



LAW COMMISSION OF ONTARIO

COMMISSION DU DROIT DE L'ONTARIO

# Legal Capacity, Decision-making and Guardianship: Final Report

## Backgrounder #4

### **Increasing Self-Determination and Autonomy**

#### **1. What Does the LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* Say About Increasing Self-Determination and Autonomy?**

Ontario's capacity, decision-making and guardianship laws have multiple purposes, including, but not limited to, safeguarding the autonomy of persons with legal capacity, promoting the participation of affected individuals in decision-making, increasing clarity and accountability for substitute decision-makers, and reducing the exploitation and abuse of individuals who may be vulnerable because of their impaired decision-making. These laws can have a profound effect on an individual's self-determination and autonomy if and when the law removes an individual's right to make decisions and appoints a substitute decision-maker.

The LCO's *Legal Capacity, Decision-Making and Guardianship: Final Report* emphasizes the importance of increasing self-determination for all persons affected by capacity, decision-making and guardianship laws. The recommendations would:

- Provide a wider range of decision-making tools to meet a greater variety of needs;
- Require stronger accommodation and autonomy-enhancing practices within substitute decision-making;

- Develop pilot projects and evidence-based decision-making on autonomy-enhancing decision-making practices;
- Work towards replacing statutory guardianship;
- Recognize the potential benefits of supported decision-making approaches for some individuals and in some contexts; and,
- Commit to ongoing research and evaluation of any new models or approaches in order to promote evidence-based policy-making.

The LCO's recommendations would place Ontario at the forefront of decision-making issues internationally.

## **2. What Did the LCO Learn?**

Substitute decision-makers may be appointed through powers of attorney, through automatic appointments for treatment decisions, and through guardianships for property and personal care. Guardianships have the greatest impact on self-determination and autonomy for two reasons: First, these appointments are made by a third party rather than chosen by the individual. Second, these appointments grant extensive and long-term powers that are expensive and complex to revoke.

The LCO heard many concerns about the interventions of substitute decision-makers. On the one hand, the LCO heard that there are circumstances where substitute decision-making is necessary and appropriate, but that the process is too complex and costly to access. More frequently, however, the LCO heard numerous and serious concerns about interventions that were inappropriate or excessive.

Two views were expressed as to causes and potential responses to these concerns. First, many stakeholders told the LCO that the current system is based on sound principles but that its implementation falls short. The LCO heard, for example, that systems for appointments and monitoring are too complex and expensive. The LCO also heard that substitute decision-makers are sometimes poorly informed about their responsibilities and/or that they lack appropriate supports. Second, some stakeholders stated that substitute decision-making is itself inappropriate and that "supported decision-making" is the appropriate path forward. Supported decision-making allows for the appointment of a person to assist the individual in making decisions by themselves. In such a system, individuals with impaired decision-making abilities retain the legal right to make their own decisions.

### 3. The LCO's Recommendations

Chapters Four of the LCO's *Final Report on Legal Capacity, Decision-making and Guardianship* includes several recommendations to improve self-determination and autonomy in capacity, decision-making and guardianship law. The LCO's recommendations include:

- The human rights concept of accommodation be incorporated into approaches to legal capacity;
- The Government of Ontario develop pilot projects on autonomy-enhancing decision-making practices and undertake continued monitoring and study of emerging practices and laws;
- The existing requirements for autonomy-enhancing practices within substitute decision-making be strengthened;
- The Government of Ontario develop legislation to enable individuals to enter into support authorizations for day-to-day decision-making needs;
- The Government of Ontario and others work towards the development of a statutory framework for network decision-making;
- The Government of Ontario strengthen existing requirements for consideration of a "least restrictive alternative" to guardianship;
- The Government of Ontario conduct research and consultations towards replacing statutory guardianship with an adjudicative process;
- The Government of Ontario develop more limited forms of guardianship, including time-limited or reviewable guardianship orders, limited property guardianships, and appointments for a single decision.

More information about the LCO's *Capacity, Decision-Making and Guardianship: Final Report* is available at <http://www.lco-cdo.org/>.