an inalienable and non-derogable right for persons with disabilities to be considered as legally capable at all times.

The former view appears to have been that of Canada when it ratified the CRPD: at that time, it also entered a *Declaration and Reservation*, which states that “Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives”.⁵⁹ It declares Canada’s understanding that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports “in appropriate

circumstances and in accordance with the law”, and reserves the right for Canada “to continue their use in appropriate circumstances and subject to appropriate and effective safeguards”.

The latter view, that legal capacity is an irremovable right of all individuals in all circumstances, was taken in the *General Comment* developed by the Committee on the Rights of Persons with Disabilities.⁶⁰ General Comments “are the result of a wide process of consultation and, although not legally binding, are regarded as important legal references for interpretation and implementation of specific aspects of the treaties”.⁶¹ In the view of the Committee, “there is a general misunderstanding of the exact scope of the obligations of State parties under article 12”. Certainly the view of Article 12 evinced by the Committee differs radically from what Canada appears to have understood it was signing. The following is a brief summary of the views of the Committee.

- Article 12 affirms that all persons with disabilities have full legal capacity, and that legal capacity is a *universal attribute* inherent in all persons by virtue of their humanity, and which they cannot lose through the operation of a legal test. Legal capacity includes both the capacity to hold rights and the capacity to act (“to engage in transactions and in general to create, modify or end legal relationships”). Perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity. Status, outcome and functional approaches to incapacity all violate Article 12. All practices that in purpose or effect deny legal capacity to a person with a disability must be abolished.
- All regimes wherein legal capacity may be removed from a person, even in respect of a single decision; where a substitute decision-maker can be appointed by someone other than the person concerned and this can be done against her or his will; or where decisions may be made for another based on an objective assessment of their “best interest” must be abolished. Creation of supported decision-making regimes in parallel with these substitute decision-making regimes is, in the view of the Committee, not sufficient to comply with Article 12. The Committee goes further to urge States parties to develop effective mechanisms to combat both formal and informal substitute decision-making.
- Persons with disabilities must be provided with the supports that they require to enable them to make decisions that have legal effect. These supports must respect the rights, will and preferences of persons with disabilities. Where the will and preference cannot be ascertained, the best interpretation of will and preference must be the basis for decision-making. Persons have a right not to exercise their right to supports. A person must have the right to refuse support and to terminate or change a relationship at any time.

- Safeguards must be created to ensure protection from abuse, with a primary focus on ensuring the rights, will and preference of the person. Safeguards must include protection against undue influence, but must also respect the right to take risks and make mistakes.
- These are not rights of progressive realization: States parties must take steps immediately to realize these rights.

That is, the *General Comment* sets out a program of immediate and profound law reform, with enormous personal, social and legal ramifications not only for individuals themselves, but also for governments, family members and third parties. The *Comment* raises a host of practical questions and implementation issues, for which States Parties are expected to develop solutions.

Both Canada's *Declaration and Reservation* and the *General Comment* provide important insights into potential interpretations of Article 12 of the CRPD, which Canada has committed itself to implement. Given the nature of the LCO's role and mandate, neither the *General Comment* nor the *Declaration and Reservation* limits the LCO's potential recommendations, although they certainly inform them. It is the responsibility of the LCO to make recommendations that are at minimum consistent with Canada's international commitments. Given the non-binding nature of a *General Comment* and the existence of Canada's *Declaration and Reservation*, Canada is not clearly bound to carry out the program of reform set out in the *General Comment*. However, the LCO may certainly recommend that the government take steps beyond minimum compliance with its obligations. This does not mean that the LCO accepts the interpretation given Article 12 by the *General Comment*. It is the responsibility of the LCO to carefully review available research and the results of public consultations, and to make recommendations for law reform based on that review: it is then the role of government to evaluate the LCO's analysis and recommendations and to take such steps as it believes appropriate.

It is somewhat artificial to separate the approach to legal capacity set out in the *General Comment* from its thorough going critique of the very concept of substitute decision-making and its advocacy for its complete replacement by a comprehensive system of supported decision-making. However, it is the LCO's view that there is some benefit in separately discussing the *General Comment's* critique of the functional and cognitive approach to capacity from the search for alternatives to substitute decision-making. There are concepts of supported decision-making which are not dependent on the approach to legal capacity expressed in the *General Comment*. Some of the available models of "supported decision-making", such as that in place in Alberta,⁶² use a functional capacity test as a threshold for entry into such

arrangements. One may reject the approach to legal capacity set out in the *General Comment*, without closing the door on the concept of supported decision-making.

This Chapter will focus on the critique of the functional and cognitive test for legal capacity adopted in Ontario, and thereby on the inevitable challenges and shortcomings of any approach to legal capacity and decision-making.

2. The LCO Frameworks and the Principle of Autonomy

As was highlighted in Chapter III, one of the central law reform priorities identified through the LCO's work on this project is to reduce unnecessary and inappropriate intervention in the lives of persons affected by this area of the law, in keeping with the principle of fostering autonomy and independence. Persons affected by this area of the law were clear that they wished at the least for the opportunity to be consulted and heard on decisions that affect them, and to make their own decisions where possible. Several individuals described, with considerable pain, their experiences of being disregarded and unheard, and their sense of being thwarted in directing their own lives.

Mom can be overly patronizing, I have made great recovery from a catastrophic injury. I recently earned a [university] degree. I am entering my 30s now and I'd appreciate better independence, freedom and dignity. Giving another person full arbitrary power over another person's life decisions can become inefficient and messy and dehumanizing. Canadian culture does not support things like arranged marriage, but this can be likened to the situation people who have substitute decision makers may sometimes feel. Sometimes it feels like simply because they got this legal piece of paper I am looked at and treated differently than I normally would be treated, my valuable insights and intuition can become ignored, and sometimes any opinion I may have can become scorned. Having such a profound legal document completed I feel has set back my recovery from severe injury and I have certainly suffered losses I believe purely as a result of having this capacity assessment done It added immense stress.⁶³

Participants in the LCO's focus group for persons with aphasia, a condition that affects the ability to speak, write or understand language, described, with deep emotion, the impact of having health practitioners or others with whom they interact, automatically assume that they could not understand or participate in a decision and turn towards the person accompanying them, excluding them from the discussion of their own lives. A consideration of approaches to legal capacity must grapple with the question of whether Ontario's approach is fundamentally incompatible with the principle of autonomy: this is the position underlying the *General Comment*.

The debates regarding the concept of legal capacity explicitly draw on the principle of fostering autonomy and independence, with critiques of current practices and proponents of the approach set out in the *General Comment* pointing to shortfalls in the promotion and protection of autonomy in systems such as Ontario's. Those who criticize the current legislation without wishing to abandon substitute decision-making see the shortfalls as issues of implementation; proponents of the model put forward in the *General Comment* see the concepts of legal capacity and substitute decision-making as fundamentally inconsistent with the principle of autonomy.

However, acknowledging the importance of fostering autonomy is only one aspect of a consideration of the appropriate approach to legal capacity. As was discussed in Chapter III, while our society places a high value on autonomy and self-determination, we are all subject to a wide range of legal restrictions aimed at protecting the rights and needs of others or of the collective, or at preventing unconscionable risk. That is, as important as autonomy is, it is always subject to limits, whether practical, social or legal. There are some types of risks or negative outcomes that are seen as unacceptable, regardless of the autonomous choice of the individual, and regardless of whether the person is considered to have legal capacity or not. What is considered an unacceptable risk or negative outcome is always subject to continued debate and legislative change. The limitations to autonomy imposed by legal capacity and decision-making laws are not automatically inappropriate simply and only because they are limitations to autonomy; however, the creation of additional burdens on autonomy for only some individuals means that they must be subject to careful scrutiny to ensure that they are justifiable.

As Chapter III discussed, the principles of safety or security are often posed as in tension with that of autonomy and independence in this area of the law, due to its preoccupations with issues of choice and risk, emphasizing the importance of a nuanced approach to both sets of principles. There is no simple resolution to the challenges underlying this area of the law: both the approach taken in the *General Comment* and that put forward in Canada's *Declaration and Reservation* are conceived by their proponents as attempting to maximize the two principles, albeit in different ways.

By its very nature, autonomy includes the right to take risks and make bad decisions. Functional approaches to legal capacity emphasize the right of persons who meet that threshold of legal capacity to take risks and make bad decisions within a broad range of activities, but inherently limit the right to do so of persons who do not meet that threshold, since the test requires that for a person to take a risk or accept a negative outcome, he or she must understand that they are taking such a risk or accepting such an outcome. The substitute decision-maker may take a

risk or accept a negative outcome on behalf of the person, within the limitations of the legislation – for example, to refuse a recommended health treatment – but must accept the responsibility for having done so. In the approach put forward in the *General Comment*, the right to take risks and the corresponding responsibility to accept negative outcomes extends to all, hedged only by the ability of the person to repudiate decisions made as the result of undue influence or duress on the part of a supporter.

The issues underlying concepts of legal capacity therefore must be understood to include not only the right to take risks, but also the corresponding responsibility to bear the consequences of those risks. In a legal framework, this raises questions regarding the appropriate apportionment of liability and accountability. The following section looks more closely at the relationships between decision-making, legal accountability, autonomy and risk.

3. Legal Accountability and Responsibility for Decisions

As briefly described above, the general approach of Ontario law towards this area is that where impairments in decision-making ability reach a threshold of legal incapacity, another individual(s) will take responsibility for entering into agreements on behalf of the individual: that individual can be held to account for how she or he carries out that role. For example, the SDA specifies that guardians and powers of attorney for property are liable for damages resulting from a breach of their duty.⁶⁴

The allocation of legal accountability and responsibility for decisions has both positive and negative aspects. The status of legal capacity – in the sense of the ability to make decisions and enter into agreements on one's own behalf – is often conceptualized as an aspect of legal personhood. As the *General Comment* states,

Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.⁶⁵

Somewhat less attention is paid to the other aspect of the retention of legal capacity – that it entails acceptance of responsibility for the legal consequences of a decision. This raises a number of thorny issues, for which the *General Comment* provides little practical guidance.

As a starting point in understanding the implications of the approach proposed in the *General Comment*, it is important to understand that in a regime where all individuals have legal capacity at all times, the consequences of a risky or outright bad decision remain with the individual, who is entitled to make such decisions, no matter how compromised their decision-making abilities may be. For example, within the framework set out in the *General Comment*, it appears that treatment of a person with a severe mental health disability that affected decision-making abilities without her or his consent would never be considered acceptable, even to prevent serious harm.⁶⁶ As another example, a person with an acquired brain injury who quickly spends his or her entire settlement on lavish gifts and impulse purchases and is thereby reduced to lifelong poverty, could not be prevented from doing so under the type of legal framework envisioned in the *General Comment*, even if his or her brain injury had affected her or his ability to assimilate the risks and negative effects of that course of action. While supporters could attempt to dissuade the individual, they would not have the right to stop her or him, and if the individual wished to dispense with their support, it would be within the individual's rights to do so.

All individuals have the right to take risks and make foolish decisions, and, by way of comparison, certainly many individuals who unquestionably meet the “understand and appreciate” test are poor money managers. The fundamental question here is something slightly different: whether it is just for an individual to suffer significant adverse consequences which she or he was not able to understand or foresee.

Certainly, the person appointed as supporter in these arrangements has an important role in assisting the supported individual with assessing the implications of a decision. However, the supporter may not be able to adequately convey the implications of a decision, whether because of the nature of the decision-making impairment or the lack of skill of the supporter: in either case, the supported person will remain legally responsible for the decision, regardless of the degree of their understanding of the consequences. In any case, the essence of this approach is that the supporter is not empowered to bind the individual to his or her understanding of the risk or negative outcome.

If the supported person does not understand when making a decision that a risk is being taken or the negative outcome that may result, it is harder to articulate the nature of the “right to risk”. It is the LCO's view that a requirement that sole legal accountability attach to a decision

only where the individual had the ability to be informed about and to assess the consequences, is not on its face an unreasonable requirement.

As a related issue, an approach to legal capacity that understands all individuals as retaining at all times capacity to make decisions also raises the question of what we mean when we speak of “making a decision”, and how we attach accountability to that activity. In the LCO’s view, there is a meaningful difference in terms of the appropriate allocation of accountability between the situation where an individual is able not only to have and indicate some kind of desire or preference, but to have, with whatever necessary degree of support and assistance, some insight into what implications the implementation of that preference would have for her or his life, and those situations where another person is required to carry out that assessment of the potential consequences of that desire.

Practically speaking, almost all individuals may be able to indicate in some way whether they are comfortable or uncomfortable in a particular situation, for example, or to communicate basic desires or interests. For individuals who develop disabilities late in life, others who know them may be able to infer what their wishes are or might be in a particular circumstance through knowledge of their history. These kinds of communication or knowledge may provide guidance to a supporter for many daily decisions. However, it may not, practically speaking, provide clear guidance in complex issues or novel scenarios. Many an adult child has faced anguishing decisions regarding the appropriateness of a particular medical treatment for a parent, despite having had a lifetime’s worth of knowledge of that parent’s values and preferences, because the application of those values and preferences is unclear in the particular situation. Where decisions involve multiple and complicated alternatives and are high-stakes, even if the “supporter” is conscientious and attentive to the individual, it is highly debatable as to whether that individual can be said to have “made a decision” in a way that would justify the supported individual having sole accountability and liability for the decision. There is a difference between the exercise that is undertaken when a decision has been made through an interpretation of another individual’s values and goals, and one that is directly made without the necessity for this kind of empathetic inference. To attempt to place oneself in another’s shoes is a challenging and highly fallible endeavor, no matter how rigorously and carefully it is carried out, and again, this is particularly true in complicated situations or ones where there is no past experience to rely on as a guide. Even in the best of circumstances, as humans we are prone to misunderstanding each other. In many circumstances, the supporter can not simply be a neutral conduit for a clearly ascertainable decision by the individual. These unavoidable limitations, in the LCO’s view, have implications for the ethical obligations of the persons providing assistance, and by extension, should also have legal implications. Where a

decision has been made through this kind of empathetic inference, the individual at the centre should not be left to solely suffer the legal consequences.

Finally, as critics of supported decision-making have pointed out, the allocation of sole accountability for the decision to the supported person unless the supported person can demonstrate that the supporter has distorted the process for her or his own benefit, raises risks of abuse. In those supported decision-making approaches where there are no limits on the level of risk or negative outcome that a supported person can take on and no duty on supporters to avoid such outcomes, it is difficult to design effective safeguards for persons whose decision-making abilities are severely impaired. In a context in which the supported person may not have the ability to remember or communicate the substance of the interactions between themselves and the supporter, or where the supporter claims to be the only person able to carry out the “best interpretation of will and preference” of the supported individual, a supporter may easily claim to have followed preferences that are detrimental to the supported person and beneficial to themselves, and it will be difficult to either detect or challenge such misuses or abuses of decision-making powers.

D. The LCO’s Approach

1. Avoiding Unnecessary Intervention

Article 12 of the CRPD and the *General Comment* highlight the central importance of avoiding paternalism in regards to persons with disabilities, and respecting the role of choice and risk in human experience. In public policy, there are often difficult balances to be struck between respecting individual rights to make risky or bad choices, and avoiding untenable outcomes. Issues related to legal capacity raise these questions in ways that are particularly challenging, given the vulnerability of the group affected, as well as the long history of unwarranted and ultimately counterproductive paternalism towards older persons and persons with disabilities.

It is the view of the LCO that there are circumstances where it is appropriate to find that an individual lacks legal capacity to make a particular decision or type of decisions: a test for legal capacity can be justified. However, it is also the view of the LCO that such removal of rights should be understood as a serious matter, to be undertaken only where truly necessary, and that it should be attended with strong procedural protections. This understanding underlies much of the current legislative regime, but it is clear to the LCO that more must be done to ensure that this understanding is a lived reality.

The LCO's project on *Capacity and Legal Representation for the Federal RDSP*, described in section I.D of this *Interim Report*, provides an example of where the extensive and costly process of appointing a guardian under the SDA was not commensurate with the context. The imposition of a formal guardianship on an individual solely for the purpose of opening an RDSP account and managing the funds within it was seen by many as an excessive burden on the autonomy of individuals who otherwise did not require the assistance of a substitute decision-maker. As a result, there was seen to be a strong rationale for the development of a streamlined way to appoint a trusted person for this limited purpose.⁶⁷

2. Acknowledging the Multiple Aspects of Decision-making

The discussion above acknowledges that decision-making has multiple aspects, with which any concept of legal capacity must grapple. Decision-making is a way in which individuals exert control over their lives, express their values and assert their individuality. As such, it is with good reason associated with the recognition of an individual's basic humanity and with fundamental rights. Decision-making status is also associated with legal accountability. The concept of legal capacity can be thought of as a means of bringing together these aspects. The concept of "dignity of risk" emphasizes the right of individuals to take risks and make decisions that others consider unwise, as part of respect for human autonomy. However, the notion of *unqualified* accordance of legal accountability to persons with impaired decision-making abilities also raises important ethical and philosophical questions.

It is the LCO's view that concepts of legal capacity must take into account both concerns for autonomy and the practical and ethical issues associated with the allocation of legal accountability.

3. The Duty to Accommodate

The legal concept of the duty to accommodate can provide some assistance with the broader goal of minimizing unnecessary interference in individual decision-making.

The human rights principle of accommodation is well recognized in Ontario law, both as part of *Charter* jurisprudence and as a statutory entitlement in the Ontario *Human Rights Code*. Section 17(1) of the *Code* provides that a person's rights are not contravened if the only reason they have been denied the right is because they cannot fulfil the essential duties or requirements related to the exercise of the right because of disability. However, the *Code* also imposes a duty under section 17(2) to accommodate in respect of services, employment, housing accommodation, contracts and vocational services, where an individual is unable to fulfil an

essential duty or requirement due to disability before the person is found incapable of fulfilling the duties or requirements; and section 11, dealing with constructive discrimination, addresses analogous circumstances in relation to all prohibited grounds, including age or disability.⁶⁸ As the *Code* has primacy over other legislation unless there is a specific legislative exemption,⁶⁹ the duty to accommodate applies also to legal capacity and decision-making laws.

Legal Capacity, the Duty to Accommodate and the Provision of Services

Since impairments in decision-making abilities disproportionately affect persons with particular types of disabilities, such as intellectual, mental health or cognitive disabilities, the application by service providers of requirements related to legal capacity may create challenges for individuals with disabilities in accessing services, thereby raising human rights issues and questions regarding the duty to accommodate.

While the duty to accommodate would clearly appear to apply to service providers dealing with legal capacity issues on the part of persons to whom they provide services, the specific content of this duty is far from clear.

The LCO has not identified any *specific* caselaw, policy guidance or detailed academic analysis of the application of the duty to accommodate to the use of legal capacity tests by service providers. It is not clear in what circumstances the application of a legal capacity test by service providers may be justified within the framework of the *Code* (or potentially, for some service providers, under the *Charter*), or what the nature, extent and limits of a duty to accommodate might be.

Following on the discussion throughout this Chapter, it is the LCO's view that legal capacity may be necessary for the receipt of services in at least some circumstances. It is also the LCO's view that a human rights analysis should be applied to ensure that requirements for legal capacity are not imposed inappropriately or unnecessarily, and that where legal capacity is necessary for the receipt of a service, accommodations should be provided to assist individuals to meet that requirement where possible.

Chapter VI.F.2 further discusses the duty to accommodate for service providers.

The Duty to Accommodate and the Assessment of Capacity

In addition to the *Code*-affiliated duty to accommodate with respect to legal capacity on the part of service providers, there may be a broader application of the general concept of the duty to accommodate to the concept of legal capacity itself, and more specifically to assessments of

capacity. The *Code* is not straightforwardly read as applying to such situations: the assessment of capacity with respect to property, personal care or the provision of treatment does not appear to itself be the provision of a service, although as described above, it may be a necessary step for accessing a service.

However, separate from an analysis of the specific duties under the *Code*, the broad human rights *concept* of accommodation may assist in bringing the Ontario approach to legal capacity and its assessment into closer alignment with a human rights approach. From this viewpoint, if an individual is able to meet the test for legal capacity with the provision of appropriate accommodations, and the provision of those accommodations does not amount to undue hardship, then not only must those accommodations be provided, but the test for legal capacity should be considered to have been met on an equal basis with those who have not required accommodations.

To some degree, this is implicit in the emphasis in the legislation on legal capacity residing in the *ability* to understand and appreciate, rather than actual understanding or appreciation. Barriers to communication, for example, should not affect an individual's ability to understand and appreciate the requisite information, even if they affect the actual understanding and appreciation. A person with aphasia that affects the ability to receive language, for example, may not be able to understand the risks and benefits of a flu shot, presented in a dense written document, but may be able to do so if appropriate communication approaches are applied. However, in practice, without accommodations, it may be difficult to identify the existence of the ability.

The *Code* also prohibits discrimination on the basis of ancestry, ethnic origin, place of origin and race, grounds that may be associated with language and culture.⁷⁰ This is a reminder of the importance of ensuring that assessments of capacity are not distorted by linguistic barriers or cultural misunderstandings. For a meaningful assessment of legal capacity to take place, it may be necessary to employ linguistic or cultural interpretation, to avoid, for example, mistaking a culturally influenced behavior for evidence of a lack of ability to understand or appreciate the issue at hand.

The principle of accommodation should therefore, in this context, be understood broadly as responding to a range of circumstances and needs that may obscure the abilities of individuals, whether listed in the *Human Rights Code* or not.

Ensuring accommodations during the assessment of capacity does not guarantee that such accommodations will be available in the daily life of the individual, as the need for decisions

arises. That is, finding that a person has the ability to understand and appreciate when accommodated, does not mean that they will have supports necessary to make decisions when they arise. For that reason, it is important that an approach to legal capacity that incorporates the concept of accommodation extend both to the assessment process and to service providers, as discussed in Chapter VI.F.2. It is also true, and important to keep in mind, that in some cases, it will be the service provider who is carrying out the formal or informal assessment (for example, the provision of treatment).

This approach is incorporated to some degree into the *Guidelines for the Conduct of Assessments of Capacity*, created by the Ministry of the Attorney General as mandatory guidance for conducting of Capacity Assessments regarding the management of property or personal care by Capacity Assessors under the *Substitute Decisions Act, 1992*. For example, the *Guidelines* require Capacity Assessors to ask their questions “in a way that accommodate[s] the person's culture, vocabulary, level of education and modality of communication”, and specifically note,

Cultural diversity of the elderly in Ontario is an important issue. Many are first generation Canadians whose first language is not English or French. Cultural norms and traditions may be very different and have a profound influence on day-to-day life.⁷¹

The *Guidelines* provide detailed guidance on accommodating the needs of specific populations, such as older persons, persons with psychiatric disabilities, persons with intellectual disabilities and those with focal neurological disorders.⁷² It is the view of a number of the expert stakeholders that this accommodation approach is implicit in Ontario’s approach to legal capacity: whether this is well understood across contexts and consistently implemented is another matter.

E. Draft Recommendations

Based on all of the above, the LCO recommends that Ontario retain an approach to legal capacity that is functional and cognitive. It is the view of the LCO that this approach, if properly implemented with appropriate attention to procedural protections and the provision of less restrictive alternatives, is best suited to minimizing unwarranted interference while appropriately allocating legal responsibility. It is unjust to allocate sole legal responsibility for a decision or action to an individual who could not understand the potential consequences of that decision. For there to be dignity in risk, the individual must have at least some understanding that a risk is in fact being taken.

Ontario's approach to the "understand and appreciate" test has been nuanced. Pains have been taken to calibrate the test to the contexts and nature of particular types of decisions. For example, the specific statutory components of the "understand and appreciate" test for creating a power of attorney for property management and for personal care, differ significantly, with the test to create a power of attorney for personal care being a very accessible one. The LCO believes that this approach is, despite its limitations, appropriate and effective: concerns regarding the *implementation* of this approach are dealt with throughout this *Interim Report*.

DRAFT RECOMMENDATION 3: The current Ontario approach to legal capacity, based on a functional and cognitive approach, be retained.

In accordance with a human rights approach to legal capacity and decision-making issues, it should be clearly understood that legal capacity exists where the test for capacity can be met by the individual with the provision of appropriate supports and accommodations short of undue hardship. Accommodations may include alternative methods of communication, extra time, adjustments for time of day or environment, or the assistance of a trusted person who can provide explanations in a manner that the individual can understand. They may also include accommodations related to language, culture or other areas where special needs may affect the assessment process. A clear inclusion of a responsibility to provide accommodations during an assessment will support the Consent and Capacity Board (CCB), when reviewing challenges to determinations of capacity, in implementing this approach to legal capacity.

DRAFT RECOMMENDATION 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.

F. Summary

The concept of legal capacity lies at the heart of this area of the law, and debates about approaches to it potentially raise foundational questions. It is in the nature of the concept to raise difficult questions about autonomy, risk and accountability, and different approaches to the concept will balance these competing needs in different ways.

Commentators have challenged Ontario's functional and cognitive approach to legal capacity, as expressed through its use of tests based on the "ability to understand and appreciate", as unduly limiting to individual autonomy, and have advanced an alternative approach in which all adults have legal capacity and the function of the law is to provide supports for the exercise of that capacity.

There are limitations and challenges in any approach to legal capacity and decision-making, as any approach must grapple with difficult issues related to risk, autonomy, accountability and the nature of what we consider to be "decision-making". No approach can solve all of the underlying issues: all will have shortcomings in one direction or another. Overall, it is the view of the LCO that Ontario's functional and cognitive approach, when appropriately implemented, achieves an appropriate balance between fostering, to the greatest extent possible, the ability of individuals to direct their own lives, and the need to ensure appropriate allocation of legal accountability for decision-making. However, any assessments of legal capacity should be made only after providing appropriate accommodations.

It is essential that this approach to legal capacity be appropriately implemented, so that it does not result in unwarranted and over-extensive removal of decisional autonomy from individuals. Implementation raises serious and challenges issues of its own, which are dealt with at length in the next Chapter, Chapter V.

The adoption of this approach to legal capacity does not foreclose the question of whether substitute decision-making should be the only approach available to individuals who cannot make decisions independently, or whether other alternatives should be made available to some portion of those affected by these laws, a question which is taken up in Chapter VI.

V. ASSESSING LEGAL CAPACITY: IMPROVING QUALITY AND CONSISTENCY

A. Introduction and Background

Because of the potentially momentous implications of a determination of legal capacity, it is essential that the mechanisms that are in place for assessing it are effective and just. Capacity assessment mechanisms that are difficult to navigate, overly costly or insensitive to the needs of persons with disabilities and their families will reduce the ability of the system to address fluctuating or evolving capacity, and lead to the inappropriate application of the law. Capacity assessments that are of poor quality or offer inadequate procedural protections may lead to the removal of rights and autonomy from persons who are capable of making their own decisions.

Capacity assessment is in many cases the entry point to the *Substitute Decisions Act, 1992* (SDA) or the *Health Care Consent Act, 1996* (HCCA): the level of supports, options and navigational assistance available at this stage will significantly shape how individuals and families experience this area of the law.

As will be discussed below, Ontario's legal capacity, decision-making and guardianship laws include multiple means of assessing capacity, including examinations for capacity under the *Mental Health Act* (MHA), evaluations of capacity to consent to admission to long-term care under the HCCA, assessments of capacity to consent to treatment under the HCCA, formal Capacity Assessments by a designated assessor under the SDA, and informal assessments of capacity by service providers. When this Chapter refers to "capacity assessment" or "assessing capacity", it includes all Ontario mechanisms for assessing capacity, unless it is otherwise specified. When the Chapter refers to "Capacity Assessment" using the upper case, it is referring specifically to assessments carried out under the SDA regarding property and personal care.

B. Current Ontario Law

1. Overview

Ontario's systems for assessing legal capacity in the various domains of decision-making are described at length in Part II of the *Discussion Paper*. What follows here is a brief overview.

Ontario might best be described as having, not *a* system for assessing legal capacity, but a *set* of systems for assessing capacity. In keeping with the general approach of the reforms that lead to Ontario's current legislation, assessment systems are specific to particular types of decisions. The SDA, HCCA and MHA collectively set out four formal systems for assessing capacity under those statutes:

- 1) examinations of capacity to manage property upon admission to or discharge from a psychiatric facility (MHA);
- 2) assessments of capacity to make treatment decisions (HCCA);
- 3) evaluations of capacity to make decisions about admission to long-term care or for personal assistance services (HCCA);
- 4) Capacity Assessments regarding the ability to make decisions regarding property or personal care (SDA).

There are areas of commonality among these assessment mechanisms, but they differ from each other considerably in terms of factors such as the following:

- 1) who conducts the assessment;
- 2) the training and standards imposed on persons conducting the assessment;
- 3) information and supports for persons undergoing assessments;
- 4) documentation required for the assessment process; and
- 5) mechanisms and supports for challenging an assessment.

Each system has its own set of checks and balances for the overarching tensions between accessibility to the process and accountability, preservation of autonomy and protection of the vulnerable that underlie this process.

While the various capacity assessment systems vary in their levels of process and the challenges of navigation as among themselves, the existence of multiple separate systems does inevitably result in considerable complexity in the system as a whole.

The different systems tend to affect different populations, although there may be considerable overlap, particularly for persons with mental health disabilities or for individuals who interact with issues of capacity at various points over their lives. Professionals who conduct assessments tend to work in mainly one of the assessment systems: that is, persons who conduct capacity evaluations under the HCCA regarding admission to long-term care would not commonly also be Capacity Assessors under the SDA. However, as professionals may also act informally to assist individuals in navigating through the legal capacity, decision-making and guardianship system, professionals operating in one assessment system may find themselves attempting to

provide information about other assessment systems to individuals or their families. As well, there may be confusion as to which assessment system appropriately applies in a particular instance. In practice, there is considerable ambiguity and confusion related to the intersection and interaction of the systems.

2. *Informal Assessments of Capacity*

Service providers regularly informally assess legal capacity, to determine whether a particular individual can enter into an agreement or contract, or agree to a service. Certain service providers, such as health practitioners, have a legislated and long-standing duty to ensure that they have obtained valid consent to provide their services.⁷³ Lawyers and paralegals will need to ensure that clients have the capacity to provide instructions, create a valid power of attorney, or to bring legal proceedings where appropriate.⁷⁴ Service providers entering into contracts or agreements will have a strong interest in ensuring that the individual has the capacity to enter into the contract and that it is not voidable due to, for example, unconscionability or undue influence. In each case, this is a fundamental preliminary step to providing the service. If the consent or the agreement is not valid, there may be significant consequences for the service provider.

A decision by a service provider that an individual does not have legal capacity to agree to a particular service or enter into a contract may trigger entry into formal substitute decision-making arrangements in order to access the service, whether through the activation of a power of attorney or the creation of a guardianship by a family member.

The LCO's project on *Capacity and Legal Representation for the Federal RDSP* provides an example of this dynamic. To open a federal Registered Disability Savings Plan through a financial institution, there must be a plan holder who is "contractually competent". Where a financial institution does not believe that an individual has the legal capacity to be a plan holder, it may decline to enter into a contract. Currently, in these situations, the would-be beneficiary may need to seek a legal representative, such as a guardian of property or a person acting under a power of attorney for property, to open an RDSP.⁷⁵

These types of informal assessments thus play a very important role in the practical operation of Ontario's legal capacity, decision-making and guardianship system. The way in which these assessments are carried out may have a significant impact on the breadth of application of substitute decision-making in Ontario.

During the LCO's preliminary consultations, some service providers expressed discomfort with their role in assessing legal capacity, indicating that they felt that they did not have sufficient expertise or skill to carry out assessments appropriately, and noting that it did not always fit naturally with other aspects of their role. This is particularly true where legal capacity and decision-making law is only a small part of the work that service providers are doing, and issues arise only on an infrequent basis. In many service organizations, it is front-line workers who will be directly encountering issues related to legal capacity and decision-making, and who will be tasked with identifying potential issues and applying correct procedures. It is also at the front-lines where pressures related to limited resources, competing needs and the tension between standardization and responsiveness to individual needs will be most acute.

Service providers will want to feel secure that they can reasonably rely on the decisions that individuals make as they interact with them as valid in law, particularly where legal capacity is lacking or unclear.

During the consultations, the LCO heard concerns that unduly risk-averse approaches to assessment by service providers, or approaches that seem to be based on assumptions or stereotypes about certain groups of individuals, may have the effect of pushing individuals unnecessarily into formal substitute decision-making arrangements.

3. *Examinations of Capacity to Manage Property under the Mental Health Act*

These assessments, which are governed by Part III of the MHA,⁷⁶ were intended to provide a speedy and simple mechanism for ensuring that those admitted to psychiatric facilities did not thereby lose their property due to temporary inability to manage it. When a person is admitted to a psychiatric facility, an examination of capacity to manage property is mandatory, unless the person's property is already under someone else's management through a guardianship for property under the SDA or the physician has reasonable grounds to believe that the person has a continuing power of attorney that provides for the management of the person's property.⁷⁷ These examinations are performed by a treating physician, usually a psychiatrist. A re-examination of the patient *may* take place at any time while the patient is in the facility,⁷⁸ and *must* do so prior to discharge. At the time of discharge, the certificate must either be canceled⁷⁹ or a notice of continuance ordered.⁸⁰ A physician who determines that a person lacks capacity to manage property must issue a certificate of incapacity, which must be transmitted to the Public Guardian and Trustee (PGT).⁸¹ The PGT then becomes the patient's statutory guardian of property,⁸² unless the patient has a springing POA.⁸³ If the physician fails to re-examine the patient prior to discharge, the guardianship of the PGT or any replacement will terminate.

The MHA does not explicitly define incapacity to manage property, and the regulations offer no additional guidance in this regard. However, the definition set out in the SDA⁸⁴ has been applied for the purposes of determining the capacity to manage property under the MHA.⁸⁵

Patients admitted to a psychiatric facility are not entitled to refuse the examination to determine their capacity to manage property.⁸⁶ However, they are afforded substantial procedural rights, including the right to receive notice that a certificate of incapacity has been issued;⁸⁷ the right to timely provision of a rights adviser;⁸⁸ and the right to apply to the Consent and Capacity Board (CCB) to review the assessment.⁸⁹ As with the provision of all rights, however, the ability to exercise the rights has to be taken into account in determining how meaningful the rights are.

4. *Assessments of Capacity to Manage Property or Personal Care under the Substitute Decisions Act, 1992*

Other than MHA examinations of capacity to manage property on admission to a psychiatric facility, discussed above, all other assessments of legal capacity to manage property are governed by the SDA, as are assessments of capacity to manage personal care, which includes decisions related to health care, clothing, nutrition, shelter, hygiene or safety. Capacity Assessments with respect to the management of property or personal care may be triggered in a variety of ways and for a number of different purposes, including to create a statutory guardianship for property;⁹⁰ to bring into effect a power of attorney for personal care or property that is contingent on a finding of incapacity; to challenge or reverse a previous finding of incapacity; or to provide evidence in an application for court-appointed guardianship; or when ordered by a court.⁹¹ They can result in a broad range of outcomes for the assessed individual, from having no legal effect to triggering a statutory guardianship, the form of substitute decision making most limiting on the individual's autonomy.

Only a qualified Capacity Assessor can conduct a statutorily required Capacity Assessment under the SDA.⁹² To be designated as a Capacity Assessor, a person must be a member of one of the following health regulatory colleges of Ontario: Physicians and Surgeons, Psychologists, Occupational Therapists, Social Workers and Social Service Workers (and hold a certificate of registration), or Nurses (and hold a certificate of registration).⁹³ Qualified Capacity Assessors must have completed the requisite training and requirements to maintain qualification, which are significant. The Capacity Assessment Office (CAO) of the Ministry of the Attorney General maintains a list of designated capacity assessors.

Capacity Assessors must comply with the *Guidelines for Conducting Assessments of Capacity*⁹⁴ established by the Ministry of the Attorney General.⁹⁵ The *Guidelines* attempt to create a standard assessment protocol that will prevent inconsistent or bias-laden assessments. Failure to comply with the *Guidelines* may lead to a complaint to the Assessor's health regulatory college.⁹⁶ The *Guidelines* set out key principles that should inform Capacity Assessments, such as the right to self-determination and the presumption of capacity; outline the conceptual underpinnings of Capacity Assessments; elaborate on and explain the test for capacity; and set out a five-step process for Capacity Assessment.

The SDA sets out a number of procedural rights for persons undergoing these Capacity Assessments,⁹⁷ including a right to refuse an Assessment (with some exceptions), a right to receive information about the purpose, significance and potential effect of the Assessment, and a right to receive written notice of the findings of the Assessment.⁹⁸ For cases involving a finding of incapacity to manage property for the purposes of establishing a statutory guardianship in favour of the Public Guardian and Trustee (PGT), the PGT must, upon receipt of the certificate of incapacity, inform the individual that the PGT has become their guardian of property and that they are entitled to apply to the CCB for a review of the finding of incapacity.⁹⁹ As well, for persons who become subject to statutory guardianship, there is a right to apply to the CCB for a review of the finding of incapacity, within six months of that assessment.¹⁰⁰

5. *Evaluations of Capacity with Respect to Admission to Long-Term Care and Personal Assistance Services*

The HCCA sets up a specific assessment process under Part III for decisions related to admission to long-term care homes (as defined in the *Long-Term Care Homes Act, 2007*) and under Part IV for consent to personal assistance services. An evaluation of capacity with regards to an admissions decision happens when an individual's family or health professional believes they should move into long-term care, and there is reason to believe the individual lacks legal capacity to make a decision on this issue. As with decisions regarding treatment, legal capacity is not supposed to be associated with the individual's consent or refusal of consent. However, individuals are usually evaluated when they disagree with their family's or health practitioner's opinion. These evaluations can happen when a person is living in the community (at home, either alone or with someone) or when the person is in hospital, for example. Often, the discussion about long-term care follows an incident such as a fall that raises concerns over the individual's well-being in their current living situation. In practice, numerous capacity determinations often occur at once, such as assessment of capacity to make admissions decisions and capacity to manage property, since a decision to move into long-term care will

often require a decision to sell one's home to finance the long-term care, or to give up an apartment.¹⁰¹

Unlike assessments of capacity to make treatment decisions, which can be performed by any health professional, evaluations of capacity to make personal assistance services decisions and admissions decisions are performed by a special category of health professionals who are called capacity evaluators. Capacity evaluators must be members of the regulatory college of a limited list of professionals: audiologists and speech-language pathologists, dietitians, nurses, occupational therapists, physicians and surgeons, physiotherapists, psychologists¹⁰² and social workers.¹⁰³ Although in reality those who perform evaluations may undergo additional training, there is no legal requirement that they do so.

There is no guidance in the HCCA or regulations regarding the conduct of capacity evaluations. Nor are there guidelines, official policies or training materials, or mandatory forms. This forms a striking contrast with the detailed guidance for Capacity Assessors under the SDA, as described above. There is, however, a five-question form known as the "evaluator's questionnaire", so ubiquitous as to be almost standard practice.¹⁰⁴ The CCB and the courts have repeatedly held that simply asking the five questions on the form and recording the answers does not constitute a proper capacity evaluation.¹⁰⁵ In addition to this form, numerous guides have been created to provide additional guidance for those conducting evaluations of capacity to make admissions decisions. However, since none of these guides is endorsed by the legislation or regulations, evaluators are not required to use them. It is also unclear how much buy-in these guides have or how widely they are distributed.

As is the case with assessments regarding consent to treatment, oversight of capacity evaluators is carried out through the health regulatory colleges, with sections 47.1 and 62.1 of the HCCA requiring evaluators, like treating health practitioners, to follow the guidelines of their profession's governing body for the information about the effects of their findings to be provided to the individuals they evaluate.

An individual undergoing a capacity evaluation under the HCCA is entitled to the same rights as with an assessment of capacity to consent to treatment under Part II of the HCCA. In the admissions decisions context, there is no statutory right to be informed of the purposes of the evaluation, to refuse the evaluation, to have a lawyer or friend present, or to be informed of these rights prior to the evaluation. However, the standard evaluation form includes an information sheet that is to be given to the individual found to be incapable and boxes the evaluator should check indicating that the evaluator has informed the person of the finding of lack of capacity and of his or her right to apply to the CCB. Despite the lack of rights spelled out

in the HCCA, individuals undergoing capacity evaluations may be entitled to some procedural rights based on the common law principles of natural justice.¹⁰⁶

Individuals can apply to the CCB for a review of a finding of incapacity to consent to admission or personal assistance services, unless they have a guardian of the person who has the authority to give or refuse consent to admission to a care facility or an attorney for personal care under a POA that waives the right to apply to the CCB.¹⁰⁷

6. Assessments of Capacity with respect to Treatment Decisions

Assessment of capacity to make treatment decisions is regulated under Part II of the *Health Care Consent Act, 1996*. The HCCA requires valid consent to treatment: if a health care practitioner is of the opinion that a person is incapable with respect to the treatment, then the person's substitute decision-maker must consent on the person's behalf in accordance with this Act.¹⁰⁸ A health practitioner is entitled to rely on the presumption of capacity, unless the practitioner has reasonable grounds to believe that the person is incapable with respect to the proposed treatment:¹⁰⁹ where such reasonable grounds exist, the practitioner must assess to determine whether the person is capable of providing consent. This must take place any time a health treatment is proposed; the legislation applies equally inside or outside of a hospital, long-term care facility or doctor's office.

Assessments to determine capacity to make treatment decisions are specific to time and treatment. An individual may be legally capable with respect to one treatment but not another¹¹⁰ or capable with respect to a treatment at one time and not at another.¹¹¹ The treatment-specific nature of legal capacity means that a new assessment must be done if a new type of treatment is proposed.

There is no specific required training related to assessing capacity outlined in the HCCA or regulations. However, each college regulates the mandatory qualifications for membership, and may provide guidelines or publications that address the importance of obtaining consent before administering treatment.¹¹² Health practitioners may also receive training from their employers. There are also a number of publications by advocacy organizations and experts that can be used by practitioners.¹¹³

The rights of patients with regard to notices of a finding of incapacity and the right to apply for review, for example, depend on where the patient may be located at the time of the finding, and on the rules of the health regulatory college governing the professional who makes the finding. A finding of lack of capacity to consent to a treatment must be communicated to the

patient. If the individual is a patient in a psychiatric facility, they are entitled to written notice under the MHA.¹¹⁴ Outside a psychiatric facility, a patient is not statutorily entitled to written notice of a finding of incapacity to consent to a treatment. The form of notice a health practitioner must give and whether a patient must be informed of their right to apply to the CCB for review of the finding is governed by the health regulatory college to which the practitioner belongs. Generally, colleges require that the health practitioner inform individuals who have been found legally incapable who their SDMs are and the requirements regarding their substitute decision-making role (if they are capable of understanding this information), as well as informing them about the right to apply to the CCB.

An individual can apply to the CCB for review of a finding of incapacity to consent to a treatment unless they have a guardian of the person who has authority to give or refuse consent to the treatment or an attorney for personal care under a POA that waives his or her right to apply to the CCB for review.¹¹⁵

Oversight is mainly performed by the health regulatory colleges. Health professionals are overseen by their respective colleges. Patients can make a complaint to the practitioner's health regulatory college if they believe the practitioner did not follow the proper procedure or over-stepped their authority.

C. Areas of Concern

Issues related to assessment of legal capacity were the focus of considerable interest and discussion during the LCO's public consultation. The concept of legal capacity and its operationalization raise some of the most difficult issues in this area of the law. Assessments of capacity may be misused or misunderstood. There is confusion as to the multiple mechanisms for assessing capacity, and the standards for assessing capacity. As well, there is considerable concern regarding the provision of procedural rights to persons who are assessed under the HCCA.

1. Misunderstandings of the Purpose of Assessments of Capacity and Their Misuse

A formal assessment of capacity may be a very upsetting and stressful experience for individuals, and may be felt to be a significant invasion of privacy. Courts have recognized that a capacity assessment is an "intrusive and demeaning process"¹¹⁶ and a "substantial intervention into the privacy and security of the individual".¹¹⁷ An assessment may also have very significant and long-term ramifications for the autonomy of the individual should it result in a finding that

the individual lacks legal capacity. It is therefore important that assessments of capacity not be performed unnecessarily, or for purposes unrelated to the intent of the legislation.

Ontario's legislation emphasizes the presumption of capacity in specified circumstances, including the ability to contract and to consent to treatment, and this should deter the inappropriate use of assessments of capacity. The Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity*, which apply to Capacity Assessments under the SDA, emphasize, "In every case, there is a presumption of capacity and there should be reasonable grounds that prompt the request for a formal capacity assessment. Routine screening of whole classes of individuals cannot and should not be endorsed, as this prejudices an individual's capacity based on class membership".¹¹⁸

However, as is true throughout this area of the law, in considering the issue of assessments of capacity it is important to take into account that this legislation is implemented in the context of particular supports and services, some of which are under enormous pressure. These pressures shape the application of the law, as families and professionals may attempt to employ it for means not intended, to solve the problems with which they are faced. No reform to the SDA, HCCA or MHA will by itself reduce or remove these pressures, and therefore no reform to the legislation will on its own resolve the problem of misapplication.

I also, and this might be a really naïve thought and question, but based on my experience which is reading some of the families that I work, with their experiences there seems to be a discrepancy sitting around the table too around the intention or the outcome of assessments. I can think of a family specifically who had applied for one intended outcome and gone through the process and had misunderstood it completely... As we talk I realize, and I wonder if this isn't part of the education piece too, if there needs to be some further education and training around the intended outcomes of these things. Are they to provide independence or are they to support families who are literally breaking apart at the seams?

Focus Group, Advocacy and Service Organizations, October 2, 2014

A major concern has been attempts to use assessments to control others or to further family disputes. Capacity Assessments under the SDA have the potential to result in transfer of long-term control over individuals or their assets, creating an incentive for abuse or misuse. While the SDA allows individuals to request a Capacity Assessment of themselves (as well as of another person), Verma and Silberfeld report that "[p]eople rarely refer themselves for assessment".¹¹⁹ Rather, Capacity Assessments are often requested by a family member or a lawyer acting on behalf of a family member. While it is likely that in most cases the family member may be genuinely concerned for the individual's well-being, it is also possible that they may be looking to benefit personally from a finding of legal incapacity, or may be using the

Capacity Assessment in an ongoing rivalry with another family member.¹²⁰ Similarly, Silberfeld *et al* identify potential conflicts of interest in the context of requests for reassessments to restore capacity, suggesting that third parties who are not legal decision-makers for an individual may pressure the individual to request a reassessment so that the third party can informally take over the decision-making authority.¹²¹ The potential for these kinds of issues is apparent from the caselaw.¹²² The burden of dealing with potentially conflicting agendas and the possibility of nefarious purposes falls on the Capacity Assessor.¹²³

Issues of legal capacity intersect in complicated ways with issues related to risk and vulnerability. While most would acknowledge that capable individuals have the right to live at risk, and that foolish decisions are not themselves indicators of incapacity, in practice these concepts may become difficult to apply. A number of service providers and professionals discussed the moral distress that may be associated with the struggle to discern the ethically and legally appropriate course to take in difficult cases.

I would think the way I could respond to your question would be more about the impact that it has for our staff when there is that uncertainty and the distress that they take home with them because they're believing one way and they feel very strongly about their professional credentials and wondering, you know... we recently had someone because, you know, really go through some real moral distress around this particular issue because they didn't feel as though it was really lining up with their professional judgment.

Focus Group, Community Health and Social Service Providers, September 26, 2014

In the focus groups, the LCO observed that there may be a blurring of lines in some areas between the purposes of legal capacity and decision-making legislation and adult protection goals: while issues of risk and abuse certainly overlap with issues of legal capacity, it is important to also understand the distinctions. As a result of these misapprehensions, SDA Capacity Assessments may be unnecessarily triggered: for example, family members of vulnerable individuals may unnecessarily trigger the Capacity Assessment and guardianship process because they do not know how else to protect that family member from perceived or actual harms. They may not be aware of non-legal options, or the family may not be sufficiently cohesive to implement them. Family members may feel frustrated at a lack of information or options available to address the particular situation they face, especially if they are unable to consult a lawyer (for example, due to costs), and the Capacity Assessment process under the SDA may be comparatively easy to launch for those who have the means to do so, even when requesters may not understand the implications.

I think sometimes it's to get a quick solution ... [to] a difficult situation or an issue, rather than kind of looking at that behaviour or whatever as some kind of meaning and some kind of needs that

aren't being filled. I mean, sometimes behaviours are really deceiving and people interpret that, you know, they can't... they can't do anything now so I'll take full control.

Focus Group, Developmental Services Sector, October 17, 2014

I've had a few occasions now where a person, a resident isn't comfortable having their family member act as their POA, because it's changed the dynamic so much of that relationship. Or it's the family member who says, I can't take it anymore. I just want to be your daughter. I don't want to have to take care of her money. So that's often triggered a Capacity Assessment to be done, and then for PGT to take over. I've had that about five or six times.

Focus Group, Service Providers for Individuals Living with Dementia, October 21, 2014

Similarly, in terms of evaluations of capacity to consent to long-term care, family members may trigger an evaluation because they are concerned about the risks that the person is facing in the community and the level of supports that he or she is receiving.

I would just add that from the community side of things, I've often seen physicians that are very much pressured by whatever reports the adult children are giving. You know, mom's leaving the pot on the stove, is a common one. You know, she's having more falls at home. And I think that it probably sounds like the physician is feeling that pressure around the risks. And so it's quite easy to say, yes, you know, I support that, you know, that she should be going to long-term care. And then we [the CCAC] come out and do the assessment, and then we might be telling the client and family, you know what? You're capable, and we need to put other things in place, like get an automatic kettle, or, you know, and putting those things in. So I find that a bit of a... a bit of a challenge for sure.

Focus Group, Toronto Central Community Care Access Centre Staff, November 4, 2014

It has been pointed out that those conducting examinations of capacity to manage property under the MHA may face temptations to employ them in ways that address institutional pressures.¹²⁴ The case of *Re V* provides an example of these dynamics. In this case, V's physician was of the opinion that V could be discharged if there were financial resources available to support him. V had no financial means and did not want to apply for ODSP or other financial assistance: his physician thought that if he were found incapable of managing property, the PGT could apply for financial assistance on his behalf and V could be discharged. The physician had not examined V upon his admission to the facility, but had just assumed his incapacity to manage property at that time. The CCB overturned the physician's finding of incapacity to manage property and admonished the attempt to use the PGT to force V to comply with the discharge plan.¹²⁵ Concerns have also been raised that these examinations may be used as an "end run" around the requirements surrounding Capacity Assessments with respect to the management of property under the SDA. Jude Bursten, a patient rights advocate with the

Psychiatric Patient Advocate Office (PPAO), reports that some physicians have requested that clients be admitted to a facility to force an examination of their capacity to manage property when these patients have exercised their right under the SDA to refuse an assessment.¹²⁶ Since examinations under the MHA are of no cost, while Capacity Assessments involve a fee that may range from hundreds to thousands of dollars, there may be pressures to use the MHA provisions rather than those under the SDA.

These concerns are not unique to the Ontario context. The Victorian Law Reform Commission emphasized in its *Final Report* on guardianship the importance of ensuring that there is a valid trigger present to justify any assessment of capacity, and taking steps to “engage the person in the assessment process by seeking agreement and informing the person about the process as far as possible”.¹²⁷ Alberta legislation requires that there be a valid cause for concern in order to necessitate a capacity assessment with respect to property or personal care, that is, an event that puts the individual or others at risk and that seems to be caused by an inability to make decisions.¹²⁸ Assessors in Alberta must know the reason that a capacity assessment has been requested and familiarize themselves with the circumstances leading to the request.¹²⁹

2. Access to Capacity Assessments under the Substitute Decisions Act, 1992

Capacity Assessments under the SDA are provided on a consumer choice model. The government ensures minimum standards through education and ongoing training requirements, and the provision of thorough guidelines. The Capacity Assessment Office (CAO) maintains a list of designated Capacity Assessors who have met the requirements. However, it is the responsibility of individuals and service providers who wish for a Capacity Assessment to be conducted to locate an appropriate Capacity Assessor from the list and to fund the cost of the Assessment, a cost which may vary from hundreds to thousands of dollars, depending on the nature and complexity of the Assessment required.

The CAO does make efforts to ensure that designated Capacity Assessors are available in regions across Ontario and will provide assistance to persons seeking to locate Capacity Assessors who are able to communicate in languages other than English.

The CAO also operates a Financial Assistance Program to cover the costs of a Capacity Assessment in situations where an individual (not an institution or agency) is requesting an Assessment and cannot afford the fees. Criteria for assistance under this Program include the following:

- the particular assessment required cannot, by law, be completed by anyone other than a designated Capacity Assessor (that is, an assessment by a Capacity Assessor as a “letter of opinion”, for example regarding capacity to create a will or POA will not be covered);
- the Capacity Assessment Office agrees that a Capacity Assessment is appropriate in the circumstances;
- the person is able to self-request or family member requests, and the person will not refuse the Assessment; and
- the individual requesting the Assessment meets the financial criteria to be eligible for financial assistance. The financial criteria are very restrictive, but would generally cover persons living on Ontario Disability Support Program payments, or an older adult whose income was restricted to Canada Pension Plan and Old Age Security payments.¹³⁰

It should be kept in mind that where a guardian of property is appointed through a Capacity Assessment, the guardian can provide reimbursement for the costs of the Assessment from the incapable person’s funds if there is sufficient money to do so

Concerns about the accessibility of Capacity Assessments were raised throughout the consultation. It is important to remember that Capacity Assessments are necessary, both for entry into guardianship and also for exit, and therefore their accessibility is a matter of significant importance to families and to individuals affected by issues related to legal capacity.

In keeping with the observations of Jude Bursten, noted in the previous section, it has been suggested to the LCO that there is sometimes pressure by physicians or other professionals in the system to gain entrance to the MHA examinations for capacity to manage property because these examinations produce the same results as a Capacity Assessment (statutory guardianship, should the person be found to lack the capacity to manage property), but are no cost and do not require the consent of the person to be examined.

The cost of Capacity Assessments was a significant concern for many community organizations and service providers who work with populations affected by issues related to legal capacity.

One of the barriers that I’ve seen from a financial capacity [assessment] is the cost. Making way for a Capacity Assessment. You know, when you’re mentioning it and it could be \$400 for something, that really is, it’s a lot of money for people here. That’s one thing I’ve seen.

Focus Group, Service Providers for Individuals Living with Dementia, October 21, 2014

There's no consistency or standardisation on the ability to administer. And I know I'm stupid in this area but when I think about those kind of dilemmas, right, well, this person really could benefit from a competency assessment but it's going to cost \$2,000 to do it, why is that? Why is there that cost associated with something that might be... like, I can understand screening, screening, screening and then saying, yes, you meet the criteria to get a free competency assessment because if that's the thing that's preventing the person from getting the proper care, right, it doesn't seem logical to me that someone should have to pay \$2,000 to get a competency assessment when we're trying to [improve] the person's life and whatever. So, that... when you [another participant] were just talking about it I was thinking, well, that's kind of crazy.

[Second speaker] And it's very prohibitive for some people. Even if they do want to have it done in advance and have their wishes condoned. But it's, obviously, not everyone can fork over that cash.

Focus Group, Community Health and Social Service Providers, September 26, 2014

Further, the CAO fund for Capacity Assessments is of relatively limited reach, and is not necessarily well-known or understood. The Ontario Brain Injury Association commented that

Specialized capacity assessments are also a costly procedure, leaving many concerned loved ones at a loss as to how they can best support the individual in question. Many people with an ABI [Acquired Brain Injury] are on Ontario Disability Support Program (ODSP) and their caregivers or concerned family/friends are not in any financial position to pay for an assessment. Having a subsidy, or provincially funded program for those who are on social assistance will ease the burden of the costly nature of the process.¹³¹

The issue is not only one of cost, but also of navigation, as individuals are responsible for locating and selecting their own Assessors, based on the list that the CAO provides. This may be particularly difficult for individuals who are marginalized or low-income.

I don't know what other people's experience is in areas other than Toronto, here there's quite a lengthy Capacity Assessor list but everyone's independent on that list. There's no, sort of, coordination around it. It's the client's individual responsibility to contact the Assessors, schedule and, sort of, negotiate all that type of thing. And that has been quite difficult. That itself has been a barrier for a number of clients in my experience. Particularly if they require an interpreter to communicate. But even if not, having the ability to have even voicemail accessible to return calls back and forth, all of these things are quite difficult. And not knowing what the expectations are of the Capacity Assessor either. That's been hard for our clients.

Focus Group, Rights Advisers and Advocates, September 25, 2014

[T]he process itself isn't even that good, there's no central number, you're calling each Assessor, like some of them are good, some of them aren't, also. And then also trying to find different languages and all of that kind of stuff, right, so before you even start, it's quite a process, and then the billing

itself is also, you have to figure that out for like maybe, who's going to pay, they all want it differently, like it's a lot of work, it's a pain.

Focus Group, Clinicians, September 12, 2014

Particular concerns were raised for persons in remote communities, including Aboriginal communities. In smaller or more remote communities, there may be no Capacity Assessors, or no Capacity Assessor with the necessary expertise. The cost of assessment will then significantly increase, because the costs of travel will be included in the fee, and these may be considerable. As well, the nature of the process may not work well for individuals who are low-income, or for particular communities.

In Thunder Bay we have a large northern community of Aboriginal communities and, again, that would be the same. No Assessor around there. The cost of flying in and out. But also the process is so bureaucratic. It's too... it's not user friendly, all this. So, it's very difficult for a lot of the Aboriginal communities that, to understand what options they have and how to access those processes. How to get, you know, again, like, sometimes they don't even have touch tone phones, you know, or they don't even have a phone and voice message and all that to get a hold of a Capacity Assessor. And there's no one to walk them through and assist them with that a lot of it.

Focus Group, Rights Advisers and Advocates, September 25, 2014

3. The Complex Relationships between Mechanisms for Assessing Capacity

The LCO's consultations revealed widespread confusion about the roles and operation of Ontario's multiple mechanisms for assessing capacity. This was true for individuals and families, and it was also surprisingly common among service providers. Sometimes service providers directly indicated their difficulties in understanding and navigating these systems, while in other cases, their confusion was apparent from the discussion, in which it was clear that particular service providers did not understand the scope of various types of assessments. Most service providers provide the majority of their services within one domain, and therefore with one type of assessment: interactions with the other mechanisms are not a daily occurrence, and so confusion may occur in these cases. It is also important to remember that these same service providers are often the most accessible guide to navigating Ontario's legal capacity and decision-making system available to families and individuals: if they are not able to provide accurate information, they may unintentionally mislead these individuals. In particular, participants in the consultation identified confusions between SDA Capacity Assessments for personal care and capacity evaluations under the HCCA regarding consent to admission to long-term care or for personal assistance services, and between MHA examinations of capacity to manage property and SDA Capacity Assessments regarding property.

Especially at the CCACs we've noticed that there's an understanding gap between, or rather even just, a language gap between the words assessment and evaluation. And people confusing the two or using the words interchangeably....

[Second speaker] Exactly, and one costs a lot of money and one is free. So, and people thinking that certain aspects, that the assessment provider, that also, that they can do an evaluation, which is not true at all. And vice versa. So, it is a, it's a very blurred line that has been very difficult for us to, kind of, clearly point people towards a direction of, you know, as a care coordinator you can only perform an evaluation. If you want an assessment you must pay a Capacity Assessor to do this for you and it's something that has been very challenging for us.

Focus Group, Community Health and Social Service Providers, September 26, 2014

I so often find, in practice, people will say, well, let's get the Assessor in here. Well, you don't need an Assessor. The evaluator, who may be the proposer... who is the proposer of the treatment, is the one evaluating. So, just some way of making sure that... I don't know if it's education or how it's stated in law, to differentiate those rules.

Focus Group, Joint Centre for Bioethics, October 1, 2014

One is just the word capacity assessment because when people see it they automatically think they have to get a Capacity Assessor. So, I think we have to somehow make sure that people understand that we're not talking about a Capacity Assessor when we say capacity assessment.

Focus Group, Rights Advisers and Advocates, September 25, 2014

In their paper, *Health Care Consent and Advance Care Planning*, the Advocacy Centre for the Elderly (ACE) and Dykeman Dewhirst O'Brien (DDO) noted that in focus groups with health practitioners,

There was some confusion expressed by health practitioners about who determines capacity for treatment. Some health practitioners were not confident that they knew how to assess the capacity of a patient to make treatment or other health decisions. Some thought that they were required to get a psychiatrist to assess capacity for treatment decision-making. A few health practitioners thought they would need to get a "Capacity Assessor" to perform this assessment.

ACE and DDO lawyers have also dealt with cases where health practitioners providing services in long-term care homes have assumed that a person was incapable for treatment if that person had been determined by an "evaluator" (as defined in the HCCA) to be incapable for admission to long-term care. These health practitioners may not have understood that capacity is issue specific and that a person could be capable for some or all treatment decisions although determined incapable for the decision for admission.¹³²

As was briefly referenced in the previous section, the parallel processes between assessments for property management under the MHA and the SDA are the source not only of confusion, but of practical difficulty for individuals who may at varying times fall within the scope of both systems.

I know from my perspective, there's interaction between the *Mental Health Act* and *Substitute Decisions Act*, but I think entanglement is probably a better word, is really complex, is very difficult to try to explain to our clinicians, and is very, results down the line in a lot of difficulties for the family, and trying to explain to clients, yes, because there are situations where the client is an inpatient for a psychiatric facility and yes has no right of review for financial incapacity under the *Mental Health Act*, and trying to explain how that could be possible is very difficult. Part of that I think comes from the fact that the this financial incapacity piece has been embedded on the back of the *Mental Health Act*, completely seemingly separate from everything else that's going on in the *Substitute Decisions Act*. So I think where that point of crossover is, where you sort of leave the realm of the *Mental Health Act* and enter the realm of the *Substitute Decisions Act*, there's enhanced costs that come with it, right of refusal that comes with it. The fact that [unclear] raise obligations in costs associated with the assessments, is very challenging.

Focus Group, Clinicians, September 12, 2014

Clinicians commented that part of the need for a separate process under the MHA was that the costliness and cumbersomeness of Capacity Assessments under the SDA make it too difficult to ensure that MHA patients have their basic finances protected or for them to regain control over their finances once legal capacity is regained. As rights advisers pointed out to the LCO, the vast majority of individuals in the mental health system are living in low-income, and not only can they not afford a Capacity Assessment, but may not have the most basic wherewithal, for example in terms of access to a telephone, to arrange one.¹³³ One clinician commented that “essentially you almost want to encourage them to how to become an inpatient, to be able to be assessed, and that sounds like a really broken system”.

I think the biggest issue is accessibility, so you have an outpatient client who isn't doing that well, but even if you are able to see that as a clinician, there isn't really accessible ways of getting that assessed in the community. So it's kind of like you [another participant] were saying, it works well in an inpatient standpoint, but if you have an outpatient, it becomes very complicated, and I think also for families being able to navigate that, in the absence of some sort of clinician or case worker, that kind of help.

Focus Group, Clinicians, September 12, 2014

This is perhaps a greater issue now than when the legislation was initially passed, because of the trend towards outpatient treatment. Many psychiatrists, rights advisers and clinicians pointed to the cumbersome processes for reassessment for persons who transition from inpatient to outpatient.

The other thing that I've seen is very challenging from a client rights perspective or a patient rights perspective, is if the initial finding made as an inpatient, subsequently getting right of review to the

CCB is exceedingly difficult, and we're constantly, particularly if the client has been discharged and then readmitted, because they have remained under the statutory guardianship, they don't have a MHA right of review, and for a lot of the clients, when I am giving the advice that what they have to do is get a new assessment, here's a phone number for the PGT's capacity office, I know that what I'm saying to them is, you will never have a CCB hearing about this. Being able to get an assessor and afford it, it's not going to happen.

Focus Group, Clinicians, September 12, 2014

The Centre for Addiction and Mental Health's submission addresses this issue, commenting that,

The inability of psychiatrists to perform examinations of capacity to manage property with their outpatients is a shortcoming of capacity, decision-making and guardianship legislation that negatively impacts people with mental illness and leads to system inefficiencies. CAMH recommends making amendments to the MHA and/or SDA to ensure that they work cooperatively to facilitate assessments of financial capacity by qualified practitioners, including psychiatrists, in the community. Amendments must include standardized guidelines for when and how to examine capacity in community settings and patients must have access to the same procedural rights they are afforded in inpatient settings.¹³⁴

4. Lack of Clear Standards for Assessments under the Mental Health Act and Health Care Consent Act

As was described above, Capacity Assessors designated under the SDA must meet specified requirements for ongoing training, as well as comply with the thorough Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity*. Other forms of assessment of capacity are not regulated in the same way, and by and large, these assessments are mainly subject to the professional judgment of the practitioners who carry them out.

The SDA *Guidelines* do not apply to the examination of capacity to examine property under the MHA and guidelines for assessing capacity published by the relevant colleges focus on capacity to consent to treatment. It seems that examinations to determine capacity to manage property performed by physicians in psychiatric facilities are relatively unregulated and under-analyzed. The LCO's research did not uncover any policies, tools or training manuals specifically tailored to this type of assessment, although it is certainly possible that such materials have been developed for use within facilities.

One area of misunderstanding or misapplication of the MHA with respect to examinations for capacity to manage property relates to section 54(6), which dispenses with the requirement to make such an examination where "the physician believes on reasonable grounds that the

patient has a continuing power of attorney under that Act that provides for the management of the patient's property". A lack of clarity regarding "reasonable grounds" together with misunderstandings of continuing powers of attorney for property may lead to confusion and gaps in rights in this area. Without appropriate enquiry, there may be a failure to determine whether the patient's power of attorney for property actually covers all of her or his property, or is currently in effect, with the result that the safeguards against property loss intended by the MHA may not have effect. The individuals affected by this provision are not entitled to rights advice, exacerbating the issue. Because it is relatively much more common for older persons to prepare powers of attorney, this issue may have particular impact on older adults.

There is no guidance in the HCCA or regulations with respect to the conduct of capacity evaluations. Nor are there guidelines, official policies or training materials, or mandatory forms. Evaluations of capacity with respect to admission to long-term care are generally conducted with reference to the five question form highlighted earlier, a document whose origins are cloudy, but which is widely treated as an "official" document. As already noted, the CCB and the courts have repeatedly held that simply asking the five questions on the form and recording the answers does not constitute a proper capacity evaluation.¹³⁵

Some organizations have created guides to capacity evaluations which recommend a more thorough approach. The most comprehensive of these is *Assessing Capacity for Admission to Long-Term Care Homes: A Training Manual for Evaluators*, prepared by Jeffrey Cole and Noreen Dawe.¹³⁶ There are also specialized tools, such as the *Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease* by the Dementia Network of Ottawa,¹³⁷ and the *Communication Aid to Capacity Evaluation (CACE)*, developed by Alexandra Carling-Rowland.¹³⁸ Since none of these guides is endorsed by the legislation or regulations, evaluators are not required to use them. It is also unclear how much buy-in these guides have or how widely they are distributed.

The level of procedural protections to be afforded to persons subject to an evaluation of capacity is also unclear. By contrast with Capacity Assessments under the SDA, there is no statutory right to be informed of the purposes of the evaluation, to refuse the evaluation, to have a lawyer or friend present, or to be informed of these rights prior to the evaluation. However, individuals undergoing capacity evaluations may be entitled to some procedural rights based on the common law principles of natural justice. Notably, in *Re Koch*, Justice Quinn ruled that the basic standards set out in section 78 of the SDA with respect to Capacity Assessments, should also apply to assessments under the HCCA. Lawyers practicing before the CCB have noted that the decision in *Re Koch* has been inconsistently applied, as some adjudicators consider the comments of Justice Quinn as obiter.¹³⁹ In *Saunders v. Bridgepoint Hospital*, a case involving evaluation of capacity to consent to admission to long-term care,

Madam Justice Spies held that as a matter of procedural fairness, “a patient must be informed of the fact that a capacity assessment, for the purpose of admission to a care facility, is going to be undertaken, the purpose of the assessment and the significance and effect of a finding of capacity or incapacity.”¹⁴⁰

Another recurring theme in consultations was the confusion regarding the conduct of assessments of capacity to consent to treatment. As with capacity evaluations, training and guidance on assessments of capacity to consent to treatment are left to the health regulatory colleges, and these vary considerably from college to college. The abilities and level of confidence of health practitioners in carrying out assessments of capacity to consent to treatment therefore also varies widely.

What I notice a lot is, there's much confusion. I will have physicians who are adamant with me, that say the college of physicians and surgeons says they don't assess. And when I remind them that we all assess as health care providers, there's, they don't seem to comprehend. Yes. They don't. It's a real struggle, because it's a legal context as well, not a medical context, in terms of... you know, so some people will incorrectly, as well, in the medical field, use things [unclear] or those other kinds of medical-based screenings for cognitive function, rather than understanding the whole capacity and that assessment of it. So, from the very beginning, it's a challenge. And then, I guess, the other side of that coin is, actually, health care providers standing up and saying there needs to be a capacity, a licensed or authorised capacity assessment. What we're challenging, interpretations of the capacity, and they may be different across family and health care provider person.

Focus Group, Service Providers for Individuals Living with Dementia, October 21, 2014

The lack of clear standards for assessments under the HCCA, together with shortfalls in training or education within some professions, creates confusion and anxiety around assessments under this Act, and a desire to defer the assessment elsewhere.

I think, in part, that people find assessing capacity [under the HCCA] difficult, because there are no standards. So, it's like, there's somebody who they believe somehow [has] more expertise; let's get that person, and so I think there's, kind of, the reluctance, because they're just not sure how to assess capacity. I think that's new clinicians, perhaps, or even if it could be a nurse practitioner who's proposing treatment. I mean, maybe the doctors are in a better position, but the other ones who are... they may be thinking, I'm not qualified enough, even though I'm the occupational therapist and I'm proposing that. So, I think it could be just some... they think that other person just knows more. That's, I think, one reason.

[Second speaker] I've seen this lots recently under several consultations, where you're bringing in geri-psych because you think they have greater expertise, but it's not an area in which they have the best expertise, and they don't know the patient best of all. So, you know, they're seeing the patient out of context and asking the wrong kinds of questions, and yet, because of that perception of superior expertise, everybody defers to that assessment, when the OT may well be the person who's

seen the patient for... the patient performing, and sees dramatic... in the case I'm thinking about, the team had seen a change over time, whereas the geri-psych person is seeing that person in the moment, right, and may think that's where they normally function and it's not the case. So it's misapplication.

Focus Group, Joint Centre for Bioethics, October 1, 2014

As ACE and DDO commented in their paper, confusion about capacity and consent under the HCCA among health practitioners is exacerbated by the significant reliance on materials from other jurisdictions or materials that include incomplete or misleading information.¹⁴¹

While the lack of clear standards and adequate training for assessments of capacity under the MHA and the HCCA are problematic in itself, given the challenges of assessing capacity and the vital importance of such assessments to the rights and wellbeing of those assessed, the lack of a consistent approach between different mechanisms for assessing capacity also adds to the confusion and complexity of the system.

I was just going to say the other part of it is I'm not sure that, you know, a lawyer or a psychologist, an evaluator in the long-term care sector, the treatment assessor in terms of the health part, I'm not even sure that what they're assessing is consistent, right? Are they asking the same questions and doing the same process? I don't think so.

Focus Group, Developmental Services Sector, October 17, 2014

It is true that there are significant differences between some of the domains and contexts in which assessments are carried out. Assessments under the HCCA are generally carried out with respect to a particular decision, and not with respect to an entire domain of decision-making, as are Capacity Assessments under the SDA. Further, assessments under the HCCA are generally carried out in situations where a particular decision is required on a time-sensitive basis, whereas Capacity Assessments under the SDA are more frequently carried out in the context of more general concerns about the abilities of the individual to manage their decisions independently. However, the LCO cannot identify a principled reason for significant differences in the standards for Capacity Assessments regarding management of property under the SDA and examinations for capacity to manage property under the MHA. Further, there are certain common elements to assessments of capacity which are fundamental to the approach underlying the entire legislative regime and that ought to be clear and respected across all contexts and domains.

5. Quality of Assessments

Assessing legal capacity is a challenging endeavour. Legal capacity, as it is embodied in Ontario law, is a nuanced concept. There is an inevitable tension between the concept of capacity as being contextual and fluctuating, and the need of the legal and health systems for clear thresholds. Given the potential impact of an assessment of capacity, it is important to ensure that these assessments are of high quality, and that those who are conducting them have the skills to carry them out effectively. In its written submission, the Ontario Brain Injury Association (OBIA) emphasized that

The importance of having a qualified, trained person administering these assessments cannot be stressed enough. The assessor should have sound knowledge of the policies, but also have detailed knowledge of, in this case, ABI. No two people with ABI are alike.¹⁴²

The assessment challenges inherent in the concept are exacerbated by the great diversity of the populations that may be subject to assessment. For example, the nature of the decisional limitations of persons living with dementia, developmental disabilities, acquired brain injuries or various types of mental health disabilities will vary widely, and assessment strategies need to take into account these differences. The OBIA has pointed out the complexity of assessing persons with brain injury: these individuals may be able to answer questions at the time of assessment but not be able to put them into effect because of damage to the areas of the brain that process information, make decisions, filter information and initiate activities; as well their abilities may fluctuate considerably. The OBIA suggested that the best way to assess a person with a brain injury is to assess them in their environment over time.

As well, communication barriers or cultural differences may affect the assessment of legal capacity. As was noted in Chapter III.B, Ontario's population is extremely linguistically and culturally diverse. A number of consultees raised issues related to language barriers: without expert interpretation, the true abilities of an individual may not be manifest. Cultural differences may be subtle, and an assessor may not realize that a pattern of communication that seems to indicate a lack of legal capacity may simply be the manifestation of different cultural norms. Those who assess capacity may need additional training or supports to meaningfully address these challenges.

Members of the Deaf community have raised concerns that communication barriers for persons who are culturally Deaf (such as a lack of skilled interpreters), and the low levels of literacy for this community arising from educational barriers, result in improper assessments of the legal capacity of members of this group.

Just coming to the idea of assessments, I've noticed not having the appropriate accommodations on the assessments or the way assessments are done. It is really key to have those appropriate accommodations. I mean again if you don't have that in place there is misrepresentation of what is written on that assessment or what is part of that assessment so I think it is really key before you even start any type of assessment is to look at those accommodations, what does that person need to do to do it successfully regardless of their hearing loss, interpreters, FM systems, a note taker ensuring that this person knows that they have the right to access that information and be able to have that assessment done correctly I think is key.

Focus Group, Advocacy and Service Organizations, October 2, 2014

Similarly, it may require some patience and skill to communicate with persons with aphasia: failure of health practitioners to take the time to do this may result in the assumption of their incapacity and referral of decision-making to family members. In a focus group with persons with aphasia, participants expressed considerable personal pain at the tendency of health practitioners and others to assume their incapacity.

While some concerns were raised regarding the quality of some Capacity Assessors, particularly in those areas of the province where there is less choice, overall there was appreciation for the training and standards for SDA Capacity Assessments, and the bulk of the concerns about assessments were focussed on other assessment processes, particularly assessments under the HCCA.

I was going to say certainly the formal assessments done by designated Capacity Assessors you do have to pick and choose but I generally find that those Assessors are well versed in protecting autonomy, defending rights and at least those that I've experienced have gone out of their way to accommodate people ... Outside of that process with evaluations and others there is I think a much wider range where people are some better trained than others and take more care than others but those processes seem to be much less organized and sometimes they are pretty perfunctory. Some don't seem to understand that you can't assess someone without the accommodations that they think are supposed to be assessed without support and that can affect things.

Focus Group, Advocacy and Service Organizations, October 2, 2014

It should be noted that Community Care Access Centres, which perform a significant number of capacity evaluations for consent to admission to long-term care, have undertaken a variety of initiatives to increase the skills of their staff and to institute appropriate procedural protections for those they evaluate. Toronto Central CCAC staff told the LCO,

That also speaks to what ... you [another participant] were also articulating, that coordinators take this process really seriously, and... from both a professional practise perspective, and also taking care that this is a major decision, that we're working with the client, and a life-changing decision.... And so

we undertook in this committee, or these guys undertook in this committee to change the... we decided that they... they decided that they didn't want to use the provincial tool, the five questions to determine somebody's capacity to make decisions around long-term care. So they developed quite a significant, lengthy tool that's flexible, that really captures questions around whether the client understands and appreciates and is able to make decisions around long-term care.

Focus Group, Toronto Central Community Care Access Centre Staff, November 14, 2014

However, the process and tools used significantly vary even among the different CCACs, and CCACs are certainly not the only stakeholders carrying out capacity evaluations. For example, many hospitals have their own social workers or occupational therapists carrying out evaluations. The LCO has heard that many evaluations are still being carried out with only the "five questions" discussed above as a guide. CCAC staff have pointed to inconsistent application of the law, and to concerns that the law is not being appropriately attended to, whether because of institutional pressures or lack of understanding of the law.

The hospitals don't like to be told what to do obviously, so yes, we do use the law. I've had to go to the hospital ethicist before and say, I don't think this is being followed. Can you support me in this? And then they do get involved and enforce it. Sometimes you have to do that if people aren't willing to re-do the evaluation, or they just outright refuse and say, no, I won't do it. And to be... kindly remind them that it is the law, and that you're not doing this correctly.

Focus Group, Toronto Central Community Care Access Centre Staff, November 4, 2014

Concerns were widely raised that physicians and other health practitioners do not receive sufficient training and support regarding assessment of capacity to consent to treatment, so that these assessments may be inadequately completed, or not done at all.

I've had discussions with doctors. Well, how did you come to this decision? And one doctor said, well, she was sleeping, so I just talked to her daughter. So things like that. Like, they're... they just making decisions based on that moment, and I don't think they're reassessing on an ongoing basis, especially if people are coming in with some infection, and they're delirious, and then a couple days after antibiotics start, they're clearing up. Like, just because someone was sleeping, that's not a good enough reason to make them incapable.

[Second speaker] Or they just automatically go to the family without even having the discussion because, like, they come and get admitted to hospital, and it's just automatically... because you... when we come and do these assessments and have the conversations at rounds, one of the questions I've asked before is, well, who are you getting to consent for the treatment? And it's like, oh, we talked to the family. But you're... for long-term care or for whatever you're saying, you think she's capable, so why wouldn't she... this person be capable to be able to make the decisions about their own treatment decisions? So it just seems to be whatever's the path of least resistance

In their paper, *Health Care Consent and Advance Care Planning*, prepared for the LCO, the Advocacy Centre for the Elderly and Dykeman Dewhirst O'Brien carried out a review of regulatory policies and publications, consent and advance care planning forms and systems and institutional policies and practices, as well as conducting focus groups with health practitioners, older adults and lawyers. In focus groups with older adults, ACE and DDO heard that

[P]articipants stated that health practitioners generally do not adequately provide options and seek informed consent when seniors attend hospitals and long-term care homes. The participants noted that the power imbalance between physicians and seniors was significant, and that this affected the ability of seniors to ask appropriate questions related to the treatments proposed by health practitioners. Many of the participants shared anecdotes of their experiences with the health care system, a common theme of which was that physicians would not seek informed consent to treatment from either patients or SDMs.

Several of the participants stated that when a senior is transferred to hospital from long-term care they are frequently presumed to be incapable of consenting to treatment. Many of the participants expressed frustration with the fact that health practitioners discuss treatment options with family and friends rather than a capable patient, apparently as a result of the patient's age and appearance.¹⁴³

6. Inadequate Provision of Rights Information

Given the implications of a determination of lack of legal capacity to make a decision, it seems essential that individuals who are subject to assessments of capacity must be provided with meaningful procedural protections, to ensure that they have the opportunity to understand the process to which they have been subjected and its implications, and to challenge the process and its results.

Within the HCCA, the provisions regarding rights information fulfill a crucial role. These provisions are intended to promote understanding of and access to the rights set out in the legislation, most centrally the right to challenge a finding of incapacity by application to the CCB. Inadequate implementation of the provisions related to rights information undermines the careful balance of the legislation between the need for effective functioning of the health and long-term care systems, individual rights to decisional autonomy, and the importance of ensuring valid consent to treatment and to admission to long-term care. Without meaningful provision of information about rights to persons who are found to lack legal capacity, protection for autonomy is very significantly undermined.

Many stakeholders raised significant concerns about widespread inadequate provision of rights information, across all HCCA settings. There were concerns that in many cases, rights information is not being provided at all. For example, the Advocacy Centre for the Elderly (ACE) wrote in their submission,

It is ACE's experience that persons found incapable under the HCCA (with the exception of *Mental Health Act* patients) are rarely advised of this finding and are even more seldom advised of their rights. ACE's experience is that incapacity is also seldom appropriately documented in the patient's medical chart.¹⁴⁴

Existing rights information mechanisms are often seen as insufficient to provide meaningful access to the rights under the legislation.

I think that part of the problem is if you are not a patient in a psychiatric facility or you're not somebody who's on a community treatment order you have no assistance whatsoever from anybody. We know by anecdotal evidence and personal evidence that, for example, physicians or dentists in the community get people to sign consent for other people and they don't give them their rights or rights information as they're supposed to, or required by their college. And I think there needs to be some centralized clearinghouse for information for individuals to call so that they can find out exactly what their rights are because we know that the people that are supposedly telling them aren't actually telling them and they're not helping them.

Focus Group, Rights Advisers and Advocates, September 25, 2014

This is seen as a particularly widespread issue in long-term care homes, with the perception that this amounts to a systemic issue in this setting, one in which a significant percentage of individuals live with some form of dementia and therefore are at higher risk of not meeting the threshold for legal capacity to consent.

Here in our facility it was a long-term care assessment. The person was found incapable to make that decision and the person applied for a hearing and the CCAC person came to our office and said, they applied for a hearing, I don't know how they knew how to do that, or how they had the information that they could, but they did and now I don't know what to do. And I was just, kind of, you know, you're just, kind of, taken aback, going, if you made the assessment did you not give them that information? And what do you mean, you don't know what to do now? I was just really shocked. And I can tell you from my own personal experience that long-term care, when they say someone is incapable, they don't give them that information. They just go right to the person that they assume would be the power of attorney and request permission to do things.

Focus Group, Rights Advisers and Advocates, September 25, 2014

As well, rights information may be provided in a very cursory way, or without taking into account the needs of those receiving the information. For example, persons with visual

disabilities may simply be provided with a written document, without any explanation. Linguistic barriers may not be addressed adequately, or at all.

When someone doesn't speak the language or read English that the doctor doesn't always get a translator or to translate the treatment order or treatment plan for the client. So, he only has to go by what he's being told to do. And I think that's extremely unfair for anybody in Ontario, that because they don't speak the language they don't have the right to know what it is that has been taken away from them. Or they're being told that they have to follow a plan but they don't know what the plan is because they are unable to read it because it's not in their language or it's not being explained to them in their language because they haven't received a translator.

Focus Group, Rights Advisers and Advocates, September 25, 2014

We're not doing the same thing [as under the MHA] with maybe some of the incapable for long-term care. As a care coordinator, I was just giving them the rights. And I really think it's person to person on how that's done. Just giving them that piece of paper, if they're in fact reading it. If they're allowing them that next step of actually calling the number. And in fact, calling the number's not going to actually get you that consent capacity. It's doing that form, meeting the patient, getting them to sign. So I really question how many times people are really getting that right to that consent and capacity board. Because the current process for how we're giving them the rights. I think we might be more effective if you had a rights advisor, similar level to a form three or the form 21 at the hospital.

Focus Group, Service Providers for Individuals Living with Dementia, October 21, 2014

The LCO is troubled by these widespread reports, as they raise fundamental issues about the protection of basic rights.

It was emphasized to the LCO that there is limited awareness among many health practitioners of their responsibility to provide rights information. As well, the specifics of that responsibility differ among professions, because it is the health regulatory colleges that are responsible for providing that guidance: the HCCA specifies only,

A health practitioner shall, in the circumstances and manner specified in the guidelines established by the governing body of the health practitioner's profession, provide to persons found by the health practitioner to be incapable with respect to treatment such information about the consequences of the findings as is specified in the guidelines.¹⁴⁵

The health regulatory colleges differ widely in the content and specificity of these guidelines. Some are very brief on this topic, simply requiring that the practitioner inform the incapable person of the findings, the reasons, the right to review and that a substitute decision-maker will be making the decision in question,¹⁴⁶ while others provide much more extensive guidance.¹⁴⁷ Some require that the practitioner provide the rights information in a way that accommodates

the needs of the person found incapable, for example through the provision of interpreters or communication aids.¹⁴⁸ Some appear to restrict the duty to provide information about rights to circumstances where the person indicates disagreement with the finding of incapacity or the appointment of the SDM,¹⁴⁹ while others appear to require provision of rights information whenever there is a finding of incapacity.¹⁵⁰ Some explicitly discharge the practitioner from providing rights information where the practitioner does not believe that the individual will be able to understand that information, for example because of extreme youth or disability.¹⁵¹ Some merely require the practitioner to inform the incapable person of a right to appeal,¹⁵² while others require the practitioner to provide practical assistance, for instance by referring them to assistance within the facility or recommending that they hire a lawyer,¹⁵³ and some leave the matter to the professional judgment of the practitioner, such as requiring them to provide “reasonable assistance”.¹⁵⁴

The rights and supports of the individual found to lack legal capacity therefore vary considerably, depending on the particular health professional who has determined incapacity. Even within a health regulatory college, the degree of rights and supports appears to be vary; for example, the College of Respiratory Therapists requires more than some in providing assistance to the individual, yet also does not require the provision of rights information when the practitioner does not believe that the individual will be able to understand it.

When a rights adviser isn't involved and a person is having their capacity changed, so, whether it be someone in the community, whether it be someone who is incapable with respect to long term care, there doesn't seem to be consistency for the person who is supposed to be explaining, under the legislation, what the person's options are if they disagree with the capacity assessment. What it says is guidelines from the College and I investigated on behalf of a person living in the community that was made incapable with respect to long-term care, what the guidelines were for the College of Physicians and Surgeons because they're to have guidelines in terms of what they tell people about the consent and capacity board, access to legal aid, etc. And I phoned to the College of Physicians and Surgeons and they said, well, we don't really have a guideline, it's part of a practice direction with respect to capacity. And when you go in and look at it there's really not very much there in terms of the obligation of the person

Focus Group, Rights Advisers and Advocates, September 25, 2014

As well, as is discussed at greater length in Chapter XI, health practitioners differ widely in the nature and amount of education and training that they receive on issues related to legal capacity and consent. Practitioners may have only a limited understanding of issues related to capacity and consent in general, and even less understanding of the procedural rights available to individuals who are found to lack capacity to consent.

A number of stakeholders emphasized that in the *Consent to Treatment Act*, an earlier incarnation of the *Health Care Consent Act, 1996*, individuals were entitled to advice from an independent advocate in a number of situations, such as applications to the CCB for directions regarding the prior expressed wishes of an individual, and applications to the CCB for permission to depart from the prior expressed wishes of an individual. The advocate was required to notify the individual of the decision or determination that had been made with respect to her or him; explain the significance of the decision or determination in a way that took into account the special needs of that person; and explain the rights that the individual had in that circumstance, such as a right to challenge the decision or determination. The LCO received a number of recommendations to reinstate the provision of this type of advice to at least some portion of the situations under the HCCA, through the expansion or creation of the kind of rights advice function provided under the MHA. For example, the Mental Health Legal Committee argues,

It is trite but worth emphasizing that vulnerable persons require enhanced systems in place to protect their rights. In the context of psychiatric patients, the requirement of independent rights advice under the *MHA* and *HCCA* plays a significant role in protecting the rights of individuals who are involuntarily detained, found incapable in various respects or are subject to a community treatment order. Rights advisors are essential in assisting patients who are cognitively impaired with following up on their wishes to challenge findings of incapacity by completing and filing the application to the CCB, by connecting them with counsel specialized in the area and by completing applications to Legal Aid Ontario to secure funding for counsel. Interestingly, community treatment order substitute decision-makers, also receive mandatory rights advice.

There is no independent rights advice regime in place respecting findings of incapacity outside of the *MHA* context. In these situations the rights advice is expected to be provided by the assessor or evaluator or simply left to the patient. Outside of the context of mandatory independent rights advice, persons who disagree with incapacity findings generally fail to challenge them.

There is no principled basis for the provision of independent rights advice in some but not all situations where an individual is found to be incapable with the result that they face significant infringements of their autonomy or liberty. Accordingly, the MHLC recommends legislative changes to require independent rights advice in all situations where an individual is found incapable with respect to treatment, managing property or admission to long-term care.¹⁵⁵

D. Applying the LCO Frameworks

As discussed in Chapter IV, debates about legal capacity and how it is defined are often described in terms of competing principles of autonomy and “beneficence” or safety. In some ways, this area of the law can be understood as a mechanism for balancing and fulfilling the principles. A determination with respect to legal capacity can be a means of protecting the

ability of individuals to make choices about their own lives, or of preventing or addressing abuse of neglect of individuals who are vulnerable due to impaired decision-making abilities.

It is important to keep in mind, as with the application of the principles to all aspects of this area of the law, the close connection of the principles with each other in practice. For example, if a poorly conducted evaluation of capacity results in inappropriate admission to long-term care, there is a direct and significant impact on the fulfilment of the principle of participation and inclusion.

This direct and vital connection to the principles means that the provisions for the application of the legislation must be appropriately designed and effectively implemented: otherwise, the laws may actually undermine the principles. This was acknowledged in the development of the legislation and in many of its aspects, particularly the procedural rights surrounding the assessment of legal capacity. The processes for assessing legal capacity must in their substance result in the protection and promotion of autonomy and security, as well as respecting the principles in the processes themselves.

The LCO is concerned that in a number of respects, the current capacity assessment processes fail to respect, and in some cases may actually undermine the principles.

The *Frameworks* highlight the challenges for persons with disabilities and older persons of navigating processes that are complicated or multi-layered, and the importance of providing adequate navigational supports for these kinds of processes, or of simplifying those processes. As was discussed in Chapter IV, as well as in this Chapter, legal capacity is a multi-dimensional, contextual concept, and in attempting to address these multiple dimensions, the systems surrounding the assessment of capacity have multiple entry points, differing processes and consequences, and confusing areas of overlap and differentiation. However, it is important to consider how these processes can be made easier to access and navigate for older persons and persons with disabilities. The current system for accessing Capacity Assessments under the SDA presents a number of barriers for older adults and persons with disabilities related to cost and complexity. This is especially true for those persons with disabilities and older adults who are most likely to be directly affected by this process: they are more likely to have limited access to the funds necessary for a Capacity Assessment and to have extra difficulties in navigating complicated systems without supports. The *Frameworks* point towards the importance of either simplifying complex systems, to make them more transparent and accessible, or of providing supports or advocacy services to assistance with navigation.

The *Frameworks* also emphasize the profound importance of ensuring that persons with disabilities and older persons are meaningfully informed about their rights, and that the processes in place are such as to enable these individuals to pursue these rights. Providing the information and the processes necessary to access rights is itself essential to promoting autonomy and dignity for these groups; as well, without such processes, individuals will be unable to achieve the principles, even if the substance of the legislation complies with those principles. These considerations underscore the gravity of the kind of concerns that have been voiced about the adequacy of rights information under the current regime. Most seriously, there is no practical guarantee that individuals who are found to lack legal capacity – and thus to be unable to make decisions for themselves – under the HCCA are ever informed that they have rights to challenge those decisions, or even that such a determination has been made and what its effect is. Based on what the LCO has heard through its research and consultations, it appears that many older persons and persons with disabilities are deprived of this basic guarantee. This is a clear and serious shortfall in the current law.

The LCO's research and consultations have highlighted the enormous gap that may exist between the abstract concept of legal capacity as described in the statute and the everyday understanding and implementation of the law by individuals, including professionals, families and those directly affected. Everyday practical needs and popular "common-sense" understandings of the law drive much of its current implementation. Because this area of the law relies so much on the efforts and understandings of private individuals, the gap between the statute and lived experience is wide, and is a challenge for law reform. There is, as this Chapter documents, particular concern about the lack of adequate training and education for those professionals carrying out assessments of capacity to consent to treatment and evaluations of capacity to consent to admission to long-term care and to consent to personal assistance services. The lack of clear standards and consistent delivery mechanisms for professional training and education puts at risk the autonomy, security, and dignity of those individuals who lack or may lack legal capacity.

The principles of diversity (as defined somewhat differently in each *Framework*), together with the focus of the *Frameworks* on the importance of lived experience in understanding the principles, reminds us that the experiences and needs of persons who may be affected by this area of the law will vary significantly: it is important in assessing legal capacity that differences related to gender, language, culture, disability, geographic location and other factors be taken into account, to the extent possible. As was noted above, needs related to disability, such as the needs of the culturally Deaf community or persons with aphasia, and needs related to cultural differences, such as for Aboriginal persons, should be addressed appropriately in assessments of legal capacity. As well, the needs of persons living in remote or rural

communities should be taken into account. Research and public consultations highlighted the particular needs and barriers faced by persons living in long-term care.

E. The LCO's Approach to Reform

Ontario's systems for assessing capacity face a number of challenges in attempting to balance the need for nuance with the challenges of complexity; the importance of due process with needs for accessibility and efficiency; and the advantages of expertise and specialization with the costs of training and formality. There is no single right approach to these issues: any regime will raise challenges. Furthermore, many consultees identified positive aspects of the current system, especially in its intentions. Therefore, rather than recommending radical reform of Ontario's capacity assessment systems, the LCO has attempted to identify practical solutions that will maintain and hopefully build on the strengths of the current approach and reduce some of the negative side effects.

Of greatest concern to the LCO are issues related to the quality of certain types of assessments and to gaps in the provision of fundamental procedural rights to all individuals who are assessed. There are concerns about the accessibility of Capacity Assessments under the SDA, in particular with respect to cost, navigational supports (particularly for groups with special needs), and geographical location, and the LCO believes that as resources are available, the Capacity Assessment Office should continue to seek means to address these important issues. However, there was a general sense that Capacity Assessments are subject to clear and appropriate standards, and that most Capacity Assessors display appropriate levels of skill and sensitivity. The situation with assessments under the HCCA is much more troubling, with widespread concerns being raised about lack of clear standards, uneven application of the existing legislative requirements and lack of meaningful mechanisms for affected individuals to pursue their rights.

There is a cost to provision of procedural rights, both financially and in the efficiency of the provision of services, and this must be taken into account in system design. However, it is the view of the LCO that certain basic rights and protections for vulnerable persons should be non-negotiable.

The LCO makes draft recommendations in Chapter XI regarding information, education and training. Better understanding of rights and obligations should reduce some of the confusion surrounding Ontario's assessments of capacity, improve the quality of assessments and assist families and individuals in asserting their rights. However, it is the LCO's view that better education and information alone will not resolve the issues raised under the HCCA. The lack of

clear standards and meaningful monitoring for assessment under the HCCA creates a situation where the kinds of systemic shortfalls that have been identified are not entirely surprising. The LCO's draft recommendations therefore focus on

- provision of clear, *enforceable* standards for assessments of capacity that take place outside the SDA, so that those providing assessments clearly understand their obligations and those being assessed have clear rights and can identify when those rights have been respected; and
- improving monitoring of assessments of capacity under the HCCA, with a view to developing approaches to addressing systemic shortfalls in this area, particularly with respect to process rights.

The draft recommendations that the LCO has made preserve the basic approach adopted with the creation of the SDA and HCCA, and aim to make incremental improvements. However, the LCO believes that the results of these improvements should be carefully monitored. If significant improvement is not evident within a reasonable period of time, the LCO believes that government should consider a fundamental redesign of assessment under the HCCA to strengthen the implementation of this area of the law, and to ensure that those affected have appropriate access to basic procedural protections.

F. Draft Recommendations

1. Triggers for Assessment

It is implicit in Ontario's legislation related to legal capacity, decision-making and guardianship that substitute decision-making is required only where there is both a lack of legal capacity and a need for a decision to be made. Lack of legal capacity by itself is not sufficient to justify the intrusion on autonomy associated with substitute decision-making. And in practice, many individuals who would be found to lack legal capacity if assessed are never assessed, and are never subject to substitute decision-making, because for them there is no need for the significant types of decisions associated with legal capacity, decision-making and guardianship law.

Under the HCCA, assessments of capacity to consent to treatment or to admission to long-term care are triggered only where a specific treatment or service is in contemplation and there are reasonable grounds to question the presumption of capacity to provide consent – that is, where there is a clear, specific and present need.¹⁵⁶

There is no clear requirement for a trigger under the SDA; instead individuals have the right to refuse an assessment, and the *Guidelines* clearly require Capacity Assessors to notify the individual of this right of refusal. Further, the *Guidelines* emphasize that

Routine screening of whole classes of individuals cannot and should not be endorsed, as this prejudices an individual's capacity based on class membership. For example, it is incorrect to assume that all intellectually disabled persons must be incapable by virtue of their disability. It is incorrect to assume that a diagnosis of a severe psychiatric disorder like schizophrenia renders the person unable to meet his or her personal care or financial needs.¹⁵⁷

Form C for Capacity Assessors requires the Assessor to identify a cause for the Assessment, such as “information about inability to manage personal care” or “information about person potentially or actually endangering his or her well-being or safety”.

As was noted above in section V.B.2, many assessments are carried out for non-statutorily required purposes, such as to underpin the creation of a will or a power of attorney. Capacity Assessors complete these as “opinion letters” and they do not fall within the purview of the SDA.

The MHA actively requires an examination of the capacity to manage property of *all* persons admitted to a psychiatric facility, unless the person’s property is already under someone else’s management through a guardianship for property under the SDA or a continuing power of attorney for property. As has been noted elsewhere, these provisions are intended as a protection for this group, to prevent significant disruption to the lives of those admitted to a psychiatric facility due to an inability to manage property during this time. However, the mandatory examination for all those admitted is unusual in the context of the overall legislative scheme, in that it appears to reverse the presumption of capacity for this specific group – individuals admitted to a psychiatric facility - subjecting all members of this group to an examination, on the basis of their psychiatric disabilities. That is, there appears to be a presumptive conflation of the status of having a psychiatric disability with lack of legal capacity to manage property and with a need for guardianship. While it may be appropriate to give consideration in all cases to whether an examination is necessary, it may be excessive to require an examination in all cases.

As was noted above, assessments of capacity are intrusive processes with potentially significant implications for the affected individual’s rights. It is the view of the LCO that such assessments should take place only where necessary for the interests of the individual, and not on the basis of presumptions about particular classes of individuals, or to further the interests of family members or service providers

Given the concerns raised during the consultations about misuse of assessments of capacity, the LCO believes that the purposes or appropriate triggers for an assessment of capacity should be clarified. Chapter III.E.1 highlighted the value of clarifying the purposes of the legislation in this area in promoting appropriate application: this is an example of where greater clarity regarding purpose could reduce misuse.

Alberta legislation requires that there be a valid cause for concern in order to necessitate a capacity assessment with respect to property or personal care, that is, an event that puts the individual or others at risk and that seems to be caused by an inability to make decisions.¹⁵⁸ Assessors must know the reason that a capacity assessment has been requested and familiarize themselves with the circumstances leading to the request.¹⁵⁹ The LCO believes that this stronger language, which pairs both the inability to make decisions and a need for the type of intervention associated with guardianship, provides a helpful approach that can be incorporated in Ontario. The LCO believes that it would be helpful to strengthen the language included in Form C for Capacity Assessors created under Regulation 460/05, which Capacity Assessors must complete. In addition, in keeping with Draft Recommendation 1, a clear statement in the SDA of the appropriate purposes for capacity assessment would be valuable.

DRAFT RECOMMENDATION 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.**

It is the view of the LCO that examinations of capacity to examine property under the MHA should require some trigger: the current requirements are inconsistent with a presumption of capacity. However, to avoid creating a disincentive to assistance for individuals who do require an SDM while in a psychiatric facility to avoid unnecessary loss of property, the bar should not be set too high. Physicians should not, for example, be required to investigate the financial arrangements of the individual.

The LCO recommends that the trigger for an assessment under the MHA be harmonized with that under the HCCA: that is, adopting the language of “reasonable grounds” for belief that

there is a lack of legal capacity to manage property. This provides physicians contemplating an examination under the MHA with a test that is familiar to them from their general practice, and avoids adding to the complexity of the legislative scheme.

DRAFT RECOMMENDATION 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.

2. *Accessing Capacity Assessments under the Substitute Decisions Act, 1992*

As is clear from the previous discussions, Capacity Assessments by designated Capacity Assessors are vital both for entering guardianship where necessary, and for exiting it where it is no longer appropriate. Access to Capacity Assessments is therefore closely connected to the preservation of personal security for individuals and to their autonomy. Lack of access to Capacity Assessments may compromise fundamental rights.

It is also clear that some individuals may face considerable challenges in accessing Capacity Assessments: these individuals will tend to be the most vulnerable individuals, such as persons living in low-income, those with low literacy levels or who speak English as a second language, those living in remote communities, persons from various cultural communities, and Aboriginal persons. In a consumer model, such as the one adopted for Capacity Assessments, where it is the responsibility of individuals to navigate and fund the process, these types of barriers can have a significant impact on an individual's ability to understand and enforce rights regardless of legal capacity to make decisions. The Capacity Assessment Office does important work in assisting individuals to access information and in administering the fund for those who meet the income criteria. However, additional efforts are required to ensure that vulnerable groups are not disadvantaged in accessing their rights.

DRAFT RECOMMENDATION 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; for 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.

3. Minimum Common Standards for All Formal Assessments of Capacity

As was discussed above, while the SDA provides clear and comprehensive guidance for Capacity Assessments through the *Guidelines for Conducting Assessments of Capacity*, no such guidance exists for assessments of capacity under the MHA or HCCA. Rather, this role is left to the discretion of the multiple health regulatory colleges, which vary widely in the extent and content of the guidance that they provide. It is not clear on what principled basis the quality and standards of assessments should vary so considerably, not only depending on the particular domain but also on the particular health practitioners carrying out the assessment. While there are some differences depending on the domain or the particular type of treatment for which consent is being sought, the fundamental nature of an assessment of capacity and the principles which underlie it are, or should be, consistent. That is, there are basic rights accruing to persons under assessment that are not, or should not be, simply a matter of professional judgment.

Further, it is the view of the LCO, based on its consultations, that the lack of clear guidance contributes not only to confusion but to shortfalls in the quality of assessments of capacity, particularly assessments for the purposes of treatment or admission to long-term care under the HCCA.

The LCO therefore concludes that official *Guidelines* should be developed for assessments under the HCCA, parallel to those existing under the SDA. Because there are contextual differences between assessments in the domain of property and those carried out for the purposes of obtaining consent to treatment or to admission to long-term care, these *Guidelines* would not be identical, but would incorporate the same fundamental precepts, including the following:

- an explanation of the purpose of assessments and the need for an appropriate trigger for assessment, of their context in Ontario's legislative scheme for consent, and of the fundamental rights that are at stake;
- a description of the "understand and appreciate" test, including the right of capable persons to make decisions that others may consider foolish or risky;
- basic procedural rights for those assessed or evaluated, including the right to be informed that an evaluation or assessment is to be undertaken, the purpose of the assessment and the significance of a finding of incapacity, the right to have counsel or a trusted friend present during the evaluation, and the right to be informed of these rights prior to the evaluation;

- the duty on the part of the assessor to accommodate the needs of the person being assessed, in order to make an accurate judgment regarding their ability to understand and appreciate, including the provision of appropriate aids to communication;
- guidance on conducting assessments for populations with special needs, including needs related to language and culture; and
- basic practical guidance on carrying out an assessment interview.

DRAFT RECOMMENDATION 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.

4. Providing Statutory Guidance for Rights Information

The LCO takes very seriously the widespread complaints regarding the shortfall in the provision of meaningful notification, information and advice to persons found legally incapable under the HCCA. Failures to provide this type of support to persons found legally incapable, who by their nature and circumstances will have difficulties in accessing and enforcing rights, amount to at the least a significant violation of the most basic procedural rights and at worst the risk that individuals are having their fundamental right to make decisions for themselves removed unnecessarily or inappropriately.

As was noted earlier in this Chapter, many stakeholders recommended an expansion of the rights advice function that currently exists under the MHA to at least some of the situations under the HCCA where there are significant changes to legal status. These stakeholders felt that the rights information model under the HCCA is insufficiently rigorous to provide minimum due process to individuals who are found incapable under that statute, and that these individuals therefore have insufficient meaningful access to their statutory rights.

The LCO has considered the proposals to expand the provision of rights advice beyond the MHA. The rights advice approach provides independent and expert information and advice to persons whose rights are significantly at stake and who are particularly vulnerable. Overall, Ontario's rights advice program under the MHA is well regarded, and is considered a vital element of the province's mental health system.

While the LCO agrees that the rights information model as currently implemented has significant shortcomings and that the rights of persons found incapable under the HCCA are insufficiently protected, we have reluctantly concluded that the full and immediate expansion of rights advice to all those found legally incapable under the HCCA is not a viable approach, not

only for reasons of cost, but of practicality. For example, looking only at the long-term care sector, Ontario has over 630 long-term care homes, with close to 80,000 beds;¹⁶⁰ just over three-quarters of the residents have some level of cognitive impairment.¹⁶¹ To meet the needs for information and advice through independent rights advisers would be not only expensive, it would be logistically very difficult. Considerable efforts were put into the implementation of the *Advocacy Act*: while there were multiple reasons for that legislation's short history, the difficulty of the endeavour was obvious, and the LCO does not believe that an attempt to resurrect this approach would be the most effective in the current demographic, social and economic environment.

The LCO has focussed its immediate draft recommendations on strengthening the existing rights information regime.

As a first step, the LCO believes it is essential to clarify and standardize the requirements for rights information, so that persons found to lack legal capacity *consistently* receive the same basic information about their status, its effect and their recourse, and so that health practitioners are not confused about how to carry out this important responsibility. While there are variances between the contexts in which the various health professions assess legal capacity and provide rights information, the LCO believes that there are certain fundamental procedural rights to which all persons found to lack capacity should have access.

The LCO addresses issues related to education and training in Chapter XI. Education and training for health practitioners regarding rights information is important, but by itself will not address this fundamental procedural gap. Where there are shortfalls in the provision of rights information, these can only be addressed by a complaint to the relevant health regulatory college, and such complaints must be based on the standards and guidelines of that profession. Where the health regulatory colleges have provided minimal guidance, the person who has received inadequate rights information has no recourse: the health practitioner has met his or her obligations. The LCO believes that it is the role of government, in these circumstances, to provide consistent standards for fundamental procedural protections for persons whose right to self-determination is being removed.

Once minimum standards have been clarified, the LCO's draft recommendations regarding education, training and oversight may be helpfully employed to promote the effective application of these standards.

As a further step, ensuring standard documentation regarding the implementation of these procedural steps will not only encourage health practitioners to carry them out consistently,

but will enable more general monitoring of the implementation, so that the effectiveness of reforms can be evaluated and further steps designed as necessary.

DRAFT RECOMMENDATION 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*.

The LCO believes that the implementation of draft Recommendation 9 will improve the implementation of rights information. It is important to recognize, however, the inherent shortcomings in a rights information model, in that health practitioners are required to provide information about legal and procedural rights, a subject which is not at the core of their expertise, and to do so in situations where they themselves have just determined that the individual does not have capacity and where a challenge to that finding would involve them in proceedings before the CCB. There are unavoidable challenges to due process built into a rights information model. Access to independent and expert advice is clearly preferable.

While a full rights advice model, in which independent and expert advice is provided to every individual every time a finding of incapacity is made with respect to treatment or long-term care, is untenable, as was discussed above, there may be means of providing something short of this, but that still advances rights for affected individuals.

The Independent Mental Capacity Advocates of England and Wales provide an example of an advocacy program that is highly targeted to the most serious situations and the most vulnerable individuals. Under the *Mental Capacity Act 2005*, the Independent Mental Capacity Advocacy (IMCA) service is responsible for helping “particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions”.¹⁶² An IMCA must be involved with a person who lacks legal capacity and has no one to support them, whenever a serious medical treatment is proposed, or long-term residential accommodation is under contemplation.¹⁶³ IMCAs are required to have specific experience, have completed IMCA training, have integrity and a good character, and be able to act independently.¹⁶⁴ IMCAs have broad powers to support and advocate for individuals, including the responsibility for engaging in uninstructed advocacy in some circumstances, carrying out research and investigations, and themselves challenging decisions: the LCO is not suggesting such extensive powers, which may be appropriate in the larger context of the *Mental Capacity Act, 2005* in which health practitioners, social workers and other professionals may themselves make best interests decisions about the care of a client who is found to lack legal capacity, but would not fit easily in the Ontario approach. Rather, the IMCA model can assist in identifying means by which some form of rights advice could be extended in a targeted fashion.

Another potential model is medico-legal partnerships (MLPs) or what are sometimes call Health Justice partnerships. These are common in the United States, and have recently been gaining increasing profile in Ontario, as part of a broader exploration of multidisciplinary approaches to legal services. Health Justice partnerships are based on an acknowledgement of the multifaceted interrelationship between legal needs and health problems. Health Justice partnerships adopt a multidisciplinary model that integrates “access to legal services as a vital component of health care”.¹⁶⁵ Health Justice partnerships have formalized a “culture of advocacy”¹⁶⁶ in the clinical context by dealing with a range of legal needs which have been shown to affect health and well-being, including income and insurance issues, housing and utilities, education and employment, legal status, family law, and capacity and guardianship issues. Generally speaking, Health Justice partnerships involve multidisciplinary health teams (typically made up of health care providers, legal aid and/or pro bono lawyers, social workers and law students¹⁶⁷) that collaborate to “identify root causes of problems that generate needs, understand broader context in which legal needs arise, and work proactively towards disrupting harmful tendencies of the system”.¹⁶⁸ By leveraging the resources of community partners such as legal aid agencies, law schools, pro bono law firms, hospitals, health centres, medical schools and residency programs to identify, triage and resolve health-harming legal issues, and embedding the referral system within the existing health care infrastructure and medical

consultation process, the cost associated with providing patient-clients access to legal assistance is minimized.

There are a number of Health Justice partnerships currently operating in Ontario. Pro Bono Law Ontario (PBLO) has established such partnerships within a number of hospitals, including at the Hospital for Sick Children, the Children's Hospital of Eastern Ontario in Ottawa, the Holland Bloorview Kids Rehabilitation Hospital, and McMaster Children's Hospital. These programs provide assistance in cases where a parent's employment, housing or benefits are threatened because they are caring for a sick child, or because of domestic abuse or immigration issues, for example.¹⁶⁹ PBLO's triage lawyers assess patient-client needs through legal issue spotting interviews, provide summary legal advice, perform document preparation, and make referrals to legal aid or *pro bono* lawyers.¹⁷⁰ Private bar lawyers who participate in PBLO's *pro bono* initiatives typically provide support to families through advice or representation on matters including administrative law, immigration and refugee law, family law, or estate planning for families of children with permanent disabilities.¹⁷¹ ARCH Disability Law Centre and St. Michael's Family Health Team have partnered to tackle the legal dimensions of patient health and poverty law issues, in an approach based on a community development model and a disability rights framework. Various other clinics have joined this initiative,¹⁷² which provides legal services to patient-clients, legal education to health care professionals, and leadership on systemic advocacy and law reform.¹⁷³ Legal Aid Ontario provides funding. Once the current pilot is complete, the partnership is expected to expand to five other Family Health Team sites.¹⁷⁴

There are a number of promising aspects to these Health Justice partnerships, including the ability to provide legal services within a health care context, the collaboration between a range of professionals and organizations, and in the partnership between ARCH Disability Law Centre and St. Michael's, the broad approach to legal services as including not only direct services but also legal education for health professionals and a capacity for systemic advocacy. This kind of understanding of legal advocacy and access to justice as vital components of health care underlies the shift in approach necessary to meaningfully incorporate rights protections into assessments of capacity and consent to treatment.¹⁷⁵ Health Justice partnerships may have potential to promote inclusion and participation, foster autonomy and independence, and respond to diversity by:

- engaging lawyers in health care delivery, whether through on-site or external *pro bono* legal assistance,

- training health care professionals to go beyond consideration of a patient's medical profile and better understand the context in which they live, work and play to spot legal issues likely to jeopardize their health,
- in the areas of the law in which Health Justice partnerships provide services, empowering the patient-client (and their families) with information about rights and the means by which those rights can and should be enforced so they can actively participate in (re)constructing their own health futures, and
- expanding the model to focus on multiple vulnerable populations with unique challenges and needs.

A central challenge, however, in adapting these types of initiatives to strengthen rights protection for persons lacking legal capacity in the context of consent to treatment and admission to long-term care, is that this context requires rights information or advice to challenge a health professional's decision or action. Unless patients explicitly request a referral to the triage lawyer, health professionals bear the burden of flagging legal issues. In scenarios where the health care professional is providing the referral for legal advocacy against an external party such as an employer or landlord, this model functions quite effectively, as the health care professional acts as an advocate on behalf of their patient. However, in a scenario where the patient requires rights information or advice to enforce their rights against the health professional, the model does not resolve the tension derived from this conflict of interest. A Health Justice partnership, as they are currently designed, does not guarantee participation or commitment from health professionals, nor does it promise delivery of objective and adequate information and advice to patient-clients. Further thought would be required to identify means of addressing this shortcoming to adapt the Health Justice Partnership model to the particular needs of this context.

DRAFT RECOMMENDATION 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.

5. Strengthening Reporting, Auditing and Quality Improvement Measures

The provision of clear minimum standards for rights information is an important first step in strengthening these provisions of the HCCA, and together with efforts to improve training and education among health practitioners, as recommended in Chapter XI, should result in some

improvement in this area. However, given the systemic nature of the concerns raised and the challenges that families and individuals face in identifying where there has been a shortfall in rights information and in addressing such gaps, the LCO believes that some system wide attention to the issue is also necessary to ensure basic procedural rights.

As a further step to assist in regularizing and improving the quality of requirements related to capacity, consent and rights information under the HCCA, the LCO considered recommending a form of systemic oversight of the implementation of these provisions. For example, in its 2010 paper commissioned for the LCO's project on *The Law as It Affects Older Adults*, the Advocacy Centre for the Elderly (ACE) recommended the creation of a Health Care Commission, intended to address complaints by residents of long-term care homes about lack of knowledge of their rights and a lack of accessible mechanisms for enforcing those rights. The Health Care Commission, in the vision of ACE, would be similar in some ways to the Office of the Provincial Advocate for Children and Youth: it would be independent, and would carry out both individual and systemic advocacy.

However, the LCO has concluded that it is more efficient and potentially more effective to integrate monitoring and oversight related to legal capacity and consent into existing mechanisms related to health care and long-term care. These sectors are already highly fragmented, with multiple institutions and stakeholders providing education and training, oversight and quality control.

Health Quality Ontario

Under the *Excellent Care for All Act, 2010* the mission of Health Quality Ontario (HQO) is to advance priorities that include high quality health care; responsive, transparent and accountable health care organizations and executive teams; and an accessible, appropriate, effective, efficient, and patient-centred health care system.¹⁷⁶ HQO has a mandate to monitor and report to the people of Ontario on, among other matters, health system outcomes,¹⁷⁷ to support continuous quality improvements, to promote health care supported by the best available scientific evidence, and other matters that may be included in regulations. HQO undertakes a variety of activities pursuant to this mandate, including

- public and annual reporting both to the public and to the Ministry of Health and Long-term Care on the health status of Ontarians and the quality of health services;
- Quality improvement plans (QIPs), which “enable organizations to communicate their quality improvement goals and help them focus their efforts on key health system priorities”, and which are required to reflect the “voice of the customer”;¹⁷⁸

- production of theme reports on key cross-sector or sector specific issues and areas of improvement for health system stakeholders, such as a recent report on Experiencing Integrated Care;¹⁷⁹
- patient and public engagement strategies, such as the development of a primary care patient engagement survey to measure the patient experience;¹⁸⁰ and the creation of a Patient, Family and Public Advisors Council;¹⁸¹
- knowledge transfer initiatives; and
- creation of tools and resources to assist health providers in identifying and bridging gaps in quality of care and service delivery.¹⁸²

HQO also includes a new Patient Ombudsman function, which is not yet in force. The Patient Ombudsman can receive, investigate and facilitate the resolution of complaints made by patients and former patients of a health sector organization about their care and health care experience, and can make recommendations to these organizations following the conclusion of an investigation.¹⁸³

It is the LCO's view that the mandate and functions of HQO may enable it to take a helpful role in educating health care organizations and their staffs regarding assessments of capacity under the HCCA, including issues related to rights information, as well as in encouraging health care organizations to develop strategies to address gaps in these areas and monitoring the success of such strategies. It would be essential to the successful involvement of HQO in this area that it be able to:

- integrate a concept of quality that includes respect for and promotion of the autonomy of patients; and
- incorporate in any initiatives an understanding of the legal foundations of capacity and consent, and the associated rights of patients.

Long-Term Care Homes Act, 2007

As was discussed extensively in the LCO's *Final Report on the Framework for the Law as It Affects Older Adults*, persons living in long-term care have distinct and significant challenges in accessing legal rights, both by nature of the setting, which is in many ways removed from the broader community, and by virtue of the characteristics of long-term care residents, who are increasingly persons with very significant disabilities that may affect their abilities to understand and assert their rights. Rights protection mechanisms that may adequately address the needs of persons living in the broader community may be insufficient to provide meaningful assistance to this population. This issue was considered at length in a paper prepared for the LCO by the Advocacy Centre for the Elderly in 2010.¹⁸⁴ The long-term care home sector

incorporates a number of specific oversight, monitoring and complaints mechanisms intended to address, at least in part, the very significant challenges faced by residents of long-term care homes in protecting and enforcing their rights.

The *Long-Term Care Homes Act, 2007* includes a Bill of Rights that directly addresses many issues related to legal capacity, decision-making and consent, including rights to:

- have his or her participation in decision-making respected;
- participate fully in the development, implementation, review and revision of his or her plan of care, give or refuse consent to any treatment, care or services for which his or her consent is required by law and to be informed of the consequences of giving or refusing consent, and to participate fully in making any decision concerning any aspect of his or her care, including any decision concerning his or her admission, discharge or transfer to or from a long-term care home or a secure unit and to obtain an independent opinion with regard to any of those matters; and to
- manage his or her own financial affairs unless the resident lacks the legal capacity to do so.¹⁸⁵

Every licensee of a long-term care home must ensure that these rights of residents are fully respected and promoted. These rights are the subject of a deemed contract between the resident and the licensee.¹⁸⁶ Enforcement of these rights would therefore take the form of an action against the licensees for breach of contract. As the Advocacy Centre for the Elderly has pointed out, for most residents this is not a particularly practical means of enforcing the important protections set out in the Bill of Rights.¹⁸⁷ Compliance with the Bill of Rights may also be included in the inspections carried out under the *Long-Term Care Homes Act, 2007*, which empower inspectors to ensure compliance with the requirements of the Act.¹⁸⁸

With the advent of the *Long-Term Care Homes Act, 2007*, the long-term care sector has incorporated a number of new mechanisms for quality improvement, reporting and compliance, including:

- clear responsibilities for licensees of long-term care homes to provide initial and ongoing training to ensure that all the staff of the home “have the proper skills and qualifications to perform their duties”; the statute and regulations specify a number of areas of mandatory training, including “[a]ll Acts, regulations, policies of the Ministry ... that are relevant to the person’s responsibilities”;¹⁸⁹

- critical incident and mandatory reporting requirements on areas of key concern, including issues of abuse or neglect of a resident, or non-arm's length transactions with residents;
- surveys of residents and their families to be conducted at least once in every year, to measure their satisfaction with the home and the care, services, programs and goods provided at the home, with an obligation on the licensee to make a reasonable effort to act on the results of the survey and improve the quality of care;¹⁹⁰
- annual inspections of long-term care homes;¹⁹¹ and
- the creation of Residents' and Family Councils, with the power to advise residents on their rights and obligations; review certain documentation related to the home; mediate and attempt to resolve disputes between residents and the home; and report any concerns and recommendations to the Director.¹⁹²

The Ministry of Health and Long Term Care operates the ACTION line as a means for residents of long-term care homes to report concerns about the care and services that they receive, as well as concerns regarding home care. An operator assesses the urgency of the matter and where the matter relates to a long-term care home, may refer the information to a compliance advisor to complete an investigation.

The LTCHA clearly articulates the rights of residents of long-term care homes regarding the right to make their own decisions where possible, and for meaningful processes with respect to consent to treatment and care. The LCO believes that existing mechanisms for monitoring and quality improvement can and should be mobilized to strengthen the ability of legally capable residents to make decisions for themselves and for all residents to exercise their procedural rights related to capacity and consent.

Local Health Integration Networks

Another important potential avenue for accountability and oversight are the Local Health Integration Networks (LHINs). The 14 LHINs, established under the *Local Health System Integration Act, 2006* (LHSIA),¹⁹³ were created by the Ontario government to fund and coordinate health services in the province.¹⁹⁴ Their legislative mandate is to plan, integrate and fund health care services, which sometimes involves increasing, decreasing or discontinuing funding, or requiring that a service be delivered according to particular specifications.¹⁹⁵ LHINs report to the Ministry of Health and Long-Term Care (MOHLTC); they must also provide information as requested to the Ontario Health Quality Council.¹⁹⁶

The LHSIA indicates that the LHINs are expected to undertake efforts to improve the quality of health services, as well as the experience of patients and families who engage with the health care system. The purpose of the LHSIA references improving the health of Ontarians through “better access to high quality health services, coordinated health care in local health systems and across the province and effective and efficient management of the health system at the local level by local health integration networks”.¹⁹⁷ The MOHLTC provincial strategic plan, *Patients First: Ontario’s Action Plan* commits to “putting people and patients first by improving their health care experience and health outcomes”, including through supporting Ontarians to take charge of their health and providing the education, information and transparency Ontarians need to make the right choices about their health.¹⁹⁸

LHINs have the power to audit service providers within their network. They may also require them to provide reports, plans or financial information necessary for undertaking such a review.¹⁹⁹ Specifically, section 22 of the LHSIA enables a LHIN to require any health service provider to whom the network provides or proposes to provide funding, or any other prescribed entity or person to provide to it plans, reports, financial statements or other information. LHINs may disclose the information gathered in this manner to the Minister or to the Ontario Health Quality Council.

LHINs also have a responsibility to evaluate, monitor and report on and be accountable to the Minister for the performance of the local health system and its health services.

The various LHINs have undertaken a range of initiatives to meet these responsibilities. For example:

- The Central LHIN’s Integrated Health Service Plan 2013-16 lists “person-centeredness” as one of the four quality-based system directions for guiding LHIN activities and investments,²⁰⁰ citing the phrase “*nothing about me, without me*”.²⁰¹ The Central LHIN has developed a number of tools to reflect patient priorities and adopt more robust mechanisms for quality improvement and accountability, including a *Patient Experience Framework* which is designed to incorporate understanding and improving the patient experience as a strategic objective by engaging patients, families and caregivers to assess quality from the patient’s perspective. The Framework will monitor the patient experience with a consumer scorecard populated with indicators selected by patients, families and caregivers. Proposed scorecard indicators as of March 2014 include, among others, respect for the patients’ values, preferences and expressed needs; information, communication and education, and the involvement of family and friends.²⁰² The

Framework will also develop “always events”, which are described as “aspects of the patient experience that health care providers should always get right”.²⁰³

- The Toronto Central LHIN has developed a number of initiatives related to quality improvement, including a Quality Table which brings together a wide range of stakeholders to develop comprehensive measures for quality, System Quality Indicators, a Patient Experience Survey and a Standard Discharge Summary.
- The South West LHIN has created a Quality Improvement Enabling Framework to guide quality improvement initiatives and outreach efforts. Health service providers use this framework to develop and align quality improvement initiatives with the LHIN’s overarching goals.

The vital role that LHINs play in setting policy goals, service standards and quality indicators makes them well-placed to promote, support and monitor improvements in the quality of assessments of capacity under the HCCA and the provision of rights information. Existing commitments to improving the patient experience, informing people and patients, and improving quality of care are aligned with this objective.

DRAFT RECOMMENDATION 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.
- 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.

DRAFT RECOMMENDATION 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 capacities 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.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

G. Summary

Because legal capacity is the central organizing concept of this area of the law, how we assess legal capacity is foundational to the ability of the law to achieve its goals. And because legal capacity, decision-making and guardianship law addresses issues of fundamental rights, the success of our approaches to assessing legal capacity has a profound effect on the rights of those affected.

Ontario has multiple interconnected systems for assessing legal capacity. Ontario's nuanced approach to the concept of legal capacity, described in Chapter IV, is mirrored in its complicated systems for assessment. These multiple systems attempt to reflect and address the many environments in which assessments are carried out and the varied purposes for assessment. They are, however, confusing and difficult to navigate. For this reason, the LCO has recommended clarifying standards and basic procedural rights, to better guide both those who seek or provide assessments and those who are subject to them.

As noted above, the appropriate application of assessments is connected to access to basic rights; therefore, it is important that individuals be able to access assessments as necessary and to be provided with adequate and appropriate procedural rights. The LCO is concerned by widespread reports of shortfalls in procedural rights for persons found legally incapable under the HCCA. Given the complexity of the system and current restraints, the LCO has identified a number of immediate steps which can be employed to strengthen the current rights information regime, as well as emphasized the importance, over the longer term, of identifying how the most vulnerable individuals can have access to advice about their rights that is independent and expert.

This Chapter did not address in-depth concerns related to the mechanisms available to challenge the results of assessments of capacity, a topic which is dealt with in Chapter VIII, dealing with rights enforcement and dispute resolution. Issues of access to high quality, consistent and appropriate assessments of capacity also underlie issues related to external appointment processes (particularly in the case of statutory guardianship), which is addressed in Chapter IX, as well as some issues related to personal appointments, which are the subject of Chapter VII.

VI. SUBSTITUTE DECISION-MAKING AND ALTERNATIVES: STRENGTHENING DECISION-MAKING PRACTICES AND PROVIDING OPTIONS FOR DIVERSE NEEDS

A. Introduction and Background

Chapter IV touched on the issue of alternatives to substitute decision-making as part of its discussion of challenges to current approaches to the concept of legal capacity. Because concepts of legal capacity are so closely tied to particular approaches to decision-making, while this Chapter deals directly with the issue of alternatives to substitute decision-making, as well as substitute decision-making itself, it will refer back to some of the discussions and conclusions in Chapter IV.

Ontario, like other common law jurisdictions, employs an approach to legal capacity and decision-making based on substitute decision-making. Under the *Substitute Decisions Act, 1992* (SDA) and *Health Care Consent Act, 1996* (HCCA), where a person does not meet the threshold for legal capacity and a decision is required, another person – a substitute decision-maker (SDM) – will be in some way appointed to make that decision. In recent years, as the social model of disability has been more widely accepted and human rights approaches have continued to grow in influence both internationally and domestically, voices have urged a re-examination of the substitute decision-making model and the development of alternatives. The term “supported decision-making” is often used to refer to these alternatives. There has also been some exploration of the concept of “co-decision-making”. The creation of the *Convention on the Rights of Persons with Disabilities* (CRPD), which addresses the issue in Article 12 and was discussed in Chapter IV, has added urgency to the discussion.

This is one of the most controversial issues in this area of the law, as well as one of the most difficult, raising profound conceptual and ethical questions, as well as considerable practical challenges. It is not possible in this limited space to thoroughly analyze all of the issues associated with models of decision-making. The literature is voluminous, and different legal systems have adopted a range of approaches. The *Discussion Paper* provides an overview in Part Three, Ch. I. This Chapter is focussed on the question of reforms to Ontario laws. It adopts as its basis the analytical framework suggested by the LCO *Framework* principles, and takes into account Ontario’s legal history and current context, the diversity of needs and circumstances, and the aspirations and concerns voiced through the LCO consultations. It sets out the key issues, including the debate regarding substitute and supported decision-making, identifies

approaches that should form the basis of law reform related to these issues, and finally makes a number of draft recommendations for changes to the law.

It is helpful to keep in mind, when considering laws related to legal capacity and decision-making, two aspects of these laws: the realities of making decisions with or on behalf of someone else; and the determination of who is legally liable for any decisions that are reached.

Decision-making practices include all those values and daily practices with which those who surround a person with impaired decision-making abilities approach the practical realities of reaching particular decisions. This might include, for example, processes such as consulting with the person affected or others who have a close relationship with the person. It might also include the criteria or considerations which are brought to bear in the process, such as what the affected individual's goals are or have been, what might produce the best quality of life for the affected individual, and so on. Decision-making practices take place, by and large, in the private sphere and are inherently relatively informal. By their nature, they are difficult to monitor and to regulate, tied up as they frequently are in family and social histories and dynamics. Whether these informal interactions are on the whole positive and supportive of the achievement of autonomy, inclusion, dignity and security for the individual, or whether they are negative or outright abusive, in most cases only becomes visible when the family unit interacts with the public realm. In some cases, such interactions are quite rare.

Legal accountability frameworks come into play in those circumstances where decisions reached through the decision-making practices referenced above must be put into effect in the public sphere, for example by entering into a contract or reaching an agreement regarding services. As part of its broader role in regulating such matters as the validity of contracts, professional standards and institutional responsibilities, the law also addresses how contracts may be entered into and consent provided where an individual lacks legal capacity, including who may be responsible for entering into agreements or providing consent to third parties, and who will be held accountable and liable for these decisions. In the more private realm of decision-making practices, considerations of autonomy, security and dignity are pre-eminent, although even decisions in this realm might affect others (such as other family members) and this may also have to be considered. In the more public realm of decision-making where decisions may have significant practical and legal consequences, not only for the individual but for third parties, considerations of clarity, certainty, and appropriate apportionment of accountability and liability must also be given significant weight.

B. Current Law in Ontario

It is worthwhile to remember that in most situations where individuals have impaired decision-making abilities that may amount to legal incapacity should an assessment be conducted, the law is not invoked. In some cases, individuals are not in situations that require significant decisions involving interactions with large institutions or professionals whose accountability and regulatory environments require legal clarity and certainty. In other cases, institutions informally accommodate families. By their nature, informal arrangements are flexible and adaptable to the particular needs of an individual. In most cases, these types of informal arrangements work well, although they are accompanied by a certain degree of risk.

Where the law is invoked, Ontario has a modern and carefully thought-out substitute decision-making system. The term “substitute decision-making” is used to describe a range of legal systems and approaches: to treat these various systems as interchangeable and subject to a uniform critique tends to lead to misunderstandings. It is helpful to keep in mind that substitute decision-making systems have evolved over time, in response to changing understandings and circumstances. However, there are some core elements, which are briefly listed below.

1. **Intervention is only permitted where an individual has been found to lack legal capacity.** Persons who have legal capacity have the right to make decisions independently, regardless of the wisdom of those decisions.
2. **Where an individual is found to lack legal capacity and a decision is required, a substitute decision-maker will be appointed to make the decision(s) on behalf of the individual.** The substitute decision-maker (SDM) is thereafter held responsible for his or her actions in this role, and may be liable for damages for breach of duties, although it should be noted that the exact nature of the duties and the forms and level of accountability vary widely. The SDM is to act on the individual’s behalf and for that person’s benefit, although the specifics of how this is to be done again vary widely.
3. **Substitute decision-makers may be appointed by the individual or externally.** SDMs may be appointed in a variety of ways. They may be appointed by the individual him or herself, through a planning document, such as a power of attorney. They may be appointed externally (as with a guardianship). They may also be appointed through a prioritized list (as with Ontario’s system for treatment decisions). Ontario includes appointments through all three of these mechanisms.
4. **There is a preference for close relationships in the appointment of substitute decision-makers.** While most systems make some provision for appointment of institutions or professionals where no family or friends are available to take on this role, there is a preference for close relationships as the foundation of the role.

Ontario's approach to substitute decision-making includes the following key elements, among others:

Cognitive capacity threshold: As is outlined in Chapter IV, the threshold for legal capacity is based on the individual's ability to "understand and appreciate" the information relevant to a particular decision. While legal capacity may evolve or fluctuate, and while it is specific to particular decisions or types of decisions (that is, it is not "plenary"), it is an all-or-nothing quality. A person either has legal capacity to make a particular decision or does not. Where an individual does not have legal capacity to make a particular decision or type of decision, a surrogate (the "substitute decision-maker" or SDM) will make the decision on behalf of that person, taking with it related responsibilities.

Opportunities for individuals to choose or have input in the selection of a substitute: Ontario's legislation aims to make it relatively simple and inexpensive for individuals who are legally capable to select their own SDM for property, personal care or treatment decisions through the creation of powers of attorney (POA). Ontario places relatively few restrictions on the content of POAs or requirements for their valid creation. As well, when guardians are identified, either through the statutory guardianship process's replacement provisions or through court-appointments, the Public Guardian and Trustee (PGT) and the court respectively are required to consider the wishes of the person who is being placed under guardianship.

Focus on trusting relationships as the foundation of substitute decision-making: Ontario's statutory scheme includes a number of mechanisms intended to give priority in identifying SDMs to existing relationships presumed to be based on trust and intimacy. For example, the hierarchical list of SDMs in the HCCA gives priority, where an SDM does not already exist, to family members. Similarly, the replacement provisions for guardianships under the SDA focus on family members.

Duties of SDMs to promote participation and consider wishes and preferences: For the most part, Ontario takes what some have termed a "substituted judgment" approach to substitute decision-making. In this approach, the SDM attempts to place her or himself in the individual's shoes, applying the individual's values and preferences to the degree that they are known and understood, and to make the decision that the individual would make if able to understand and apply all of the relevant information. Under the SDA, both attorneys under a POA and guardians are directed to promote the participation in decision-making of the person, as well as to consult with others who have supportive relationships with the individual. For personal care decisions under the SDA and for all decisions under the HCCA, SDMs must consider the "prior capable

wishes” of the individual, the values and beliefs held while the person was capable, and current wishes where they can be ascertained.

Domain and decision-specific approaches: SDMs are appointed for particular decisions or types of decisions. A person may have legal capacity to make some decisions and not others. Under the SDA, SDMs may be appointed for either property or personal care. Further, personal care guardians may be appointed for only some specific elements of personal care, which includes health care, nutrition, shelter, clothing, hygiene or safety. Grantors of POAs may of course tailor the scope of authority of the attorney they appoint. Under the HCCA, capacity is assessed in relation to the ability to make a particular decision only, and the scope of authority of the person appointed is restricted to that particular area.

Procedural protections for persons who may lack legal capacity: While protections may not be complete or ideal, Ontario’s statutory scheme pays considerable attention to procedural protections for persons who may lack capacity, including mechanisms for providing information to the individual and for challenging decisions about legal capacity.

C. Areas of Concern

It was evident throughout the LCO’s research and consultations that there are many shortfalls in Ontario’s legal capacity and decision-making laws arising from implementation issues. Provisions intended to protect the ability of individuals to make choices for themselves to the degree possible may not be fully or appropriately put into practice for a variety of reasons, including lack of awareness or misunderstanding of the legislation, gaps in supports and processes for ensuring access to the law, and shortfalls in remedies and enforcement. These broader implementation issues are addressed throughout this *Interim Report*. This section focuses on issues specific to the role of SDMs.

1. The Relationship between the Law and Decision-making Practices

It was notable during the LCO’s public consultations with family members and individuals directly affected that while some had clearly undertaken considerable research related to their legal roles, the vast majority of participants who were either receiving or providing assistance in the form of substitute decision-making had only a very minimal knowledge of Ontario’s thorough legislative requirements regarding decision-making practices. Participants were not always clear even as to the difference between a will and a power of attorney document, and the focus group facilitator was generally required to provide an explanation of the difference between a guardianship and a power of attorney, as well as the basics of the legislative

framework. Very few SDMs were aware of the duty to keep records or accounts or any of the other specific requirements of the role. Practically speaking, decision-making practices were rooted in family roles and history, the nature of the relationship, and a personal sense of the ethical obligations involved. That is, the law does not immediately present itself to families as the primary means of understanding what it is they are undertaking: the law was mainly understood as a potential tool for carrying out family roles and duties. In practice, most families have very little interaction with any formal legal structure outside of a few major decisions (such as a decision to open a Registered Disability Savings Plan or to sell a house), or in the case of a crisis.

Many service providers and professionals noted this disjunction during the consultations: family members often have a very weak understanding of their obligations as SDMs under the law, and as a result, the law is very imperfectly realized in practice.

It is difficult for the law to effectively reach into the essentially private realm of decision-making practices. Often, inappropriate decision-making practices come to light only when they result in abuse that comes to the attention of third parties or service providers. This issue can never be wholly addressed without a degree of oversight and monitoring that would be burdensome for the vast majority of families and friends who are carrying out good decision-making practices to the best of their ability. However, there are some practical ways in which the problem of mistreatment or abusive decision-making practices can be reduced: these are addressed in Chapter VII.

Many of the families with whom the LCO interacted indicated that as SDMs they employed decision-making practices that would be considered consistent with “supported decision-making” (as is described later in this Chapter), in that they were attempting to support their loved one’s ability to make decisions about their own lives, and to find ways to put into effect that individual’s values and preferences and to achieve his or her life goals.²⁰⁴ This is not to suggest that the LCO’s consultations provide a representative sample of SDMs or that families never employ paternalistic and restrictive approaches to their role as SDMs – based on the comments of service providers and professionals, the latter is not at all uncommon. However, it does highlight that it is not uncommon for families to see the promotion of their loved one’s autonomy as an important part of their role, regardless of the legislative framework in place.

During the LCO’s consultations, the LCO repeatedly heard that families struggle with the challenges of implementing good decision-making practices. There is very little information or support available to family members or other SDMs to assist them with the practical, emotional and ethical aspects of this important role. Setting aside for the moment issues of outright abuse

of substitute decision-making, misunderstandings of the requirements of the law, inadequacies in the practical skills necessary to carry out the roles of SDMs, and a lack of supports for non-professional SDMs play a significant role in shortfalls in decision-making practices in Ontario.

It is the LCO's view that if one of the ultimate goals of this area of the law is to support the autonomy, dignity and participation of individuals who lack or may lack legal capacity, one of the most effective means of doing so is to promote better decision-making practices on the ground.

2. The Concepts of Supported Decision-making and Co-Decision-making

Beyond strengthening decision-making practices for SDMs, there are also more thorough-going proposals for reform of Ontario's approach to decision-making for persons with impaired decision-making abilities. Most prominently, it has been proposed that Ontario's legal capacity and decision-making laws would be better able to respect diversity and autonomy if the current approach were to be either replaced or enhanced by formal recognition of what is termed a "supported decision-making" approach. The critiques of Ontario's current approach and the concept of "supported decision-making" were discussed at some length in the *Discussion Paper* at Part Three, Ch I, along with "co-decision-making".

There is a multiplicity of meanings given to the term "supported decision-making", even among its proponents. It is the LCO's observation that there is a very wide and often conflicting range of thought as to what does and does not constitute "supported decision-making". A practice described as supported decision-making by one person may be firmly placed outside the bounds of the concept by another. In part, this is because there has to this point been relatively little practical legal application of "supported decision-making": to some degree, it is a concept for which practical forms of implementation remain under development.

The concept of supported decision-making has its basis in the social model of disability, and has as its aim enabling and empowering individuals with disabilities that may affect their ability to receive, assess and retain information to exercise control over decisions that affect them. The goal of supported decision-making is to avoid loss of legal capacity through the provision of supports by persons with whom they have relationships of trust and intimacy. It is centred on the insight that for almost all of us, decision-making is a consultative endeavour such that we rely on supports from trusted others in making decisions of various kinds, and seeks to extend this approach to legal decision-making arrangements. The LCO's *Discussion Paper* identified four widely (though certainly not universally) agreed-upon elements of "supported decision-making" approaches:

1. **Supported decision-making does not require a finding of lack of capacity.** The focus of supported decision-making is not on the presence or lack of particular mental attributes, but on the supports and accommodations that can be provided to assist individuals in exercising control over decisions that affect them.
2. **In supported decision-making arrangements, legal responsibility for the decision remains with the supported individual.** The supported individuals retain control over their decisions, and those decisions are theirs, and not their supporters’.
3. **Supported decision-making arrangements are based on consent by the individual who may require assistance in making decisions and those who will assist him or her.** These arrangements must be entered into freely in order to function.
4. **Supported decision-making is based on relationships of trust and intimacy.** For supported decision-making to function as envisioned, any supporter must have significant personal knowledge of the individual, and must have the trust of the individual, to assist her or him in understanding and putting into effect her or his values and preferences.

“Supported decision-making” may be understood as a way of articulating or promoting two goals for laws and practices related to decision-making and persons with impairments related to memory, communication or cognition. The first is the avoidance of legal structures that stigmatize or separate from the mainstream individuals who have difficulty in making decisions independently. The concept of “legal capacity” as a threshold for decision-making status, together with the use of “substitute decision-making” for individuals who do not meet the threshold, is seen by some as detrimental to the equality rights of the individuals affected, as it confines them to a legal status that removes rights that are enjoyed by others. The second goal is the implementation of decision-making practices that build on the abilities of individuals with impairments that affect decision-making; recognize these as individuals with values, goals and preferences that are to be respected; and promote their inclusion and participation in the broader society. Ideally, these two goals connect and support each other, so that legal structures promote and protect positive decision-making practices. In theory at least, the greater control afforded to individuals by retention of their legal status should promote positive decision-making practices.

Debates regarding “supported decision-making” tend to revolve around the provisions of Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD). The provisions of Article 12, the *General Comment* on Article 12 and Canada’s *Declaration and Reservation* related to Article 12 were canvassed at length in Chapter IV. For the purposes of this Chapter, Article 12 requires in part that States Parties:

- take appropriate measures to provide access for persons with disabilities to the supports they may require in exercising their legal capacity;
- ensure that all measures related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. These safeguards must ensure that measures related to the exercise of legal capacity respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person's circumstances; apply for the shortest time possible; and are subject to regular review by a competent, independent and impartial authority or judicial body; and
- take all appropriate and effective measures, subject to the provisions of the Article, to ensure the equal rights of persons with disabilities in a range of areas, including owning or inheriting property; controlling their own financial affairs; having equal access to bank loans, mortgages and other forms of financial credit; and ensuring that persons with disabilities are not arbitrarily deprived of their property.

As discussed in Chapter IV, it has been argued, most notably in the *General Comment* on Article 12, that Article 12 as a whole, including its provisions related to the concept and exercise of legal capacity, requires the abolition of substitute decision-making, to be replaced entirely by “supported decision-making”. Canada’s *Declaration and Reservation* indicates a quite different understanding of the responsibilities associated with compliance with Article 12. It declares Canada’s understanding that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports “in appropriate circumstances and in accordance with the law”,²⁰⁵ and reserves the right for Canada “to continue their use in appropriate circumstances and subject to appropriate and effective safeguards”.²⁰⁶

Chapter IV considered the approach proposed in the *General Comment*, in which all individuals retain at all times legal capacity to make decisions. As noted above, one of the consequences of such an approach is that substitute decision-making is never permissible: rather, individuals with impaired decision-making abilities must be able to freely seek and receive supports to make decisions for themselves. The LCO has not adopted this approach to legal capacity. Rather, the LCO has recommended the retention of Ontario’s current functional and cognitive approach, together with an emphasis on an accommodation approach to legal capacity, such that if an individual can meet the test for legal capacity with appropriate accommodations, that person should be considered to have legal capacity. This has implications for the LCO’s approach to the concept of supported decision-making, in that it treats supported decision-making as a less restrictive alternative to substitute decision-making, rather than a complete replacement for substitute decision-making.

The concept of co-decision-making was also canvassed in the *Discussion Paper*. Co-decision-making, sometimes referred to as joint or shared decision-making, is another alternative to substitute decision-making. In co-decision-making, joint decision-making between the adult and the appointed co-decision-maker is mandated. Co-decision-making is therefore a more restrictive arrangement than supported decision-making, because the individual must make decisions about identified matters jointly, and a decision made by the person alone is not legally valid. Co-decision-making is therefore a significant departure from both the substitute and supported decision-making models, both of which see the capacity to make a decision as ultimately resting with a single individual – either the substitute decision-maker where the individual lacks capacity (under a substitute model) or with the individual her or himself (in the supported model) – even though the decision-making process may include consultation or assistance.

Co-decision-making has had much more limited implementation than supported decision-making. Both Alberta and Saskatchewan make provision for co-decision-making through judicial appointment.²⁰⁷

Co-decision-making received very little attention during the LCO's consultations. It is considerably more complicated both to understand and to put into practice than supported decision-making, and so has less appeal to third-parties, and at the same time places greater restrictions on autonomy so that it is less attractive to proponents of supported decision-making. However, it is also seen as less amenable to abuse than supported decision-making, and so raises fewer concerns, in some ways, than supported decision-making.²⁰⁸

Given the challenges of implementation and the low levels of interest, the LCO has not further explored the inclusion of formal co-decision-making mechanisms in Ontario law. However, the LCO recognizes that there are potential benefits to shared approaches to decision-making, and concepts underlying co-decision-making have influenced the LCO's thinking about network decision-making and some aspects of the draft recommendations regarding supported decision-making.

3. Comments on Supported Decision-making during the Public Consultation

As was extensively canvassed in the *Discussion Paper*, the means by and extent to which supported decision-making should be put into practice remain the topic of considerable debate.

The LCO raised issues related to approaches to decision-making in all of its focus groups, and specifically raised the topic of supported decision-making in a significant majority of them. As

well, considerable time was devoted to the topic at the LCO's Consultation Forum held on October 30, 2014. Of the 16 written submissions received by the LCO, three identified this as an area of significant focus and concern.

The vast majority of those participating in the LCO's consultations were not aware of the concept of supported decision-making. Most family members and individuals directly affected had only a shadowy knowledge of the current law, and very little knowledge of the broader critiques or law reform efforts surrounding it. Their focus was for the most part on what in their experience had been helpful or unhelpful, and what the law should, in general, assist them to do. Most professionals and service providers had not encountered the concept before, or had only encountered it in the LCO's documents and so were not prepared to discuss the topic in any detailed fashion. However, those who were previously acquainted with the concept were generally passionate on the topic, whether in favour or not. Because the concept of supported decision-making has deep roots in the community living movement and in the experiences of individuals with intellectual disabilities and their families, persons connected with the intellectual disability community were by far the most likely to be conversant with the concept of supported decision-making.

Those who had some familiarity with the concept used the term in a variety of ways. Some professionals, individuals and advocates have given deep thought to the concept and have a clear, consistent and philosophically grounded approach to the term. Others may use the term as a general way of talking about decision-making practices or legal frameworks that are more flexible or informal, or avoid a finding of incapacity. Some may use the term as a catch-all for any alternative to guardianship. The LCO has heard the term used as including powers of attorney, for example. This imprecision makes it difficult to take a clear message from some of the focus group discussions related to supported decision-making.

Both the arguments raised in favour of supported decision-making and those expressing opposition to the implementation of such a system were set out in the *Discussion Paper*. The core arguments in favour of supported decision-making have their roots in concern for advancing the autonomy and equality of persons with disabilities that affect their decision-making abilities. The key concerns raised centred on the potential for abuse of such a system by family members and third parties, the question of its suitability for all groups affected by this area of the law, and on what was perceived to be the lack of clarity surrounding responsibility and liability inherent in such a system. These concerns are addressed at some length later in this Chapter. It should be noted that consultees were not responding to the approach set out in the *General Comment* or specific proposals put forward to the LCO, but to the general concept, most particularly as it has been implemented in other Canadian jurisdictions.

In its submission, ARCH Disability Law Centre advocates a move towards supported decision-making, to bring Ontario's system into closer compliance with the *General Comment's* interpretation of Article 12. The submission proposes research on best practices for supported decision-making, strengthened rights advice provisions for persons found to lack legal capacity, requiring periodic capacity assessments for those found incapable and increasing time-limited decision-making arrangements, educating decision-makers and requiring them to make regular reports, establishing a monitoring and capacity office, and strengthening mechanisms for dispute resolution.

The Coalition on Alternatives to Guardianship proposes a comprehensive reform of Ontario's decision-making laws, towards a system which is centred on a form of supported decision-making and allows for continuation of substitute decision-making only in the form of powers of attorney. This is an extremely complex proposal, which can only be briefly summarized here. The Coalition advocates that the purpose of a new legislative scheme be the promotion of a right to legal capacity, to provide safeguards where it cannot be exercised independently, and to ensure access to supported decision-making. The proposal provides for three ways to exercise legal capacity: legally independently (which may require the provision of supports and accommodations), through a power of attorney as provided for in the SDA, and through statutory supported decision-making arrangements. Supported decision-making arrangements could be created by personal appointment or, where this is not possible, by external appointment, something which not all proponents of support decision-making envision. At all points where incapacity for legal independence may be triggered, an "Alternative Course of Action" assessment would be required. A comprehensive system of institutional safeguards would be established, including an Office of the Provincial Advocate for the Right to Legal Capacity to provide both systemic and individual advocacy, a legislated role for monitors for supported decision-making arrangements, an expanded tribunal to adjudicate on these matters, a broad complaint and investigation function, and a registry for supported decision-making arrangements.

The Advocacy Centre for the Elderly, in its submission, expressed grave concerns about the potential of supported decision-making arrangements for abuse. In this, it was supported by the submission of the Mental Health Legal Committee.

Many clinical and social service professionals were interested by the concept of supported decision-making, hoping that some implementation of the concept could add to their ability to provide nuanced responses to some complex situations, particularly for younger persons whose skills are developing, or persons whose decision-making abilities fall within the "grey area" on

the borders of legal capacity. However, as is discussed further later in this Chapter, they tended to feel that the concept was more easily applicable to some populations than others.

The LCO heard from a number of family members of persons with intellectual or developmental disabilities who were proponents of supported decision-making. As is to be expected, for the most part, these family members were chiefly interested in the development of options that they believe would be better suited to their loved one's situation than the current guardianship system. They were generally reluctant to pronounce definitively on what other situations or families might require. That is, their concern was not so much to see a fundamental restructuring of the law (as for example, along the lines of the *General Comment*, or other comprehensive program of reform) but to ensure that there was room within the system to meet their own needs.

Family members, for the most part, were looking for an approach to decision-making assistance that would be relatively informal (so as to maintain accessibility), flexible and non-stigmatizing. Parents of adult children with intellectual or developmental disabilities noted that they had put considerable effort into focussing on their children's abilities and potential: a declaration of incapacity was felt to run counter to the entire philosophy with which they had raised and supported their now adult children. Further, the complicated and costly process for guardianship was seen to be beyond the emotional, practical and financial resources of many families. However, there was also considerable discussion about risks of informal systems. Family members emphasized the vulnerability of their loved ones to abuse, and many openly worried about what would happen if their loved one survived them: the kind of informality that would make it easiest for them to support their loved one might not be appropriate in other circumstances. Issues of abuse are dealt with later in this *Interim Report*; however, these issues are also relevant to the consideration of approaches to decision-making.

The greatest concerns regarding current approaches to decision-making were voiced regarding guardianship (whether instigated under the SDA or MHA), as opposed to decision-making through powers of attorney (POA) or by proxies under the HCCA. POAs allow individuals to select the person(s) providing decision-making assistance and are amenable to customization to individual circumstances. They do not necessarily entail a formal declaration of incapacity (although they may) and as personal documents are seen as less marginalizing than the formal legal status of guardianship. HCCA decision-making arrangements are similarly seen as flexible and relatively non-stigmatizing. Because guardianship involves a formal declaration of incapacity, and is often time-consuming and costly to enter or exit, it is seen as having very "weighty" status. Family members emphasized to the LCO that, by and large, they did not see this as a practical or appropriate option the law provides for their loved ones. While the

number of Ontarians under guardianship is relatively small,²⁰⁹ guardianship it is often the only formal option for those persons with intellectual or developmental disabilities who cannot independently make major decisions: unlike persons who develop disabilities affecting decision-making abilities later in life or whose disability is episodic, they may never at any point in their lives be able to meet the test for legal capacity required for them to appoint a POA for property (if they have any) or for personal care.

As is to be expected, consultation participants who were directly affected by the law had a range of views about how decisions regarding their lives should be made, the appropriate role for loved ones, and the type of assistance that was helpful and appropriate. While some felt that unwanted “help” was foisted on them, others indicated that they knew that they were unable to make certain types of decisions or were at some times unable to make decisions, and that they were comfortable relying on their loved ones to make those decisions for them.

It was noted that supported decision-making is a more realistic option for some than for others, whether because of the nature and extent of a particular individual’s needs with respect to decision-making, or because of their social contexts. Not everyone has family members or friends in their lives who could potentially play this role: some are socially isolated, others live at a geographical distance from those who most love and understand them, and for some, their significant others are frail, vulnerable or themselves in need of supports. The latter scenario is not uncommon for older persons, whose social networks are aging along with them. Even where relationships exist that could form the basis of supported decision-making, there can be no guarantee of permanence. This is also true for substitute decision-making: the added difficulty lies in the deep reliance of supported decision-making approaches on these relationships of trust and intimacy. Where these relationships disappear, so will the foundations for supported decision-making for a particular individual.

Issues related to decision-making practices and legal accountability frameworks are often discussed as a binary debate regarding the relative merits of “substitute” and “supported” decision-making. In the LCO’s view, this approach can oversimplify the issues at stake, as it tends to elide the nuances of decision-making processes and the broader social context, as well as the diversity of needs and available supports. In considering proposals for reform, the LCO has focussed less on whether or not a particular practice constitutes “supported” or “substitute” decision-making, or on whether one of these approaches as a whole is categorically superior to the other, and more on how in Ontario’s context, current laws and practices relating to decision-making practices and legal accountability can be reformed to better support the achievement of the *Framework* principles for the wide range of individuals who fall within the scope of Ontario’s legal capacity, decision-making and guardianship laws. In

the view of the LCO, a binary approach towards approaches to decision-making is not likely to serve well the diversity of needs within Ontario's population.

4. Concerns Related to Abuse of Supported Decision-making Arrangements

Significant concerns were raised regarding the potential for abuse of supported decision-making arrangements. Because supported decision-making systems in their purest form generally place no limit on the right of the individual to make decisions that are unwise, risky or result in negative consequences, it is more difficult to hold supporters to objective standards and therefore may be more difficult to hold supporters to account for misusing their role.

I don't want to be the fly in the ointment, but I also see the other side a whole lot, where we make assumptions that families should be supportive more... We don't have difficulty, at least in our shop, if someone says, I want Sally to sit beside me. You know, we honour that ... but what we do see is an awful lot of families driving the train, and really, the patient... so, while it's an attractive idea, I really think the devil's in the details.... So, to me it isn't that the legislation needed to change so much, it's more that people need to understand better what their role is as decision-makers for others.

Focus Group, Joint Centre for Bio-ethics, October 1, 2014

Supporters can be held responsible for their own behaviour in the decision-making process, both in relation to the individual and to third parties: in both Alberta and the Yukon, laws related to supported decision-making arrangements explicitly address issues of misrepresentation, undue influence or fraud on the part of supporters that might affect the individual by, for example, diminishing the person's assets. In both jurisdictions, decisions may not be recognized as belonging to the individual where these were at play.²¹⁰ However, it may be difficult to obtain evidence of misrepresentation or undue influence on the part of a supporter. As noted above, decision-making practices are for the most part essentially private and informal, and not the subject of documentation. Where close personal relationships are involved, there are likely to be tangled webs of power and interdependence: it may be quite difficult, both practically and psychologically, to disentangle the interests and motives of "supporters" from those of the individual they are intended to support. Some persons who are unable to make decisions independently may have considerable difficulty identifying the motives of those who are supporting them, communicating what the decision-making process was like from their perspective, or reliably remembering what that process was. In such circumstances, it may be very difficult to demonstrate that misrepresentation or undue influence were at work, except in the most egregious of cases. As the Advocacy Centre for the Elderly (ACE) has commented,

The difficulty with this [supported decision-making] arrangement is that it creates a risk of undue influence by a legally designated support person. While this risk also exists in more traditional arrangements involving attorneys and guardians for property, we are concerned that actual abuse by a support person will be more difficult to detect as the true identity of the decision-maker, and the factors influencing each decision, may become opaque.²¹¹

The extent of the risk of abuse depends in part on the approach one takes to supported decision-making. If one sees supported decision-making as an approach appropriate only for individuals who are able to make use of assistance to themselves assess issues and make choices, the risk may not be substantially more than is already undertaken by persons who create powers of attorney. However, in an approach where all individuals are “supported” and legal capacity is retained even by those individuals with the most severe disabilities, the risks are significantly greater. This is particularly so where only one or two people can claim to be able to interpret the wishes of the individual, and where the individual effectively has no ability to independently signal her or his unhappiness or to seek help.

5. Concerns Regarding Clarity and Accountability

Service providers and third parties raised concerns about the inherent lack of clarity in supported decision-making arrangements. In discussions with financial service providers, interviewees often expressed both empathy for the challenges faced by families of persons with disabilities that impair their decision-making abilities and concern that proposed supported decision-making arrangements would place an unreasonable burden on their institutions. As some representatives of financial institutions told the LCO, it is essential that third parties are able to receive instructions from one person who has binding authority: there cannot be duelling authorities.

As an illustration of the difficulties, during interviews carried out for this project, some financial institutions operating Registered Disability Savings Plan (RDSP) accounts told the LCO of family members who wished an RDSP account to be opened in their loved one’s name, but who also wished the financial institution to hide the existence of the account from the account holder, or to refuse to release assets if or when the account holder requested. That is, the financial institution was being asked both to provide individuals with impaired decision-making abilities with legal status as the holder of the account, and to deny these individuals the basic responsibilities of account holders because family members believed that the individuals were unable to exercise those responsibilities even with their support. These kinds of situations put financial service providers into extremely difficult positions.

The Coalition on Alternatives to Guardianship has recommended, in response to such concerns, that legislation provide for protection of third parties who enter into agreements with individuals in formal supported decision-making arrangements, to the extent that the third parties abide by the principles of supported decision-making, and respect and accommodate the duties of decision-making supporters. Third parties would be entitled to request and receive a notarial or original copy of a decision-making agreement on which the individual was relying, and would themselves be entitled to rely on the exercise of that arrangement as evidence of a valid decision.²¹²

As the LCO understands this proposal, the third party would not be required to “look behind” the supported decision-making agreement. So long as there were no clear signs of abuse, the third party would be entitled to rely on the agreement and hold the individual responsible. It would be for the individual to seek redress from the supporter should there be duress or undue influence. The LCO is concerned that such an approach may leave many victims of financial abuse with little practical remedy. Further, while it might protect the third party from liability, the third party might still be unable to enforce the contract, as it might be found to be unconscionable. That is, to truly address the concerns about supported decision-making raised by third parties could require a thorough reconsideration of some of the basic principles of the law of contract.

6. Responding to Diverse Needs

The decision-making abilities of individuals may be impaired for a variety of reasons and in a variety of ways and degrees. Some individuals whose decision-making abilities are affected by temporary or more permanent illness or disability may be able to continue to make all of their decisions independently, but may need more time or alternative communication strategies. Some may need help in understanding their options and the implications, but with that assistance, can make decisions on their own. Others may be able to articulate their overall goals, but will not be able to understand and assess how various options might assist them in reaching their goals. For others, their goals will have to be inferred from their behaviours and their reaction to various situations and environments or from their past choices. Some have insight into their needs and will accept or seek assistance; others will not. Some have the ability to learn and to improve their decision-making abilities; others will be living with conditions that will result in continual deterioration of their abilities. Finally, every person will come to decision-making with his or her own personality, history and approach to receiving assistance, as well as with access to different levels and types of support.

During the consultations, several professionals and service providers lamented the lack of nuance in the system: in their view, the system is overly binary, and has difficulty with situations that fall into the “grey zone”: for example, where an individual falls on the borderlines of the capacity test.

I feel like often I’m constrained by [the] very arbitrary dichotomous approach to either capable or incapable, and that’s just not a developmental approach, and we have youth who maybe are sixteen, but actually their capacity to - not understand, often they’re very capable of understanding information - but the appreciation and the translation of that into sort of ramifications and impact on their lives down the line may be grossly lacking or very variable, day-to-day depending on who’s ticked them off. It bothers me, so that’s the receiving end. But I mean, I think really that’s where I find myself operating, it’s really about, even if, if a youth is made incapable, really where does that get us, very very, not very far, unless we can have a process of having that youth still very much in the conversation about the decisions and actually ultimately agreeing to the decisions, but with a little bit oomph behind how to support the parents.

Focus Group, Clinicians, September 12, 2014

As was referenced above, many clinical and social service professionals were interested by the potential of supported decision-making approaches to allow for a broader array of options in some complex situations or for some specific populations. However, these professionals also tended to feel that the concept was more easily applicable to some populations and situations than others. For example, some felt that a precondition for effective supported decision-making was that the individual have insight into their needs and limitations, so that she or he could effectively assess the need for and access appropriate supports. Others felt that some types of decisions were more amenable to a collaborative approach than others. The concept of supported decision-making was thus seen as potentially a means of adding to the options in the current system, rather than as a replacement for a substitute decision-making model.

I think what I see across the spectrum of the organisation is that one size fits all doesn’t fit. You know, we see a lot more collaboration with families in terms of decision making in some areas like [unclear] than we necessarily do in the adult populations, and then there are some decisions that are being made, you know, housing, some of the more rehabilitative decisions that are, almost by necessity have to be collaborative, we can’t physically transport someone to their housing. Yet there are times when, for example, on our very acute care units where somebody needs particular medication, the need for a very very decisive decision on behalf of someone who cannot make that decision, you know, in terms of administration and medication is very important to be able to have. You know, those types of situations of more collaborative, supported decision making model, maybe sort of fraught with difficulty in terms of being able to administer acute medical care when it’s needed.

Focus Group, Clinicians, September 12, 2014

D. Applying the LCO Frameworks

The debates surrounding models of decision-making appear to bring into stark competition the *Framework* principles of promoting autonomy and of safety or security. Certainly, proponents of supported decision-making often frame the debate in this way. This is not without validity. The LCO heard from some directly affected individuals who were fiercely protective of their autonomy, who felt that they were over-protected and over-regulated by their SDMs or by family members providing informal assistance, and that there should be more room for them to take risks, make choices that others would disagree with, and in general control their own lives. Supported decision-making is intended to avoid intrusions on the self-determination of persons with conditions that affect their decision-making abilities, and respect the ability of these individuals to take risks and experience their consequences. As has been emphasized throughout this *Interim Report*, there are shortcomings in the ability of the current laws in protecting and promoting autonomy: supported decision-making may provide one means for reducing that shortfall.

At the same time, critics of supported decision-making often point to what they see as a lack of adequate safeguards for the safety and security of individuals under supported decision-making approaches. The greater the impairment in the decision-making abilities of the individuals to whom supported decision-making may apply, the more weighty these concerns become. There are risks in any decision-making model: the very nature of the impairments that give rise to the need for this area of the law makes such risks unavoidable. The risks will naturally increase with the vulnerabilities of those directly affected by the law, whether those risks arise from the degree of the impairment, a lack of social relationships and supports, or the negative assumptions and attitudes in the broader culture.

However, as the general discussion of the principles in Chapter III emphasized, it is important not to take a simplistic view of the principles and their interrelations. Not all individuals subject to substitute decision-making see it as an unjustifiable intrusion on their autonomy. There were many participants in the consultations who were directly affected by these laws who felt that, given their own limitations, their loved ones were in a better position to make certain types of decisions and wished to entrust them with that role.

If I wouldn't have had it [a POA] already in place, it would've been a disaster because I found my care at [the hospital] was horrible.... You know and to be honest with you, usually we're not in any condition, you know at the point to understand what's going on, let alone have someone trying to explain something.

Focus Group, Persons with Acquired Brain Injuries, November 7, 2014

And as discussed in Chapter III, there are those who see planning documents such as powers of attorney as a way to preserve their choices and identities in the face of potential changes to their abilities: the notion of appointing another person to make a decision for them was not seen as antithetical to their autonomy unless the power was abused. Married couples, for example, sometimes conceptualized this kind of assignment of responsibility as an extension of how they had assigned roles and divided labour throughout their relationships. These individuals trusted their spouses to make decisions for them and to respect their individuality in doing so. The concept of substitute decision-making was for these individuals not seen as something foreign or intrusive. Younger persons with disabilities affecting their decision-making abilities tended to express more interest in the opportunity to change and take risks, and thus placed more emphasis on respect for their current values and goals. While the LCO was not able to extensively explore cultural perspectives on decision-making models, it is important to keep in mind that gender and culture may also affect approaches to autonomy and decision-making.

[M]ost of us who have folks from another culture, you know, their value of autonomy is not the same, and how do we deal with that in terms of supportive-decision making too, for that person, that group. And I'm conscious of intracultural differences as much as I am of intercultural differences, but this is something to be mindful of, you know. This is part of this discussion.

Focus Group, Joint Centre for Bioethics, October 1, 2014

That is, in addressing the promotion of the principles of autonomy and security in decision-making models, consideration must also be given to the principle of responding to diversity. There may not be a single most appropriate approach to decision-making, able to reflect the wide range of needs and experiences among those directly affected by the law. If an aim of this area of the law is to address sometimes conflicting aspirations for both control over decisions and safeguards against exploitation, there may not be a single best way of meeting this aim.

The principles of understanding membership in the broader community and recognizing that we all live in society are particularly relevant when considering models of decision-making, pointing us to the importance of taking into account the legitimate needs for clarity, certainty and accountability of those who provide services to or enter into agreements with persons whose decision-making abilities are impaired, as was highlighted above. Regardless of the approach taken, it is necessary to identify clearly who has legal authority – and therefore accountability – for any decision made, particularly in relation to third parties, but also for everyone involved in the arrangement.

E. The LCO's Approach to Reform

The issues in this area raise considerable challenges. The legislation applies to all, but the needs of those affected vary considerably from group to group, across time and across types of decisions. Desires for non-marginalizing approaches and for greater autonomy may sit uneasily with needs for clarity and accountability and with concerns about abuse and misuse. The effort to find new approaches that will better meet needs may result in risks to individuals who tend to be marginalized and vulnerable, and for whom errors in approaches may have serious, long-term consequences. The LCO has given careful consideration to how to best meet these competing considerations.

1. Substitute Decision-making as a Last Resort

The law reform leading to the current legislation identified as one of its core values freedom from unnecessary intervention, and the SDA and HCCA include many mechanisms intended to promote this value, including presumptions of legal capacity, decision-specific approaches to capacity, procedural protections for persons found legally incapable and the “least restrictive” provisions of the SDA with respect to court-appointed guardianships. Many organizations and individuals recognize the seriousness of a finding of legal incapacity and do take a last resort approach. However, it is clear that in practice, the legislation has not fully achieved this goal: there was widespread agreement throughout the consultations that one of the goals of law reform in this area should be to limit the use of substitute decision-making arrangements, and in particular guardianship, which is more intrusive than either POAs or appointments under the HCCA, to those circumstances where it is truly warranted. While there was disagreement as to how much further the use of substitute decision-making - and especially guardianship - could be narrowed, there was certainly agreement that there was room for improvement in ensuring that these were last resort options, and throughout this *Interim Report*, the LCO is making draft recommendations to this effect.

This includes recommendations to:

- promote better understanding of their roles and responsibilities among SDMs (Chapter XI);
- improve the quality of assessments of capacity and of the associated procedural protections, so that individuals are not inappropriately found legally incapable (Chapter V);
- improving transparency and accountability for personal appointments, to reduce the misuse of these appointments (Chapter VI);

- increasing the flexibility and options available when external appointments of SDMs are made, to provide greater tailoring in both time and scope of appointments and to reduce unnecessary appointments (Chapter IX); and
- strengthening mechanisms for rights enforcement and dispute resolution, and in particular expanding the accessibility of these mechanisms, through expanded use of administrative justice (Chapter VII).

2. Promoting Positive Decision-making Practices

Proponents of supported decision-making believe that substitute decision-making is by its very nature incompatible with the preservation of the autonomy and dignity of affected individuals: that the removal of the legal status of responsibility for decisions that is associated with a determination of incapacity is fundamentally at odds with the possibility of that person's being able to exercise any control or agency in their own lives.

This is a compelling critique. The legal status associated with substitute decision-making has both a practical and a symbolic impact. Its visible removal of legal responsibility for a set of decisions undermines not only the practical ability of an individual to independently undertake certain transactions, but the social status of the person as the key decision-maker in his or her own life. In a sense, it compromises the public "face" of the person.

This question of how the law should recognize different types of decision-making where an individual cannot act independently cannot be completely severed from the issue of decision-making practices on the ground. However, as the preceding discussion illustrated, decision-making practices on the ground are not necessarily determined by legal status. Family members in a substitute decision-making role may approach that role in a way that is harmonious with the practices promoted by supported decision-making. Such approaches are certainly not contrary to either the substance or the intent of the current legislation. Indeed, these types of daily practices would be embraced and promoted as good practice by many, if not most, professionals and service providers.

And as was raised by a number of persons during the LCO's consultations, the vulnerability of persons with disabilities affecting their decision-making abilities to abuse or manipulation is grounded not only, and not even primarily, in the loss of legal status associated with a finding of incapacity, but also in much broader and less tractable societal barriers. It is not difficult to imagine a regime in which all individuals retained legal capacity but in which the interactions of "supporters" with the supported individuals were paternalistic and controlling. That is, while philosophically "supported decision-making" is intended to promote the ability of individuals to

exert control over their lives, as with any legal regime in this area, there will always be significant challenges at the level of implementation and daily practice, which is by its nature resistant to supervision.

The LCO has therefore considered recommendations to support and strengthen positive decision-making practices, such as further encouraging the involvement of the individual in decisions affecting her or his life to the greatest extent possible, and ensuring that decisions are attentive to and reflect to the greatest degree possible the values, preferences and life goals of the individual affected.

3. Legal Accountability Should Accord with Decision-making Processes

Both in this Chapter and in Chapter IV, considerable attention has been paid to the allocation of legal responsibility when individuals are not able to make decisions independently.

It is the LCO's view that there is a difference in the ethical obligations that individuals undertake when they assist another person to themselves understand the information associated with a decision and to weigh the risks and benefits, and a situation where individuals are using their empathy and past experience to inform the uncertain enterprise of interpreting another individual's values and goals and then applying them to a practical issue. There is a limit to our ability, as humans, to understand and interpret even those whom we know best: even with best efforts and intentions, we are always liable to error in our attempts to stand in another's place. This is not to say that this exercise is valueless, but to highlight the jeopardy in simply attributing a decision made in this way as purely the individual's own, without acknowledging the significant intermediary role.

The difference in whether the individual is actually making the decision or someone else is acting as an intermediary should be reflected in legal accountability structures. Where a decision is being made through this kind of empathetic inference, the individual carrying out this exercise should be aware that they are undertaking a significantly morally freighted activity and that the obligations on them are high. Further, the individual at the centre should not be left to solely suffer the legal consequences. That is, legal accountability structures should mirror, as closely as possible, the actual decision-making process. Where the individual her or himself is ultimately making a decision, even with assistance from another, it is reasonable to retain accountability with that individual. However, where another person is the one actually weighing options and consequences, even if based on the values and preferences of the individual, the person who is carrying out this analytical process should have some clear accountability and legal consequences for the decision ultimately reached.

4. *Providing Options to Meet Diverse Needs*

The needs and circumstances of those affected by this area of the law are extremely diverse. People need different types and levels of supports and assistance, face different types of risks, and exist in very different contexts. Approaches to this area of the law must, to the degree possible, recognize and make room for this diversity. This is challenging, in part because providing multiple options adds to the complexity of an already seemingly convoluted system, and in part because systems generally have difficulty adapting to situations that do not produce yes or no answers.

As noted above, most of the interest in “supported decision-making” was found in the intellectual disability community. The concepts underlying this approach to capacity and decision-making can be understood as an extension of the principles underlying the community living movement. The concept seems to have less resonance among other groups disproportionately impacted by these laws, and in fact, some advocates for other affected groups have expressed strong concerns about the susceptibility of these new approaches to abuse and misuse, as well as their appropriateness to the needs of the individuals involved. To the extent that supported decision-making has been implemented in common-law jurisdictions and that evidence has been gathered about its implementation, supported decision-making approaches have been almost entirely found within the intellectual disabilities community: it is unclear how this approach would work in practice for some other groups. As is discussed elsewhere, while the aspirations for dignity, inclusion and autonomy are widely shared, the means for achievement of these aspirations may differ between groups or individuals. It is the LCO’s view that these differences should be understood and respected. What works for some may not work for all. The supports needed to achieve autonomy may differ significantly, and a single legal framework may be inappropriate for addressing these varying needs. However, we must also recognize that concerns about abuse and the entitlement of third parties to have clarity in who is accountable to them cut across the different approaches.

5. *Progressive Realization*

The principles underlying the CRPD – those of respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; and accessibility – must guide any approach to this area of the law, and indeed underlie the LCO’s *Framework* principles.

The desire that some have expressed for an approach to legal capacity and decision-making that is more flexible, nuanced and respectful of the dignity of those affected requires imaginative new approaches to the law. At this time, many jurisdictions are re-examining their legislation, and some have recently implemented or are in the process of implementing significant changes. However, as was noted in the *Discussion Paper*, there is currently little in the way of an evidence base on which to ground law reform. Given the vulnerability of the population affected, the LCO is concerned that reform proceed in a way that minimizes the risk of grave unintended negative effects, particularly given the concerns expressed about the potential of supported decision-making approaches to enable abuse in some circumstances. Without due care and balance in reform of this area of the law, those whose rights are intended to be promoted may instead find themselves in worse circumstances – particularly since many of those affected are already more at risk of marginalization and abuse than the general population.

For this reason, the LCO is particularly concerned by the stance taken in the *General Comment* that these rights are not subject to progressive realization, but are those of immediate implementation. It is essential to progress towards greater dignity and autonomy for persons affected by this area of the law, but it is also essential to do so in a way that seeks to build on evidence, realistically and practically addresses the difficulties, takes into account the diversity of needs and circumstances of those affected, and proceeds with reasonable caution so as not to inadvertently result in greater harm than benefit.

The LCO therefore believes a “progressive realization” approach to reform in this area, which adopts the approach underlying Article 12, aims to better promote and protect the *Framework* principles, and seeks to implement them by building on existing good practices, providing new options with carefully considered safeguards, and evaluating the evidence on which reform is based, is appropriate.

F. Draft Recommendations

1. Clarifying Legislative Requirements for Substitute Decision-making Practices

As was argued above, a primary goal of legislation in this area of the law should be the promotion of positive decision-making practices.

An approach to decision-making practices that is rooted in respect for the individual’s life goals and values, and aims to maximize the individual’s ability to exercise control is not prohibited by

or contrary to the SDA or HCCA. A number of provisions in the SDA aim to promote just such an approach, including the requirements for SDMs to:

- encourage the participation of the individual in the decision-making process, to the best of his or her ability;
- foster regular contact between the individual and supportive family members and friends;
- consult from time to time with other supportive persons who are in contact with the individual; and
- seek to foster the person's independence.²¹³

SDM Roles With Respect to Personal Care

The SDA also provides reasonably clear guidance as to the basis on which SDMs are to reach decisions. In the case of personal care decisions, the SDM must act in accordance with the individual's prior capable wishes where known (and must be diligent in ascertaining such wishes), and where there are no prior capable wishes, to consider the values, beliefs and (if ascertainable) the current wishes of the individual, as well as the individual's quality of life.²¹⁴ The personal care SDM must also choose the least restrictive and intrusive course of action that is available and appropriate in the circumstances.²¹⁵ Similarly, the HCCA includes clear direction for SDMs making decisions related to treatment or admission to long-term care to take into account the persons prior capable wishes, and where there are no such wishes, factors including the person's wishes, and their values and beliefs.²¹⁶

In the LCO's view, these requirements regarding decision-making processes are consistent both with the *Framework* principles, and with the vision of supportive and autonomy enhancing approaches to decision-making practices put forward by proponents of supported decision-making (although not with their approach to legal standing and accountability). The LCO does not see in the language of the HCCA or in the SDA with respect to considerations for personal care decisions any significant inconsistency with the "best interpretation of will and preference" approach put forward in the *General Comment* and in some submissions. While the Ontario's statutory language in these cases might be somewhat different, the aim is harmonious, although of course it must be understood in its context, in which the ultimate decision does rest with the SDM.

For the most part, the general role and principles related to substitute decision-making with regards to personal care are clear and appear to be appropriate, although there are concerns regarding widespread misunderstandings of the role of personal care SDMs. One common and troubling misunderstanding is the belief that the personal care SDM has a broad authority to

restrict access to the individual. It is, for example, not uncommon for an adult child to restrict or attempt to restrict access to the parent by a sibling, or a parent to attempt to regulate the romantic life of an adult child, in contravention of the wishes of the person for whom they are SDM, because of a personal conflict or dislike. The LCO has heard that long-term care or retirement home personnel may inappropriately facilitate such denials of access.

The LCO has heard some concerns related to a lack of clarity and procedural protections regarding the authority of SDMs to make decisions about very serious matters, such as detention in a long-term care home or retirement home. Many of these facilities include secure units, intended to protect the safety of residents whose disabilities are such that they are at risk of getting lost or otherwise coming to harm. While long-term detention may well be necessary for safety of some vulnerable individuals, such detention does raise fundamental liberty and autonomy interests, and so requires careful balancing of rights. The Advocacy Centre for the Elderly (ACE) has pointed out that the legality of these secure units is unclear.²¹⁷

Health providers have a legal duty of care to their patients, as do hospitals and long-term care homes not only to patients but to all persons who are lawfully on the premises. The common law provides for a limited right to restrain or confine persons for short periods of time in an emergency where immediate action is required to prevent serious bodily harm to the person or to others,²¹⁸ and the HCCA explicitly preserves this common law duty.²¹⁹ However, there is no clear authority under either the SDA or the HCCA for a guardian of the person, power of attorney for personal care or HCCA appointee to consent to *ongoing* detention in a long-term care home or retirement home, except in those rare circumstances where a “Ulysses Clause”, as enabled under section 50(2) of the SDA, has been inserted in the POAPC or court order, authorizing “the attorney and other persons under the direction of the attorney to use force that is necessary and reasonable in the circumstances to take the grantor to any place for care or treatment, to admit the grantor to that place and to detain and restrain the grantor in that place during the care or treatment”.

HCCA appointees, of course, only have authority to make decisions related to treatment, admission to long-term care or personal assistance services, depending on the specific findings of incapacity that are made and so do not have authority regarding detention. The *Mental Health Act* does provide at length for involuntary admission for persons with a diagnosed mental disorder who meet a number of other conditions,²²⁰ but this will not be the applicable or appropriate process for many residents of long-term care or retirement homes. Notably, in *R. v. Webers*, the court found a hospital patient who had not been provided with the procedural safeguards of the *Mental Health Act* to have been unlawfully detained.²²¹

The *Long-Term Care Homes Act, 2007*, sets out a detailed scheme for detention of residents with consent from the SDM where necessary, including provisions for written notice, rights advice and review by the Consent and Capacity Board; however, these provisions have never been brought into force.²²² There are parallel unproclaimed provisions in the *Retirement Homes Act, 2010*.²²³ These are accompanied by provisions in the HCCA, also unproclaimed, outlining the jurisdiction of the CCB with respect to secure units.²²⁴

Beyond the challenges associated with the lack of legal clarity surrounding the detention in long-term care or retirement homes of persons who do not have legal capacity, there are concerns about the lack of appropriate safeguards and procedural rights surrounding these types of decisions, which involve deprivation of very fundamental rights. As the Victorian Law Commission commented in dealing with these issues, “Because liberty is a value of paramount importance in our community, it is strongly arguable that actions involving total loss of liberty should be authorised by a process that involves appropriate checks and balances”.²²⁵ The Victorian Law Reform Commission recommended that the informal practices surrounding detention in that Australian state be replaced by a new authorization process, as being more consonant with liberty interests.²²⁶ In the high-profile *Bournewood* case in the United Kingdom, the European Court of Human Rights found that the detention in hospital of a man with autism who lacked legal capacity violated the provisions of the *European Convention* safeguarding the right to liberty and security of the person, in that the lack of procedural safeguards for such detentions made them “unlawful”.²²⁷ In response to this decision, the *Mental Capacity Act, 2005*, includes in Schedule A.1 a very elaborate scheme providing detailed requirements about when and how deprivation of liberty may be authorized, an assessment process that must be undertaken before deprivation of liberty may be authorized and arrangements for renewing and challenging the authorization of deprivation of liberty.²²⁸

DRAFT RECOMMENDATION 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.

SDM Roles With Respect to Property Management

In respect of property management decisions, the SDA sets out a hierarchical list of priorities that should guide property decisions, with first priority given to expenditures that are reasonably necessary for the individual’s education, support and care, followed by those that are reasonably necessary to meet the needs of the individual’s dependents, and finally, the

satisfaction of other legal obligations. The SDA allows for gifts, loans and charitable donations, albeit under limited conditions.²²⁹ In general, the SDM for property must exercise his or her powers “for the incapable person’s benefit”, including taking into account the individual’s personal comfort and wellbeing, and must manage the property in a manner consistent with personal care decisions.²³⁰ This is not as clearly harmonious with a focus on the values and preferences approach to decision-making as the provisions regarding personal care. While SDA does not refer to a “best interests” type of decision-making approach, in setting out a list of priorities, it does restrict options and essentially requires SDMs to prevent individuals from seriously mismanaging their money, for example, by dispersing it to relatives and friends or by making extravagant purchases, with a view to ensuring that the benefit of the property primarily accrues to the individual. This could certainly be viewed as a paternalistic approach: in contrast, persons who have not been determined to lack legal capacity are permitted to make foolish or risky decisions that will result in their own impoverishment.

Given the risk of financial abuse of persons with impaired decision-making abilities by trusted others, the LCO believes that it is reasonable to maintain some objective limitations on property decisions for persons who lack legal capacity. That is, to create as the sole criterion for property decisions the “best interpretation of will and preference” of the individual would make it far too easy for unscrupulous individuals to carry out financial abuse without repercussions.

However, the LCO also believes that it would be beneficial for the SDA to make clear that, within the existing priorities, SDM decisions related to property management should be made keeping in mind the life goals and values of the individual, either as expressed while capable, or as demonstrated by the individual who has been found legally incapable. Specifically, in allocating expenditures for the person’s support, education and care, the SDM should consider both the prior expressed wishes and the current values and goals of the individual. The LCO does not believe that this should extend to allocation of resources to the needs of dependents: it is dependents who will often be acting for the individual, and to do so would raise concerns regarding undue influence and conflicts of interest.

Further, the LCO has heard many concerns throughout the consultation that the property management provisions of the SDA are being misunderstood and misused as a means of structuring the incapable person’s finances in such a way as to maximize the ultimate estate and minimize taxes. Some of the most protracted disputes under the SDA might be characterized as preliminary estate litigation. Financial services providers frequently commented that SDMs appear to take literally the provisions of the SDA that an SDM for property “has power to do on the incapable person’s behalf anything in respect of property

that the person could do if capable, except make a will”,²³¹ without regard to the purposes of the legislation, arguing that they should therefore be entitled to outright convert the financial assets or structure them for the benefit of the estate rather than the person.

The LCO has also heard concerns that substitute decision-makers for property may use their authority in this arena to inappropriately exercise control over the personal choices of the individual – for example, refusing to pay for telephone or internet to cut off relationships of which the SDM disapproves, even if the individual does not lack capacity with respect to these kinds of decisions.

It may therefore be useful to clarify in the legislation that the paramount goal of substitute decision-making related to property is not, for example, to maximize assets, to exert inappropriate control over the personal choices of the individual, or to prepare for the transfer of the estate, but to maximize the wellbeing of the individual, when wellbeing is considered as including the person’s autonomy, social inclusion and participation, security, dignity and overall quality of life.

DRAFT RECOMMENDATION 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.**

Clarifying Terminology

When the SDA was created, the term “substitute decision-maker” was not intended to suggest that the person so appointed had untrammelled authority to impose their own values and preferences on the individual for whom he or she was acting, and the actual provisions of the legislation do not indicate that SDMs have such a role. However, the LCO has encountered sufficient misunderstanding of the term during the public consultations to suggest that the term is often conflated with a pure “best interests” approach in which the judgment of the SDM replaces the values of the person affected, and may make some contribution to inappropriate decision-making practices.

I think one of the biggest gaps that tends to be when someone is aware that they're a substitute decision maker is that they're not aware that they need to be making the decision that that person would have wanted, not what they [want]. And that tends to be a discrepancy that I see.

Focus Group, Community Health and Social Service Providers, September 26, 2014

Some other jurisdictions have moved to replace the terminology of “substitute decision-maker”. For example, the Irish Bill (currently at Committee stage), refers to “decision-making representatives” rather than substitute decision-makers, a terminology that finds some echo in the provisions of the HCCA that refer to the appointment by the Consent and Capacity Board of a “representative” to make decisions under that Act. Under the *Mental Capacity Act* of England and Wales, the Court of Protection appoints a “deputy” to make necessary decisions.

The LCO has considered a number of alternative terms that might better reflect the nature of the role that Ontario’s legal capacity, decision-making and guardianship regime assigns to substitute decision-makers.

- The term ‘**agent**’ has been defined as “[o]ne who acts for another whether for any form of remuneration or not”²³² or “[o]ne who, by mutual consent, acts for the benefit of another; One authorized by a party to act on that party’s behalf”.²³³ An agent is a person employed to act on behalf of another; the act of the agent done within the scope of his or her authority will bind the principal.²³⁴ An agent’s primary duty is to obey and carry out the principal’s instructions,²³⁵ and do the best he or she can for the principal.²³⁶ If an agent departs from the principal’s instructions the transaction will not be upheld.²³⁷ An agent who fails to carry out instructions is liable for resulting damages to the principal.²³⁸ Importantly, it has been noted that “[t]he outstanding feature of an agent’s employment in a legal sense is that he is employed primarily to bring about business relations between the principal and third persons, and this characteristic is perhaps the most distinctive mark of the agent as contrasted with others not agents who act in representative capacities.”²³⁹
- A “**deputy**” is “[o]ne who acts instead of another, or who exercises an office in another person’s name”.²⁴⁰ In the Canadian context, the term “deputy” is mainly associated with public office.²⁴¹
- The term “**representative**” has a broader connotation than either deputy or agent. The *Pocket Dictionary of Canadian Law* defines the term as follows: “The person who takes the place of or represents another person. A deceased person’s executor or administrator is called a personal representative; Any person who acts on behalf of another”.²⁴² Notably, the term is already in use in the HCCA, as the designation for a

person appointed to make one or more decisions under that statute: extending its usage more broadly may have the benefit of simplification as well as clarification. It should be acknowledged that the use of the term in British Columbia and the Yukon in the context of the more fluid “representation agreements” might cause some confusion.

Overall, the LCO believes that the use of the term “decision-making representative” rather than “substitute decision-maker” or guardian would reduce confusion regarding the roles of persons appointed to carry out these duties. Use of the full phrase helps to avoid confusion with the use of the term “representative” under representation agreements in other jurisdictions.

The LCO has considered whether this clarified terminology should also extend to persons acting under a power of attorney. The term “power of attorney”, while widely used, is highly confusing to non-lawyers, who tend to misunderstand not only the meaning of “attorney” in this context, but also the reference to “power”, which seems to emphasize the rights of the actor, rather than the serious and significant duties involved. Clarification of the terminology would also be highly beneficial here, but the LCO is concerned that the wide usage of the term “power of attorney” would make it difficult to replace in popular discourse, and might lead to more confusion than clarification.

DRAFT RECOMMENDATION 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.

2. A Clear Duty to Accommodate for Service Providers

The duty to accommodate and its relation to legal capacity, decision-making and guardianship law was discussed in Chapter IV. As was outlined there, the human rights principle of accommodation is established in *Charter* jurisprudence, as well as both the federal and Ontario *Human Rights Codes*. In particular, the Ontario *Code* imposes a duty to accommodate in respect of services, where an individual is unable to fulfil an essential duty or requirement due to, for example, age or disability (as well as all other *Code* grounds).²⁴³ It would appear then, that service providers who fall within the jurisdiction of the Ontario *Code* are required to accommodate persons who, because of their disability, may have difficulty in meeting the legal test of capacity; however, the specific content of this duty is far from clear.

At minimum, this duty likely involves a requirement on service providers to accommodate, for example, through methods of communication, or the timing or environment surrounding the

service, where such accommodation is necessary for the individual to demonstrate their ability to understand and appreciate the requisite matters and therefore to receive the service, and where such accommodation does not amount to undue hardship.

From discussions with a range of stakeholders and individuals during the consultations, it appears that service providers have in the past not infrequently provided informal accommodations for individuals whose legal capacity was unclear. However, as was noted in Chapter II, there is a strong trend, across all sectors, towards increasing formality and a restrictive approach towards legal capacity issues. Some have pointed towards this trend as one of the reasons for the need for supported decision-making arrangements, as a formal means of replicating the benefits of these informal arrangements.

The LCO is sympathetic towards the confusion that service providers may experience in this difficult area, without any clear guidance as to the nature and extent of their duty to accommodate, and believes that a clear statement of the nature of the duty to accommodate in this area would be of benefit both to service providers, and to individuals and their families.

Clarification could be provided in at least two ways. Legal capacity, decision-making and guardianship laws could include provisions regarding the duty to accommodate. This would enable guidance to be specifically tailored to this context and integrated with other aspects of the law. One drawback to this approach would be the development of a body of interpretation and caselaw separate from the main body of human rights law in the province of Ontario.

Another approach would be to create clarity through mechanisms associated with the *Code* itself. Regulations could be drafted under the *Code*, as was done to provide guidance to landlords about the types of information that could be sought in a rental application.²⁴⁴ It should be noted that banks fall under the federal human rights statute, and so would not be captured by such a regulation. As well, some service providers may fall within the ambit of the *Charter of Rights and Freedoms*, so that the duty to accommodate is raised within that context and that jurisprudence. Alternatively, the Ontario Human Rights Commission (OHRC) could create specific guidelines on this issue, pursuant to its powers under section 30 of the *Code*. Such policies or guidelines have persuasive power, but are not specifically binding. Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) *may* consider policies approved by the OHRC in a human rights proceeding before it. Where a party or an intervener in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervener, the OHRC may apply to the HRTO to have the HRTO state a case to the Divisional Court to address this inconsistency.

In developing guidance regarding the duty on the part of service providers to accommodate with respect to legal capacity and decision-makers, the LCO suggests that further consultation be conducted with service providers and other key stakeholders, so as to be better able to provide clear and practical guidance for the range of contexts and constraints in which these issues arise.

DRAFT RECOMMENDATION 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.

3. *Personal Support Authorizations*

As was described at length in the *Discussion Paper*, the most common forms of supported decision-making in Canada are the representation agreements and supported decision-making authorizations in British Columbia, Alberta and the Yukon. Those interested in the detailed workings of these arrangements can reference the descriptions in Part III, Ch1.D.2 of the *Discussion Paper*.

Because British Columbia's representation agreements employ a non-cognitive test for their creation, they are available to a much wider segment of the population than any other personal appointment process in Canada. The ability of a representative to act either to support decision-making or to make decisions on the individual's behalf makes the instrument either more flexible or more ambiguous, depending on one's point of view. The Canadian Centre for Elder Law conducted a review of supported decision-making laws in the Western Canadian jurisdictions as part of a commissioned paper for the LCO. While interviewees who were participating in representation agreements were generally positive about the experience, experts within the system had a more mixed response. Lawyers continue to have concerns about lack of clarity and ease of misuse, and others pointed to improper usage of representation agreements as a "more palatable form of substitute decision-making". Third parties find these arrangements unclear and expressed concern about what these agreements mean for responsibility and liability.²⁴⁵

Alberta's newer supported decision-making authorizations are restricted to personal care decisions. Supporters are prohibited from making decisions on behalf of an adult and a decision made or communicated with assistance is considered a decision of the adult. To enter into a supported decision-making authorization, the individual must understand the nature and effect of the document, which restricts these arrangements to individuals with stronger decision-

making abilities, generally those on the borderlines of what would be required for independent legal capacity.²⁴⁶ The authorizations retain validity so long as the creator retains the capacity necessary to create them – that is, they do not endure if capacity diminishes. These authorizations are still very new, as the legislation only came into force in 2009. However, the available information indicates a very positive response, with no widespread concerns regarding abuse or misuse.²⁴⁷

The LCO's project on *Capacity and Legal Representation for the Federal RDSP* ultimately recommended that the Government of Ontario implement a process that would enable adults to personally appoint an "RDSP Legal Representative" to open or manage funds in an RDSP, where there are concerns about their capacity to enter into an RDSP arrangement with a financial institution.

The LCO does not favour the broad representation agreement approach adopted in British Columbia: the ability of those appointed to act as either substitutes or supporters is liable to abuse, as well as producing confusion. The Alberta approach of support authorizations provides a more promising model for overall reform to decision-making approaches.

In keeping with the accommodation-based approach to legal capacity and decision-making adopted in Chapter IV, the LCO believes that personal support authorizations can, if properly structured, provide an accessible means of addressing the needs of persons who are near the borderlines of legal capacity. In structuring such arrangements, it is important to be sensitive to the risks of abuse, identified by a number of stakeholders, as well as to the concerns regarding clarity and legal accountability expressed by those who enter into agreements with individuals who are not able to make decisions independently.

To reduce the risk of abuse and provide clarity, a supported decision-making arrangement should, in the view of the LCO:

- **Set the threshold for legal capacity to create an authorization at an appropriate level:** In Chapter IV, the LCO recommended that a functional and cognitive approach to legal capacity be retained. To enter into a support authorization, an individual should understand the nature of these arrangements, and that they entail some risk. Support authorizations are not an appropriate arrangement for persons with very significant impairments to their decision-making abilities: in those situations, higher levels of responsibility and accountability should be accorded to the arrangement. The LCO therefore proposes a test that draws on the common-law definition of test of capacity to grant a power of attorney: the ability to understand and appreciate the nature of the

authorization. This is consistent with the approach recommended in the LCO's project on *Capacity and Legal Representation for the Federal RDSP*. That Report did identify as a secondary option the use of the more flexible criteria adopted in British Columbia's *Representation Act*: however, the broader scope of these proposed personal support authorizations, and the potential lack of the basic oversight provided in the RDSP context by interaction with a financial institution makes such criteria less appropriate in this context.²⁴⁸ Personal support authorizations may provide a solution for some individuals who currently face barriers to opening an RDSP account; the network decision-making considered in the next section, and the limited purpose appointments proposed in Chapter IX may provide solutions for others.

- **Focus on more concrete, day-to-day or routine decisions:** The LCO does not believe that support authorizations are appropriate for situations where significant assets or very complex issues are at stake, both because these circumstances may provide incentives to abuse and because the potential risks to those supported are high. The LCO's view on this is influenced by the newness of these types of arrangements: limited implementation of support arrangements may provide evidence on how these types of arrangements may be structured to provide positive outcomes in a wider range of circumstances. Further, for many individuals directly affected by this area of the law, most, if not all, decisions fall into this category. Combined with the LCO's recommendation in Chapter VIII regarding the ability to appoint a decision-making representative for single decisions, these types of arrangements may provide a means for a significant number of individuals to avoid the imposition of guardianship. The LCO believes that support authorizations should extend to routine decisions related to property, as well as to personal care decisions, particularly given the ways in which decisions related to property and personal care may intertwine. Routine decisions may include, for example, payment of bills, receiving and depositing pension and other income, making purchases for day-to-day needs, or making decisions about daily activities or diet.
- **Include clear duties for supporters, to address concerns related to misuse or abuse of these arrangements:** Supported decision-making focuses on processes and not outcomes, so that supported individuals are entitled to take risks in the areas covered by the arrangement. Where the duties of supporters have been enumerated in legislation in other jurisdictions, they focus on the roles and responsibilities of the supporter in the decision-making process, rather than on setting benchmarks for the decision.
- **Include monitoring arrangements:** Because support arrangements focus on process rather than outcomes, it is more difficult to determine whether a supporter is in fact fulfilling his or her duties. The appointment of a monitor may address some of these

concerns. The roles, powers and responsibilities of monitors are further discussed in Chapter VI. It is the LCO's view that, considering the nature of support authorizations, a monitor should be mandatory and not optional, and that the monitor should be a person who is not a family member and does not have a conflict of interest for the decision in question.

- **Ensure clarity regarding accountability for decisions:** While supporters would be liable for compliance with their statutory responsibilities, the decision would be that of the supported person.

It is not the intent of the LCO's draft recommendation to propose precise wording for legislation or to fully work out all details of a statutory support authorization regime, but rather to identify the key elements for such authorizations.

In drafting legislation to enable support authorization, there will be a number of issues to which consideration must be given, including execution requirements, the processes associated with withdrawal by a supporter, termination of a support authorization by the creator, and the remedies available to the parties to a support authorization, in case of dispute or allegations of misuse. In general, it is the LCO's view that technical processes and requirements should, to the degree possible, be harmonized with those for powers of attorney. The LCO has identified some instances where the process-oriented nature of support authorization indicates that a different approach is required: there may be some others.

Chapter VIII of this *Interim Report* outlines a number of proposed fundamental reforms to Ontario's dispute resolution and rights enforcement provisions related to legal capacity, decision-making and guardianship, including oversight of decision-making under the SDA through a reformed Consent and Capacity Board (CCB) rather than the Superior Court of Justice, providing the CCB with jurisdiction to provide directions and consider compliance with wishes regarding decision-making, and the opportunity for individuals themselves to bring forward applications regarding compliance with obligations. Mechanisms for resolving disputes and enforcing rights in relation to support authorizations will be crucial to the success of these authorizations: the exact mechanisms will depend on whether the LCO's draft recommendations about dispute resolution and rights enforcement are taken up by government. At minimum, mechanisms must be put into place to enable meaningful oversight of compliance by a supporter with duties under the statute, and of resolving disputes regarding the validity or scope of support authorizations.

DRAFT RECOMMENDATION 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 day-to-day, basic routine decisions related to personal care and property;
- 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.

4. Exploring Network Decision-making

Many Canadians with disabilities, particularly those with intellectual or developmental disabilities, currently use personal support networks of various types to assist with social inclusion, manage funding and services, or to support person-directed planning. Some of these arrangements are completely informal. Others, such as those adopting British Columbia's Vela Microboard model, are thoroughly formalized, using the legal tool of incorporation to receive funds on behalf of an individual, arrange services and act as an employer of record. Some of these networks may be considered to be, at least to some extent, decision-making entities. Since these personal support networks have affiliations with the community living movement, as does the concept of supported decision-making, it is not surprising that some networks see themselves as providing decision-making supports for persons who might otherwise be determined to lack legal capacity.

It should be noted that few individuals currently have access to the kind of personal relationships and supports that are necessary to constitute a functioning network. During the LCO's focus groups, parents of adult children with disabilities frequently referenced the concept of a network, and noted that their creation and maintenance was extremely difficult.

While personal networks raise many interesting ideas and opportunities, the LCO's interest is related to their decision-making roles. There is relatively little research on the forms and usages of personal support networks. The LCO commissioned contract research on personal support networks in the fall of 2014, with the aim of exploring potential connections and opportunities for personal support networks and alternative decision-making arrangements.²⁴⁹

One theme to emerge from that research was that networks that engage in decision-making provide "something unique":

[T]here is an apparent power to the group approach. Again and again, informants talked about something different, something that is added, by having a group of caring individuals who could bring a range of perspectives, check each others' biases and assumptions and fill in for each other's inevitable absences. Many spoke of the group approach as providing safety.²⁵⁰

The bringing together of a group of people with diverse skills and perspectives to support one individual offers not only some checks against abuse, but also a unique form of decision-making. It may be debated whether or not network decision-making "qualifies" as supported decision-making: where a network reaches a decision, it is not necessarily that of the individual alone, whether or not there is a declaration of incapacity involved. However, it can provide a process that is supportive of the individual, includes the person in the decision-making process, and respects his or her life goals and values.

The LCO believes there is merit to formalizing network decision-making in legal capacity and decision-making law. Such a formalization would likely apply only to a relatively few individuals, as the vast majority of those who may not meet the threshold for legal capacity do not have personal support networks, formal or informal. However, it appears that network decision-making can work, and work well for some individuals.

By network decision-making, the LCO means a form of decision-making with the following characteristics:

- It includes three or more individuals who share responsibilities, at least one of whom is not a family member.
- It keeps the person for whom the network is formed at the centre, protecting and promoting his or her participation in the decision-making process, and adopting as its core purpose the realization of the individual's values and life goals.
- It maintains a group process with the aim of collectively supporting a process which advances the autonomy and the achievement of life goals for the individual at the centre of the network.

Ideally, network decision-making could enable decisions on a broader range of issues than the LCO proposes be available through personal support authorizations: as a more formal process, with the inherent safeguards associated with multiple participants, there may be lower levels of risk associated with network decision-making.

The microboard process, which employs incorporation as a legal tool, has two particularly interesting aspects. One is that it can potentially provide decision-making supports in a way that does not necessarily require an assessment of legal capacity. The other is that incorporation provides a recognized and widely understood means of sharing legal responsibility and accountability within a group, as opposed to a single individual. The decision-making entity is itself accountable, rather than any single member.

As interesting as legal incorporation is as a means of formalizing network decisions, it also has its limitations. It adds, rather than reduces legal complexity: few individuals would be able to manage the costs and regulatory requirements of setting up a legally incorporated decision-making network, and third parties might find that it added to rather than reduced the challenges of identifying the authorization of an agreement or transaction. Further, it is not clear how well corporate accountability mechanisms would work in this particular context. As

well, there is an uneasy pairing between corporate law and the ultimately private and personal nature of the decision-making at stake. There are symbolic as well as practical drawbacks.

However, it may be possible to adapt the following elements of an incorporation model to the legal capacity and decision-making process:

- A set of formal requirements for the network to identify and commit to, including:
 - the purposes for the network;
 - the principles for the operation of the network;
 - the processes through which the network fulfils its responsibilities;
 - record keeping requirements; and
 - the roles for individual members of the network;
- A registration process through which the completion of foundational requirements is verified, together with basic annual filing requirements.

There are clearly costs and complexities associated with the development of a network decision-making model; however, the LCO believes that the concept merits further examination, with a view towards implementation in law, if feasible.

DRAFT RECOMMENDATION 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.

G. Summary

Issues related to alternatives to substitute decision-making are one of the most challenging areas for law reform at this time. Proposals for reform recognize both that fundamental rights are at issue and that respect for the autonomy of persons with disabilities must be a priority, and that it is essential to avoid unfair allocation of risks and negative outcomes. At the same time, there is a diversity of both needs and desires among those directly affected by legal capacity, decision-making and guardianship laws. These are tensions that are inevitable in this area of the law, and will arise in any system adopted. The effort is to find the best balance for the current Ontario context.

These issues are being explored and debated in many parts of the world. The discussions in Ontario are one part of a much larger conversation. Through this continued debate and

exploration, practical knowledge about positive approaches will be developed over time. The LCO's proposals are intended to take a progressive approach to the area, allowing for some implementation of these new approaches. Experience with such law reforms may allow further steps to be taken at a later date, with fewer concerns regarding abuse and misuse.

In this Chapter, the LCO has recommended reforms to:

- clarify and strengthen the duties of SDMs to base their decisions in the values, preferences and life goals of the individual affected;
- clarify the duty of service providers to accommodate with respect to the legal capacity of persons to whom they provide services;
- allow individuals to create support authorizations to enable them to obtain support from trusted individuals with respect to personal care and limited property management matters; and
- examine the practicalities of a statutory legal framework for decision-making networks.

The LCO's proposals in this Chapter must be understood in the context of the full range of the draft recommendations in this *Interim Report*. Draft recommendations aimed at better promoting and protecting autonomy are found throughout and include:

- proposals in Chapter V aimed at improving the quality and appropriate use of assessments of capacity, to avoid unnecessary or excessive removal of decisional autonomy from individuals;
- reforms to rights enforcement and dispute resolution systems proposed in Chapter VIII: these would, if implemented, make it easier for individuals to challenge inappropriate use of substitute decision-making;
- proposed reforms to external appointment processes set in Chapter IX: these would strengthen opportunities to divert individuals from guardianship, and enable more tailored and limited approaches to guardianship; and
- proposals in Chapter XI to strengthen the provision of education and information, in order to reduce misuse or misapplication of current provisions of the law and improve the understanding and skill of substitute decision-makers, for example in supporting the participation of individuals decision-making.

VII. PERSONAL APPOINTMENT PROCESSES: ENHANCING CLARITY AND ACCOUNTABILITY FOR SUBSTITUTE DECISION-MAKING

A. Introduction and Background

1. *The Importance of Personal Appointments*

One of the most important reforms included in the *Substitute Decisions Act, 1992* (SDA) was the introduction of powers of attorney (POA) as instruments that could operate during the legal incapacity of the grantor. This created a process for personally appointing substitute decision-makers (SDM) in a way that was highly flexible and accessible. The POA was a considerable advancement for the autonomy of Ontarians, allowing them to choose for themselves who would make decisions for them if necessary, and to create tailored instructions or restrictions for those decision-makers.

However, these instruments are also highly vulnerable to abuse or misuse. Personal appointments such as POAs rely on the individual to screen potential appointees to ensure that they are capable of undertaking the associated duties, and are willing and suitable to do so. Attorneys, particularly family members, may accept the role out of a sense of duty, without any sense of the extent or nature of the obligations that it entails. Because Ontario's legislation regarding POAs aims to make these tools widely accessible, there are relatively few practical or procedural barriers to their creation, as compared with other jurisdictions. The resultant risk is that those creating POAs may not fully understand the potential implications of doing so, and may put themselves at risk of abuse, neglect or exploitation by their attorneys. In practice, individuals may choose an attorney for reasons that have very little to do with who would best exercise that role, and more to do with family dynamics.

As well, as private appointments, these powerful documents are amenable to very little scrutiny, so that abuse or misuse may be difficult to detect. Further, the very impairments in memory, ability to receive or assess information or to evaluate the intentions of others that are reasons to activate substitute decision-making arrangements also make it harder for those individuals to monitor the activities of the persons acting under a personal appointment or to identify or seek help regarding inappropriate or abusive behaviour.

This Chapter focuses on the creation of personal appointments and the responsibilities of those appointed, with a view to addressing these concerns. **Although they are not a form of substitute decision-making, the proposed support authorizations are also personal**

appointments and pose similar risks. Therefore, the discussion in this Chapter is also applicable to these arrangements, should the government decide to add such arrangements to the legislation. Where there are differences in approach for POAs and support authorizations, these will be explicitly addressed, as with the discussion of monitors in Chapter VI. Chapter VIII, which addresses rights enforcement and dispute resolution, discusses the available mechanisms and remedies where abuse or misuse arises: this Chapter focuses on the prevention and identification of such issues.

2. Distinguishing Abuse and Misuse

It is useful, when considering these issues, to make some distinction between misuse of statutory powers and the carrying out of abuse through these powers. Although abuse and misuse may overlap and both may have significant negative consequences for those affected, they differ in their motives and in whether they are inadvertent or intentional, and therefore in strategies for prevention, identification and redress. For example, the provision of information and education is likely to be important in addressing misuse of statutory decision-making powers; it is likely to have less of an impact in shaping the behaviour of deliberate abusers. It is important, when considering potential law reforms in this area, to give thought to the ramifications for both misuse of the legislation and outright abuse.

Abuse carried out through statutory powers is just one aspect of the broader problem of abuse of older persons and persons with disabilities. Abuse may include physical, sexual, psychological or financial abuse, as well as neglect.²⁵¹ Abuse may be perpetrated by institutions or by individuals – as the Vanguard Project notes, by “anyone who may be in a position of intimacy with or power over the vulnerable adult”. It generally includes an element of violation of trust and dependency.²⁵²

While definitions of abuse, elder abuse and abuse of persons with disabilities continue to be subjects of debate, it is clear that these are large issues with multiple dimensions and many aspects that fall beyond the scope of this project. In particular, this project is not intended to deal with abuse of persons whose decision-making abilities are not impaired and whose legal capacity is not at issue. Broader issues related to abuse of legally capable older adults were frequently raised during the consultations. While these form part of the context of the issues under examination in this project, the LCO does not intend to make recommendations on these more general issues and believes that it is important to maintain a distinction between the situations of legally capable and incapable persons with respect to abuse.

Misuse of statutory decision-making powers is a more pervasive problem. A well-intentioned individual may be unaware of or misunderstand their role and obligations under an appointment, or may not have the skills to fulfil it, and as a result, he or she may, for example, use a POA for purposes beyond those intended, fail to carry out important obligations such as consulting the person or keeping accounts, or inappropriately apply a paternalistic or best interests approach to decision-making where the legislation indicates another approach is required. As a result, the clear intent of the legislation may be subverted, and the autonomy, dignity and participation of the affected individual may be undermined.

B. Current Ontario Law

Current Ontario law includes a number of provisions intended as safeguards against abuse or misuse of the powers granted to SDMs under a POA.

Execution requirements: The SDA includes a number of requirements for the creation of a POA that are intended to ensure that those creating POAs understand the implications, and are not coerced into creating these documents. These include the requirements for two independent witnesses to the creation of the POA, and for a statement of intent in creating a continuing POA for property, among others.

Record-keeping requirements: All SDMs under the SDA are required to keep accounts of their activities on behalf of the person they are appointed to assist.

Procedural duties: The SDA includes a number of requirements that increase transparency and accountability for SDMs, including duties to explain their role to the person, foster supportive contact with family and friends, and to consult from time to time with family and friends in the discharge of their responsibilities.

Standard of care: SDMs for property are held to a fiduciary standard, while SDMs for personal care are required to act diligently and in good faith.

Clear requirements for decision-making: The clear requirements as to the principles and considerations to be taken into account in the discharge of the SDM's role simplify determinations of whether the SDM is acting to benefit the person rather than his or herself.

C. Areas of Concern

As was discussed at some length in the *Discussion Paper*, Part Four, Ch I, there are widespread concerns about abuse and misuse of substitute decision-making arrangements, with particular focus on POAs. Partly because of the nature of the laws in this area and partly because of the nature of the problem of abuse, the information available about abuse of legal capacity and decision-making laws is scanty. The available information is reviewed in the *Discussion Paper*.

The paucity of information is a challenge for law reform. However, it is fair to say that abuse and misuse of legal capacity and decision-making laws was a dominating concern in both the preliminary consultations for this project and in the fall 2014 public consultations. Concerns were expressed by legal professionals, families, health practitioners, advocates and community organizations, long-term care providers, financial institutions and other service providers – that is, across the full range of those consulted. The general perception is that this is a significant and very troubling issue, and that demographics and economics indicate that it is only likely to grow in extent.

I live now in a full time practice where I only see those that go wrong and I'm always mindful of the fact that I hope to think most of them go right, so that we've got to be careful before we cast a wide net that affects 100% of the situations. I'm not going to be blind to the fact that there is an ever growing number of situations of terrible abuse, talking about financial abuse Having said that, with an aging population, with what appears to be great inroads made in medical science to keep us alive longer but not necessarily keep our minds functional, we become more susceptible as we grow older and more vulnerable, and so there's a lot of that grey area.

Focus Group, Trusts and Estates Lawyers 1, October 14, 2014

The LCO received a number of very lengthy submissions from family members who felt that their loved ones had been mistreated through the law and expressing frustration with the mechanisms for redress currently available. Service providers in particular often struggle with these issues. In many cases, abuse and misuse of powers only comes to light through interactions with service providers, for example when a long-term care provider notices that a resident cannot meet expenses, or a family member presses a financial institution to undertake what it believes to be an improper course of action. These individuals and institutions face challenging ethical and practical issues in addressing concerns about abuse.

It is important to keep in mind that the vast majority of appointees will be family members or close friends. These are the individuals who know the affected persons most intimately, and who might be expected to best understand their values and hopes, to have their well-being at heart, and to have the requisite dedication and commitment to carry out the often extensive

responsibilities associated with this role. These are also the persons with whom the individual who lacks or who is preparing for the possibility of lacking legal capacity is likely to have multi-layered ongoing ties of interdependence. This area of the law is therefore almost always implemented within the complex dynamics of family relationships.

Many consultees pointed out that in most cases these family members are acting not for gain but out of love and duty. Most are not only carrying out this very significant responsibility as SDMs, but also themselves providing substantial care to their loved one, as well as attempting to meet other family or employment obligations. The task, while for the most part willingly accepted, is a heavy one. These individuals emphasized that they are already navigating multiple burdensome bureaucracies, filling out reams of paperwork, and making considerable personal sacrifices. In their view, it is unreasonable to expect more in this vein from them: they are at the limit of what they can manage. Many family members expressed a desire for oversight and monitoring processes that would be meaningful in identifying and addressing abuse, but not burdensome on families doing the best that they can.

So that [any oversight processes] it's not hard, it's not so onerous I won't participate in the process, but it might catch... because if you're going to allow someone to go into a life-threatening situation, you're probably taking them into their finances, too, right? And have it so that it's a complaint base, too, so that if my neighbour thinks I'm taking advantage of [my adult child] or the organisations think I'm taking advantage of [my adult child], it could be reported by anybody, just like with the CAS. Anybody can make a report and there will be an investigation.

Focus Group, Family Members of Persons with Intellectual Disabilities, October 16, 2014

A few family members also expressed the feeling that “the government” should not be intruding into their personal family affairs, and that by and large families should be trusted to care responsibly for their members.

[I]t doesn't make any sense for those of us, the majority who are taking very good care of their family, whether we have money or don't have money. There are still lots of people without any that are taking very good care of their family members, and you're always under threat of interference. ... if you tried to come and walk in my door, you wouldn't even get past the door, period, end of... I don't care who you are. This is my family, this is my home, and nobody asked you to come here, and I didn't say that you could, you know? You know, nobody sends anybody to see how I deal with my other children, and sometimes they need help making decisions, believe it or not, you know, like in the real world.

Focus Group, Family Members of Persons with Intellectual Disabilities, October 16, 2014

On the other hand, family members worry, often intensely, about the risks that their loved ones will face if they outlive them. They see their loved ones as vulnerable, and the current system as offering inadequate protections. One aging parent of an adult child with a disability commented that if, after her death, her family members failed to properly carry out their responsibilities to her loved one, her only recourse would be that, “I’ll haunt you every night”.²⁵³

The issue of misuse of SDM powers was closely tied, in the view of consultees, with the widespread ignorance of the requirements of the legislation. Since persons creating POAs often have only a limited understanding of the implications of these documents, they may not give sufficient thought to whom they should appoint, or to whether they should include restrictions or further instructions in the document. POAs may be selected, not based on who will best carry out the role, but to avoid unpleasantness or family disagreements. As a result, grantors may appoint individuals who do not have the skills or the temperament to carry out the role appropriately, or jointly appoint family members whose past history indicates a complete inability to work together.

In the same vein, most SDMs have only a limited understanding of their roles. There are no mechanisms for ensuring that SDMs understand their task: while some will take the initiative to research their responsibilities, many will not. As a result, it is not surprising that these roles are often imperfectly carried out.

Lack of institutional or professional understanding of POAs may add to these challenges. For example, long-term care homes or retirement homes may strongly encourage new residents to create these, without understanding or communicating the risks and requirements associated with these powerful documents. In a recent case where a POA for property created under such conditions led to significant financial abuse, Deputy Judge Michael Bay commented on a long-term care home’s practice of “strongly encouraging” POAs among new residents as follows:

The evidence indicates that an official of the centre suggested that the family simply print a power of attorney form off the Internet. There is no indication that any sort of independent legal advice was recommended for the grantor. Nor is there any indication that new residents receive guidance as to the pros and cons of granting a power of attorney for property, who they might chose and who they might wish to avoid, how to build in safeguards or limitations or otherwise customize the document so that it serves their needs and wishes. Most importantly, it does not appear that the incoming resident was told how powerful and dangerous a power of attorney can be and that she was free not to grant one if she wished

To put pressure on elderly vulnerable persons to do so without due contemplation; for that is what inevitably occurs when such a ‘strong suggestion’ is made by a person in authority at time of

admission to a care facility and without independent professional advice; is nothing short of appalling. To then divert all of the resident's mail to a third party without regard to the resident's capacity and without their permission is to invite and facilitate the sort of financial victimization that occurred in this case.²⁵⁴

Another concern is that there are no proactive monitoring mechanisms. While both POAs and guardians are required to keep records, it will be rare for either a guardian or a POA to be required to pass their accounts. Where abuse is detected, it is often because a service provider has encountered something problematic, whether it is a homecare worker witnessing an inappropriate interaction, a long-term care home provider finding that a resident can no longer pay his or her bill because the finances have been drained, or a financial service institution noticing a suspicious pattern of transactions. Often, by the time abuse comes to light, it has been ongoing for some time. Where the abuse is financial, it is very difficult to recover any funds: the damage is done. Of course, the impact of any type of abuse on the self-worth, happiness and overall wellbeing of the victim is a long-lasting one.

Balanced against concerns regarding abuse and misuse was the perceived importance of maintaining the accessibility and ease of use of POAs. Many consultees pointed to the importance of powers of POAs as tools for planning ahead and retaining some control over one's future: in their view, people ought to be encouraged, not discouraged from creating these instruments. Requirements that make the creation of a valid POA too difficult or too costly would, in this view, defeat the fundamental goals of these instruments.

[T]he beauty of the power of attorney arrangement is its theoretical simplicity and the ease with which a person can make plans for their own incapacity and the ease with which somebody doing so can choose who it is they want to have control over their affairs.

Focus Group, Trusts and Estates Lawyers 1, October 14, 2014

D. Applying the *Frameworks*

Concerns related to abuse and misuse clearly invoke the LCO *Framework* Principles of security and safety, described in Chapter III. Importantly, the principles of security and of safety identified in the *Framework for the Law as It Affects Older Adults* and the *Framework for the Law as It Affects Persons with Disabilities* respectively linked them to freedom from abuse and exploitation; the *Framework for the Law as It Affects Older Adults* also linked it to the ability to access basic supports such as health, legal and social services.²⁵⁵ The importance of safeguards against abuse of persons who fall within legal capacity and decision-making law is explicitly identified in Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD), which states that

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Issues related to safeguards against abuse and misuse also connect to the principle of autonomy and independence. Abuse and misuse clearly can undermine autonomy and independence, and certainly it is generally in the interests of abusers to exert maximum control over the person that they are abusing or exploiting. The institution of safeguards and remedies can protect and restore the autonomy and independence of a person who is at risk of or who is experiencing abuse.

In balancing the principles, it is important to take into account that personal appointments, such as POAs and support authorizations, are themselves expressions of and ways of protecting and promoting autonomy – unless of course they are created under conditions of ignorance, duress or manipulation. Powers of attorney (and potentially, support authorizations), as relatively unrestricted instruments for individuals to make choices about the conduct of decision-making in situations of actual or potential lack of legal capacity, both enhance autonomy for grantors and, if used without proper knowledge or care, increase risks of abuse. That is, safeguards and interventions with respect to abuse and misuse must be weighed against the value of these instruments in promoting autonomy and independence. Safeguards and remedies for abuse and misuse can restrict the autonomy of affected individuals. Additional safeguards for personal appointments may diminish access to these autonomy-enhancing instruments, or reduce the range of choices that individuals can exercise through them. Additional safeguards must therefore be designed in a way that keeps in mind the potential “cost” of each safeguard to individual autonomy.

One means of enhancing security in the context of personal appointments is to increase the degree to which they are implemented in the context of the grantor's broader social networks – that is, to engage the community of interested individuals who may surround the grantor in monitoring and potentially intervening in cases of abuse or misuse. That is, law and policy may be used to strengthen the effectiveness of existing social networks. These social networks may not be as powerful or knowledgeable as institutions, but they may be seen as less intrusive on privacy and self-determination because these are relationships that have been chosen by the individual.

It is clear that in addressing issues of abuse and misuse, there must be a nuanced understanding of the principles of autonomy and independence, and of safety/security. While the principles must be balanced, they must also be understood as closely connected: one cannot be achieved without the other.

E. The LCO's Approach to Reform

The lack of a meaningful evidentiary base regarding the use and misuse of substitute decision-making powers adds considerable difficulty to the task of law reform in this area. This is particularly true for POAs. As it is impossible to know how many POAs are in operation in the province, and there is not much in the way of quantitative evidence regarding the extent of the abuse or misuse of POAs, one is left to rely on anecdotal evidence. The LCO's consultations on these issues emphasized two messages: the value of POAs and the corresponding importance that they continue to be accessible to Ontarians across all income levels; and the widespread perception that these instruments, and potentially to a somewhat lesser degree guardianships, are poorly understood, are easily misused, and are in fact misused (and outright abused) with considerable frequency.

When the current legislative scheme was in development, considerable attention was paid to the balance between accessibility and accountability in the creation of personal appointments and guardianships. The SDA includes a number of important safeguards, outlined above, but the overall balance has been towards accessibility and ease of use. Now that the legislation has been in place for some two decades, the experience of the legislation, together with shifts in technology and demographic trends, suggests to the LCO that while accessibility of these instruments remains as important as ever, some adjustments must be made to address issues of misuse and abuse.

Do you just, I think you [another participant] expressed it this way, this is just the cost that we pay of allowing people the freedom of self-determination. Which we all agree is the right underlying premise for these laws and I don't think anybody would give you pushback on that. And is that just the cost? You know, that's a valid point to make. And I don't know but I don't, I'm not sure that it necessarily means we ignore the potential for abuse if there is some way to strike a balance between controlling that to some extent and still recognising individual rights and privacy and rights of choice and so forth, that's maybe something worth exploring.

Focus Group, Trusts and Estates Lawyers 1, October 14, 2014

There appear to be a few key issues underlying concerns about misuse of POAs: the widespread lack of knowledge or understanding of the responsibilities associated with these instruments on

the part of those who are appointed under them; a lack of transparency about the contents or existence of these documents, making it difficult to ensure that they are being implemented as intended; and a lack of meaningful mechanisms for accountability when these documents are misused.

The LCO has adopted the following four goals for reforms related to abuse and misuse of decision-making powers:

1. maintaining reasonably straightforward and low-cost access to planning tools;
2. promoting better understanding of these personal and external appointments among both grantors and those exercising powers: there are predators, as well as families whose dynamics are negative and exploitive, and these people will not be influenced by better information, but most families are doing the best they can and will be better able to fulfil their responsibilities with stronger supports;
3. as resources are limited at all levels, giving preference to reforms that are not unduly complex, burdensome or costly either for government or for individuals and families; and
4. making it easier for those who are already involved with and have concern for populations that are particularly vulnerable to raise concerns.

These issues are closely connected to concerns related to dispute resolution and rights enforcement, which are addressed in Chapter VIII.

F. Draft Recommendations

1. Promoting Understanding of Duties and Responsibilities

While issues of education and information are dealt with more comprehensively in Chapter XI, these issues were particularly strongly raised in relation to abuse and misuse of POAs, and so are also briefly addressed here. The Ministry of the Attorney General provides helpful online information on POAs, guardianships and the role of the Public Guardian and Trustee (PGT), as well as a series of paper handouts,²⁵⁶ and there is a considerable amount of valuable information contained in the government Power of Attorney Kit. Organizations such as ARCH Disability Law Centre, Elder Abuse Ontario, the Advocacy Centre for the Elderly, and Community Legal Education Ontario all provide information to a range of audiences and in a variety of formats. However, these resources all rely on persons creating or acting under the POA to seek them out, and these individuals may not know where or how to find this information, or even that they need to seek out information.

Chapter XI makes a number of broader draft recommendations related to the provision of education and information to individuals and to their SDMs. The discussion for the purposes of this Chapter focusses on means of providing standard basic information about statutory responsibilities either at the time of creation of a POA or at the time it is activated. The LCO received a number of suggestions for improving understanding of roles and responsibilities under POAs.

Requiring legal counsel for the creation of a valid personal appointment

As was noted above, Ontario currently includes a number of execution requirements intended to safeguard against abuse, including a requirement for two witnesses. These witnesses must be over 18 years of age and may not be under guardianship, and they may not include the attorney named in the document, the attorney's spouse or partner, the grantor's spouse or partner, or a child of the grantor.²⁵⁷ Some jurisdictions have much more stringent requirements related to witnessing: Manitoba restricts witnesses to a list of certain professionals,²⁵⁸ and Saskatchewan requires that witnesses each sign a witness certificate attesting to their opinion that the grantor could understanding the nature and effect of the enduring power of attorney at the time that it was signed.²⁵⁹ In its recent *Final Report* on the Nova Scotia *Powers of Attorney Act*, the Law Reform Commission of Nova Scotia recommended that in addition to excluding minors, the attorney and the attorney's spouse or partner from acting as witnesses, the adult children of the attorney should be excluded as witnesses to an enduring power of attorney. The Law Reform Commission commented that, "We acknowledge the difficulty in further restricting the range of potential witnesses. Sometimes family members and other interested persons are in the best position to confirm the donor's legal capacity and willingness."²⁶⁰

During some of the LCO's focus groups, it was proposed that, as a safeguard against abuse in the execution process beyond requirements for witnesses, grantors should be required, in order to create a valid continuing power of attorney for property or personal care, to seek legal advice.

Canadian jurisdictions generally do not require legal advice to create a valid POA. The exception is the Yukon, which requires that enduring POAs be accompanied by a certificate of legal advice.²⁶¹ Saskatchewan offers the option of either having two witnesses for the POA, or having a lawyer provide legal advice and a certificate of witness.²⁶²

There was some support during the LCO's focus groups for requiring a certificate of legal advice either for all POAs or for POAs for property management only – notably, one of the two focus groups with trusts and estates lawyers strongly endorsed such a requirement, as a method of ensuring validity of POAs and understanding of their ramifications among donors, and thus as a measure to prevent abuse and misuse. However, many others, including a second group of trusts and estates lawyers, were very hesitant about such an approach. The additional cost and trouble of securing legal advice would, in this view, make POAs inaccessible for lower income individuals, and would act as a deterrent even for those who could afford the legal fees.

The LCO believes that such a requirement would be unduly burdensome and would in fact deter some significant number of individuals from completing a POA, thereby pushing individuals either into arrangements that are very difficult to monitor and do not carry the same legal obligations (such as sharing PIN numbers for bank accounts or the creation of joint accounts), or into the much more restrictive guardianship system. **The LCO does not recommend a requirement for legal advice for the creation of a personal appointment.**

The LCO has proposed a number of draft recommendations in Chapter XI aimed at increasing the reach, accessibility and reliability of the information and education available to individuals regarding legal capacity and decision-making: it is the view of the LCO that improving access to information can improve the quality of personal appointments without creating the kind of undue barriers associated with a requirement for legal advice.

A mandatory standard form for powers of attorney

The Ministry of the Attorney General has created a standard form for creation of powers of attorney, which includes valuable and fairly extensive information about the nature of these documents, the attendant responsibilities, and some practical considerations. This form is not mandatory, and it is difficult to know how widely it is used, or how well known its existence is.

There was discussion in some focus groups about making this form or some version of it mandatory. It was felt that this would ensure that all individuals creating a POA would at minimum have access to a basic level of correct information. There are a number of jurisdictions that do have standard mandatory forms. The Australian state of Victoria has a mandatory form, and England and Wales' *Mental Capacity Act 2005* includes a mandatory form for personal appointments. On the other hand, others pointed out the risk that some significant number of individuals would inadvertently create invalid POAs, because they were unaware of the requirement to use the standard form. Given the low level of public understanding of this area of the law and the lengthy history during which no mandatory form has been employed, significant public education resources would be required for the transition to a mandatory

form. Further, and more importantly, the use of a standard form might reduce the flexibility of these instruments, one of their major benefits. On balance, **the LCO does not recommend the introduction of a mandatory form for powers of attorney.**

Given that support authorizations would be both a new concept and a new instrument in Ontario, if our recommendation in this regard is implemented, the LCO believes that there must be an extra emphasis on ensuring that these instruments are clear and that basic information is provided both to those completing them and to those accepting the role. As was indicated in Chapter VI, the LCO believes that support authorizations should use a standard, mandatory form, to be developed by government, as reflected in Draft Recommendation 19 c).

Statements of commitment

One means of promoting a clear understanding among persons acting under a personal appointment of the responsibilities which they are taking on is to require them to formally acknowledge these responsibilities as part of the appointment process. This proposal was widely supported during the LCO's public consultations.

For example, British Columbia requires that an attorney sign an acknowledgement of the appointment prior to acting.²⁶³ The Victorian Law Reform Commission (VLRC), in its review of capacity and guardianship laws in that Australian state, recommended that legislation require all decision-makers to undertake in writing to act in accordance with their statutory responsibilities and duties.²⁶⁴ Kerri Joffe and Edgar-Andre Montigny of ARCH Disability Centre recommend the adoption of such a requirement in Ontario, adding that such documents should be available for use in any legal or administrative proceedings regarding failure to comply with a particular duty or obligation.²⁶⁵ Support for some form of acknowledgement was also voiced during a focus group with lawyers practicing in the area.

But maybe further when the power's actually invoked, maybe you need on the form some kind of reference to, for further information about your obligations under this appointment, go to such and such. And then you actually need a tick, you know, kind of like the... I have read and I agree, right. Now, I know online we do it, we don't read, we tick, just to get to the next screen, but, you know, if either attached to the form there are these simplified but complete criteria, or if there's a website that you can go to, whether that's part of the AG's website or some other. And you need any third party dealing on the basis of that document needs to see the check mark, I've read and I understand and I agree and the attorney's signature. Again, maybe collectively, these little things might help. And so that gives you the opportunity. I mean, if the prescribed form, does it have attached to it basic educational information about the obligations and information about where you can find out more about your obligations. Powers of attorney for dummies, or, you know, create a nice little private seminar or whatever.

The LCO agrees that such a requirement would provide some means of informing SDMs or supporters about the nature of their responsibilities, that these are serious and significant obligations, and that they can be held to account for how they carry out their responsibilities. It also ensures that they clearly indicate their acceptance of these responsibilities and accountability. While such a requirement does add some burden to the process of putting a POA or support authorization into effect, the LCO believes that on balance, the requirement to complete a statement of commitment upon activation of a POA or support authorization is not an unduly onerous requirement in view of the potential benefit. Statements of Commitment may be effectively paired with Notices of Attorney Acting, described below: these types of documents do add to the formality of powers of attorney, but do so at relatively low-cost.

DRAFT RECOMMENDATION 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 acknowledgement form part of the Notice of Attorney Acting described in Recommendation 22.**

2. *Increasing Transparency*

One of the repeated concerns voiced about POAs is the lack of transparency associated with these documents. It may be difficult to determine whether a POA exists, whether it is valid, and whether it should be in operation. This lack of transparency may be connected to risks of abuse.

Several service providers pointed out the difficulties of ascertaining who is, in fact, entitled to act on behalf of a person whose legal capacity is lacking, whether because of difficulties in locating POAs, or in determining their validity. They often connected this to shortfalls in monitoring of SDMs, because without this basic information, it is very difficult to know how many POAs are in existence and are active, who they are for, and who is acting under them.

The LCO heard from some family members who had suspected that their loved one was being abused, exploited or neglected by a person claiming to hold a POA, but who had been unable to force that person to provide a copy of the POA to verify its contents without resort to expensive legal steps. They felt that it should be much easier to verify whether a POA actually existed and the scope of its authority, without the necessity to take legal action.

Registries

There was considerable discussion of registries during the focus groups from a broad range of participants, including family members, service providers, legal professionals and persons directly affected. Many consultees felt that a registry would advance transparency and accountability, and reduce risks of abuse. The Ontario Brain Injury Association commented in their submission that,

POAs who are chosen by the individual themselves can create barriers for stakeholders trying to provide support. It can be difficult to ascertain if there is a POA and, depending on who they are, can create challenges when delivering safe, confidential services. A registry system would be something to explore for the purposes of the service providers supporting the individual and also serve to help mitigate potential abuse. This way a POA can register as such and provide the basic demographic information so that a service provider can 'look up' the client to ensure that the right person is supporting them and that as organizations they are collecting the right signatures for consent for services. By having the POA name and information registered formally this could potentially act as a means to reduce the risk of abuse.

Registries raise complex implementation issues, particularly in relation to considerations of cost and privacy.

A properly implemented, mandatory registry is likely to be a costly endeavour, which raises the issue of how it would be resourced. Would those registering a POA (or, potentially, a support authorization) be required to pay a fee? If so, how large of a fee would be necessary, and would it reduce access to POAs for individuals of modest means? Or would family members and service providers be required to pay to access information in the registry?

More complex yet are issues related to privacy. A registry moves POAs, to some extent, from the private realm into the public. The benefit is that this potentially increases the amenability of these instruments to scrutiny; the downside is that the private information of the person creating the POA would also be more accessible to scrutiny. Who would be entitled to access information in the registry, and what information would they be entitled to receive? Would the effect on the privacy of the grantor affect the likelihood that POAs would be created?

[E]ven having this conversation with my mum, you know, she was, like, nervous to even talk about a power of attorney. It was when she was in the very, very early stages of some kind of dementia, right, so, she had still, like, quite a bit of awareness and stuff. But she was hesitant to talk about it because I think she didn't want to think about that in the future and if you're going to have a process that might be prohibitive, like, someone might be saying, oh well, I don't want the government to get involved or, you know, having to renew that every five years or three years. That might even make some people who are already naturally uncomfortable with it even more uncomfortable. Because I agree in principle to it but it might be something that actually prevents people from thinking about it or following through and doing it.

Focus Group, Community Health and Social Service Providers, September 26, 2014

Further, one of the most vexing issues service providers may face with POAs is the difficulty of determining validity. Who is to say that a grantor had legal capacity at the time of creation of a continuing power of attorney for property? Where there are multiple competing POAs (a surprisingly common experience, according to many service providers) which should be accepted and acted upon? A registry office does not imply the power to investigate a POA, but only to take note of its existence. Regardless of a registry, service providers will still be left with the dilemma of determining whether it is appropriate to act on a particular POA, where circumstances raise concerns.

Given these challenges and limitations, the LCO believes that some of the aims of a registry can be more flexibly and cost-effectively met through the mechanism of notices of attorney acting, as described below. While this mechanism would not resolve concerns about the validity of POAs, or simplify access to personal appointments by service providers, they would increase transparency about the activation of personal appointments, and permit some individuals access to information about the content of the appointment and how it is being exercised, thereby improving accountability and transparency. **The LCO therefore does not recommend the creation of a registry for POAs.**

Notices of Attorney Acting

The Western Conference of Law Reform Agencies, in its review of measures to prevent abuse of POAs, recommended the adoption of a statutory provision requiring the attorney under either a continuing POA to serve a “Notice of Attorney Acting” following a determination that the grantor lacks legal capacity to manage her or his own affairs and the commencement of the attorney’s exclusive responsibility to manage the grantor’s affairs, without the grantor having the ability to monitor the use of the POA or to rescind it. The grantor may designate by name in the POA the person or persons to receive the Notice, or may designate persons who are *not* to receive the notice. Where no person is named, the attorney must make reasonable efforts to

provide notice to the immediate family members of the grantor. If there is no person to whom the attorney can give notice, the Notice must be provided to the appropriate public official.

The Nova Scotia Law Reform Commission, while embracing the concept of the Notice of Attorney Acting, has recommended that grantors ought to be able to explicitly opt-out from the notice requirement, because of the significant privacy issues at stake.²⁶⁶ The LCO shares this concern regarding privacy. While a notice would alert family members to the appointment – and now implementation – of an attorney with potential to misuse or abuse the POA, something that may not otherwise come to the attention of the other family members, overall this benefit seems outweighed by the risk of unnecessary and ill-intentioned disputes or the revelation of private information to persons without a close ongoing relationship. Not all family members are close and not all play a positive role, and a default notification may create risks of conflict or misuse, as well as violations of privacy, that on balance outweigh the additional transparency created by default notifications.

The Law Reform Commission of Nova Scotia raised, in its *Discussion Paper*, further concerns about the timing of the Notice:

Practically speaking, requiring notice to be sent only after the donor is declared incapacitated assumes that the donor will not need the assistance of others to ensure that the attorney is properly undertaking his or her duties before then. As we have emphasized throughout this paper, this will not always be the case. There may be a long time between when the donor [sic] begins to act for a vulnerable donor and when the donor is finally determined to be incapacitated – if indeed the donor is ever “declared” to be incapacitated at all. In our view, the notice should be sent within a reasonable time after the attorney has begun to exercise any authority granted by the EPA [Enduring Power of Attorney]. The requirement would also apply to any alternate attorney who assumes the appointment at a later date.²⁶⁷

However, in its *Final Report*, the Nova Scotia Law Reform Commission recommended tying issuance of the notice to the initial onset of incapacity, on the basis that the law does draw a bright line between capacity and incapacity, and protects the autonomy of the donor so long as capacity exists: it is only upon a declaration of incapacity that protection interests come into play.²⁶⁸

It should be kept in mind that under the SDA, while POAPC only come into effect upon incapacity, POA for property may come into effect immediately and endure into incapacity, or may come into effect upon a determination of incapacity, depending on how the POA is drafted. A POA for property may never involve a declaration of incapacity. In the case of *Zonni v. Zonni Estate*, the grantor of a continuing power of attorney for property retained capacity until her death: while the POA was effective, the appointed attorney was never active, and the

Court rejected an effort to hold the attorney liable for property transactions undertaken subsequent to the effective date of the POA.²⁶⁹ In other cases, persons acting under a power of attorney have been found responsible for all transactions undertaken once some duties have been assumed, even if the grantor continues to attend to some functions.²⁷⁰ In the view of the LCO, the time at which the attorney begins to exercise authority, and therefore assumes liability, under a continuing POA may therefore be the appropriate point in time at which to deliver a Notice of Attorney Acting.

The LCO concurs that Notices of Attorney Acting can provide a reasonably low-cost and flexible means of increasing transparency and accountability for persons acting under a POA. A careful balance must be struck among the differing needs of grantors. Not everyone will want to have family members notified, whether for good reasons or bad. Automatic notification schemes risk alerting abusers or creating unnecessary conflict. Where a POA names one or more individuals to receive a Notice of Attorney Acting, that Notice ought to be accompanied by the Statement of Commitment recommended above.

DRAFT RECOMMENDATION 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.**

3. *Enabling Monitoring*

As the brief review of Ontario law indicates, the mechanisms available for monitoring the activities of attorneys are limited, with the onus falling on grantors to carefully consider

potential appointees and to exercise caution in their appointments. The mechanisms that exist for addressing abuse or misuse are largely “passive” rather than proactive; for example, while the duty to maintain accounts is important, those acting under a POA may never be required to share those accounts with anyone. As a result, it may be difficult to detect abuse when it is occurring. For this reason, there was considerable interest during the consultations in how to increase oversight or scrutiny of SDMs.

Annual Reporting Requirements

Ontario requires both guardians and attorneys (whether for property management or personal care) to keep records of their activities. The Court may, on application, order that the accounts of a guardian or attorney for property be passed, in the same manner as the passing of executors’ and administrators’ accounts. The Court may, upon the passing of accounts, take a variety of steps, including directing the PGT to bring an application for guardianship of property, ordering a capacity assessment of the grantor of a POA, or suspending or terminating the POA or guardianship.²⁷¹

In some jurisdictions, guardians and in some cases attorneys for property are required to submit accounts annually.²⁷² Joffe and Montigny advocate for a broad reporting requirement for all decision-makers:

Decision-makers’ reports should indicate what they have done to promote the autonomy and decision-making capacity of the ‘incapable’ person, and how they have encouraged the person to be involved in the community. Reports should include any efforts the decision-maker has made to involve supportive family or friends of the ‘incapable’ person in enhancing the person’s quality of life. Decision-makers should also report any concerns expressed by the ‘incapable’ person along with an account of what steps were taken to address those concerns.

Currently, under the SDA, ‘incapable’ persons may request a passing of accounts. Instead, under the new legal capacity regime, the obligation for a decision-maker to pass accounts should be made mandatory and included in all decision-making appointments or orders, regardless of whether anyone has expressed concerns about the decision-maker’s actions or requested a passing of accounts. Decision-makers must be required to pass their accounts at regular intervals, such as annually or more often, depending on the circumstances of the ‘incapable’ person. Accounts may be submitted with reports, in order to minimize the incidences of monitoring.²⁷³

Regular reporting requirements were discussed in a number of the LCO’s focus groups. While there was some feeling that regular reporting requirements would induce SDMs to take their responsibilities more seriously, and could deter some abuse, there was concern that annual reporting requirements would be too onerous for SDMs. To be meaningful and amenable to

review, the formatting and precise content of accounts would have to be standardized, requiring SDMs to master the details of these requirements.

As well, for reporting requirements of this sort to be more than an administrative burden for SDMs, there would have to be some meaningful scrutiny of the accounts submitted, as well as the ability to provide some information and support to SDMs attempting to meet this requirement. This indicates that some significant staffing apparatus would be required for this function.

It is the LCO's view that, given limited resources, available resources would be better deployed to the priorities of preventing misuse of powers through education and information, and of enabling more effective response to abuse through enhanced complaints mechanisms, rather than devoting extensive resources to oversight of the majority of compliant SDMs. **The LCO therefore does not recommend the institution of regular reporting requirements for SDMs.**

Audits

It has been suggested that Ontario's legal capacity and decision-making systems would benefit from some form of a random audit program.

Joffe and Montigny, for example, recommend the establishment of a Monitoring and Advocacy Office with broad powers that include monitoring and overseeing of decision-makers, addressing situations in which decision-makers are abusing or misusing their powers, and dealing with complaints from persons lacking legal capacity. In their vision, this Office would receive and review reports from decision-makers, and would have the power to launch investigations or issue compliance orders in response to those reports. The Office would also manage a "Visitor" system, and would be empowered to investigate and address concerns raised by a Visitor.²⁷⁴ Visitors would consist either of trained volunteers or professionals who provide rights advice to persons whose legal capacity is lacking or in doubt.

A number of common-law jurisdictions outside of Canada have Visitor programs of varying scope and powers. For example, under the *Mental Capacity Act, 2005* (MCA), England and Wales have a system of "Court of Protection Visitors". These Visitors, some of whom are designated "Special Visitors" with expertise in capacity-related disabilities, may be ordered by the Court of Protection to visit deputies (who are the equivalent of Ontario's guardians), attorneys or the individuals for whom these persons are acting and to prepare reports for the Public Guardian on issues as directed.²⁷⁵ The MCA's *Code of Practice* describes their role as follows:

The role of a Court of Protection Visitor is to provide independent advice to the court and the Public Guardian. They advise on how anyone given power under the Act should be, and is, carrying out their duties and responsibilities. There are two types of visitor: General Visitors and Special Visitors. Special visitors are registered medical practitioners with relevant expertise. The court or Public Guardian can send whichever type of visitor is most appropriate to visit and interview a person who may lack capacity. Visitors can also interview attorneys or deputies and inspect any relevant healthcare or social care records. Attorneys and deputies must co-operate with the visitors and provide them with all relevant information. If attorneys or deputies do not co-operate, the court can cancel their appointment, where it thinks that they have not acted in the person's best interests.²⁷⁶

In addition to investigating abuse, Visitors can assess the general wellbeing of the individual and provide advice and support to attorneys and deputies.

The Visitor program in England and Wales has a broader function within that jurisdiction's legal capacity and decision-making system than auditing for compliance, and indeed is closely tied to the operation of the specialized Court of Protection and its dispute resolution and rights enforcement mechanisms.

The "Community Visitors" system in the Australian state of Queensland is focussed on persons in congregate settings, such as long-term care homes and mental health facilities. This system has both oversight and complaints functions. As part of their oversight functions, they regularly visit mental health facilities and other sites (other than private homes) where individuals with diminished capacity reside or receive services²⁷⁷ to review and provide reports on matters including the following:

- the adequacy of services for the assessment, treatment and support at the site;
- the appropriateness and standard of services for the accommodation, health and wellbeing of consumers at the site;
- the extent to which consumers at the site receive services in the way least restrictive of their rights;
- the adequacy of information given to consumers at the site about their rights; and
- the accessibility and effectiveness of procedures for complaints about services for consumers at the site.²⁷⁸

Visitors have a responsibility to inquire into and seek to resolve complaints, and where complaints cannot be resolved, to refer them promptly to the appropriate body for investigation or resolution or both.²⁷⁹ They have broad powers to "do all things necessary or convenient to be done to perform the community visitor's functions", including entering

visitable sites without notice, requiring the production of information or documents, and meeting with consumers alone.²⁸⁰

The Visitor program adopted in Queensland is very broad, with implications far beyond legal capacity and decision-making. It addresses issues of both systematic and individual advocacy within a wide range of congregate settings. It responds to similar concerns and in many ways parallels the Health Care Commission proposed by the Advocacy Centre for the Elderly in a 2009 paper commissioned by the LCO as part of the project on *Law as It Affects Older Adults*.²⁸¹ While there are many interesting aspects to Queensland's Visitor system and to the proposed Health Care Commission, in the LCO's view they raise issues that go beyond the scope of this current project and would require considerable additional research and consultation.

A comprehensive random auditing program would be both resource intensive and intrusive on the privacy both of families and persons directly affected, and therefore the LCO does not recommend such a program. The applicability and viability of a limited type of Visitor program focused on identifying least restrictive alternatives is addressed in Chapter IX, as part of the discussion of reforms to external appointment processes.

Monitors

Under the British Columbia *Representation Agreement Act*, a person creating a representation agreement must name a monitor, unless the representative is the Public Guardian and Trustee, a spouse or a trust company or credit union, or the person has named two or more representatives who are required to act jointly.²⁸² A monitor must make reasonable efforts to determine whether the representative is complying with the statutory requirements. The monitor is entitled to visit and speak with the represented adult and to access records and accounts. If the monitor has reason to believe that the representative is not complying with the requirements of the Act, he or she must promptly inform the Public Guardian and Trustee.²⁸³ There are no similar requirements for monitors for supported decision-making arrangements in Alberta or the Yukon. Manitoba has similarly provided attorneys with a duty to provide an accounting either to a person named in the POA, or, where no person is so named, to account annually to the nearest relative.²⁸⁴ The person receiving the accounting has no duty or liability with respect to the accounting.

There was considerable interest during the focus groups in the concept of a monitor, particularly in those focus groups with persons directly affected and with family members. It was felt that this could provide a relatively simple and low-cost reassurance of some oversight

of the activities of individuals acting under a personal appointment, as well as an incentive to take more seriously the requirements of the legislation.

But the idea of that monitor is excellent, it's like in your treatment plan, that one that you've decided, I want to be in this hospital and no other, and all this, your monitor can look, yes, he's in that hospital, yes he's being treated only by this doctor, that's great, that's been taken care of, okay, this person's been activated, so we're going to water the plants and we're going to take care of the pets, that's great, this has been done, and that really seems really valuable.

Focus Group, Individuals with Mental Health Disabilities, August 21, 2014

It was pointed out that many individuals do not have a large circle of trusted friends and family: it may be sufficiently difficult to find anyone to act under a power of attorney, let alone a second person to act as a monitor. Even where a person does have family, those family may not play a positive role in the life of the grantor, and so it would be risky to automatically entitle them to access the highly personal information of the grantor, through a default such as that incorporated in Manitoba's legislation.

Therefore, it was felt that monitors should not be mandatory for POAs. However, it was recommended that public information, including the standard POA form prepared by government, provide information about and strongly encourage grantors to designate a monitor, and that there be clear legislative requirements surrounding the role of a monitor. A participant in the focus group for persons with mental health disabilities commented that while monitors could be implemented in a way that is helpful, they also run the risk of being overly adversarial and interventionist, and therefore unhelpful, suggesting that "if you're going to have that ... put into practice, there again needs to be some ethical guidelines around that".

For monitors to be an effective option, they should have not only clear statutory duties, but also the powers necessary to be able to perform their appointed role. A monitor must have the right, for example, to access the information necessary to carry out the role and to meet with the person who has created the appointment.

Chapter VI discussed the issue of monitors in the context of personal support authorizations. Because of the differences in the roles of supporters and substitutes, the risks of abuse and misuse associated with supported decision-making arrangements differ in some (although certainly not all) ways from those associated with substitute decision-making. The success of a supported decision-making arrangement depends entirely on the quality of the decision-making process employed, rather than on the outcomes, making it more difficult to evaluate these arrangements objectively. These differences would also affect the role of a monitor in a supported decision-making arrangement. Because a supporter is not intended to make

decisions, supporters are not required to keep the same kind of records of their activities that an SDM is: a monitor would be focussed on ensuring that the decision-making process was appropriate and that the supported person continued to find that the arrangement met his or her needs. Because an assessment of the success of supported decision-making arrangements is a qualitative endeavour, the LCO believes that the inclusion of a trusted monitor in the actual supportive arrangement, thereby permitting on-going knowledge of the process, is a vital safeguard.

DRAFT RECOMMENDATION 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 support authorization; and**
- c) specify the following duties of a monitor for either a power of attorney 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 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 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 cases 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.**

G. Summary

Recommendations for reform of Ontario's mechanisms for addressing abuse and misuse of decision-making powers require a careful balancing of a number of objectives, including the effective use of limited resources; maintaining the accessibility of planning tools; avoiding over-

burdening well-intentioned family members and friends who take on statutory responsibilities; promoting understanding of rights, risks and responsibilities among all those involved; and reducing the incidence of abuse and misuse and improving the means for identifying and addressing it.

The LCO's draft recommendations have focused on identifying practical options that can be implemented at low-cost, and without adding unreasonable burdens on persons acting under a personal appointment, while still promoting greater clarity, transparency and oversight. In particular, the LCO recommends that those appointed under a personal appointment document be required to complete a Statement of Commitment at the time that they take up their responsibilities under the appointment, and that grantors be encouraged to identify individuals who must be notified at the time a person begins to act under a personal appointment. As well, the LCO recommends that the role of monitor be formalized and that use of this mechanism be encouraged for a POA and required for support authorizations.

As was noted at the outset of this Chapter, concerns regarding abuse and misuse of powers of attorney have been attributed, to a significant degree, to pervasive misunderstanding and ignorance about these important documents. Some of the reforms proposed in this Chapter, such as the Statements of Commitment, are intended in part to ameliorate this problem. Chapter XI addresses problems of information and education in the broader context of this area of the law.

This Chapter focused on the creation and contents of personal appointments: the following Chapter, Chapter VIII, examines Ontario's current institutions and processes for enforcing rights and resolving disputes. Where there are disputes about the validity of a power of attorney or the actions of an attorney, for example, these are the institutions and processes to which families resort for redress and resolution. The reforms proposed in this Chapter should therefore be considered also in the context of the draft recommendations set out in Chapter VIII.

VIII. RIGHTS ENFORCEMENT AND DISPUTE RESOLUTION: EMPOWERING INDIVIDUALS

A. Introduction and Background

In the LCO's preliminary consultations for this project, one of the dominant areas of concern was access to law, particularly in relation to the processes and dispute resolution mechanisms under the *Substitute Decisions Act, 1992* (SDA). There was a strong sense that these mechanisms are often costly, complex and difficult to access, and that as a result, the rights and responsibilities under the SDA are not realized as intended. The results of these initial consultations were confirmed in the responses to the LCO's fall 2014 public consultations, with participants conveying a message that significant reform in this area is warranted.

It should be kept in mind that effective access to the law will affect every other aspect of the legal capacity, decision-making and guardianship system. Lack of accessibility may create incentives for families to adopt riskier informal approaches or to attempt creative solutions to their problems which are not in harmony with the intent of the legislation, for individuals to abandon attempts to obtain their rights, or for parties with superior access to the resources necessary to navigate the system to misuse it for their own ends.

Concerns regarding the appropriate implementation of the rights and responsibilities under the *Health Care Consent Act, 1996* (HCCA) tend to focus on the quality of assessments of capacity under that Act, and on the appropriateness and effectiveness of procedural protections at the point of determinations of legal capacity, most particularly regarding rights information for persons found legally incapable under the HCCA. These concerns are dealt with at length in Chapter V of this *Interim Report*. While there were particular critiques of the operations of the Consent and Capacity Board (CCB), such as the ongoing debate as to whether the CCB is overly focused on legal rights or insufficiently so, and an interest in exploring greater use of alternative dispute resolution, the sense was that overall, the flexibility of the HCCA appointment mechanisms and the existence of the CCB as an accessible administrative tribunal providing speedy and relatively responsive adjudication, is an appropriate approach. This Chapter will therefore mainly focus on concerns regarding processes for dispute resolution and rights enforcement under the SDA.

All of the adjudicative processes under the SDA, including processes for appointment, variation and termination of guardianships, and the provisions for passings of accounts and seeking directions, are closely tied together, as are the administrative investigation processes under the

mandate of the Public Guardian and Trustee (PGT). These will therefore all be addressed together in this Chapter, as mechanisms by which individuals access the law. Chapter IX will address some specific concerns and proposals for reform related to external appointment processes: as these are issues related to the substantive powers of adjudicators, rather than access mechanisms, they are dealt with separately, although they are connected.

B. Current Ontario Law

Dispute resolution and rights enforcement related to legal capacity, decision-making and guardianship takes place in many venues in Ontario, including through internal institutional policies and procedures (for example, the Patient Advocacy Offices that exist in many hospitals), sectoral complaints mechanisms such as the Ombudsman for Banking Services and the formal complaints mechanisms available through the health regulatory colleges. However, the core of Ontario's dispute resolution and rights enforcement mechanisms for legal capacity and decision-making lies with the CCB, the Superior Court of Justice, and the "serious adverse effects" investigations process that lies with the PGT. These mechanisms are described below.

1. The Role of the Consent and Capacity Board

The mandate of the CCB extends to a number of statutes, including the *Mental Health Act*, the *Personal Health Information Protection Act, 2004*, and the *Mandatory Blood Testing Act*, in addition to its vital role in overseeing the application of Ontario's laws related to legal capacity and consent. In particular, the CCB may hear the following applications:

- To review a finding of incapacity, whether by a health professional with respect to treatment,²⁸⁵ an evaluator with respect to admission to care facilities or consent to personal assistance services provided in a long-term care home,²⁸⁶ or by a Capacity Assessor with respect to property;²⁸⁷
- To appoint a decision-making representative with respect to decisions to be made under the HCCA;²⁸⁸
- For permission for an SDM to depart from the prior capable wishes of a person who lacks legal capacity;²⁸⁹
- To determine whether an SDM is acting in compliance with the requirements of the HCCA as to how decisions are to be made;²⁹⁰
- For directions when the appropriate application of the HCCA with respect to a required decision is not clear; and²⁹¹

- For review of certain specified decisions that have significant impacts on the rights of the person, such as admission to a treatment facility and admission to a secure unit in a care facility.²⁹²

In practice, the vast majority of the applications that the CCB addresses are reviews of determinations that a person is incapable with respect to treatment, or findings that an individual should be admitted or remain admitted at a psychiatric facility on an involuntary basis.²⁹³ In many ways, the CCB's activities remain highly focused on mental health law, and this is reflected in the composition and culture of this tribunal.

Members of the CCB may hear applications alone or in panels of three or five. Board members include lawyers, psychiatrists and public members. The CCB's Rules of Practice take a broad approach to the admission of evidence: the Board may "admit any evidence relevant to the subject matter of the proceeding", and may direct the form in which evidence is received.²⁹⁴ The legislation gives priority to expeditious resolutions: hearings must commence within seven days of an application and decisions rendered (and summary reasons provided to the parties) within one day of the conclusion of the hearing.²⁹⁵ Decisions of the CCB may be appealed to the Superior Court of Justice on questions of both fact and law.²⁹⁶

The effectiveness of the CCB is supported by the requirements for rights advice under the MHA, described in Chapter V, and the widespread provision by Legal Aid Ontario (LAO) of counsel without cost for individuals whose rights are at issue before the CCB, as is detailed later in this Chapter.

2. The Role of the Superior Court of Justice

The processes for the appointment, variance and termination of guardianships are described at some length in Chapter IX, and so will not be detailed here. There are two methods by which an individual may enter into guardianship: an administrative statutory guardianship process, when someone is found incapable under Part III of the MHA or section 16 of the SDA, available only for property matters; and a court-appointment process, for guardianships of property or of the person, initiated by anyone under section 22 of the SDA or section 55 of the SDA, respectively. Most appointments of guardians are currently through the statutory guardianship process: the Superior Court of Justice currently appoints between 200 and 260 guardians per year.²⁹⁷ There are summary procedures for guardianship appointments and terminations, but they are used infrequently. It is important to keep in mind that while appointments, variance and terminations of guardianship orders may be relatively straightforward, these orders may also be sought as part of broader disputes, in some cases involving abuse or misuse of funds.

The Superior Court of Justice also has an important role in providing oversight of the activities of SDMs and resolving questions of interpretation. Notably, the Court may hear applications for the passing of all or part of the accounts of either a guardian or attorney for property. The Court also has broad powers to “give directions on *any question* arising in connection with the guardianship or power of attorney” [emphasis added] for either property or personal care.²⁹⁸

Significantly, the Court has broad remedial powers when addressing applications for directions or for the passing of accounts. Upon an application for directions, the Court may “give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this Act”.²⁹⁹ Upon the passing of accounts of an attorney, the Court may direct the PGT to apply for guardianship or temporarily appoint the PGT pending the determination of the application, suspend the POA pending the determination of the application, order a capacity assessment for the grantor, or order the termination of the POA. Similarly, with an application to pass the accounts of a guardian, the Court may suspend the guardianship pending the disposition of the application, temporarily appoint the PGT or another person to act as guardian pending the disposition of the application, adjust the compensation taken by the guardian or terminate the guardianship.³⁰⁰

3. *Investigations by the Public Guardian and Trustee*

The administrative complaints and investigation powers under the SDA are an important part of Ontario’s overall system for addressing legal capacity, decision-making and guardianship issues, and are highly valued by stakeholders. It should be noted that the investigative function of the PGT is a significant advance on what is available in many other jurisdictions, which do not have similar administrative investigative processes specific to legal capacity and decision-making issues and instead rely entirely on criminal or civil judicial processes. On the other hand, many jurisdictions do have “adult protection” legislation, which creates broad powers of intervention into the affairs of adults, whether they are legally capable or incapable: it is the LCO’s observation that some of the debate regarding the PGT’s complaint and investigation powers results either from a confusion with or a desire for such a broader regime.

Sections 27 and 62 of the SDA provide the PGT with the duty and the powers to investigate “any allegation that a person is incapable” with respect to either property or personal care and that “serious adverse effects are occurring or may occur as a result”.

The SDA gives the PGT significant discretion in determining the steps necessary for an investigation, as well as powers of entry and access to records for the purposes of carrying out these investigations.³⁰¹

If the results of the investigation reveal reasonable grounds to believe that a person is incapable and that serious adverse effects, as defined in the legislation, are or may be occurring, the PGT shall apply to the court for a temporary guardianship. The court may appoint the PGT as guardian for a period of not more than 90 days, and may suspend the powers of an attorney under a POA during the period of the temporary guardianship. The order must set out the powers and any conditions associated with the temporary guardianship. At the end of the period of temporary guardianship, the PGT may allow the guardianship to lapse, request the court to provide an extension or apply for a permanent guardianship order.

The connection of the complaint and investigation function with the potential outcome of guardianship by the PGT is worth emphasizing: the *only* action that the PGT is statutorily empowered to take as a result of an investigation is an application for temporary guardianship, which, although temporary, is nevertheless a very significant intervention in the life of the affected individual. The legislation implicitly therefore does not contemplate investigations in any but the most serious matters.

In the 2013-2014 fiscal year, the PGT's Investigations Unit received over 10,000 recorded communications. Most of these were referred elsewhere for appropriate action, including to family, the Capacity Assessment Office, private lawyers, Community Care Access Centres, health practitioners, and the police or other law enforcement. As a result of these communications, 239 investigations were opened. During that fiscal year, 214 investigations were completed. Sixty-one of these resulted in guardianship for the PGT under the provisions of the SDA regarding statutory guardianship; 78 were referred elsewhere, including to family, a community agency or police; in 63 cases, the investigation was concluded with a determination that an application for temporary guardianship was not required according to the statutory test; 3 were closed for other reasons, such as the death of the allegedly incapable person; and 8 resulted in an application to the court for guardianship by the PGT.³⁰²

C. Areas of Concern

1. Access to the Law

Access to the law is critical in the MHLC's[Mental Health Legal Committee] submission. No matter how well a law is written, if there is no meaningful communication of rights and no practical access to legal representation for the individual affected, the law is futile.³⁰³

A paper commissioned by the LCO from the ARCH Disability Law Centre emphasized the close connection between dispute resolution mechanisms and principles such as dignity and accessibility.

Whatever forms the dispute resolution mechanisms take, a key consideration will be ensuring that such mechanisms respect the principle of accessibility, which requires that safeguards related to legal capacity be accessible for persons with disabilities. Consideration should be given to providing supports to assist persons with capacity issues to access and use dispute resolution mechanisms. Such mechanisms must also be crafted to respect the principle of inherent dignity and worth, which requires meaningful mechanisms to ensure that people can raise concerns about mistreatment or abuse and receive meaningful redress. At minimum, dispute resolution mechanisms must be provided in a timely manner, must be navigable and useable by persons with capacity issues, and must be provided at no cost to low-income persons.³⁰⁴

During the consultations, a widespread view was expressed that the court-based mechanisms under the SDA for external appointments, oversight and dispute resolution are simply inaccessible to the vast majority of individuals who are affected by the legislation, whether individuals who lack or may lack legal capacity, or their family members or substitute decision-makers.

Stakeholders widely perceive that the implementation of the SDA is significantly distorted by barriers related to cost and complexity. It is worth remembering that as originally conceived and passed, the SDA was to be accompanied by the extensive advocacy supports envisioned in the *Advocacy Act*, as described in the *Discussion Paper* at Part Four Ch IIIB. The repeal of the *Advocacy Act* was not accompanied by alternative supports for persons directly affected by the SDA: rather, vulnerable individuals were left to navigate a complex system on their own. Whatever the flaws or benefits of the scheme developed in the *Advocacy Act*, the central insight underlying that Act remains valid: that special attention is required to ensure that individuals who lack or may lack legal capacity have meaningful access to their rights.

Court-based processes are, by their nature, complicated, technical and often intimidating, and so very difficult for individuals to navigate effectively or with confidence without significant advice and navigational supports.

A lot of people are very put off, and it's a very daunting procedure and when it happens it is, kind of like, the world has blown up around you and now everything has descended into chaos and you have to lawyer up and everyone's losing their minds, essentially.

Focus Group, Community Health and Social Service Providers, September 26, 2014

It is in many cases not realistic for individuals to attempt to navigate these processes on their own, and this is particularly true for individuals who lack or may lack legal capacity, and whose needs are intended to be at the centre of this area of the law.

In areas of the law where self-representation before the courts has become increasingly common, such as family law, significant efforts have been made to assist individuals who represent themselves. Initiatives include the development of specialized Unified Family Law Courts in several areas of Ontario, the Family Law Information Centres, and the creation of various tools and information materials intended to assist individuals, such as Legal Aid Ontario's Family Law Information Program and the Law Society of Upper Canada's information portal.³⁰⁵ The numbers of persons involved in guardianship litigation being so much smaller, similar supports and tools are not available for this group. And certainly, the development of such supports has not resolved the struggles within the family law system to ensure that individuals are effectively able to access the law: the LCO's Report, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* identifies the many ways in which the phenomenon of litigants without lawyers taxes both individuals and the justice system, including the decision of some Ontarians not to access the justice system at all and to forego exercising their rights.³⁰⁶

In cases related to the *Substitute Decisions Act*, the cost of legal advice and representation for an application to court can be beyond the reach of many families. During the LCO's focus groups, one trusts and estates lawyer referred to litigation in this area as "the sport of kings". Practically speaking, redress is unavailable because it is beyond the individual's resources.

Accessibility issues and access to justice issues are as apparent in this area as in all areas of the civil law system in Ontario. There is a significant hardship surrounding individuals who do not have the resources to pursue litigation at the Superior Court of Justice or appeals from the CCB and other applications under the SDA. In both cases, access to sufficient resources is essential.³⁰⁷

As ARCH Disability Law Centre has observed, this issue is exacerbated because the SDM has easier access to the funds of the individual who has been found to be legally incapable than does the individual him or herself. Citing an example from its own experience, ARCH commented,

[T]he SDA permits guardians to use the 'incapable' person's funds to pay for legal counsel to challenge the 'incapable' person's attempts to assert his/her autonomy. This is exactly what happened in Hazel's case: her guardian used Hazel's money to pay his own legal counsel, while at the same time refusing her access to her own funds, which she needed in order to defend herself. The guardian's access to Hazel's funds was automatic, while her ability to recoup costs if he 'overspent' would be based on her being able to convince a court to issue a costs award against the guardian.

This latter process would impose further costs upon Hazel. Even if she was successful in obtaining an order from the court, there is no guarantee that her guardian would have had the resources to honour the order.³⁰⁸

Specific concerns are raised about the process for appointing and terminating guardianships. Concerns regarding the costs of the necessary Capacity Assessment by a designated Capacity Assessor were discussed in Chapter V. Where guardianship is entered through a court process, there are considerable additional expenses, including those for legal fees, which may be very significant, particularly for those of modest means. Family members commented that an application for court-appointed guardianship was far beyond their means. The LCO has heard that some third parties may not see guardianship as a viable option for some individuals who lack legal capacity, due to cost and process barriers, even where it is the legally appropriate course of action.

As a result of the perceived barriers to guardianship applications, service providers may, with the best of intentions, seek to do an “end run” around the legislation by, for example, allowing families to exercise powers beyond those set out in an existing POA. Families may seek to obtain guardianship powers beyond those strictly needed at the present time, because they do not wish to go through the trouble or expense of re-applying to the court as circumstances change.³⁰⁹ On the other hand, families may also seek to avoid the costs and trouble of formal proceedings by such means as sharing PIN numbers or creating joint accounts, thereby exercising considerable powers with no mechanism for oversight or ability to impose legal responsibility for abuse. Chapter IX of this *Interim Report* addresses the importance of ensuring that guardianship is flexible, applied only where necessary, and tailored in time and scope to the needs of individuals. Flexibility and tailoring are challenging to achieve in a system that effectively discourages individuals and families from accessing it. That is, one of the fundamental purposes of this area of the law, to ensure that those who are able to make decisions independently are able to do so and to provide substitute decision-making for those who truly require such assistance, is significantly undermined by the challenges associated with accessing adjudication.

The practical inaccessibility of redress was a dominating theme in discussions of abuse and misuse of powers of attorney and guardianship. The result of these barriers to access is that abuse or misuse of the law may go unaddressed. As one trusts and estates lawyer commented, “That’s why I think a lot more of it does occur and falls under the radar screen, because people just can’t either practically or refuse to engage in a million dollar plus nightmare”.³¹⁰ As one individual told the LCO about her attempt to seek justice for what she believed had been the

exploitation and mistreatment of her mother at the hands of a sibling: “Every door leads to a lawyer’s office”. In the end, she was unable to pursue redress for her parent.

This lack of meaningful access to adjudication of issues under the SDA affects every aspect of this law and is, in the view of the LCO, one of its central shortfalls. Without effective access to adjudication, individuals who need a guardianship to ensure that necessary decisions are appropriately made do not have access to this assistance, and those who do not need or no longer need a guardianship face significant barriers in preserving or restoring their autonomy. Abuse or misuse of substitute decision-making powers, whether under a guardianship or a power of attorney, finds no effective means of redress, unless it reaches the very high threshold necessary to justify the PGT applying for a temporary guardianship order.

2. Managing Disputes in the Context of Ongoing Relationships

There was considerable comment during the consultations on the challenges and opportunities posed by involvement in most disputes in this area of the law of parties who have had and may continue to have ongoing relationships, whether it is disputes within families about substitute decision-making, or differences between health professionals and their patients regarding legal capacity. The issues in this area often affect the fundamental rights of those whose legal capacity is lacking or in doubt. As a result, there is a significant inherent tension between the value of an adversarial approach that can assertively protect rights, and the importance of less formal or adversarial approaches in preserving relationships that may be essential to the well-being of the individual.

In the context of powers of attorney and guardianships, it was pointed out that relationship dynamics may play a dominating role in how the law is accessed or not accessed. In some cases, the desire to preserve relationships may inhibit the willingness of individuals to access an adversarial system.

[T]he challenge is there too that people often don’t want to bring a complaint [about abuse] because, you know, they want the person to stop but they don’t want to lose the contact.

Focus Group, Community Health and Social Service Providers, September 26, 2014

On the other hand, where families do enter the adversarial system, family relationships may be permanently destroyed, as individuals engage in no-holds barred, scorched earth tactics against other family members. The LCO spoke to a number of individuals who told very painful personal stories of family conflict: it was clear that, as high as the financial toll of these conflicts might be, the personal cost was greater. To lose, for example, the opportunity to say goodbye to a

parent before his or her death, is a cost that cannot easily be reckoned. These conflicts may be fuelled, not only by the high stakes in the present moment and the emotional toll of the roles and decisions that families must take on in these circumstances, but also by long and complicated family histories. Adjudicators may have difficulty in reining in these highly emotional litigants. In this way, this area of the law takes on, in some of its aspects, some of the qualities and challenges of what is usually considered family law.

ARCH Disability Law Centre pointed out that appropriately designed dispute resolution processes may be able to further both the goal of upholding the legislation's aims and of preserving relationships, as accessible and less adversarial approaches may reduce tensions between parties and preserve relationships.

[A] significant portion of the problems that arise in the context of guardianships involve issues other than financial mismanagement or fraud by the guardian. Many issues relate to conflict over how much freedom and autonomy a guardian allows a person who is subject to his/her guardianship. These are rarely issues that require litigation. However, they are issues of key importance to the daily lives of persons subject to guardianships. If left unresolved, these disputes can create serious tension between an 'incapable' person and his/her guardian. In cases where the issue may be resolved through litigation, this process is not accessible for many 'incapable' persons. Therefore, in a new legal capacity regime, 'incapable' persons must have access to effective dispute resolution mechanisms. This would reduce tensions between decision-makers and 'incapable' persons, preserve productive relations between them, and reduce the need for litigation.³¹¹

In the clinical setting, clinicians pointed out the tensions between their ongoing role as providers of treatment and the legal role that they must play at a CCB hearing.

I'm just glad you [the facilitator] raised the odd situation of being a physician, having to be purely in a legal role, at the same time your patient is sitting beside you, and you're really wanting to operate purely from the clinical realm ... There are avenues, but I think as physicians there's a tension of, well, let's see, do I keep them in the [legal] forum or do I discontinue the forum, do I really want to go to the forum extent when I think they're going to challenge... I would rather that not be a challenge of any part of my [unclear] when I'm doing the clinical work. The forum is a clinical tool, and has to be used as a clinical tool, in the clinical realm and defined in the clinical realm. You know, I've learnt so much, I've gone through all the processes, and as I say, without exception, it's been very positive and I think I'm a better clinician from it, even though it's not purely a clinical [unclear] But there's something very odd about the tensions you find yourself with.

Focus Group, Clinicians, September 12, 2014

Part of the challenge is also due to the difficulties in reconciling the medical and legal approaches to these issues. The LCO heard from various stakeholders about the importance of a meaningful mechanism for protecting the rights of patients and ensuring accountability for

those who make decisions affecting their rights. For example, one participant in a focus group for rights advisers and advocates commented that “I find the adversarial system, the way it’s run is the only form of accountability that our doctors have”. On the other hand, clinicians felt that sometimes the focus on legal rights was ultimately counterproductive.

[W]e’re looking at this, the legal dimension versus the medical dimension, as well, and thinking about wellness and best outcomes versus thinking about rights and responsibilities, they don’t match well, so it might be a great success for the mental health bar in Toronto to have won this case, and we’re thinking, yes, but the person has to stay in hospital for a year and now they’re going to be untreated so it’s tough.

Focus Group, Clinicians, September 12, 2014

3. *Responding to the Context*

Consultees emphasized the importance of adjudicators who are knowledgeable not only about the law, but its broader context, so that they are able to understand the needs and values of those appearing before them, and work effectively within the multiple systems that surround this area of the law.

There is no doubt that adjudicators in this area face significant challenges. A number of trusts and estates lawyers pointed out to the LCO that increasingly they are seeing SDA cases that are really preliminary estate litigation, with families jockeying for advantage with respect to the disposition of the significant assets of the person who lacks or is alleged to lack legal capacity. This is often complicated litigation: it also has very little to do with the wellbeing of the person who lacks or may lack legal capacity, or with the ultimate purposes of the legislation. As the Mental Health Legal Committee has pointed out, “Individuals and families with significant resources have access to the courts but in some cases tend to use disputes surrounding incapable relatives as proxies for other conflicts”.³¹²

Several participants pointed out that not infrequently in these cases, the person who is ostensibly at the centre of the dispute is not only not represented, but is not present, so that this individual is symbolically and practically marginalized. It is important that systems dealing with legal capacity and decision-making find ways to meet the challenge of keeping the affected individual at the centre of the process.

In the context of hearings by the CCB, the LCO was told that the composition of that Tribunal is heavily weighted towards expertise in the area of mental health and the law in that area, reflecting the current mix of cases. However, demographics and social trends point to increasing pressures in other areas, such as issues related to capacity to consent to admission

to long-term care, end-of-life issues, and other issues associated with aging and the law. The *Rasouli* case, a high-profile dispute related to substitute decision-making and consent to the withdrawal of treatment for an unconscious patient, points to the very important role that the CCB plays, and may increasingly play, in Ontario's approach to the difficult and controversial issues associated with end of life.³¹³ As a result, the current structure and composition of the CCB may need adjustments to reflect these emerging realities.

In an echo of the concerns voiced in the context of SDA adjudication, persons who had experienced the mental health system and CCB processes expressed a desire for a process more consistently able to give mental health patients the experience of being meaningfully heard, regardless of the ultimate decision. A number of these individuals spoke to their experience of the CCB process as an extension of the mental health system and of their psychiatrists' overwhelming power in their lives, and some spoke movingly of the transformative power of being heard and respected despite their illness, and again, regardless of the ultimate decision.

4. Addressing Concerns Regarding Abuse

Many service providers raised concerns that there are no clear pathways to remedying any but the most evident and serious cases of abuse.

[W]e have the legislation, and we can spout the legislation, but what actual supports do we have to help us push and actually come and bring that legislation and support that legislation? Because sometimes you feel like, okay, I have a piece of paper, but you don't have anything to back the... back it up or be able to... like in the situation you were talking about, like, with the law, like, at what point can we get them to step in? Or what supports do we have through the actual law and not just with the legislation?

Focus Group, Toronto Community Care Access Centre Staff, November 4, 2014

The lack of supports was a particular difficulty for service providers who are not experts in this area of the law, and so do not encounter these issues every day. As some financial services institutions pointed out to the LCO, the frontline workers who are most likely to encounter a troubling situation will generally have backgrounds in financial and business matters, not social services. Further, a service provider who notices something suspicious and calls in the authorities will, if no clear problem is found, be unlikely to be provided any further access to the individual: raising the issue may then be ultimately to the detriment of the individual who the complaint was meant to protect. If the police or the PGT do not view the issue as meeting their threshold, the proper course of action may not be clear. To request a passing of accounts or make an application for guardianship is a costly and complicated proceeding: it may be beyond the resources of a family member, and is most often not an appropriate course of

action for a service provider. Some long-term care home providers commented favourably on the requirements and mechanisms for reporting concerns about abuse under the *Long-Term Care Homes Act, 2007*, as setting clear standards, processes and duties, and so making it easy for long-term care home providers to do the right thing.³¹⁴

Participants in the consultations expressed appreciation for the important role of the PGT's powers to investigate and to seek temporary guardianship, as well as placing these in the context of criminal law remedies and the reporting provisions under the *Long-Term Care Homes Act, 2007*, and the *Social Inclusion Act*.³¹⁵ However, they also expressed a keen sense of the limitations of the current mechanisms. Concerns were expressed that the jurisdiction of the PGT was too narrow or that the PGT interpreted it overly narrowly, so that these provisions offer insufficient assistance in situations of abuse or misuse.

It's a huge issue. We train our staff to get as many facts as they can, otherwise the PGT will hang up, and they'll say, call back when you know what you're talking about, and they'll say, but I've got a problem here, I suspect this... and we've worked with the PGT. You know, they're good people, that's not the issue. It's just that they can't deal with these. What they see is off-the-wall requests. The other thing we have, which is this horrendous workaround that we have to do because of systematic barriers, so our staff will see issues, say, that somebody that they believe is being abused, right? Financially, physically... they have to, at this point in time, we have to do... half the time, we can't get them assessed for capacity, because that costs money, right, and there's no way, because it's the abuser, the SDM, who's in fact... well, who controls it. So we do this elaborate move, and sometimes we use the *Health Care Consent Act*, which is all we have as evaluators to... in this process, to get them evaluated as incapable for long-term care, trying to precipitate. Which is not the issue at all. We want to keep them at home if we could, but we're trying to get away to get the PGT's attention, because we know the PGT won't usually follow through unless the client is incapable, right... assessed as incapable, for finance or personal care, right?

Focus Group, Joint Centre for Bioethics, October 1, 2014

Most importantly, many felt that the threshold for a PGT investigation is currently too high, restricted as it is to concerns related to "serious adverse effects". Many felt that only the most serious cases were being investigated. As noted above, the other mechanisms available under the legislation to address concerns, such as bringing an application for guardianship or seeking the passing of accounts are seen as either unrealistic or inaccessible. As a result, there may be no meaningful way to address concerns about abuse that do not meet the threshold.

In ACE's experience, persons calling the office of the PGT to report [abuse-related] concerns are often told that they need better proof of incapacity before the PGT will commence an investigation. ACE has seen numerous examples of the Office of the PGT narrowly interpreting 'serious adverse effect' – limiting their investigation to only the more extreme cases of abuse and neglect.

ACE recognizes that the PGT is doing the most that it can with limited resources. However, as the government agency primarily responsible for investigating concerns of neglect and abuse of mentally incapable adults, the PGT is not meeting the need in Ontario. ACE recommends reforming the *Substitute Decisions Act* to require the PGT to commence an investigation into all allegations of abuse and neglect of the mentally incapable. Of course, ACE anticipates that the scope of the investigation will vary depending on the allegations raised and the information obtained.³¹⁶

Further, it was suggested that the PGT should have a wider range of remedies available following an investigation, beyond application for temporary guardianship. This suggestion is often paired with proposals to broaden the range of issues which the PGT has the power to investigate. For example, Joffe and Montigny propose a Monitoring and Advocacy Office with a broad mandate, which could, upon receipt and investigation of a complaint, have wide powers to resolve the complaint, including through mediation and other forms of dispute resolution.³¹⁷

Finally, there may be perceived conflicts of interest for the PGT in this role, as the results of the investigation may ultimately lead to guardianship by the PGT over the individual.

D. Applying the Frameworks

The *Framework for the Law as It Affects Older Adults* highlights that “[t]he principles of *respecting dignity and worth* and of *security* mean that there must be meaningful mechanisms to ensure that older adults are able to raise concerns about mistreatment, exploitation or abuse, that there is meaningful redress when such issues arise, and that they are not subject to retaliation for doing so”.³¹⁸ A corresponding statement appears in Step 6 in the Framework for the Law as It Affects Persons with Disabilities. The connection between meaningful access to rights enforcement mechanisms and the principles is particularly clear in this area of the law where autonomy, dignity and security/safety are directly at stake in the implementation of the law.

The preceding discussion also points to how dispute resolution mechanisms in this area of the law may or may not support the principles of participation and inclusion, by providing means to resolve disputes while maintaining important relationships, and of the importance of fair and effective dispute resolution mechanisms to families, professionals and service providers, highlighting the principle of membership in the broader community.

There are many positive aspects of the current system, including the Legal Aid funding of supports and the availability of rights advice for many proceedings before the CCB, the relatively accessible and expeditious CCB processes, and the Section 3 Counsel provisions. The

Framework questions assist in identifying the following ways in which current mechanisms fall short:

- shortfalls in mechanisms to address power imbalances and prevent potential retaliation against those who raise issues, for example in the barriers faced by persons who wish to challenge the appointment of a guardian over them, or difficulties that persons who lack or may lack legal capacity may have in attempting to raise concerns about how a substitute decision-maker is exercising his or her powers;
- the lack of navigational assistance for individuals who lack legal capacity or their families to help them in accessing systems which are highly formal, process-based and intimidating; and
- the problems associated with the implementation of the Section 3 Counsel program, including the lack of protections to ensure unimpeded access to counsel by the person who lacks or may lack legal capacity.

The *Frameworks* highlight some strategies that may be employed to improve access to rights enforcement and dispute resolution, including:

- simplifying processes;
- providing specialized supports and assistance for persons who face barriers due to disability, older age, low-income or other aspects of identity; and
- empowering individuals by improving access to information and supports that can enable self-advocacy.

The merits and feasibility of these various approaches in this particular context are considered in the remainder of this Chapter.

E. Draft Recommendations

1. Increasing Access to Rights Enforcement and Dispute Resolution under the Substitute Decisions Act, 1992

Consultees emphasized that for those directly affected by the law, the ability to be meaningfully heard on issues that directly affect their lives is central to their wellbeing. In evaluating mechanisms for access, the key considerations are whether the proposed forum provides a meaningful, expert and accessible determination.

[O]ur clients want their day in court. What that court is, is to be determined. But it should be more sensitised and almost individualised to our clients. Clients just want to be heard and if the CCB does it, great, Superior Court does it, but I wish there was a mechanism where everybody could be pleased that, you know, they've had a fair hearing, everybody had their fair say and a decision was reached. And that's, sort of, part of the recovery process ...

Focus Group, Rights Advisers and Advocates, September 25, 2014

The *Discussion Paper* identified the following three key options, among others, for improving access to the law under the SDA, all of which received some comment during the LCO's public consultations:

1. Develop a specialty court or specialized court processes to improve access to rights enforcement and dispute resolution under the SDA:
2. Move some or all SDA functions currently under the jurisdiction of the Superior Court of Justice to an administrative tribunal, most likely an expanded CCB; or
3. An expanded complaints and investigation function.

These options are not all mutually exclusive, and in fact implementation of some approaches may support the effectiveness of others. Based on the results of the consultations, as well as the LCO's research and analysis, the LCO recommends a combination of approaches to strengthen access to rights enforcement and dispute resolution under the SDA.

Specialized Court or Specialized Court Processes

In the LCO's *Discussion Paper*, consideration was given to whether Ontario's legal capacity and decision-making system would benefit from the creation of a specialty court focussed on these issues. Ontario has created a number of specialized courts that are able to provide expert, targeted and holistic services to better address their particular contexts. The Unified Family Courts and the Mental Health Court are two well-regarded examples of such an approach to justice. The Mental Health Court was formed in 1998, in response to the strains placed on the Ontario Court of Justice by the increasing numbers of mentally disordered accused at Toronto's Old City Hall location. Toronto's Mental Health Court provides diversion services, accommodates the needs of mentally ill accused, expeditiously deals with issues of "fitness to stand trial" and attempts to "slow down the 'revolving door'". It provides expert and holistic services: the Crown Attorneys are dedicated, permanent staff, there are nine Mental Health Workers attached to the Court, a psychiatrist from the Centre for Addiction and Mental Health attends daily to perform "stand down assessments", and court clerks have specialized knowledge of the system.³¹⁹

The United Kingdom's Court of Protection (CoP) provides an example of a specialized court in the context of legal capacity and decision-making law. It is a court that has a specific mandate to address this area of the law, and it has a specialized set of tools at its disposal for addressing the issues. The CoP has broad jurisdiction, including the following:

- making determinations of capacity;
- making declarations, decisions or orders on financial or welfare matters affecting persons who have been found to lack capacity;
- appointing and removing deputies to make ongoing decisions for persons who have been found to lack capacity;
- determining the validity of powers of attorney;
- considering objections to the registration of a power of attorney.³²⁰

The CoP has tailored processes and powers, including specialized rules of procedure,³²¹ a comprehensive, plain language and authoritative "Code of Practice",³²² dedicated staff who are able to provide information and limited assistance to individuals attempting to complete the CoP's complicated forms and processes, and the ability to request reports from a Court Visitor, the Public Guardian and Trustee, a Local Authority or a National Health Service body.³²³

As was noted above, the Ontario Superior Court of Justice currently hears between 200 and 260 applications for guardianship each year. There are in addition an unknown number of applications regarding variances, terminations, or oversight functions related to either guardianship or powers of attorney. From discussions with practitioners, the overall numbers of cases in this area of the law are not high, likely because of the accessibility issues highlighted earlier in this chapter.

A specialized court dealing with legal capacity and guardianship issues could institute tailored processes and supports, both to facilitate access and to enable more holistic approaches to the issues, as has been done with the Mental Health Court, for example. However, the LCO believes this is likely not a viable solution in Ontario, because the numbers of cases would not make it practicable, unless perhaps the matters currently dealt with by the CCB were transferred back to the Court, an option which current users of the CCB are unlikely to find immediately appealing. The existence of the CCB means that the courts will always be dealing only with a portion of the Ontario cases related to legal capacity and decision-making, unlike, for example, the Court of Protection of England and Wales which addresses all issues in this area of the law. Significant investments in supports would likely be necessary to reduce barriers to access to the courts, both actual and perceived, to encourage those individuals and families who currently

abandon attempts to seek redress to instead access the courts. **Accordingly, the LCO does not recommend the creation of a specialized court to address legal capacity and guardianship issues.**

The characteristics of specialized courts, however, point to the usefulness of being able to tailor adjudication by the appropriate body to the context, in areas such as these where the law is closely tied to broader social issues and where those affected may need specialized supports or assistance to effectively access adjudication. Expertise, a holistic approach, and an emphasis on developing processes that can accommodate special needs, are all elements that may be of assistance in increasing meaningful access to the law for persons impacted by issues related to legal capacity, decision-making and guardianship. As indicated below, the LCO believes that an administrative tribunal can provide the kind of specialized expertise and tailored approaches necessary for effective and accessible adjudication in this area of the law.

An Expanded and Reformed Administrative Tribunal

In Part Four Ch IIC of the *Discussion Paper*, the LCO noted that some commentators had expressed interest in expanding the role of administrative tribunals in Ontario's legal capacity, decision-making and guardianship system, and raised for consideration whether there might be a benefit in moving some or all of the functions currently performed by the Superior Court of Justice to an administrative tribunal, such as an expanded and reformed version of the CCB. Consultations indicated broad interest in reforms in this direction.

Administrative tribunals are commonly created as a means of providing less costly, less formal and more specialized adjudication, In *Rasannen v Rosemount Instruments Ltd*, Justice Abella, writing for the Ontario Court of Appeal, describes the role and function of administrative tribunals as follows:

They were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.³²⁴

Sir Andrew Leggatt's comprehensive 2001 *Report of the Review of Tribunals, Tribunals for Users: One System, One Service*, which made recommendations for reform of Britain's administrative tribunal system, commented,

Choosing a tribunal to decide disputes should bring two distinctive advantages for users. First, tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills. Secondly, tribunals' procedures and approach

to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms. Most users ought therefore to be capable of preparing and presenting their cases to the tribunal themselves, providing they have the right kind of help. Enabling that kind of direct participation is an important justification for establishing tribunals at all.³²⁵

The Leggatt Report also emphasizes as a potential benefit of administrative tribunals their ability to employ and develop specialized subject matter expertise, particularly when dealing with issues that involve broader policy frameworks or contexts, or “polycentric” issues in which there are multiple interacting interests or considerations. Tribunal members are often expected to draw on contextual socio-economic and cultural factors and to leverage expert knowledge to further the policy goals enunciated by Parliament.³²⁶

As was noted in the *Discussion Paper*, the Australian states moved jurisdiction over legal capacity, decision-making and guardianship issues to administrative tribunals during a wave of reform in the 1980s and early 1990s. Each of the state tribunals has somewhat different powers and structures. The move has been generally viewed as a success. One comprehensive review concluded:

Tribunals tend to pay more attention to social context and functioning, and are less likely to appoint proxies. This may have something to do with the tribunal form or the more inquisitorial style of hearing. But it also reflects a different narrative, a different vision of what the jurisdiction is about. They need social information to identify socio-legal crises. They may be reluctant to appoint substitutes, but they are more interventionist than courts in addressing systemic issues. The tribunals also pay more attention to incorporating the person for whom the application was made into an alliance.³²⁷

Law reform commissions in Queensland and in Victoria have recently undertaken comprehensive reviews of their legislation in this area, and while they suggest adjustments to their respective tribunal systems, there is no suggestion that these matters would be better dealt with by the courts.³²⁸ The Victorian Law Reform Commission briefly considered the international use of courts as venues for guardianship hearings and noted that it did not receive any suggestions about moving away from its tribunal, concluding that “Australia’s tribunal-based approach to guardianship has been one of its strongest features and should continue”.³²⁹

During the LCO’s public consultations, there was considerable interest in the use of an administrative tribunal for adjudication of issues under the SDA. Generally, this took the form of proposals to expand the jurisdiction of the CCB.

The creation of the CCB was one of the significant innovations implemented through the reforms of the 1990s. Stakeholder responses during the LCO’s consultations indicate that this

innovation is widely viewed as a success. While consultees raised specific concerns regarding the CCB, including the perennial debate as to whether its approach is too rights-focused or insufficiently so, and whether the CCB has the appropriate expertise for the range of cases before it, there was strong general support for the CCB as a body that has the capacity to develop and employ expertise in this area of the law, provides speedy and comparatively flexible adjudication of disputes, and is relatively accessible. The proposal to expand the jurisdiction of the CCB into the realm of the SDA can be understood as recognizing and aiming to build on this success.

Transfer of jurisdiction of matters under the SDA to an administrative tribunal, and more specifically to the CCB, is seen as having a number of potential benefits.

Specialization: As the Leggatt Report emphasizes, administrative tribunals have the capacity to specialize in the areas of the law under their jurisdiction. Adjudicators may be chosen for a range of related expertise: as was noted earlier in this Chapter, the CCB currently includes among its adjudicators approximately one-third lawyers, one-third psychiatrists, and one-third members of the public who bring a range of knowledge and experience. As well, the focus on a single area of the law allows adjudicators to develop deeper knowledge of the particular dynamics and contexts of the cases before them.

In addition, administrative tribunals can tailor their processes and procedures to the needs of their particular clientele. Because of their specialization, there is an opportunity for these tribunals to develop an understanding of the needs and circumstances of those they service and the barriers they face in accessing justice, and to adjust their own operation to address these barriers. The CCB's practice of holding hearings in a variety of venues, including, importantly, in psychiatric facilities or hospitals, is an example of how administrative tribunals can adapt to address barriers and needs.

As the discussion above emphasizes, there are examples in the Ontario context of courts specializing in this way, although it is inevitably a more challenging endeavor, given the structure of the courts. Further, the small number of cases currently before the Superior Court of Justice makes it difficult for the Court to develop specialized expertise in this area.

Accessibility: Among stakeholders consulted, considerable support for the idea of transferring SDA matters to an administrative tribunal arises from the perception that administrative tribunals can provide a more accessible and less intimidating form of justice than the current court-based system, thus addressing some of the most significant concerns regarding barriers to dispute resolution and rights enforcement in this area. For example, the Northumberland

Community Legal Centre commented in its submission that issues such as abuse of powers of attorney “should be removed from the courts as those processes are often too long, too costly, and too unavailable for low income vulnerable persons”.³³⁰ Certainly, as was referenced in *Rasannen v. Rosemount Instruments Ltd*, increasing accessibility and reducing complexity and expense is part of the rationale for administrative tribunals as a whole.

A possible risk in delegating adjudication related to the SDA to an administrative tribunal is the trend towards “judicialization” of administrative justice, in which tribunals become more court-like, more formal and more costly.³³¹ It would be important, in delegating powers under the SDA, to carefully consider the tribunal’s organizational structure and procedural practices in the light of navigability and the particular challenges that face this group of potential applicants.³³²

Flexibility: increased specialization and reduced barriers to access may allow administrative tribunals to provide more flexible, contextual and tailored responses to legal capacity, decision-making and guardianship issues. In Chapter IX, the LCO has proposed a number of draft recommendations intended to better tailor the use of guardianship to the actual needs of individuals. As is discussed in that Chapter, while most of these draft recommendations can be implemented within the current system, they are unlikely to have a significant impact so long as the cost and intimidating procedural requirements of Ontario’s adjudication mechanisms in this area act as a deterrent to accessing the law, and inadvertently encourage those who access the system to seek maximum powers as a means of avoiding the need for a return to adjudication.

System coordination: In practice, issues related to property, personal care and treatment are closely intertwined. While the practicalities of legal capacity and decision-making issues differ between health care and other settings because of the nature of the context, the underlying principles and challenges are the same. The current division of legal capacity and decision-making adjudication between the CCB and the Superior Court of Justice is somewhat artificial, and contributes to the challenges in navigating and effectively employing the system. For example, in making decisions in applications regarding prior capable wishes, the CCB must often consider the provisions and effect of powers of attorney for personal care. However, the CCB does not appear to have jurisdiction to consider the validity of the powers of attorney that it examines: if issues are raised on this point, only the Superior Court of Justice can address these,³³³ so that the core issues must be, in effect, severed. There is merit to the idea of a unified approach, within a single institution, to this area of the law.

It is the view of the LCO that, given the existence of the CCB, it would be more sensible to build on this existing tribunal, rather than creating a new body. However, it should be acknowledged that the CCB, as it currently exists, is very much focused in the area of mental health law, and

that this has significantly influenced its composition and procedures. The CCB has expertise in issues related to legal capacity and decision-making, as well as in serving marginalized communities and balancing the difficult ethical and policy challenges that underlie this area of the law. This provides an important foundation, but it would be important to re-examine the composition, training and processes of the CCB to effectively address a broader mandate, including with respect to addressing the financial issues often raised under the SDA. There are over 200 administrative tribunals in Ontario, addressing a wide variety of issues, ranging from fundamental rights to environmental protection to financial services and securities, so that there is considerable precedent to draw from in adapting the CCB to address a broader mandate.

As noted above, the CCB as presently constituted includes a number of highly beneficial features, including a history of and commitment to speedy adjudication; its uncommon practice of taking hearings to the location of the individual, with the accompanying focus on ensuring that the person at the centre of the issue has the opportunity to be present and participate; and relatively strong supports to accessibility through Legal Aid Ontario. All of these features would bring considerable benefit to issues currently adjudicated under the SDA.

Some have expressed concern about the ability of an administrative tribunal such as the CCB to address some of the more challenging matters currently dealt with by the Court under the SDA. This is the view expressed in a House of Lords report on the “post-legislative scrutiny” of England and Wales’ *Mental Capacity Act, 2005* that considered and ultimately dismissed suggestions to replace the Court of Protection (described above) with a tribunal structure. The report stated, “While we have sympathy with concerns raised regarding access and delays, we believe that the replacement of the Court with a new tribunal system would risk the loss of expertise and potentially increase costs in the system”.³³⁴ Specifically, the authors raised concerns about the fact-finding abilities of tribunals, and the logistics for tribunals of making cases that must frequently re-convene. In the case of the CoP, the choice facing the authors was not between the judicial system in general and an administrative tribunal, but between an existing expert specialized court and the development of a new administrative tribunal.

Other consultees pointed out, however, that the CCB is already responsible for addressing issues related to end-of-life, which are as weighty, complex and controversial as any legal issue can be.

The use of the provisions of the SDA by warring families to extensively litigate access to funds, particularly in situations where the person lacking or alleged to lack legal capacity has substantial assets, raises a different set of concerns: that is, whether the CCB, as currently

constituted, has the ability to effectively manage the dynamics of cases in which the parties are willing to spend immense funds and to take an extremely adversarial approach. The issues are not necessarily more difficult, but managing the litigating parties may be challenging. This is, however, not a challenge unique to legal capacity and decision-making law. Further, it is the view of the LCO, as is expressed elsewhere, that to the extent that the provisions of the SDA are being used to pursue preliminary estate litigation and similar matters, these are misuses of legal capacity and decision-making laws, which have as their purpose the benefit of the person who lacks or may lack legal capacity.

On balance, the LCO believes that in the Ontario context, where an administrative tribunal dealing with similar and related issues already exists and has demonstrated its abilities to provide effective, expert and comparatively accessible adjudication, it makes sense to transfer jurisdiction to that body of other issues related to legal capacity and decision-making, as a means of increasing the specialization, accessibility, flexibility and coordination of rights enforcement and dispute resolution in this area of the law.

This approach would not, in the view of the LCO, require any reduction in the other areas of the CCB's mandate, such as its responsibilities under PHIPA or the *Mandatory Blood Testing Act*.

In order for this approach to be most effective, it should be accompanied by reforms to assist the CCB to fulfil this new mandate. It may be useful to reconsider, for example, the range of expertise found among CCB members and the merits of including a core of full-time members within the composition of the Board. Certainly, the expansion of issues and clientele would require a re-examination of the extent and nature of the training provided to adjudicators, and the responsibility for addressing financial issues and long-term appointments may necessitate a re-thinking of some aspects of the current rules of practice.

As noted in section B2 of this Chapter, the CCB currently may hear applications for directions when the appropriate application of the HCCA with respect to a required decision is not clear, and to determine whether an SDM is acting in compliance with the requirements of the HCCA for how decisions are to be made (colloquially known as "Form G" applications, in reference to the mandated CCB form for commencing such an application). Extending such applications to issues under the SDA would not only promote consistency in the CCB's role, but would also create a means by which concerns regarding the abuse or misuse of powers of attorney or guardianship, a key issue identified in section C1, could be more easily addressed.

Currently, a Form G application can be brought only by the health care practitioner proposing treatment, person proposing admission to a care facility or staff member responsible for the

personal assistance service. The LCO received a number of proposals that the person directly affected also be empowered to bring a “Form G” application to the CCB. Both the Advocacy Centre for the Elderly and the Mental Health Legal Committee proposed such an amendment in their formal submissions. The LCO believes that while many individuals with concerns regarding the actions of their SDM would not, practically speaking, be in a position to bring such an application, such an amendment would be of value to a number of individuals who have the supports necessary to bring an application, and would be consistent with the broad goal of encouraging attention to the values and wishes of the person lacking legal capacity.

It has also been proposed that an opportunity be created for family or others who have a close relationship with the individual lacking legal capacity to be empowered to bring a Form G application, and in this sense to act as advocates for the individual. It has been pointed out that health practitioners may have many reasons for not wishing to bring an application and may not always be in a position to ascertain whether the SDM is in fact complying with the requirements of the legislation. Careful thought would be required to define the circumstances in which family or friends could bring such an application, but the LCO believes that this proposal also has value.

There would also be a number of practical issues to consider. Earlier in the discussion, the issue of validity of powers of attorney was touched on: careful consideration would be required regarding whether this issue should be transferred to the CCB. While issues related to, for example, whether the individual had the requisite capacity to create the power of attorney, issues related to undue influence are in the view of some more suited to consideration by the Court.

Chapter VI discussed the creation of new personal appointments in the form of support authorizations: such a reform would require the creation of dispute resolution and enforcement mechanisms. Should the government take up the LCO’s draft recommendations regarding support authorizations, an expansion of the jurisdiction of the CCB should include oversight of support authorizations, as well as recourse for the monitors recommended in Chapter VII.

Expanded and Strengthened Complaints and Investigation Function

The expansion and strengthening of Ontario’s complaints and investigation mechanisms related to misuse of statutory decision-making powers or abuse of persons lacking legal capacity was identified as a priority in many of the focus groups, as well as in submissions. It was suggested that the mandate of the PGT investigation powers be expanded beyond the current focus on

serious adverse effects and the necessity of a temporary guardianship by the PGT, to enable it to examine and address not only cases of serious abuse or neglect, but also misuse of SDM powers. There are three related elements here:

- the level of discretion available to the PGT with respect to investigation of complaints;
- the types of issues which the PGT is empowered to address (currently only those related to “serious adverse effects” resulting from a lack of capacity); and
- the remedies available to the PGT upon conclusion of an investigation, which currently include only an application for temporary guardianship.

In the Australian state of Victoria, the Public Advocate includes among its responsibilities “investigating complaints or allegations of abuse or exploitation of people with disabilities, or any need for, or inappropriate use of, guardianship”.³³⁵ Investigations may commence either at the instigation of the Victorian Civil and Administrative Tribunal (VCAT) or through a complaint from any person. The Victorian Law Reform Commission (VLRC) notes, “While these provisions are expressed broadly, they are limited in their application to circumstances where a guardianship or administration order might be appropriate. Further, the Public Advocate does not have a comprehensive range of powers to carry out these functions.”³³⁶ The VLRC recommended strengthening the investigative powers of the Public Advocate, as well as expanding this role to include situations where there is concern that a person undertaking the roles of supporter, co-decision-maker or private guardians might be misusing their powers or acting inappropriately by abusing, neglecting or exploiting a person with impaired decision-making ability due to a disability.³³⁷

In Queensland, the Adult Guardian has the power to investigate any complaint or allegation that an adult with impaired capacity is being, or has been, neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements.³³⁸ As part of this mandate, the Adult Guardian has the power to compel the production of detailed accounts from attorneys or administrators, and a right to “all information necessary to investigate a complaint or allegation or to carry out an audit”.³³⁹ After an investigation or audit is completed, the Adult Guardian must create a report and provide it to the person at whose request it was carried out, as well as to every attorney, administrator or guardian for the person, and any interested party.³⁴⁰ If the Adult Guardian determines that the request for an investigation was frivolous, vexatious or without good cause, the person requesting the investigation may be required to pay the amount for the cost of the investigation that the Adult Guardian considers appropriate. Similarly, where the Adult Guardian determines that the attorney or guardian has contravened the law with respect to finances, the Adult Guardian can again require personal payment of the investigation costs. In its review of Queensland’s legal capacity and guardianship laws, the

Queensland Law Reform Commission considered at some length whether the Adult Guardian ought to have a mandatory duty to investigate all complaints. It rejected this proposal, saying

In the Commission's view, section 180 of the *Guardianship and Administration Act 2000* (Qld) should continue to provide that the Adult Guardian has a discretion in relation to the complaints and allegations that are investigated. While, on one level, it may appear attractive to suggest that the Adult Guardian should be required to investigate complaints or allegations made by other agencies within the guardianship system, the Commission is concerned that, if the legislation were amended to impose a duty on the Adult Guardian to investigate complaints or allegations made by certain bodies, compliance with that duty could adversely affect the Adult Guardian's ability to prioritise referrals and to investigate those complaints and allegations where the adults concerned appear to be most at risk.³⁴¹

Under the *Mental Capacity Act 2005* of England and Wales, the Public Guardian works jointly with other agencies to address concerns about abuse. The Public Guardian is empowered to receive "representations" (including complaints) about how deputies or persons acting under a power of attorney are exercising their powers.³⁴² The Public Guardian has investigatory powers, although it may investigate jointly with other bodies such as social services, National Health Services bodies, police or other bodies. It may also refer complaints to appropriate agencies, although it retains responsibility for ensuring that the Court of Protection has the information it requires to take any necessary actions with respect to attorneys or deputies.³⁴³

The LCO has considered proposals that would require the PGT to carry out at least some investigation of all complaints received, but has concluded that such a requirement would likely require considerable investment to relatively little benefit. While such a requirement could be accompanied by language enabling the PGT to dismiss without investigation complaints that are, for example, out of jurisdiction or trivial or vexatious, the formalization of the PGT's discretion and the liability of this process to judicial review would be burdensome. Further, it would not address the fundamental question, which is that of the actual jurisdiction and remedies available to the PGT with respect to complaints and investigations.

From the consultations, it appears that some of the pressure on Ontario's investigative system arises from the relative inaccessibility of the available court-based dispute resolution mechanisms. Where a family member believes that a guardianship order or power of attorney is being misused, an application to the Superior Court of Justice for a passing of accounts or to apply for guardianship is a pathway available only to persons of considerable means and stamina. Reforms to Ontario's adjudicative mechanisms related to the SDA may reduce some of the pressure on the PGT's available mechanisms.

An expanded complaints and investigation function within the PGT would certainly be one means of expanding access to the rights protected by the HCCA. As ARCH Disability Law Centre has pointed out, a complaints function that dealt flexibly with issues not only of neglect and abuse of guardianships and powers of attorney, but also the much more common issues of misuse of decision-making powers could be of benefit to many individuals. However, it is the LCO's view that an expanded administrative tribunal, as discussed above, would be a preferable option to expanding the responsibilities of the PGT. It would increase accessibility of appointments under the SDA, as well as the use of appointments. Further, an administrative complaints mechanism might find it challenging to address the common disputes within families that are the source of many concerns regarding misuse. The current powers of the CCB to consider whether an SDM under the HCCA is acting in compliance with the requirements of the HCCA as to decision-making and to provide directions when the appropriate application of the HCCA with respect to a required decision are unclear, could usefully be expanded to issues under the SDA, to address many of these issues. As an additional measure, the list of those entitled to make application to the CCB regarding compliance of the substitute decision-maker with the requirements of the legislation could be expanded to include the individual her or himself, thus providing the individual with some means to voice concerns without relying on a third party to identify the issues.

It is the view of the LCO that the most practical and effective option for improving access to the law is an expansion of the jurisdiction of the CCB, and that if this is not feasible in the shorter term, it is nevertheless the preferable option in the long term. Any steps taken to address the concerns that underlie the proposal to expand the CCB's jurisdiction need, therefore, to be consistent with the principle of progressive realization, to advance towards the goal of improved access to the law, and to not be inconsistent with its achievement. Should government decide not to implement this recommendation, there may be merit in examining at least some expansion of the potential subject matter of complaints to the PGT under the SDA. An expansion of the scope of matters into which the PGT could conduct an investigation could not address concerns regarding the accessibility and flexibility of the appointments process. Further, there are limits on the types of matters which a purely administrative process could appropriately address. However, in the absence of other reforms, there may be some merit in giving the PGT the power to examine a broader range of issues related to compliance with the requirements of the SDA, such as complaints regarding an SDM's duties to keep accounts, foster personal contact with supportive family or friends, or choose the least restrictive alternative.

Finally, apart from the subject matter of the investigation, it may be worthwhile to consider, whether there would be benefit in enabling a broader range of *responses* to an investigation on

behalf of the PGT. An application for temporary guardianship by the PGT is a very weighty response, and will be appropriate in only a limited range of circumstances. As one option, should the jurisdiction of the CCB be expanded as the LCO recommends in Draft Recommendation 24, the PGT could be given the option of referring a written report to the Consent and Capacity Board, which would be empowered to make a range of orders on the basis of the report, such as ordering training or regular reporting for a guardian or power of attorney, or using its powers with respect to suspending, varying or terminating a guardianship or power of attorney.

DRAFT RECOMMENDATION 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.**

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.**

DRAFT RECOMMENDATION 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.

2. Expanded Supports for Navigation and Advocacy

As was discussed above, adjudication of issues related to legal capacity, decision-making and guardianship may be benefited by the provision of administrative or legal supports intended to enhance the effectiveness and accessibility of adjudication. Ontario's legal capacity, decision-making and guardianship system currently includes a number of supports that assist in enhancing the fairness and effectiveness of the system, including Section 3 Counsel and Legal Aid supports.

As was discussed earlier in this Chapter, access to legal representation is an important element of access to the law, whether for the person directly affected, those acting as SDMs, or others involved in the situation.

Individuals whose legal capacity is lacking or at issue of course have the most at stake, and will generally face the greatest practical barriers in accessing legal representation. These barriers are acknowledged in the parallel provisions of section 3 of the SDA and section 81 of the HCCA. Section 3, discussed at greater length below, gives the Court discretion to appoint legal counsel for an individual whose legal capacity is at issue under that Act and who does not have legal representation. Section 81 of the HCCA states that where an individual who is party to a proceeding before the CCB may be incapable and does not have counsel, the CCB may direct LAO to arrange for legal representation. It should be noted that this does *not* require LAO to issue a certificate for that legal representation if the individual is not otherwise eligible, and the individual will be responsible for the resultant legal fees. The CCB has issued a *Policy Guideline* in relation to this provision.³⁴⁴

Despite the available LAO supports and section 81 of the HCCA, some individuals who lack or may lack legal capacity may be unrepresented before the CCB – for example, because they have made an informed choice to decline representation. In such cases, the CCB's *Policy Guideline 2* provides direction to CCB members on assistance to these individuals. It indicates that the duty to inquire “gives the Board the authority to take a proactive role during the course of the hearing when dealing with the unrepresented subject of an application” and that while

respecting the rights of other parties, “The panel should err on the side of providing more, rather than less, assistance to the unrepresented person”.³⁴⁵

The provisions of section 3 of the SDA and of section 81 of the HCCA are of course focussed on the needs of the person at the centre of the dispute, as is LAO’s certificate program. It is not uncommon for family members to be unrepresented in their appearances before the CCB, and very common for health practitioners to appear without representation, an issue which has been the subject of some comment over the years.³⁴⁶

Strengthening Section 3 Counsel

Ontario’s “section 3 counsel” provisions are an important element of access to the law in this area. Individuals may of course retain their own counsel if they wish. Section 3 of the SDA makes some provision for appointment of counsel where a person has not retained counsel and their legal capacity is at issue. Under that section, in such circumstances the court may arrange for legal representation to be provided, and the person will be deemed to have capacity to retain and instruct counsel for that purpose.

In some of these cases, the person may be eligible for legal aid, and a certificate may be issued. If not, the person is responsible for their own legal fees. Either the person or his or her guardian of property or power of attorney for property may seek review of the legal fees charged by counsel appointed under this section.

“Section 3 counsel” play a vital role in ensuring that the rights of persons alleged to be lacking legal capacity are recognized and advanced, something broadly acknowledged by key stakeholders during the consultations. This role would continue to be important should the functions of the Superior Court of Justice be transferred to the CCB, as the LCO has recommended.

Lawyers acting as Section 3 Counsel have pointed out to the LCO that in a not insignificant number of cases, the person currently acting as guardian or exercising a POA for the person at issue is opposed in interest to that person, and that these SDMs have considerable opportunity and incentive to attempt to thwart effective representation by Section 3 Counsel. If they have physical custody of the individual, they may attempt to block or limit access by the counsel, or may attempt to monitor or eavesdrop on conversations between the lawyer and client. They may use their control over the finances of the individual to unreasonably block or delay payment of legal fees. These difficulties may undermine the ability of Section 3 Counsel to perform their roles effectively, and may dissuade lawyers from taking on section 3 clients. It has

been suggested that reforms are required to reduce the opportunities for SDMs to improperly thwart the intent of the section 3 provisions. As the Mental Health Legal Committee comments,

There is a need to spell out in the *SDA* that access to counsel, including lawyers appointed under section 3 of the *SDA*, may not be impeded. Anecdotal examples of barriers include third parties hiding or physically preventing counsel from speaking or meeting with the client; third parties insisting on being present during lawyer-client meetings; third parties surreptitiously recording or monitoring lawyer-client meetings; third parties hiring replacement lawyers; third parties who control assets refusing to pay the lawyer; third parties bringing motions to remove lawyers from the record; claims for personal costs against the lawyer under rule 57.07 of the *Rules of Civil Procedure*; and third parties bringing collateral proceedings (i.e. negligence actions) against section 3 counsel. Consideration should also be given to adding section 3 counsel to the enumerated persons who it is an offence to hinder or obstruct in section 89 of the *SDA*.

We agree that Section 3 Counsel need to be protected from conduct that may prevent them fulfilling their functions appropriately or make it difficult for them to do so.

Concerns have been raised regarding the training available to lawyers acting as Section 3 Counsel. It has been proposed that panel qualification standards for lawyers who wish to be appointed under this program be developed, including appropriate requirements for experience and training.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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*.

Improving Legal Aid Supports

The *Legal Aid Services Act, 1998* requires Legal Aid Ontario (LAO) to provide services in the area of mental health law.³⁴⁷ In particular, LAO provides legal aid certificates to clients in the civil mental health system who are exercising rights to review by the CCB under the MHA and HCCA. The qualifications for a legal aid certificate for a CCB hearing are relaxed compared to those for other issues. In the fiscal year 2010-11, LAO expended \$2.8 million on certificates for CCB applications, which included the issuance of 2,836 certificates and 2,566 hearings conducted.

To place this number in context, in that year, there were a total of 5,216 applications filed with the CCB.³⁴⁸

As well, both the community legal clinic system and specialty legal clinics such as ARCH Disability Law Centre and the Advocacy Centre for the Elderly (ACE) play very significant roles, not only in assisting individuals to assert their rights, but in identifying and addressing systemic issues in this area of the law, including through public education and law reform activities.

The Legal Aid funding currently provided in relation to CCB hearings is one of the strengths of the system, and has a significant impact on its accessibility and effectiveness. Should government accept the LCO's recommendation for an expanded mandate for the CCB, it would be important for Legal Aid Ontario to consider how to extend its current supports to this broader range of matters. Should SDA matters remain within the jurisdiction of the Superior Court of Justice, some of the access issues could be ameliorated by a greater focus by Legal Aid Ontario on this area.

The Mental Health Legal Committee, among others, has advocated that greater Legal Aid funding be provided to this area of the law.

In *SDA* proceedings, representation of the alleged incapable persons is often crucial. It is particularly difficult to fund representation, however, where a person's assets have been converted or are illiquid. Legal Aid has been practically absent from the funding of counsel retained directly by the alleged incapable person or appointed pursuant to section 3 of the *SDA*. Legal Aid has no payment tariff applicable to such representation and lacks an institutional appreciation of what is involved. The funding of representation by Legal Aid where necessary in such matters must be restored. Legal Aid can, among other things, facilitate representation in cases of illiquidity by taking liens on a clients' real property.³⁴⁹

In its 2014 budget, the Ontario government, as part of a broader strategy to improve access to justice and legal supports, particularly for vulnerable individuals and groups,³⁵⁰ committed to expanding access to legal aid by raising the income eligibility threshold to qualify for legal aid assistance.³⁵¹ Based on the above objectives and funding, LAO has undertaken a comprehensive, multi-year plan to significantly expand access to justice for low-income Ontarians. This initiative will lead to the most significant and rapid increase in legal aid certificates in more than 25 years.³⁵² As one part of this initiative, LAO is expanding certificate services to provide legal assistance to eligible clients in a mental health proceeding where there are conflicts regarding statutory guardianship and substitute decision-making for a person who has been found incapable.³⁵³ Several new certificates for representation before the Consent and Capacity Board and Superior Court of Justice will be available to persons caught in the middle of a guardianship dispute, who wish to have their guardianship reviewed, and to

substitute decision makers whose health care decisions are being challenged. This initiative is intended to:

increase the availability of advocacy before mental health tribunals and court proceedings dealing with serious liberty and personal security issues related to guardianship of person and property, and treatment decisions by substitute decision makers.³⁵⁴

It should be noted that Legal Aid Ontario is currently in the process of developing a Mental Health Strategy intended to produce a “multi-faceted, multi-year strategy that will improve access, increase capacity, and build on LAO's current client services”.³⁵⁵ A consultation paper was released in November 2013, with consultations closing in February 2014.³⁵⁶ In this consultation paper, LAO defined its overall objectives for its Mental Health Strategy as

- expanding access to mental health legal aid services, including financial eligibility;
- developing structures, policies, and processes to better reflect a maturing understanding of mental health clients’ needs within LAO and the justice system;
- providing better and more systemic supports to the lawyers, community clinics, community agencies and other service providers who provide mental health legal aid services; and,
- promoting ongoing discussion and evaluation of mental health legal aid services by LAO, clients, the bar, community clinics and other stakeholders.³⁵⁷

The LCO has below provided draft recommendations regarding LAO supports within the existing system. Should the draft recommendations related to support authorizations or the expansion of the mandate of the CCB be implemented, the LCO encourages LAO to consider how these reforms can be supported within its mandate and resources.

Concerns have been raised about the consistency of the expertise among the legal bar appearing before the CCB. There is a particular challenge outside the Greater Toronto Area, where there are fewer cases, and therefore fewer opportunities for lawyers to develop the specialized skills and knowledge that are necessary.

DRAFT RECOMMENDATION 30: Legal Aid Ontario consider 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;
 - 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.

3. Expanded Use of Mediation and Alternative Dispute Resolution

The *Discussion Paper* canvassed the possibility of expanding the use of mediation in this area, as a means of reducing costs, making the process less intimidating, and preserving important relationships. It also noted the risks associated with the use of mediation in issues related to legal capacity, decision-making and guardianship. Where issues relate to fundamental rights, mediation may be inappropriate: for example, the British Columbia Law Institute's consultations in its elder law and guardianship mediation study indicated a general consensus that issues of legal capacity cannot be mediated, and this was reflected in British Columbia's *Elder and Guardianship Mediation Report*.³⁵⁸ As well, mediation processes may raise concerns because the person who lacks or is alleged to lack legal capacity is inherently in a vulnerable position: as a result of the clear imbalance of power, there is a risk that mediation may tilt the process towards excessive intervention.

The CCB for a while there, and I don't know what they're doing in other areas of the province but they were trying to do mediation. And they would get everybody together and they'd mediate. And, you know, the person would withdraw their application, say, for involuntary status, because the doctor would now agree that they could have some privileges. But there was nothing to force the doctor to not change that agreement the next day because he said, oh, well, you've changed, you're not the same as you were yesterday. So, I think conflict mediation is not really very helpful in those kind of situations and, so, I mean, because the person, they need an answer, yes or no. It can't be something that's wishy-washy or if there's going to be mediation they have to find a way to enforce the mediation. And mediation only really works if you've got two parties who are at an equal level and the patient and the doctor are not at an equal level from a power perspective by any stretch of the imagination.

Focus Group, Rights Advisers and Advocates, September 25, 2014

As has been highlighted throughout this *Interim Report*, disputes within legal capacity, decision-making and guardianship law frequently occur within the context of complex family dynamics and involve tangled relationships of interdependence. Reaching a resolution may require

attention not only to the legal matters at stake, but also practical attention to the underlying issues.

Much of the usefulness of mediation in this context would therefore depend on high levels of specialized knowledge and skill among the mediators.

Despite these acknowledged limitations, there was considerable, albeit cautious interest throughout the LCO's consultations in exploring greater use of mediation or other forms of alternative dispute resolution in this area of the law. For example, the Mental Health Legal Committee stated in its submission that "[t]he court-based processes for the resolution of disputes and rights enforcement under the *SDA* would benefit, in our view, from an expansion of the mandatory mediation requirement in rule 75.1.02 of the *Rules of Civil Procedure*",³⁵⁹ which set out requirements for mandatory mediation in proceedings related to estates, trusts and substitute decisions. Currently, those Rules apply only in the cities of Toronto and Ottawa, and the county of Essex. Mandatory mediation under Rule 75.1.02 is part of a larger set of processes for mandatory mediation of civil actions. Under mandatory mediation, disputes are mediated by private mediators chosen by the parties. The Ministry of the Attorney General provides litigants with a roster of private mediators, but litigants may choose a non-roster mediator. Given the nature of the issues raised by legal capacity and decision-making laws, which are frequently ones associated with fundamental rights, the particular needs and circumstances of persons directly affected by these laws, as well as the dynamics of their relationships, a simple expansion of the current mandatory mediation program is unlikely to be able to meet the specific needs in this area, and may create risks of negative results for those directly affected. This does not mean that mediation may not be of assistance in increasing access to meaningful dispute resolution in this area; however, a more tailored approach may be in order.

A post-legislative review of the operations of the *Mental Capacity Act, 2005* of England and Wales concluded that "mediation would be beneficial in many more cases prior to initiating proceedings in the Court of Protection", and recommended that consideration be given to making mediation a pre-requisite to launching proceedings, particularly for proceedings for property and financial affairs where the cost falls to the person lacking legal capacity.³⁶⁰

The ADR Institute of Ontario commented in the context of supported and co-decision-making that,

ADRIO supports the continued exploration into both supported and co-decision making with one important caveat: the likelihood of conflict arising between the supporting players must be acknowledged and a framework for managing the conflict that allows the voice of the individual to

be heard must be operationalized. Without a dispute resolution process built into the system the individual's voice may not be heard. ADRIO therefore encourages the CCB to adopt **early mediation** as an important strategy to address the conflict that inevitably arises among the supporting individuals, whether they be parents, children, neighbours or friends.³⁶¹

The ADR Institute pointed to the work of the Institute in assisting the Community Care Access Centres with the development of Independent Complaint Facilitators to resolve disputes related to health and personal care provided through the CCACs. It suggested that the CCB develop a "province wide roster of professional mediators with specialized knowledge of the area to be available as needed for early mediation and facilitation of disputes related to capacity and other decisions".

In the context of the CCB, consultees pointed to the constraints on alternative dispute resolution imposed by the tight legislative timelines, as well as the inappropriateness of mediation to certain aspects of the CCB's mandate, particularly determinations of capacity. However, they also indicated that it would be useful to further explore the potential of mediation in relation to some types of applications, such as "Form G"s, which address compliance with the legislation, such as whether an SDM has respected the principles for giving or withholding consent to treatment.

I really highly value the prehearing in terms of the Form G process, to try to mediate conflict. What I've found with and experienced with Form G in mediation - well, recently, well about two months ago now, is that, we didn't succeed with the mediation, but one of the things it did too though was it helped to make sure that the hearing was shorter, because even though we couldn't come to a consensus, the - all roles and represented parties knew what was expected of them, knew what witnesses were going to be present, knew that they would probably be assessed in capacity, and knew that we had done the... what is the responsibilities of the substitute decision-maker. So, instead of having a hearing that went on for a few days, it was confined to one day. A long day, but one day. But I like the prehearing as a concept, because perhaps - because I think it helps with the therapeutic relationship too, if you can potentially mediate the conflict before it gets to the hearing, which is obviously far more confrontational.

Focus Group, Joint Centre for Bio-ethics, October 1, 2014

The above comment highlights the value of situating mediation in the context of broader pre-hearing processes, in which there are mechanisms for information exchange and narrowing of issues.

Others suggested an exploration of the possibility of having some type of dispute resolution service available *prior* to the filing of an application, possibly through community organizations.

I'm wondering if we could just, like, remove the kind of lawyer-ness out of it and say, before there is a dispute, what could we do? And this is where when I mentioned the Administrative Justice Support Network ..., what is working well in the community and how do people that are working well and having, being able to provide their loved ones a life worth living, and could they not be a bit of a mentor or a bit of a go-to before we arrive at something that needs to be mediated or arbitrated or what have you?

Focus Group, Families of Individuals with Developmental Disabilities, October 16, 2014

Like mediation or something? I'm wondering whether or not, because again, cost and all of those things can be very prohibitive, but organisations and smaller community organisations sometimes, I think about St. Stephen's where they do neighbourhood dispute resolution or whatever. Something that is much less formal but just bringing - because, again, when you come to family dynamics obviously people have an interest one way or the other in what happens because, or else they wouldn't be there, right. So, I just think something less formal. Maybe something more community based, maybe something that isn't cost prohibitive, maybe based on income, maybe based on whatever, the person's ability to pay, use it, or again, make it a community service. And different community organisations that exist, it's offered.

Focus Group, Community Health and Social Service Providers, September 26, 2014

It should be noted that the Public Guardian and Trustee has the power, under the SDA, to mediate certain disputes arising in the context of substitute decision-making under that Act.³⁶² However, the PGT's other roles under the SDA, including its powers to investigate and to seek temporary guardianship, can create at the very least a perception of a conflict of interest that interferes with its ability to fulfil this role.

On balance, the LCO believes that greater room should be made within Ontario's legal capacity, decision-making and guardianship system for mediation and other forms of alternative dispute resolution. A comprehensive report by the British Columbia Law Institute on *Elder and Guardianship Mediation*, referenced above, concluded, "Recent legislation and private practice experience indicates that elder and guardianship mediation are important and positive new areas of legal expansion in Canada",³⁶³ and made a number of helpful recommendations around best practices for elder and guardianship mediation. The LCO believes that the following recommendations in the report are relevant to potential reforms in Ontario.³⁶⁴

- Guardianship mediators must have minimum relevant core competencies, including knowledge of the relevant law and of alternatives to guardianship; of concepts of capacity, and of the needs of persons who may be affected by issues related to capacity and how these needs may be accommodated; and understanding of the power imbalances inherent in guardianship issues and of strategies to address these.

- There must be clear standards and values for guardianship mediation, as well as a code of ethics.
- Mediators in these cases have a duty to ensure that all parties have the capacity to participate in mediation. If a party is incapable of participating in mediation, the mediator has a duty to explore whether there is someone appropriate who can represent the wishes of the incapable person in mediation. Where the mediator believes that a party is unable to participate meaningfully in the mediation process, and there is neither a representative nor another appropriate person to represent the incapable person's wishes, the mediator should suspend or terminate the mediation. Neither issues of legal capacity nor serious cases of abuse should be mediated.
- Court-connected guardianship programs should be initially developed as pilot projects.

The LCO agrees that mediation may be an appropriate way to improve the processes for the parties at the CCB, or in court processes, as long as appropriate mediation protocols are observed similar to those recommended by the BCLI's report and listed above.

Among the practical issues to be considered in an expansion of mediation at the CCB, particularly if the CCB's area of jurisdiction is expanded as set out in draft recommendation 24, is the application of Rule 7 of the *Rules of Civil Procedure*, which specifies that no settlement of a claim made by or against a person under disability is binding on the person without the approval of a judge. This Rule protects the interests of parties under disability from exploitation by other parties.³⁶⁵ The application of this Rule in administrative law is not clear. In *Lang v Ontario*, a case before the Human Rights Tribunal of Ontario involving a minor with a disability, the Vice Chair determined that it could not adopt procedures that when applied would derogate from the inherent jurisdiction of the Superior Court, that the HRTO did not have jurisdiction under either its enabling statute or the *Statutory Powers Procedures Act* to issue an order approving a settlement, and that the HRTO would not, therefore, make an order approving the proposed settlement.³⁶⁶ Further, in their paper, *Addressing the Capacity of Parties before Ontario's Administrative Tribunals*, authors Tess Sheldon and Ivana Petricone of ARCH Disability Law Centre comment that "the issue of whether a settlement involving persons under the guardianship of the Public Guardian and Trustee would be binding without approval of the Court remains unsettled".³⁶⁷

DRAFT RECOMMENDATION 31: If the Ontario Government does not take up 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.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

F. Summary

From the outset of this project, access to the law for persons falling within the scope of the SDA was identified as one of the most troubling gaps in Ontario's laws related to legal capacity, decision-making and guardianship and as an urgent priority for reform. The current court-based system is inaccessible to all but a few, and as a result, the positive rights under the law are not enforced and the promise of the legislation is unfulfilled.

This lack of access, and the resultant inflexibility, affect every aspect of this area of the law, including both overuse of guardianship and the risky informal “workarounds” that service providers or families may develop to avoid the necessity to access the courts, as well as the endemic concerns regarding misuse of powers of attorney.

Issues related to access to the law are not unique to legal capacity, decision-making and guardianship law: this is a broader issue. In this case, the rights at stake are fundamental, and the population affected is, by its very nature, particularly vulnerable. This lends additional urgency to the problem.

The LCO has considered a number of approaches to addressing this issue. The recommendation, to move oversight of the SDA to a reformed and expanded CCB is a bold step, and would involve start-up costs in the short-term, but the LCO believes that this is, over the longer term, the most forward-looking, cost-effective, realistic and practical option for reducing the problem.

Making the adjudication of matters under the SDA more flexible and accessible enables and strengthens other reforms that can reduce unnecessary intervention, as is further discussed in the following Chapter.

IX. EXTERNAL APPOINTMENT PROCESSES: INCREASING FLEXIBILITY AND REDUCING UNNECESSARY INTERVENTION

A. Introduction and Background

As was discussed in Chapter III, one of the values underlying the current legislation related to legal capacity, decision-making and guardianship is avoidance of unnecessary intervention. Substitute decision-making was intended to be used as a last resort, where legal capacity is lacking and substitute decision-making is required for a necessary decision to be made. Ontario's current laws related to legal capacity, decision-making and guardianship contain a number of significant measures intended to prevent unnecessary intervention in the lives of individuals and ensure that substitute decision-making – and in particular guardianship – are used only where there are no appropriate available alternatives. However, during the LCO's public consultations, many participants expressed concerns that substitute decision-making continues to be inappropriately or excessively employed. Chapter V, which considers assessments of capacity, addresses concerns with how substitute decision-making is triggered under the *Health Care Consent Act, 1996* (HCCA) through various assessments of legal capacity.

During the consultations in this project, the most serious concerns about inappropriate intervention were expressed about guardianship, since it is more restrictive than a power of attorney (POA), is the least flexible in terms of entry and exit, does not provide the opportunity for the individual to select the substitute decision-maker (SDM) or to formally express wishes as is possible with POAs and is generally experienced as more marginalizing. As well, because powers of attorney are personal documents rather than public appointments, many of the issues related to their misuse arise in connection either with faulty approaches to assessing capacity (and thereby improper activation of these documents) or with misuse by the SDM, issues that are dealt with in Chapter VII of this *Interim Report*. Therefore, this Chapter focusses on the appointment of guardians.

There are a variety of reasons why substitute decision-making may be sought or imposed where it is not wholly necessary. In some cases where legal capacity is doubtful, service providers may seek formal arrangements that appear to provide them with assurance that the agreements into which they are entering are legitimate and enforceable. Efforts to comply with privacy protections may preclude individuals from making use of the kind of informal supports and arrangements that have been employed in the past, for example by making it difficult for family members to obtain or share information on behalf of their loved ones. Families who are struggling with the challenges of caring for a person with a significant disability affecting their

cognition may hope that formal substitute decision-making arrangements will give them greater access to supports or ease the difficulties of providing care. Warring family members may hope that a formal position as SDM will give them the upper hand in their disputes. Pressured service providers may find it simpler to consult with and obtain decisions from family members, rather than take the time to determine on a case by case basis whether the individual can make her or his own decisions or to effectively communicate with a person with challenges in receiving, analyzing or providing information.

Problems in the implementation of existing laws may contribute to this kind of misuse or overuse of substitute decision-making. For example, professionals, service providers and SDMs often misunderstand the law in this area, particularly the concept of legal capacity and the responsibilities of SDMs, so that they fail to respect the provisions of the law intended to limit the use of substitute decision-making, such as the presumption of capacity and the notion of domain or decision-specific capacity. The costliness and complexity of the processes for creating and terminating guardianships may encourage guardians to seek broad, rather than limited, and possibly more appropriate, powers to avoid having to undergo the process again, and may discourage efforts to terminate guardianships when they are no longer needed.

There are draft recommendations throughout this *Interim Report* that aim to reduce inappropriate or unnecessary interventions and to safeguard autonomy. For example, draft recommendations related to education and information aim to ensure that SDMs understand the limits of their powers and their responsibilities to encourage the participation of the person affected. Draft recommendations related to alternatives to substitute decision-making, as outlined in Chapter VI, aim to provide options for those for whom other approaches are more appropriate. Draft recommendations in Chapter VII aimed at strengthening monitoring and rights enforcement related to substitute decision-making are intended to reduce inappropriate or excessive use of substitute decision-making powers. This Chapter focusses on changes to the external appointment processes to help ensure that guardianships are used only where and to the extent that no other alternative is available and appropriate.

B. Current Ontario Law

In Ontario, guardians may be appointed through two means: statutory guardianship for property (only) and court-appointed guardianships for either property or personal care.

Statutory Guardianship

Statutory guardianship is the major means through which individuals enter into property guardianship. Based on 2013-2014 figures provided by the Public Guardian and Trustee, of those persons currently under property guardianship in Ontario, approximately three-quarters entered this status through the statutory guardianship process.³⁶⁸

Statutory guardianships are triggered automatically through a finding of a lack of capacity, either through an Examination for Capacity under Part III of the *Mental Health Act* (MHA), or through a Capacity Assessment requested by “a person” under section 16 of the SDA.

The processes for these assessments were more fully detailed in Chapter V. However, it is important to note that these assessment processes are attended by a number of important rights protections, intended to recognize that the consequences of these assessments for the fundamental rights of the affected individual may be extremely significant. For example, Capacity Assessments under the SDA may only be conducted by a qualified Capacity Assessor who has met designated requirements for education and training.³⁶⁹ The SDA sets out a number of procedural rights for persons undergoing these assessments,³⁷⁰ including a right in most circumstances to refuse an assessment;³⁷¹ a right to receive information about the purpose, significance and potential effect of the assessment;³⁷² and a right to receive written notice of the findings of the assessment.³⁷³ Where the individual becomes subject to a statutory guardianship, the Public Guardian and Trustee (PGT) must, upon receipt of the certificate of incapacity, inform the individual that the PGT has become their guardian of property and that they are entitled to apply to the Consent and Capacity Board (CCB) for a review of the finding of incapacity.³⁷⁴ Persons who enter into statutory guardianship under the provisions of the MHA do not have the right to refuse the assessment, but do have the important right to timely provision of a rights adviser,³⁷⁵ who will meet with the patient and inform her or him of the significance of the certificate and of the right to appeal to the CCB. If requested, the rights adviser will assist the patient to apply for a hearing before the CCB, obtain a lawyer or apply for Legal Aid.³⁷⁶

Statutory guardianship is intended to provide an expeditious, relatively low-cost administrative process for entering guardianship. It was included in the SDA in accordance with the recommendations of the *Fram Report*, which characterized it as a process intended to “allow families to avoid unnecessary applications to court in situations where there is no doubt about an individual’s incapacity, and the person does not object to having a [guardian]”.³⁷⁷ It is important to note that statutory guardianship applies only to property management, and not to personal care.

Upon a finding of incapacity to manage property, the PGT becomes the statutory guardian, unless there is already a POA covering all property or a guardianship in place. However, designated individuals may apply to the PGT to become replacement guardians of property, and where the applicant is suitable and has submitted an appropriate management plan, the PGT may appoint the person. There is a fee of \$382 plus HST levied where an application for replacement guardianship is approved and a certificate of statutory guardianship is issued.

Court-Appointed Guardianship

Application process and procedural protections: Any person may apply to the Superior Court of Justice to appoint a guardian of property or personal care.³⁷⁸ It is important to note that guardianships of the person can *only* be obtained through a court order, and not through a statutory process. Further, guardianship of the person may be full or partial, and full guardianship may be ordered only if the court finds that the individual is incapable with respect to all issues contained within this area, including health care, nutrition, hygiene, safety, shelter and clothing.³⁷⁹

An application for guardianship must be accompanied by:

1. the consent of the proposed guardian;
2. a plan for guardianship (if the application is for personal guardianship) or for management of property (if the application is for guardianship of property);
3. a statement from the applicant indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or if it was not possible to give the person this information, an explanation of why it was not possible.³⁸⁰

The SDA contains additional measures to ensure an adult's due process rights in these applications. It requires that notice of the application be served with accompanying documents on the adult alleged to be incapable, specified family members and the PGT, among others.³⁸¹ The SDA also requires, in the case of a summary disposition application, at least one statement of opinion by a Capacity Assessor that an adult is incapable and, as a result, the same measures of due process that apply to Capacity Assessments for statutory guardianship appointments also apply to those for summary disposition applications. These include that a Capacity Assessor must provide information to the adult about the purpose and effect of the assessment and that the adult is entitled to refuse the assessment.³⁸²

As well, for all applications for court-appointed guardianships, the PGT is a statutory respondent.³⁸³ The PGT reviews these applications, and will send a letter addressing the issues raised by the application to counsel for the applicant as well as to the Registrar for the Superior Court of Justice. In most cases, issues are clarified and resolved prior to hearing, but in rare cases, the PGT may appear at the hearing to submit responding evidence or make submissions or both.³⁸⁴

Summary procedures: The SDA provides for summary procedures for both applications for and termination of guardianship. This allows the applications to be addressed on the basis of the documents provided, without a hearing or any appearances, where all parties agree to do so. In such summary applications, the judge may grant the relief sought, request the parties to provide further evidence or make representations, or order the matter to proceed to a hearing.³⁸⁵

There is little evidence about how summary dispositions operate in practice. The LCO heard from one lawyer that in some cases summary disposition applications have worked effectively and expeditiously as a streamlined process. They minimize the possibility of a court appearance, which makes them more cost-effective. They have particularly worked well in the developmental disability community, when the relationship between the adult and his or her family members is “straightforward” and the application is not contested.³⁸⁶ However, summary disposition applications are not used frequently. The LCO has heard that one explanation for the low usage of summary disposition applications in Ontario is that appointing a guardian without a hearing has raised concerns regarding due process, given the gravity of the rights at issue.³⁸⁷ The Law Society of Upper Canada states that “it should be noted that not all jurisdictions or members of the bench allow guardianship matters to proceed in this fashion, citing that the seriousness of the relief requested requires a hearing”.³⁸⁸

Least restrictive alternative: Under the SDA a guardian may only be appointed by the court under the following circumstances:

- the individual has been determined to lack capacity to make decisions related to property or to personal care, and as a result of that lack of capacity needs decisions made on her or his behalf by a person authorized to do so;³⁸⁹ and
- the court is satisfied that there is no alternative course of action that would not require a finding of incapacity and would be less restrictive of the person’s decision-making rights.³⁹⁰

The term “alternative course of action” is not defined in the legislation, and in practice, these provisions have received limited use. Powers of attorney have been recognized as important alternatives to guardianship,³⁹¹ as well as the importance of informal supports. Notably in *Koch (Re)*, the Court found Koch capable of managing property, commenting that mental capacity exists if the individual is able to carry out decisions with the help of others, and that the appellant had access to a number of services and supports that allowed her to function in her environment.³⁹²

The wording of the legislation indicates that guardianship is meant to be used as a last resort: even if a person is found to lack legal capacity, a guardian will only be appointed if there is a need for decisions to be made, and there is no less restrictive alternative available. Stephen Fram commented about these provisions to the Standing Committee that held hearings regarding what became the SDA that

It has always been the intention of the various governments that guardianship, because it takes away all rights in connection with a person, be the last alternative when you can't use powers of attorney for personal care, when you can't use a Ulysses contract, where you can't use other forms of a Consent to Treatment Act. The last thing in the world we want is too much guardianship in the province. This really says, 'Guardianship is the last resort. If you can't get the decisions in another way, court-appoint the guardian, but otherwise look to less restrictive means.'³⁹³

Bach and Kerzner argue that the least restrictive alternative and alternative course of action provisions were originally intended specifically to “address the needs of a very specific group – those individuals with significant intellectual and cognitive disabilities who were unlikely to meet the threshold to appoint a power of attorney for personal care”, and who wish to make decisions without a finding of incapacity, in the context of their trusting relationships, by enabling alternative approaches to substitute decision-making.³⁹⁴

When an SDA Capacity Assessment is carried out for the purposes of an application for a court-appointed guardianship, the Capacity Assessor may be required to complete, as an accompaniment to the Capacity Assessment, a “Needs Statement” which addresses whether it is necessary for decisions to be made on the person’s behalf. The Ministry of the Attorney General’s binding *Guidelines* for conducting Capacity Assessments comment as follows on such Needs Statements:

In providing a "needs statement", the assessor is commenting on necessity: that is, whether the person will derive substantial benefit from having a guardian act or make decisions on his or her behalf.

In the absence of a court ruling providing interpretation as to the definition of "necessity", two interpretations are proposed, and it is recommended that assessors answer both:

1. Is there a requirement for a formal consent (to a transaction, for example) in order to obtain or provide protective services to reduce the risk of harm or to prevent the loss or dissipation of the estate?The focus is on the merits of the appointment of a guardian for the benefit of the person, as opposed to the benefit of a third person such as a creditor.

2. Does the person face likely and serious harm to his or her well-being, or to their estate, if a guardian is not appointed?

This interpretation recognizes that guardianship legislation has risk-management for the incapable person as its ultimate goal.³⁹⁵

C. Areas of Concern

Despite the procedural and substantive protections associated with the appointment of guardianships in Ontario, there remain concerns that some individuals continue to have substitute decision-making arrangements inappropriately applied to them, or that appropriate substitute decision-making arrangements are in practice implemented in a way that overly restricts the lives of those affected. The most significant concerns include the following:

Overly broad application of guardianship: Concerns have been raised that even where guardians have been appointed for valid reasons, those guardianships may nevertheless be too broad.

The concept of legal capacity, as understood in Ontario, is domain specific. A person may have legal capacity to make one type of decision and not another. It is one thing to make decisions about where to live or what type of activities one may wish to engage in, and another to make decisions about finances. Further, many individuals may have the ability to make day-to-day decisions in a particular domain, but may not have the ability to make complex or long-term decisions in that area. Making decisions about day-to-day spending requires quite a different skill set from, for example, managing a real estate transaction or making decisions about investments. Reflecting this nuanced approach to legal capacity, the SDA makes provision for partial guardianships for personal care issues. A guardian may be appointed in relation to decisions about, for example, safety, while independent decision-making is preserved for decisions about nutrition, clothing and hygiene. On the other hand, within the domain of property, all guardianships are plenary. This is significant because most guardianships in operation in Ontario are for property: there are over 16,833 open property guardianships in Ontario, as compared to 1,838 personal guardianships.³⁹⁶

It has been hypothesized that the inflexibility and relative inaccessibility of external appointment processes contribute to a tendency for courts to award plenary guardianships. Professor Doug Surtees, in considering the empirical evidence related to guardianship reform in Saskatchewan, notes that despite the positive principles included in that jurisdiction's 2001 reforms, including the presumption of capacity and a legislative preference for the least restrictive alternative, the overwhelming majority of guardianship orders continue to be virtual plenary orders. Surtees suggests that a lack of knowledge of the legislation on the part of the bench and bar may underlie the issue; as an alternative, applications for guardianship may be delayed too long, so that they are only brought at the point where plenary orders are in fact the least restrictive alternative.³⁹⁷

Addressing fluctuating capacity: Concerns have also been raised that it may be difficult for individuals, once guardianship has been imposed, to take the necessary steps to regain legally independent decision-making status. Legal capacity, by its nature, frequently fluctuates. Some people will develop greater decision-making abilities over time as they learn and acquire access to social resources, others will experience declines in their decision-making abilities, and others will cycle in and out of legal capacity. It is therefore important that processes be sufficiently responsive and flexible that those who actually have legal capacity do not find themselves under substitute decision-making, and those who require assistance are able to access it in a timely manner.

Kerri Joffe and Edgar-Andre Montigny, in a paper prepared by ARCH Disability Law Centre for the LCO, emphasize the many barriers that individuals under guardianship may face when attempting to regain their legal ability to make decisions independently, particularly because all of the mechanisms currently available in the SDA are “passive”, meaning that they require the person who has been found legally incapable to understand and actively assert their rights.

Provisions that require an ‘incapable’ person to take legal action against a guardian privilege guardians and disadvantage ‘incapable’ persons attempting to protect their rights. Legal processes under the SDA are complex, and usually require the ‘incapable’ person to find, retain and pay for legal counsel. As a result they are not accessible to many ‘incapable’ persons. Once an ‘incapable’ person is made subject to a guardianship by the court, s/he may be highly vulnerable to manipulation and intimidation by unscrupulous guardians. This vulnerability is heightened by a lack of obligation on the guardian, court, PGT, or any other public authority to provide information about the guardianship or rights advice to the ‘incapable’ person.³⁹⁸

Statutory guardianship: While statutory guardianship processes have the intended benefit of relative simplicity as compared to the court-based process, with the attendant lower costs, the consequent disadvantage is that they tightly tie together the assessment of capacity not only

with guardianship, but with guardianship by the PGT, such that unless an individual already has an SDM, a finding of lack of legal capacity automatically puts the individual under guardianship by the PGT. Unlike the court-based process for the appointment of a guardian, physicians examining capacity to manage property under the MHA are not required (and nor are they in a position to) consider whether the individual's needs could be met through a less restrictive course of action. As was noted above, Capacity Assessors under the SDA may prepare a "needs" statement where the assessment is being completed in the context of an application for a court-appointed guardianship, but do not do so in the context of a statutory guardianship.³⁹⁹ And unless the individual has already completed a comprehensive power of attorney for property or has a guardian, the PGT will become the guardian: any family or friends must actively take steps to replace the PGT as guardian.

Thus, statutory guardianship may be seen as inconsistent with some of the values that underlie the legislation as a whole. Despite the general intent to give preference as SDMs to family or other persons with intimate knowledge of the individual, statutory guardianship makes the PGT the guardian of first, not last, resort. Further, the automatic appointment of an SDM upon a finding of incapacity suggests that the incapacity itself is sufficient to justify the appointment of a guardian, regardless of whether the needs of the individual can be managed through other arrangements or supports, contradicting the value expressed in the *Fram Report* of avoiding unnecessary intervention. Considerable efforts have been made to ensure that Capacity Assessors, who make this life-altering determination, are trained, professional and adhere to clear standards, and that procedural rights are provided, particularly for patients examined under the MHA; however, it is nonetheless the case that a determination that is fundamental to individual rights is being made as a matter of professional judgement by a health care professional, rather than as a legal determination of rights.

This apparent disjunction between the general intent of the legislation and the use of statutory guardianship processes becomes more acute when it is remembered that this is the means through which the vast majority of those under guardianship in Ontario have entered into this status and that, as was noted above, persons under guardianship may find it difficult to access the necessary resources to challenge that status.

The result of statutory guardianship, that the PGT is in most cases the guardian of first resort, rather than of last, also raises the question as to whether this is the best means of employing the expertise of the PGT, and of government resources in general.

D. Applying the *Frameworks*

Chapter VI of this *Interim Report*, dealing with alternatives to substitute decision-making, explores at length the relationship of the *Framework* principles to substitute decision-making. It is not necessary to repeat that analysis here, beyond noting that these issues are clearly closely tied to the *Framework* principles of promoting autonomy and independence, as well as of safety and security. The LCO believes that there are situations where substitute decision-making provides the most appropriate approach for allocating legal accountability for decision-making and ensuring meaningful safeguards against abuse of persons who are vulnerable due to deficits in their decision-making abilities. However, it is also widely understood that because substitute decision-making does have a profound impact on the autonomy of the persons on whom it is imposed (as well as potentially affecting achievement of the other principles, such as possibly diminishing the individual's dignity or opportunity to participate in their community), significant efforts must be taken to ensure that it is only imposed with care, and in situations where no less intrusive means are available or appropriate.

It is therefore necessary that there be processes in place that allow for the careful weighing of considerations related to autonomy, security, and participation and inclusion in the particular circumstances of the individual. It is always true that the *Framework* principles apply not only to outcomes but also to processes, but because determinations related to substitute decision-making have such fundamental implications for individual achievement of the principles, it is particularly important that processes are designed to enable meaningful access by individuals and to ensure that meaningful consideration can be given to the rights of the individuals involved.

E. The LCO's Approach to Reform

As was discussed in Chapter VI, it is the LCO's view that substitute decision-making is necessary for some individuals in some circumstances, to promote appropriate accountability according to the decision-making process and to avoid serious abuses of those persons whose limitations in decision-making abilities leave them vulnerable. However, the principles make it clear that substitute decision-making should be a last resort, after other alternatives for meeting the needs of the individual have been explored, and that it should be applied in the most limited fashion that is feasible in the circumstances.

Chapter X discusses the appropriate decision-making role for the PGT as being that of a type of safety net for individuals who, whether because of a lack of resources or because of the nature of their needs, lack access to effective and trustworthy decision-making. Substitute decision-

making is best carried out, where possible, in the context of a trusting relationship where the values and wishes of the person affected can be ascertained, but where no such relationships exist, a skilled professional approach can provide a viable option. The PGT provides specialized, skilled and trustworthy professional decision-making, but this type of support should be applied where necessary and not as a first option. A focus on a last-resort approach to guardianship is also a more effective use of resources at all levels. As the statistics cited earlier in this Chapter demonstrate, government (in the form of the PGT) has a very significant role in providing guardianship services in this province, and it makes sense to take steps to ensure that these services are targeted to those who most truly require them.

Throughout this *Interim Report*, the LCO has considered the general goal of reducing unnecessary intervention in developing its draft recommendations. LCO draft recommendations regarding alternatives to substitute decision-making, provision of education and information, and increasing the accessibility of adjudication through an expanded role for an administrative tribunal all are intended to contribute to reducing unnecessary intervention and promoting the autonomy of persons affected by this area of the law. The draft recommendations in this Chapter are only one element of the LCO's overall approach to promoting these goals.

As well, in designing these draft recommendations, the LCO has considered how they fit into the overall approach to reform in this project – that is, with the draft recommendations that the LCO has made in other Chapters regarding changes to Ontario's legal capacity, decision-making and guardianship system.

The LCO's draft recommendations therefore focus on three key approaches to reducing the use of guardianship:

1. identifying means to divert individuals from guardianship where less intrusive approaches, such as provision of enhanced services or access to community or family supports, can address the needs.
2. ensuring that guardianships are limited in scope to those areas where decision-making assistance is needed, and that the individual retains decision-making authority to the greatest extent possible.
3. ensuring that guardianships are limited in time to those periods when they are truly necessary. When an individual recovers legal capacity or has developed supports that make guardianship unnecessary, there should not be undue barriers to removing the guardianship.

F. Draft Recommendations

In keeping with the considerations and approaches outlined above, the LCO recommends focus on four goals as means of more closely targeting substitute decision-making to need:

1. promoting more consistent exploration of alternatives to guardianship;
2. re-examining the use of statutory guardianship as a means of external appointments;
3. promoting greater opportunities for the use of partial or limited appointments; and
4. promoting regular consideration of time limited appointments and of mandated reviews of the appropriateness of external appointments of substitute decision-makers.

1. Exploring Alternatives to the Appointment of a Substitute Decision-maker

During the LCO's consultations, it was repeatedly pointed out that there are many individuals who, if assessed, would be found to lack legal capacity. Nevertheless, these individuals do not require guardianship, either because the type of decisions they make do not necessitate interaction with formal processes such as those associated with treatment or financial institutions, or because they are receiving the supports and services they need in a way that does not entail the formal appointment of a substitute decision-maker. The supports are not formalized, but they are effective. For example, many people highlighted the important role that Adult Protective Services Workers (APSWs) play in the lives of many people, and how those supports reduce the need for more formal interventions. In a focus group with professionals in the development services sector, participants emphasized that they make it a priority to find ways to support individuals in ways that do not formally diminish their autonomy and independence: while the informal nature of these connections and supports are not always well recognized, they are crucial.

The Courts, in considering the application of the "least restrictive alternative" provisions of the SDA, have looked to informal supports and services in determining whether guardianship is appropriate. In its important decision in *Koch (Re)*, the Court recognized these types of supports, finding the appellant capable with respect to property management. The Court commented that mental capacity exists if the individual is able to carry out decisions with the help of others, and that the appellant had access to a number of services and supports that allowed her to function in her environment.⁴⁰⁰

In a similar vein, in *Deschamps v. Deschamps*, the Court declined to make a finding of lack of capacity to manage property with respect to Mr. Deschamps, because he could make decisions with appropriate assistance from his spouse or his appointed attorneys.⁴⁰¹ The Court quoted the report of Mr. Deschamps' Capacity Assessor as follows:

I am of the opinion that Mr. Deschamps is incapable of managing his finances. However, given Mr. Deschamps' specific circumstances, I do question the need for a substitute decision maker. There appears to be a less restrictive way of handling his financial affairs, either by way of daily help from his wife (whom he clearly married of his own free will) or by asking his appointed attorneys (which he is competent to choose) to help. In this case the appointment of a guardian would appear to be far outweighed by the adverse consequences of such an action in terms of quality of life or psychological well-being.⁴⁰²

However, it has been noted that it is relatively rare for there to be any person in the court process for guardianship who has an interest in raising less restrictive alternatives for the individual or has the knowledge and ability to identify such alternatives. As was noted in Chapter VIII, Section 3 Counsel under the SDA can play a vital role in promoting consideration of the wishes and needs of individuals who are the subject of guardianship applications, although as was discussed in that Chapter, there are limitations inherent in their role.

The Coalition on Alternatives to Guardianship, in their Brief to the LCO, commented that the current system is heavily focussed on assessments of capacity. This is particularly true for the statutory guardianship process, even though the *Guidelines for Conducting Assessments of Capacity* and Assessor training encourage an exploration of less restrictive alternatives: "Assessors may not be aware of all of the available alternatives in a specific community and they are not in a position, nor do they have the legal mandate, to determine which, if any, might be feasible in a given situation".⁴⁰³ In response to this concern, the Coalition recommends an extensive system of Alternative Course of Action Assessors. These "ACA Assessors" would operate in a manner parallel to the current system of Capacity Assessors, with a set of requirements for training and education, and a roster of approved ACA Assessors maintained by government. These ACA Assessments would be engaged, in parallel to Capacity Assessments, at multiple points under both the SDA and the HCCA, including prior to engaging the HCCA hierarchy, during "serious adverse effects" investigations by the PGT, and whenever guardianship is in contemplation.⁴⁰⁴

The LCO believes that the goal underlying the Coalition Brief, of providing a meaningful opportunity for consideration of alternatives prior to creation of a guardianship, is valid and shares the concern that the current system does not provide sufficient mechanisms to allow for such a consideration. However, the LCO is concerned that the Coalition's proposal for an extensive new system of ACA Assessors is likely to be costly and cumbersome, and contribute

to the complexity and burdensomeness of a system that the LCO has heard is already quite challenging for individuals to navigate. It is particularly difficult to see how the proposed system of ACA Assessors could play a meaningful role in questions of consent to treatment, given the sheer number of such determinations made every day in the province and the need for flexibility and efficiency in the provision of treatment.

Rather, the LCO has considered whether it might be more effective to strengthen the ability of the adjudicators who are determining a guardianship application under the SDA to give wider and more meaningful consideration to the “least restrictive alternatives” provisions of the SDA in those cases that warrant it: specifically, whether there may be means for adjudicators to obtain more information about the circumstances of individuals prior to the decision to appoint a guardian.

A simple alternative for strengthening the “least restrictive alternative” provisions would be to require the adjudicator to explicitly address the issue in the decision regarding the appointment, or to require parties to the application to address the issue. However, given that the parties to the application will often not have either the interest or the knowledge to address the issue, and the challenges that an adjudicator faces in addressing the issue in a vacuum of evidence, the LCO believes that something more is required.

The Court of Protection (CoP) of England and Wales has the power to call for a report to be made to it by the Public Guardian or a Court of Protection Visitor, or may require a local authority or National Health Service body to arrange for a report to be made, on such matters related to the individual who is the subject of an application.⁴⁰⁵ Under the CoP’s *Rules of Procedure*, the creator of such a report must undertake the following:

- contact or seek to interview such persons as he thinks appropriate or as the court directs;
- to the extent that it is practicable and appropriate to do so, ascertain what the individual’s wishes and feelings are, and the beliefs and values that would be likely to influence the person if she or he had the capacity to make a decision in relation to the matter to which the application relates;
- describe the person’s circumstances; and
- address such other matters as are required in a practice direction or as the court may direct.⁴⁰⁶

The Victorian Civil and Administrative Tribunal (VCAT), which was described more fully in Chapter VIII, has similar powers with respect to that state’s Public Advocate Office. The Public

Advocate's Office has a broad array of powers, which are described in the *Discussion Paper*, Part IV, Ch. 3.D.1, and which include advocacy and investigations into complaints of abuse or exploitation. In complicated matters, VCAT may request the Public Advocate to conduct a formal investigation into the matter prior to a hearing.⁴⁰⁷ This might include investigations into less restrictive alternatives, or on issues related to consent for special procedures. In 2013-2014, the Public Advocate conducted 362 investigations, of varying length and depth, at the request of VCAT.⁴⁰⁸

A somewhat different approach is taken in Court Visitor programs operated in several American states. Rather than the adjudicator requesting reports or investigations from other bodies with relevant expertise, in these programs the courts oversee their own specialized Court Visitor programs for their guardianship cases. Court Visitors may be directed by the court to visit a person who is the subject of a guardianship-related application, to gather information on that person's circumstances. Utah's Court Visitor Program is described as follows:

Volunteers are needed to serve as court visitors: to observe and report about the circumstances of incapacitated adults.... A judge sometimes needs a visitor to gather evidence to help the judge:

- Decide whether the protected person may be excused from court hearings.
- Decide the nature and extent of the protected person's incapacity.
- Decide the nature and extent of the guardian's authority.
- Ensure that the court's orders are being followed.

The judge may appoint a visitor to inquire about and observe a protected person's circumstances to provide a more complete and nuanced picture of that person's life.⁴⁰⁹

Court Visitor programs may be operated on a relatively informal volunteer basis, or may be compensated and require Visitors to meet a set of educational and training requirements, and to make formal written Reports to the court.⁴¹⁰

In the Ontario context, there are examples of administrative tribunals with the power to order investigations. For example, the Human Rights Tribunal of Ontario (HRTO) has the power, at the request to a party to an application, to appoint a person to conduct an inquiry if the HRTO is satisfied that an enquiry is required to obtain evidence, that the evidence obtained may assist in achieving a fair, just and expeditious resolution of the merits of the application and it is appropriate to do so in the circumstances. At the conclusion of the enquiry, the person appointed must provide the HRTO and the parties with a copy of a report detailing the results. The *Human Rights Code* gives the person conducting the inquiry broad investigative powers.⁴¹¹

The LCO believes that providing adjudicators with a mechanism to gather additional information in selected appropriate cases, with a view to ensuring that the question of “least restrictive alternative” has been meaningfully considered, will contribute towards the goal of reducing inappropriate or unnecessary intervention.

It is important to acknowledge that the gathering of such information is not an easy task. Part of the context of legal capacity, decision-making and guardianship law, as has been acknowledged throughout this *Interim Report*, is the pressure on services and supports for groups whose members are most often found to lack or potentially lack legal capacity. Identifying alternatives may require not only knowledge of the law and an ability to navigate complicated service and support systems, but also considerable creativity, and a thorough understanding of the circumstances of the individual in question. Such reports will not be of use in all, or anything close to all, cases. Nevertheless, it is the LCO’s view that as the Court has a duty to satisfy itself on the issue of the less restrictive alternatives, there must be some meaningful mechanism through which such an enquiry may be made.

Further, while current constraints on supports and services available to persons with disabilities that may affect legal capacity mean that less restrictive alternatives may today be difficult to identify for many individuals, such supports may expand over time and it is worthwhile to put in place the mechanisms through which such supports and services can be accessed as they become more available.

Within the existing system in which the Superior Court of Justice makes determinations regarding applications for guardianship, it would not be practical to institute a Court Visitor program. If the government implements the LCO’s draft recommendations regarding expanded jurisdiction for the Consent and Capacity Board, as detailed in Chapter VIII, the creation of a Visitor program may be feasible. The LCO cautions that evaluations of the American experience have indicated that volunteer programs, while often embraced with enthusiasm as a cost-effective means of meeting needs in this area, have not generally been found to fulfil the hopes vested in them, as they tend to be resource intensive to develop and oversee.⁴¹² Because of the challenges in identifying and assessing less restrictive alternatives, a volunteer program is not likely to be effective in this context: to provide meaningful information to an adjudicator, a Visitor program would have to be expert, specialized and professional.

The LCO therefore believes that it would be more practical and effective to make use of existing expertise by enabling adjudicators to seek reports from existing expert bodies and providing statutory authority to these bodies to prepare such reports. In drafting legislation to this effect, it would be important to consider the kind of rights to information that would be appropriate to

allocate to those undertaking such investigations: without some statutory rights to gather information it would be difficult to conduct meaningful investigations into the circumstances of individuals, but due attention must also be paid to issues of scope and privacy. As well, attention would be required to allocation of the costs of such reports.

DRAFT RECOMMENDATION 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.

2. Eliminating or Reducing the Use of Statutory Guardianship

As was described earlier in this Chapter, in Ontario law, guardians may be appointed either through a court process, or through an administrative “statutory guardianship” process in which a finding of incapacity by a Capacity Assessor leads to guardianship by the PGT for individuals who do not already have a substitute decision-maker in place. A significant majority of guardianships in Ontario are created through the statutory guardianship process.

Because Ontario’s statutory guardianship processes automatically make the PGT guardian of property upon a finding of incapacity, this provides a very simple means for individuals without family or friends who are able or willing to act for them to access the services of the PGT as a substitute decision-maker. Whether or not this is a benefit depends on one’s perspective. For individuals who truly need this type of assistance, the simplicity of this approach is beneficial. On the other hand, the process may discourage family from taking on the role of guardian. Family members who do wish to act for the individual must go through the process of applying to be named as a replacement guardian: something which several families who spoke to the LCO found objectionable in principle. The LCO has also heard from some individuals and from some trusts and estates lawyers that the replacement application process may be lengthy and confusing. The PGT may therefore find itself with a larger caseload than is truly necessary or appropriate: it becomes in many cases a guardian of first, rather than last resort. This situation

conflicts with the assumption underlying Ontario's current legislative framework that substitute decision-making is best provided by those who have a close relationship with the individual for whom they are making decisions, and who are thereby able to effectively encourage the individual's participation in decision-making and to take into account her or his values, preferences and wishes.

The draft recommendations in this Chapter focus on increasing the opportunity to divert individuals from guardianship or to reduce the scope or duration of guardianship, to preserve to the greatest extent appropriate the autonomy of individuals. However, these types of recommendations sit uneasily with the statutory guardianship process, which is designed for administrative simplicity, and in which the key determinant is a professional judgment as to the individual's functional abilities, rather than a weighing of needs and options in light of available supports and services. Considerable effort has been expended to ensure the professional quality of Capacity Assessments under the SDA; however, Capacity Assessors are not intended to perform such a weighing of options, which is more appropriate to an adjudicative approach. The type of reforms recommended in this Chapter have limited impact in a system in which three-quarters of all guardianships result from a process in which a finding of incapacity almost automatically results in guardianship by the PGT.

The LCO notes that many other jurisdictions have only limited "statutory guardianship"-type processes or none at all. For example in its 2009 reforms, Alberta ended its analogous process, so that all applications for guardianship are processed through the courts.⁴¹³ Issues related to accessibility to the process were addressed through the Review Officer system described in Part Four Ch. III.D of the *Discussion Paper*, as well as by a number of initiatives to create plain language forms and information. In the United States, California does not have an administrative process for creating guardianships. It does have an urgent process whereby the Public Guardian must apply to be the conservator of the person or of the estate or both, where the person needs a conservator, no one else is qualified and willing to act in the best interests of the person, and there is "an imminent threat to the person's health or safety or the person's estate".⁴¹⁴ That is, the advantages of statutory guardianship may be designed into an adjudication-based system for external appointments.

In a system in which applications to the court for guardianship, even when uncontested, generally cost thousands of dollars, an administrative system for guardianship is perhaps unavoidable. However, should jurisdiction over external appointments be transferred from the Superior Court of Justice to an expanded Consent and Capacity Board (CCB), as the LCO recommended in Chapter VIII, thus making applications for external appointments less intimidating and costly, and more accessible, the question of statutory guardianship can be

considered afresh. As well, the CCB's focus on and strength in timely decision-making reduces concerns that statutory guardianship may be necessary to ensure timely-decision-making in urgent matters. Depending on how an expanded CCB was reconstituted, it may be necessary to give consideration to the kind of supports, Legal Aid or otherwise, that would be required to ensure that low-income individuals had meaningful access to appointments or termination of appointments as necessary.

It is the LCO's considered view that a guardianship system with the following characteristics is not only more truly consonant with the *Framework* principles and the CRPD, but also will result in a more effective allocation of limited government resources:

- the PGT is truly a guardian of last resort, within the parameters described in Chapter X;
- an adjudicator, rather than the PGT, is responsible for determining whether a family member is a suitable guardian; and
- there is an opportunity to tailor the guardianship order to the needs of the individual, and to consider whether a less restrictive alternative than guardianship is available to individuals who lack legal capacity.

Resources which are currently expended in having the PGT acting either temporarily or over the longer term for individuals who have other appropriate options, and in having the PGT assess replacement applications can be better allocated to providing a transparent and accessible hearing process for external guardianship appointments through the tribunal system.

Should the government accept this recommendation, it would be necessary to give consideration to the processes through which the PGT could be appointed as a last-resort guardian. Currently, outside the statutory guardianship process, the PGT can be appointed only in the following circumstances:

- as a temporary guardian resulting from an "serious adverse effects" investigation;⁴¹⁵ or
- when an application for guardianship is made to the Court proposing the PGT as guardian of property or personal care; it is accompanied by the written consent of the PGT to act as guardian; and there is no other suitable person who is available and willing to be appointed.⁴¹⁶

It is currently quite rare for the PGT to be appointed through either of these means. Of the approximately 10,800 property guardianships in which the PGT was acting in the fiscal year

2013-2014, in only 318 had the PGT been named by the Court; the remainder had resulted from the statutory guardianship process. The PGT was also acting in 21 personal care guardianships at that time, all through Court appointments. The PGT's serious adverse effects investigations provide a means of alerting the PGT to situations where abuse or exploitation makes the involvement of the PGT necessary. Currently, in situations where family is unavailable, unwilling or inappropriate to act, a guardianship by the PGT may be effected by organizing a Capacity Assessment resulting in a statutory guardianship. If statutory guardianship was eliminated, it would be less obvious how situations where an individual has no one else to act would be effectively brought to the PGT's attention. The current processes under sections 22 and 55 of the SDA provide a legal process through which the PGT could seek appointment, but it may be necessary for the PGT to institute an administrative process through which the PGT's services as a guardian of last resort could be sought. Alberta's PGT has developed such a process,⁴¹⁷ which could provide a model which could be modified to Ontario's needs.

This recommendation would alter the import of examinations of capacity to manage property under the MHA or Capacity Assessments under section 16 of the SDA that find a lack of legal capacity, in that they would become a foundation for an application for an appointment of a guardian, as with current applications for court-appointed guardianships, as opposed to resulting in a change of legal status. To ensure that persons found incapable under the MHA do not languish under guardianship due to a lack of any person willing to initiate the process for removal, the LCO suggests that an MHA examination that results in a finding that legal capacity has been regained could be treated as a deemed application to the tribunal. It may also be necessary to consider providing the CCB with the power to make the PGT a temporary guardian in urgent situations, while a guardianship application is in preparation.

Should government decide not to eliminate statutory guardianship, there may be some adjustments that can be made to enable the exploration of alternatives prior to a statutory guardianship. The adoption of such adjustments would have to be carefully weighed, however: the core benefit of statutory guardianship is its simplicity, so that burdening the process with additional requirements could undermine the very rationale for its existence. Further, requiring the PGT to take additional steps prior to commencing its role as a statutory guardian could increase the burden on that organization in a manner disproportionate to any reduction in its workload. Models from other jurisdictions that could possibly be adapted to the Ontario context include the following.

Providing the PGT with urgent powers to protect property: The state of California does not have processes similar to statutory guardianship: all appointments of guardians are made by courts. California does have, however, an urgent process to allow the Public Guardian to step in

and protect property while it searches for appropriate agents or family members to manage the property. The process can be commenced by the issuance of a signed declaration by two peace officers to the Public Guardian. This declaration allows the Public Guardian discretion to take control or immediate possession of any real or personal property belonging to the person. Peace officers may issue such declarations where they reasonably believe that the person is substantially unable to manage their financial resources or resist fraud or undue influence; has consulted with an individual who is qualified to perform a mental status examination, and reasonably believes that as a result of the inability there is a significant danger that the person will lose all or a portion of the property, or a crime is being committed against the person. These declarations are temporary, but can be renewed. If an appropriate substitute decision-maker cannot be identified, the Public Guardian must apply for conservatorship.⁴¹⁸ Some form of such a process adapted to Ontario's needs might be used to allow the PGT to intervene where necessary while not accepting the role of guardianship, creating an alternative to the statutory guardianship system.

Allowing the Public Guardian to delay accepting the guardianship role: Saskatchewan has a process analogous to statutory guardianship; however, the PGT does not automatically become a property guardian after a certificate of incapacity is issued. Rather, to become the property guardian, the PGT must sign under seal an acknowledgment to act.⁴¹⁹ The PGT *must* sign the acknowledgement agreeing to act if (i) it believes that the adult's estate needs to be administered and (ii) no one has applied or appears to be interested in applying to be the property guardian. The PGT may also sign the acknowledgment if there is a serious concern of financial abuse or a dispute among family members.⁴²⁰ Allowing the PGT some discretion as to when to take up a statutory guardianship may allow time for family members to come forward or for alternatives to guardianship to be explored: it would, however, require the PGT to develop additional processes for exercising such discretion.

DRAFT RECOMMENDATION 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.**

3. Time Limits and Mandated Reviews of External Appointments

Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) explicitly requires that measures related to legal capacity “apply for the shortest time possible and are subject to

regular review by a competent, independent and impartial authority or judicial body”. This is in keeping with the understanding of substitute decision-making as a significant intrusion on the autonomy of the individual, which should be employed only when and as necessary.

The SDA permits the court to impose time limitations when it appoints guardians of the person or of property, but it does not create any preference for time-limited guardianships, or mandate regular review. The legislation does not explicitly reference time limitations for statutory guardianships. Temporary guardianships arising from “serious adverse effects” investigations are specifically limited to 90 days (although the court has the power to extend the term, as well as reducing or terminating it).

Related to the review of appointments of guardians is that of re-assessment of capacity, as a finding of regained capacity is central to a challenge to guardianship. Section 20.1 of the SDA requires a statutory guardian of property, upon request by the incapable person, to assist in arranging a reassessment. The section includes time limitations to preclude over-use of this provision.⁴²¹ Notably, the SDA does not include parallel provisions for court-appointed guardians, perhaps based on the more thorough scrutiny involved in court appointments and the ability of the court to impose time limitations.

Other jurisdictions have stronger measures in place to review external appointments of SDMs. In the Australian state of Victoria, orders for guardianship, whether personal or property, by the Victorian Civil and Administrative Tribunal (VCAT) are subject to regular re-assessment. Under the legislation, a reassessment must occur within 12 months after the VCAT makes an order, and at least once within each three year period after an order is made, unless the VCAT orders otherwise. Upon reassessment, the VCAT has the power to continue, revoke, vary or replace the order, as it finds appropriate.⁴²² In practice, VCAT often orders reassessments of personal guardianship orders every 12 months, and of property administration orders every three years. The VCAT also has the power to issue a self-executing order that expires after a designated period or event, unless an application is made to extend the order. These are more common for personal than for financial appointments.⁴²³

The province of Alberta has included in the *Adult Guardianship and Trusteeship Act* somewhat weaker requirements for review: where the court appoints a guardian (who may deal only with personal matters) or trustee (who deals with property matters), if the capacity assessment report indicated a likelihood of improvement in capacity, the order *must* include a date for application for a review; if the capacity assessment report does not so indicate, the order *may* include a date for application for a review.⁴²⁴ Saskatchewan takes a somewhat different approach towards the same end: where the court makes an order, it must determine whether it

is in the best interests of the adult to require a review of the order and if a review is required, shall specify the period within which the review is to take place.⁴²⁵

ARCH Disability Law Centre recommends that all substitute decision-making arrangements, public and private, be time-limited, with provisions for review and potential renewal upon expiry of the term of the appointment.⁴²⁶

Consideration should be given to making all substitute decision-making arrangements in Ontario limited in time. Upon the expiration of the appointment, the decision-maker could seek a renewal of the arrangement. Such renewal would be subject to a review process, whereby the 'incapable' person's circumstances would be reconsidered. The substitute decision-making arrangement could be modified to enhance or reduce the decision-maker's powers, depending on the 'incapable' person's circumstances. The review process would provide an opportunity for individuals to challenge their 'incapable' status, seek to terminate the arrangement, or raise concerns about their decision-makers. Were such reviews to be instituted, consideration would have to be given to what body would oversee and administer the process.⁴²⁷

As well, ARCH suggested that all persons subject to substitute decision-making be notified of a right to have their capacity reassessed on a regular basis and of the existence of public funds to cover the costs for those who cannot afford an assessment, and that wherever the court orders a substitute decision-making arrangement, it must require the decision-maker to offer or arrange a capacity assessment at regular intervals.⁴²⁸

Under the rights-based principled approach to legal capacity, the need for a substitute decision-maker should be subject to regular review by a competent, independent and impartial public authority or statutory body. This is important in order to ensure that substitute decision-making arrangements do not last longer than necessary, and to provide 'incapable' persons with opportunities to reassert their right to legal capacity. Therefore, in Ontario's new legal capacity regime, persons subject to substitute decision-making arrangements must be notified of their right to have their capacity reassessed, and of the existence of public funds for those who are impecunious. Where a court orders a substitute decision-making arrangement, the order must require the decision-maker to offer and/or arrange for a capacity assessment at specified intervals of time.⁴²⁹

The LCO agrees that a greater emphasis on review of external appointments would bring Ontario's legislation, both in theory and practice, closer to the LCO *Framework* principles, the language of the CRPD and the underlying values of the current legislative scheme.

In evaluating ARCH's proposal, it is the view of the LCO that the considerations are different for POAs than for guardianships. All POAs for personal care, and many POAs for property are *only* legally effective during periods of incapacity, so that the appropriate mechanism for reviewing

the use of POAs for personal care is reassessment of capacity. As well, the private nature of these instruments is not easily compatible with a public review process.

A greater emphasis on review of external appointments can be incorporated into the current system; however, the implementation of the LCO's draft recommendation, set out in Chapter VIII, to move the responsibility for appointments of guardians from the Superior Court of Justice to an expanded Consent and Capacity Board (CCB) would make this recommendation more effective, because a review would be accessible in practice to a wider range of individuals.

It is the LCO's view that it would not be practical in the Ontario context to require a regular review of every appointment of a guardian. This would result in a very large volume of cases, significant numbers of which are unlikely to demonstrate substantial changes in circumstances sufficient to require a change in appointment status.

The Alberta approach, requiring the courts to turn their minds to issues of review at the time of appointment, is in the view of the LCO, more practical and a better use of limited resources. However, the focus of the analysis on changes to legal capacity excludes the possibility that a person who lacks legal capacity may nonetheless develop supports or otherwise enter into a situation where guardianship is no longer necessary. The LCO therefore supports a somewhat broader approach to review that is more compatible with the existing SDA language related both to the need for decision-making and the "least restrictive alternative".

As a further step, guardians could be required to submit on a regular basis an affidavit to the effect that there have been no changes in the legal capacity of the individual, the need for decision-making or the availability of a less restrictive alternative. This would require the guardian to regularly turn her or his mind to the status of the person under guardianship, and could be effectively paired with a duty for the guardian, should he or she have reason to believe that the individual has regained legal capacity, to assist the person to terminate the guardianship order.

Accompanying the requirement of guardian submission of affidavits, the LCO believes that court-appointed guardians, like statutory guardianships, should be required to assist with arranging reassessments of capacity, within reasonable time frames. Because it will most frequently be the case that the guardian has control over the resources of the person affected, the practical assistance of the guardian will often be indispensable in effecting a reassessment. Without such assistance, an effort to regain independent status may be practically inaccessible for many individuals.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

4. Greater Opportunity For and Use of Limited Appointments

Partial Guardianships

As was described above, Ontario's approach to decision-making is domain-specific. It clearly distinguishes between decisions for property and personal care, and as noted above, for court-appointed guardians of the person, there is a strong legislative preference for partial guardianships. While the SDA permits the Court, in appointing guardians of property, to impose such conditions as it deems appropriate, there is not the same strong legislative language directing the consideration of and preference for partial guardianships for property. Nor does the legislation specifically address the possibility of partial guardianships for statutory guardians of property.

Some jurisdictions provide explicitly for partial guardianships for property matters. In Alberta, when the court addresses trusteeships for property matters, the court may provide that the order applies "only to property or financial matters specified in the order".⁴³⁰

Stronger provisions were recommended by the Victorian Law Reform Commission, in its review of that Australian state's capacity and guardianship laws. It recommended that for both personal and financial matters, a non-exhaustive list of types of decisions be created. In

particular, it suggested a very specific list of financial matters, including such things as paying sums of money to the person for their personal expenditure, receiving and recovering money payable to the person, carrying on a trade or business of the person, performing contracts entered into by the person, investing for the person, undertaking a real estate transaction for the person, withdrawing money from, or depositing money into, the person's account with a financial institution, and many others.⁴³¹ For any guardianship order, the Victorian Civil and Administrative Tribunal (VCAT) would stipulate in the order which specific powers the guardian or administrator should have or, in rare circumstances, that the guardian is able to exercise powers related to all matters in the list.⁴³² That is, the legislation would specifically direct the VCAT's consideration to the very particular decision-making needs of the individual at issue, and indicates that full administration of property-related matters by the substitute decision-maker should be the exception and not the rule.

If partial guardianships for property are considered desirable, it must be taken into account that the majority of property guardianships in Ontario are created through statutory appointments, which do not easily accommodate a mechanism for partial appointments.

It should be noted that because the range of decisions that may fall within property management is so extensive, and because needs will often evolve as an individual moves through the life cycle, there is a risk with partial guardianships for property of unexpected and problematic gaps in the guardianship order. As with other draft recommendations, a more accessible tribunal-based process for appointments would make this recommendation more viable. As well, appointments for limited property guardianships could be paired with review orders, as recommended above, to reduce the risk of problematic gaps.

Professor Doug Surtees, in his examination of the implementation of reforms to Saskatchewan's laws related to guardianship, found that despite reforms to legislation intended to reduce overly-broad use of guardianship, the vast majority of appointments continued to be for plenary or virtually plenary orders (that is, the only powers not granted were powers that were not relevant, such as powers to make decisions about employment in relation to a person of very advanced age). In his analysis of this trend, Surtees pointed to the possibility of implementation issues, including lack of understanding of the legislation on the part of the bench and bar, or that the transaction costs associated with repeated orders creates an incentive to seek plenary orders.⁴³³ If the latter is the case, a move towards a more accessible tribunal system for appointments may reduce this incentive and make partial orders a more practical option for many families.

The LCO believes that increasing the opportunities for limited appointments is in keeping with the underlying values of legal capacity and decision-making laws, and that if the government accepts the draft recommendation for an expanded administrative tribunal is accepted, this may become a more practical option for appointments.

DRAFT RECOMMENDATION 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.

Single Decisions

In some jurisdictions, the court or tribunal has the power to make a specific necessary decision for an individual, rather than appoint a substitute decision-maker or supporter. For example, in the Bill currently at the Committee stage in the Irish parliament, where the court has made a finding of incapacity, and a co-decision-making order is inappropriate, the court has the power to make the necessary decision or decisions on behalf of the individual, “where it is satisfied that the matter is urgent or that it is otherwise expedient for it to do so”. The court may also appoint a decision-making representative solely for the purpose of making a single decision, where appropriate.⁴³⁴

Under Ontario’s regime, decisions for treatment, admission to long-term care and personal assistance services for persons who lack legal capacity are made on a decision-specific basis without the need for a formal, long-term appointment of a substitute decision-maker. Accordingly, the need for a single decision will be relatively rare. However, the LCO’s project on Registered Disability Savings Plans (RDSPs) provided an example of how such a situation can arise. The RDSP is a federal program under the *Income Tax Act* to provide support to adults with disabilities as they grow older. Where an individual lacks legal capacity to open a plan, a legally authorized person must be appointed to do so. While the requirements and consequences of appointing a guardian were perceived as disproportionate to the nature of the decision to be made, affected adults might also be unable to meet the threshold for capacity to make a power of attorney. The LCO’s *Final Report* in its RDSP project provided recommendations for creating a streamlined appointment process to meet this particular need.⁴³⁵ However, other similar situations do arise, such as the settlement of trusts, and it is neither efficient nor effective to contemplate developing special processes for each type of case that may arise. It is the LCO’s view that partial or single appointments for property decisions may provide an effective avenue for some individuals in these types of circumstances, particularly when combined with more accessible appointment processes, as recommended in Chapter VIII.

The LCO does not believe that it is consonant with the approach to legal capacity and decision-making adopted in this project to provide an adjudicator with the authority to make decisions for an individual in the manner suggested by the Irish Bill. However, we note that the HCCA currently includes a process whereby the CCB can appoint a representative to make a decision under that statute.⁴³⁶ The LCO believes that expanding this power to issues related to property management or personal care would increase the flexibility of the system to address those situations where needs for formal decision-making are relatively rare, and even a partial guardianship would unnecessarily restrict the autonomy of the individual. As with representatives under the HCCA, any person could bring an application, with the PGT able to do so as a last resort.

As with the draft recommendations for reviews and partial guardianships for property, this recommendation is worthwhile within the current court-based system, but is likely to have a much stronger impact if adjudication under the SDA is moved to a more accessible forum.

DRAFT RECOMMENDATION 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.

G. Summary

In this Chapter, the LCO recommends a number of measures related to the appointment of guardians that are intended to reduce the scope and use of guardianship, and more closely tailor this sometimes necessary but highly intrusive function to those circumstances where it is truly necessary. Guardianship is intended to apply not simply where an individual has a functional limitation, but where that functional limitation, *in the circumstances of that individual*, makes substitute decision-making necessary in order that required decisions can be made in a way that has legal effect, and the individual has not appointed a POA. These draft recommendations are intended to enable guardianship to be tied more closely to the needs and circumstances of each particular individual. The LCO's draft recommendations require some re-allocation of resources, but in the view of the LCO, this would result in the more effective use of limited resources overall. Some draft recommendations, such as the elimination of statutory guardianship, could only be implemented in the context of a much more accessible adjudication system, as recommended in Chapter VIII, while others could be implemented within the current adjudication system, but would be more effective when paired with reforms to adjudication.

In summary, the LCO recommends that,

- adjudicators considering the appointment of a guardian for matters related to property or personal care be empowered to request a report on the circumstances of the individual in question, including the nature of their needs for decision-making, the supports already available to them, and whether there are additional supports that could be made available to them that would obviate the need for guardianship. Organizations that may be appropriate to prepare such reports may include the Public Guardian and Trustee, Adult Protective Services Workers, and Developmental Services staff;
- the statutory guardianship process under sections 15 and 16 of the *Substitute Decisions Act, 1992* be eliminated, as a matter of progressive realization, and replaced by applications for appointments to the Consent and Capacity Board;
- the *Substitute Decisions Act, 1992* be amended to require adjudicators to turn their minds, at the time of the appointment of a guardian, to whether the order should be time-limited or subject to review at a specific time, and that guardians be given an explicit duty, when they have reason to believe that the individual may have regained legal capacity, to assist the person to have the guardianship order terminated;
- the *Substitute Decisions Act, 1992* be amended to permit adjudicators to make appointments for limited property guardianships; and
- the *Substitute Decisions Act, 1992* be amended to permit an adjudicator to appoint a representative to make a single decision related to property or personal care.

X. EXPANDING CHOICE OF DECISION-MAKING REPRESENTATIVE

A. Introduction and Background

Under current Ontario law, where a person does not have the legal capacity to make a particular decision or type of decision and a substitute decision-maker (SDM) must be identified, in the vast majority of cases that SDM will be a member of the individual's family or a close friend. There are a relatively small number of individuals who have as their SDMs a professional (such as a lawyer, for example), an organization (such as a trust company) or the government (through the Public Guardian and Trustee (PGT)).

The *Discussion Paper*, Part Three, Ch II, raised the question of whether, in light of changing economics, family structures and demographics, Ontario ought to expand the range of options for appointments as SDMs available to individuals. This Chapter examines that issue.

It should be emphasized that this discussion does *not* include supported decision-making arrangements, in which the individual makes the final decision with assistance from others. It is the view of the LCO that supported decision-making requires close, trusting personal relationships. While many persons granted powers of attorney (POAs) or appointed as guardians are in trusting relationships with the individual for whom they make decisions and may be selected for such reasons (as discussed below), this is not necessarily the case. Furthermore, where no such relationships exist or they are not appropriate as a basis for decision-making, the more formal accountability mechanisms associated with substitute decision-making are essential.

B. Current Ontario Law

1. Legislative Overview

The provisions of Ontario law regarding who may act as a substitute decision-maker are outlined at length in the *Discussion Paper*, Part Three, Ch. II. This section is therefore intended only as a brief review, and not a comprehensive discussion.

Powers of Attorney

The grantor of a power of attorney (POA) under the *Substitute Decisions Act, 1992* (SDA) faces only minimal restrictions on whom he or she may appoint in that role. These include

requirements that the holder of the POA be of a minimum age, be legally capable, that the PGT may only be appointed with permission in writing, and, in the case of a power of attorney for personal care (POAPC) that certain conflicts of interest be avoided.⁴³⁷ The SDA explicitly contemplates either a guardian or a power of attorney for property taking compensation for those services, in accordance with a prescribed fee scale; no such specific provision is made for compensation for SDMs for personal care.⁴³⁸

As was described in Chapter VII, as personal appointments, there is no oversight of persons acting as POAs *per se*. Where a professional such as a lawyer or accountant or a trust company takes on this role for compensation, the oversight mechanisms are those associated with the profession or institution, to the degree that they are considered applicable to the activity of providing substitute decision-making.

Court-Appointed Guardians

Guardians for property or personal care may be appointed through an application to the Superior Court of Justice. The court must consider the following statutory directions:

- The court shall *not* appoint a person who provides health care or residential, social, training or support services to the incapable person for compensation, with limited exceptions, such as if the individual providing services is the person's spouse or partner, or the attorney under the POA.
- The court shall *not* appoint the PGT unless the application proposes the PGT as guardian, the PGT consents, and there is no other suitable person who is available and willing to be appointed.
- The court *shall* consider whether the individual being proposed as guardian is already acting under a POA for the person, the wishes of the person involved if they can be ascertained, and the closeness of the relationship between the proposed guardian and the person.⁴³⁹
- A guardian for property must reside in Ontario, unless the out-of-province resident provides security in a manner approved by the court for the value of the property to be managed.⁴⁴⁰

The Court does, in some situations, appoint trust companies to act as guardians for property, generally in cases where there are significant assets that require skilled management and often where there is discord within the family.

Replacement of Statutory Guardians for Property

The process by which the PGT may be appointed as a statutory guardian for property is described in Chapter IX. Where the PGT is the statutory guardian for property, an application may be made to replace the PGT as guardian by the following persons:

- the person's spouse or partner;
- a relative of the person;
- an individual holding a continuing POA for property for that person, if that POA was completed prior to the certificate of incapacity and did not give the attorney authority over *all* of the person's property; or
- a trust company, if the person has a spouse or partner who consents in writing.⁴⁴¹

The PGT reviews the application, and if the PGT is satisfied that the management plan submitted by the applicant is appropriate and that the applicant is suitable, the PGT shall appoint the applicant as the replacement statutory guardian. The SDA directs the PGT to consider, in reviewing the application, the legally incapable person's current wishes if they can be ascertained and the closeness of the relationship between the applicant and the person.⁴⁴²

The Health Care Consent Act, 1996

The *Health Care Consent Act, 1996* (HCCA) sets up a simple system for determining the identity of the SDM where one is required. The statute lists, in descending order of preference, those who may act as decision-makers where a person has been found to lack capacity for a particular necessary decision, as follows:

1. the person's guardian of the person, if the decision required falls within the guardian's scope of authority;
2. the person's attorney for personal care, if the decision required falls within the attorney's scope of authority;
3. a representative appointed by the Consent and Capacity Board (CCB), if the decision falls within the representative's scope of authority;
4. the person's spouse or partner;
5. a child or parent of the person, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of a parent;
6. a parent of the person who has only rights of access;
7. a sibling of the person;

8. any other relative of the person (including those related by blood, marriage or adoption).⁴⁴³

An SDM appointed through this hierarchical list must be

1. capable with respect to the decision to be made;
2. at least 16 years of age, unless he or she is the parent;
3. not prohibited by court order from having access to or giving or refusing consent on behalf of the person;
4. available; and
5. willing to assume the responsibility.⁴⁴⁴

If no person identified through the list meets the requirements, the PGT shall make the decision.⁴⁴⁵

2. The Preference for Family and Friends

A review of the legislation quickly indicates a strong preference for family as SDMs. This is not surprising: the role is a difficult and demanding one which not infrequently spans many years and may be closely entwined with caregiving choices and responsibilities. Families can bring a deep personal knowledge of the individual to guide them with decision-making and assist with the practical and emotional aspects of the task. As well, they can often bring the profound commitment to the wellbeing of the individual that the role requires. It is a role imbued with trust and responsibility, and for many people, families are where they are most comfortable placing that trust and responsibility.

Nonetheless, some individuals either do not have family or friends who are appropriate, willing or able to take on this role, or would prefer that the role be carried out by someone with professional skill and objectivity. Trust companies will act as POAs for property for some existing clients, and will also sometimes be appointed as guardians for property in court proceedings. Lawyers and accountants will also sometimes agree to act under a power of attorney for property for their clients. Trust companies are, of course, heavily regulated institutions. Lawyers and accountants are guided by their professional standards and are subject to the oversight of their regulatory bodies, although not necessarily with respect to this role.

3. *The Role of the Public Guardian and Trustee*

The PGT may become guardian for a person who lacks legal capacity in two ways:

1. **Statutory Guardianships for property:** where a statutory guardianship results from a finding of legal incapacity to manage property under Part III of the *Mental Health Act* (MHA), or by a Capacity Assessor under section 16 of the SDA, the PGT will *automatically* become the guardian of property, unless there is an SDM already in place through a valid POA or guardianship.⁴⁴⁶ The PGT will continue as guardian so long as one is required, unless a replacement is approved, as described above.
2. **Appointment by the court:** This *Interim Report* deals at greater length in Chapter VIII with powers of the PGT to conduct investigations where there are concerns that a person lacks capacity and serious adverse effects may or are occurring as a result. The important point here is that if, as a result of the investigation, the PGT has reasonable grounds to believe that the person is legally incapable with respect to property or personal care, and that the prompt appointment of a temporary guardian is necessary to prevent adverse effects, the PGT must apply to the Court for an order appointing it as temporary guardian.⁴⁴⁷ More broadly, the Court is empowered to appoint the PGT as guardian either of property or personal care where the application proposes the PGT as guardian, the PGT consents, and there is no other suitable person who is available and willing to be appointed.⁴⁴⁸

The PGT will also act as a decision-maker of last resort under the HCCA, as described above, and may consent (in rare circumstances) to appointment under a POA.

What is important to note from the above is that the PGT acts as decision-maker in two broad circumstances: where there is no other appropriate, available and willing person to act, and where, as with statutory guardianships and guardianships resulting from investigations, there is perceived to be a need for an entity that can act quickly to prevent dispersal of property (as with statutory guardianships) or to end ongoing abuse, neglect or exploitation. The appropriateness of having the PGT act as, essentially, an SDM of first resort through its automatic appointment through statutory guardianship is addressed in Chapter VIII. This Chapter will focus on the PGT's role as an SDM of last resort.

In 2013-2014, the PGT was acting for 21 clients under personal guardianship (3 on a temporary basis).⁴⁴⁹ The PGT notes that the court will appoint it to make personal care decisions only "very occasionally" and in most cases to "remove the individual from a situation of harm or to prevent access by third parties who are abusing the person".⁴⁵⁰

It is more common for the PGT to act as guardian of property, most frequently through statutory guardianships. In 2013-2014, the PGT was a court-appointed guardian of property for 318 individuals. It was a statutory guardian for property for 4,881 individuals who had received certificates under the MHA, and for 5,567 individuals who had received a certificate of incapacity through a Capacity Assessment in the community. As well, it was acting for a small number of individuals (31) where a replacement statutory guardian had died, resigned or become legally incapable with respect to property management.⁴⁵¹ In 2013-2014, the PGT opened 1,888 new property guardianship files, 841 through MHA certification and 1,032 through Capacity Assessments.⁴⁵²

In 2011-2012, the PGT made 4,664 treatment decisions, under its responsibility to do so where there is no one who meets the HCCA requirements.

The *Annual Reports* of the PGT point to a steady and significant increase in the caseload of the PGT since 2000, both in absolute numbers and the number of clients as a percentage of Ontario's adult population,⁴⁵³ likely reflecting Ontario's aging population, as well as other demographic shifts such as smaller family sizes and increased family mobility. The PGT's *Annual Reports* also point to increased complexity in the client files handled.⁴⁵⁴

C. Areas of Concern

The LCO heard a number of concerns about the options for potential SDM appointees available to individuals.

The complexities and challenges of the role: The role of an SDM can be extremely challenging. Some lawyers commented to the LCO that if people really understood what they were taking on when they agreed to act under a POA, far fewer people would be willing to do this. In addition to the demanding legal requirements, SDMs often face many practical, emotional and ethical challenges. Decisions may be high-stakes, involve complicated information and require rapid response. Decisions may well need to be made over the objections of the person who is intended to benefit over the long-term, so that the emotional costs may be high: for example, while admission to long-term care may be necessary, it is very often not a welcomed decision. Not infrequently, despite the guidance of the legislation, it will be far from clear what the "right" thing is to do in a particular circumstance. And as discussed in Chapter XI, there are relatively few practical supports for those taking on the role of substitute decision-maker.

In conversations with trust companies that act under POA for property or as guardians for property, these professionals also emphasized the challenges of the role, despite their expertise in financial management and the benefit of accumulated experience. The shifting nature of legal capacity, the complexity of the law, the difficulties of family dynamics and the challenging nature of some individuals' needs all combine to make this a demanding role, even in the best circumstances.

Individuals who are socially isolated: It is difficult to tell how many individuals there are who have no family members or friends who would both be appropriate SDMs and who are willing to act as such. Because of the PGT's role as statutory guardian, one cannot conflate the PGT caseload with the population of individuals who require "last resort" decision-making. Throughout the consultations, the LCO repeatedly heard concerns about growing numbers of individuals who are socially isolated and have no appropriate person to act as an SDM if necessary. Families are more often geographically separated as work and individuals become increasingly mobile. Families are smaller, divorce is more frequent, and fewer individuals have children. As lifespans lengthen, older people may find themselves outliving their families and friends. As well, the challenges and stigma associated with certain types of disabilities may tend to leave these individuals at greater risk of social isolation. One long-term care home administrator with whom the LCO spoke indicated that she was aware of a long-term care home in which approximately one-third of the residents were having their property decisions made by the PGT.

Constrained options: Powers of attorney offer individuals the opportunity to choose for themselves who will act for them, should such assistance become necessary. It seems reasonable that individuals, knowing their own needs and their social circle, will be in the best position to make good choices about SDMs.

However, it was pointed out these are, in most cases, constrained choices. Few of us have a wide circle of support from which to choose. The people who are closest to us, or who we most trust, may not have the skills to manage complex property issues or the temperament to make high stakes treatment decisions, or may live too far away to be able to effectively fill the role. Or the family dynamics or dependency relationships may be such that the person creating the POA may not be comfortable to name the person(s) who would be most effective, because others would be hurt or upset by the choice. In some cases, the individual must make the least inappropriate choice within a set of suboptimal options. These kinds of constrained choices may contribute to problems once the POA comes into effect, whether in the form of attorneys who exercise their duties poorly or abusively, or conflicts within the family regarding the exercise of the POA functions.

There are, therefore, individuals who are looking for SDM options beyond their family and friends, not because they are socially isolated, but because they simply have no one in their social circle with the necessary skills or temperament to fill this role, or because family dynamics make it impossible to fill the role without serious conflicts arising.

At a focus group with persons with mental health disabilities, some participants noted that the HCCA, with its prioritizing of family relationships, means that even if they do not feel that their family members would be appropriate decision-makers and have decided not to appoint them, those family members are automatically granted authority to make treatment decisions should they become legally incapable with respect to treatment. Individuals whose behaviour contributed to their mental health disability are then given authority over treatment of that disability, and considerable power over the individual.

I think certainly that [HCCA] list needs to be looked at, and how it's sort of like enshrined into law, that there needs to be some kind of process by which, you know, I'm not going to say it's always possible for somebody to sort of direct who is going to be the best decision maker.... But yes, there needs to be something so that we don't have this sort of like enshrinement of your spouses... because if you look at women who have been abused or people have been in sort of relationships in this sort of thing, like where I've seen that, they're hostile, they keep them ...

Focus Group, Individuals with Mental Health Disabilities, August 21, 2014

Similarly, the Advocacy Centre for the Elderly (ACE) has commented that

ACE has seen numerous cases where seniors are being abused by their lone family member. In these cases, even where the senior revokes a power of attorney for personal care, the abusive family member remains the lone willing and available person to act as SDM for the senior for decisions governed by the HCCA. The senior often does not know anyone who is trustworthy, willing, and legally able to act as their power of attorney for personal care. It is ACE's experience that, where the PGT is asked to consent to being named as the senior's attorney for personal care under the SDA, this consent is refused. As such, under the HCCA hierarchy, the abusive family member remains the highest ranking SDM – and the senior is required to rely on informal arrangements in which health practitioners are asked to skip over the abusive family member and proceed directly to ask the PGT for a treatment decision in the event the senior becomes incapable in the future.⁴⁵⁵

Many lawyers who work in this area told the LCO that they are very frequently asked to act as POAs. Some lawyers will take on this role, but many will not. Some trust companies reported being asked by clients to act as POAs for personal care, a role which they cannot take on, and which they would view as inappropriate for them even if it was permitted.

The role of the Public Guardian and Trustee: Consultees appreciated the role of the PGT as a guardian of last resort, while also recognizing the natural limitations of that role, in that the PGT is not, as presently constituted, naturally placed to develop the kind of ongoing, intimate relationships that are the best foundation for acting in a substitute decision-making role. It was generally felt that there was a better fit between property decision-making and the nature of the PGT, than other types of decisions.

The personal care decisions gap: As was noted above, while the PGT does regularly make treatment decisions where no person on the automatic HCCA list is willing and available, it is quite rare for the PGT to be appointed as guardian of the person: at the time of the last annual report, the PGT was acting in this role for only 21 individuals in the province of Ontario. This likely reflects the deeply personal nature of this type of decision-making and an understandable reluctance to have government involved in this type of role.

A number of service providers identified a gap in personal care decision-making. Trust companies pointed out that they not infrequently found themselves acting as a property decision-maker without anyone at all to consult regarding personal care issues, and identified this as a significant challenge in achieving the overall goals of the legislation. Long-term care home providers identified a similar gap, with residents of long-term care homes who had no one to engage on their behalf in any kind of broader care planning. Both types of service providers emphasized the importance of having someone who knows the person, cares about them, and can advocate on their behalf when necessary. As one long-term care home service provider put it, it is not just that there is no one to make decisions, but that there is no one *who cares about the individual* to make decisions.

The kind of caring that families can provide at their best is difficult to replicate. While the options discussed later in this Chapter may not be able to completely fill this gap, they may be able to provide some skill and knowledge to guide personal care for those individuals who currently lack any supports at all in this area.

The LCO was pointed to the growing number of businesses providing “elder care planning”, “transition planning” or “seniors care management” services as to some degree informally moving into this gap. These businesses may assist individuals or their families in developing and monitoring care plans; navigating the health, long-term care or community services systems and assisting with accessing services; providing counselling or advice where difficult choices must be made (for example, whether to move to long-term care or remain in the community); and providing practical supports to carry out decisions.

Abuse, Neglect and Conflicts of Interest: Chapter VII dealt at length with concerns about abuse and misuse of substitute decision-making powers. Where there is vulnerability and an opportunity for personal gain, there will always be a risk of abuse. This is true whether the SDM is a family member, a friend or a professional. It is therefore always important, when considering who may act in a substitute decision-making role, to take into account conflicts of interest and the risk of abuse.

The PGT and trust companies are obviously heavily regulated institutions, which reduces the chances of misuse of power for personal gain. Current legislation already prohibits the Court from appointing as a guardian any person who provides health care or residential, social, training or support services to the incapable person for compensation, unless that person is also the incapable person's spouse, partner or relative, and there are similar restrictions on who may be appointed to act as a power of attorney for personal care.⁴⁵⁶ Comments on potential options for expanding who may act in a decision-making role frequently focussed on risks of abuse or neglect arising from economic motivations. While the current situation results in shortfalls in the provision of decision-making for those who need it, there was a high degree of confidence that the PGT and trust companies perform their roles in a trustworthy fashion, and commentators felt that new options ought to be structured to fill the gap without substantially comprising the safety of affected individuals.

D. Applying the *Frameworks*

Both of the LCO *Frameworks* for the law as it affects older adults and the law as it affects persons with disabilities identify a principle of promoting participation and inclusion. The definition of the principle in the *Framework for the Law as It Affects Older Adults* emphasizes the "right to be actively engaged in and integrated in one's community", as well as the importance of removing barriers of all kinds to such involvement, particularly for those who have experienced marginalization and exclusion. The *Framework for the Law as It Affects Persons with Disabilities* identifies the importance, not only of designing inclusively and removing barriers to participation and inclusion, but also of actively facilitating involvement.

The *Final Report* for the project on the law as it affects persons with disabilities noted,

Persons with disabilities have often experienced physical or social exclusion or marginalization, whether arising from attitudinal, physical, social or institutional barriers.... [P]ersons with disabilities continue to be pushed to the margins in a variety of social areas, including employment, education and community life. The principle of inclusion aims to redress this exclusion, and make persons with disabilities full members of their communities and society at large.⁴⁵⁷

The *Report* accompanying the *Framework for the Law as It Affects Older Adults* makes a similar point, drawing on the WHO's *Active Ageing Policy Framework*'s broad approach to participation as including a right to be active in all aspects of community life.⁴⁵⁸

Continued shortfalls in the inclusion of persons with disabilities and older adults in social and community affairs lie at least partially at the root of the lack of social networks and supports that some older adults and persons with disabilities face, and which manifest in a lack of willing, available and appropriate family and friends to act as SDMs.

The principle of fostering autonomy and independence includes, for older adults, “the right of older persons to make choices for themselves”, and for persons with disabilities “the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives”.⁴⁵⁹ In general, the principle of autonomy and independence points to the importance of promoting the ability of persons with disabilities and older persons to have and make *meaningful* choices about the appointment of an SDM. The current legislation reflects this principle in a number of ways. The emphasis in the legislative scheme on personal appointments reflects the importance of individuals choosing their SDMs for themselves. The SDA directs the PGT, when reviewing applications to replace it as statutory guardian, to consider the legally incapable person's current wishes if they can be ascertained,⁴⁶⁰ and the Court is directed to a similar consideration in the case of court-appointed guardians.⁴⁶¹

For isolated and marginalized individuals, the connection between the principle of participation and inclusion and that of independence and autonomy becomes very clear. Without inclusion in the community and the social supports and networks that provides, these individuals have no meaningful choice as to who will assist them with decision-making if that need arises, something that is central to their autonomy.

Consultees have raised grave issues regarding individuals who have no one to ascertain and speak for their personal care needs. Without a person who has a duty to pay attention to their needs and wants, encourage their participation in decision-making to the greatest degree possible, and ensure that necessary decisions are made and communicated, these individuals are at risk of being not only misunderstood but of having their needs disregarded because there is no one to understand and communicate them. This is an affront to the dignity of individuals who are not able to make decisions independently, but who nonetheless retain the right to be treated with respect and to have their values and preferences ascertained and taken into account.

As discussed above, issues related to choice of legal representative are not of concern only to those who are socially isolated or marginalized. Because of the complex and challenging role of SDMs, even individuals with thriving social networks may find it difficult to identify someone with the requisite skills, temperament and time to undertake this responsibility. For these individuals, expanding options for who may act as an SDM may also contribute to greater autonomy.

It is important to remember as well that even with expanded options, some individuals are always likely to have few choices – persons whose financial means are too limited to be of interest to for-profit service providers, and who are, through their circumstances or the nature of their disability, hard to serve and who require careful and compassionate attention. A “market-based” approach to increasing choice of SDM may have an unintended side effect of reducing service to these most vulnerable individuals, unless appropriate attention is paid to ensuring that their needs are met in a professional and ethical way.

As many have pointed out, any expansion of options must pay careful attention to the principle of recognizing the importance of security or facilitating the right to live in safety. Expanding options may promote safety and security, as individuals may not be constrained to appoint persons who they are aware may not have the skills or temperament to perform the role well, for lack of other options – or worse yet, have their decision-making default to inappropriate persons under the HCCA hierarchy. However, as there is always risk associated with decision-making arrangements, it is important that options to be made available to individual be identified and designed in a way that carefully balances the benefits of increasing choice with risks of abuse or misuse. In particular, issues related to conflicts of interest and of oversight are important.

E. The LCO’s Approach to Reform

The LCO has identified the following five foundations for law reform on this issue.

All those who lack legal capacity and require a substitute decision-maker to make necessary decisions should have meaningful access to this type of assistance. Those individuals who lack legal capacity and require substitute decision-making assistance to make decisions that are necessary to their wellbeing should have access to someone who can take the time to ascertain their needs and goals, has the ability to make and communicate decisions as needed, and has the skills and knowledge to do so in compliance with Ontario’s laws.

The needs of individuals who lack or may lack legal capacity are diverse, and can be best met by providing a range of options. The substitute decision-making needs of a wealthy senior with a complicated family structure, of a widow with a fixed income living in long-term care with her surviving family members half a continent away, or of a socially marginalized low-income person with a significant mental health disability are likely to be very different. All may have difficulty identifying someone with whom they have a close personal relationship and who is willing and appropriate to act as an SDM if needed, but the type of arrangement that would meet their needs may differ significantly. Currently, the PGT may be the default option for all of them, but a wider range of options may better serve their needs.

While family remains important, family members are not always the best choices for SDMs. As has been emphasized throughout this *Interim Report*, the role of SDM is a demanding one. Even loving family members may not be suited to this role. The common conflation of caregiving with substitute decision-making is often unhelpful: while the two roles may go together, it is not necessary or even always best that they do so. The preference for family in the current legislative scheme is understandable, and it is likely that for most individuals, family members will remain the first choice for SDMs. However, the current tacit assumption that family members can adequately fill this role in the overwhelming number of cases, with only a few isolated cases falling within the purview of the PGT, is not likely to bear up under current social and demographic trends, and fails to meet the needs of a not insignificant minority of Ontarians.

The PGT has a vital role in providing professional, ethical and expert substitute decision-making for individuals for whom other options are not appropriate or available. As something of a corollary to the previous point, there will likely always be some set of individuals for whom other options are not appropriate or available – for example, because they do not have funds to pay for services, or because the nature of their needs is too complex or demanding for most service providers. It is important that the PGT remain available to provide the decision-making services that they need to such individuals.

There are always risks of abuse and misuse of powers associated with substitute decision-making: an expansion of options for who may act must take careful account of these risks. This includes considering the incentives that are built into a particular type of SDM arrangement, the risks associated with conflicts of interest, power imbalances, and the availability of meaningful oversight and accountability mechanisms.

F. Draft Recommendations

1. Enable Individuals to Exclude Family Members from Appointment under the HCCA Hierarchy

HCCA's automatic hierarchy of appointments in general provides an effective means of providing for substitute decision-making in situations where a flexible and rapid response is required. Individuals who wish to opt out of the automatic hierarchy can, in most cases, address such concerns by creating a POA for personal care that identifies a decision-maker of their choice for treatment or other HCCA issues. The legislation also allows for the PGT to consent to be appointed under a power of attorney; however, this is a rare occurrence.

As was noted above, the LCO has heard concerns that individuals with only one family member, or who are unable to trust any of their available family members, may nonetheless find themselves with someone they object to or who is abusive as their default decision-maker under the HCCA. Expanding the options for SDMs to allow a broader role for professional representatives and community organizations may reduce the number of situations in which this occurs. However, the problem is integral to the structure of the HCCA.

In its submission to the LCO, the Advocacy Centre for the Elderly has recommended that the issue be addressed by allowing individuals to create a document excluding one or more individuals from the HCCA hierarchy.

The HCCA already permits individuals to revoke a POA for personal care.⁴⁶² Revocations must be in writing and meet the same execution standards in terms of witnesses as those for the creation of a POA for personal care.⁴⁶³

The LCO believes that allowing individuals who have legal capacity to make a POA for personal care to create a document that excludes particular individuals from appointment under the HCCA hierarchy would be a simple and effective means of empowering individuals to ensure that decisions about their treatment, placement in long-term care, or personal assistance services are not made by persons with whom they have a negative relationship. The effect would be to limit the list to those the individual implicitly approves or to allow the PGT to make HCCA decisions where necessary, without requiring it to consent to act in the broader role of a POA for personal care.

DRAFT RECOMMENDATION 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*.

2. Focusing the Public Guardian and Trustee's Substitute Decision-making Role

The LCO believes that the government maintains a responsibility to ensure that Ontarians have access to trustworthy and competent substitute decision-making when they require it. While relatively few Ontarians would identify government as their *ideal* choice for a substitute decision-maker, preferring that role to be filled through a more personalized relationship, participants in the LCO's consultations recognized the value of the PGT as an expert, professional and trustworthy decision-maker for those whose needs cannot be appropriately met elsewhere. There are individuals who, because of their social isolation and low-income do not have access to any other options when it comes to substitute decision-making. There are other individuals who do have family members, but where the family dynamics are so negative or skill levels so low as to put the wellbeing of the individual at risk. There are others whose needs are so challenging that other options are not viable and the expertise and professionalism of the PGT is required to ensure the provision of appropriate substitute decision-making. These individuals, who cannot be adequately served in a for-profit model or by those without considerable expertise in and dedication to addressing the challenging ethical and practical issues that may arise in substitute decision-making, should, in the view of the LCO be the core focus of the PGT's substitute decision-making activities. It is in this sense that the LCO believes that a "last resort" role for the PGT should be understood: not solely as a backstop for situations where there are *no* alternatives at all, but as a provider of expert services for those whose needs cannot be appropriately served by other options. As referenced in Chapter IX, there may also be urgent situations where it may be appropriate for the PGT to step in on a temporary basis, while other options are put into place.

A comprehensive review of American public guardianship programs pointed to both the importance and the challenges of this role:

Guardianship is not social work, although it involves important elements of social work. Conversely, guardianship, a product of the courts, is not completely law. Guardianship is an amalgam of many disciplines: law, medicine, social work, and psychology. Most importantly, guardianship deals directly with human beings, society's most vulnerable human beings. Yet those under the care of the state often are still not afforded basic considerations. Living the decisional life for these unbefriended people is perhaps the most important and complex state function performed. Guardianship remains shrouded in mystery for most of the public, yet the public guardian performs a highly important state

function for the most at-risk population, individuals who deserve no less than excellence from public servants.⁴⁶⁴

The LCO recommends that the PGT continue to fill the vital role of SDM of last resort, understood in the sense described above. The creation of other options for those for whom they are appropriate, together with the curtailment of the role of statutory guardianship in Ontario's system, should reduce some of the pressures currently facing the PGT and enable a renewed and strengthened focus on the needs of those who truly require the assistance of the PGT.

Should statutory guardianship be abolished, as the LCO has recommended in Draft Recommendation 35, to enable this focus for the PGT, it would be important for the legislation to include clear statements of the purpose of the PGT with respect to guardianship, and the criteria under which it should be appointed.

DRAFT RECOMMENDATION 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.

3. Regulated Professional Decision-making Representatives

Should Professional Decision-making Representatives Be Encouraged?

As was noted above, individuals or institutions can act as SDMs for profit under POAs for property. Many trust companies provide a highly regulated and expert SDM service to small numbers of clients. Individuals do appoint various professionals, most commonly lawyers and accountants, to act as their POAs for property.

Individuals may see professional decision-making representatives as an appealing source of substitute decision-making in two circumstances. Where individuals have no trusting relationship with an appropriate person who is willing and able to act on their behalf, professional decision-making representatives might be an alternative to the PGT. As well, some might find the idea of a professional decision-making representative appealing because their specialized focus gives professional decision-making representatives the opportunity to develop experience and expertise in fulfilling this role, and they are independent of negative family dynamics. However, there are currently a number of factors limiting the use of such professional services.

Individuals who are seeking to appoint a professional as SDM have no easy way of finding such services. Trust companies generally offer their services as POA for property to only a limited range of existing clients, and so are not available to many individuals who might see professional decision-making representatives as a desirable option. While some lawyers or accountants will act as POA for property, many will not, and so individuals may have to conduct extensive searches to find one that will act, and will have to determine for themselves whether that professional has the requisite skills and ethical compass.

Further, there is no clear provision for professional SDM services with respect to personal care. As was noted above, several consultees identified a troubling gap in the provision of substitute decision-making assistance in the realm of personal care for individuals who do not have a relationship with someone who is willing and able to take on this role.

Perhaps most importantly, there are significant risks associated with for-profit substitute decision-making. The risks include not only substantial financial loss and life-long impoverishment, but also significant violations of the fundamental rights of individuals, carried out to maximize profit and minimize risks of detection of misuse of power. For-profit substitute decision-makers will of course seek to make meaningful profit from their work: the natural incentives to do so are to reduce the amount of service provided and to increase fees. The risks are particularly high because the client does not have the ability to terminate the arrangement or to effectively supervise the substitute decision-maker. For those individuals seeking for-profit substitute decision-making because they are socially isolated or have no family members nearby, there are effectively no eyes on the activities of the professional. In the United States, where professional fiduciary programs are very common, there have been repeated concerns about unethical behavior on the part of some subset of providers.⁴⁶⁵

The lack of oversight of professional decision-making representatives may quite validly deter potential clients from pursuing such a route: whatever the limitations of family or of the PGT, it may well be preferable to rely on the ethical and affective bonds of the one or the fundamental guarantees associated with services provided by government, as opposed to the unknown and potentially grave risks associated with unsupervised individuals motivated solely by profit.

Finally, it should be acknowledged that professional decision-making representatives are likely to appeal to a relatively small segment of those who require substitute decision-making: those with the financial means to make it reasonably remunerative for a professional to provide this type of service. Notably, for both trust companies and lawyers, these types of services are just one part of a larger business plan. Outside of larger centres, it may not be feasible for

professionals to specialize in this work. This is particularly true given that any type of regulatory scheme would inevitably increase the costs of running such a business.

It is important to keep in mind that substitute decision-making for profit exists in Ontario now. Professionals such as lawyers, accountants and others take on this role, and are guided in it by the professional ethics, standards and oversight mechanisms associated with their profession, to the extent that they are applicable. The issue under consideration is whether steps should be taken to increase the ease of access and to make such services more appealing to the public by provision of oversight and standards.

On balance, the LCO believes that a well-supervised and regulated program for professional decision-making representatives could support a broader range of trustworthy options for persons to act as SDMs. Such a program could meet a need for expert and professional SDM services for those who have the means to pay for such services and who either do not have appropriate trusted others to fill this role or who prefer to have such assistance provided by a neutral and expert third party. It would provide individuals with a practical alternative between the appointment of family and friends, and the use of the PGT, and help to ensure that the resources of the PGT can be focussed on those who most truly need its services.

However, the LCO strongly believes that it is essential that such a program be, in fact, well supervised and regulated. Otherwise, such a program could easily amount to a dereliction of care and a license to abuse a population that is by its very nature vulnerable. The LCO's draft recommendation to this effect must be understood in this context: the associated safeguards should be regarded as a *minimum* level of oversight. Without such safeguards, the *status quo*, even with its acknowledged limitations, is preferable for individuals directly affected. Further, it is unlikely to provide a sufficiently appealing option for many individuals considering their alternatives. Therefore, government may wish to conduct further research to determine whether the benefits of increased options for the public and of increased focus for the PGT would be outweighed by the cost of adequate safeguards.

Appropriate Form of Regulation

A preliminary question is whether regulation should take the form of a licensing regime, in which professional decision-making representatives could not legally practice without meeting specified requirements, or a certification approach, in which professionals may voluntarily seek certification from a self-governing entity, with certification providing reassurance to the consumer that the person meets certain qualifications and is subject to the code of conduct, rules, and other guarantors of safety and quality provided by the certifying agency.

The Manitoba Law Reform Commission (LRC), in its report on *Regulating Professions and Occupations*⁴⁶⁶ proposes a cost-benefit analysis when considering whether to regulate an occupation, weighing the need for protection of the public from the improper performance of the service against the costs of regulation.⁴⁶⁷

It must be recognized that there are incremental “costs” associated with any form of regulation, whether it be licensing, certification or some other form of regulation. There are obvious costs, such as the resources required to administer the regime (for example, the costs associated with operating the regulatory office) that will have to be borne either by the taxpayer or indirectly by the purchasers of the service depending on the regulatory model. The Manitoba LRC also pointed to less often considered costs, such as increased prices for consumers: a requirement that no one but a licensed professional can perform a service limits competition and essentially creates a monopoly of those who can offer the service, thereby adversely affecting the pricing for the service.⁴⁶⁸ This can create a barrier to access for those less financially able. A certification regime will limit competition less than licensing and thereby be less costly, as consumers are able to hire either a certified or uncertified person to do the work. The Manitoba LRC therefore recommended that licensing should be used “sparingly and cautiously”, and only where the threatened harm to the public from inadequate performance of the service is serious.⁴⁶⁹

The LCO believes that a professional decision-making representative regime should be subject to licensing, rather than simply certification. As has been highlighted throughout this *Interim Report*, there are significant and substantial risks of harm that are intrinsic to substitute decision-making, due to the combination of the population being served, the basic rights at issue, and the access substitute decision-making provides the SDM to financial or other benefits of the individual served. This recognition underlies the very existence of Ontario’s legal framework in this area, and the role allocated to the PGT. The combination of these attributes with the profit motive indicates a need for great caution and care. Further, without regulation and oversight, professional representatives are not likely to be taken up to any great degree, due to valid consumer concerns about abuse. While regulation may increase costs of access, the LCO proposes that the PGT remain responsible for service for those who are not best served by other means: the regulated profession should not be the sole means of access to these kinds of services, but part of a mix that will continue to include families, the PGT and trust companies, which are already thoroughly regulated.

The question that follows is who should be responsible for oversight. The two main options are government, either through a government Ministry or an agency such as the Financial Services

Commission, or self-regulation, such as the Law Society of Upper Canada or the regulated health professions provide.

It should be noted that while self-regulatory entities are funded by the members that they regulate, direct oversight by government or a government agency may be funded by, for example, the levying of fees to regulated individuals. That is, a choice between models is not automatically a choice between self-funding or taxpayer funding.

While all models of regulator have government oversight, self-regulatory models are one step removed from this oversight compared to situations where the government or one of its agencies is directly regulating the activity. The Manitoba LRC in its 1994 report examined the advantages and disadvantages of the self-regulatory model. It identified that in some circumstances, the profession itself may be in the best position to create the rules that would govern the profession, saying, “Compliance [with those rules] may also be more likely if self-government results in a sense of community among practitioners which strengthens a commitment to high standards of competence and ethical conduct”.⁴⁷⁰ This more clearly applies to professions that are relatively “mature” in the sense of there being an established community of persons practising the particular activity, a history of ethical conduct and a well-understood and established standard of practice, than to a situation such that under consideration, where a new profession is essentially being created.

As well, the Manitoba LRC notes that for self-regulation to work, there must be a “critical mass” of practitioners to pay for and take on the tasks necessary for a self-regulatory entity to function. The Health Professions Regulatory Advisory Council, which provides advice to the Minister of Health and Long-Term Care if so requested on whether unregulated professions should be regulated,⁴⁷¹ considers whether “the practitioners of the profession are sufficiently numerous to support and fund, on an ongoing basis, the requisite number of competent personnel to enable the regulatory body to continue to discharge its functions effectively.”⁴⁷²

A key disadvantage of self-regulation identified by the Manitoba LRC is the potential for the regulator to experience conflict between the self-serving interests of the profession versus the broader public interest. In this regard, the Health Professions Regulatory Advisory Council examines whether “the profession’s leadership has shown it will distinguish between the public interest and the profession’s self-interest. Regulatory colleges are mandated to privilege the former over the latter”.⁴⁷³

In examining the American experience in the larger states, most have some type of direct government oversight of professional guardians. The state of California has established a

Professional Fiduciaries Bureau, to license, oversee and regulate professional fiduciaries.⁴⁷⁴ In Florida, the Statewide Public Guardianship Office is responsible for registration of Professional Guardians and for receipt and review of annual reports and Guardianship Plans. In Texas, oversight of professional guardians is carried out through a branch of the judiciary, the Judicial Branch Certification Commission, which is also responsible for oversight of other professions associated with the courts, such as court reporters, process servers and court interpreters.⁴⁷⁵

Overall, it appears to the LCO that in this situation, where the intent of regulation is essentially to establish and support the development of a relatively new or little considered service or profession, a self-regulatory approach is not particularly practical, at least not at this point in time, and that some form of direct regulation, perhaps similar in some key aspects to that developed for Capacity Assessors, should be developed.

Safeguards of Quality and Against Abuse

Finally, careful consideration must be given to the establishment of safeguards for this service, both as a means of protecting users and to develop this as a credible alternative to the *status quo* in the minds of potential users.

As was briefly referenced above, it is very common in the United States for guardianship to be exercised by corporate employees or by other professionals or practitioners.⁴⁷⁶ The LCO has examined the experience in the United States for lessons learned in this respect. The regimes for regulating professional guardians/professional fiduciaries vary considerably from state to state, from very informal to highly regulated. Some of the common safeguards and structures associated with these programs, as operated in larger states with populations more comparable to those of Ontario, are identified below.

American regulatory regimes for professional guardians tend to be designed to capture those individuals and organizations that are carrying out these roles as a primary business, and to exclude family members or friends who are receiving some compensation for their responsibilities or lawyers or other professionals who may occasionally take on this responsibility. Generally, regulation applies to those who are providing services for compensation to multiple individuals.

The National Guardianship Association (NGA), founded in 1988, plays an important role in this area,⁴⁷⁷ with a mission to “advance the nationally recognized standard of excellence in guardianship”. The NGA has developed national practice standards for individuals and for agencies. It has advocated for guardianship certification and has created a Centre for

Guardianship Certification, through which individuals may be certified as a National Certified Guardian or a National Master Guardian. It provides considerable professional development opportunities for guardians. Should government decide to proceed with the development of professional fiduciaries, the NGA may be of considerable assistance, for example, as a source of standards.

Pre-certification requirements: While small jurisdictions may treat professional guardianships relatively informally, relying on court supervision and informal networks as safeguards, larger states where there are many professional guardians acting tend to have relatively thorough pre-certification requirements.

Education, training and certification: Many states require completion of education or training, completion of a certification exam, or both. For certification of a professional guardian, Florida requires guardians to complete a minimum of 40 hours of training, and to score a minimum of 75 per cent on a Professional Guardian Competency Examination, which is administered by the University of South Florida, or receive a waiver from the Statewide Public Guardianship Office. In California, applicants must complete 30 hours of education in approved education courses.⁴⁷⁸ In Texas, applicants are required to have at least two years of relevant experience or have completed an approved course, and to successfully pass an approved exam after no more than four attempts.⁴⁷⁹

Credit and criminal history checks: For certification, guardians may be required to undergo a criminal records check, a credit check or both. Florida requires all professional guardians to provide credit and criminal records checks at their own expense, as part of their requirements for practice.⁴⁸⁰ California stipulates that the Professional Fiduciaries Bureau not issue a license to any person who has been convicted of a crime that is “substantially related to the qualifications, functions, or duties of a fiduciary”, who have “engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary”, who have been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or who have “demonstrated a pattern of negligent conduct”.⁴⁸¹ Texas includes criminal record provisions, but not credit checks.⁴⁸²

Bonds or insurance: Some states require guardians to have insurance or to post bonds. For example, in Florida, all professional guardians must post a blanket bond of a minimum of \$50,000 that covers all wards under the guardians care.⁴⁸³ In Washington State, the professional guardian must post a bond in an amount determined by the court for each ward, though that bond may be waived for clients with very low levels of assets.⁴⁸⁴

Registration: Where certification is required, a registry of certified guardians is generally maintained. For example, in California, licensing is carried out by the Professional Fiduciaries Bureau. The PFB maintains a list of qualified, licensed private professional fiduciaries, which can be found on their website.⁴⁸⁵ It is also required to provide information regarding any sanctions imposed on licensees, including, but not limited to, information regarding citations, fines, suspensions, and revocations of licenses or other related enforcement action taken by the bureau relative to the licensee.⁴⁸⁶

Ongoing duties and responsibilities: In addition to pre-certification requirements, states may also impose ongoing duties to ensure standards and enable monitoring.

Continuing education: Following the completion of the initial 40 hours of mandatory training, professional guardians in Florida must complete 16 hours of continuing education every two years. The Florida Guardianship Association approves continuing education activities for this purpose.⁴⁸⁷ Similarly, in California, to renew a license, applicants must complete 15 hours of continuing education,⁴⁸⁸ in an education course approved by the Professional Fiduciaries Bureau.⁴⁸⁹

Regular reporting: Professional guardians in Florida must register annually with the Statewide Public Guardianship Office. As part of this registration, they must provide regular credit and security checks for themselves and their employees, and evidence that they have completed their required continuing education requirements.⁴⁹⁰ For each individual to whom they provide services, both an Initial Guardianship Report and an Annual Guardianship Plan must be filed. The Annual Guardianship Plan includes an Annual Accounting Report, as well as information about the residence, social condition and mental and physical health of the ward.⁴⁹¹

In California, licensees are required to keep complete and accurate records of client accounts, and to make those records available for audit by the bureau.⁴⁹² They must also file an annual statement with the PFB, which provides a range of information, including whether the licensee has been removed as a conservator, guardian, trustee, or personal representative for cause; the case names, court locations, and case numbers for all matters where the licensee has been appointed by the court; whether she or he has been found by a court to have breached a fiduciary duty; any licenses or professional certificates held by the licensee; any ownership or beneficial interests in any businesses or other enterprises held by the licensee or by a family member that receives or has received payments from a client of the licensee; and whether the licensee has been convicted of a crime.⁴⁹³

In Texas, guardians must file an annual report indicating the number of wards under their care, the aggregate fair market value of the property of all wards, money received from the State of Texas for guardianship services and the amount of money received from any other public source. Following certification, guardians must submit annual renewal applications.⁴⁹⁴

Professional standards: Florida sets standards for profession guardians through its statute. For example, guardians must visit each ward once every four months to ensure that their needs are being met.⁴⁹⁵ In California, the Professional Fiduciaries Bureau is responsible for the development of a code of ethics for fiduciaries.⁴⁹⁶ In Texas, the Judicial Branch Certification Commission is responsible for the creation of the Minimum Standards of Guardianship Services, with which guardians must comply.

These jurisdictions provide some examples of screening and oversight mechanisms for professional fiduciaries. These designation and oversight mechanisms are in many ways reminiscent of those employed for Capacity Assessors designated under the *Substitute Decisions Act, 1992*, as described in Chapter V. To be included in the list of designated Capacity Assessors maintained by the Capacity Assessment office, Capacity Assessors must meet minimum educational requirements, complete a qualifying course on which they are evaluated, complete regular continuing education courses, comply with government standards, and regularly submit copies of assessments for review and feedback.

Minimum educational and training requirements for certification, together with ongoing professional development obligations are a sensible approach to ensuring that professional fiduciaries do indeed have the specialized skills which are one of the main proposed benefits of such a scheme. Clear standards are a basis for accountability: as was noted above, the standards created by the National Guardianship Association may form the basis for the creation of standards for an Ontario system. As well, recording and reporting requirements are a basic mechanism for oversight where professionals are handling funds for vulnerable individuals.

DRAFT RECOMMENDATION 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 decision-making 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.

4. Exploring a Role for Community Organizations

Should Community Organizations Act as Decision-making Representatives?

For-profit professional representatives may provide appropriate options for individuals with sufficient property to justify the expense. It has been suggested that community organizations could provide an additional non-profit option. As organizations that are close to the community, provide a range of supports, and that have the ability to develop a deep understanding of the contexts and needs of the particular populations they serve, community organizations may have the capacity to provide a more personal and holistic approach to the role of SDM for their populations, and to serve populations that would not be able to access for-profit services or that might be challenging for families to adequately support.

Community organizations in Ontario do already act as trustees for benefits under the Ontario Disability Support Program,⁴⁹⁷ as well as for Canada Pension Plan (CPP) and Old Age Security (OAS) benefit.⁴⁹⁸ In some ways the function of these informal trustees are analogous to the duties that may be undertaken by a guardian for property or a person acting under a POA for property, although it should be noted that these trustees are dealing only with one relatively limited income source, and that the nature of the ODSP program creates some opportunity for monitoring and for reasonably timely corrective action should an informal trustee misuse funds. While concerns have been raised about various aspects of the ODSP informal trusteeship provisions, including insufficient oversight and a lack of effective recourse for individuals to challenge the appointment of a trustee, the LCO has heard that some community organizations are able to provide very good informal trusteeship services as part of a more holistic package of services that they provide to clients that they know well and regularly interact with. This is certainly the intent of the federal Supporting Homeless Seniors Program, which aims to assist

vulnerable seniors in receiving their federal income benefits by expanding “the capacity of reputable organizations and municipalities already on the front-lines of service delivery to homeless seniors to help them apply for and administer their CPP, OAS and/or GIS benefits”.⁴⁹⁹ It is also true, however, that community organizations may be reluctant to take on this role due to pressures on budgets or staff.

The Bloom Group, operating in British Columbia as a provider of mental health and supportive housing, emergency shelters for women and children, and hospices, largely in Vancouver’s Downtown Eastside,⁵⁰⁰ is an example of a community organization providing this type of day-to-day decision-making, as a trustee for federal pension programs. It receives referrals from the British Columbia Public Guardian and Trustee and from social services.⁵⁰¹ In the fiscal year 2013-2014, the Bloom Group managed the finances of 858 individuals, described as “seniors who are vulnerable to financial abuse and people who have physical and/or mental constraints”.⁵⁰² The organization does charge a fee for its services, but notes that it keeps its fees as low as possible, so that individuals with limited incomes can access these services, and that it invests the fees back into the program. The program’s Adult Guardianship Workers work with mental health teams, care facilities and other community groups as necessary. The Adult Guardianship Workers provide the following services, among others:

- development of a functional budget and plan for debt reduction, in co-operation with client, based on income, monthly expenditures, debts and saving for future needs;
- bill payments such as rent, meals, utilities and pharmacy;
- facilitation of income tax filing and filing back taxes;
- liaison with community care workers to provide financial support to, and for, clients when appropriate;
- monthly statements upon request; and
- application to all possible income such as Guaranteed Income Supplement and the Disability Tax Credit.⁵⁰³

Some community organizations that the LCO spoke with during consultations indicated that they saw a role as SDM as confusing their mandate, and therefore inappropriate. Others expressed some interest in such a role, seeing it as beneficial to their clientele and an extension of work that they already do. One example pointed to was the Canadian Hearing Society’s General Support Services program, which provides advocacy services and life supports to individuals.⁵⁰⁴ Others pointed to the evolution of person-centred service approaches.

Thinking about that from our perspective, I won't speak for the agency, but we have a really, you know, person-centred approach to providing services, and we build supports around people, and there is no stranger who supports anymore. I mean, relationship is developed and supports are quality, you know, based on what the person needs, so we already have, you know, the basis of what's in the best interest of the person and we support people to make their own decisions already. ... Helping them make decisions might, you know, be a conflict of interest, but in an agency like our size, we could put in checks and balances, you know, like, counter that.... Because we have that already built into our agency and services and supports that we provide for people and that, I think, is such an critical piece to recognize legally. Why do we have to branch off and go to a stranger for decision-making care when we have this wholesome, really positive approach to good outcomes?

Focus Group, Developmental Services Sector, October 17, 2014

Those organizations indicating interest in a role for community organizations did point out that careful thought would have to be given to conflict of interest issues and to the limits of their expertise. While a key potential benefit of appointing a community organization to serve as SDM for an individual is the holistic approach that such an organization might be able to bring to this role, the flip side of this is that a community organization that provides social services and also acts as an SDM may experience at least potential, if not actual, conflicts of interest between these two roles. There is a risk that the agency may make decisions that inappropriately take into account the needs of the agency as a service provider, in a way that may not be in the best interests of the person for whom they are acting. A review of American public guardianship systems, in which a "social service agency" model for the provision of last resort guardianship is very common, succinctly expressed this tension:

At first blush, the social service agency model might seem the most logical placement for public guardianship in that staff are knowledgeable about services and have networks in place to secure services. However, this model presents a serious conflict of interest in that the guardian cannot objectively evaluate and monitor the services provided. Nor can the guardian zealously advocate for the interests of incapacitated persons, including lodging complaints about the services provided. The filing of an administrative action or a lawsuit may be stymied or prevented entirely.⁵⁰⁵

There was a suggestion that community organizations could perhaps partner with the PGT, with the organizations making day-to-day decisions for their clientele, but with the ability to refer decisions that were beyond their expertise or raised conflicts of interest back to the PGT for determination.

If I was going to invest some money into the system, I would invest it in helping the Guardian and Trustee clear some of the [unclear]. Like you know, they have so many people where they're you know, managing finances for. And, like again, do you need a pair of pants or not? Like, that stuff can

be done in the community. You know, surely there's somebody that you have, like, say you have the mechanism through the ODSP trustee ... So get those people and let them focus like they've done.

Focus Group, Service Providers for Individuals Living with Dementia, October 21, 2014

Another suggestion was that community organizations could perhaps partner with trust companies to serve some clients, to provide not only checks and balances but a more comprehensive set of skills. Clear standards for professionalism and ethics would also be of assistance.

I think it's about professionalism and training. Yes, there can be a conflict, there's no question, but typically if you're looking for a power of attorney for property when it is being assigned to a bank you're going to assume the conflict has been removed but the bank or trust company still needs direction from someone in terms of how it is done. That is a role that [our organization] plays often and again it needs to be bigger than that to be able to have professional guidance of what someone's needs are.... So there's a risk of conflict but I think it can come back to who is holding that role, by profession, by experience and by training.

Focus Group, Advocacy and Service Organizations, October 3, 2014

It should also be noted that the PGT, trust companies and the proposed professional fiduciaries all are in a position to develop expertise in the role of SDM, because it is a core area of focus for those who carry out it. While community agencies might bring deep knowledge of particular areas – for example, the needs of persons with mental health disabilities and the systems that they must navigate – they may not naturally develop a profound knowledge of the legislative scheme and their responsibilities under it, and how to best fulfil these.

The LCO's *Final Report* in its project on Capacity and Legal Representation for the Federal RDSP, considered the appropriateness of enabling community agencies to act as legal representatives for RDSPs. Noting that organizations are commonly named as trustees for ODSP, CPP and OAS, and that the Saskatchewan *Powers of Attorney Act* enables the appointment of corporations as attorneys under a POA, the LCO also recognized the risk posed by conflicts of interest and the significant responsibilities attendant on acting for multiple individuals. The LCO made the following recommendations:

6. The Government of Ontario recognize that community organizations are eligible to act as RDSP legal representatives where they are approved to provide services to adults with disability through designated Ontario ministries.
7. The Government of Ontario develop and implement a process for a designated government agency to approve the eligibility of community organizations to act as RDSP legal

representatives, where they are not approved under Recommendation 6. The government agency be required to maintain a list of approved community organizations.

8. The Government of Ontario require that community organizations appointed as RDSP legal representatives under Recommendations 6 and 7 develop and implement a management policy with procedures to do the following:
 - a) maintain separate records of transactions respecting each beneficiary's RDSP;
 - b) undertake periodic review of each beneficiary's records; and
 - c) ensure that a suitable employee has clear signing authority to represent the community organization in transactions with a financial institution at all times.⁵⁰⁶

The responsibilities of a community organization acting as an SDM for property or personal care would be considerably broader and more complex, as well as entailing more risk to the individual, than are roles as trustees or as legal representatives for the purposes of opening and holding an RDSP account.

It is the view of the LCO that community organizations could perform a valuable role in relation to decision-making, given their specialized knowledge of particular communities and their ability to develop ongoing relationships with their clients. For example, community organizations with deep roots in particular disability communities may be well placed to understand the needs, options and circumstances surrounding common types of decisions, or members of certain ethno-cultural communities, community organizations might aid in interpreting the concepts, practices and goals of decision-making in a culturally appropriate manner. However, the role of community organizations in decision-making should be tailored both to the expertise and to the existing responsibilities of these organizations.

It would not be appropriate, for example, for community organizations to be making end of life or other major health decisions, or managing the investments of clients: these kinds of decisions lie beyond their roles and skill sets. However, community organizations, as a number of participants in the consultations noted, are well-placed to assist clients with day-to-day decision-making. They also may be particularly well placed to address the personal care gap identified earlier in this Chapter, assisting individuals with identifying and accessing services and supports to meet their life goals and making decisions about lifestyle and day-to-day activities. Further, these community organizations may have considerable expertise in assisting individuals in identifying and accessing services and programs and in assisting with practical choices. Practically speaking then, the role of community organizations then might include basic budgeting and bill payment, assistance with application to government programs or services, arranging for support services, and personal care decisions related to nutrition, clothing, hygiene and daily activities.

If, as the LCO has recommended, an accessible means is created for application to an administrative tribunal for appointment as a representative for single decisions, a system could perhaps be envisioned in which community organizations could manage day-to-day decisions related to personal care and property, with health care decisions defaulting to the PGT under the HCCA and the relatively rare major decisions related to finances or personal care or situations of conflict of interest managed through the single application process. Alternatively, the suggestions regarding partnerships between the PGT or trust companies and community organizations could be explored.

Appropriate Form of Regulation

It is a challenge to develop an effective model to engage community organizations appropriately in substitute decision-making. In considering the best way to structure appointment of community agencies to act as SDMs, it is important to remember that most community agencies are relatively small, and are already operating at capacity. Because there is always a risk of abuse or misuse of substitute decision-making powers, there must be meaningful screening and oversight of organizations seeking to act as SDMs. However, community agencies may have considerable difficulty in complying with complex screening or oversight requirements, particularly if they are not intending to act for a significant number of clients and therefore do not develop deep knowledge of these systems.

In the United States, there are many non-profit organizations that have qualified as professional representatives under the rules of their particular states, and provide this type of service to those that require it. Some organizations are dedicated entirely to this type of work,⁵⁰⁷ while others carry out this role as one part of a broader mandate. This approach has the benefit of simplicity: rather than multiple approaches to identifying SDMs, there would be a single, consistent licensing approach. However, it may not be reasonable to require long-established non-profit organizations to undergo the same degree of process and scrutiny as a for-profit entity with no established track record of service or expertise. Further, the needs and concerns of a non-profit organization that wishes to include this role as one part of its supports to the community it serves will be different from those of a specialized for-profit entity. Certainly, while a specialized non-profit entity may appropriately seek licensing as a professional fiduciary, able to address the full range of decisions required for clients, this process may not be appropriate or necessary for community agencies that may wish to provide substitute decision-making only for daily decisions as part of its broader service role.

Further, if, as suggested above, the substitute decision-making role of community organizations is limited to day-to-day decision-making, rather than major decisions about accommodation,

health care, or investments, the type and extent of oversight will differ from that required for entities taking on more extensive roles.

Three options for enabling community organizations to take on this more limited role while providing adequate screening and oversight are identified below.

A statutory amendment could permit the appointment of community agencies to this role. In Saskatchewan, *The Powers of Attorney Act* permits the appointment of corporations other than trust corporations as attorneys under a power of attorney.⁵⁰⁸ This provision was adopted in 2002, after the Law Reform Commission of Saskatchewan recommended that the appointment of corporate attorneys be permitted under the law, so that advocacy groups and “not-for-profit organizations dedicated to assisting vulnerable adults” would be able to act as attorneys.⁵⁰⁹ In British Columbia, an exemption under the *Financial Institutions Act* allows the Bloom Group to act as a trustee for its clients, as described above.⁵¹⁰

The Public Guardian may directly delegate responsibilities to one or more community organizations. The State of Florida, in addition to a professional fiduciary system, has a public guardianship program for those who cannot pay for guardianship services. The Statewide Public Guardianship Office (SPGO) delegates public guardianship responsibilities to a range of non-profit organizations operating in various locales. To receive a contract, organizations must meet a range of criteria related to professional training, registration, knowledge, staffing and avoidance of conflicts of interest.⁵¹¹ A 2009 review of Florida’s public guardianship program concluded that it was highly cost-efficient,⁵¹² but also noted that there was a conflict of interest inherent in the program in that the model “puts social services providers in the position of consenting to or refusing their own services”.⁵¹³

The review of American public guardianship programs referenced earlier highlighted that it is increasingly common for public guardianship services to be “contracted out”, and expressed reservations about the practice:

Arguably, the “contracting out” approach allows states to experiment with various models of public guardianship service provision tailored to the needs of a particular region. However, this practice is not without peril and presents a service efficiency and effectiveness conundrum. Public administration literature indicates that contracting out for services is appropriate when the services of government are discrete (e.g., repairing potholes), yet, when the services of government are highly complex, as with public guardianship, services are best provided by a governmental entity. Under the “privatization premise”, contracting of this nature may pose a substantial threat to the provision of public guardianship services due to attenuated and unclear lines of authority, i.e. accountability.⁵¹⁴

Delegation of the decision-making powers of the Public Guardian and Trustee would raise challenging questions of legal liability, oversight and risk management. Consideration would also have to be given to the funding of the services to be provided.

Government may designate community organizations to act as SDMs. In Saskatchewan, *The Adult Guardianship and Co-decision-making Act* permits the Minister to designate corporations, agencies or categories of these as eligible applicants for the role of substitute or co-decision-makers, and non-governmental organizations such as the Saskatchewan Association for Community Living, have been appointed as co-decision-makers or guardians through this means.⁵¹⁵ In practice, such appointments are extremely rare.⁵¹⁶ Organizations may find it challenging to take on these demanding roles without additional supports, training and resources.

England and Wales have adopted a similar approach on a broader scale. In that jurisdiction, the Public Guardian and Trustee does not act as a guardian (deputy) of last resort. Rather, the Public Guardian and Trustee is responsible for maintaining a “panel” of individuals and organizations who are willing and appropriate to serve as deputies where necessary. Where a “last resort” deputy is needed, the Court of Protection may select a deputy from this panel.⁵¹⁷ The panel at this point consists largely of lawyers, but does include some community organizations, and the Public Guardian and Trustee has indicated its commitment to “diversifying” its panel to include a wider range of skills and a broader set of options to meet the diversity of individual needs.⁵¹⁸ The Office of the Public Guardian has published “Deputy Standards”, for these professional deputies and public authority deputies.⁵¹⁹ These standards do not have the force of law, but form part of the foundation of the Office’s supervisory function over the work of deputies, which is considerably more intensive than what is found in Ontario.

DRAFT RECOMMENDATION 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.

G. Summary

The role of an SDM is a challenging one, requiring skill, sensitivity, dedication, knowledge of the law and a strong ethical sense. Because of the structural vulnerability of persons for whom an

SDM has been appointed, SDMs who are unskilled, uncaring or unethical may have a devastating effect on the lives of persons whom they are appointed to serve.

Ontario's current system relies heavily on family and friends to undertake this role out of love and duty, with the PGT available as an alternative where necessary. Many are served very well by the current system, but it is also true that changing demographics and family structures are undermining the assumptions on which the current approach is based. There are a number of gaps and shortfalls. The growing need places pressure on the services provided by the PGT, and the PGT, as it is currently constituted, is not well-placed to make personal care decisions for individuals. In some cases, family members, while willing, do not have the necessary skills to carry out this difficult role.

Community organizations may, in some circumstances, be able to provide decision-making on day-to-day, relatively low-risk decisions related to finances and personal care, as part of a more holistic set of services. The LCO also believes that it is worthwhile to explore the possibility of regulating professional representatives, as a means of expanding options for expert substitute decision-making. However, there are risks associated with such an approach, so that any program would have to be well-regulated to reduce opportunities for abuse and misuse.

XI. EDUCATION AND INFORMATION: UNDERSTANDING RIGHTS AND RESPONSIBILITIES

A. Introduction and Background

The law related to legal capacity and decision-making is unavoidably extensive, elaborate and multi-layered and, for some people, perplexing, dealing as it does with difficult ethical and practical issues, and attempting to balance needs of diverse groups across a range of circumstances. The law attempts to incorporate nuance and to be responsive to fluctuating needs. While this nuance and responsiveness is in many ways a benefit, it does make the law more challenging to implement successfully. During consultations, all stakeholders pointed to shortcomings in understandings of the law and in the skills necessary to apply it as key issues to be addressed in any review. The need for improvements in education and information has therefore been a theme throughout this project, and arises in every chapter of this *Interim Report*. This chapter does not attempt to replicate this material, but to provide a focussed examination of some key elements.

It should be noted that, despite its importance, the provision of information and education is not a panacea for all of the issues affecting this area of the law. Information on its own does not create the ability to act on it. The draft recommendations for reform in this area must be understood in conjunction with other draft recommendations throughout this *Interim Report*, particularly including those related to monitoring and oversight, and dispute resolution and rights enforcement.

B. Current Ontario Law and Practice

1. Understanding Needs for Education and Information

In considering reforms to promote better understanding (and therefore better implementation) of the law, the needs of four groups must be taken into account:

- persons directly affected (i.e., those whose legal capacity is either lacking or in doubt);
- persons providing assistance as substitutes or, if the LCO's recommendations are implemented, supporters;
- professionals who are expected to provide expert implementation of the law (including health practitioners expected to assess capacity and obtain consent, and

lawyers expected to create powers of attorney or to assist with disputes or rights enforcement); and

- third parties who interact with the law in the context of providing services or contracting with respect to a transaction.

The needs of these groups will differ, as well as the most effective methods of reaching them.

Persons directly affected by the law will be the most profoundly affected by the quality and extent of the information they receive about the law, as this will substantially shape their ability to make meaningful choices in this context and to protect and enforce their rights. Except for those persons granting powers of attorney who have sophistication in handling affairs or easy access to professional assistance, this is also the group that will likely have the most challenges in receiving adequate information, or even in realizing that they could benefit from information. The conditions affecting their legal capacity will affect their ability to understand and appreciate information about the law itself. Many persons directly affected by the law will require accommodations or supports in receiving or accessing information. As well, they will very often encounter the law at a time of crisis, when it is difficult to seek out and process information.

Persons who act as substitutes or supporters will, for the most part, be family members or friends with no particular expertise in understanding or applying the law. Many will also be acting as caregivers, and in most cases, they will not be paid for their activities. In their roles, they will be often required to navigate extensive processes or intimidating institutions, understand novel medical or financial concepts, develop skills as advocates, and manage difficult family or professional relationships. In the LCO's consultations, these family members often emphasized the challenges of their roles, and the lack of supports available to them.

Third parties most often do not have issues surrounding legal capacity and decision-making as a core element of their enterprise. It will in most cases be front-line workers with no particular skill set in this area who will directly encounter issues related to legal capacity and decision-making, and who must identify potential issues and apply correct procedures. It is also at the front-lines where pressures related to limited resources, competing needs and the tension between standardization and responsiveness to individual needs will be most acute. Large organizations, such as financial institutions or hospitals, will generally develop internal expertise, perhaps including policies, protocols or guidelines. Smaller organizations may not have the ability to develop these kinds of internal resources. It is important to emphasize that third parties are, by and large, well-intentioned in their efforts to serve their clients, and that they may be operating in contexts of considerable constraint and difficulty. There may be no

simple solutions to the ethical, practical or resource challenges that these institutions or professionals may face in providing services to what may at times be their most vulnerable clients, although opportunities do exist to deepen provider competencies in this area through existing institutions and programs.

Those professionals who must apply the law as part of their professional duties must deal with the most complicated and challenging issues under the law, and have the most significant responsibility for ensuring the effective and appropriate implementation of the law. This group includes the professionals who carry out the different forms of assessment of capacity; lawyers who assist with the preparation of powers of attorney or with resolving disputes arising under the law; and hospital or long-term care home staff who develop internal policies and procedures for addressing these issues.

2. Some Legislative History: The Advocacy Act Requirements

When the current legislative scheme was initially proposed, it contained three statutes: the *Substitute Decisions Act, 1992* (SDA), the *Consent to Treatment Act* (the predecessor to the *Health Care Consent Act, 1996*) and the *Advocacy Act*. The *Advocacy Act* is described at length in the *Discussion Paper*, Part Four, Ch III.B. For the purposes of this discussion, it suffices to note that the *Advocacy Act* and the accompanying provisions in the SDA and *Consent to Treatment Act* made extensive provision for rights advice. At key transition points in the lives of persons affected by the law where important rights were at stake, advocates were made responsible for providing information and otherwise interacting with the individual in various ways, including the following:

- notifying the individual of the decision or determination that had been made about her or him;
- explaining the significance of the decision or determination in a way that took into account the special needs of that person;
- explaining the rights that the individual had in that circumstance, such as a right to appeal the decision or determination; and
- in some cases, ascertaining the wishes of the individual (e.g., whether he or she wished to challenge the decision or determination) and to convey those wishes to the appropriate body (e.g., the Public Guardian and Trustee).

Action on these decisions or determinations could not be taken until the advocate had carried out these duties, or had made efforts to do so and had been prevented, for example by

contravention of their rights of entry. This role was engaged in the following situations, among others:

- the appointment of a statutory guardian of property following an examination under the *Mental Health Act*;
- the appointment of the Public Guardian and Trustee (PGT) as a temporary guardian following an investigation into serious adverse effects;
- applications for validation or registration of powers of attorney for personal care;
- applications for court-appointed guardianships;
- court orders for assessment of capacity, including orders for apprehension of the individual to enforce assessments;
- findings of incapacity with respect to treatment made within a psychiatric facility;
- findings of incapacity with respect to “controlled acts” in a non-psychiatric facility;
- applications to the CCB for directions regarding the prior expressed wishes of an individual; and
- applications to the CCB for permission to depart from the prior expressed wishes of an individual.

These requirements were removed in 1996, when the *Advocacy Act* was repealed and the *Consent to Treatment Act* replaced by the current *Health Care Consent Act, 1996* (HCCA). While the current legislation contains some provisions related to the provision of information, they are minimal compared to what was originally contemplated.

3. Current Statutory Requirements

Currently, the SDA, Part III of the *Mental Health Act* (MHA) and the HCCA include the following requirements for information to be provided to affected individuals at a limited number of key transition points.

Assessing Capacity: Because an assessment of capacity can in a number of circumstances have very significant automatic effects on the individual’s status and choices, information about the legal effect of the assessment, the rights of the individual and the options available is crucial. The provision of rights advice and rights information in these circumstances was discussed at length in Chapter V, and will only be summarized here.

MHA examinations of capacity to manage property: those undergoing these examinations have a right to notice of the issuance of a certificate of incapacity, and to timely provision of rights advice by a specialized Rights Adviser. The Rights Adviser will provide information to the patient about the significance of the certificate and the right of appeal.

HCCA assessments of capacity to consent to treatment: a finding of lack of capacity must be communicated to the individual. Outside of psychiatric facilities, the form and content of the notice depends on the guidelines of the health regulatory college.

HCCA evaluations of capacity to consent to admission to long-term care or to personal assistance services: the HCCA does not require provision of information to the affected individual; however, the form for evaluators includes an information sheet that must be provided to the individual and a box to tick that the individual has been informed about the finding and the right to appeal.

SDA Assessments by designated Capacity Assessors: the individual must be provided with information about the purpose, significance and potential effect of the assessment, as well as written notice of the findings of the assessment. Where a statutory guardianship results, the PGT must inform the individual that it has become the guardian and that there is a right to apply for review of the finding.

The significant shortfalls in the rights information regime under the HCCA were discussed at length in Chapter V, and were the subject of several draft recommendations for reform. It is also worth noting that even where information is provided to individuals, they may face many barriers to acting on that information without further assistance, whether because of disabilities or impairments, a lack of supports or the constraints of their environments.

Roles and responsibilities of Substitute Decision-makers (SDMs): the SDA requires SDMs appointed either through a power of attorney (POA) or a guardianship, to explain their powers and duties to the affected individual. Section 70 of the SDA requires a proposed guardian in a court application for guardianship to include in the application a signed statement either that the person alleged to be incapable has been informed of the nature of the application and the right to oppose it, or explaining why this was not possible. Sections 32(2) and 66(2) require SDMs under the SDA to explain to the individual the powers and duties of the guardian (although not, notably, any means of rights enforcement for the individual).

There is no formal mechanism for ensuring that the duties under sections 32(2) and 66(2) are carried out. Further, while the PGT can be expected to thoroughly understand the “powers and duties” of an SDM, in many cases the family and friends who are acting as SDMs are not conversant with their statutory responsibilities: they will neither be aware of their duties to explain them, or in a position to accurately describe them. And there will be some minority of SDMs who are abusive, neglectful or exploitive. In these situations, which are precisely the ones

where the individual will most require understanding of legal rights and recourse, the SDM is very unlikely to detail them.

The currently statutory regime does not include formal requirements or supports to inform or educate SDMs, or third parties. For example, persons appointed under a POA need not even be informed that they have been appointed, and there are no mechanisms for ensuring that attorneys understand their role. While the process for becoming a guardian is more rigorous than that for a personal appointment, there are no requirements or formal supports to assist them with gaining the information and developing the skills that are necessary.

4. Non-statutory Provision of Education and Information

There has been considerable effort by a variety of institutions to provide affected individuals, family members and SDMs, professionals and third parties with the information required for the effective functioning of this area of the law.

Educational institutions: Many of the service providers or professionals charged with implementing or supporting the implementation of the law must meet certain educational requirements prior to entering their professions. This is true for social workers, health professionals and lawyers, for example. Educational institutions may provide information related to this area of the law, either as mandatory or voluntary course material.

Professional regulatory bodies: Professional regulatory bodies play an important role in providing information and education to their members across a wide range of subject areas. Professional regulatory bodies, such as the health regulatory colleges or the Law Society of Upper Canada, may require practitioners to demonstrate specific knowledge or skills to join the profession, and may provide ongoing education and training opportunities. They may develop policies and guidelines of practice that are binding on their members and may be the subject of complaints where there is non-compliance.

Employing institutions: For professionals working in large institutions, such as hospitals, long-term care homes, Community Care Access Centres, or large social service agencies, their implementation of the law will be significantly shaped by their employer. Institutions may develop internal policies dictating how the law is to be interpreted and applied, create internal training programs or resources, or provide access to information and advice through internal legal or ethics departments.

Government mandated training and education: The current statutory regime requires those carrying out the various forms of formal capacity assessments to be members of specified professions, and thereby to have completed the requisite education and met accreditation standards. Beyond that, specific training is not mandated, with the notable exception of Capacity Assessors who are designated under the SDA, who must have completed the requisite training and requirements to maintain qualification, as is described in Chapter V of this *Interim Report*.

Professional associations: Professional associations may also provide materials or continuing education opportunities. For example, the Canadian Medical Association's *Code of Ethics* includes provisions related to respecting the right to accept or reject treatment, ascertaining wishes and provision of information to patients. The Ontario Bar Association's Trusts and Estates Section regularly provides Continuing Professional Development related to powers of attorney, as does the Health Law Section with respect to capacity and consent.

Government bodies: The Consent and Capacity Board (CCB), the Ontario Seniors Secretariat, and the Public Guardian and Trustee (PGT) provide informational materials and conduct presentations aimed both at professionals and institutions, and at families and those directly affected. Both the PGT and the Capacity Assessment Office (CAO) receive thousands of phone calls each year, through which they provide information and referral to appropriate resources.

Advocacy and consumer organizations: Organizations that work with and advocate for persons directly affected may develop education and training for professionals, as part of initiatives aimed at closing the implementation gap and promoting the rights of the individuals that they serve, as well as providing information materials and advice to those directly affected. For example, ARCH Disability Law Centre, the Advocacy Centre for the Elderly and Elder Abuse Ontario regularly engage in public education activities in this area.

Academics and experts: academics and experts may use their skills to develop tools for "knowledge translation", aiming to turn complex issues of law and professional practice into practical tools or resources. For example, the National Initiative for the Care of the Elderly (NICE) has as its goals to help close the gap between evidence-based research and actual practice; improve the training of existing practitioners, geriatric educational curricula, and interest new students in specializing in geriatric care; and effect positive policy changes for the care of older adults.

C. Areas of Concern

Concerns regarding education, information and understanding of the law were prominent in all focus groups, as well as in most of the written submissions that the LCO received. In fact, widespread confusion regarding the law among family members, individuals directly affected and many service providers was evident in the focus group discussions.

It is useful to note that similar concerns were raised in the LCO's project on *Capacity and Legal Representation for the Federal RDSP*. The LCO there identified that the provision of information in accessible formats, languages and locations would be crucial to the success of any streamlined process, and recommended that Government of Ontario distribute public legal education to potential users of the recommended streamlined process, in a variety of accessible languages and formats.⁵²⁰

Individuals Directly Affected

Many participants in the consultations emphasized both the importance of ensuring that individuals directly affected by the law are aware of their rights, and the shortfalls in current mechanisms for conveying information about rights.

I think it's important [if you] give people the ability to take away people's rights then you have to have the mechanism in place for people to inform them when it happens. And right now it is only in our [Schedule 1] facilities and yet their rights are being taken away in group homes and long term care and in the community where they're not being advised. And if it [rights advice] happens in the [psychiatric] facility and they're still, you know, somewhat abused, what's happening in the community? And why aren't there some people out in the community having their rights respected?

Focus Group, Rights Advisers and Advocates, September 25, 2014

ARCH Disability Law Centre, in its submission to the LCO, emphasized the importance of providing those directly affected by this area of the law with rights advice, so that they understand the kinds of assistance with which they will be provided, the legal obligations of those providing assistance, their rights, the available mechanisms for dispute resolution, and the safeguards in place to address abuse and misuse of statutory powers.⁵²¹

As was discussed in Chapter V, there was considerable and widespread concern that rights information, as required under the HCCA, is provided inconsistently, cursorily, or not at all. ACE commented that “persons found incapable under the HCCA (with the exception of *Mental*

Health Act patients) are rarely advised of this finding and are even more seldom advised of their rights”.⁵²²

Ontario legislation does provide clear and strong rights for persons directly affected by legal capacity, decision-making and guardianship law. However, without knowledge of their rights under the law – or even of the fact that they have rights under the law – individuals directly affected are very unlikely to be able to effectively access those rights.

Family Members

Many consultees, in both submissions and focus group discussions, emphasized the lack of understanding and skill among many family members who must deal with this area of the law, and advocated for better education and supports for this group.

Many stakeholders identified a pressing need to provide SDMs with at least basic information on their statutory duties, so that they are able to comply.

[T]he only time an SDM gets any sort of knowledge on what their actual duties as an SDM are is in the cases of community treatment orders where a person's been made incapable. SDMs actually need to be given an opportunity to know what their responsibilities and rights are under the law because most of them don't really understand what's being placed upon them when they are taking on that mantle. So, it might be helpful if they, the SDMs, whether it's for property or treatment, but SDMs be required to actually speak to a rights adviser or other professional just so that they, that knowledge gap for them is filled in.

Focus Group, Rights Advisers and Advocates, September 25, 2014

In its submission, the Mental Health Legal Committee (MHLC) commented,

Beyond the prevention of harm to the incapable person, requirements that information and advice be provided to attorneys and guardians before their actions are under scrutiny would be preventative and could result in a net costs savings in government and judicial resources otherwise directed at enforcement.

Similar concerns apply to persons appointed to make treatment or admission to long-term care decisions under the HCCA.

Indeed, the LCO facilitator of the focus groups of family members acting as SDMs observed that they very often lacked even the most rudimentary knowledge of the laws under which they were operating, despite their obvious commitment to the wellbeing of their loved ones. Participants were often unaware of the distinction between a power of attorney and a health

care proxy or a guardianship, or even of the difference between a power of attorney and a will. Most were unaware of the obligation to keep accounts, let alone the nuances surrounding the concept of legal capacity, the requirements regarding decision-making practices or the processes for enforcing rights. In the consultation surveys completed by those assisting with decision-making, 42 of 97 respondents indicated that they had received some explanation of their roles when commencing their responsibilities, while 55 had not received any explanation. Interestingly, despite this indicated lack of access to information about their responsibilities, of the 98 respondents answering the question about their understanding of their legal responsibilities, just over 60 per cent either agreed or strongly agreed that they had a good understanding of their legal role and responsibilities as someone providing assistance with decision-making: perhaps some of those responding had taken the initiative to seek out information on their role and responsibilities. Of course, this was a self-assessment of level of understanding.

Beyond basic understanding of the law, many spoke of a need, not just for compliance information, but for tools and supports for SDMs that would help them to carry out their roles. As one Rights Advisor pointed out, “The reality is that SDMs are just plain folks trying to get through the day with a responsibility they're not trained for, they're not prepared for, and without some supports or some advice then it's a very difficult, emotional if not intellectual duty”. In its submission, the Ontario Brain Injury Association commented,

When the role of a decision-maker is given to the caregiver, the learning curve is immense and daunting. In many instances, the specific roles and responsibilities of a decision-maker are not fully understood, or applied and those caregivers are left to twist in the wind, in most cases alone with no outside guidance or support. Not only do they need to understand their loved one post-injury and how to relate and maintain close relationships, but also to learn how to navigate the health care system.

Due to the tremendous pressures and stress there is a high risk of caregiver burnout which could potentially be managed if the right amounts and types of supports were provided. Respite services, training and education on the role as a decision-maker and how to navigate the system would be extremely helpful. Having training resources or modules for those in a decision-making role would be an essential tool for both unpaid caregivers to have at their disposal and for publicly funded service providers who can support decision-makers initially.⁵²³

Professionals and Other Service Providers

The MHLC submission also emphasized the importance of providing further education about the roles and responsibilities of attorneys and guardians to both members of the bar and the judiciary. Similar concerns were voiced by other stakeholders.

The other problem with the lawyers is there's not a lot of education out there on this [mental health and capacity] issue and, you know, to a large degree they have to comply with the panel requirements that Legal Aid has got and for some lawyers, especially lawyers in areas where there's not a lot of mental health going on, it's hard for them to do that. So, we don't want to, you know, we want them to be updated but we don't really want them to make it so onerous that people don't want to be on the panel any more.

Focus Group, Rights Advisers and Advocates, September 25, 2014

The need for greater information and education targeted to professionals, including members of health regulatory colleges was emphasized in the submission from the Centre for Addiction and Mental Health.

Capacity, decision-making and guardianship legislation spans several Acts and is designed to cover the myriad of circumstances where a person may be incapable of making their own decisions. The complexity of this legislation can make it impractical and inaccessible to those who must use it every day.... Consultations with CAMH clinicians about capacity, decision-making and guardianship legislation indicate that there is ongoing confusion and uncertainty about the current law in this area. Therefore, CAMH recommends that the LCO's final report highlight the overall need for education, training and resources for clinicians, individuals, and their families on capacity, decision-making and guardianship legislation. This should be a shared effort of government, universities, professional regulatory bodies and large employment institutions.

ACE, both in the commissioned paper jointly completed with Dykeman Dewhirst O'Brien for this project, and in its submission to the LCO, emphasized concerns about endemic misunderstandings of the requirements of the HCCA regarding capacity and consent among health practitioners, and the connected issue of the widespread use of forms, guides, tools and policies that were not in compliance with Ontario law. A review of a sample of materials from hospitals and long-term care homes by ACE and DDO revealed that many of these documents incorporated significant misunderstandings of the law: for example, several documents incorrectly suggested that SDMs could engage in advance care planning on behalf of individuals lacking legal capacity, and several institutions were using materials from other jurisdictions without adaptations to ensure compliance with Ontario law. This is of particular concern because focus groups with health practitioners indicated that "health care organizations' forms drive practice".⁵²⁴

Beyond the specifics of the law, professionals would also benefit from greater practical support and guidance on applying the law in the context of the wide range of needs and individual circumstances that they are likely to encounter. For example, professionals may benefit from support in addressing issues of cultural diversity in the context of legal capacity and decision-making.

To sum up, there was very widespread agreement both as to the importance of education and information all those interacting with legal capacity and guardianship law, and as to the inadequacy of current means of imparting education and information, despite the best efforts of a wide range of organizations.

D. Applying the *Frameworks*

The LCO's *Framework* for the law as it affects persons with disabilities comments,

Many laws are exceedingly complex, so that understanding and navigating them requires considerable effort and expertise, and persons with disabilities may be expected to do so on their own, without supports or appropriate accommodation. Those operating such systems may have an imperfect understanding of the needs and circumstances of persons with disabilities, or may harbor ableist attitudes or assumptions.⁵²⁵

The companion *Framework* for the law and older adults makes a similar comment. This is certainly a true statement for law regarding legal capacity and decision-making. The *Frameworks* directly connect this challenge to the importance of access to information and education, both for those directly affected by the law and for those charged with implementing it. As the *Framework for the Law as it Affects Persons with Disabilities* further comments, where there is a lack of access to information about rights and recourse under the law, “the autonomy of persons with disabilities may be undermined, as they are unable to make informed choices about laws, policies and programs that may affect them”.⁵²⁶ Similarly, without an understanding of the law and of available mechanisms for rights enforcement, persons with disabilities and older persons will find it very difficult to safeguard their safety or security. Both *Frameworks* include as a consideration in measuring how processes under a law or policy comply with the principles, whether “mechanisms have been developed to ensure that [older adults or persons with disabilities] are informed about their rights and responsibilities under the law, and that they have access to the information necessary to seek access to their rights”. It is the view of the LCO that currently, Ontario’s legal capacity, decision-making and guardianship system does not adequately meet this consideration, and in this respect falls short in enabling Ontarians with disabilities or who are older adults to access the *Framework* principles.

The principle of responding to diversity and individuality points to the importance of ensuring that information and education is truly accessible. Older adults and persons with disabilities may face a range of barriers to accessing information, including a lack of disability-accessible information and heavy reliance on online forms of information. Further, needs for information

often arise at a point when individuals are in crisis, and at such times, these individuals will have additional difficulties in navigating complex systems and multi-layered bureaucracies.⁵²⁷

This principle also reminds us that some groups of older adults or persons with disabilities will find it more difficult than others to access information and education. Many service providers pointed to the additional challenges faced by older persons and persons with disabilities who are newcomers. Language may be a barrier; as well, these individuals may not have the social networks or navigational knowledge to be able to identify where they can seek information or assistance. Francophone communities raised similar concerns regarding access to information and services, particularly in areas that are more rural or remote. As well, those who live in low-income may have more challenges in locating accurate and comprehensive information that relates to them, and both persons with disabilities and older adults are more likely to live in low-income. A focus group with members of the Residents Councils for long-term care homes highlighted the many barriers to information experienced by people who live in these settings.

The *Frameworks* recommend considering whether those charged with implementing the law have been provided with adequate ongoing training and education to enable them to perform their duties in a way that respects the principles, including training and education on the *Charter*, *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*, anti-ageism and anti-ableism. It was the strong view of the vast majority of stakeholders consulted during this project that Ontario's system falls significantly short in this respect, and that the implementation of the principles in the context of this area of the law is jeopardized as a result.

E. The LCO's Approach to Reform

Improving access to education, information and skills development is a central priority for the LCO's approach to reform of law, policy and practice related to legal capacity and decision-making. These elements are fundamental to reducing the implementation gap; promoting dignity, autonomy, security, and participation and inclusion; and responding to diverse needs.

Based on the *Frameworks* and on the feedback received through the consultations, in aiming to improve access to education, information and skills development, the LCO's draft recommendations focus on achieving the following objectives:

1. Promoting education and information that is:
 - **accessible** in the broadest sense of the term, taking into account disability-related accommodation needs, the diversity among those affected by the law (including cultural and linguistic diversity), the circumstances of those living in congregate

- settings and remote or rural areas, and the barriers faced by those living in low-income;
- **timely**, so that individuals and institutions are able to access the information at those key transition points when they require it, including proactive provision of information as necessary;
 - **appropriate** in terms of the kind of information that is provided; and
 - **trustworthy**, in that it is free of bias or conflict of interest, as well as accurately reflecting Ontario's laws and good practice.
2. Increasing the **coordination** of the provision of education and information, so as to provide users with a clearer point of access, as well as enabling the identification of gaps and the development of priorities and innovative strategies.
 3. Maintaining a **collaborative** approach to the development of resources, so that organizations with expertise in the subject and intimate knowledge of user needs can be supported to develop information and educational resources that meet user needs.
 4. Identifying clear **accountability** for the coordination and provision of education and information related to legal capacity and decision-making.

F. Draft Recommendations

1. Improving Coordination and Strategic Focus in the Provision of Education and Information

Clear statutory accountability for education and information related to legal capacity and decision-making laws

As noted above, while many organizations undertake information and education programs and initiatives relating to legal capacity and decision-making as part of their mandates to advocate, educate or provide services, no institution has a specific mandate related to education and information on legal capacity and decision-making. This lack of clear accountability leads to confusion among stakeholders and the public as to authoritative sources of information, and a lack of coordination in the development of information and education. As was noted earlier in the Chapter, the LCO's consultations evinced considerable confusion among almost all key stakeholder groups about where the information that they needed could be found. System users are regularly relying on information that is inaccurate, outdated, or simply inapplicable to the Ontario system. There are significant gaps in the provision of information, particularly to groups that are more vulnerable or difficult to reach. For legislation which is now two decades old, the level of misunderstanding, confusion and simple ignorance is both surprising and disturbing. This is particularly so because of the fundamental nature of the rights at issue.

Many stakeholders advocated for the benefits of a strong, central coordinating body for this area of the law. In its submission to the LCO, and in keeping with the recommendations in a commissioned paper prepared by its lawyers, Kerri Joffe and Edgar-Andre Montigny, ARCH Disability Law Centre, has proposed that persons affected by legal capacity and decision-making laws would be best served by a system that includes a central coordinating body, though one with a mandate much broader than education and information:

Persons with capacity issues require a central body that they can turn to for information about their rights, access to a dispute resolution mechanism, and legal advice or referral where required. Equally, support persons will need access to information and training to enable them to carry out their role effectively. This requires that there be a central body that can ensure that qualified and trained professionals are available to offer support and assistance to persons with capacity issues, train and monitor support persons, and resolve disputes between individuals and their support persons. ... A central body would be well placed to monitor the entire supported decision-making regime and identify trends and issues that require investigation and reform.⁵²⁸

The LCO believes that Ontario would benefit by the allocation of a clear responsibility for improving access to education and information related to this area of the law. Identification of clear responsibility would help achieve the following objectives:

- stakeholders and system users more easily able to identify a starting point for accessing the information and resources that they need, and to be appropriately confident about the trustworthiness and applicability of the information that they source;
- coordination of the resources now being allocated to information and education in this area, ensuring that work is shared rather than replicated, and that scarce resources are effectively deployed;
- a more strategic approach to the development and dissemination of information and resources than is possible within the current extremely decentralized approach, so that gaps, promising approaches and potential partnerships are systemically identified, and resources are targeted where they will have the most significant impact.

It is the view of the LCO that this could most easily be accomplished by allocating clear statutory responsibility for education and information related to legal capacity and decision-making law. This is not meant to undermine the important work carried out by many organizations, but to allow for the development of a more coherent and strategic approach to education and information in this area, by identifying a central location of responsibility. Such a clear statutory statement would also have the effect of recognizing the essential role of

information and education in the successful implementation of these laws, and in protecting the autonomy and safeguarding the rights and wellbeing of those directly affected.

It is not uncommon in other jurisdictions to provide a statutory mandate for education and information in this area of the law. The 2013 Irish Bill to reform that nation's legal capacity and decision-making laws (which reached Committee stage in June 2015) specifically tasks the Irish Public Guardian and Trustee with the "promotion of public awareness of matters (including the principles and procedures of the United Nations Convention on the Rights of Persons with Disabilities...) relating to the exercise of their capacity by persons who lack or shortly may lack capacity to make decisions for themselves."⁵²⁹ More specifically, the Bill gives the Public Guardian and Trustee responsibility for establishing a website or otherwise providing for electronic dissemination of information to members of the public, as well as promoting public awareness of the law to persons likely to create enduring powers of attorney, enter into decision-making assistance agreements, or apply to act as co-decision-makers or representatives.

In the Australian state of Victoria, the Office of the Public Advocate is required, among other functions, to "arrange, co-ordinate and promote informed public awareness and understanding by the dissemination of information" about the provisions of their legal capacity and decision-making legislation, the role of the Tribunal and the Public Advocate, the duties and powers of guardianships and administrators, and the protection of persons with disabilities from abuse and exploitation, as well as the protection of their rights.⁵³⁰ The Public Advocate undertakes a range of education and information activities, including the provision of community education sessions to a range of stakeholders, publication of fact sheets and other information documents, and provision of support to persons using the system.⁵³¹ In its review of Victoria's legal capacity and decision-making laws, the Victorian Law Reform Commission noted that stakeholders raised concerns about the Public Advocate's limited resources,⁵³² and made a number of specific recommendations about the key elements that community education efforts should emphasize.⁵³³ It commented that while the Public Advocate should retain primary responsibility for community education in this area, "these programs should be delivered in partnership with other organisations that interact with the many different user groups of guardianship laws".⁵³⁴

In Ontario, where legislation addresses the rights of individuals who are vulnerable or marginalized, it is not uncommon to include responsibilities related to education in the enabling statute. For example, under the *Provincial Advocate for Children and Youth Act, 2007*, the Provincial Advocate is made responsible, among other duties, to "educate children, youth and their caregivers regarding the rights of children and youth".⁵³⁵ Under the *Accessibility for*

Ontarians with Disabilities Act, 2005, the Accessibility Directorate includes, among its functions, “conduct[ing] research and develop[ing] and conduct[ing] programs of public information on the purpose and implementation of this Act”.⁵³⁶ Similarly, the Ontario *Human Rights Code* includes among the functions of the Ontario Human Rights Commission, developing and conducting programs of public information and education and promoting awareness and understanding of, respect for and compliance with the *Code*.⁵³⁷ That is, this proposal is not unusual in the context of legislation that directly affects rights, as does this area of the law.

Such a statutory mandate should not be understood as necessarily entailing significant new expenditures, although progressive realization may require expansion: at the outset, a reallocation of currently dispersed resources to a more centralized function may be beneficial.

Where should a statutory responsibility for education be allocated?

Should government include a statutory responsibility for education and information related to legal capacity, decision-making and guardianship in reformed legislation, where should such authority be allocated?

The most obvious option is the office of the Public Guardian and Trustee (PGT), which already carries out many important functions related to legal capacity, decision-making and guardianship, including acting as a decision-maker of last resort under both the SDA and HCCA, and as statutory guardian for property; appointing replacement guardians for property; conducting “serious adverse effects” investigations and applying to the court for temporary guardianships as appropriate; reviewing applications for court appointments of guardians, and making submissions or appearances as appropriate; reviewing accounts of guardians for property when they are submitted to the Court for approval; maintaining the registry of guardians; and arranging for “section 3 counsel” for those who are subject to proceedings under the SDA and require counsel. Notably, the PGT already provides some education and information functions, as briefly described above, and fields thousands of phone calls each year. In the Irish Bill, referenced above, the Public Guardian and Trustee is proposed to have responsibility for a wide range of functions, including public education and information.

However, as was discussed in Chapters VIII and X, the LCO believes that the optimal role for the PGT is as a professional and expert decision-maker, focused on meeting the needs of vulnerable clientele whose needs cannot be appropriately met elsewhere, and free of conflicts of interest in carrying out this role.

Another option would be for government to create a new office, responsible for all system functions related to legal capacity and guardianship other than last resort guardianship. This would include education, oversight of Capacity Assessors and the proposed Professional

Representatives, complaints and investigations, and the basic oversight mechanisms for guardians that are currently in place, such as review of accounts of guardians when they are submitted for approval and maintenance of the register of guardians. The LCO agrees with ARCH Disability Law Centre and other stakeholders that a central, coordinating office, bringing brought together the various system functions and providing an expert and visible resource for all stakeholders, would be of benefit to the legal capacity, decision-making and guardianship system as a whole. The current fragmented and decentralized system is, as has been noted throughout this *Interim Report*, extremely difficult to navigate for individuals directly affected, families and service providers. In the current climate of fiscal restraint, this may not be an appealing option, but it could be considered as a matter of progressive realization.

A practical option within the current system for locating strengthened education and information functions would be an expanded Capacity Assessment Office. This Office already performs important work in assisting individuals in navigating through the current system, as well as providing training to Capacity Assessors. Properly resourced, the current expertise of the Office could be expanded to apply to a broader range of issues within the system.

What should be the focus of this new education and information function?

It is the LCO's view that the valuable work already being done should not be supplanted, but supported and enhanced. It is clear from the LCO's research and consultations that community, advocacy and service organizations that have direct ties to those using or implementing the laws often have, in addition to existing relationships as trusted sources of information, deep knowledge of information and education gaps, and considerable experience in devising education strategies that are appropriate for their particular communities. Given the wide range of individuals and institutions affected by this area of the law, no one organization can single-handedly meet all needs.

However, there are several pressing education and information issues in this area:

- **Improving visibility of and access to information:** Because there is currently no central information source, individuals and smaller organizations are often unsure where to look for the information that they need. Finding appropriate and accurate information may require considerable patience and navigational skills, so that people who are in crisis or do not have strong skills may not be able to locate the information that would assist them. Many individuals participating in focus groups mentioned contacting three or four different offices to find information. Others had difficulty identifying where they

would begin the search for information. Creation of a central source for information and education on these issues would make it easier for individuals to locate information.

- **Ensuring access to accurate information:** Concerns have been raised about the accuracy of the information that individuals or institutions are accessing. Individuals or organizations may inadvertently rely on outdated information, or on sources from other jurisdictions. As well, because this is a complex area of the law, some resources may inadvertently incorporate errors. ACE and DDO identified the problem of reliance on inaccurate information about the law governing health care consent and advance care planning as a major concern.⁵³⁸ Poor implementation of the law may be caused by good faith reliance on incorrect information.
- **Developing a more strategic and coordinated approach:** Because education and information in this area has been developed in a fragmented fashion, as organizations develop materials or initiatives to meet their own mandates and the needs of their own communities, they may not be aware of each other's work, and so efforts may be unnecessarily replicated. As well, there may be communities or needs that are not being served, because there is no organization that has the resources or the mandate to address them. The new function could work with existing structures and institutions to identify needs and develop strategies, initiatives and appropriate materials.

Education and information in this area should include the following areas:

- rights and responsibilities under law, including means of enforcing rights and resolving disputes;
- the concepts underlying the law, including legal capacity, and substitute and supported decision-making;
- the principles that animate the law, and their links to the fundamental human rights as expressed in the *Human Rights Code*, *Charter of Rights and Freedoms* and international instruments, including the *Convention on the Rights of Persons with Disabilities*;
- good decision-making practices; and
- resources and supports available to persons directly affected, to family caregivers and to those acting as supporters or substitutes.

It may also be valuable to create practical plain language tools or guides in a number of different languages or targeted to the needs of specific communities, such as Aboriginal older adults, or members of particular newcomer communities, recognizing where appropriate that different cultural understandings of the same concept may require sensitive translation or preferably, guides originally written in languages other than English or French. Tools might also focus on areas where there are widespread shortfalls in skills or understandings among SDMs:

for example, it was suggested that it would be helpful to make available resources to assist substitute decision-makers with keeping records, or developing management plans.

Key information gaps identified for persons directly affected include the following circumstances in particular:

- the importance of planning ahead, including both the benefits and risks of powers of attorney (and if implemented, the proposed support authorizations and decision-making networks), as well as information about how these documents can be customized to the needs of the individual;
- the nature of assessments of capacity, including the appropriate usage of such assessments and the rights of individuals related to assessments of capacity;
- the roles and responsibilities of substitute decision-makers (and supporters if incorporated into Ontario law); and
- their rights to recourse under the law, should they feel that they have improperly been found incapable or that a substitute or supporter has misused their powers.

The following were among the many gaps family caregivers and substitute decision-makers identified:

- the purpose and impact of a power of attorney or a guardianship;
- the specific responsibilities of an attorney or guardian;
- the concept of legal capacity, especially including its decision-specific nature;
- principles and good practices for decision-making, including the responsibilities to encourage participation, and to take into account the values and wishes of the individual;
- the rights of persons directly affected by decision-making laws, including rights to request a new capacity assessment or to challenge a finding of incapacity under the HCCA;
- practical guidance on keeping accounts, encouraging participation in decision-making, managing financial responsibilities, and advocating for the individual that they have been appointed to assist;
- information about practical supports and resources that are available to them; and
- appropriate methods of addressing family disputes or concerns about misuse or abuse of an appointment.

The information and education needs of professionals and third parties will vary widely, depending on the nature of their interaction with the law and the particular communities or

clients they serve or interact with. Professionals who are responsible for implementing the law (such as health practitioners, lawyers and social workers) will often require in-depth, comprehensive training and tools, as the issues that they deal with are frequently extremely complicated. Service providers may need access to more basic information: the LCO heard considerable need for information on issues related to the concept of capacity, the various mechanisms for assessing capacity, and the appropriate response to concerns about abuse or misuse.

Education and information may take on a variety of forms, including print or online materials, public awareness campaigns, in-person training or education sessions, or information hotlines, among others. It would be the role of the mandated institution to identify the most pressing needs and develop the appropriate strategies to meet them. In addressing the needs of persons directly affected, the mandated institution should take into account the factors identified in the *Frameworks*, including the needs of individuals in rural and remote settings, as well as those in congregate settings where access to information may be more challenging; outreach to cultural communities; disability accessibility; and involving persons directly affected in strategies for outreach to those groups.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

2. Improving Information for Family and Other Substitute Decision-makers

Provision of information and education to family members acting as SDMs was widely identified as a priority across multiple stakeholder groups. A number of stakeholders suggested that at least some education be mandatory. For example, the Mental Health Legal Committee recommended obligatory education respecting the roles and obligations of attorneys and guardians. Completion of qualifications or a course ought, in the view of the Committee, to be part of the appointment process or required on the commencement of the appointment. The Mental Health Legal Committee notes in its submission,

Beyond the prevention of harm to the incapable person, requirements that information and advice be provided to attorneys and guardians before their actions are under scrutiny would be preventative and could result in a net cost savings in government and judicial resources otherwise directed at enforcement.

Kerri Joffe and Edgar-Andre Montigny of ARCH Disability Law Centre took a similar view in their paper commissioned by the LCO.

At minimum, the training should educate decision-makers about their legal obligations under the SDA; the scope and limits of their decision-making authority; and the rights of the ‘incapable’ person. The training should educate decision-makers about how to carry out their functions in a manner that respects the rights-based principled approach to legal capacity. For example, decision-makers should understand the principle of protecting and promoting the autonomy and independence of ‘incapable’ persons, and should be aware of their role in implementing this principle in practice.⁵³⁹

The Australian state of Victoria currently provides optional training sessions for newly appointed guardians and administrators. The Victorian Law Reform Commission, in its review of guardianship law in that state, supported reforms to allow the Victorian Civil and Administrative Tribunal (VCAT) to order individuals to complete training as a condition of appointment as a guardian or administrator.⁵⁴⁰

The LCO agrees that a central component of a renewed focus on education and information should target SDMs and supporters (if included in reformed laws). Given that the numbers of persons who act as SDMs in Ontario is very large, the LCO does not believe it is feasible to institute a mandatory certification or training program, at least not within the resources presently available.

However, there ought to be not only better information, but also better access to information, as well as to voluntary education programs. The draft recommendations above regarding the identification of accountability for education and development of priorities and strategies, should make it easier to meet the needs of this group. The LCO believes that the creation of a visible, accessible, authoritative source of information for SDMs (and potentially, formal or informal supporters) would make a significant contribution, given the widespread confusion among family members and SDMs about sources of information. The creation and maintenance of such a clearinghouse could be undertaken within government, or could be outsourced to organizations with expertise in public legal information, such as Community Legal Information Ontario, or to organizations with expertise in this area of the law.

DRAFT RECOMMENDATION 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.

As a simple means of further supporting access to information for personal appointments, standard forms for powers of attorney and the proposed support authorizations should identify how these individuals can access further information and education, through links to the proposed central clearinghouse, for example. In addition to amendments to the existing standard forms for powers of attorney including such information, it could be included in the proposed forms for support authorizations, statements of commitment and notices of attorney acting.

DRAFT RECOMMENDATION 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.

For individuals appointed through the automatic process under the HCCA, a relatively simple means of improving access would be to ensure that the health practitioner, upon identifying an SDM in order to seek consent, provides basic information to the SDM about the role, their duties and how to access further information.

The Ontario Court of Appeal in *M. (A.) v. Benes* canvassed the importance of the provision of information to a substitute decision-maker under the HCCA, to allow that person to fulfill their obligations under the Act.⁵⁴¹ A prior decision by the Superior Court of Justice had found that the principles of fundamental justice required that SDMs be informed early in the process of their rights and duties under section 21 of the HCCA, including the criteria by which their treatment decisions would be judged by the Board and the powers of the Board on review. The Court held that the failure of the HCCA to include effective provisions for explaining their rights and duties to SDMs was unconstitutional, since it violated section 7 of the *Charter of Rights and Freedoms*.⁵⁴² The Court of Appeal overturned this ruling, finding that that properly construed, section 10(1)(b) of the HCCA already imposes a statutory obligation on health practitioners to ensure that SDMs understand the statutory criteria when deciding whether consent to a proposed treatment should be given or refused.

In practice, as the submissions of stakeholders indicate, SDMs under the HCCA are not consistently provided with such information. As part of the reform of the rights information regime under the HCCA proposed in Chapter V, the LCO suggests that the duty of the health practitioner to provide this information be codified and clarified. To be of use, this need not be a complicated process: provision even of a standard pamphlet to all SDMs appointed in this way would be a considerable advance on the current state of affairs in which SDMs may find themselves making important and difficult decisions with no guidance as to their legal responsibilities.

DRAFT RECOMMENDATION 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.

As well, the LCO believes that, where an external appointment is made, the adjudicator should have the power to order the appointee to complete training where the circumstances warrant: obviously personal appointments do not offer the same opportunity to require training at the outset of the appointment, but adjudicators should have the power to order training of SDMs or supporters in other circumstances where disputes are brought before them.

DRAFT RECOMMENDATION 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.

3. Strengthening Education and Training for Professionals

As was briefly described above, professionals who must apply legal capacity, decision-making and guardianship laws in the course of their work potentially receive information and education about their roles and responsibilities from a wide array of sources, including their educational institutions, regulatory bodies, professional associations and employers, as well as from government and from experts and academics (such as the National Initiative for the Care of the Elderly, for example).

The plethora of professions involved in applying legal capacity, decision-making and guardianship laws, together with the multitude of information providers, makes developing recommendations for improving education and information tailored to these needs challenging.

The draft recommendations in Chapter V regarding the role of Health Quality Ontario, the compliance mechanisms related to the *Long-term Care Home Acts* and the Local Health Integration Networks (LHINs) are also substantially relevant to issues of training, education and information among professionals and others working in the field of health and long-term care: the draft recommendations outlined below should be understood in concert with those draft recommendations.

Educational institutions provide the foundation for professional understandings and attitudes, as well as often providing access to ongoing information and education programs. It is important to remember, however, that many professionals are now educated outside Ontario, whether elsewhere in Canada or abroad, which places some limitations on the immediate potential impact of reforms in educational curricula on practice in the field.

The LCO believes that the health regulatory colleges can play a strong role in the education of health professionals in this area. The *Regulated Health Professions Act* (RHPA) provides Ontario's health regulatory colleges with a common legislative framework for regulating their members' skills, practices and conduct. The RHPA's primary objectives are to:

1. protect the public from harm in the delivery of health care services,
2. ensure that health professionals are accountable to the public, and
3. guarantee access to quality care by establishing standards for professional competence and ethical conduct.⁵⁴³

Section 4 of the RHPA creates a *Health Professions Procedural Code*, which is deemed to be part of each health profession act. This Code specifies that the duty of each College is “to work in consultation with the Minister to ensure, as a matter of public interest, that the people of Ontario have access to adequate numbers of qualified, skilled and competent regulated health professionals”.⁵⁴⁴ The objects of the colleges include, among others,

- regulating the practice of the profession and governing the members in accordance with the applicable legislation;
- developing, establishing and maintaining standards of qualification for persons to be issued certificates of registration;
- developing, establishing and maintaining programs and standards of practice to assure the quality of the practice of the profession;
- developing, establishing and maintaining standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members.⁵⁴⁵

The Code sets out the governance structure and practice standards to be followed by the colleges, as well as the procedural elements of the regulatory system involving registration, complaints, investigations, discipline and incapacity.⁵⁴⁶ That is, the RHPA sets out a general governance template, with each regulated health profession governed by a “profession-specific statute outlining its scope of practice, the controlled acts its members can perform (if any), and titles restricted to members”.⁵⁴⁷

As well, the RHPA has institutionalized the concept of “quality assurance” in the regulation of Ontario’s health professionals. The Code defines a “quality assurance program” as “a program to assure the quality of the practice of the profession and to promote continuing evaluation, competence and improvement among the members”.⁵⁴⁸ Though the health regulatory colleges maintain discretion in designing quality assurance programs, all are required to: (i) leverage continuous education and professional development to improve patient outcomes and (ii) regularly assess and improve its members’ competency.⁵⁴⁹

Health regulatory colleges are responsible for ensuring that quality assurance programs meet the legislative requirements set out in the Code. All regulated health professionals are expected to participate in a continuing competence program that encourages members to “demonstrate the ways in which they have maintained their professional competence and enhanced their practice”.⁵⁵⁰ As well, members should be well-acquainted with their college’s quality

improvement strategy which “aims to improve work processes in order to provide better quality service”.⁵⁵¹

The health regulatory colleges employ a number of quality assurance mechanisms, including mandatory examinations and performance assessments, to stimulate continuous learning, monitor compliance, and trigger enforcement protocol when necessary. The RHPA allows for variation in the design of quality assurance programs across health professions to ensure colleges have the flexibility they need to fulfill their overarching public interest mandate in a way that addresses the unique needs and concerns associated with their context. Each college outlines how continuous learning and professional development initiatives are implemented, most likely through a centralized template so as to allow for comparative analysis and systematic evaluation of the results.⁵⁵²

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

DRAFT RECOMMENDATION 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.

G. Summary

Based on the results of public consultations and research, the LCO has identified as a priority for reform strengthening of the provision of education and information to those interacting with this area of the law. The LCO’s public consultations clearly identify widespread shortfalls in this area at the current time: these shortfalls affect the quality of the implementation of every aspect of this area of the law.

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The *Frameworks* emphasize the importance of ensuring that persons with disabilities and older adults have the information necessary to understand and access their rights, and that those

charged with implementing or applying the law have been provided with adequate ongoing training and education to enable them to perform their duties in a way that respects the *Framework* principles.

We have identified the following key priorities for strengthening the provision of education and information:

- promoting clearer accountability for the provision of appropriate and accurate information and education;
- increasing the accessibility of education and information for all those interacting with the law; and
- enabling a more coordinated and strategic approach to the development and delivery of education and information.

To these ends, the LCO recommends the following measures:

- Inclusion in legislation of clear responsibility for the development and coordination of education and information initiatives;
- creation of the capacity to identify gaps and priorities for the development and delivery of information and education; development and coordination of initiatives to meet these needs; and creation of a central clearinghouse where stakeholders can locate accessible, relevant and trustworthy information;
- strengthening of the ability to connect families and substitute decision-makers to education and information resources; and
- strengthening of the provision of information and education to professionals who are charged with implementing or applying the law.

These draft recommendations should be understood in the context of the draft recommendations in Chapter V to improve the quality of assessments of capacity under the HCCA and in Chapter VII to promote understanding of persons acting under a power of attorney of the responsibility which they are undertaking.

XII. PRIORITIES AND TIMELINES

As is evident throughout this *Interim Report*, legal capacity, decision-making and guardianship laws raise many difficult issues. Entangled as these laws are in the broader social contexts surrounding aging and disability, family caregiving, and delivery of health and social services, they present challenging ethical and practical questions. They also raise issues of fundamental rights for individuals who are very frequently vulnerable or marginalized. Consultees have emphasized to the LCO the gravity of the issues at stake in reforming these laws, and the seriousness of society's responsibility to those affected. The LCO has taken this message to heart, and has attempted to craft recommendations that respond to the circumstances of those affected and that respect and promote their rights and wellbeing.

At the same time, the LCO has recognized the constraints surrounding reform of these laws, including fiscal restraints for government and key institutions, competing needs among stakeholders, and, in a number of areas, a lack of a clear evidentiary base on which to proceed.

There are two ways of approaching the implementation of the proposed reforms in this *Interim Report*. The first approach addresses the comprehensive impact and ultimate goals of the draft recommendations. As an aid to implementation and as part of its progressive realization approach to law reform in this area, the LCO has below identified key priorities for reform, those draft recommendations which have the greatest potential to substantially transform this area of the law and address the most serious, systemic issues. The second approach provides a practical framework for how to achieve this comprehensive reform over time. For this purpose, the LCO has identified draft recommendations which are relatively straightforward to implement, and so can be addressed in a shorter time frame, as well as those which require more time, thought or resources for implementation. These are discussed in section 3 below, and a full listing provided in Appendix B. The LCO's identified priorities are not necessarily among those draft recommendations that are simplest to implement: the timeframes are not a reflection of priorities, but an acknowledgement of the challenges of reform. Institutions which are the subject of the LCO's draft recommendations might choose to focus first on priority recommendations, or on first addressing more straightforward changes while working towards more challenging reforms.

A. Key Priorities for Reform

In this *Interim Report*, the LCO has made over fifty draft recommendations for reform to laws, policies and practices: a summary of these draft recommendations, organized by topic, can be found in Appendix A. Among these many draft recommendations, the LCO gives priority to

those that most substantially and systemically address the key themes identified in Chapter I of reducing unnecessary and inappropriate intervention, improving access to the law, and enhancing the clarity and coordination of the laws. The LCO has identified as high priorities the following three sets of draft recommendations:

Expansion and reform of the Consent and Capacity Board to create an expert, independent, specialized administrative tribunal able to provide flexible, accessible and timely adjudication with respect to appointments of substitute decision-makers, resolve disputes related to the roles of these decision-makers, and enforce the rights under the legislation (Chapter VIII). In the view of the LCO, many of the shortfalls in the current system arise from the inaccessibility and inflexibility of the current rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992*, and an expanded administrative tribunal provides the most viable means of addressing these issues.

Relevant draft recommendations: 24-26, 32 – 33

- Transferring jurisdiction over the creation, variance and termination of guardianship appointments, and of the review of accounts and provision of directions regarding powers of attorney from the Superior Court of Justice to the CCB;
- Reforming the composition and rules of procedure of the CCB to strengthen its expertise and tailor its processes for this new jurisdiction, including reconsideration of current time limits for adjudication;
- Broadening the power of the CCB to provide directions with respect to the wishes of the person and to determine compliance with a substitute decision-maker's obligations; and
- Development of a pilot project to develop a specialized mediation program at the CCB.

These reforms would not only enable more meaningful responses to widespread concerns regarding abuse and misuse of substitute decision-making powers, but would enable the application of a more tailored and limited approach to guardianship through the reforms proposed in Chapter IX and highlighted below.

Strengthening information and education for individuals affected, families and professionals and service providers involved with legal capacity and decision-making law (Chapter XI): it was clear to the LCO during public consultations that this area of the law is poorly understood. The complexity of the law makes this lack of knowledge and comprehension understandable, but in practice it leads to systemic shortfalls in the implementation of the law. Without better understanding of the law, not only is the current law poorly implemented, but any reforms would face the same challenges.

Relevant draft recommendations: 45 – 54

- Creation of a clear statutory mandate for coordination and development of education and information initiatives, strategies and materials, addressing the needs of persons directly affected, substitute decision-makers and supporters, professionals and service providers;
- Development of a central, coordinated clearinghouse of information for substitute decision-makers and supporters, in plain language and in a variety of accessible formats;
- Empowering adjudicators to require a guardian or person acting under a personal appointment to obtain education on specific aspects of her or his duties and responsibilities;
- Professional educational institutions and the health regulatory colleges re-examine their requirements and curricula in this area, and consider strengthening coverage of issues related to this area of the law.

Improving the quality of assessments of capacity and promote access to basic procedural rights for those found incapable under the *Health Care Consent Act, 1996* (Chapter V): the LCO was gravely concerned about the widespread lack, in practice, of basic procedural and quality assurance protections for individuals whose fundamental rights to make determinations for themselves are being removed. These recommendations would improve understanding of the law among those responsible for administering assessments and providing rights information, strengthen access to the law for those found to be lacking legal capacity under the HCCA, and reduce inappropriate use of substitute decision-making under that Act.

Relevant draft recommendations: 8 – 14

- Creation of official *Guidelines* for assessments of capacity under the HCCA;
- Development of statutory minimum standards for the provision of rights information under the HCCA;
- Exploration of means of providing independent and expert advice about rights to persons found incapable under the HCCA;
- Strengthening oversight and supports for rights information provision through existing institutions, such as Health Quality Ontario, the Local Health Integration Networks and the monitoring and quality control systems for long-term care; and
- Monitoring and evaluating these reforms with respect to their success in administering assessments of capacity and respect for procedural rights.

B. Other Areas of Focus

The realization of the priorities through the draft recommendations identified above would have a transformative effect throughout this area of the law: addressing the priorities would have an overarching impact on multiple aspects of the law. The identification of these high priority recommendations does not detract from the significance of addressing concerns related to more specific issues, especially those regarding safeguards against abuse, and reducing or tailoring the use of guardianship. Concerns about these issues were raised by a wide range of stakeholders from the inception of this project, and identified as central to the effective functioning of this area of the law. They are profoundly connected to the values underlying the law, and addressed by the *Framework* principles.

Reducing or tailoring the use of guardianship (Chapters VI, IX): One of the central underlying aims of Ontario's current laws regarding legal capacity, decision-making and guardianship is to avoid unnecessary or inappropriate intervention, and to preserve to the extent possible the autonomy of individuals whose decision-making abilities are impaired. Guardianship is intended as a last resort. In practice, however, there are significant shortfalls in Ontario's current law, whether because of implementation challenges, or a lack of options to meet the diversity of needs among those affected by these laws.

Relevant draft recommendations: 18 – 20, 34 - 40

- Incorporating and clarifying a human rights accommodation approach into the assessment of legal capacity and the responsibilities of service providers;
- Creation of statutory personal support authorizations for day-to-day, routine decisions related to property and personal care, to enable persons who can make decisions with some assistance to appoint persons to provide them with such assistance;
- Examination of the practicalities of a statutory legal framework for network decision-making;
- Strengthening the provisions of the *Substitute Decisions Act* regarding the consideration of less restrictive alternatives prior to the appointment of a guardian;
- Replacing the statutory guardianship process with applications to the Consent and Capacity Board for appointment of a guardian, in association with the implementation of the draft recommendations for expanded jurisdiction for the CCB;
- Strengthening opportunities for review of guardianship appointments and for the creation of time-limited appointments;
- Enabling adjudicators to make appointments for limited property guardianships where appropriate; and
- Enabling adjudicators to appoint a representative for a single decision.

Strengthening safeguards against abuse (Chapter VII): While powers of attorney provide a flexible and accessible means of planning for future needs, as private documents they are also susceptible to misuse and abuse, and indeed, concerns are rife regarding inappropriate or outright abusive use of these documents by those appointed under them. The LCO has proposed reforms intended to bring greater transparency and accountability to these instruments, while maintaining their simplicity and ease of use.

Relevant draft recommendations: 21-23

- Requiring persons accepting appointment under a power of attorney or personal support authorization to sign, prior to acting under such an appointment, a Statement of Commitment that sets out their statutory responsibilities, the consequences of failure to fulfil these responsibilities, and their acceptance of these responsibilities and consequences;
- Requiring persons acting under a power of attorney to issue, at the time they begin to exercise their authority, a Notice of Attorney Acting to specified individuals;
- Creating a statutorily-based option for persons creating a power of attorney (and a requirement for persons creating a support authorization) to name a monitor with responsibilities for making reasonable efforts to determine whether the appointed person is complying with the statutory requirements for that role.

C. Timeframes for Implementation of Reforms

In keeping with a progressive realization approach to the draft recommendations, the LCO recognizes that some changes are more difficult, and will take a longer time to bring about. Appendix B identifies recommendations which are fairly straightforward to implement and therefore could be addressed in a relatively short time-frame, those that are somewhat more complex or costly, and those that require significant time, resources or consideration to implement. As was noted above, the allocation of draft recommendations to particular timeframes does not reflect their level of priority, but rather their ease of implementation. This categorization is intended to assist with a step-by-step approach to comprehensive reform.

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.

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.

Long-term draft recommendations are those that involve challenging 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.

There are a number of draft recommendations which are fairly low-cost and straightforward, and could be implemented in a relatively short period of time. These include recommendations which aim to clarify the law and therefore strengthen its implementation. While unlikely to be transformative on their own, they may assist with the broader effort to improve the effectiveness of these laws. **These include the draft recommendations in Chapter III regarding clarification of the purposes and principles of the law, the draft recommendations in Chapter III regarding the duty to accommodate in the assessment of capacity, and the draft recommendations in Chapter VI regarding the duties of substitute decision-makers.**

The implementation of some draft recommendations will require effort over a period of time. For example, it is the view of the LCO that **guardianship by the Public Guardian and Trustee should be focused on those individuals who require its expert, specialized and trustworthy services** to receive appropriate substitute decision-making. Statutory guardianship, which makes the Public Guardian and Trustee the guardian of first resort for many individuals, is ultimately incompatible with the underlying principles of the legislation, and places an undue burden on the PGT, which could more effectively focus its efforts elsewhere. However, the LCO recognizes that statutory guardianship is fundamental to the current statutory scheme, and that its removal could not be accomplished overnight. Draft recommendations related to the end of statutory guardianship and a re-focussed role for the Public Guardian and Trustee have been therefore identified as long-term efforts.

The use of professional representatives and of community organizations as substitute decision-makers may offer an opportunity to broaden the options available to individuals, better address the needs of some groups of individuals, and more effectively focus the work of the PGT, and should be further explored. However, a careful examination is required of the costs and benefits of a properly supervised system of professional substitute decision-makers,

an analysis which government is in the best position to undertake. Draft recommendations in this area have also been identified for long-term implementation.

The LCO urges government, should it undertake reforms of legal capacity, decision-making and guardianship law, to incorporate into its approach mechanisms for monitoring the effect of its reforms. As has been highlighted throughout, the issues are challenging and multi-dimensional, and the affected population is often vulnerable. The current legislation has been hampered in its effectiveness by a range of implementation issues: an active monitoring of the impact of reform would allow adjustments to be made as needed.

XIII. NEXT STEPS: RESPONDING TO THE INTERIM REPORT

The LCO invites your comments on one or more of the issues raised by this *Interim Report*. The LCO will consider all comments we receive and we may alter or amend our draft recommendations based on the feedback we receive. Our final recommendations will appear in our *Final Report*. The *Final Report* with recommendations is subject to approval by the LCO's Board of Governors.

There are many ways to express your views or help us hear from those affected by this project:

1. Send us your comments in writing, by fax, in an email or through our online comment box at <http://www.lco-cdo.org/en/content/get-touch>
2. Call us to arrange a time to talk about your experiences, ideas and comments in person or on the telephone.
3. You may have other suggestions for how you can best express your views or help others tell us their experiences.

You can mail, fax or e-mail your comments by **Friday, March 4, 2016** to:

**Law Commission of Ontario
Legal Capacity, Decision-making and Guardianship
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**

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.

XIV. ENDNOTES

¹Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012), online: <http://www.lco-cdo.org/en/older-adults-final-report> [LCO, *Framework for the Law as It Affects Older Adults*]; Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012), online: <http://www.lco-cdo.org/en/disabilities-final-report> [LCO, *Framework for the Law as It Affects Persons with Disabilities*].

²For a brief overview of this law reform process, see Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Discussion Paper* (Toronto: May 2014), Part I, Ch 1.B, online: <http://lco-cdo.org/en/capacity-guardianship-discussion-paper> [LCO, *Legal Capacity and Decision-making Discussion Paper*].

³LCO, *Legal Capacity and Decision-making Discussion Paper*, note 2.

⁴Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Summary of Issues for Consultation* (Toronto: June 2014), online: <http://www.lco-cdo.org/en/capacity-guardianship-discussion-paper-summary-consultation-issues> [LCO, *Summary of Issues*].

⁵*Health Care Consent Act, 1996*, S.O. 1996, c. 2, Schedule A [HCCA].

⁶*Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [SDA].

⁷*Mental Health Act*, R.S.O. 1990, c. M.7 [MHA].

⁸The British Columbia Law Institute has carried out substantial work on common law tests of capacity: British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (Vancouver: September 2013), online: http://www.bcli.org/wordpress/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf.

⁹*Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A [PHIPA].

¹⁰The Uniform Law Conference of Canada, together with the Uniform Law Commission, has undertaken a project to develop a uniform act on interjurisdictional recognition of substitute decision-making documents. See http://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0013.pdf, item #13.

¹¹LCO, *Framework for the Law as It Affects Older Adults*, note 1; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1.

¹²Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (Toronto: 1987) [Fram Report].

¹³Law Commission of Ontario, *Final Report, Capacity and Legal Representation for the Federal RDSP* (Toronto: June 2014) [LCO, *RDSP Final Report*], online: <http://www.lco-cdo.org/en/rdsp>.

¹⁴David N. Weisstub, *Enquiry on Mental Competency: Final Report* (Toronto: Publications Ontario, 1990), 55 [Weisstub Report].

¹⁵Fram Report, note 12, vii.

¹⁶Fram Report, note 12, 39-47.

¹⁷Review of Advocacy for Vulnerable Adults, Terms of Reference, January 1987 in Sean O'Sullivan, *You've Got a Friend: A Review of Advocacy in Ontario* (Toronto: Ontario Ministry of the Attorney General, 1987), 121-22.

¹⁸SDA, note 6, s. 2; HCCA, note 5, s. 4(2).

¹⁹HCCA, note 5, ss. 10, 40.

²⁰SDA, note 6, ss. 32(1), 38.

²¹SDA, note 6, ss. 66(2)-(3).

²²SDA, note 6, ss. 32(2)-(5).

²³The LCO has commenced a project on Improving the Last Stages of Life, which will address some of these issues. Information on this project may be found online at <http://www.lco-cdo.org/en/last-stages-of-life>.

²⁴ Treatment without consent is permitted in emergencies under s. 25 of the HCCA, while admission to a long-term care facility without consent is permitted in a crisis situation under s. 47 of the HCCA.

²⁵ LCO, *Framework for the Law as It Affects Older Adults*, note 1; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1.

²⁶ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, GA Res 61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010) [CRPD].

²⁷ Kerri Joffe & Edgar-Andre Montigny (ARCH Disability Law Centre), *Decisions, Decisions: Promoting and Protecting the Rights of Persons with Disabilities Who are Subject to Guardianship* (Toronto: Law Commission of Ontario, January 2014) [Joffe & Montigny], 6, online: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-arch>.

²⁸ City of Toronto, *Toronto Facts: Diversity*, online: <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=dbe867b42d853410VgnVCM10000071d60f89RCRD&vgnnextchannel=57a12cc817453410VgnVCM10000071d60f89RCRD>.

²⁹ LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, Ch. II.D; LCO, *Framework for the Law as It Affects Older Adults*, note 1, Ch. III.A.

³⁰ See, for example, Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Toronto: Law Commission of Ontario, October 2010) [Bach & Kerzner, *A New Paradigm*], 141 and following, online: <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>; and Coalition on Alternatives to Guardianship, *The Right to Legal Capacity and Supported Decision-making for All, A Brief to the Law Commission of Ontario* (Toronto: October 2014) [Coalition on Alternatives to Guardianship, *Brief*] 30 and following, online: <http://communitylivingontario.ca/sites/default/files/Coalition%20Brief%20to%20LCO%20-%20Oct%202014%20-%20final.pdf>.

³¹ Margaret Isabel Hall, “Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability” (2012) 58:1 McGill L. J. 61, 65.

³² SDA, note 6, s. 78.

³³ MHA, note 7, s.59.

³⁴ SDA, note 6, ss. 22(3) and 55(2).

³⁵ SDA, note 6, ss. 32(3), 66(3), (4), and (5); HCCA, note 5, s.21.

³⁶ A “Ulysses agreement” allows a person creating a power of attorney for personal care to waive rights to challenge a finding of incapacity or to permit the use of force to facilitate treatment. Not surprisingly, the requirements for the creation of a “Ulysses agreement” are stringent: SDA, note 6, s. 50; HCCA, note 5, s. 32(2).

³⁷ LCO, *Framework for the Law as It Affects Older Adults*, note 1, 87-88.

³⁸ A brief discussion of adult protection laws may be found at LCO, *Framework for the Law as It Affects Older Adults*, note 1, Ch. III.B.5.

³⁹ Among the aspects of diversity which should be considered in applying the *Frameworks*, should be included gender identity, reflecting the protections of the Ontario *Human Rights Code* and the growing understanding of the experiences of individuals related to gender identity and of the discrimination experienced by individuals on this basis.

⁴⁰ HCCA, note 5, s. 1.

⁴¹ *Adult Protection and Decision-making Act*, S.Y. 2003, c. 21, Sched. A, [Adult Protection and Decision-making Act], s. 4.

⁴² *Alberta Guardianship and Trusteeship Act*, S.A 2008, c. A-4.2, [AGTA], s. 2; *The Adult Guardianship and Co-Decision-making Act*, S.S. 2000, c. A.5.3, [Adult Guardianship and Co-Decision-making Act], s. 3; *Adult Protection and Decision-making Act*, note 41, s. 2; *Mental Capacity Act 2005*, (UK), c. 9, [Mental Capacity Act], s. 1; *Assisted*

Decision-Making (Capacity) Bill 2013, Bill No. 83 of 2013, Minister for Justice and Equality (July 13, 2012), [Irish Bill 2013], s. 8. The Irish Bill 2013 was reviewed by the Select Committee on Justice on June 17, 2015.

⁴³ Victorian Law Reform Commission, *Guardianship: Final Report* (Melbourne, Australia: 2012) [VLRC, *Final Report*], 78, online: <http://www.lawreform.vic.gov.au/projects/guardianship-final-report>.

⁴⁴ *Long-Term Care Homes Act 2007*, S.O. 2007, c.8, [LTCHA], s. 1.

⁴⁵ LCO, *Framework for the Law as It Affects Older Adults*, note 1, 107.

⁴⁶ Policy Horizons Canada, “The Case for Evidence Based Policy”, 2013, online: <http://www.horizons.gc.ca/eng/content/case-evidence-based-policy>.

⁴⁷ Michael Howlett & Jonathan Craft, “Policy Advisory Systems and Evidence-Based Policy: the Location and Content of Evidentiary Policy Advice” in Shaun P. Young, ed., *Evidence Based Policy-making in Canada* (Don Mills, Ontario: Oxford University Press, 2013), 28.

⁴⁸ *An Act to amend the Human Rights Code*, S.O. 2006, c. 30, s. 57.

⁴⁹ See Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Toronto: Queen’s Printer for Ontario, 2012), online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf.

⁵⁰ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11. [AODA], s. 41.

⁵¹ See, for example, the extended discussion by the Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws: Report*, (Queensland Law Reform Commission: September 2010), [QLRC R67] Volume 1, 264-69, online: <http://www.qlrc.qld.gov.au/publications>. A very helpful outline of the evolution of these approaches can be found in Kristin Booth Glen, “Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond” (2012) 44 *Colum. Hum. Rts. L. Rev.* 93-169.

⁵² Weisstub Report, note 14.

⁵³ HCCA, note 5, s. 4.

⁵⁴ SDA, note 6, s. 2; Capacity Assessment Office, Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (Toronto: 2005), [MAG, *Guidelines*], I.2, online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>.

⁵⁵ *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32, [Starson], para. 80.

⁵⁶ CRPD, note 26.

⁵⁷ CRPD, note 26, Article 1.

⁵⁸ CRPD, note 26.

⁵⁹ Nations Treaty Collection, “Status of Treaties: Convention on the Rights of Persons with Disabilities”, [Declaration and Reservation], online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

⁶⁰ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014) Article 12: Equal Recognition Before the Law* (April 11, 2014), [General Comment], online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en.

⁶¹ Office of the High Commissioner for Human Rights, “The right to take risks and make mistakes: equal recognition before the law for people with disabilities” (Geneva: OHCHR, 15 May 2014), online: <http://www.ohchr.org/EN/NewsEvents/Pages/LegalEquality.aspx>. A helpful resource on the status of General Comments can be found in Conway Blake, “Normative Instruments in International Human Rights Law: Locating the General Comment”, Center for Human Rights and Global Justice Working Paper No. 17 (New York: 2008), online: <http://chrgi.org/wp-content/uploads/2012/07/blake.pdf>.

⁶² For a discussion of the supported decision-making mechanisms incorporated into legislation in various Canadian jurisdictions, see LCO, *Legal Capacity and Decision-making Discussion Paper*, note 2, Part Three, Ch I.D.2.

⁶³ Consultation questionnaire. Excerpts from questionnaires have been edited to remove identifying information and for typographical errors.

⁶⁴ SDA, note 6, ss. 33(1), (2), (3).

⁶⁵ *General Comment*, note 60, para 8.

⁶⁶ The *General Comment* (note 60) emphasizes that the right to choose medical treatment must be respected even in crisis situations (para 42). It states that accurate and accessible information must be provided, as well as non-medical options.

⁶⁷ LCO, *RDSP Final Report*, note 13, section III.A.

⁶⁸ Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 [*Human Rights Code*], ss. 11 and 17.

⁶⁹ *Human Rights Code*, note 68, s. 47(2).

⁷⁰ See, for example, Ontario Human Rights Commission, *Policy on Discrimination and Language* (Toronto: June 19, 1996), online: <http://www.ohrc.on.ca/en/policy-discrimination-and-language>.

⁷¹ MAG, *Guidelines*, note 54, Section III.2 and VII.2.

⁷² MAG, *Guidelines*, note 54, Section VI.

⁷³ HCCA, note 5, s. 10.

⁷⁴ Law Society of Upper Canada, *Rules of Professional Conduct*, adopted by Convocation June 22, 2000, Section 3.2-9, "Client with Diminished Capacity" online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>; Law Society of Upper Canada, *Paralegal Rules of Conduct*, adopted by Convocation March 29, 2007, Rule 3.02 "Client with Diminished Capacity", online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486158>. For a very helpful overview of the law in this area, see ARCH Disability Law Centre, *Addressing the Capacity of Parties Before Ontario's Administrative Tribunals: Promoting Autonomy and Preserving Fairness*, December 2009, Chapter One, online: <http://www.archdisabilitylaw.ca/addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne>.

⁷⁵ LCO, *RDSP Final Report*, note 13.

⁷⁶ MHA, note 7, ss. 54-60.

⁷⁷ The person must *have* a guardian under the SDA, but with respect to the power of attorney, the physician must believe "on reasonable grounds" that such a document exists: MHA, note 7, s. 54(6).

⁷⁸ MHA, note 7, s. 54(2).

⁷⁹ Cancellation of a certificate is issued using form 23, which only requires the patient's name and identifying information and the physician's signature: Ontario Ministry of Health, *Form 23, Mental Health Act – Notice of Cancellation of Certificate of Incapacity to Manage One's Property under Section 56 of the Act* (Toronto: Queen's Printer for Ontario, 2013), online: [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6442-41~1/\\$File/6442-41E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6442-41~1/$File/6442-41E.pdf).

⁸⁰ MHA, note 7, s. 57(2).

⁸¹ MHA, note 7, s. 54(4).

⁸² SDA, note 6, s. 15.

⁸³ Consent and Capacity Board, *Review of Capacity to Manage Property (Form 18)*, 2, online: www.ccboard.on.ca/english/publications/documents/form18.pdf.

⁸⁴ SDA, note 6, s. 6: "A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

⁸⁵ See *Roy v Furst*, [1999] OJ 1490 (SCJ), a decision by Justice MacLeod, noting the lack of definition for capacity to manage property in the MHA, turned to the definition in section 6 of the SDA as the basis for her judgment.

⁸⁶ This is indicated by the use of binding language (“a physician shall examine” as opposed to “the physician may examine”): MHA, note 7, s. 54(1).

⁸⁷ MHA, note 7, s. 59(1).

⁸⁸ MHA, note 7, s. 59(2).

⁸⁹ MHA, note 7, s. 60(1).

⁹⁰ SDA, note 6, s. 16(1).

⁹¹ SDA, note 6, s. 79.

⁹² SDA, note 6, s. 1(1). Note that designated Capacity Assessors frequently provide opinions with respect to capacity to, for example, create a power of attorney or make a will, situations in which the SDA does not require a formal Capacity Assessment.

⁹³ *Capacity Assessment*, O. Reg. 460/05 [Capacity Assessment Reg], ss. 2(1)(a), 2(2).

⁹⁴ MAG, *Guidelines*, note 54.

⁹⁵ Capacity Assessment Reg, note 93, ss. 3(1)-(2).

⁹⁶ Capacity Assessment Reg, note 93, s. 3(3).

⁹⁷ SDA, note 6, ss. 78(1)-(3).

⁹⁸ SDA, note 6, ss. 78(5), 16(4).

⁹⁹ SDA, note 6, ss. 16(5)-(6).

¹⁰⁰ SDA, note 6, s. 20.2. Note that persons who are found incapable of managing property and who then fall under a continuing power of attorney do not have this avenue open to them. Nor are there rights of review for a finding of incapacity for personal care. See the discussion in D’Arcy Hiltz & Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario, 2013 Edition*, (Lexis Nexis: Markham, Ontario, 2012), [Hiltz & Szigeti], 32, 43-44.

¹⁰¹ Hiltz & Szigeti, note 100, 194. It should be noted that the cost of long-term care is regulated, and may be subsidized.

¹⁰² HCCA, note 5, s. 2.

¹⁰³ *Evaluators*, O. Reg. 104/96, s. 1.

¹⁰⁴ The origins of this form are not documented and recollections differ as to its original development. However, it appears to have been in use from the very beginning of the current regime, and has been widely treated as an “official”: Interview with Judith Wahl, Advocacy Centre for the Elderly.

¹⁰⁵ *H. (Re)*, 2005 CanLII 57737 (ON CCB) states, “Merely asking those five questions and getting (or not getting) answers is not a fair test of a person’s capacity.” See, for example, *Starson*, note 55, paras 77, 81 (evaluators must displace the presumption of capacity on a balance of probabilities and demonstrate that an individual lacks the ability to appreciate the foreseeable consequences of the decision); *Saunders v. Bridgepoint Hospital*, 2005 CanLII 47735 (ON SC), [Saunders] para. 121 (procedural fairness requires that evaluators inform individuals about the capacity assessment process on an ongoing basis).

¹⁰⁶ In *Koch (Re)*, Quinn J imported some of the procedural safeguards from the SDA into the admissions context, specifically, the right to be informed of the significance of a finding of incapacity, the right to have counsel or a trusted friend present during the evaluation, the right to refuse the evaluation, and the right to be informed of these rights prior to the evaluation: *Koch (Re)* (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712 (Gen Div) [*Koch (Re)*]. However, some consider these comments to be *obiter* and the Board has not always considered itself bound by them: Hiltz & Szigeti, note 100, citing *I.L.A. (Re)*, 2004 CanLII 29716 (ON CCB).

¹⁰⁷ HCCA, note 5, ss. 50(1)-(2).

¹⁰⁸ HCCA, note 5, s. 10.

¹⁰⁹ HCCA, note 5, s. 4(3).

¹¹⁰ HCCA, note 5, s. 15(1).

¹¹¹ HCCA, note 5, s. 15(2).

¹¹² See for example, College of Audiologists and Speech Language Pathologists, “Obtaining Consent for Services: A Guide for Audiologists and Speech Language Pathologists” (CASLPO, June 2006), online: http://www.caslpo.com/sites/default/uploads/files/GU_EN_Obtaining_Consent_for_Services.pdf [CASLPO, *Obtaining Consent*]; College of Physicians and Surgeons of Ontario, “Determining Capacity to Consent: Guiding Physicians through Capacity and Consent to Treatment” (CPSO, 2007) Dialogue 32, online: <http://www.cpso.on.ca/uploadedFiles/policies/policies/policyitems/Consent.pdf>; College of Physicians and Surgeons of Ontario, “Consent to Medical Treatment, Policy 4-05” (January/February 2006), online: <http://www.cpso.on.ca/policies/policies/default.aspx?ID=1544> [CPSO, *Consent to Medical Treatment*]; College of Nurses of Ontario, *Practice Guideline: Consent* (2009), online: http://www.cno.org/Global/docs/policy/41020_consent.pdf [CNO, *Practice Guideline: Consent*]; College of Dietitians of Ontario, “Guidelines: Health Care Consent Act (HCCA)”, online: <http://www.cdo.on.ca/en/pdf/publications/guidelines/hcca.pdf> [College of Dietitians, “Guidelines”]; College of Dietitians of Ontario, “The Jurisprudence Handbook for Dietitians in Ontario” (Fall 2012), online: <http://www.cdo.on.ca/en/pdf/Publications/.../Jurisprudence%20Handbook.pdf>; College of Occupational Therapists of Ontario, *Guide to the Health Care Consent and Substitute Decisions Legislation for Occupational Therapists* (1996), online: http://www.coto.org/pdf/hcca_guide.pdf [College of Occupational Therapists of Ontario, *Consent*]; College of Respiratory Therapists of Ontario, “Responsibilities Under Consent Legislation” (December 2011), online: <http://www.crto.on.ca/pdf/PPG/UnderConsent.pdf>, [College of Respiratory Therapists, “Responsibilities Under Consent Legislation”]; College of Physiotherapists of Ontario, “Health Care Consent Act: Briefing Note” (2005, updated 2007), online: <http://www.collegept.org/Assets/registrants/guideenglish/briefing%20notes/BNhealthCareConsentAct.pdf>; College of Chiropractors of Ontario, “Standard of Practice: Consent” (Amended November 2004), online: http://ccholive.v51.com/site_documents/S-013%20Consent.pdf.

¹¹³ National Initiative for the Care of the Elderly, *Tool on Capacity & Consent: Ontario Edition* (Toronto: Advocacy Centre for the Elderly, 2003), online: http://www.nicenet.ca/files/NICE_Capacity_and_Consent_tool.pdf.

¹¹⁴ MHA, note 7, ss. 38, 59.

¹¹⁵ HCCA, note 5, s. 32.

¹¹⁶ *Flynn et al v. Flynn*, (18 December 2007) 03-66/07 (Ont SCJ), cited in *Abrams v. Abrams* (2008), 173 A.C.W.S. (3d) 410, 173 A.C.W.S. (3d) 606, (Ont SCJ) [Abrams], para. 50.

¹¹⁷ *Abrams*, note 116, para. 50.

¹¹⁸ MAG, *Guidelines*, note 54, 12.

¹¹⁹ Sarita Verma & Michel Silberfeld, “Approaches to Capacity and Competency: The Canadian View” (1997) 20:1 Int JL & Psychiatry 35, [Verma & Silberfeld] 42.

¹²⁰ Henry Olders, “Comprehensive Assessments of Competence: A Psychiatrist’s Perspective” (2011) 5:2 McGill JL & Health 283, [Olders] 285.

¹²¹ Michel Silberfeld and others, “Capacity Assessments for Requests to Restore Legal Competence” (1995) 10:3 International Journal of Geriatric Psychiatry 191, 196.

¹²² See, for example, *Koch (Re)*, note 106, where a husband requested evaluation of his wife’s capacity following the production of a draft separation agreement by his wife’s lawyer. *Urbisci v. Urbisci*, 2010 ONSC 6130, 67 E.T.R. (3d) 43, also involved a request for assessment in the midst of separation proceedings, when Mrs. Urbisci decided that her husband and daughter were more concerned about her money than her well-being and decided to revoke an existing power of attorney in favour of her husband. *Deschamps v. Deschamps* (1997), 52 O.T.C. 154, 75

A.C.W.S. (3d) 1130 (Gen Div) [*Deschamps*], involved a son seeking to be appointed guardian of property for his father as part of an extensive effort to prevent him from re-marrying.

¹²³ Verma & Silberfeld, note 119, 41.

¹²⁴ Olders, note 120, 283 - 284.

¹²⁵ *V. (Re)*, 2009 CanLII 13471 (ON CCB).

¹²⁶ Jude Bursten, "Mental Health Law in the Community: A rights Protection Framework That Falls Apart?" in Psychiatric Patient Advocate Office, *Mental Health and Patients' Rights in Ontario: Yesterday, Today and Tomorrow* (Toronto: Queen's Printer for Ontario, 2003) 69, online: <https://ozone.scholarsportal.info/bitstream/1873/13331/1/283377.pdf>. During preliminary consultations, some stakeholders raised similar concerns about potential improper use of MHA examinations as a compulsory alternative to SDA assessments. Some commented that this was generally well-intentioned. For example, the costs associated with SDA assessments make them impractical in some circumstances. However, the LCO did not locate any documented instances of this kind of practice.

¹²⁷ VLRC, *Final Report*, note 43, 113.

¹²⁸ AGTA, note 42; Alta Reg 219/2009, s. 3(1)(a).

¹²⁹ AGTA, note 42; Alta Reg 219/2009, s. 4(2)(a).

¹³⁰ Capacity Assessment Office Brochure, online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp#pays>.

¹³¹ Written submission to the LCO from the Ontario Brain Injury Association, October 2014, 2 [OBIA Submission].

¹³² Judith Wahl, Mary Jane Dykeman & Brendan Gray, *Health Care Consent and Advance Care Planning in Ontario* (Toronto: Law Commission of Ontario, January 2014), [Wahl, Dykeman & Gray], 253-254, online: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-ace-ddo>.

¹³³ Focus Group, Rights Advisers and Advocates, September 25, 2014.

¹³⁴ Written submission to the LCO from Centre for Addiction and Mental Health, October 16, 2014, [CAMH Submission] 3.

¹³⁵ See note 105, above.

¹³⁶ Jeffrey Cole & Noreen Dawe, *Assessing Capacity for Admission to Long-Term Care Homes: A Training Manual for Evaluators* (2010, revised 2011), iii, online: <http://www.ccac-ont.ca/Upload/central/General/ConsentandCapacityTrainingManual.pdf>. It is not clear to which study they are referring, unfortunately.

¹³⁷ The Dementia Network of Ottawa, "A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease", online: <http://www.community-networks.ca/uploads/L%20consentlawOttAlzheimers.pdf>.

¹³⁸ Alexandra Carling-Rowland, "Communication Aid to Capacity Evaluation – CACE: A Communicatively Accessible Capacity Evaluation to Make Admissions Decisions" (2012), online: <http://www.aphasia.ca/wp-content/uploads/2012/11/Communication-Aid-to-Capacity-Evaluation-CACE.pdf>.

¹³⁹ In *Koch (Re)*, note 106, Quinn J imported some of the procedural safeguards from the SDA into the admissions context, specifically, the right to be informed of the significance of a finding of incapacity, the right to have counsel or a trusted friend present during the evaluation, the right to refuse the evaluation, and the right to be informed of these rights prior to the evaluation.

¹⁴⁰ *Saunders*, note 105, para 18.

¹⁴¹ Wahl, Dykeman & Gray, note 132, 260 – 261.

¹⁴² OBIA Submission, note 131, 2.

¹⁴³ Wahl, Dykeman & Gray, note 132, 263-264.

¹⁴⁴ Written submission from the Advocacy Centre for the Elderly, October 17, 2014, [ACE Submission Legal Capacity], 9.

¹⁴⁵ HCCA, note 5, s. 17.

¹⁴⁶ College of Occupational Therapists of Ontario, *Consent*, note 112, 1.6 and 1.7.

¹⁴⁷ For example, the College of Audiologists and Speech Language Pathologists, provide specific guidance as to the information to be provided to the person found incapable, the necessity of providing the information to the individual in a way that is appropriate to the individual's capacity, the duty to continue to involve the individual to the extent possible in discussions with the SDM, and the duty to assist the individual with exercising the option to apply to the CCB for a review of the finding: CASLPO, *Obtaining Consent*, note 112, 12.

¹⁴⁸ For example, College of Respiratory Therapists, "Responsibilities Under Consent Legislation", note 112, 15; CASLPO, *Obtaining Consent*, note 112, 12 "The CASLPO member has an obligation to inform the patient/client in a manner appropriate to the patient/client's capacity".

¹⁴⁹ See, for example, College of Physicians and Surgeons, *Consent to Treatment*, note 112, 7; CASLPO, *Obtaining Consent*, note 112, 12, College of Dietitians, "Guidelines", note 112, 4. The College of Nurses of Ontario requires members to respond to indications that "the client is uncomfortable with this information" by exploring and clarifying this discomfort and then informing the client of options: CNO, *Practice Guideline: Consent*, note 112, Appendix B: Advocating for Clients).

¹⁵⁰ For example, neither the College of Physicians and Surgeons *Consent to Medical Treatment*, note 112, 7 or the College of Nurses of Ontario's *Practice Guideline: Consent*, note 112, provides any exceptions with respect to informing the incapable person of the finding and its consequences.

¹⁵¹ For example, College of Respiratory Therapists, "Responsibilities Under Consent Legislation", note 112, 15.

¹⁵² College of Dietitians, "Guidelines", note 112, 4.

¹⁵³ College of Respiratory Therapists of Ontario, "Responsibilities under Consent Legislation", note 112.

¹⁵⁴ College of Physicians and Surgeons, *Consent to Medical Treatment*, note 112, 7. See also CNO, *Practice Guideline: for Consent*, note 112, which requires the nurse to use "professional judgment to determine the scope of advocacy services to assist the client in exercising his/her options".

¹⁵⁵ Written submission to the LCO by the Mental Health Legal Committee, November 28, 2014, [MHLC Submission] 9-10.

¹⁵⁶ HCCA, note 5, s. 4(3).

¹⁵⁷ MAG, *Guidelines*, note 54, I.2.

¹⁵⁸ AGTA, note 42; Alta Reg 219/2009, s. 3(1)(a).

¹⁵⁹ AGTA, note 42; Alta Reg 219/2009, s. 4(2)(a).

¹⁶⁰ Dr. Samir K. Sinha, Living Longer, Living Well Report Submitted to the Minister of Health and Long-Term Care and the Minister Responsible for Seniors on recommendations to Inform a Seniors Strategy for Ontario (December 20, 2012), 131, online: http://www.health.gov.on.ca/en/common/ministry/publications/reports/seniors_strategy/docs/seniors_strategy_report.pdf.

¹⁶¹ Canadian Institute for Health Information, *Health Care in Canada 2011: A Focus on Seniors and Aging* (Ottawa: 2011), online: https://secure.cihi.ca/free_products/HCI_C_2011_seniors_report_en.pdf.

¹⁶² Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (London: TSO, 2007), [COP], 178, online: <http://www3.imperial.ac.uk/pls/portallive/docs/1/51771696.PDF>.

¹⁶³ *Mental Capacity Act*, note 42, s. 39.

¹⁶⁴ COP, note 162, 184.

¹⁶⁵ Robert Pettignano, Lisa Bliss & Sylvia Caley, "The health law partnership: a medical-legal partnership strategically designed to provide a coordinated approach to public health legal services, education, advocacy,

evaluation, research, and scholarship”, J Leg Med (2014) 57, 69; Margaret Graham Tebo, “Just What the Doctor Ordered: Hospital on-site legal services programs help address legal ills of children” (2001) 87:10 ABA J 28, 28; Elizabeth Tobin Tyler, *Poverty, health and law: readings and cases for medical-legal partnership* (Durham, N.C: Carolina Academic Press, 2011) [Tobin Tyler] 71.

¹⁶⁶ Tobin Tyler, note 165, 84.

¹⁶⁷ Joel Teitelbaum, “Obligation and Opportunity: Medical-Legal Partnership in the Age of Health Reform” (2014) 35:1 7, pages 11, 21.

¹⁶⁸ Tobin Tyler, note 165, 81.

¹⁶⁹ Pro Bono Law Ontario, *Medical-Legal Partnerships for Children: Bridging the Justice Gap*, [PBLO], online: <https://www.pblo.org/volunteer/medical-legal-partnerships-children/>.

¹⁷⁰ LawHelpOntario.org, *Legal Help for Children: Medical Legal Partnerships*, online: <https://www.lawhelpontario.org/legal-help-for-children/medical-legal-partnerships/>.

¹⁷¹ PBLO, note 169.

¹⁷² PBLO, note 169.

¹⁷³ Johanna McDonald, “ARCH and the St. Michael’s Hospital Legal Services Program: A Health Justice Initiative”, *ARCH Alert: ARCH's Quarterly Newsletter on Disability and the Law* (26 June 2015), [ARCH Alert], online: http://archdisabilitylaw.ca/sites/all/files/ARCH%20Alert%20-%20June%2026%202015%20-%20Text_0.txt.

¹⁷⁴ ARCH Alert, note 173.

¹⁷⁵ Law Society of Upper Canada - Equity Initiatives Department, *Report to Convocation: Access to Justice Committee* (2011) 14.

¹⁷⁶ *Excellent Care for All Act, 2010*, S.O. 2010, c. 14, [Excellent Care for All Act] preamble.

¹⁷⁷ *Excellent Care for All Act*, note 176, s. 12(a)(iv). Amendments have been passed but not yet proclaimed in force to include monitoring and reporting on “patient relations”.

¹⁷⁸ Health Quality Ontario, *Annual Report 2013-2014*, [HQO, *Annual Report 2013-2014*], 9, online: <http://www.hqontario.ca/About-Us/Annual-Reports>.

¹⁷⁹ Health Quality Ontario, *Experiencing Integrated Care: Ontarian’s Views of Healthcare Coordination and Communication* (2015), 3, online: <http://www.hqontario.ca/Portals/0/documents/pr/report-experiencing-integrated-care-1504-en.pdf>.

¹⁸⁰ HQO, *Annual Report 2013-2014*, note 178, 6; Health Quality Ontario website – Primary Care – Primary Care Patient Survey, online: <http://www.hqontario.ca/quality-improvement/primary-care/patient-experience-survey>.

¹⁸¹ Health Quality Ontario website – About Us – Patient, Family and Public Advisors Council and Network, online: <http://www.hqontario.ca/about-us/patient-and-family-advisors>.

¹⁸² Health Quality Ontario website – Health Links – Webinar Series, online: <http://www.hqontario.ca/quality-improvement/health-links/webinar-series>.

¹⁸³ *Excellent Care for All Act*, note 176, s. 13.1.

¹⁸⁴ Advocacy Centre for the Elderly, *Congregate Living and the Law as it Affects Older Adults*, *Research Paper for the Law Commission of Ontario* (Law Commission of Ontario: August 2009), [ACE, *Congregate Living*], online: <http://www.lco-cdo.org/en/olderadults>.

¹⁸⁵ LTCHA, note 44, s.3(1).

¹⁸⁶ LTCHA, note 44, s. 3(3).

¹⁸⁷ ACE, *Congregate Living*, note 184, 18-20, 47, 111.

¹⁸⁸ LTCHA, note 44, ss. 141-143.

¹⁸⁹ LTCHA, note 44, s. 76.

¹⁹⁰ LTCHA, note 44, s. 85.

¹⁹¹ LTCHA, note 44, s. 143.

- ¹⁹² The powers and functions of Residents' and Family Councils are set out in the LTCHA, note 44, ss. 56 – 67.
- ¹⁹³ Elyse Sunshine, "LHINs: A Primer", online: www.grljp.com/.../9%20-%20Local%20Health%20Integration%20Netwo [Sunshine]; Paul Barker, "Local Health Integration Networks: The Arrival of Regional Health Authorities In Ontario"(Paper prepared for presentation at the Annual Meeting of the Canadian Political Science Association, University of Saskatchewan, Saskatoon, Saskatchewan, May 2007) 5 [Barker].
- ¹⁹⁴ Gokal Bhandari & Anne Snowdon, "Design of a patient-centric, service-oriented health care navigation system for a local health integration network" *Behaviour and Information Technology*, Vol 31 No 3, March 2012, 275; Barker, note 193, 2.
- ¹⁹⁵ Barker, note 193, 6, 7; Sunshine, note 193, 1; Bob Gardner, *Local Health Integration Networks: Potential, Challenges and Policy Directions* (Wellesley Institute: June 2006), 2.
- ¹⁹⁶ *Local Health System Integration Act, 2006*, S.O. 2006, c. 4, [LHSIA], ss. 14(6) and 18(4).
- ¹⁹⁷ LHSIA, note 196, s. 1.
- ¹⁹⁸ Ministry of Health and Long-Term Care, "Patients First: Action Plan for Health Care" (Government of Ontario: February 2015) 5, 7, 13, 14.
- ¹⁹⁹ Sunshine, note 193, 2.
- ²⁰⁰ Central Local Health Integration Network, "Creating Caring Communities: Advancing Excellence in Local Health Care Together", 2, 10, online: <http://www.centrollhin.on.ca/goalsandachievements/ihsp.aspx>.
- ²⁰¹ Central Local Health Integration Network, "Patient Experience: Quality through the Eyes of the Patient", [Central LHIN, "Patient Experience"] online: <http://www.centrollhin.on.ca/goalsandachievements/patientexperience.aspx>.
- ²⁰² Dr. Karima Velji, "Designing a Framework and Scorecard for Patient Experience for the Central LHIN and Beyond" (Central Local Health Integration Network, 2014), online: <http://www.centrollhin.on.ca/goalsandachievements/patientexperience.aspx>.
- ²⁰³ Central LHIN, "Patient Experience", note 201.
- ²⁰⁴ Bonnie Laschewicz and others, *Understanding and Addressing Voices of Adults with Disabilities within Their Family Caregiving Contexts: Implications for Capacity, Decision-Making and Guardianship* (Toronto: Law Commission of Ontario, January 2014), online: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-laschewicz>, provides examples both of families who are attempting to support individuals in this sense, and of families that employ a more paternalistic approach to decision-making for their loved ones.
- ²⁰⁵ Declaration and Reservation, note 59.
- ²⁰⁶ Declaration and Reservation, note 59.
- ²⁰⁷ AGTA, note 42, s. 13; *Adult Guardianship and Co-Decision-making Act*, note 42, ss. 13, 39.
- ²⁰⁸ ACE Submission Legal Capacity, note 144, 8.
- ²⁰⁹ The full figures for 2013-2014 are included in LCO, *Legal Capacity and Decision-making Discussion Paper*, note 2, Part Three, III.C.3. There were 1838 open personal guardianship files and 16,833 open property guardianship files. The numbers should be treated with caution: while the PGT maintains a register of private guardianships, it is up to the guardian to inform the PGT of the termination of the guardianship due to, for example, death of the person under guardianship so that there may be fewer active guardianships in the province than these numbers suggest.
- ²¹⁰ *Adult Protection and Decision-Making Act*, note 41, ss. 5(2), 11; AGTA, note 42, s. 6(2).).
- ²¹¹ Advocacy Centre for the Elderly, Written submission to the LCO on the RDSP Project, February 28, 2014, 9.
- ²¹² Coalition on Alternatives to Guardianship, *Brief*, note 30, 26.
- ²¹³ SDA, note 6, ss. 33(3),(4), (5); 66(5),(6),(7), (8).
- ²¹⁴ SDA, note 6, ss. 66(2.1), (3), (4).
- ²¹⁵ SDA, note 6, ss. 66(8) and (9).

²¹⁶ HCCA, note 5, s. 21.

²¹⁷ Advocacy Centre for the Elderly, Written submission to the LCO on the *Framework for the Law as It Affects Older Adults*, July 2008, 23-24.

²¹⁸ See *Conway v Fleming*, [1996] 1242 ACWS (3d) 62, para 282-285; *W (Re)*, 2006 CarswellOnt 9390 (ON CCB) para 28 and 30.

²¹⁹ HCCA, note 5, s. 7; *R. v. Thomas*, 2000 CarswellOnt 1173; [2000] OJ No 1308; 46 WCB (2d) 59, para 4.

²²⁰ MHA, note 7, s. 20.

²²¹ *R v. Webers* 95 CCC (3d) 334; [1994] OJ No 2 (QL); 25 WCB (2d) 305 1994 CanLII 7552 (ON SC).

²²² LTCHA, note 44, s. 32.

²²³ *Retirement Homes Act, 2010*, S.O. 2010, c. 11, s. 70.

²²⁴ HCCA, note 5, ss. 53.1, 54.2.

²²⁵ VLRC, *Final Report*, note 43, Ch. 15, 318.

²²⁶ VLRC, *Final Report*, note 43, Ch. 15.

²²⁷ See *R v. Bournewood Community and Mental Health NHS Trust; Ex parte L* [1998] All ER 289 for the original decision of the House of Lords, and *HL v United Kingdom* 40 EHRR 32 for the decision of the European Court of Justice.

²²⁸ *Mental Capacity Act*, note 42, Sched. A.1, “Hospital and Care Home Residents: Deprivation of Liberty”.

²²⁹ SDA, note 6, s. 37.

²³⁰ SDA, note 6, s. 32(1).

²³¹ SDA, note 6, s. 31(1).

²³² Daphne A. Dukelow, *Pocket Dictionary of Canadian Law*, 3rd ed, (Toronto: Carswell, 2011) [*Pocket Dictionary*] under the word “agent”.

²³³ John A. Yogis & Catherine Cotter, *Barron’s Canadian Law Dictionary*, (Hauppauge, N.Y.: Barron’s Educational Series, 2009), 6th ed, under the word “agent”.

²³⁴ *Graham Mining Ltd. v. Rapid-Eau Technologies Inc.* [2000] O.J. No. 5332.

²³⁵ *Menna v. Guglietti* (1969), 10 D.L.R. (3d) 132 (Ont. H.C.); *Olanick v. R. Cholkani & Co.* (1980), [1980] I.L.R. 1-1282 (Ont. H.C.); *Mitchell v. Sykes* (1883), 4 O.R. 501 (Ont. H.C.); *People’s Credit Jewellers Ltd. v. Melvin* (1933), [1933] O.W.N. 76 (Ont. Co. Ct.).

²³⁶ *Paul S. Starr & Co. v. Watson* (1972), [1973] 1 O.R. 148 (Ont. C.A.).

²³⁷ *Johnson v. Birkett* (1910), 21 O.L.R. 319 (Ont. K.B.); *Laskin v. Bache & Co.* (1971), [1972] 1 O.R. 465 (Ont. C.A.); *Royal Securities Corp. v. Montreal Trust Co.* (1967), [1967] 2 O.R. 200 (Ont. C.A.); *Metropolitan Toronto Pension Plan v. Aetna Life Insurance Co. of Canada* (1992), 98 D.L.R. (4th) 582 (Ont. Gen. Div.).

²³⁸ *Garber v. Union Bank of Canada* (1919), 46 O.L.R. 129 (Ont. H.C.); *Rudd Paper Box Co. v. Rice* (1912), 3 O.W.N. 534 (Ont. C.A.); *Canadian Packing Co. v. Union Stockyards of Toronto* (1922), 23 O.W.N. 291 (Ont. H.C.); affirmed (1923), 24 O.W.N. 33 (Ont. Div. Ct.); *Independent Cash Mutual Fire Insurance Co. v. Winterborn* (1913), 4 O.W.N. 674 (Ont. H.C.); *Zuckschwerdt v. Royal Bank* (1932), 41 O.W.N. 435 (Ont. C.A.); *Metropolitan Toronto Pension Plan v. Aetna Life Insurance Co. of Canada* (1992), 98 D.L.R. (4th) 582 (Ont. Gen. Div.); *Alan Webster Family Trust v. Midland Walwyn Capital Inc.* (2002), 2002 CarswellOnt 276 (Ont. S.C.J.); varied (2005), 2005 CarswellOnt 2760 (Ont. C.A.).

²³⁹ *Timmins (Town) v. Brewers’ Warehousing Co Ltd* [1962] O.R. 536, 539 [1962] O.J. No. 574.

²⁴⁰ *Pocket Dictionary*, note 232, under the word “deputy”.

²⁴¹ See, for example, *Interpretation Act*, RSO 1990, c I.11 [repealed], ss. 28, 77.

²⁴² *Pocket Dictionary*, note 232, under the word “representative”.

²⁴³ *Human Rights Code*, note 68, ss. 11 and 17.

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- ²⁴⁴ *Human Rights Code*, note 68, O. Reg. 290/98, *Business Practices Permissible To Landlords In Selecting Prospective Tenants For Residential Accommodation*.
- ²⁴⁵ Krista James & Laura Watts (Canadian Centre for Elder Law), *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Toronto: Law Commission of Ontario, March 2014), [James & Watts] 49-55, online: <http://lco-cdo.org/en/capacity-guardianship-commissioned-paper-ccel>.
- ²⁴⁶ For an outline of Alberta's supported decision-making authorizations see LCO, *Legal Capacity and Decision-making Discussion Paper*, note 2, 126-128.
- ²⁴⁷ James & Watts, note 245, 57-62.
- ²⁴⁸ LCO, *RDSP Final Report*, note 13, section IV.C.3.
- ²⁴⁹ Sophie Nunnelley, *Personal Support Networks in Practice and Theory: Assessing Their Implications for Supported Decision-making Law* (Toronto: Law Commission of Ontario, January 2015), [Nunnelley, *Personal Support Networks*], online: <http://www.lco-cdo.org/en/capacity-guardianship-commissioned-paper-nunnelley>.
- ²⁵⁰ Nunnelley, *Personal Support Networks*, note 249, 103.
- ²⁵¹ National Initiative for the Care of the Elderly, *Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada* (Toronto: 2012).
- ²⁵² BC Adult Abuse/Neglect Prevention Collaborative, *Vulnerable Adults and Capability Issues in BC, Provincial Strategy Document* (January 2009), 23, online: <http://www.bcli.org/sites/default/files/Vanguard> (16May09).pdf.
- ²⁵³ Focus Group, Families of Individuals with Developmental Disabilities, December 3, 2014.
- ²⁵⁴ *Rae Campbell v. George Xenoyannis and Adrianna Solman*, Superior Court of Justice, Small Claims Court, SC – 14-00035494-00, July 2, 2015, 85.
- ²⁵⁵ LCO, *Framework for the Law as It Affects Older Adults*, note 1, 97; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, 85-87.
- ²⁵⁶ Online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/incapacity/poa.asp>.
- ²⁵⁷ SDA, note 6, ss. 10(2), 48(2).
- ²⁵⁸ *Powers of Attorney Act*, C.C.S.M. c. P97 [Manitoba, *Powers of Attorney Act*], s. 11(1).
- ²⁵⁹ *Powers of Attorney Act*, 2002, S.S. 2002, c. P-20.3, [Saskatchewan, *Powers of Attorney Act*] s. 12(1)(b), *Powers of Attorney Regulations*, RRS P-20.3, Reg. 1 Form E.
- ²⁶⁰ Law Reform Commission of Nova Scotia, *The Power of Attorney Act, Final Report*, August 2015, [Nova Scotia LRC, *Final Report*] 85, online: http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf.
- ²⁶¹ *Enduring Power of Attorney Act*, R.S.Y. 2002, c. 73, s 3(1)(b)(iv).
- ²⁶² Saskatchewan, *Powers of Attorney Act*, note 259, s. 12(1).
- ²⁶³ *Power of Attorney Act*, R.S.B.C. 1996, c 370, s. 17.
- ²⁶⁴ VLRC, *Final Report*, note 43, 195
- ²⁶⁵ Joffe & Montigny, note 27, 107.
- ²⁶⁶ Nova Scotia LRC, *Final Report*, note 260, 175.
- ²⁶⁷ Nova Scotia Law Reform Commission, *Powers of Attorney Act, Discussion Paper*, March 2014, 153, online: <http://www.lawreform.ns.ca/Downloads/Discussion%20Paper%20-%20Powers%20of%20Attorney%20Act.pdf>.
- ²⁶⁸ Nova Scotia LRC, *Final Report*, note 260, 175.
- ²⁶⁹ *Zonni v. Zonni Estate*, 2006 CarswellOnt 519 (WL Can).
- ²⁷⁰ *Fareed v. Wood*, 2005 CarswellOnt 4591 (WL Can) para 20.
- ²⁷¹ SDA, note 6, s. 42.
- ²⁷² For example, in the United Kingdom, appointed deputies are required to regularly submit accounts to the Public Guardian and Trustee: COP, note 162, 8.66.
- ²⁷³ Joffe & Montigny, note 27, 102-103.

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- ²⁷⁴ Joffe & Montigny, note 27, 103-104.
- ²⁷⁵ *Mental Capacity Act*, note 42, ss. 49, 58, 61.
- ²⁷⁶ COP, note 162, 248.
- ²⁷⁷ *Guardianship and Administration Act 2000 (QLD) [Guardianship and Administration Act]*, ss. 222-24.
- ²⁷⁸ *Guardianship and Administration Act*, note 277, s. 224.
- ²⁷⁹ *Guardianship and Administration Act*, note 277, s. 224(3).
- ²⁸⁰ *Guardianship and Administration Act*, note 277, s. 227.
- ²⁸¹ ACE, *Congregate Living*, note 184, 88 and following.
- ²⁸² *Representation Agreement Act*, R.S.B.C. 1996, c. 405, [*Representation Agreement Act*], s. 12(1).
- ²⁸³ *Representation Agreement Act*, note 282, s. 16.
- ²⁸⁴ Manitoba, *Powers of Attorney Act*, note 258, s. 22.
- ²⁸⁵ HCCA, note 5, s. 32.
- ²⁸⁶ HCCA, note 5, ss. 50, 65.
- ²⁸⁷ SDA, note 6, s. 20.1.
- ²⁸⁸ HCCA, note 5, ss. 33, 51, 66.
- ²⁸⁹ HCCA, note 5, ss. 35, 53, 68.
- ²⁹⁰ HCCA, note 5, ss. 37, 54, 69.
- ²⁹¹ HCCA, note 5, ss. 35, 52, 67.
- ²⁹² HCCA, note 5, ss. 34, 53.1, 54.2. Note that the provisions with respect to secure units are not yet in force.
- ²⁹³ For the fiscal year 2011-2012, over 80 per cent of all applications fell into these categories: Consent and Capacity Board, *Annual Report 2011 – 2012*, 5, online: <http://www.ccboard.on.ca/scripts/english/governance/Annual-Reports.asp>.
- ²⁹⁴ Consent and Capacity Board, *Rules of Practice*, 23.1 “Evidence” online: <http://www.ccboard.on.ca/english/legal/documents/rulesofpractice.pdf>.
- ²⁹⁵ HCCA, note 5, s. 75.
- ²⁹⁶ HCCA, note 5, s. 80.
- ²⁹⁷ Communication from the Public Guardian and Trustee, June 18, 2015. One hundred and sixty-two court appointments of guardians in 2005 were of persons or institutions other than the PGT; the number in 2006 was 172; 182 in 2007; 188 in 2008; 175 in 2009; 206 in 2010; 184 in 2011; 250 in 2012; 207 in 2013; and 227 in 2014. Over the same period of time, the court appointed the PGT as guardian in between 10 and 18 cases per year.
- ²⁹⁸ SDA, note 6, ss. 39, 68.
- ²⁹⁹ SDA, note 6, ss. 39(4), 68(4).
- ³⁰⁰ SDA, note 6, ss. 42(7)-(8).
- ³⁰¹ SDA, note 6, ss. 82-83.
- ³⁰² Communication from the Public Guardian and Trustee, May 6, 2014.
- ³⁰³ MHLC Submission, note 155, 7.
- ³⁰⁴ Joffe & Montigny, note 27, 108.
- ³⁰⁵ An overview of self-help tools available for people with family disputes can be found in Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity: Final Report* (Toronto: February 2013), [LCO, *Increasing Access to Family Justice*] section B.1, online: <http://lco-cdo.org/en/family-law-reform-final-report>.
- ³⁰⁶ LCO, *Increasing Access to Family Justice*, note 305, 24-25. There are ongoing initiatives to improve family law processes, although issues remain.
- ³⁰⁷ MHLC Submission, note 155, 7.
- ³⁰⁸ Joffe & Montigny, note 27, 62-63.

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- ³⁰⁹ Doug Surtees, “How Goes the Battle? An Exploration of Guardianship Reform” (2012) 50:1 Alta. L. R. 115-27 [Surtees].
- ³¹⁰ Focus Group, Trusts and Estates Lawyers 1, October 14, 2014.
- ³¹¹ Joffe & Montigny, note 27, 107-108
- ³¹² MHLC Submission, note 155, 6.
- ³¹³ *Cuthbertson v. Rasouli*, [2013] 3 SCR 341, 2013 SCC 53.
- ³¹⁴ LTCHA, note 44: section 19 imposes a duty on long-term care homes to protect against abuse, and section 20 requires long-term care homes to create and abide by a zero tolerance policy towards abuse and neglect. Section 24 provides for mandatory reporting of certain types of behaviours, including abuse and neglect.
- ³¹⁵ LTCHA, note 44; *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities*, 2008, S.O. 2008, c. 14.
- ³¹⁶ ACE Submission Legal Capacity, note 144, 9.
- ³¹⁷ Joffe & Montigny, note 27, 104.
- ³¹⁸ LCO, *Framework for the Law as It Affects Older Adults*, note 1, Step 6 “Do the Complaint and Enforcement Mechanisms Respect the Principles?”. Emphasis in the original.
- ³¹⁹ See Toronto Mental Health Court, “Overview of the Court” (2008), online: <http://www.mentalhealthcourt.ca>; Justice Richard D. Schneider, “Mental Health Courts” in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen’s Printer for Ontario, 2008), 186-88.
- ³²⁰ Judiciary of England and Wales, *Court of Protection Report 2010*, 6, online: <https://www.judiciary.gov.uk/publications/court-of-protection-report-2010/>.
- ³²¹ *Mental Capacity Act*, note 42, s. 51.
- ³²² *Mental Capacity Act*, note 42, s. 42.
- ³²³ *Mental Capacity Act*, note 42, s. 49.
- ³²⁴ *Rasanen v. Rosemount Instruments Ltd.* (Ont. C.A.) 17 OR (3d) 267; 112 DLR (4th) 683; 175 NR 350; [1994] CarswellNS 154; [1994] FCJ No 1584 (QL); [1994] OJ No 200 (QL); 1 CCEL (2d) 161; 367 APR 19; 68 OAC 284; 94 CLLC 14.
- ³²⁵ Andrew Leggatt, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals*, March 2001, para. 1.2.
- ³²⁶ Alison Christou, “The ‘Good’ Tribunal Member --- an Aretaic Approach to Administrative Tribunal Practice” (2009) 28:2 Univ Qld Law J 339, 342-43; Stephen H Legomsky, *Specialized justice : courts, administrative tribunals, and a cross-national theory of specialization* (New York: Oxford University Press, 1990) 10–12.
- ³²⁷ Terry Carney & David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Sydney: The Federation Press, 1997) 197.
- ³²⁸ VLRC, *Final Report*, note 43; QLRC R67, note 51, Chapter 20.
- ³²⁹ VLRC, *Final Report*, note 43, 485.
- ³³⁰ Written submission of the Northumberland Community Legal Centre to the LCO, November 17, 2014, 3.
- ³³¹ Judith McCormack, “Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change” (1995) 59 Sask Law Review 385 at 5-6, 9-10.
- ³³² A helpful discussion may be found in Wendi J Mackay, “Administrative Institutions from Principles to Practice: Guidelines for Review and Design” (2006) 19:1 Can J Admin Law Pract 63. Also see Lorne Sossin & Jamie Baxter, “Ontario’s Administrative Tribunal Clusters: A Glass Half Full or Half Empty for Administrative Justice? (2012) online: http://digitalcommons.osgoode.yorku.ca/all_papers/28, 10–11.
- ³³³ See JG (CCB) (2012) CanLii 48963; JD (CCB) (2011) CanLii 86366

³³⁴ Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-Legislative Scrutiny* HL Paper 139, Published by the Authority of the House of Lords, 13 March 2014, [*Mental Capacity Act Post-Legislative Scrutiny*] 83.

³³⁵ Guardianship and Administration Act 1986 (Vic), s. 16.

³³⁶ VLRC, *Final Report*, note 43, 447.

³³⁷ VLRC, *Final Report*, note 43, 455.

³³⁸ *Guardianship and Administration Act*, note 277, s. 180.

³³⁹ *Guardianship and Administration Act*, note 277, s. 183(1).

³⁴⁰ *Guardianship and Administration Act*, note 277, s. 193.

³⁴¹ QLRC R67, note 51, Vol 4, 176.

³⁴² *Mental Capacity Act*, note 42, s. 58(1).

³⁴³ COP, note 162, 250-51.

³⁴⁴ Consent and Capacity Board, *Policy Guideline 2: Ordering Counsel Where the Subject of an Application Does Not Have Legal Representation* (September 2007) online: <http://www.ccboard.on.ca/english/legal/documents/policyguideline2.pdf>.

³⁴⁵ Consent and Capacity Board, *Policy Guideline 2: Ordering Counsel Where the Subject of an Application Does Not Have Legal Representation* (September 2007) online: <http://www.ccboard.on.ca/english/legal/documents/policyguideline2.pdf>.

³⁴⁶ During the LCO's public consultations, some health practitioners communicated their concerns that patients very often have legal representation during a hearing while it is rare for them to have access to legal assistance: some felt that this creates some imbalance in the proceedings, while others felt that it added to the challenges of their role during a hearing.

³⁴⁷ *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, s. 13.

³⁴⁸ Legal Aid Ontario, *Mental Health Strategy Consultation Paper* (November 2013) 13, [*LAO, Mental Health Strategy*] online: <http://legalaid.on.ca/en/policy/downloads/Mental%20Health%20Strategy%20consultation%20paper.pdf?t=1429543918228>.

³⁴⁹ MHLC Submission, note 155, 8.

³⁵⁰ Ontario Ministry of Finance, 2014 Ontario Budget, online: <http://www.fin.gov.on.ca/en/budget/ontariobudgets/2014/ch1d.html#s1-71>.

³⁵¹ Ontario Ministry of Finance, 2014 Ontario Budget, note 350.

³⁵² Legal Aid Ontario, *2015 Questions and Answers: Legal Eligibility*, [*LAO, Legal Eligibility*], online: http://www.legalaid.on.ca/en/info/legaleligibility_qanda.asp.

³⁵³ LAO, *Legal Eligibility*, note 352.

³⁵⁴ LAO, *Legal Eligibility*, note 352.

³⁵⁵ LAO, *Mental Health Strategy*, note 348.

³⁵⁶ LAO, *Mental Health Strategy*, note 348.

³⁵⁷ LAO, *Mental Health Strategy*, note 348, 6.

³⁵⁸ Canadian Centre for Elder Law, *Elder and Guardianship Mediation Report*, (Vancouver, B.C.: 2011) [CCEL, *Elder and Guardianship Mediation*] 32, online: http://www.bccli.org/sites/default/files/EGM_Report_Jan_30_2012.pdf. Note that this Report was developed in anticipated of the inclusion of mandatory mediation in British Columbia's *Adult Guardianship Act*. However, the relevant amendments from S.B.C. 2007, Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, have not been proclaimed in force.

³⁵⁹ MHLC Submission, note 155, 6.

³⁶⁰ *Mental Capacity Act Post-Legislative Scrutiny*, note 334, 85.

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- ³⁶¹ Written submission from the ADR Institute of Ontario to the LCO, September 23, 2014, 5.
- ³⁶² SDA, note 6, s. 88.
- ³⁶³ CCEL, *Elder and Guardianship Mediation*, note 358, 134.
- ³⁶⁴ CCEL, *Elder and Guardianship Mediation*, note 358, Chapter 7.
- ³⁶⁵ Willson A McTavish, “The Office of the Official Guardian” (1988) 7 *Advocates Soc J* 2, 23-25. In *Wu Estate v. Zurich Insurance Co*, the Ontario Court of Appeal noted that the requirement in Rule 7 derives from the court’s *parens patriae* jurisdiction: the duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability [2006] 268 DLR (4th) 670, para 10.
- ³⁶⁶ *Lang v. Ontario (Community and Social Services)*, 2005 HRT0 5, para 8, 52, 57, 63, 64, 70.
- ³⁶⁷ Tess Sheldon & Ivana Petricone, *Addressing the Capacity of Parties before Ontario’s Administrative Tribunals: Respecting Autonomy, Protecting Fairness*, (Toronto: ARCH Disability Law Centre, 2009) 44.
- ³⁶⁸ Communication from the Public Guardian and Trustee, May 6, 2014. According to the figures provided, there were 3975 open court-appointed guardianships for property (318 of these had the PGT as guardian; the remainder were private). There were 12, 858 statutory guardianships: 2379 private statutory guardianships, 4881 held by the PGT under s. 15 of the SDA; 3657 held by the PGT under s. 16 of the SDA; and 31 held by the PGT under s. 19 of the SDA.
- ³⁶⁹ Capacity Assessment Reg, note 93, ss. 2(1)(a), 2(2).
- ³⁷⁰ SDA, note 6, ss. 78(1)-(3).
- ³⁷¹ SDA, note 6, ss. 78(1)-(3).
- ³⁷² SDA, note 6, s. 78(2).
- ³⁷³ SDA, note 6, ss. 78(5), 16(4).
- ³⁷⁴ SDA, note 6, ss. 16(5)-(6).
- ³⁷⁵ MHA, note 7, s. 59(2).
- ³⁷⁶ Psychiatric Patient Advocate Office, *Annual Report 2011: Rights Protection in a Time of Change* (Toronto: 2011), 6, online: www.sse.gov.on.ca/mohltc/ppao/en/Documents/PPAO%20Annual%20Report%202011.pdf.
- ³⁷⁷ Fram Report, note 12, 104.
- ³⁷⁸ SDA, note 6, ss. 24, 57.
- ³⁷⁹ SDA, note 6, s. 59.
- ³⁸⁰ SDA, note 6, s. 70.
- ³⁸¹ SDA, note 6, s. 69.
- ³⁸² Summary disposition applications require the filing of two pieces of evidence containing an opinion that the adult is incapable. At least one of these must contain an opinion that it is necessary for decisions to be made on the adult’s behalf and at least one must be undertaken by a capacity assessor. See SDA, note 6, ss. 72, 77-78.
- ³⁸³ SDA, note 6, s. 69.
- ³⁸⁴ Office of the Public Guardian and Trustee, “Role of the Office of the Public Guardian and Trustee”, Paper prepared for the Law Society of Upper Canada Program, Advocacy for the Senior Client (September 24, 2003).
- ³⁸⁵ SDA, note 6, ss. 72-77.
- ³⁸⁶ Consultation with Brendon Pooran.
- ³⁸⁷ Consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
- ³⁸⁸ Law Society of Upper Canada, “How to Have a Guardian of Property Appointed through Court Application”, online: <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/How-to-Have-a-Guardian-of-Property-Appointed-through-Court-Application/>.
- ³⁸⁹ SDA, note 6, ss. 25(1), 58(1).
- ³⁹⁰ SDA, note 6, ss. 24, 57.
- ³⁹¹ See for example, *Covello v. Sturino* [2007] O.J. No 2306 158; *Deschamps*, note 122.

³⁹² *Koch (Re)*, note 106.

³⁹³ Ontario, Legislative Assembly, Committee Transcripts: Standing Committee on Administration of Justice, “Bill 74, *Advocacy Act, 1992*, and Companion Legislation” (October 5, 1992). A “Ulysses contract” allows a person creating a power of attorney for personal care to waive rights to challenge a finding of incapacity or to permit the use of force to facilitate treatment. Not surprisingly, the requirements for the creation of a “Ulysses contract” are stringent: see SDA, note 6, s. 50; HCCA, note 5, s. 32(2).

³⁹⁴ Michael Bach & Lana Kerzner, *Fulfilling the Promise, Ensuring Alternatives to Guardianship*, unpublished paper, received March 2014, 17-18.

³⁹⁵ MAG, *Guidelines*, note 54, Part VI.

³⁹⁶ Data for the 2013/2014 fiscal year, provided by the Public Guardian and Trustee. This figure should be treated with caution, however: while guardians have a duty to inform the PGT’s registry when a guardianship is terminated, the PGT does not itself actively monitor the registry.

³⁹⁷ Surtees, note 309, 115-27.

³⁹⁸ Joffe & Montigny, note 27, 62.

³⁹⁹ MAG, *Guidelines*, note 54, Part VI.

⁴⁰⁰ *Koch (Re)*, note 106.

⁴⁰¹ [1997] O.J. No. 4894 (Ont. Gen. Div.).

⁴⁰² *Deschamps*, note 122, para. 11.

⁴⁰³ Coalition on Alternatives to Guardianship, *Brief*, note 30, 28.

⁴⁰⁴ Coalition on Alternatives to Guardianship, *Brief*, note 30, 28.

⁴⁰⁵ *Mental Capacity Act*, note 42, c.9, s. 49.

⁴⁰⁶ Court of Protection, *Rules of Procedure 2007*, Rule 117, Reports Under Section 49 of the Act.

⁴⁰⁷ *Guardianship and Administration Act 1986* (Vic), [Guardianship and Administration Act (Vic)], s 16(1)(d); VLRC, *Final Report*, note 43, 470.

⁴⁰⁸ Office of the Public Advocate, *Annual Report 2013-2014*, 16-17, online: <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/strategic-plans-and-annual-reports/18-opa-annual-report-2013-2014>.

⁴⁰⁹ Utah Courts, “Court Visitor Volunteers”, online: <https://www.utcourts.gov/visitor/>.

⁴¹⁰ Oregon provides an example of a more formalized Court Visitor program. The Court Visitor’s role is to gather information pertaining to whether guardianship is necessary, and if so, whether the proposed guardian is suitable. The Visitor must interview the individual who is the subject of the application, the proposed guardian, other family members and other individuals identified by the court, and provide a written report with recommendations in the prescribed format within 15 days of appointment. See for example, Deschutes County Circuit Court, *Court Visitor Information and Instructions*, online: http://courts.oregon.gov/Deschutes/docs/form/court_visitor/VisitorInstructions.pdf.

⁴¹¹ *Human Rights Code*, note 68, s. 44.

⁴¹² Pamela B. Teaster and others, “Staff Service and Volunteer Staff Service Models for Public Guardianship and “Alternatives” Services: Who Is Served and with What Outcomes?” 5 J. Of Ethics L. & Aging 131 (1999) 142-145.

⁴¹³ For Alberta’s previous process, see *Dependent Adults Act*, R.S.A. 2000, c.D-11, ss.70-72. For its current court-based process, see AGTA, note 42, Divisions 3 and 4.

⁴¹⁴ California *Probate Code* §2920(a)(1).

⁴¹⁵ SDA, note 6, ss.27, 62.

⁴¹⁶ SDA, note 6, ss. 24(2.1), 55(2.2).

⁴¹⁷ The application form for referral can be found at <http://humanservices.alberta.ca/documents/PT0002.pdf>.

⁴¹⁸ California *Probate Code*, §2952-2955.

⁴¹⁹ *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36-.3, s. 29(2) [*The Public Guardian and Trustee Act*]; *The Public Guardian and Trustee Regulations*, R.R.S. c. P-36.3, Reg. 1, s. 27(1). See also Saskatchewan Ministry of Justice, “Capacity and Incapacity Forms” (2012), online: <http://www.justice.gov.sk.ca/Capacity-Incapacity-Forms>. Restrictions exist on who can give a certificate, see: *The Mental Health Services Act*, S.S. 1984-85-86, c. M-13.1, s. 15.

⁴²⁰ *The Public Guardian and Trustee Act*, note 419, s. 29(3); Saskatchewan Ministry of Justice and Attorney General, *Substitute Decision Making — A Framework* (Regina: Public Guardian and Trustee, 2011), 9, online: <http://www.justice.gov.sk.ca/PGT-sdm>.

⁴²¹ SDA, note 6, s. 20.1

⁴²² *Guardianship and Administration Act* (Vic), note 407, ss. 61(1), 63(1).

⁴²³ VLRC, *Final Report*, note 43, 243.

⁴²⁴ AGTA, note 42, ss. 33(8), 54(7).

⁴²⁵ *Adult Guardianship and Co-Decision-making Act*, note 42, s. 40(3).

⁴²⁶ Joffe & Montigny, note 27, 98.

⁴²⁷ Joffe & Montigny, note 27, 98-99.

⁴²⁸ Joffe & Montigny note 27, 98.

⁴²⁹ Joffe & Montigny note 27, 97-98.

⁴³⁰ AGTA, note 42, s. 54(5).

⁴³¹ VLRC, *Final Report*, note 43, 192.

⁴³² VLRC, *Final Report*, note 43, 264.

⁴³³ Surtees, note 309, 115-127.

⁴³⁴ Irish Bill 2013, note 42, s. 27. The Bill was reviewed by the Select Committee on Justice on June 17, 2015.

⁴³⁵ LCO, *RDSP Final Report*, note 13.

⁴³⁶ HCCA, note 5, ss. 33, 51

⁴³⁷ SDA, note 6, ss. 5, 12(1), 44, 46(3), 53(1)(a

⁴³⁸ SDA, note 6, s. 40

⁴³⁹ The exception to this being for summary disposition applications, which are uncontested.

⁴⁴⁰ SDA, note 6, ss. 24, 57.

⁴⁴¹ SDA, note 6, s. 17(1).

⁴⁴² SDA, note 6, s. 17(4)-(5).

⁴⁴³ HCCA, note 5, ss. 20(1), 41, 58.

⁴⁴⁴ HCCA, note 5, s. 20(2).

⁴⁴⁵ HCCA, note 5, s. 20(5).

⁴⁴⁶ SDA, note 6, ss. 15, 16

⁴⁴⁷ SDA, note 6, ss. 27, 62

⁴⁴⁸ SDA, note 6, ss. 24, 57

⁴⁴⁹ Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.

⁴⁵⁰ Office of the Public Guardian and Trustee, *The Role of the Office of the Public Guardian and Trustee* (Queen’s Printer for Ontario, 2006, reprinted 2013), [OPGT, *The Role*] 3.

⁴⁵¹ Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.

⁴⁵² Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.

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- ⁴⁵⁴ OPGT, *Annual Report 2011 – 2012*, note 453, 5.
- ⁴⁵⁵ ACE Submission Legal Capacity, note 144, 9.
- ⁴⁵⁶ SDA, note 6, ss. 24, 46(2), 57.
- ⁴⁵⁷ LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, 83.
- ⁴⁵⁸ LCO, *Framework for the Law as It Affects Older Adults*, note 1, 94.
- ⁴⁵⁹ LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, 4; LCO, *Framework for the Law as It Affects Older Adults*, note 1, 3.
- ⁴⁶⁰ SDA, note 6, s. 17(4)-(5).
- ⁴⁶¹ The exception to this being for summary disposition applications, which are uncontested.
- ⁴⁶² HCCA, note 5, s. 53(1).
- ⁴⁶³ HCCA, note 5, s. 53(2).
- ⁴⁶⁴ Pamela B. Teaster, Erica F Wood, Winsor C. Schmidt Junior, Susan A. Lawrence, *Public Guardianship After 25 Years: In the Best Interests of Incapacitated People? National Study of Public Guardianship, Phase II Report* (American Bar Association: 2007) [Teaster and others, *Public Guardianship After 25 Years*] 105, online: http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/wards_state_full_rep_11_15_07.authcheckdam.pdf.
- ⁴⁶⁵ See, for example, Janet Phelan “Funding Shortage Inhibiting PFB’s Effectiveness”, *San Bernardino County Sentinel*, November 19, 2010, online: <http://www.estateofdenial.com/2010/11/20/californias-professional-fiduciaries-bureau-appears-ineffective-in-its-mission/>; “Law-makers take first step to curb abuse by professional guardians”, online: <http://www.myelderadvocate.com/news/story/lawmakers-take-%E2%80%98first-step%E2%80%9D-to-curb-abuse-by-professional-guardians>; “Viewers claim guardians abuse elderly’s rights”, online: <http://www.local10.com/news/call-christina-viewers-claim-guardians-abuse-elderlys-rights/32658868>; National Association to Stop Guardian Abuse, online: <http://stopguardianabuse.org/>; Colton Lochhead, “Clark County’s private guardians may protect — or just steal and abuse”, *Los Vegas Review Journal*, online: <http://www.reviewjournal.com/news/las-vegas/clark-county-s-private-guardians-may-protect-or-just-steal-and-abuse>.
- ⁴⁶⁶ Manitoba Law Reform Commission, *Regulating Professions and Occupations*, October 1994, [Manitoba LRC, *Regulating Professions*] online: http://www.manitobalawreform.ca/pubs/pdf/archives/84-full_report.pdf.
- ⁴⁶⁷ Manitoba LRC, *Regulating Professions*, note 466, 19.
- ⁴⁶⁸ See also Canada Competition Bureau Report, *Self-regulated professions: Balancing competition and regulation* (2007) which also recognizes that regulation adversely affects competition and thereby limits choice and higher price for service for consumers.
- ⁴⁶⁹ Manitoba LRC, *Regulating Professions*, note 466, 24.
- ⁴⁷⁰ Manitoba LRC, *Regulating Professions*, note 466, 48.
- ⁴⁷¹ *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 [RHPA], s. 11(2)(a).
- ⁴⁷² Health Professionals Regulatory Advisory Council, *Regulation of a New Health Profession under the Regulated Health Professions Act (RHPA), 1991 – Criteria and Process* (July 2011), [HPRAC], online: http://www.hprac.org/en/reports/resources/RegulatingaNewProfession_CriteriaProcess_July2011.pdf.
- ⁴⁷³ HPRAC, note 472.
- ⁴⁷⁴ California *Professional Fiduciaries Act* § 6510 [CPFA].
- ⁴⁷⁵ Tex. Gov’t Code Ann § 152 (West 2014).
- ⁴⁷⁶ One author estimates that one-quarter of all guardianships in the U.S. are provided in this way: Alison Barnes, “The Virtues of Corporate and Professional Guardians”, 2002 *Stetson Law Review*, Vol. XXXI, 941-1025, 942.

⁴⁷⁷ National Guardianship Association, online: www.guardianship.org.

⁴⁷⁸ CPFA, note 474, § 6538(a).

⁴⁷⁹ Tex Gov't Code Ann § 152.101 (West 2014).

⁴⁸⁰ Fla Stat Ann § 744.3135 (West 2015); see also Fla Stat Ann §§ 744.1085(3), 744.1085(4) (West 2015.).

⁴⁸¹ CPFA, note 474, § 6536.

⁴⁸² Tex Gov't Code Ann § 152.101 (West 2014).

⁴⁸³ Fla Stat Ann § 744.1085(2) (West 2015).

⁴⁸⁴ Wash Rev. Code Ann 11.88.100 (West).

⁴⁸⁵ Professional Fiduciary Association of California, online: <http://www.pfac-pro.org>.

⁴⁸⁶ CPFA, note 474, § 6580(c).

⁴⁸⁷ Fla Stat Ann § 744.1085(3) (West 2015); see also Florida State Guardianship Association, "Guardianship Training," online: www.floridaguardians.com/education/8-hour-family-course.

⁴⁸⁸ CPFA, note 474, § 6538(b).

⁴⁸⁹ Professional Fiduciaries Bureau, "Pre-Licensing Education Information", online: http://www.fiduciary.ca.gov/forms_pubs/prelicreq.shtml.

⁴⁹⁰ The registration form may be found at Department of Elder Affairs, State of Florida, "Professional Guardian Registration Status," online: http://elderaffairs.state.fl.us/doea/spgo_professional.php.

⁴⁹¹ Fla Stat Ann § 744.3678 and 744.3675 (West 2015).

⁴⁹² CPFA, note 474, § 6560.

⁴⁹³ CPFA, note 474, § 6561.

⁴⁹⁴ Texas Judicial Branch, Judicial Branch Certification Commission, Guardianship Certification, Forms, "Renewal Applications," online: <http://www.txcourts.gov/media/928662/Applicant-Checklist-Renewal-04-03-15.pdf> ; see also <http://www.txcourts.gov/media/890873/Renewal-App-GC.pdf>.

⁴⁹⁵ Fla Stat Ann § 744.361(9) (West 2015).

⁴⁹⁶ CPFA, note 474, § 6518, 6520.

⁴⁹⁷ *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Schedule B, s. 12(1).

⁴⁹⁸ See in particular the Supporting Homeless Seniors Program, in which third party administrators, including not only family and friends, but also municipalities, registered charitable organizations, and non-profit organizations act on behalf of vulnerable seniors to receive CPP, OAS or Guaranteed Income Supplement benefits: Service Canada, *Supporting Homeless Seniors Program – Overview*, [Supporting Homeless Seniors], online: Service Canada <http://www.servicecanada.gc.ca/eng/audiences/partners/thirdparty.shtml>.

⁴⁹⁹ *Supporting Homeless Seniors*, note 498.

⁵⁰⁰ The Bloom Group, "About – Overview", online: <http://www.thebloomgroup.org/about/overview/>.

⁵⁰¹ Interview with Lesley Anderson, Bloom Group, July 22, 2015.

⁵⁰² The Bloom Group, *Annual Report 2013-2014*, <http://www.thebloomgroup.org/annualreport/>.

⁵⁰³ The Bloom Group, "Our Work", online: <http://www.thebloomgroup.org/our-work/adult-guardianship/>.

⁵⁰⁴ Canadian Hearing Society "Services – General Support Services", online: <http://www.chs.ca/services/general-support-services>.

⁵⁰⁵ Teaster and others, *Public Guardianship After 25 Years*, note 464, 90.

⁵⁰⁶ LCO, *RDSP Final Report*, note 13, 66.

⁵⁰⁷ See, for example, Guardianship Associates of Utah, which is the only non-profit organization in that state providing direct guardianship services. It also assists families in obtaining guardianship of their family members and provides public education on guardianship issues: <http://guardianshiputah.org/>.

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- ⁵⁰⁹ Law Reform Commission of Saskatchewan, *Consultation Paper on Enduring Powers of Attorney*, (Saskatoon: January 2001), 28, online: <http://www.lawreformcommission.sk.ca/Papers.htm>.
- ⁵¹⁰ *Financial Institutions Act*, RSBC 1996, c. 141, “Trust and Deposit Business Exemption Regulation”, BC Reg 173/2008, s. 2.
- ⁵¹¹ Pamela B. Teaster and others, *The Florida Public Guardian Programs: An Evaluation of Program Status and Outcomes, Report for the Florida Department of Elder Affairs Statewide Public Guardianship Office* (August 2009) [Teaster and others, *The Florida Public Guardian Programs*] 11.
- ⁵¹² Teaster and others, *The Florida Public Guardian Programs*, note 511, 11.
- ⁵¹³ Teaster and others, *The Florida Public Guardian Programs*, note 511, 10.
- ⁵¹⁴ Teaster and others, *Public Guardianship After 25 Years*, note 464, 91-92.
- ⁵¹⁵ *Adult Guardianship and Co-decision-making Act*, note 42, s. 30.
- ⁵¹⁶ Interview with Doug Surtees, April 8, 2015.
- ⁵¹⁷ COP, note 162, 8.33.
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- ⁵¹⁹ Office of the Public Guardian, *Deputy Standards – Professional deputies* (July 2015) online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442272/ProDeputyStandardsFINALv3.pdf.
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- ⁵²¹ Written submission to the LCO from ARCH Disability Law Centre, October 31, 2014, 7-9 [ARCH Submission].
- ⁵²² ACE Submission Legal Capacity, note 144, 9.
- ⁵²³ OBIA Submission, note 131.
- ⁵²⁴ Wahl, Dykeman & Gray, note 132, 250-53.
- ⁵²⁵ LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, Step 5 “Do the Processes Under the Law Respect the Principles?”
- ⁵²⁶ LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 1, 54.
- ⁵²⁷ LCO, *Framework for the Law as It Affects Older Adults*, note 1, 159; LCO, *Framework for the Law as It Affects Persons with Disabilities*, 54.
- ⁵²⁸ ARCH Submission, note 521, 13.
- ⁵²⁹ Irish Bill 2013, note 42, s. 56 (1)(a).
- ⁵³⁰ *Guardianship and Administration Act* (Vic), note 407, s. 15(c).
- ⁵³¹ VLRC, *Final Report*, note 43, 448.
- ⁵³² VLRC, *Final Report*, note 43, 453.
- ⁵³³ VLRC, *Final Report*, note 43, 73-74.
- ⁵³⁴ VLRC, *Final Report*, note 43, 72.
- ⁵³⁵ *Provincial Advocate for Children and Youth Act*, 2007, S.O. 2007, c. 9, s. 1.
- ⁵³⁶ AODA, note 50, s. 32(3).
- ⁵³⁷ *Human Rights Code*, note 68, s. 29.
- ⁵³⁸ Wahl, Dykeman & Gray, note 132.
- ⁵³⁹ Joffe & Montigny, note 27, 100-101.
- ⁵⁴⁰ VLRC, *Final Report*, note 43, 413.
- ⁵⁴¹ 46 OR (3d) 271; 180 DLR (4th) 72; [1999] OJ No 4236 (QL); 126 OAC 216; 70 CRR (2d) 29.

⁵⁴² *A.M. v. Benes*, 1998 CanLII 14770 (ON SC)

⁵⁴³ Health Professions Regulatory Advisory Council, *Adjusting the Balance: A review of the Regulated Health Professions Act, 2001*, 1, 11, online: http://www.hprac.org/en/reports/resources/RHPA_Review_2001_Report.pdf.

⁵⁴⁴ *Health Professions Procedural Code, Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, Sched 2 [*Health Professions Procedural Code*], s.2.1.

⁵⁴⁵ *Health Professions Procedural Code*, note 544, s. 3(1).

⁵⁴⁶ Conference Board of Canada, *Achieving Public Protection through collaborative self-regulation: Reflections for a new paradigm*, 2007, 54, online: www.eicp.ca/en/toolkit/regulation/achieving_public_protection.pdf.

⁵⁴⁷ Joan M Gilmour, Merrijoy Kelner and Beverly Wellman, "Opening the Door to Complementary and Alternative Medicine: Self-Regulation in Ontario" (2003) 24 *Law & Policy*, 154.

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⁵⁴⁹ Zubin Austin and others, "Continuous Professional Development: The Ontario Experience in Professional Self-regulation through quality assurance and peer review", (2003) 67 *American Journal of Pharmaceutical Education*, 227. Marianne Tompkins & Denise Paquette-Frenette, "Learning Portfolio Models in Health Regulatory Colleges of Ontario, Canada" (2010) *Journal of Continuing Education in the Health Professions* [Tompkins & Paquette-Frenette] 30, 57.

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⁵⁵² Tompkins & Paquette-Frenette, note 549, 60.