

# Legal Capacity, Decision-making and Guardianship

FINAL REPORT  
March, 2017



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO



# Legal Capacity, Decision-making and Guardianship

FINAL REPORT

March 2017

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LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

# About the Law Commission of Ontario

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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### Disclaimer

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Upper Canada, or of our supporters, the Law Deans of Ontario, or of York University.

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# Foreword

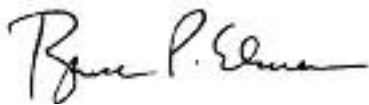
Legal capacity, decision-making and guardianship laws govern how decisions relating to property, medical treatment and personal care are made in situations where an individual's decision-making abilities are in some way impaired but decisions must, nonetheless, be made.

Ontario's capacity, decision-making and guardianship laws took shape as a result of a comprehensive and thoughtful law reform effort spanning the late 1980s and early 1990s. This regime is primarily set out in the *Substitute Decisions Act, 1992* (SDA), the *Health Care Consent Act, 1996* (HCCA), and, to a lesser extent, the provincial *Mental Health Act* (MHA). The laws and policies in this area are administered by a wide range of governments, health care institutions, community agencies, professionals, financial institutions, courts and tribunals, and many others across the province.

The Board of Governors of the Law Commission of Ontario (LCO) approved a project to review these laws in 2011 and work began at the end of 2012. Over the next four years, what followed was the most extensive research and consultation initiative in the LCO's history. During this time, the LCO heard considerable concern expressed about how the law and policy in this area were operating in practice. The LCO also learned about significant legal, demographic, social and attitudinal changes that could affect the design and implementation of these laws.

The *Final Report* is the most comprehensive analysis of Ontario's framework governing capacity, decision-making and guardianship laws in almost thirty years. The *Final Report* commends the strengths of the current system while addressing areas that need improvement. The *Final Report* includes recommendations to: develop and pilot new approaches to decision-making; improve the quality and consistency of capacity assessments; enhance the clarity and accountability of powers of attorney; improve rights enforcement and dispute resolution; improve external appointment processes; develop new roles for professionals and community agencies; improve public education and information; and improve data collection, reporting and evaluation.

The LCO's Board of Governors, composed of appointees of the founding partners, the judiciary and members at large, approved this *Final Report* in November 2016. The Board's approval reflects its members' collective responsibility to manage and conduct the affairs of the Law Commission of Ontario, and should not be considered to be an endorsement by individual members of the Board or by the organizations to which they belong.



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The Law Commission of Ontario would also like to extend its thanks to the numerous organizations and individuals who helped shape this project through their involvement in the public consultations. A list of contributing organizations and individuals can be found in Appendix C.



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# Legal Capacity, Decision-making and Guardianship

# Executive summary

## INTRODUCTION

This is the Executive Summary of the Law Commission of Ontario's (LCO) *Final Report* on legal capacity, decision-making and guardianship in Ontario. The *Final Report* contains the LCO's analysis and recommendations regarding provincial legislation, policies and practices in this far-reaching and important area of law.

Legal capacity, decision-making and guardianship laws can have a profound influence over some of the most important and intimate legal decisions and choices in a person's life. Persons who have been determined to lack legal capacity may lose their right to make decisions about their personal care, their finances, their living arrangements, or many other decisions that each of us must make every day.

Legal capacity, decision-making and guardianship laws affect thousands of Ontarians and their families every day. Most obviously, these laws affect the approximately 17,000 Ontarians who are currently subject to some kind of a guardianship order or the thousands of others whose capacity is assessed as part of obtaining consent to health care treatments, for admission to residency to a long term care home, or as part of the provision of many other services. In addition, every Ontarian who has ever granted or been given a power of attorney is affected by this area of law.

Legal capacity, decision-making and guardianship touches upon some of the most profound and consequential issues in law. It is suffused with questions and controversies regarding personal independence, a person's right to make choices and take risks, legal accountability for decision-making, and the balance between a person's autonomy and his or her safety and security. The law also touches upon the some of our most intimate and close personal relationships.

The *Final Report* is the most comprehensive analysis of Ontario's legal framework in this area in almost thirty years. The *Final Report* assess the objectives, policies, structures, legal instruments, and procedures governing capacity, decision-making and guardianship in Ontario. The *Final Report* makes recommendations that build on the strengths of the current system and improve areas where necessary. The LCO's recommendations are practical, achievable, and should benefit persons affected, their families, institutions, and service providers across the province.

## THE LAW COMMISSION OF ONTARIO

The LCO is Ontario's leading law reform agency. The LCO provides independent, balanced, and authoritative advice on some of Ontario's most complex and far-reaching legal policy issues. The LCO evaluates laws impartially, transparently and broadly. The LCO's work is informed by legal analysis; multidisciplinary research; public consultations; social, demographic and economic conditions; and the impact of technology.

LCO reports include principled, practical, "problem-solving" recommendations informed by broad consultations and tested through a transparent, comprehensive review process that engages a broad range of individuals, experts, and institutions. The LCO gives a voice to marginalized communities and others who should have an important role in law reform debates and discussions.

More information about this project and the LCO is available on the LCO's website at [www.lco-cdo.org](http://www.lco-cdo.org).

## LAW REFORM AND LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

Ontario's current statutory regime for legal capacity, decision-making and guardianship took shape as a result of a comprehensive and thoughtful law reform effort spanning the late 1980s and early 1990s.

Ontario's legislative regime for capacity, decision-making and guardianship is set out in three statutes: the *Substitute Decisions Act, 1992* (SDA), the *Health Care Consent Act, 1996* (HCCA), and, to a lesser extent, the *Mental Health Act* (MHA). In addition, there are also countless policies, guidelines, and practices designed to implement this legislation. These laws and policies are administered by a wide range of government ministries, health care institutions, community agencies, professionals, financial institutions, courts and tribunals, and many others across the province.

## ISSUES CONSIDERED

This LCO considers several important and overlapping questions in this project:

### **Does the System Reflect Contemporary Law and Values?**

Several important and far-reaching choices underpin Ontario's legal capacity, decision-making and guardianship laws. New ideas and developments both within and outside Ontario challenge many of these choices. For example, many agree with the current law's conceptual framework but believe that the system can do more to promote autonomy, social inclusion, rights protection, and participation in decision-making. Others are urging a fundamental re-examination of the Ontario's substitute

decision-making model. The LCO considers these and related questions at length in the *Final Report*.

### **Does the System Reflect Contemporary Needs?**

Over the years, Ontarians have developed increasingly nuanced and sensitive understandings of the needs and capabilities of the individuals, families, and others affected by these laws. The *Final Report* considers whether the system in Ontario reflects and responds to these understandings. The LCO considers needs from multiple perspectives, including persons directly affected, families, service providers and professionals, and others. The LCO also considers needs in light of demographic and social trends, changing family structures, and Ontario’s cultural and linguistic diversity.

### **Is the System Working on the Ground?**

The LCO’s *Final Report* discusses the legislative framework and objectives of Ontario’s capacity, decision-making and guardianship system at length. The *Final Report* considers whether Ontario achieves these objectives in practice. In other words, the project considers whether there is gap between the formal law – as expressed in statutes – and lived experience of the legislation. Understanding and addressing the “implementation gap” is an important theme in the *Final Report*.

### **Are the System’s Legal Protections Adequate and Accessible?**

Meaningful access to justice underpins the entire legal capacity, decision-making and guardianship system. Effective and appropriate mechanisms for dispute resolution and rights enforcement are therefore a priority in the *Final Report*.

## **LCO APPROACH AND PROCESS**

The LCO’s analysis and recommendations in the *Final Report* are independent, evidence-based, and impartial. The research and consultations on this project were the most extensive and complex in LCO history. The Report builds upon and extends the analysis in three earlier LCO projects, the *Framework for the Law as It Affects Older Adults*, the *Framework for the Law as It Affects Persons with Disabilities* and the LCO’s recently completed *Capacity and Legal Representation for the Federal RDSP*.

The LCO wishes to extend special thanks to the project’s Advisory Group; to the dozens of agencies and institutions involved in the project; to the authors of the project’s commissioned research papers; and, most importantly, to the thousands of Ontarians who participated in meetings, consultations, or focus groups.



## FINDINGS

Ontario has now had almost a generation's worth of experience with its capacity, decision-making and guardianship laws. The LCO was able, with the benefit of extensive research and consultations, to make many important observations and findings about the objectives and operation of this system. These findings are the basis for the LCO's final recommendations.

### Strengths and Attributes

The LCO has concluded that the legal capacity, decision-making and guardianship regime in Ontario has many important strengths or attributes. These include:

- Ontario's capacity, decision-making and guardianship laws aim to promote self-determination and personal autonomy.
- The system promotes a nuanced and contextual approach to legal capacity.
- Ontario has clear and largely appropriate legal duties for substitute decision-makers.
- There are many important legal protections for persons lacking or who may be lacking legal capacity.
- Powers of attorney are simple and accessible.
- The legislation acknowledges the important role of families.
- The Consent and Capacity Board is an accessible forum for dispute resolution.
- The Public Guardian and Trustee is a necessary and important institution.

### Areas of Concern

The LCO's research and consultations also revealed several important areas of concern. This is perhaps not surprising, given the complexity of the system and the length of time since the last major law reform effort. The LCO's areas of concern will be familiar to many of the individuals and institutions who work in the system today. Many of these concerns overlap with one another. These include:

- The system is confusing and complex.
- The system lacks coordination.
- There is a lack of clarity and consistency for capacity assessments.
- There is a need for legal tools that are less binary and more responsive to the range of needs of those directly affected.
- Individuals, families, and service providers need more supports.
- Guardianships are insufficiently limited, tailored and flexible.
- Oversight and monitoring mechanisms for substitute decision-makers need to be improved.
- There are significant barriers to Capacity Assessments under the *Substitute Decisions Act, 1992*.

- There is a lack of meaningful procedural protections under the *Health Care Consent Act, 1996*.
- The rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992* are inaccessible to many Ontarians.
- There is a need for statutory provisions regarding detention of persons lacking capacity.
- The system needs to promote pilots, monitoring, research and evaluation.

## FINAL REPORT: SUMMARY AND RECOMMENDATIONS

The LCO has concluded that many of the fundamental objectives, policy choices, structures, legal instruments, and procedures governing capacity, decision-making and guardianship in Ontario remain sound. In some cases, there are opportunities to learn from experiences with the current legislation. As a result, the LCO's recommendations identify practical solutions that maintain and build on the strengths of the current system while addressing areas that need improvement. The LCO believes that its recommendations are practical, achievable, and will benefit persons affected, their families, institutions, and service providers across the province.

The *Final Report* includes detailed recommendations of a range of issues. The following section summarizes the discussion and major recommendations in each chapter of the *Final Report*. Appendix A to this Executive Summary and the *Final Report* itself set out the LCO's specific and final recommendations.

### Chapters 1 – 3

Chapters 1 to 3 establishes the groundwork for the *Final Report*. Chapter 3, for example, discusses the two LCO Framework projects – the *Framework for the Law as It Affects Older Adults* and the *Framework for the Law as It Affects Persons with Disabilities* – and establishes a set of principles and purposes to guide the legislation and its implementation.

In these chapters, the LCO recommends (**Recommendations 1-2**) that:

1. The Ontario government identify purposes and principles for capacity, decision-making and guardianship legislation consistent with the LCO *Frameworks*; and,
2. The Ontario government develop an overall strategy for reform that includes data collection, reporting and evaluation.

### Chapter 4: New Approaches to Decision-Making

This area of the law centres on a functional and cognitive approach to legal capacity, paired with a substitute decision-making approach. This approach is consistent with other common law jurisdictions. Emerging approaches rooted in disability-rights frameworks and which find expression in Article 12 of the *Convention on the Rights of Persons with Disabilities*, propose a move towards “supported decision-making”. This

approach aims to preserve the legal capacity of persons with impaired decision-making abilities through the appointment of “supporters” who will assist those persons to make decisions. The concept and operation of supported decision-making raises both challenges and opportunities for law reform.

The *Final Report* emphasizes the importance of increasing self-determination for all persons affected by these laws. The *Final Report* identifies the diversity of needs and goals among persons directly affected and notes the potential benefits of supported decision-making approaches to meet the needs of some individuals and some communities. The *Final Report* identifies new processes, tools and legal instruments to meet these needs. Consistent with the LCO’s emphasis on evidence-based policy-making, the *Final Report* discusses the need for ongoing pilots and evaluation of any new models or approaches. The LCO recommendations would place Ontario at the forefront of decision-making issues internationally.

In this chapter, the LCO recommends (**Recommendations 3-9**) that:

1. The human rights concept of accommodation be incorporated into approaches to legal capacity;
2. The Government of Ontario develop pilot projects on autonomy-enhancing decision-making practices and undertake continued monitoring and study of emerging practices and laws;
3. The existing requirements for autonomy-enhancing practices be strengthened;
4. The Government of Ontario develop legislation to enable individuals to enter into support authorizations for day-to-day decision-making needs; and
5. The Government of Ontario and others work towards the development of a statutory framework for network decision-making.

## **Chapter 5: Assessing Legal Capacity: Improving Quality and Consistency**

Chapter 5 of the *Final Report* discusses capacity assessments, another fundamental issue in this area of law. The *Final Report* summarizes and analyzes the multiple systems for analyzing capacity in Ontario today. Each assessment system has its own approach to balancing the competing needs for accessibility and accountability, and preservation of autonomy versus the protection of the vulnerable.

During our consultations, the LCO heard many concerns that the overall system for assessing capacity is complicated, inconsistent and difficult to navigate. Most importantly, the LCO heard serious concerns about the quality of some forms of capacity assessments. The LCO heard concerns about specific forms of assessment, such as the barriers to accessing assessments under the *Substitute Decisions Act, 1992* (SDA), and the lack of quality assurance measures for assessments under the *Health Care Consent Act* (HCCA). There was also particular concern about the lack of procedural protections for persons assessed for capacity to consent to admission to long-term care and for health care consent more generally.

The *Final Report's* recommendations build on the strengths of existing systems, while identifying practical measures to improve the quality, consistency and rights protections between and within Ontario's capacity assessment systems.

In this chapter, the LCO recommends (**Recommendations 10-24**) that:

1. The Government of Ontario design and implement a statutory process for decision-making respecting detention for persons who lack capacity but who do not fall within the MHA;
2. The Government of Ontario clarify and tailor the purposes and proper usage of assessments under the SDA and MHA;
3. The Government of Ontario develop a strategy to improve access to Capacity Assessments under the SDA;
4. The standards for capacity assessments under the HCCA and MHA be clarified, including the development of minimum standards for the provision of rights information under the HCCA;
5. The Government of Ontario develop a strategy to expand access to independent and expert advice about rights for individuals found incapable under the HCCA;
6. Local Health Integration Networks, Health Quality Ontario, and the Ministry of Health and Long-term Care work to improve the quality, monitoring and oversight of capacity assessments under the HCCA.

## **Chapter 6: Powers of Attorney: Enhancing Clarity and Accountability**

Chapter 6 of the *Final Report* discusses powers of attorney (POA). POAs are important because they are very common forms of substitute decision-making. They are also probably the most “private” in that POAs in practice are rarely subject to outside scrutiny.

It is widely acknowledged that POAs are important legal tools for individuals, families, health care professionals, institutions, and many others. From the inception of this project, however, there have been widespread concerns about misuse and outright abuse of POAs. There is particular concern about financial abuse of older persons through POAs.

In developing recommendations to address these concerns, the LCO is mindful of the need to preserve the key benefits of POAs: their accessibility, flexibility and enhancement of choice for Ontarians. Our recommendations, therefore, focus on increasing clarity and understanding among both grantors and attorneys, and providing more options for accountability. The *Final Report* does not adopt proposals to create a mandatory registry, require the involvement of a lawyer to create a POA for property, or create mandatory reporting or random audits for attorneys.

In this chapter, the LCO recommends (**Recommendations 25-28**):

1. A mandatory, standard-form Statement of Commitment to be signed by persons accepting an appointment as an attorney, prior to acting for the first time under the appointment;

2. The delivery of Notices of Attorney Acting at the time that the attorney first begins to act: these would be required to be delivered to the grantor, the spouse, any previous attorney and any monitor appointed, as well as for any other persons identified in the POA instrument;
3. The option to name a monitor, who would have statutory powers to visit and communicate with the grantor, and to review accounts and records kept by the attorney.

## **Chapter 7: Rights Enforcement and Dispute Resolution**

Chapter 7 of the *Final Report* discusses access to justice, rights enforcement and dispute resolution. The *Final Report* states that access to justice and rights enforcement underpin the entire system. This chapter includes the LCO's analysis of the jurisdiction of the Consent and Capacity Board (CCB) and Superior Court.

The LCO heard repeatedly that the current Superior Court-based system for resolving issues under the SDA is inaccessible to all but a few, and as a result, the rights under the law are frequently not enforced and the promise of the legislation is unfulfilled. Stakeholders expressed wishes for a system that is more accessible, flexible, responsive, specialized and holistic. They also argued for greater use of approaches that can respect the ongoing relationships that are at the heart of so much litigation in this area. The *Final Report* proposes significant reforms in this area. The *Final Report* also makes further recommendations to improve access to justice.

In this chapter, the LCO recommends (**Recommendations 29-38**) that:

1. The Government of Ontario work towards the creation of a specialized, expert tribunal with broad jurisdiction in this area of the law, and the ability to provide flexible and holistic approaches to disputes;
2. The use of alternative dispute resolution approaches be strengthened;
3. Supports for litigants be strengthened, including Section 3 and Legal Aid Ontario supports;
4. The mandate of the Public Guardian and Trustee be updated to clarify its powers respecting "serious adverse effects" investigations;
5. HCCA rights enforcement be improved through allowing a broader range of individuals to bring certain applications to the Consent and Capacity Board.

## **Chapter 8: External Appointment Processes**

Chapter 8 of the *Final Report* discusses the law, policy and practice for external appointments of guardians. Guardians are appointed through two processes: court appointments, and the much more common statutory appointments. Statutory appointments, available only for property guardianships, result in automatic appointments for the Public Guardian and Trustee (PGT), with families able to apply to act as replacement guardians.

External appointments of guardians should be a last resort due to their extraordinary impact on the autonomy of the individuals affected. The *Final Report* includes several recommendations to divert individuals from guardianship where it is not necessary, and to make guardianship more flexible and tailored to the needs of individuals.

In this chapter, the LCO recommends (**Recommendations 39-45**) that:

1. The Government of Ontario strengthen existing requirements for consideration of a “least restrictive alternative” by enabling adjudicators to request expert reports;
2. The Government of Ontario conduct research and consultations towards replacing statutory guardianship with an adjudicative process;
3. The Government of Ontario develop time-limited or reviewable guardianship orders;
4. The Government of Ontario create limited property guardianships, in parallel with existing limited personal care guardianships; and
5. The Government of Ontario amend the SDA to permit adjudicators to appoint representatives to make a single decision.

## Chapter 9: New Roles for Professionals and Community Agencies

Currently, almost all substitute decision-makers are family members, with the Public Guardian and Trustee filling a vital role where family members do not act. Shifts in demographics and family structures, together with the challenges associated with this role, make this approach increasingly tenuous. There are growing pressures on the role of the PGT. LCO staff heard many concerns about a “personal care gap”, where individuals who are socially isolated increasingly find themselves with no one to act as their substitute decision-maker for personal care. There are concerns that unregulated for-profit substitute decision-makers are stepping into the gap.

The *Final Report* proposes the reforms that would provide individuals with greater choice, allow the PGT to more effectively focus its role, and reduce risks of abuse.

In this chapter, the LCO recommends (**Recommendations 46-48**) that:

1. Further research and consultation be conducted towards establishing a dedicated licensing and regulatory system for professional substitute decision-makers;
2. Further research and consultation be conducted towards allowing community agencies to provide substitute decision-making for day-to-day decisions;
3. The Government of Ontario focus the mandate of the PGT on providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.

## Chapter 10: Education and Information

Stakeholders agreed that improved education and access to information about rights and responsibilities is central to effective implementation of the law in this area. The *Final Report* emphasizes partnership and collaboration between the many institutions that interact with this area of the law, with government providing a focal point for coordination and strategic development.

In this chapter, the LCO recommends (**Recommendations 49-58**) that:

1. The assumption by the Government of Ontario of a statutory mandate to identify strategies and priorities, coordinate and develop initiatives, and develop and distribute materials, including through the creation of a central clearinghouse;
2. Strengthened roles for professional educational institutions, professional regulatory bodies, and the Ministry of Health and Long-term Care;
3. Clarification of the duty of health practitioners to provide information to substitute decision-makers upon a finding of incapacity;
4. Empowering adjudicators under the SDA to order substitute decision-makers to obtain education on specific aspects of his or her duties.

## Chapter 11: Priorities and Timelines

The final chapter of the *Final Report* sets out a short, medium, and long-term implementation plan for the report's recommendations, as well as identifying priorities for reform.

## MORE INFORMATION

More information about the project, including the project's final report, background papers, and other important documents are available on the LCO's website at [www.lco-cdo.org](http://www.lco-cdo.org). The LCO can be contacted at:

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# 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</i> , England and Wales
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



# Legal Capacity, Decision-making and Guardianship

## CHAPTER ONE

## Introduction to the project

## A. INTRODUCTION

At any given time, laws regarding legal capacity, decision-making and guardianship affect tens of thousands of Ontarians. 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.

These laws also affect tens of thousands of families and caregivers, as well as thousands of professionals, service providers, and institutions, financial institutions, health and social service professionals, hospitals and retirement homes, lawyers, governments, countless community agencies, and many others.

Most Ontarians will, at some point in their personal or professional lives, encounter this area of the law.

This *Final Report* concludes an extensive, multi-year Law Commission of Ontario (LCO) project reviewing Ontario's statutory framework for legal capacity, decision-making and guardianship. The project has examined issues related to concepts of legal capacity and decision-making, the use and misuse of powers of attorney, and appointment and dispute resolution processes, among other issues. It builds on the principles and considerations identified in the LCO's two *Frameworks* for the law as it affects older adults and the law as it affects persons with disabilities,<sup>1</sup> as well as taking into account what was learned from the project on *Capacity and Legal Representation for the Federal RDSP*.<sup>2</sup> The LCO has brought to this project its holistic, multi-disciplinary approach to law reform, and its commitment to open and transparent processes and to broad public consultation.

This report is the culmination of the most comprehensive process in the LCO's history. The project began with wide-ranging scoping interviews in early 2013 and the commissioning of several expert papers. In June 2014, the LCO released a comprehensive *Discussion Paper*<sup>3</sup> and *Summary of Consultation Issues*.<sup>4</sup> The subsequent public consultations allowed us to hear from hundreds of Ontarians, including private individuals, experts and institutional stakeholders. In January 2016, we released for feedback an *Interim Report*<sup>5</sup> with draft recommendations.

These laws also affect tens of thousands of families and caregivers, as well as thousands of professionals, service providers, and institutions, financial institutions, health and social service professionals, hospitals and retirement homes, lawyers, governments, countless community agencies, and many others.

**The LCO believes that these recommendations strike a careful balance between competing needs and perspectives and would significantly enhance the ability of Ontario's legal framework in this area to maximize self-determination, provide safeguards for those who are vulnerable, and provide effective and meaningful options for the diverse array of individuals and stakeholders who encounter it every day.**

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.<sup>6</sup> The foundations underlying the current law, of maximizing autonomy and reducing intervention, empowering families, and providing a “safety net” against exploitation and abuse of persons with impaired decision-making abilities, remain largely sound. However, much has changed since these laws came into effect, including evolving understandings of legal needs and of the rights of persons with disabilities and older persons, substantial social and demographic changes, and an ever more complex service delivery landscape. The LCO’s work revealed significant challenges in ensuring effective access to the law, providing a wide enough range of options to meet the diverse needs of those directly affected, and providing coordinated approaches across the system.

The LCO’s approach to reform has focussed on promoting the principles underlying the *Framework* projects, recognizing the diversity of needs and experiences among those directly affected and among stakeholders, acknowledging and responding to complexity, and building on the strengths of Ontario’s existing laws, policies and institutions. The central priorities for reform have been reducing unnecessary and inappropriate intervention in the lives of individuals, improving access to the law, and enhancing the clarity and coordination of the law. These priorities are advanced through 58 recommendations which would, if implemented, widen the range of options available to individuals, promote access to education and information, strengthen safeguards against abuse, enhance procedural protections, and support more meaningful rights enforcement and dispute resolution. The LCO believes that this approach builds on the strengths of the current system while responding to contemporary needs, and provides a strong foundation for the ongoing evolution of 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. While consultations have indicated broad support for the general thrust of the LCO’s approach, it is inevitable that not all will agree with all recommendations. The LCO believes that these recommendations strike a careful balance between competing needs and perspectives and would significantly enhance the ability of Ontario’s legal framework in this area to maximize self-determination, provide safeguards for those who are vulnerable, and provide effective and meaningful options for the diverse array of individuals and stakeholders who encounter it every day.

## B. SCOPE, NEEDS AND PRIORITIES FOR REFORM

### 1. Project Scope

The project addresses the following six issues:

1. The **standard for legal capacity**, including tests for capacity and the various avenues and mechanisms for assessing capacity under the *Substitute Decisions Act, 1992* (SDA), *Health Care Consent Act, 1996* (HCCA) and *Mental Health Act* (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.

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, and which were not being addressed by other bodies.

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),<sup>7</sup> *Substitute Decisions Act, 1992* (SDA)<sup>8</sup> and Part III of the *Mental Health Act* (MHA)<sup>9</sup> dealing with examinations of capacity to manage property upon admission to a psychiatric facility. The LCO is not making recommendations about the common law of capacity and consent,<sup>10</sup> capacity to consent under privacy law<sup>11</sup> or consent to research, or broader aspects of the MHA such as community treatment orders. Nor does the project address issues such as the extra-judicial recognition of powers of attorney, or 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, and which were not being addressed by other bodies.



The LCO has concluded that the objectives and general framework of the current legislative framework is sound. Experience has demonstrated, however, that for a variety of reasons, individuals continue to be subject to unnecessary restrictions on their autonomy.

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.<sup>12</sup> 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 3 will discuss the implications of the *Frameworks* for this project and for this area of the law.

During the timeframe of this project, the LCO also undertook, at the request of the Ontario government, an independent review of how adults with disabilities might be better enabled to participate in the federal Registered Disability Savings Plan (RDSP). The resultant LCO project, *Capacity and Legal Representation for the Federal RDSP*, recommended 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.<sup>13</sup>

## 2. Needs and Priorities for Reform

The LCO's extensive consultations and research identified both strengths and weaknesses within the current legal framework. Notably, the LCO believes that the values and priorities that underlay the law reform efforts of the 1990s remain relevant and that in most respects, the current laws retain broad appeal and support. The LCO has further concluded, however, that there are three broad areas of potential reforms that should be addressed to ensure the system meets the contemporary needs of individuals, families, service providers and institutions in Ontario today.

### 1. Reducing unnecessary and inappropriate intervention

Building on the influential recommendations in the 1987 *Fram Report*,<sup>14</sup> the current legislation contains many provisions specifically intended to advance the autonomy and self-determination of those who fall within its scope. These include 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.

The LCO has concluded that the objectives and general framework of the current legislative framework is sound. Experience has demonstrated, however, 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.

...[T]here 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.

The LCO is recommending several initiatives that would reduce unnecessary interventions, including:

- clarifying the application of the 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.

The LCO is recommending several initiatives that would improve access to the law for individuals directly affected and for families including:

- 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.

...[T]he 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.

### 3. Making the law clearer, more consistent, and easier to navigate

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.

The LCO is recommending several initiatives that would that would make the law clearer, more consistent, and easier to navigate, including:

- 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.

## C. THE PROJECT PROCESS

Reflecting the importance of these laws, the complexity of the issues, and the potential impact of reforms on Ontarians, this has been the largest project in the history of the LCO, involving the most extensive outreach and consultations.

Important steps and milestones in this project include:

- **Preliminary Consultations and Project Scoping:** Work on this project began 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.

The LCO received 16 formal written submissions, most of which were lengthy documents dealing in-depth with particular reform options.

- **Project Advisory Group:** In 2013, the LCO created a project Advisory Group to provide 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 at the front of this *Final Report*.
- **Expert Papers:** 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.
- **Public Consultations:** 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. 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 F. 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. The LCO also 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 of respondents) were acting for an adult child.

...[T]he LCO has heard directly from close to 800 individuals and organizations, many of whom engaged substantively with the LCO throughout the life of the project.

- *Focus Groups:* The LCO conducted thirty focus groups 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 D.
- *Consultation Interviews:* In the late fall and early winter of 2015-2016, 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.

**Interim Report:** In January 2016, the LCO released an *Interim Report* which set 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. This *Interim Report* was widely circulated for feedback. The LCO received 19 formal written submissions, held five focus groups, and conducted formal interviews with several individuals. As well, the City of Toronto organized a stakeholder forum, which was attended by over 65 individuals representing a range of service providers. The LCO also held less formal discussions with a variety of organizations and individuals. The feedback period closed on March 4, 2016.

All told, the LCO has heard directly from close to 800 individuals and organizations, many of whom engaged substantively with the LCO throughout the life of the project. A list of professionals and organizations consulted can be found in Appendix C. As well, the LCO conducted approximately 30 public presentations on this project, in this way reaching hundreds more individuals.

It is not possible within the span of this *Final 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 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 often affects individuals who are often already facing many challenges.

## D. THE FINAL REPORT

This *Report* is the culmination of a project that has examined the law of capacity, decision-making and guardianship as a whole. Many of the issues addressed in this *Report* could have been the subject of projects in themselves. However, the adoption of this broad approach has allowed us to understand and take into account the complex interactions between the many aspects of this area of the law. This is a significant contribution to the discussion. However, the scope and ambition of the project mean that the *Report* is necessarily lengthy.

This Final Report sets out the LCO's analysis of the issues, based on public consultations and research, together with recommendations for changes to law, policy and practice to address the identified priorities for reform.

As well, the *Report* is intended not only to identify solutions to current issues, but to provide an authoritative resource on these laws, and to reflect the complexity of their implementation. In particular, the LCO has been privileged to hear from hundreds of Ontarians about their experiences with and views on these laws: this *Report* records and shares this expertise.

This *Report* is not intended to repeat the material set out in the LCO's earlier *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*. This *Final Report* sets out the LCO's analysis of the issues, based on public consultations and research, together with 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 November 2, 2016.

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

**Chapter 2** 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 3** briefly describes the LCO's *Frameworks* and considers their application to this area of the law.

**Chapter 4** considers concepts of legal capacity and approaches to decision-making, and in particular discusses opportunities for integrating supported decision-making into Ontario's legal framework, and means for promoting attention to the voices of persons with impaired decision-making abilities within current decision-making approaches.

Each of Chapters 3 through 10 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 recommendations for reform.

**Chapter 5** 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 6** reviews concerns related to lack of accountability and transparency in appointment processes for powers of attorney and proposes reforms.

**Chapter 7** addresses shortcomings in Ontario's available mechanisms for enforcing rights and resolving disputes in this area of the law.

**Chapter 8** sets out reforms to guardianship appointment processes aimed to increase the flexibility of these processes and reduce unnecessary intervention.

**Chapter 9** considers new roles for professionals and community agencies in expanding options for substitute decision-making.

**Chapter 10** 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 11** briefly discusses priorities and timeframes for implementation of the recommendations.

Each of Chapters 3 through 10 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 recommendations for reform. At the end of each Chapter, a brief summary of the recommendations is provided.







# Legal Capacity, Decision-making and Guardianship

## CHAPTER TWO

# Overview of legal capacity, decision-making and guardianship in Ontario

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.

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 core elements of Ontario's approach and how each aspect fits into the entire scheme. This Chapter concludes with a summary analysis of the strengths and weaknesses of this system. Further details of key provisions are set out in the relevant Chapters.

## A. INTRODUCTION TO ONTARIO'S LEGAL FRAMEWORK FOR 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** (1990) ("*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.<sup>15</sup>
- **The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons** (1987) ("*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",<sup>16</sup> 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.<sup>17</sup>

- **The Review of Advocacy for Vulnerable Adults** (1987) (“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.<sup>18</sup>

Ontario’s resulting statutory framework for legal capacity, decision-making and guardianship is complex, extensive, intricate and nuanced. At its core are two statutes:

- The *Substitute Decisions Act, 1992* (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 which are not addressed in this project, including those related to access to personal health information and the common law. 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.

It is important to keep in mind that these laws are administered through a complex array of public and private institutions, all across the province.

For example, there are at least seven provincial ministries or institutions involved in delivering this legislation, including 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, the Public Guardian and Trustee (PGT), the Consent and Capacity Board (CCB) and the Superior Court of Justice.

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.

The complexity of this legal framework and its administration has important implications for this project.

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.

## B. KEY ASSUMPTIONS AND POLICY CHOICES

Ontario's legal framework for legal capacity, decision-making and guardianship is premised on several key policy choices. These choices underpin the legislative regime and many of the policies and practices within it.

**First**, Ontario's approach to legal capacity is functional and cognitive. This approach emphasizes the ability to make a specific decision or type of decision, evaluating the ability of the individual to understand, retain and evaluate information relevant to a decision. 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.

...[T]here is a clear preference for the private realm. Ontario's statutory regime encourages the use of family and friends as substitute decision-makers.

**Second**, 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.<sup>19</sup> 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.<sup>20</sup>

**Third**, there is an emphasis on procedural rights. For example, individuals examined for capacity to manage property under the MHA are entitled to rights advice. Capacity assessors must explain the purpose and significance of an assessment, and the individual has the right to refuse the assessment. Determinations of capacity may be reviewed by the CCB; as well, the affected individual may request a fresh assessment on a regular basis. Both the SDA and the HCCA include provisions for the appointment of counsel for persons whose legal capacity is at issue.<sup>21</sup>

**Fourth**, there is a core focus on protecting self-determination to the degree possible. Powers of attorney aim to enable individuals, not only to choose their own substitute decision-maker, but to tailor the powers granted and to express wishes as to how those powers will be exercised. Substitute decision-makers are, in most circumstances, required to encourage participation in decision-making and to take into account the values and wishes of those for whom they are acting. Courts are not to appoint a guardian without considering whether a less restrictive alternative is available.

**Finally**, there is a clear preference for the private realm. Ontario's statutory regime encourages the use of family and friends as substitute decision-makers. The SDA makes powers of attorney relatively simple and inexpensive to create and to exercise,

while the HCCA uses a hierarchical list of appointees, with the PGT acting only if no individual identified through that list is capable, of appropriate age, available and willing. While the MHA automatically creates a property guardianship by the PGT for incapable persons without a valid power of attorney, it also provides what was intended to be a relatively simple and inexpensive mechanism under the SDA through which family members can replace the PGT as guardians.

All of this must be understood in the context of policy choices in related areas, including decisions not to implement adult protection or broad based mandatory reporting requirements with respect to abuse of adults, and the new approaches to developmental services arising from the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*.

## C. IMPORTANT LEGAL PROCEDURES AND INSTITUTIONS

This section summarizes the major legal procedures and institutions involved in this area.

### 1. Statutory Mechanisms to Assess Capacity

Ontario has an extremely elaborate system for assessing legal capacity, in part deriving from its domain specific approach to capacity. In other words, Ontario's system for determining legal capacity is complex because it is intended to respond to a multiplicity of needs and situations. 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, unless the power of attorney specifies otherwise, the determination of incapacity must be

Ontario has an extremely elaborate system for assessing legal capacity, in part deriving from its domain specific approach to capacity. In other words, Ontario's system for determining legal capacity is complex because it is intended to respond to a multiplicity of needs and situations.

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 provided in a long-term care setting. 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.

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, such as a guardian, person acting under a power of attorney or a substitute decision-maker under the HCCA will make that decision.

## 2. 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, such as a guardian, person acting under a power of attorney or a substitute decision-maker under the HCCA will 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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

### **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.

**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.**



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 a 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.

**Statutory guardianship is intended to provide an expeditious, relatively low-cost administrative process for entering guardianship.**

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, 1996***

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.

### 3. Advance Care Planning

The SDA and HCCA create tools that allow individuals to plan ahead for how decisions will be made on their behalf, should that become necessary. Through a POA for personal care, they may identify who will be their substitute decision-maker if they do not agree with the hierarchy of automatic SDMs under the HCCA. They may also express wishes, values and beliefs about future health care decisions orally or in writing. Advance care planning does not constitute consent to treatment: consent must still be obtained from the SDM, except in emergencies. 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. The emphasis in Ontario law is on the role of the SDM in conveying and interpreting the prior capable wishes and in providing consent.

Advance care planning is not the same as an “advance directive”, which allows an individual to provide directions to health care practitioners with respect to treatments they will accept or refuse in future. Ontario differs from several other Canadian jurisdictions, in that advance directives are not available here.

Issues related to advance care planning and the final stages of life are currently the subject of considerable discussion and debate. The challenging issues associated with implementation of the Supreme Court of Canada's decision in *Carter v. Canada* regarding physician-assisted dying add importance to achieving an effective and appropriate statutory framework for issues related to capacity, consent and advance care planning. The LCO has commenced a project on *Improving the Last Stages of Life* which will address a number of issues related to the final stages of people's lives as they approach death.<sup>25</sup>

### 4. The Public Guardian and Trustee (PGT)

As noted above, responsibility for the administration of Ontario's legal capacity and decision-making legislation falls under multiple statutes and government ministries.

**Advance care planning is not the same as an “advance directive”, which allows an individual to provide directions to health care practitioners with respect to treatments they will accept or refuse in future. Ontario differs from several other Canadian jurisdictions, in that advance directives are not available here.**

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.

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.

## 5. 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

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*, repealed in 1996, 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.

personal assistance services provided in a long-term care home, a physician with respect to the capacity to manage property under the MHA, 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 contrast to the CCB, the Ontario Superior Court of Justice has a more limited but still crucial role in this area of law. The Superior Court of Justice is responsible for the appointment, variance and termination of guardianships, as well as 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*, repealed in 1996, 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 then *Consent to Treatment Act, 1992* (since replaced by the HCCA), assisting individuals to access the otherwise largely passive statutory mechanisms for asserting rights and reducing needs for monitoring and oversight functions.

## D. SUMMARY: STRENGTHS AND WEAKNESSES OF LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP IN ONTARIO

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

### 1. Strengths

...[O]ntario'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.

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.

**Emphasis on the importance of self-determination:** *Charter* and human rights values of self-determination and freedom from unwarranted intervention underlie many aspects of the current legislative framework, resulting in an emphasis on respecting where possible the right of individuals to make choices that others disagree with or that may be risky or unwise.

**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, an approach designed to be responsive to individual circumstances and contexts, and to reduce intervention as much as possible.

**Contextual approach:** Ontario's approach aims to be sensitive to the multiple contexts in which legal capacity and decision-making issues arise, so that processes are tailored to the specific circumstances of, for example, persons admitted to psychiatric facilities or older persons for whom long-term care is in contemplation.

**Accessible powers of attorney:** In Ontario, powers of attorney are very simple and low-cost to create, making them an 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

**The balance struck in Ontario's advance care planning 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 on a sound principled basis.**

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.

**Enabling families:** The automatic appointments of SDMs under the HCCA and the accessibility of POAs under the SDA make it easy, in most cases, for families to be appointed to act for their loved ones. Once SDMs are appointed, the current approach allows a great deal of flexibility and discretion in how duties are carried out.

**Balanced approach to advance care planning:** The balance struck in Ontario's advance care planning 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 on a sound principled basis.

**Protection of procedural rights for persons lacking or perceived to be lacking legal capacity:** The legislation makes provision for procedural rights in most situations where legal capacity is removed. This embodies a recognition that removal of the right to make one's own decisions is a serious infringement on autonomy, and attempts 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 overall provides accessible and timely 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. Weaknesses

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

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. Complexity is perhaps inevitable in any system that is designed to be responsive to multiple needs and contexts. Nevertheless, the LCO believes that the system could be clarified in some important respects.

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. Complexity is perhaps inevitable in any system that is designed to be responsive to multiple needs and contexts. Nevertheless, the LCO believes that the system could be clarified in some important respects.

**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 shortcomings 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 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.



Ontario's systems related to legal capacity, decision-making and guardianship are highly decentralized.

**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 directly affected and their families. Some individuals will attempt to represent themselves in the court system, while others decide that they must abandon attempts to enforce their rights. As a result, the rights under the legislation often go unfulfilled. This raises fundamental issues of access to justice.

**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.

**Impact on institutions and service providers:** Because of the complexity of the system, institutions and service providers may themselves experience difficulty in navigating the system – for example, in identifying the appropriate mechanism for meeting a particular person's need for an assessment of legal capacity, or how to address a concern regarding potential abuse.

**Challenges in monitoring and evaluating the system:** Ontario's systems related to legal capacity, decision-making and guardianship are highly decentralized. As a result of the relative lack both of central coordinating institutions or mechanisms and of means for gathering and disseminating data about the operation of the system, there are challenges in evaluating the current system, whether on an ongoing basis to correct problems of implementation, or as part of a more thorough-going review.







# Legal Capacity, Decision-making and Guardianship

## CHAPTER THREE

# Applying the LCO *Frameworks* to Ontario's legal capacity, decision-making and guardianship laws

...[A]dopting 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.

## A. INTRODUCTION: THE *FRAMEWORKS* FOR THE LAW AS IT AFFECTS OLDER ADULTS AND PERSONS WITH DISABILITIES

As was highlighted in Chapter 1, 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.<sup>26</sup> These projects were designed to develop approaches to law reform relating to these two 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 E of this Paper sets out the Principles and Considerations for Implementation of each of the Frameworks for easy reference. The full Frameworks contain a step-by-step process for evaluating laws, policies and practices, including examples and questions for consideration. The full Frameworks and their accompanying Reports can be accessed 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 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.

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## B. APPLYING THE FRAMEWORKS: CONSIDERING THE CONTEXTS IN WHICH THE LAW OPERATES

Step I 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.<sup>27</sup> 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.<sup>28</sup>*

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. Therefore, to the extent possible, we need to provide not only translation, but cultural translation.

**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. Some of this material is highlighted on the following page.

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.<sup>29</sup> 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 Indigenous 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. Therefore, to the extent possible, we need to provide not only translation, but cultural translation.

**Cultural translation:** 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. It may be valuable to prepare written or oral supports first, not 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 often affecting those most deeply affected by this area of the law, and the significant implications of this for any approach to law reform. 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.

## Persons Affected by Legal Capacity Laws: Some Background

### Persons with Acute Illnesses

- Those who temporarily lose legal capacity to make decisions in the context of treatment for an acute illness make up a very large but amorphous group of persons affected by this area of the law.

### Older Persons Developing Cognitive Disabilities Later in Life

- In 2008, 7 per cent of Canadians age 60 and older lived with some degree of dementia, while 49 per cent of those over age 90 did so. The Alzheimer's Society of Canada's recently estimated that the prevalence of dementia will more than double over the next 30 years, up from 1.5 per cent of Canada's population in 2008 to a projected 2.8 per cent of the population in 2038.
- The vast majority of older adults – 93 per cent – live in private households. “Aging in place” is the goal of the vast majority of older adults. As age increases, so does the likelihood of living in a congregate setting, such as a retirement home or long-term care home: approximately one-third of individuals over the age of 85 live in such a setting

### Persons with Developmental or Intellectual Disabilities

- Statistics Canada's 2006 *Participation and Activity Limitations Survey* (PALS) found approximately 0.5 per cent of Canadians age 15 or older living with a developmental disability
- The experience of disability will follow these individuals throughout their lives, substantially influencing their access to education and employment, and shaping their personal relationships, expectations and opportunities. Persons with intellectual or developmental disabilities are particularly likely to experience low-income. According to PALS 2006, the median income for persons with a developmental disability age 15 and older was \$10,415, the lowest for all categories of disability
- Persons with milder developmental disabilities may now live as long as the general population. This means many will outlive their parents, who are often their primary caregivers.

### Persons with Mental Health Disabilities

- Mental health disabilities encompass a wide range of conditions of greater and lesser severity, only some of which will result in impairments to the ability to understand information and to appreciate the risks and benefits of various courses of action.
- Mental health disabilities differ from other types of disabilities that may affect capacity in that they are often episodic.
- Unemployment and underemployment, lack of access to safe and affordable housing and to appropriate educational opportunities all contribute to poverty among persons with mental health disabilities, as well as exacerbating their illness and reducing the options that they have available to them in terms of housing and services.

### Persons with Acquired Brain Injuries

- Information about the number of Ontarians living with an acquired brain injury is difficult to come by, since the available data use varying terminology, and may include individuals with mild brain injuries or those who die as a result of their injuries.
- A survey by the Ontario Brain Injury Association found that 95 per cent of respondents had trouble with their memory, 93 per cent had trouble concentrating, 91 per cent had trouble making decisions, 80 per cent experienced anxiety, and most reported depression, trouble controlling their anger and mood swings.

*Material drawn from the LCO's Discussion Paper, Part I, Chapter IF*

**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. It is difficult to see how these roles could be effectively fulfilled if family members did not so often voluntarily assume them.

...[W]hile 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.

As lifespans extend, as more adults divorce or remain single throughout their lives, as individuals have fewer or no children, and as families become more geographically dispersed, the number of individuals who have no family member or close friend who is both willing and able to provide supports or act as a substitute decision-maker continues to grow. Given the heavy reliance of Ontario's capacity, decision-making and guardianship law on family members and the nature of the Public Guardian and Trustee as a government service and an organization of last resort, this trend is likely to pose a challenge to the system.

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.

**While supportive communities of caring individuals can be the best protectors against abuse or mistreatment of persons who need assistance with decision-making, 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 or responding to family dynamics.**

**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 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 can be the best protectors against abuse or mistreatment of persons who need assistance with decision-making, 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 or responding to 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 of 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.

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

**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.**



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.

**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.**

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 older persons may be inappropriately treated like children.

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.

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## 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.

### 1. Respecting Dignity and Worth

#### The LCO Framework Principles: 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 Reports<sup>30</sup> 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

...[P]arents 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.

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 2, 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 LCO Framework Principles: 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.

...[M]any 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.

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”<sup>31</sup>

### 3. Fostering Autonomy and Independence

#### **The LCO Framework Principles: 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.

**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.**

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”.<sup>32</sup> In practical terms, a determination of incapacity may legitimate unwanted intervention in the life of an individual who has been so identified.

The close relationship between legal capacity and decision-making laws and considerations of liberty and autonomy was highlighted in the recent Nova Scotia case of *Webb v. Webb*. The applicant was a young man who had been under the guardianship of his parents but who was later found to be “mentally competent” within the meaning of the province’s *Incompetent Persons Act*. He brought a *Charter* challenge to the law, and the Attorney General of Nova Scotia conceded that the central provisions of the *Incompetent Persons Act* violated the section 7 rights under the *Charter*. Justice Campbell commented that while guardianship may be a reasonable and rational way to assist a person who is incapable of managing her or his own affairs, the legislation in question was over broad, in that it took an all or nothing approach to legal capacity and did not allow for tailored approaches.<sup>33</sup>

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.

However, the relationship of this area of the law to autonomy and independence is not simple. As was highlighted in Chapter 2, 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),<sup>34</sup> or the entitlement to rights advice under the *Mental Health Act* (MHA),<sup>35</sup> as just two of many examples), the provisions requiring the exploration of least restrictive alternatives prior to a guardianship order by the court<sup>36</sup> – 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.<sup>37</sup> 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”<sup>38</sup>), and the expression of currently held values, preferences and choices. 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. Issues affecting autonomy and independence are discussed throughout this *Final Report*. There is broad agreement that the current approach is not sufficiently effective in ensuring that individuals retain control over their choices and their lives to the greatest degree possible.

...[T]his 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.

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.



...[W]hile 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.

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.<sup>39</sup>

Autonomy is also limited by individual circumstance and social context. We all 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 above mentioned 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.

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 LCO Framework Principles: Respecting the Importance of Security and 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.

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.

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. 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.

- *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.*

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. 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 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.<sup>40</sup> 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.

## 5. Responding to Diversity

### **The LCO Framework Principles: 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.

#### **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.

...[T]he 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.

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.<sup>41</sup> 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 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.

### **The LCO Framework Principles: Membership in the Broader Community**

#### **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. 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. 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.**

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 *Final 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. 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.<sup>42</sup>

...[I]t 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.

### **Health Care Consent Act, 1996**

#### **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 services.

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.<sup>43</sup>

**The LCO believes that it may also be valuable to include in the *Substitute Decisions Act, 1992* a statement as to its general purpose...**

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 new legislation.<sup>44</sup> The Victorian Law Reform Commission recommended the inclusion of a principles section in reformed legislation.<sup>45</sup>

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";<sup>46</sup> 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 already incorporated in Ontario into the substance of the statute; others are not. Principles commonly included in these other jurisdictions include:

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...

- 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, though not necessarily explicitly reference the *Framework* principles, as these may be too broad to provide guidance without further detail. It should 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.

**THE LCO RECOMMENDS:**

1. The Government of Ontario include in reformed legal capacity, decision-making and guardianship legislation provisions that are informed by the LCO Frameworks for the law as it affects persons with disabilities and the law as it affects older adults, and which set out
  - a) the purposes of the legislation; and
  - b) the principles to guide interpretation of the legislation.

**2. Progressive Realization**

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.

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.<sup>47</sup>*

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 4, 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.



**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.**

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 11 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 recommendations, recognizing that while some recommendations could be implemented in the short-term, others involve greater complexity or investment of resources.

### 3. Ongoing Review and Evaluation

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.



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### **Law Commission of Ontario Framework for the Law as It Affects Older Persons Monitoring and Accountability: Questions for Consideration**

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 Final Report, is the lack of relevant and worthwhile data about many key aspects of these laws...

One of the challenges in law reform in this area, referenced throughout this *Final 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.

In recent years, governments have moved towards greater transparency and openness. Ontario has identified a government-wide initiative for “open government”.<sup>48</sup> The Open Government Engagement Team released an *Open by Default* report, with multiple recommendations to move government towards greater transparency in sharing data and information and greater receptiveness to public engagement.<sup>49</sup> A recently released *Open Data Directive* outlines requirements for ministries and provincial agencies surrounding list data inventories, publishing Open Data and preparing information system to support Open Data requirements.<sup>50</sup> A greater emphasis on the collection and public sharing of information and data related to legal capacity, decision-making and guardianship would be in harmony with an Open Government approach.

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”.<sup>51</sup> 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”.<sup>52</sup>

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.

- 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.<sup>53</sup> This review was completed in 2012.<sup>54</sup>
- The *Accessibility for Ontarians with Disabilities Act*: contained 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. Reviews were completed in 2010 and 2014.<sup>55</sup>

**Monitoring and review strategies will be most effective when built into law reform from the outset.**

Monitoring and review strategies will be most effective when built into law reform from the outset. For example, as is discussed in Chapter 6, concerns about misuse of and abuse through powers of attorney is widespread. However, as there are no mechanisms for tracking the use or abuse of these documents, it is difficult to discern the prevalence and exact nature of the problem. Reforms to strengthen transparency, accountability and oversight surrounding powers of attorney would be enhanced by an accompanying strategy for researching and monitoring abuse, and evaluating the impact of reform.

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.

**THE LCO RECOMMENDS:****2: The Government of Ontario**

- a) initiate a strategy to reform legal capacity, decision-making and guardianship law;
- b) collect, review and publicly share information and data related to this area of the law;
- c) publicly report on the progress of its strategy for reform; and
- d) commit to ongoing review and evaluation of this area of the law and the effect of reforms.

The LCO believes that the principles identified in the Frameworks, together with a nuanced understanding of the contexts and goals of 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.

**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 contexts and goals of 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 and evaluation of this area of the law and of the effects of reform 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.



# 4 Legal Capacity, Decision-making and Guardianship

## CHAPTER FOUR

# Concepts of legal capacity and approaches to decision-making: promoting autonomy and allocating 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.

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.<sup>56</sup>
- Ontario’s approach, like that of many other common law jurisdictions, is based on a **cognitive and functional** approach. This approach 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.<sup>57</sup>

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 legal 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 Final Report, Ontario's systems for assessing legal capacity are dealt with in Chapter 5.*

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.

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.

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, the social model of disability, which locates disability within society rather than the individual and focusses on social and environment barriers to inclusion, has been more widely accepted. As well, human rights approaches have continued to grow in influence both internationally and domestically. In keeping with these evolutions, 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". Urgency has been added to this discussion by the creation of the *Convention on the Rights of Persons with Disabilities* (CRPD),<sup>58</sup> ratified by Canada March 11, 2010, which addresses the issue in Article 12.

There are two broad approaches to supported decision-making:

- *Supported decision-making as one of a spectrum of alternatives:* In this approach, substitute decision-making is a last resort, where an individual's decision-making needs are too complex for other less restrictive approaches. The concept of legal capacity continues to operate as a threshold for determining appropriate approaches to decision-making for particular individuals.
- *Supported decision-making as a complete paradigm shift:* In this approach, supported decision-making replaces substitute decision-making. All individuals have legal capacity in all circumstances.

Both views were expressed during the LCO's consultations, as well as the view that supported decision-making is not an appropriate approach to incorporate into Ontario law.

Issues related to concepts of legal capacity and supported decision-making are among the most controversial in this area of the law, as well as the most difficult. They raise 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 of approaches to decision-making 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.

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.

## B. DECISION-MAKING PRACTICES AND LEGAL ACCOUNTABILITY

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 accountable 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.



...[I]t 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.

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, or between a guardianship and a power of attorney, or other basics of the legislative framework. Very few substitute decision-makers (SDM) 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: 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 falls short in practice.

Ontario law sets out important requirements for good decision-making practices, such as promoting participation by the individual and paying careful attention to the individual's wishes and values. However, 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.

• *Practical ways in which the problem of mistreatment or abusive decision-making practices can be reduced are addressed in Chapter 6.*

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.<sup>59</sup> The LCO heard that many families 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 roles related to decision-making, and a lack of supports for non-professional SDMs play a significant role in shortfalls in decision-making practices in Ontario.

- *Chapter 10 identifies ways in which informational supports for families and other SDMs can be strengthened.*

**Legal accountability frameworks** come into play in many circumstances, including contracts or agreements with respect to services. For example, law 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. By way of contrast, in the more private realm of decision-making practices, considerations of autonomy, security and dignity are pre-eminent.

Legal accountability structures and decision-making practices cannot be neatly separated from each other: legal accountability structures may embody or promote particular decision-making practices. However, as the discussion of decision-making practices above illustrates, because decision-making practices exist mainly in the private realm, there is not necessarily a clean correspondence between practices and the more public realm of accountability structures.

...[S]ome of the tensions in the debates regarding legal capacity and decision-making arise from differential emphasis on the two aspects of decision-making law: decision-making practices and legal accountability structures.

The LCO has observed that some of the tensions in the debates regarding legal capacity and decision-making arise from differential emphasis on the two aspects of decision-making law: decision-making practices and legal accountability structures. Proponents of supported decision-making are often most concerned with advancing and affirming autonomy-enhancing decision-making practices: legal accountability structures are seen as mechanisms for clarifying rights to self-determination. Opponents of supported decision-making are generally most focussed on legal accountability structures and the way in which these may be employed to unjustly leave vulnerable persons with no recourse against abuse or living in untenable circumstances.

## C. CURRENT ONTARIO LAW

This section briefly outlines Ontario's current approach to the concepts of legal capacity and decision-making, as was shaped through the law reform efforts of the late 1980s and 1990s. Ontario's approach shares some fundamental elements with legal frameworks in place throughout the common law world, but also has unique aspects, growing out of Ontario's own context and history of law reform.

## 1. Ontario's Approach to Legal Capacity

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

...[O]ntario's 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. It is the ability that is most important, rather than the actual understanding or appreciation.

1. **Legislative presumption of capacity:** In most circumstances, Ontario law presumes legal capacity. The 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.<sup>60</sup> The 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".<sup>61</sup>
2. **Functional and cognitive basis for assessment of capacity:** Ontario law bases 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. Legal capacity is understood as referencing the practical decisional abilities of individuals. If a person evinces the requisite decision-making ability, the actual merit of the decision that is ultimately made is immaterial.
3. **The "ability to understand and appreciate" test:** in keeping with this functional and cognitive approach, Ontario's 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.<sup>62</sup> 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:** Ontario avoids a global approach to capacity, so that determinations of legal 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. While all are variants on the "understand and appreciate" test, in practice the requirements for meeting the test may be substantially different. In this way, the "understand and appreciate test" can operate with great flexibility, responding to its application in different contexts and for different purposes.

5. **Time limited determinations of capacity:** Ontario's regime acknowledges that decision-making abilities may vary or fluctuate over time. As a result, 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.
6. **Procedural protections for persons who may lack legal capacity:** 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.

## 2. Ontario's Approach to Substitute Decision-making

It is worthwhile to remember that in most situations where individuals have impaired decision-making abilities, 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.

...[I]n most situations where individuals have impaired decision-making abilities, the law is not invoked.

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.

### Substitute Decision-making – General

The following are the key elements of the concept of substitute decision-making as it is generally understood in common-law systems.

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 statutory prioritized list.

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.

### Substitute Decision-Making – Ontario

Ontario has incorporated into its laws the general elements of substitute decision-making described above. Its substitute decision-making regime also includes a number of important additional elements. The LCO has concluded that Ontario's statutory framework for legal capacity and decision-making places a relatively strong emphasis on autonomy-enhancing decision-making practices, together with a clear legal accountability framework which gives a central role to the substitute decision-maker.

...[O]ntario's statutory framework for legal capacity and decision-making places a relatively strong emphasis on autonomy-enhancing decision-making practices, together with a clear legal accountability framework which gives a central role to the substitute decision-maker.

1. **Decisions are based on 'substituted judgement' rather than 'best interests':** Ontario's legislation is not based on a strict 'best interests' approach in which the SDM judges for him or herself what is 'best' for the person who lacks legal capacity. For the most part, Ontario requires an SDM to attempt 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. 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.
2. **SDMs have duties to promote participation:** 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.
3. **Individuals have significant opportunities 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.

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.

4. **Trusting relationships are seen as the most appropriate foundation for 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.
5. **Approaches to decision-making are specific to particular domains and decisions:** 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.

## D. ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The rights enunciated in Article 12 of the United Nations 2008 *Convention on the Rights of Persons with Disabilities* (CRPD), ratified by Canada in March 2010,<sup>63</sup> are central to any discussion of legal capacity and decision-making. 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”.<sup>64</sup> 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.

For the purposes of this project, it is important to keep in mind that the CRPD applies to persons with disabilities (which is broadly defined), and not necessarily to all persons who may be affected by legal capacity and decision-making laws. As a result, advocates and researchers have paid less attention to the potential application of supported decision-making to older persons or persons with temporary health emergencies. Article 12 sets out requirements for States Parties with respect to legal capacity.<sup>65</sup>



There has been considerable debate about the implications of Article 12 for approaches to decision-making.

**Article 12 requires States Parties 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.

There has been considerable debate about the implications of Article 12 for approaches to decision-making.

One view of Article 12 is that it protects individuals from discriminatory determinations of incapacity based on disability status, consistent with substitute decision-making as a last resort. This appears to have been the view of Canada when it ratified the CRPD: at that time, Canada 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”.<sup>66</sup> 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”. It is the general practice of the Canadian government, when considering its position on international instruments that address matters of provincial jurisdiction, to consider the views of the provinces.

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. In this view, legal capacity is an irremovable right of all individuals in all circumstances. This view is embodied in the 2014 *General Comment* developed by the Committee on the Rights of Persons with Disabilities.<sup>67</sup> 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”.<sup>68</sup> In the view of the Committee, “there is a general misunderstanding of the exact scope of the obligations of State parties under article 12”. 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.

In summary, 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.

Needless to say, the Committee’s interpretation of Article 12 appears to be radically different from Canada’s view as set out in the *Declaration and Reservation*. Both

...[T]he 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.



envision an important role for supports to enable persons with disabilities to exercise legal capacity. Canada's approach, however, sees determinations of legal capacity as continuing to be appropriate, with supports to be provided to avoid inappropriate use of substitute decision-making. The approach in the *General Comment* requires a fundamental shift such that all individuals receive whatever supports may be appropriate to enable them to make all decision for themselves, regardless of the degree of impairment in decision-making abilities.

Neither the *General Comment* nor the *Declaration and Reservation* determines the LCO's potential recommendations. The LCO's role is 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*, neither the government of Canada nor Ontario is clearly bound to carry out the program of reform set out in the *General Comment*. However, the LCO may certainly recommend that governments take steps beyond minimum compliance with their international obligations.

There is a multiplicity of meanings given to the term "supported decision-making", even among its proponents.

## E. THE CONCEPTS OF SUPPORTED DECISION-MAKING AND CO-DECISION-MAKING

Some people believe that Ontario's legal capacity and decision-making laws should formally recognize a "supported decision-making" approach. This concept and its critics were discussed at some length in the *Discussion Paper*.

There is a multiplicity of meanings given to the term "supported decision-making", even among its proponents. 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".

The concept of supported decision-making has its basis in the social model of disability. The goal of supported decision-making is to avoid loss of legal capacity through the provision of supports by persons with whom the supported persons 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.

### Key Elements of Supported Decision-making Approaches

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 freely entered into by the individual who may require assistance in making decisions and those who will assist him or her. These arrangements cannot be imposed on the individual, and the individual must be able to exit them at will.
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.

To the degree that supported decision-making has been implemented thus far in the common law world, it has been within the functional and cognitive approach to capacity that Ontario currently applies.

In summary, “supported decision-making” may be understood as a way of articulating or promoting two goals.

- *Avoidance of legal structures that stigmatize or separate from the mainstream individuals who have difficulty in making decisions independently.* In this view, the concepts 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, are seen as detrimental to the equality rights of the individuals affected, as they remove rights that are enjoyed by others.
- *Implementing decision-making practices that promote the abilities of individuals with impairments that affect decision-making.* This includes recognition of these individuals as having values, goals and preferences that are to be respected; and promoting their inclusion and participation in the broader society.

Ideally, these two goals connect and support each other, so that legal structures promote and protect decision-making practices that enhance autonomy. In theory at least, the greater control afforded to individuals by retention of their legal status should promote positive decision-making practices.

It is also important to keep in mind the relationship between approaches to supported decision-making and concepts of legal capacity, as highlighted earlier in this Chapter. To the degree that supported decision-making has been implemented thus far in the common law world, it has been within the functional and cognitive approach to capacity that Ontario currently applies. The concept of legal capacity continues to operate as a threshold, with supported decision-making a preferred alternative to substitute decision-making. Some envision alternative approaches in which cognitive abilities become irrelevant. In these approaches, decisions are based on the will and preference of the individual, however demonstrated, and supports are applied to enable

will and preference to be actualized in decisions that remain those of the individual.

Examples of supported decision-making in common law jurisdictions include:

- support authorizations or agreements available in Alberta and the Yukon,
- representation agreements available in British Columbia and the Yukon,
- recent reforms to Ireland’s guardianship laws: Ireland retains a functional definition of capacity,<sup>69</sup> and allows for “decision-making assistance agreements” which are similar to the support authorizations or agreements available in Alberta and the Yukon.<sup>70</sup>
- recent additions to Israel’s guardianship legislation of an option for the courts to appoint a supporter for “an adult who, upon obtaining support, is able to make his own decisions in relation to his affairs”.<sup>71</sup>

**Co-decision-making is 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 – be it the substitute decision-maker (under a substitute model) or with the individual her or himself (in the supported model).**

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 this approach, 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. A decision made by the person alone is not legally valid. Co-decision-making is 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 – be it the substitute decision-maker (under a substitute model) or with the individual her or himself (in the supported model).

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.<sup>72</sup> The new legislation in Ireland includes an interesting approach to co-decision-making, which allows for personal appointments, albeit with considerable formalities and ongoing supervision of the co-decision-maker.<sup>73</sup>

Co-decision-making received very little attention during the LCO’s consultations, perhaps because it is considerably more complex, both practically and theoretically. 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.<sup>74</sup>

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.

## F. PUBLIC COMMENTS ON LEGAL CAPACITY AND SUPPORTED DECISION-MAKING

The LCO's extensive consultations for this project revealed two important findings regarding supported decision-making. First, most individuals, families and service providers were unaware of the concept. Amongst those who are aware, however, there is a striking degree of polarization. Law reform on these issues will require ongoing commitment to dialogue, and the promotion of understanding across difference.

The vast majority of those participating in the LCO's consultations were not aware of the concept of supported decision-making. For example, most family members and individuals directly affected had limited knowledge of the current law, and even less knowledge of the broader critiques or law reform efforts surrounding it.

Understandably, 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. Similarly, most professionals and service providers had not encountered the concept before, or had only encountered it in the LCO's consultations.

...[T]here is a striking degree of polarization. Law reform on these issues will require ongoing commitment to dialogue, and the promotion of understanding across difference.

Persons connected with the intellectual disability community were by far the most likely to be conversant with the concept of supported decision-making. This is not surprising, given that 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.

Amongst those who had some familiarity with the concept, the term was used 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 used 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.

The issues surrounding supported decision-making were set out at some length 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. Opposition to the concept focusses on the potential for abuse of such a system by family members and third parties, questions of its suitability for all groups affected by this area of the law (such as older persons with dementia, persons with certain mental health disabilities, or persons who are unconscious), and concerns regarding the apparent lack of clarity surrounding responsibility and liability inherent in such a system. As was noted earlier in this Chapter, proponents and opponents of supported decision-making focus on different aspects of decision-making laws: their potential for promoting autonomy-

enhancing decision-making practices, and their important role in providing clear legal accountability structures and meaningful recourse against abuse.

The arguments for and against supported decision-making were reflected in several submissions to the LCO.

In its 2014 submission, ARCH Disability Law Centre advocated a move towards supported decision-making. 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. ARCH's 2016 response to the *Interim Report* indicated support for the "general tenor" of the LCO's draft recommendations in this area, including the adoption of a human rights accommodation approach to legal capacity, the creation of support authorizations and the development of network decision-making.

...[P]otential for promoting autonomy-enhancing decision-making practices, and their important role in providing clear legal accountability structures and meaningful recourse against abuse.

The Coalition on Alternatives to Guardianship's *Final Brief*, entitled "The Right to Legal Capacity and Supported Decision-making for All", emphasized the view that Article 12 prohibits *any* distinction based on cognitive abilities. Where a person's will and preferences can be reasonably interpreted by others as a basis for directing legal relationships, there is a State Party obligation to recognize this as a legitimate way of exercising the capacity to act.<sup>75</sup> That is, where a person can evince "will and preference", this is sufficient to accord the legal accountability associated with legal capacity to a person, provided sufficient safeguards are provided. It is the view of the Coalition that this is a matter of fundamental rights: while "this is admittedly not an easy task, as the LCO has documented in its *Interim Report*, it is one that must be undertaken and is achievable".<sup>76</sup>

In pursuit of this goal, the Coalition proposes a complex, 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. In brief, 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.

The Coalition further purposes that 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.

An opposing view was expressed by the Advocacy Centre for the Elderly, which has consistently expressed support for retaining a functional and cognitive approach to legal capacity, and emphasized its grave concerns about the potential of supported decision-making arrangements for abuse. In this, it was supported by the submissions of the Mental Health Legal Committee, a group of lawyers and community legal workers practicing in the area of mental health law. Focus groups of trusts and estates lawyer raised similar concerns, including multiple issues about the practicalities of dealing with financial matters of any significant size.

**It was posited 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.**

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. It was posited 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.

Individuals 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.

The LCO heard a range of views from families. The LCO heard from a number of family members of persons with intellectual or developmental disabilities who were proponents of supported decision-making. 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 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 re-structuring 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.**

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 focusing 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 *Final Report*; however, these issues are also relevant to the consideration of approaches to decision-making.

The number of Ontarians under guardianship is relatively small – under 20,000 in 2013-14.<sup>77</sup> However, 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 for their loved ones.

Guardianship 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 or for personal care. Guardianship therefore has a particularly heavy impact on this community.

## G. LOOKING FORWARD: CONSIDERATIONS

Through its consultations, the LCO learned that the public debate of these issues is often framed as a contest between the unqualified merits of “substitute” versus “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.

The LCO has adopted a different approach: rather than focusing on whether or not a particular practice constitutes “supported” or “substitute” decision-making, the LCO is concerned with how practices and laws 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.

### 1. Applying the Principle of Autonomy

As was highlighted in Chapter 3, 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.<sup>78</sup>*

...[R]ather than focusing on whether or not a particular practice constitutes “supported” or “substitute” decision-making, the LCO is concerned with how practices and laws 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.



**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.**

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. These comments highlight the centrality in this area of the law of respecting the importance to individuals of controlling their own lives to the greatest degree possible.

The debates regarding the concept of legal capacity and supported decision-making explicitly draw on the principle of fostering autonomy and independence. Critiques of current practices and proponents of the approach that abolishes substitute decision-making point to inherent 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; others 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 3, 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. 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 3 discussed, because this area of the law is preoccupied with issues of choice and risk, the principles of safety or security are often posed as in tension with that of autonomy and independence. This highlights 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: all approaches to legal capacity 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. These approaches also inherently limit the right to take risks or make bad decisions of persons who do not meet that threshold. 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.

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.

## 2. Legal Accountability and Responsibility for Decisions

As briefly described above, the current 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 person. That individual (SDM) can be held to account for how she or he carries out that role. For example, the SDA binds SDMs to objective standards of decision-making and specifies that guardians and attorneys for property are liable for damages resulting from a breach of their duty.<sup>79</sup>

The allocation of legal accountability and responsibility for decisions has both positive and negative aspects. The status of legal capacity 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.<sup>80</sup>*

Some 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

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.

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.

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 complicated issues.

As a starting point in understanding the implications of an approach where all individuals have legal capacity at all time, it is important to understand that in such a regime, 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.<sup>81</sup>

All individuals have the right to take risks and make foolish decisions Yet 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 cannot bind the individual to his or her understanding of a risk or a negative outcome. 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.

An approach to legal capacity that presumes that individuals always retain capacity to make decisions necessarily also raises questions about the nature of decision-making and legal accountability for those decisions. In the LCO’s view, there is an important and material difference between situations where an individual is able to both indicate a preference and have some insight into the implications of that preference and situations where another person is required to assess the potential consequences of that preference.

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 their wishes 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

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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

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 being singularly responsible and legally accountable for the decision. To attempt to intuit another person's preferences is a challenging and highly fallible endeavour, 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. In many circumstances, the supporter cannot simply be a neutral conduit for a clearly ascertainable decision by the individual.

To attempt to intuit another person's preferences 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.

These abstract-seeming questions regarding legal accountability have significant practical effect on two major elements of this area of the law: safeguards against abuse, and clarity and certainty in transactions and agreements. These are addressed in detail below.

### 3. Concerns Related to Abuse of Supported Decision-making Arrangements

The Advocacy Centre for the Elderly (ACE)'s submission to the LCO raised one of the most common concerns about supported decision-making arrangements;

*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.<sup>82</sup>*

Policy-makers in jurisdictions with supported decision-making arrangements have attempted to mitigate this risk. For example, in both Alberta and Yukon, supporters can be held responsible for their own behaviour in relation to the individual and to third parties. Decisions may also not be recognized as belonging to the individual where misrepresentation, undue influence or fraud on the part of supporters were at play.<sup>83</sup>

Notwithstanding these efforts, it may still be very difficult in practice 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 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,

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.

both practically and psychologically, to disentangle the interests and motives of “supporters” from those of the individual they are intended to support. Moreover, 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 these circumstances, it may be very difficult to challenge decisions based on the supporters’ alleged misrepresentation or undue influence. This view was clearly articulated by ACE in its 2016 submission,

*Because the entire decision-making process is obfuscated by the supported decision-making approach, it becomes extremely difficult to determine where a decision originates. This creates a situation in which the individual at issue is both vulnerable to abuse and legally accountable for decisions they may or may not have had a hand in making.... Where there is a power of attorney granted, it is clear who has decision-making authority if the person is incapable. Moreover, there is some scope for the grantor to challenge the decisions made by the attorney.<sup>84</sup>*

This critique is important but not is not by itself determinative. 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.

#### 4. Concerns Regarding Clarity and Accountability

The LCO *Frameworks* highlight the importance of developing and interpreting laws, policies and practices in light of the broader community. In the context of models of decision-making, this means that the LCO must be cognizant of 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.

During our consultations, service providers and third parties raised concerns about the inherent lack of clarity in supported decision-making arrangements. For example, financial service providers 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.

**The LCO Frameworks emphasize the need to respond to diverse needs, and discourage uniform, one-size-fits-all approaches that fail to respect individual choices and circumstances.**

As an illustration of the difficulties, 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. This puts financial service providers into extremely difficult positions.

In response to such concerns, the Coalition on Alternatives to Guardianship recommended 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.<sup>85</sup>

This proposal suggests that the third party would not be required to “look behind” the supported decision-making agreement. In other words, absent 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 does not support this proposal. The LCO is concerned that such an approach may leave many victims of financial abuse without a legal 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.

## 5. Responding to Diverse Needs

The LCO *Frameworks* emphasize the need to respond to diverse needs, and discourage uniform, one-size-fits-all approaches that fail to respect individual choices and circumstances.

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.
- Some 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 some, 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.

As well, 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. The LCO's consultations suggest that all or nothing approaches to supported decision-making may not be advisable.

...[I]t is important to underscore that not all individuals or communities share the same views on legal capacity and models of decision-making.

In these circumstances, it is important to underscore that not all individuals or communities share the same views on legal capacity and models of decision-making. Many individuals and communities favour supported decision-making arrangements. Conversely, many individuals do not see substitute decision-making 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

The LCO's consultations confirmed that there are many Ontarians 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 often seen as a means to promote autonomy. Married couples sometimes conceptualized substitute decision-making roles 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

Finally, the LCO heard from many professionals and service providers that the present system lacks nuance, is overly binary, and has difficulty with situations that fall into the “grey zone”:

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.

*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

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

## H. THE LCO'S APPROACH

The issues in this area raise considerable challenges and there are no easy answers. The LCO has given careful consideration to how to best meet these competing considerations. To that end, the LCO has identified a number of foundational principles that govern the LCO's approach to these issues.

### 1. Legal Accountability Should Accord with Decision-making Processes

The LCO believes that a person's legal accountability should be consistent with their role in decision-making.

The LCO further believes that there are circumstances where it is appropriate to find that an individual does not have the decision-making ability to make a particular decision or type of decision independently. Indeed, it is hard to imagine a legal framework that does not involve some assessment of decisional abilities: there must be some system to determine issues of accountability and enforceability. A system in which all individuals have legal capacity at all times, and therefore in which legal accountability is always retained by persons with impaired decision-making ability unless fraud or abuse can be proved against a supporter, is a system that will inevitably lead to some unjust results.

As noted elsewhere, the LCO believes there is a material and legally significant difference between situations where an individual is making a decision and where someone else is acting as an intermediary. In these latter circumstances, it would be unreasonable and potentially very harmful to make the individual with impaired decision-making abilities solely responsible for the legal consequences of important decisions. The LCO further believes that the individuals acting as intermediaries should be aware that they are undertaking a significantly morally freighted activity and that the obligations on them are high.

**...[I]t is hard to imagine a legal framework that does not involve some assessment of decisional abilities: there must be some system to determine issues of accountability and enforceability.**

Accordingly, the LCO believes that 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.

## 2. Ensuring the Least Restrictive Approach

The LCO, like many others in the area, believes that the laws, policies and practices in the area of legal capacity and decision-making must take the least restrictive approach to personal rights and autonomy.

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.

The law reform leading to the current legislation identified as one of its core values freedom from unnecessary intervention. As a result, 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.

It is clear in practice, however, that the legislation has not fully achieved this goal. There was widespread agreement throughout the consultations that law reform should, for example, limit the use of substitute decision-making arrangements, and in particular guardianship, 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.

There are recommendations throughout this *Final Report* to reduce use of substitute decision-making:

- **Chapter 5:** improving the quality of assessments of capacity and of the associated procedural protections, so that individuals are not inappropriately found legally incapable

The LCO, like many others in the area, believes that the laws, policies and practices in the area of legal capacity and decision-making must take the least restrictive approach to personal rights and autonomy.

- **Chapter 6:** improving transparency and accountability for personal appointments, to reduce their misuse
- **Chapter 7:** strengthening mechanisms for rights enforcement and dispute resolution, and in particular expanding the accessibility of these mechanisms, through expanded use of administrative justice, alternative dispute resolution and supports for litigants
- **Chapter 8:** 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 10:** promoting better understanding of SDM roles and responsibilities

### 3. Promoting Autonomy-Enhancing Decision-making Practices

The LCO believes that decision-making must be guided by the life goals and values of the individual, whether that is described in terms of the “will and preference” of the person or the “values and wishes”, and that individuals should be supported to the greatest degree possible to be participants in decisions about their own lives.

...[O]ne of the most effective means of promoting autonomy, dignity and participation is to promote better decision-making practices on the ground.

This is a complex issue where law and practice often do not fit into clear categories or descriptions. It goes without saying that decision-making practices on the ground cannot be severed from questions about the legal frameworks governing these practices. However, it is also true that decision-making practices on the ground are not necessarily determined by the governing legal framework. 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 believes that one of the most effective means of promoting autonomy, dignity and participation is to promote better decision-making practices on the ground. The LCO has therefore proposed recommendations to support and strengthen positive decision-making practices.

## 4. Providing Options to Meet Diverse Needs

The LCO believes that the laws in this area should provide more options.

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, during the LCO's consultations, most of the interest in "supported decision-making" was found in the intellectual and developmental disability community. The concept currently has less resonance among other groups disproportionately impacted by these laws. Indeed, some advocates for other affected groups actively oppose supported decision-making. For example, individuals and organizations that represent and advocate for older adults have expressed particularly strong concerns, perhaps reflecting the history of financial and other forms of abuse of vulnerable members of this group.

Aspirations for dignity, inclusion and autonomy were widely shared by those the LCO consulted. That said, not all individuals and advocates agreed on the means of achieving these aspirations. 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.

**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.**

## 5. Moving Forward

The principles underlying the LCO's *Frameworks* and the CRPD must guide any approach to this area of the law.

Law reform in this area requires imaginative new approaches. It is also at a cross roads. On the one hand, at this time, many jurisdictions are re-examining their legislation, and some have recently implemented or are in the process of implementing significant changes. On the other hand, there is currently little in the way of an evidence base on which to ground law reform. In these circumstances, the LCO is proposing a measured, evidence-based approach. 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.

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.

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 basic aspirations 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.

## I. RECOMMENDATIONS

Based on all of the above, the LCO has identified five broad areas in which Ontario’s current approach can be strengthened.

### 1. Building Accommodation into Approaches to Legal Capacity

The legal concept of the duty to accommodate can provide some assistance with strengthening the ability of Ontario law to both promote autonomy and appropriately allocate legal accountability.

The human rights principle of accommodation is well recognized in Ontario law, most clearly as a statutory entitlement in the Ontario *Human Rights Code*.<sup>86</sup> The duty to accommodate applies also to legal capacity and decision-making laws.<sup>87</sup>

#### Summary of Relevant Provisions of the Ontario *Human Rights Code*

**Section 17(1):** 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.

**Section 17(2):** there is a duty to accommodate before finding that a person is incapable of fulfilling an essential duty or requirement due to disability. This applies in respect of services, employment, housing accommodation, contracts and vocational services.

**Section 11:** dealing with constructive discrimination, this section addresses the duty to accommodate for all prohibited grounds, including age or disability.

**Section 47(2):** the Code has primacy over other legislation unless there is a specific legislative exemption.

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

Impairments in decision-making abilities disproportionately affect persons with particular types of disabilities, such as intellectual, mental health or cognitive



disabilities. As a result, the provision of services to those persons raise human rights issues and questions regarding the duty to accommodate. That said, 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.

In its *Policy on Preventing Discrimination on the Basis of Mental Health Disabilities and Addictions*, the Ontario Human Rights Commission stated:

*Before determining that a person lacks capacity, an organization, assessment body, evaluator, etc. has a duty to explore accommodation options to the point of undue hardship. This is part of the procedural duty to accommodate under the Code. Accommodation may mean modifying or waiving rules, requirements, standards or practices, as appropriate, to allow someone with a psychosocial disability to access the service equitably, unless this causes undue hardship.*<sup>88</sup>

...[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.

Consistent with the discussion in 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.

However, in the absence of caselaw or policy guidance, the scope and procedural application of this duty to accommodate is unclear. The Royal College of Dental Surgeons commented in its submission,

*Dentists and other treatment providers need to understand whether they will be required to inform patients who apparently lack legal capacity of the duty to accommodate or if the patient or patient's substitute decision-maker must request accommodation.*

*Many health care providers will require education about the specific accommodations they will be expected to provide. Similarly, many dentists will require guidance about what constitutes undue hardship in the various settings where dentistry is practiced....*

*If this recommendation goes forward, RCDSO, in consultation with its members, will be required to establish guidelines and/or policies in this area. Defining reasonable accommodations for persons of questionable capacity throughout various health care services will be a substantial undertaking.*<sup>89</sup>



**Cultural differences or linguistic barriers may interfere with a service provider's assessments of an individual's ability to understand or process information, and thus of their "legal capacity". Accommodations may include interpretation or the provision of culturally sensitive assessments.**

At minimum, the duty to accommodate 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. However, more detailed and specific guidance on these points would be helpful to service providers.

A submission from Communications Disabilities Access Canada (CDAC) emphasized the barriers that persons with communication disabilities may face when attempting to access services or facing an assessment, including underestimates of capacity to make decisions, a tendency to inappropriately defer to family members and personal support staff, and undervaluation of their quality of life and right to decisional autonomy. CDAC points out that a lack of training or experience with accessible communication technologies and methodologies is a widespread problem, and that greater emphasis should be placed on provision of appropriate and expert communication assistance where required. CDAC argues that such assistance is an indispensable form of accommodation.<sup>90</sup>

Further to the discussion earlier in this Chapter, and as a separate type of accommodation, where explanations and assistance from a trusted person enable an individual to meet the test for legal capacity, these may also be appropriate accommodations. This type of accommodation for the decision-making process itself must be carefully distinguished from accommodations for communications needs. Several stakeholders expressed concerns about situations where one person is essentially "speaking for" the individual who requires accommodation, with no way for an observer to verify that the views expressed are in fact those of the individual himself or herself.

From discussions with a range of stakeholders and individuals during the consultations, it appears that service providers frequently provided these types of informal accommodations for individuals whose legal capacity was unclear. The Canadian Bankers Association, in its submission to the LCO, commented that in the banking context, there is currently an informal supported decision-making model that works well, and suggested that formalization might inadvertently undermine these informal accommodations.<sup>91</sup> However, as was noted in Chapter 2, there is a strong trend, across all sectors, towards increasing formality and a restrictive approach towards legal capacity issues.

In providing accommodations related to legal capacity, attention must be paid to linguistic and cultural diversity. Language and culture may be associated with the *Code* grounds of ethnic origin, ancestry or place of origin. Cultural differences or linguistic barriers may interfere with a service provider's assessments of an individual's ability to understand or process information, and thus of their "legal capacity". Accommodations may include interpretation or the provision of culturally sensitive assessments.

The LCO is sympathetic towards the confusion that service providers may experience in this difficult area, and believes that a clear statement of the nature of the duty to accommodate in this area would be of benefit to service providers, to individuals, and their families. Issues that would be helpful to clarify include the meaning of the “essential duty or requirement” in this context, procedural duties of service providers and those seeking accommodation in various settings, and the types of accommodations that may be considered.

Clarification could be provided in several 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.
- *Clarity could be created through regulations under the Ontario Human Rights Code.* This would be similar to the use of regulations to provide guidance to landlords about the types of information that could be sought in a rental application.<sup>92</sup> 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 also raised within that context and that jurisprudence.
- *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.

Irrespective of the option or approach taken, the LCO strongly recommends that further consultation be conducted with all affected parties, so as to be better able to provide clear and practical guidance for the range of contexts and constraints in which these issues arise.

The LCO is sympathetic towards the confusion that service providers may experience in this difficult area, and believes that a clear statement of the nature of the duty to accommodate in this area would be of benefit to service providers, to individuals, and their families.

**THE LCO RECOMMENDS:**

3: In order to clarify that a person has legal capacity where the test can be met with appropriate accommodations and to assist service providers in providing such accommodations, the Government of Ontario:

- a) define the scope and content of the human rights duty to accommodate in this area of the law, as it applies to service providers,
- b) and in doing so, consult broadly with individuals; community agencies; a wide range of service providers, including in the health, financial and private sectors; and other key stakeholders.

...[I]f 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.

**The Duty to Accommodate and the Assessment of Capacity**

In addition to the clearly *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 necessarily appear to itself be the provision of a service, although as described above, it may be a required 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 making the law and practice of legal capacity and assessments most consistent with human rights. 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. 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 when 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.<sup>93</sup> 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 behaviour for evidence of a lack of ability to understand or appreciate the issue at hand.

In this context, the principle of accommodation should 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.

Many stakeholders emphasized this point. Particular emphasis was placed on the implications of Ontario's linguistic and cultural diversity. For example, a stakeholder consultation held by the City of Toronto in response to the *Interim Report* emphasized that “language proficiencies, literacy, ability to focus, etc., should be considered as barriers to *capacity assessment*, not as indicators of *incapacity*”.<sup>94</sup> These stakeholders identified a number of accommodations and supports that should be made available during the assessment process, including appropriate translation services and literacy supports, and the use of culturally appropriate language. That is, accommodations related to the assessments of capacity should also take into account other aspects of diversity.

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 behaviour for evidence of a lack of ability to understand or appreciate the issue at hand.

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 described above. This is particularly true in circumstances where it is 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.*<sup>95</sup>

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.<sup>96</sup> Many expert stakeholders believe that this accommodation approach is implicit in Ontario’s approach to legal capacity. It is not clear, however, that this approach is well understood across contexts or is consistently implemented.

In conclusion, the LCO believes that 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.

### THE LCO RECOMMENDS:

4: The Government of Ontario 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 for capacity with appropriate accommodations, and ,
- b) the requirement that assessments of capacity be carried out in accordance with the approach to accommodation developed under domestic human rights law.

A primary goal of legislation in this area of the law should be the promotion of autonomy-enhancing decision-making practices.

## 2. Strengthening Decision-making Practices

A primary goal of legislation in this area of the law should be the promotion of autonomy-enhancing decision-making practices. 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.<sup>97</sup>

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.<sup>98</sup> The personal care SDM must also choose

the least restrictive and intrusive course of action that is available and appropriate in the circumstances.<sup>99</sup> 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.<sup>100</sup>

In the LCO's view, Ontario's statutory regime regarding decision-making processes is broadly consistent both with the *Framework* principles and with the general vision and objectives of many proponents of supported decision-making. The LCO does not regard the language of the HCCA or in the SDA respecting personal care decisions to be significantly inconsistent with the "best interpretation of will and preference" approach put forward in the *General Comment* and in some submissions to the LCO. 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.

**One common and troubling misunderstanding, for example, is the belief that the personal care SDM has a broad authority to restrict access to the individual.**

For the most part, the general role and principles related to substitute decision-making with regards to personal care are clear and appropriate, although there are concerns regarding widespread misunderstandings of the role of personal care SDMs. One common and troubling misunderstanding, for example, is the belief that the personal care SDM has a broad authority to restrict access to the individual. It is 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 also heard that long-term care or retirement home personnel may inappropriately facilitate such denials of access.

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.<sup>101</sup> 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.<sup>102</sup>

While the emphasis on managing property for the person's benefit and prioritizing personal care decisions is positive, this is not as clearly harmonious with the values and preferences approach to decision-making in the provisions regarding personal care. While SDA does not refer to a "best interests" type of decision-making approach, it does restrict options and essentially requires SDMs to prevent individuals from seriously mismanaging their money, 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.

Notwithstanding these criticisms, the LCO believes that it is reasonable to maintain some objective limitations on property decisions for persons who lack legal capacity. A legal framework in which the sole criterion for property decisions was 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. An important qualification to this approach is that 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”,<sup>103</sup> 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. These are serious concerns that any legal framework must consider thoughtfully.

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.

...[T]he 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.



Providing families and individuals with access to training and education on legally and ethically appropriate decision-making practices can be a very practical means of promoting autonomy-enhancing approaches in this area of the law.

### THE LCO RECOMMENDS:

5: The Government of Ontario 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) while retaining the existing list of priorities for property expenditure, require that when resources are allocated to the first priority of the individual's support, education and care, that consideration be given to prior capable wishes regarding the individual's well-being and quality of life, or where these have not been expressed, to the values and wishes currently held.

The vast majority of those who currently provide assistance with decision-making to persons with impaired decision-making abilities are family members, who are carrying out this challenging and often complex role with very little in the way of supports or information. This is true both of those fulfilling this role within a formal arrangement under the HCCA or SDA, and those carrying out these responsibilities informally. Both research<sup>104</sup> and the LCO's consultations demonstrate the wide range of approaches which families bring to this role.

Providing families and individuals with access to training and education on legally and ethically appropriate decision-making practices can be a very practical means of promoting autonomy-enhancing approaches in this area of the law.<sup>105</sup>

There are a number of promising examples in this area. An Israeli pilot project involved 22 individuals who were diagnosed with autism, had psychosocial disabilities, had intellectual disabilities, or had physical or communication disabilities. Most were under guardianship. They were paired with trained supporters, two of whom were salaried professionals and the remainder who were volunteers. The supporters regularly met with the individuals and guardians over the course of the year to identify goals, develop work plans, and to take steps to implement those plans; the supporters also received ongoing training and support throughout the year. The overall aim was to increase the independence with which the individuals were able to make decisions. The results of the pilot project showed a range of changes in the participants in the project, both large and small, including changes in decision-making skills and awareness, self-advocacy, self-confidence and relationships with guardians. Supporters noted particular challenges in providing appropriate supports to persons with fluctuating capacity.<sup>106</sup>

This pilot, and others in Australia, demonstrated that there is value in supportive decision-making practices, in terms of increasing decision-making abilities, self-confidence and positive attitudes. Many of the Australian pilot projects emphasized the challenges in finding supporters who had the time, resources and relationships to carry out this role.<sup>107</sup> It was clear in all of the pilot projects that the facilitators played an essential role in the success of the projects. It appeared from the some projects that there were particular needs and challenges for persons with psycho-social disabilities: this may be an important area for further work.<sup>108</sup>

These pilot projects make clear that developing and supporting autonomy enhancing decision-making practices may require a considerable shift and intensive supports for families and individuals directly affected. That is, simply adjusting the legislative framework may have relatively little impact on the lived experience of persons with disabilities, without an accompanying adjustment in practices on the ground. This adjustment in practice may be more challenging than legislative reform.

The LCO therefore believes that it is important to develop strong, evidence-based models for supporting good decision-making practices, and therefore proposes the development of pilot projects in this area. The pilots should explore autonomy-enhancing approaches for various communities, including for persons with dementia, persons with mental health disabilities, those with acquired brain injuries, those with intellectual and developmental disabilities, and other affected groups. These projects should aim to develop evidence for good practice, as well as developing tools and resources that can assist families, persons directly affected and others.

...[S]imply adjusting the legislative framework may have relatively little impact on the lived experience of persons with disabilities, without an accompanying adjustment in practices on the ground.

### THE LCO RECOMMENDS:

#### 6: The Government of Ontario

- a) develop pilot projects that evaluate autonomy-enhancing approaches to decision-making among persons with impaired decision-making abilities and their families;
- b) in developing these pilot projects, work in partnership with a broad array of stakeholders and account for the specific needs of a range of communities, including persons with a range of disabilities and decision-making needs, those who are socially isolated as well as those with existing networks, and members of various linguistic and cultural communities; and
- c) broadly circulate the results of these pilot projects.

### 3. Support Authorizations

- *The Discussion Paper outlines in detail how supported decision-making has been implemented in Canada in the form of representation agreements and supported decision-making authorizations in British Columbia, Alberta and the Yukon.*<sup>109</sup>

As noted earlier, there are several Canadian examples of support authorizations.

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.<sup>110</sup>

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”.

British Columbia’s representation agreements employ a non-cognitive test for their creation. As a result, 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.

Alberta’s supported decision-making authorizations represent a narrower approach. They are restricted to personal care decisions and supporters are prohibited from making decisions on behalf of an adult. Decisions made or communicated with assistance are 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.<sup>111</sup> 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, early information indicates a very positive response, with no widespread concerns regarding abuse or misuse.<sup>112</sup>

Another approach was recommended by the LCO in its project on *Capacity and Legal Representation for the Federal RDSP*, which 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 believes that support authorizations can, if properly structured, provide an accessible means of addressing the needs of some persons who currently have no alternatives to guardianship.

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.

The LCO believes that support authorizations can, if properly structured, provide an accessible means of addressing the needs of some persons who currently have no alternatives to guardianship. Identifying and developing positive decision-making practices, as suggested in Recommendation 6, may maximize the accessibility of these instruments.

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.

The LCO's analysis was informed by the perspectives of the many individuals and groups who commented on this issue in our consultations. For example, the City of Toronto's System Reform Table on Vulnerability in Toronto organized a stakeholder consultation that brought together 65 individuals representing multiple service and advocacy organizations. The resulting *Stakeholder Consultation Report* commented that,

*The Support Authorization concept is a welcome innovation, if the risks are managed. It could be very valuable in protecting autonomy for many people. It could save money for the health care system. It brings a social disability lens to the work and the legislation. It is not a solution for everyone, but it could be a very important enhancement to the current situation. In some respects, this is how a Power of Attorney is being used, but this would formalize the approach, and in some instances reduce the need to assign POA.*

*Managing risks to the client and the person/organization providing support. These need to be managed, by formalizing a robust monitoring system and by establishing limited liability for the person providing support. Criteria should be created and applied to determine who can and cannot be a support person ... A very clear definition of support will be needed as part of this formalization process.*<sup>113</sup>

The LCO believes that the risk of abuse and uncertainty in supported decision-making arrangements can be mitigated by the following steps

### **Set the threshold for legal capacity to create an authorization at an appropriate level**

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.

In these circumstances, the LCO therefore proposes a test that draws on the common-law 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 primary approach recommended in the LCO's project on *Capacity and Legal Representation for the Federal RDSP*.<sup>114</sup>

### Focus on more concrete, day-to-day or routine decisions

The LCO does not believe that support authorizations are appropriate, at least initially, 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 believes support authorizations are more appropriately targeted to more routine decisions, for both property and personal care.

The LCO believes that these situations of greater risk may be more appropriately dealt with through the network decision-making structures proposed below, or with the legal accountability structures imposed through substitute decision-making.

...[T]he LCO believes that support authorizations should also extend to routine decisions related to property, particularly given the ways in which decisions related to property and personal care may intertwine.

While some jurisdictions allow support authorizations only for personal care decisions, the LCO believes that support authorizations should also extend to routine decisions related to property, 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. In identifying day-to-day decisions, the approach under British Columbia's *Representation Agreement Act*, in which specific types of included decisions are spelled out by regulation, may be a useful approach.

Allowing support authorizations in day-to-day matters would have significant, beneficial consequences. For many individuals directly affected by this area of the law, most, if not all, decisions fall into this category. This approach, when combined with the LCO's recommendation in Chapter 8 regarding the ability to appoint a decision-making representative for single decisions, could potentially allow a large number of individuals to avoid guardianship. This would be a significant advancement for the rights and autonomy of individuals in these circumstances.

Some stakeholders may be disappointed with this approach. For example, the Coalition on Alternatives to Guardianship, in its response to the *Interim Report*, argued that it was necessary to expand support authorizations to a full range of decisions. The Coalition proposed a number of safeguards to support this recommendation.

- For decisions that fundamentally affect personal integrity or human dignity, such as non-medically indicated sterilization, application to the Tribunal would be required;
- Supporters would be prohibited from supporting an individual in a decision that is likely to place the adult in a grave and imminent risk of a situation of serious adverse effects.

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.

The LCO sees the first suggestion as being similar in effect to single decision appointments proposed in Chapter 8, with the difference that in essence, it would be the Tribunal making the ultimate decision, rather than the trusted person appointed by the Tribunal. The LCO believes that it is preferable that such decisions be made by the trusted person, based on their knowledge of the individual and their binding duties as set out by statute, rather than by the Tribunal itself, which does not have intimate knowledge of the person.

The LCO has carefully considered the second proposal, but is concerned that it would lead to confusion and lack of clarity. Who would make the assessment as to whether such a grave and imminent risk existed, and what would be the liability of the supporter if a correct assessment of risk was not made? How would third parties, such as financial institutions, know when the supporter had stepped aside, and what would be the responsibility of third parties in such an instance? Would the supported person be at liberty to seek another supporter who had a different risk assessment? Further, such a situation would run the risk of leaving the supported person unexpectedly without the ability to make a necessary decision, possibly in a situation of some urgency. Finally, this proposal seems to the LCO to be in some tension with the underlying premise of supported decision-making, which is to allow the supported person to assume risks and make unwise decisions on an equal basis with others.

On balance, the LCO believes that the better alternative is to restrict authorizations to day-to-day decisions at the present time. Over time, experience and evidence may demonstrate that their scope should be expanded.

### **Include clear duties for supporters, to address concerns related to misuse or abuse of these arrangements**

Essentially, the role of the supporter is to assist in the decision-making process. 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. Supported decision-making arrangements in other jurisdictions include the following responsibilities for supporters:

- accessing or obtaining information, or assisting the individual in doing so;<sup>115</sup>
- assisting the person in the decision-making process;<sup>116</sup>
- communicating or assisting the person in communicating the decision to others;<sup>117</sup>
- endeavouring to ensure that the decision is implemented;<sup>118</sup>
- advising the individual by providing relevant information and explanations;<sup>119</sup> and
- ascertaining the wishes of the individual.<sup>120</sup>

The LCO agrees that any legislative or legal arrangements in this area should include clear duties and responsibilities for supporters. This would reduce some of the concerns that have been expressed regarding accountability and the potential for abuse in these types of arrangements.

It makes sense to harmonize some of the duties of supporters with those of POAs, including responsibilities to act honestly and in good faith, to maintain records, and to engage with trusted family and friends. Because supported decision-making has its foundations in a trusting relationship between the parties, a duty to maintain such a relationship is important.

It may also be useful for legislation to identify who is and is not eligible to act as a supporter: new Irish legislation on support arrangements, for example, excludes among others persons who have a criminal record, or who are undischarged bankrupts.<sup>121</sup>

### **Include monitoring arrangements**

Like powers of attorney, support authorizations would be personal appointments. As is discussed in Chapter 6, these types of appointments, while accessible and flexible, also carry with them some risks of abuse or misuse. Some of the considerations and recommendations in that Chapter are therefore also applicable to support authorizations. In particular, Statements of Commitment and Monitors may be useful, with appropriate modifications, in encouraging understanding of roles and responsibilities, and promoting transparency and accountability.

In integrating these elements into a support authorization regime, it is helpful to keep in mind the differences between these instruments and powers of attorney. 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, as compared to an attorney appointed under a POA. As well, unlike POAs, which may endure even as the decision-making abilities of the grantor decline, support authorizations are intended for persons who are ultimately able to make their own decisions, with the assistance provided by their supporters.

Given these differences, it is the LCO's view that a monitor should be mandatory. The LCO further believes that the monitor should be a person who is not a family member and who does not have a conflict of interest for the decision in question. The considerations set out in Chapter 10 regarding potential roles for professionals and community agencies as SDMs should also apply to monitors. It is also the view of the LCO that the Notices of Attorney Acting proposed in Chapter 6 are not necessary or appropriate in the context of support authorizations.

Because supported decision-making has its foundations in a trusting relationship between the parties, a duty to maintain such a relationship is important.



### Ensure clarity regarding accountability for decisions

The LCO believes that any new model of support authorizations must specifically acknowledge that decisions made under these arrangements are the responsibility of the supported person. Supporters would be responsible for complying with their statutory responsibilities, as suggested above. The provisions in Alberta and Yukon's statutes clarifying that third parties need not recognize a decision as that of the supported person if there are reasonable grounds to believe that there has been fraud, misrepresentation or undue influence by the supporter<sup>122</sup> are a practical measure for combatting abuse, and would be useful to adopt in Ontario.

Drafting legislation for support authorizations will be complex and the LCO does not propose to recommend specific language. For example, the legislation will have to consider 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. The LCO believes that, in general, technical processes and requirements should, to the degree possible, be harmonized with the long-standing requirements for powers of attorney, as they may be amended in response to the LCO's proposals.

The LCO believes that any new model of support authorizations must specifically acknowledge that decisions made under these arrangements are the responsibility of the supported person.

*Mechanisms for training and education of would-be supporters, as well as for individuals directly affected and for professionals who will be required to advise on or interact with these documents will be crucial to the success of this initiative. Training and education issues are considered in Chapter 10.*

It will also be important to establish an appropriate process for resolving disputes and enforcing rights in relation to support authorizations. At minimum, mechanisms must be put into place to enable meaningful oversight of compliance by a supporter with statutory duties and for resolving disputes regarding the validity or scope of support authorizations.

- *Chapter 7 makes proposals for reform to Ontario's dispute resolution mechanisms.*

**THE LCO RECOMMENDS:**

7: The Government of Ontario 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 individuals to appoint one or more persons to provide assistance with decision-making;
- 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) These authorizations would be created through a standard and mandatory form;
- d) Through a support authorization, the individual would be able to receive assistance with day-to-day, 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 must 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 Recommendation 26, and supporters must complete a Statement of Commitment, as described in Recommendation 25;
- g) The duties of supporters 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 as required:
  - 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. 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.<sup>123</sup> 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 networks, 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 research on personal support networks in the fall of 2014.<sup>124</sup>

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.*<sup>125</sup>

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.

Depending on its structure and implementation, network decision-making might be understood as a form of joint decision-making, similar in theory to the co-decision-making appointments available in Alberta and Saskatchewan. In these models,

**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.**

decision-making is ultimately understood as a shared activity, rather than resting ultimately in a single individual.

However, co-decision-making appointments, as they currently exist in Canada, are formal external appointments by the courts. By way of contrast, networks, at least in the microboard model, while requiring some significant formality to create, do not require a court application, and can be designed flexibly to meet particular needs.

The co-decision-making agreements in the new Irish legislation provide an interesting analogy. These are personal appointments, but require registration, notice to interested parties with an opportunity to object to the registration, regular review by the Director of the Decision Support Service, and regular reporting by the co-decision-maker.<sup>126</sup>

The available evidence suggests that network decision-making can work, and work well, for some individuals. As a result, the LCO believes there is merit to formalizing or piloting network 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.

**The available evidence suggests that network decision-making can work, and work well, for some individuals.**

In practice, this model may apply to relatively few individuals, for the reasons discussed above.

In the long run, network decision-making could enable decisions on a broader range of issues than the LCO proposes be available through 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 LCO believes that the microboard process provides a useful foundation. This model, 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.

Microboards also have notable limitations. Incorporation adds to, 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.

The LCO believes that 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.

The Coalition on Alternatives to Guardianship has proposed external appointments of supporters for persons who would not have legal capacity to create support authorizations under the LCO's proposal. It is the LCO's view that networks decision-making could provide a more flexible and accessible alternative to substitute decision-making for situations where there are greater risks associated either with the extent of the individual's decision-making impairment or the nature of the decisions to be made.

**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.**

### THE LCO RECOMMENDS:

8: The Government of Ontario conduct further research and consultation towards the development of a statutory legal framework for network decision-making. This framework would:

- a) permit formally established networks of multiple individuals including non-family members, to work collectively to facilitate decision-making for individuals who may not meet current tests for legal capacity;
- b) identify formal requirements for the creation of networks, including accountability documents, decision-making processes and record-keeping requirements;
- c) create a registration process for networks as well as annual filing requirements; and
- d) determine the legal authority and accountability of these networks, including signing authority

## 5. Monitoring, Evaluation and Evolution

The LCO has stressed the importance of ongoing monitoring and evaluation to inform evidence-based law reform in this area, as emphasized in Recommendation 2.

Active monitoring and evaluation are particularly important with respect to issues related to support authorizations and network decision-making, due to the relative lack of evidence informing the discussion of these issues.

The LCO also believes that it is important to actively monitor developments in other jurisdictions. ARCH Disability Law Centre, in its 2016 submission, highlighted the importance of this cross-jurisdictional research:

*Internationally, legal capacity is a rapidly developing area of law, study and practice. New approaches to capacity are emerging which are incompatible with our current test for legal capacity. Progressive realization of our CRPD obligations requires that Ontario leave room for implementing such new approaches, where these approaches strike an appropriate balance between promoting autonomy, apportioning responsibility for decision-making, and safeguarding against abuse.*

*ARCH proposes that the LCO recommend that Ontario develop and commit to a plan of on-going study and monitoring of developments in legal capacity law and practice. Such a plan should include a commitment to implement new approaches to legal capacity that are appropriate for Ontario. The plan should establish measurable goals, timelines, and create a process for meaningful consultation with persons with capacity issues and other stakeholders. Progressive realization of our CRPD obligations requires no less.*

Active monitoring and evaluation are particularly important with respect to issues related to support authorizations and network decision-making, due to the relative lack of evidence informing the discussion of these issues.

### THE LCO RECOMMENDS

9: The Government of Ontario commit to an ongoing program of research and evaluation of national and international developments in positive decision-making practices and legal and social frameworks for capacity and decision-making, with a view to identifying and implementing approaches that:

- a) promote the Framework principles;
- b) address considerations related to appropriate legal accountability; and
- c) address the needs of third parties for clarity and certainty

## J. SUMMARY

The concept of legal capacity lies at the heart of this area of the law, and debates about approaches to it raise foundational questions.

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.

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.

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, both through legislative amendments and by pilot projects aimed at identifying, developing and evaluating positive decision-making practices;
- integrate the human rights concept of accommodation into the concept of legal capacity and clarify the duty of service providers and assessors 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 day-to-day issues;
- work towards the creation of a statutory legal framework for decision-making networks; and
- pursue ongoing study and evaluation of developments in this area of the law.

The LCO’s proposals in this Chapter must be understood in the context of the full range of the recommendations in this *Final Report* aimed at better promoting and protecting autonomy.

These proposed reforms represent practical steps towards strengthening the autonomy, participation and respect for dignity of persons with impaired decision-making abilities, while respecting concerns for security, and the need of service providers for clarity and accountability. When combined with the proposals in Chapter 8 for tailoring and diverting from guardianship, they have the potential to reduce the use of substitute decision-making in Ontario and more fully realize the policy goal underlying Ontario’s laws, of minimizing intervention. These proposals would, if implemented, both place Ontario in the forefront of law reform in the common-law world, and assist in building a foundation of evidence for further progress as appropriate.

**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.**





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# Legal Capacity, Decision-making and Guardianship

## CHAPTER FIVE

# 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 accessible, effective and just.

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 accessible, effective and just. Capacity assessment mechanisms that are difficult to navigate, costly, insensitive, inaccessible, poor quality or lack appropriate procedural protections may lead to the inappropriate application of the law, including 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 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.*

Ontario might best be described as having, not *a* system for assessing legal capacity, but a *set* of systems for assessing capacity. There are five systems for assessing capacity considered in this report:

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

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.

The various capacity assessment systems also vary in their levels of process and the challenges of navigation. As well, the existence of multiple separate systems inevitably results in considerable complexity in the system as a whole.

While different systems tend to affect different populations, in practice there may be considerable overlap for persons with mental health disabilities or for individuals who interact with issues of capacity at various points over their lives. In practice, there is considerable ambiguity and confusion related to the intersection and interaction of the systems.

A very general overview of key formal mechanisms for assessment of capacity is provided on the chart on the next page.

Ontario might best be described as having, not *a* system for assessing legal capacity, but a *set* of systems for assessing capacity.

### Some Key Assessment Mechanisms: A Summary Overview

This is a high level summary document provided for reader assistance only. There are many additional occasions for assessment, exceptions, requirements and contexts that are not reflected in the table. Detailed descriptions of assessment mechanisms are provided in the text

Type of assessment	Who is assessed and when?	Who assesses?	Statutorily required additional training and qualifications	Statutory or Ministry Guidelines
<b>Examinations of capacity to manage property</b>  MHA Part III	Patients: • On admission to psychiatric facility; • At any other time the physician deems necessary; • Within 21 days prior to discharge	A physician employed by the attending institution	None	None
<b>Assessments of capacity to manage property to trigger a statutory guardianship</b>  SDA, Part I	Any person 18 years of age or older may be assessed at their own request or on the request of another person.	A designated Capacity Assessor	<ul style="list-style-type: none"> <li>• Membership in a designated health college</li> <li>• Completion of required initial training</li> <li>• Participation in ongoing training</li> <li>• Conduct a minimum number of assessments each year</li> </ul>	Ministry of the Attorney General <i>Guidelines for Conducting Assessments of Capacity</i>
<b>Assessment of capacity to consent to treatment</b>  HCCA, Part II	Health practitioners must ensure that a person for whom treatment is proposed is capable of providing consent. A patient in any place for whom treatment is proposed will be assessed if the health practitioner has reasonable grounds to think a person is incapable of giving consent.  A patient in any place for whom a treatment is proposed and whose capacity the health practitioner has reasonable grounds to believe may be lacking.	Any regulated health practitioner, usually the practitioner proposing the treatment	None	Practitioners must follow the guidelines of their regulatory college
<b>Evaluation of capacity to consent to admission to long-term care</b>  HCCA, Part III	A person for whom long-term care is proposed and whose capacity there is reasonable ground to believe is lacking.	A capacity evaluator	Membership in a limited number of health professions	None

## 2. Informal Assessments of Capacity

Informal capacity assessments 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 has a significant impact on the breadth of application of substitute decision-making in Ontario, particularly as these informal assessments occur more frequently than formal assessments.

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.<sup>127</sup> 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.<sup>128</sup> 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, for example 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.<sup>129</sup>

During the LCO's 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 this 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.

**During the LCO's 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 this did not always fit naturally with other aspects of their role.**

Service providers 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. The Canadian Bankers Association, in its 2016 submission, commented,

*Financial institutions that are dealing with the life savings and financial security of their clients, including older persons and persons with disabilities, require certainty when clients or their legal representatives enter into contracts and provide instructions about the investment and disposition of the client's financial holdings. In situations where a client's actions make it less likely that presumptions of capacity can be relied upon, financial institutions should be able to obtain and rely on objective proof of a client's capacity for decision-making and/or of the legal representation of the client. We suggest development of a process that engages private professionals, such as doctors or lawyers, to provide the requisite degree of oversight and who could also provide a certification, be it of capacity or the validity of the power of attorney, for example. Legislation should provide that a financial institution could rely on this certification, thereby allowing the financial institution to discharge its obligations to its client with certainty and without the need for court proceedings.*<sup>130</sup>

Service providers 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

Examinations of capacity to manage property under Part III of the MHA,<sup>131</sup> were intended to provide a speedy and simple mechanism for ensuring that those admitted to psychiatric facilities did not lose their property due to their 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.<sup>132</sup> 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,<sup>133</sup> and *must* do so prior to discharge. At the time of discharge, the certificate must either be canceled<sup>134</sup> or a notice of continuance ordered.<sup>135</sup>

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).<sup>136</sup> The PGT then becomes the patient's statutory guardian of property,<sup>137</sup> unless the patient has a POA that comes into effect upon incapacity.<sup>138</sup> 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 SDA<sup>139</sup> has been applied for the purposes of determining the capacity to manage property under the MHA.<sup>140</sup>

Patients admitted to a psychiatric facility are not entitled to refuse the examination to determine their capacity to manage property.<sup>141</sup> However, they are afforded substantial procedural rights, including:

- the right to receive notice that a certificate of incapacity has been issued;<sup>142</sup>
- the right to timely provision of a rights adviser;<sup>143</sup> and
- the right to apply to the Consent and Capacity Board (CCB) to review the assessment.<sup>144</sup>

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

**SDA assessments can result in a broad range of outcomes for the assessed individual, from having no legal effect to triggering a statutory guardianship.**

Non-MHA assessments of capacity to manage property are governed by the SDA. The SDA also governs assessments of capacity to manage personal care, which includes decisions related to health care, clothing, nutrition, shelter, hygiene or safety. SDA Capacity Assessments may be triggered in a variety of ways and for a number of different purposes, including:

- to create a statutory guardianship for property;<sup>145</sup>
- 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.<sup>146</sup>

SDA assessments can result in a broad range of outcomes for the assessed individual, from having no legal effect to triggering a statutory guardianship.

Only a qualified Capacity Assessor can conduct a statutorily required Capacity Assessment under the SDA.<sup>147</sup> 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).<sup>148</sup>

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*<sup>149</sup> established by the Ministry of the Attorney General.<sup>150</sup> The *Guidelines* aim 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.<sup>151</sup> 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,<sup>152</sup> 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.<sup>153</sup>

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.<sup>154</sup> 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.<sup>155</sup>

## 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.

The evaluation of capacity with respect to admission occurs when an individual's family or health professional believes he or she 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.<sup>156</sup>

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.

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, psychologists<sup>157</sup> and social workers.<sup>158</sup> 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 is in striking contrast with the detailed guidance for Capacity Assessors under the SDA, as described above. In their place is a five-question form known as the “evaluator’s questionnaire”, so ubiquitous as to be almost standard practice.<sup>159</sup> Importantly, the legal status of this form is unclear. 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.<sup>160</sup> Experts and stakeholders have created numerous guides to provide additional guidance for those conducting evaluations of capacity to make admissions decisions. None of these guides have been endorsed by legislation or regulations. As a result, evaluators are not required to use them. It is not clear how much buy-in these guides have or how widely they are distributed.

**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.**

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.

Individuals in these circumstances do not have the procedural rights available in other contexts. For example, a person in these circumstances does not have a 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. Individuals undergoing capacity evaluations may be entitled to limited procedural rights based on the common law principles of natural justice.<sup>161</sup>

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.<sup>162</sup>

## 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.<sup>163</sup> 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:<sup>164</sup> 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 another<sup>165</sup> or capable with respect to a treatment at one time and not at another.<sup>166</sup> The treatment-specific nature of legal capacity means that a new assessment must be done each time a new type of treatment is proposed.

**Patient procedural rights vary depending on their setting and on the rules of the health regulatory college governing the professional who makes the finding.**

There is no specific required training related to assessing capacity outlined in the HCCA or regulations. Each college regulates the mandatory qualifications for membership, and may provide guidelines or publications that address the importance of obtaining consent before administering treatment.<sup>167</sup> 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.<sup>168</sup>

Patient procedural rights vary depending on their setting 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.<sup>169</sup> Outside a psychiatric facility, a patient is not statutorily entitled to written notice of a finding of incapacity to consent to a treatment. Moreover, 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. In practice it appears that colleges generally 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. These requirements are not consistent or provincially mandated, however.

Importantly, all individuals who have been found incapable of consenting to a treatment can apply to the CCB for review of a finding of incapacity 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.<sup>170</sup>

Oversight of the quality of these assessments and the provision of procedural rights 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. This issue is crucially important to this area of law because capacity decisions have extremely serious consequences for individuals and their families. Legal capacity decisions also have significant implications for a wide range of professionals and institutions.

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.

The discussion below summarizes the LCO's analysis regarding the most significant issues regarding assessments of capacity.

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

An assessment of capacity may have very significant and long-term ramifications for the autonomy of the individual should it result in a finding that he or she lacks legal capacity. It is therefore important that assessments of capacity not be performed unnecessarily, or inappropriately.

A formal assessment of capacity can also 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"<sup>171</sup> and a "substantial intervention into the privacy and security of the individual".<sup>172</sup> 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.

**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.**

There may be a blurring of lines in some cases between the purposes of legal capacity and decision-making legislation and adult protection goals, which aim to address abuse and neglect of vulnerable adults regardless of the legal capacity of the individuals involved.

One significant 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”.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> The potential for these kinds of issues is apparent from the caselaw.<sup>176</sup> The burden of dealing with potentially conflicting agendas and the possibility of nefarious purposes falls on the Capacity Assessor.<sup>177</sup>

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

There may be a blurring of lines in some cases between the purposes of legal capacity and decision-making legislation and adult protection goals, which aim to address abuse and neglect of vulnerable adults regardless of the legal capacity of the individuals involved. 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.



*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

ARCH Disability Law Centre reported that it has observed situations in which family members, friends and service providers obtain or request capacity assessments in situations where it may not be necessary.

*In some cases it may be seem easier to use the capacity assessment process to have a person declared incapable since this leads to the imposition of a substitute decision-maker who has clear legal authority and responsibility for certain decisions. In addition, once a substitute decision-maker is in place, there is a perception that it is no longer necessary to accommodate the 'incapable' person or involve them in decision-making. Therefore it can seem more efficient, in terms of time and human resources, to have a substitute decision-maker than to support a person to make his/her own decisions.<sup>178</sup>*

The LCO was also told that those conducting examinations of capacity to manage property under the MHA may face temptations to employ them in ways that address institutional pressures.

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

The LCO was also told that those conducting examinations of capacity to manage property under the MHA may face temptations to employ them in ways that address institutional pressures.<sup>179</sup> 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.<sup>180</sup>

Finally, the LCO heard concerns 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), reported 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.<sup>181</sup> 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.

...[T]he LCO heard concerns 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.

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

Capacity Assessments under the SDA are provided on a consumer choice model. In this model, the individual, his or her family, and/or the affected institution retains the responsibility for locating and paying for an appropriate Capacity Assessor.

The Ministry of the Attorney General has provided thorough guidelines for SDA Capacity Assessments. Through the Capacity Assessment Office (CAO), it ensures minimum standards through education and ongoing training requirements. The CAO also 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.<sup>182</sup>

**The key strength of this model lies in the quality of the assessments that result from this screening, training and oversight regime.**

#### **Capacity Assessment Office Financial Assistance Program: Eligibility Criteria**

- 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.
- 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.

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.

The key strength of this model lies in the quality of the assessments that result from this screening, training and oversight regime. While the skill of Capacity Assessors of course varies, overall, stakeholders had confidence that there are meaningful standards associated with these important processes.

The overriding concern is with the accessibility of Capacity Assessments. This concern was raised repeatedly throughout the consultations, with a number of barriers to access identified. Given that Capacity Assessments are necessary for both entry into guardianship and for exit, their accessibility is a matter of significant importance to families and to individuals affected by issues related to legal capacity. These barriers to access may result in pressures to gain entry to the MHA examinations described in the previous section.

The cost of Capacity Assessments was seen as a significant barrier to access by 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

**The LCO heard that accessibility is affected, not just by cost, but also by the lack of system navigation. 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.**

As noted above, the CAO administers a fund for Capacity Assessments. Unfortunately the LCO has heard this fund 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.<sup>183</sup>*

The LCO heard that accessibility is affected, not just by cost, but also by the lack of system navigation. 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

Linguistic and cultural barriers may also affect the ability to identify the relevance of a Capacity Assessment and to navigate access to one.

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. As well, the nature of the process may not work well for individuals who are low-income, or for particular communities.

**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.**

*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

Finally, the LCO heard that there are other populations that may face specific barriers to accessing SDA Capacity Assessments. The attention of the LCO was drawn, for example, to the situation of Youth in Care who are transitioning to independence at the age of 18. For those transitioning youth who are living with acquired brain injuries, mental health disabilities or other condition that may affect decision-making abilities, there may be no clear mechanism or responsibility for triggering a Capacity Assessment at age 18: these youth may “fall through the cracks” in various systems.

### **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. 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.

The importance of service providers understanding the system cannot be underestimated. If they are not able to provide accurate information, they may unintentionally mislead individuals and families.

The importance of service providers understanding the system cannot be underestimated. If they are not able to provide accurate information, they may unintentionally mislead individuals and families. 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

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.<sup>184</sup>*

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.

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.

*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 yet 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 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.<sup>185</sup> 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 LCO's research indicates 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.

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.<sup>186</sup>*

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

Capacity Assessors designated under the SDA must meet specified provincial requirements for ongoing training, as well as comply with the thorough Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity*. Under the MHA and HCCA, however, assessments are largely subject to the professional judgment of the practitioners who carry them out. In the LCO's view, this results in a lack of clear standards for assessments under those two statutes.

##### Examinations under the *Mental Health Act*

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. The LCO's research indicates 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 is the effect of an existing POA on examinations. Section 54(6) dispenses with the requirement to make 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”. Neither statute nor policy defines “reasonable grounds”. The LCO has heard that, when combined with misunderstandings of continuing powers of attorney for property, this lack of clarity may lead to 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. As a result, 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 disproportionate impact on older adults.

### **Capacity Evaluations under the *Health Care Consent Act***

Neither the HCCA nor its regulations provide guidance for 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 that the courts have held does not on its own constitute a proper capacity evaluation.<sup>187</sup>

**The level of procedural protections to be afforded to persons subject to an evaluation of capacity is also unclear.**

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.<sup>188</sup> 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,<sup>189</sup> and the *Communication Aid to Capacity Evaluation (CACE)*, developed by Alexandra Carling-Rowland.<sup>190</sup> These guides are beneficial but incomplete solutions. 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.<sup>191</sup> 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.”<sup>192</sup>

### Assessments of Capacity to Consent to Treatment

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.

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.

*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

...[C]onfusion 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.

As the Advocacy Centre for the Elderly and Dykeman Dewhirst O'Brien (DDO) commented in their paper commissioned for this project, 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. A further paper completed in 2016 by Judith Wahl, Mary Jane Dykeman and Tara Walton, which thoroughly reviewed tools, policies and practices related to health care consent and advance care planning, identified a range of significant limitations and legal errors in practice tools in these areas, and considered how endemic misunderstandings of the law could be most fruitfully addressed.<sup>193</sup>

### Inconsistent Approaches

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. 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 challenging. Legal capacity is a nuanced concept in Ontario law. 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.*<sup>194</sup>

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.

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. 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

**...[P]articular attention should be paid to the challenges of assessing the decision-making abilities of youth: a developmentally informed approach is required, and this does not always fit neatly with understandings of legal capacity that assume an adult population.**

Similarly, it may require some patience and skill to communicate with persons with aphasia arising from stroke or head injuries: 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.

The LCO also heard that particular attention should be paid to the challenges of assessing the decision-making abilities of youth: a developmentally informed approach is required, and this does not always fit neatly with understandings of legal capacity that assume an adult population.

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. 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

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.

undertaken a variety of initiatives to increase the skills of their staff and to institute appropriate procedural protections for those they evaluate. 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.

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.

In their paper, *Health Care Consent and Advance Care Planning*, prepared for the LCO, ACE and DDO 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.<sup>195</sup>*

## 6. Provision of Rights Information

Given the implications of a determination of lack of legal capacity to make a decision, it is essential that individuals who are subject to assessments of capacity be provided with meaningful procedural protections.

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.



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.*<sup>196</sup>

The LCO was told repeatedly that existing rights information mechanisms are 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

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.

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

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

**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.*<sup>197</sup>

There are 26 health regulatory colleges in Ontario, with responsibilities for setting and enforcing guidelines for the practice of health practitioners, providing ongoing training and education, and receiving complaints from the public. The health regulatory colleges oversee a wide range of professionals, including doctors, nurses, dentals, speech language pathologists, dental hygienists, dieticians, respiratory therapists, pharmacists, occupational therapists, and many others. All of these professionals are responsible for obtaining informed consent to treatment under the HCCA: all are therefore directly affected by legal capacity and decision-making laws. The responsibility of the health regulatory colleges to develop practice guidelines for their members allows for guidelines to be tailored to the particular skills, contexts and responsibilities of their members. However, it does also result in very wide variation in approaches, which causes challenges in the application of legal capacity laws.

The health regulatory colleges differ widely in the content and specificity of their guidelines on rights information for persons found legally incapable of consenting to treatment.

- Some, such as the College of Occupational Therapists, 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,<sup>198</sup> while others, such as the College of Audiologists and Speech Language Pathologists (CASLPO) provide much more extensive guidance.<sup>199</sup>
- Some, such as the College of Respiratory Therapists and CASLPO, 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.<sup>200</sup>
- Some, such as the College of Dietitians, 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,<sup>201</sup> while others, such as the College of Nurses, appear to require provision of rights information whenever there is a finding of incapacity.<sup>202</sup>
- Some, such as the College of Respiratory Therapists, 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.<sup>203</sup>
- Some, such as the College of Dietitians, merely require the practitioner to inform the incapable person of a right to appeal,<sup>204</sup> while others, such as the College of Respiratory Therapists, require the practitioner to provide practical assistance, for instance by referring them to assistance within the facility or recommending that they hire a lawyer.<sup>205</sup>
- Some, such as the College of Nurses and the College of Physicians and Surgeons, leave the matter to the professional judgment of the practitioner, such as requiring them to provide “reasonable assistance”.<sup>206</sup>

**This wide variation leads to inconsistent rights protections, and therefore a lack of equal treatment for persons who are often in an extremely vulnerable situation.**

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Given this context, it is not surprising that 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, 1992*, 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,

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.

*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.<sup>207</sup>*

## 7. Gaps in Provisions for Consent: Detention of Persons Lacking Legal Capacity

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

**The statutory provisions regarding detention of persons lacking capacity appear to be incomplete. 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.**

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. 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”.<sup>208</sup>

The Advocacy Centre for the Elderly (ACE) has pointed out that the legality of these secure units is unclear.<sup>209</sup> Health providers have a legal duty of care to their patients. Hospitals and long-term care homes have a duty of care 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,<sup>210</sup> and the HCCA explicitly preserves this common law duty.<sup>211</sup>

The statutory provisions regarding detention of persons lacking capacity appear to be incomplete. 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. The exception is 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. A “Ulysses Clause” may authorize “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 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* provides at length for involuntary admission for persons with a diagnosed mental disorder who meet a number of other conditions,<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> There are parallel unproclaimed provisions in the *Retirement Homes Act, 2010*.<sup>215</sup> There are also provisions in the HCCA, also unproclaimed, outlining the jurisdiction of the CCB with respect to secure units.<sup>216</sup>

The lack of consistency and clarity raises concerns and challenges for hospitals, long-term care homes, and retirement homes that are currently detaining individuals. The more important consequence, however, is for individuals who may be detained. The lack of meaningful safeguards, consistent practices, provincial rules and procedural rights puts their fundamental rights in jeopardy.

The Mental Health Legal Committee and the Advocacy Centre for the Elderly, in their 2016 submissions, both commented that issues of consent to detention raise constitutional concerns. 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”.<sup>217</sup>

These issues have been dealt with in different ways in other common law jurisdictions. In response to the *Bournewood* decision, the United Kingdom’s *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.<sup>218</sup> 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.<sup>219</sup>

The submissions by the Mental Health Legal Committee and the Advocacy Centre for the Elderly raised a number of specific issues of concern in designing any regime for consent to detention, including:

- The appropriateness of retirement homes, as private entities, having power to detain;
- The scope of the ability to detain: the unproclaimed provisions address only secure units and not other forms of detention;
- Which professionals may make recommendations to confine residents; and
- The nature of the procedural rights and safeguards that should attend any such detention, including rights to hearing, regular reviews and access to rights advice.

**The lack of meaningful safeguards, consistent practices, provincial rules and procedural rights puts their fundamental rights in jeopardy.**

## D. APPLYING THE LCO FRAMEWORKS

As discussed in Chapter 4, debates about legal capacity and how it is defined are often described in terms of competing principles of autonomy and “beneficence” or safety. The tension between these principles was discussed at length in the LCO’s *Frameworks* and earlier in this *Final Report*. In some ways, this area of the law can be understood as a mechanism for balancing and fulfilling the principles.

**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.**

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. The *Frameworks* emphasize the importance of simplifying complex systems, to make them more transparent and accessible, and providing supports or advocacy services to assist 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. 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 *Frameworks* emphasize the importance of lived experience and remind us that the experiences and needs of persons who may be affected by this area of the law will vary significantly. As a result, 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.



## E. THE LCO'S APPROACH TO REFORM

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. These topics are discussed at length earlier in this Chapter. The recommendations that follow are primarily directed at these issues. The LCO addresses related questions regarding access to information, training and education about assessment and procedural rights elsewhere in this *Final Report*.

At this time, the LCO is recommending incremental improvements to Ontario's capacity assessment regime. 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.

it is essential that there be a clear statutory regime that provides a legal foundation that protects the liberty interests of very vulnerable Ontarians, ensures that adequate safeguards and procedural protections are in place, and authorizes detention only in appropriate circumstances.

## F. RECOMMENDATIONS

### 1. Developing a Statutory Regime for Decision-making Regarding Detention

The issues identified earlier in this Chapter are urgent issues. They raise significant liberty interests, affect a large number of Ontarians, and are likely to grow over time, given current demographic trends. In these circumstances, it is essential that there be a clear statutory regime that provides a legal foundation that protects the liberty interests of very vulnerable Ontarians, ensures that adequate safeguards and procedural protections are in place, and authorizes detention only in appropriate circumstances. This regime would both protect rights and provide legal clarity and certainty to the family members, health care professionals and institutions involved in these very serious situations.

Design of such a statutory regime raises complex issues which lie beyond the scope of this project. It is therefore not the LCO's intent to proffer the specific elements of this regime. However, the considerations which have guided this project as a whole may also be of assistance to government in undertaking this task. These include:



- Attention to the fundamental rights of those affected, as well as to the guidance offered by the *Framework* principles, including those of recognizing the importance of safety/security, fostering autonomy and independence, and promoting inclusion and participation;
- Applying a “least restrictive” approach to issues related to legal capacity and decision-making;
- Carefully considering the complex roles of substitute decision-makers, including the potential for conflicts of interests and problematic family dynamics;
- Taking into account the significant barriers to access to the law faced by persons who lack or may lack legal capacity; and
- Seeking solutions that are practical and that take into account the reasonable needs of third parties and service providers.

**It is implicit in Ontario’s legislation 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.**

#### **THE LCO RECOMMENDS:**

10: The Government of Ontario design and implement a statutory process for decision-making with respect to detention for those who lack legal capacity [do not fall within the *Mental Health Act*] and whose detention is required in order to address vital concerns for security or safety. This statutory process would:

- a) balance the competing considerations of safety and fundamental liberty rights, in keeping with a least restrictive approach to issues related to legal capacity and decision-making;
- b) provide meaningful procedural protections, taking into account the significant barriers to access to justice experienced by those directly affected;
- c) consider the potential for conflicts of interest on the part of substitute decision-makers;
- d) take into account the reasonable needs of those administering the law, so as to avoid unnecessary or ineffective administrative burdens; and
- e) include a strategy for data collection, public reporting, and monitoring and evaluation.

## **2. Triggers for Assessment**

It is implicit in Ontario’s legislation 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.

Consistent with this approach, assessments of capacity to consent to treatment or to admission to long-term care are defined in legislation. They are triggered only where a) a specific treatment or service is in contemplation and b) there are reasonable grounds to question the presumption of capacity to provide consent. In other words, HCCA assessments are only triggered where there is a clear, specific and present need.<sup>220</sup>

By way of contrast, the SDA does not include a clear statutory requirement for a specific and present need. 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. 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.*<sup>221</sup>

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.

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”.

Nevertheless, it appears that in practice more direction is required to ensure protection of people's rights.

Earlier in this Chapter, ARCH Disability Law Centre's concerns with the inappropriate use of SDA Capacity Assessments to impose unnecessarily restrictive approaches were noted. While acknowledging that barriers to SDA Capacity Assessments may be of detriment to their clients, they expressed concerns that efforts to ease access to these assessments not result in easier misuse:

*Given that ARCH has observed the use of capacity assessments where less restrictive measures may have been adequate, we are concerned that the LCO's recommendation to increase access to capacity assessments may have an unintended detrimental impact by subjecting even more persons with disabilities who have capacity issues to unnecessary capacity assessments. If this occurs, more people may be subject to substitute decision-making where less restrictive measures may have sufficed.*<sup>222</sup>

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.

The LCO notes that 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.<sup>223</sup> Assessors must know the reason that a capacity assessment has been requested and familiarize themselves with the circumstances leading to the request.<sup>224</sup> 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. In keeping with Recommendation 1, a clear statement in the SDA of the appropriate purposes for Capacity Assessment would be valuable. As well, because forms tend to shape practice, a review of the forms associated with Capacity Assessments would be useful. For example, it was suggested to the LCO that the language included in Form C for Capacity Assessors created under Regulation 460/05, be strengthened.

...[T]he 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, subjecting all members of this group to an examination.

#### THE LCO RECOMMENDS:

11: The Government of Ontario:

- a) amend the *Substitute Decisions Act, 1992* to provide a clear statement as to the appropriate purposes of Capacity Assessment; and
- b) review forms under the *Substitute Decisions Act, 1992* to ensure that the forms promote the use and conduct of Capacity Assessments in accordance with the purposes and principles underlying the statute.

The MHA takes yet another approach to the triggering of an assessment. It 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 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, subjecting all members of this group to an examination. 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.

Assessments of capacity are intrusive processes with potentially significant implications for the affected individual's rights. The LCO believes that such assessments should take place only where necessary for the interests of the individual,

**Assessments of capacity are intrusive processes with potentially significant implications for the affected individual's rights. The LCO believes 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.**

and not on the basis of presumptions about particular classes of individuals. The LCO believes 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 in order 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.

Under the circumstances, 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. As well, in implementing Recommendation 17, with respect to the creation of Guidelines for examinations for capacity under the MHA, guidance should be provided on how physicians should understand and identify where reasonable grounds exist.

#### **THE LCO RECOMMENDS:**

12: Consistent with the presumption of capacity, the Government of Ontario amend section 54 of the *Mental Health Act* with respect to examinations of capacity to manage property, to require physicians to conduct such examinations only where there are reasonable grounds to believe that the person may lack legal capacity to manage property.

There was significant discussion of section 54(6) of the MHA in the submissions following the release of the *Interim Report*. This provision specifies that there is no requirement for an examination to manage property upon admission if the physician believes on reasonable grounds that there is a continuing power of attorney for property. As was discussed earlier in the Chapter, problems arise under this section where there is no careful review of the power of attorney, so that the examination may be dispensed with on the basis of a document that is not applicable in the circumstances or does not cover all of the person's property.

Some advocated for a clarification in the statute to address this issue. Specifically, it was argued that it should be clear that prior to dispensing with an examination of capacity to manage property because of the existence of a power of attorney, there must be a review of the scope and requirements of that power of attorney. If the power of attorney is not applicable or does not cover all of the property, the examination should proceed.

...[S]ome 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.

Others suggested that the provisions of section 54(6) with respect to powers of attorney be removed: the result would be that where a patient is found to lack capacity to manage property and a power of attorney exists, the power of attorney would be forwarded to the Public Guardian and Trustee along with the declaration of incapacity, and if appropriate, the statutory guardianship would then be terminated. In this way, the patient would retain the benefits of rights advice and the PGT would be responsible for examining the power of attorney document.

The LCO believes that the first option is the more practical approach in the circumstances. The disadvantage to the second approach is that it would result in additional layers of bureaucracy and legal complexity: a statutory guardianship would be created, only in order for it to be shortly thereafter terminated. This approach would also create some incentive for informal “work arounds” in such a system, as well as undermining the essential purpose of Part III of the MHA of providing speedy invocation of financial decision-making for patients where warranted. Finally, in Recommendation 40, the LCO has proposed that the Government of Ontario work towards replacing statutory guardianship with adjudication for all guardianships: an approach that broadened statutory guardianship would be inconsistent with that Recommendation.

#### THE LCO RECOMMENDS:

13: The Government of Ontario amend section 54(6) of the *Mental Health Act* to clarify that a physician may only dispense with an examination of capacity to manage property that would be otherwise required if the existing continuing power of attorney covers all of the patient’s property.

### 3. 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. 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. The LCO has concluded, however, that additional efforts are required to ensure that vulnerable groups are not disadvantaged in accessing their rights.

### THE LCO RECOMMENDS:

14: The Government of Ontario develop and implement a strategy for improving access to Capacity Assessments under the *Substitute Decisions Act, 1992*. Such a strategy would consider how to remove informational, navigational, communication and other barriers for persons in remote and First Nation communities; newcomer communities; youth in transition from care; 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.

It may be difficult for persons found incapable with respect to property under the MHA to access a new assessment under the SDA process once they are discharged. As a result, they may have no viable means of exiting from statutory guardianship.

As was described above, Regulation 460/05 under the SDA sets out a list of professions that are eligible to qualify as SDA Capacity Assessors. The LCO received a number of submissions in response to the *Interim Report* suggesting additions to this list, with a view to ensuring that persons with all types of impairments affecting decision-making have access to assessments by professionals who have the specialized skills to address their particular needs. For example, Communication Disabilities Access Canada (CDAC) pointed to the particular needs of persons with communications disabilities and highlighted the benefits of the involvement in assessments of Speech Language Pathologists, recommending that these professionals be added to the list of potential Capacity Assessors. The College of Audiologists and Speech Language Pathologists also proposed the inclusion of Speech Language Pathologists in the list:

*The College proposes that the Ministry ... consider adding CASLPO as one of the designated regulatory colleges. Speech language pathologists have the education in the capacity evaluation process, the knowledge and skills to overcome a communication barrier, and in-depth knowledge of cognitive communication disorders and how these impact decision-making. Speech-language pathologists can use their skills to determine impartially and with greater certainty, whether or not an individual living with a communication barrier has the capacity to make decisions regarding property and personal care.*<sup>225</sup>

As was described above, the LCO heard repeated concerns about the cumbersome process for re-assessment of persons under the MHA who transition from in-patient to out-patient. It may be difficult for persons found incapable with respect to property under the MHA to access a new assessment under the SDA process once they are discharged. As a result, they may have no viable means of exiting from statutory guardianship.

**The relationship between the MHA and SDA is complex, as is the question of the appropriate reach of the MHA into the community. However, the underlying goal, of ensuring that mental health patients have access to the assessments they need with respect to capacity to manage property, is an important one.**

Mental health clinicians pointed out to the LCO that it did not seem to make sense that psychiatrists who could evaluate capacity to manage property in one setting were unable to do so for the same client in another setting.

The Centre for Addiction and Mental Health (CAMH) proposed to the LCO that psychiatrists who conducted capacity examinations under the MHA be provided with the opportunities to assess or re-assess persons defined as ‘outpatients’ under the MHA. These outpatients would have the same rights and protections as persons currently examined as inpatients. This could be framed broadly, or could be restricted to re-assessments of individuals who were found incapable under the MHA provisions and who are now in the community. This is an interesting proposal, though subject to concerns about extending the reach of the MHA, which is perceived as a relatively coercive instrument, into community settings.

Another suggestion was to examine whether this issue could be addressed through amendments to the SDA process – for example, by creating a special exception or designation under the qualifications for Capacity Assessors.

The relationship between the MHA and SDA is complex, as is the question of the appropriate reach of the MHA into the community. However, the underlying goal, of ensuring that mental health patients have access to the assessments they need with respect to capacity to manage property, is an important one. The LCO believes that there is merit in considering this issue further.

#### **THE LCO RECOMMENDS:**

15: The Government of Ontario review the list of professionals eligible to conduct Capacity Assessments under the *Substitute Decisions Act, 1992*

## **4. Effective 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 certainly true that there may be appropriate 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. The LCO believes that there are basic rights accruing to



persons under assessment that are not, or should not be, simply a matter of professional judgment, no matter how well-intentioned or implemented.

The LCO heard repeatedly 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. This recommendation received strong and consistent support in the feedback to the *Interim Report*, from a wide range of stakeholders.

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. At a minimum, however, the new *Guidelines* should include the following:

**The LCO heard repeatedly 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.**

- an explanation of the purpose of assessments, of their context in Ontario's legislative scheme for consent, and of the fundamental rights that are at stake;
- a description of the "ability to 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;
- in harmony with Recommendation 4, 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 and other forms of support;
- guidance on conducting assessments for populations with special needs, including developmentally informed approaches for youth; needs related to language and culture; appropriate assessments for populations with different types of impairments;
- guidance on creating the appropriate environment and conditions for assessment,
- guidance on the appropriate frequency of assessments and on dealing with issues related to fluctuating capacity; and
- basic practical guidance on carrying out an assessment interview.

Similarly, official *Guidelines* should be developed for examinations for capacity to manage property under the *Mental Health Act*. To the degree possible, these *Guidelines* should be harmonized with those under the SDA, except where account must be taken of the differing context and procedural rights associated with these assessments.

In accordance with Recommendations 12 and 13, *Guidelines* should include an explanation of the trigger for an examination of capacity in this context and how it should be applied, and guidance on the reasonable steps that a physician should take in those cases where a power of attorney for property may exist.

#### THE LCO RECOMMENDS:

- 16: The Government of Ontario create official *Guidelines* for assessments of capacity under the *Health Care Consent Act, 1996*, incorporating basic principles, procedural rights, and guidance for appropriate assessments of particular populations, including the provision of accommodation.
- 17: The Government of Ontario create official *Guidelines* for examinations of capacity to manage property under Part III of the *Mental Health Act*, including in addition to matters listed in Recommendation 16, guidance on the appropriate application of section 54(6).

There is a real risk that individuals are having their fundamental right to make decisions for themselves removed unnecessarily or inappropriately.

## 5. 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 a significant violation of the most basic procedural rights. There is a real 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.

The LCO agrees that the current HCCA rights information model has significant shortcomings and that the rights of persons found incapable under the HCCA are insufficiently protected. Nevertheless, the LCO has 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, for reasons both of cost and 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;<sup>226</sup> just over three-quarters of the residents have some level of cognitive impairment.<sup>227</sup> 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.

As an alternative, the LCO has focussed its immediate 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.**

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. Standardization will also help to reduce the confusion of health practitioners 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 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 clear and effective common standards have been established, the LCO's 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.

**There are unavoidable challenges to access to justice and due process built into a rights information model.**

### THE LCO RECOMMENDS:

18: To strengthen Ontario's rights information regime,

- a) The Government of Ontario amend sections 17, 47.1 and 62.1 of the *Health Care Consent Act, 1996* to include clear and effective common standards for the provision of rights information to the individual who has been found to lack legal capacity, which will protect fundamental rights and will ensure that:
  - i. notice is 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 is provided in a manner that accommodates the needs of the affected individual, including alternative methods of communication; and
  - iii. the health practitioner provides 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) Consistent with Recommendations 57 and 58, the health regulatory colleges strengthen 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 and Capacity Evaluators, upon a finding of incapacity, to complete a simple regulated form, analogous to Form 33 "Notice to Patient" under the *Mental Health Act*, which would indicate the requirements for informed consent and rights information, and the practitioner's confirmation that these requirements had been adhered to.

The LCO believes that the implementation of the above recommendation will improve the implementation of rights information. It is important to recognize, however, the inherent shortcomings in a rights information model. This model requires health practitioners 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 legal capacity and where a challenge to that finding would involve them in proceedings before the CCB. There are unavoidable challenges to access to justice and due process built into a rights information model. Access to independent and expert advice is clearly preferable.

This was reinforced through the feedback to the *Interim Report*, in which multiple stakeholders emphasized the built-in limitations of a rights information model, and advocated for an extension of independent and expert advice about rights to a wider range of situations and populations.

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”.<sup>228</sup> 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.

**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 ... there may be means of providing something short of this, but that still advances rights for affected individuals.**

In identifying groups or situations where an expansion of rights advice would be most beneficial, responses to the *Interim Report* consistently identified capacity evaluations for consent to admission to long-term care as a priority. These evaluations are potentially major turning points in the life of those evaluated, often resulting in a transition from life in the community to residence in long-term care. Unlike Capacity Assessments under the SDA or examinations for capacity to manage property, they are attended by relatively sparse rights protections, and capacity evaluators themselves are not subject to the same types of training and oversight as SDA Capacity Assessors.

The challenge in applying a rights advice model to capacity evaluations is the diversity of the settings in which these take place, and of the professionals and institutions responsible for undertaking them. As well, the number of capacity evaluations carried out each year is very large, and with current demographic trends, that number is likely to grow.

Nevertheless, the LCO agrees that capacity evaluations are the correct starting point for any expansion of independent and expert information about rights.

Because of the potential cost and complexity of developing effective means for providing expert and independent information about rights, pilot projects can be a useful approach.

Because of the number of settings in which capacity evaluations take place, it may be valuable to develop a range of pilot projects. Suggestions to the LCO included:

- In a long-term care home setting;
- In a hospital setting;

- Through a Local Health Integration Network, perhaps building on work that some of the Community Care Access Centres have carried out in building ethical frameworks and supports; and
- In psychiatric facilities, as an extension of the existing rights advice programs.

Some stakeholders pointed to the potential of partnerships between the justice sector and health institutions in developing pilot projects and, eventually, models for independent and expert advice about rights in health care settings.

One example of such partnerships 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. They adopt a multidisciplinary model that integrates “access to legal services as a vital component of health care”.<sup>229</sup> These partnerships have formalized a “culture of advocacy”<sup>230</sup> 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 students<sup>231</sup>) 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”.<sup>232</sup> 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.

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,<sup>233</sup> which provides legal services to patient-clients, legal education to health care professionals, and leadership on systemic advocacy and law reform.<sup>234</sup> Legal Aid Ontario provides funding. Once the current pilot is complete, the partnership is expected to expand to five other Family Health Team sites.<sup>235</sup>

**Some stakeholders pointed to the potential of partnerships between the justice sector and health institutions in developing pilot projects and, eventually, models for independent and expert advice about rights in health care settings.**

...[G]iven 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 system wide attention to the issue is also necessary to ensure basic procedural rights.

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.<sup>236</sup>

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 some circumstances, this could create the perception or the reality of a conflict of interest. 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.

#### THE LCO RECOMMENDS:

19: In order to strengthen the protection of legal rights under the *Health Care Consent Act, 1996*, the Government of Ontario develop a strategy to expand and evaluate the provision of independent and expert advice about rights to individuals who have been found to lack legal capacity; considerations in developing such a strategy include:

- a) building on partnerships with organizations in the justice sector;
- b) focusing on those most vulnerable or whose rights are most gravely at risk, including persons subject to evaluations of capacity with respect to admission to long-term care; and
- c) developing and evaluating pilot projects in a range of settings.

## 6. 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 10, 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 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.

**The LCO has concluded that it would be 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.**

The LCO has concluded that it would be 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. Existing mechanisms and institutions that could fulfil this role are identified below.

Assessments of capacity under the HCCA take place in health care settings, and are in many ways inseparable from Ontario's broader context for providing health and long-term care. However, these assessments are, fundamentally, determinations about legal rights to self-determination. In monitoring and seeking to improve the quality of capacity assessments (and thereby, in implementing the Recommendations set out below), it is essential that these institutions incorporate into their understandings of quality a central focus on patients as bearers of rights, and on compliance with the law by health practitioners and health institutions. Institutions may find it valuable to partner with the justice sector in developing mechanisms for more meaningfully monitoring and overseeing consent and capacity law within their mandate.

### **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.<sup>237</sup>

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.

### THE LCO RECOMMENDS:

20: To improve the quality of assessments of capacity in health care settings, Health Quality Ontario:

- a) Within the scope of its mandate, take the following steps to encourage the improvement of the quality of assessments of capacity in accordance with legal standards in health care settings:
  - i. encourage health care organizations to include issues related to assessment of capacity and the accompanying procedural rights in their Quality Improvement Plans;
  - ii. encourage the inclusion of issues related to the assessment of capacity and the accompanying procedural rights in patient surveys conducted by health care organizations;
  - 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) promote approaches to quality that include respect for patient autonomy, a thorough understanding of the legal foundations of capacity and consent, and the promotion of patient rights.

**Persons living in long-term care have distinct and significant challenges in accessing legal rights. The nature of the setting is in many ways removed from the broader community. As well, long-term care residents are increasingly persons with very significant disabilities that may affect their abilities to understand and assert their rights.**

### ***Long-Term Care Homes Act, 2007***

Persons living in long-term care have distinct and significant challenges in accessing legal rights. The nature of the setting is in many ways removed from the broader community. As well, long-term care residents 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.<sup>238</sup> 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* (LTCHA) includes a Bill of Rights that directly addresses many issues related to legal capacity, decision-making and consent<sup>239</sup>.

#### **The “Bill of Rights” under the *Long-Term Care Homes Act, 2007***

The rights of each resident include:

1. To have his or her participation in decision-making respected;
2. To 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;
3. To manage his or her own financial affairs unless the resident lacks the legal capacity to do so.

**The LCO believes that these 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.**

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.<sup>240</sup> 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.<sup>241</sup> Compliance with the Bill of Rights may also be included in the inspections carried out under the LTCHA which empower inspectors to ensure compliance with the requirements of the Act.<sup>242</sup>

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 these 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.

**THE LCO RECOMMENDS:**

21: The Ministry of Health and Long-Term Care further promote the ability of 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 their staff training.

...[T]he 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.

**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),<sup>243</sup> were created by the Ontario government to fund and coordinate health services in the province.<sup>244</sup>

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.

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.<sup>245</sup> 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 LCO believes that 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.

**THE LCO RECOMMENDS:**

22: 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 under the *Mental Health Act* and *Health Care Consent Act, 1996*;
- b) ensure effective provision of rights information; and
- c) support the provision of information and resources to substitute decision-makers regarding their roles and responsibilities under the *Health Care Consent Act, 1996*.

ARCH suggested that in particular, MCSS should encourage and support developmental service providers to better address their responsibilities in relation to legal capacity and decision-making...

**Ministry of Community and Social Services**

In its response to the *Interim Report*, ARCH Disability Law Centre commented that, like the Ministry of Health and Long-term Care, the Ministry of Community and Social Services (MCSS) could play an important role in strengthening the implementation of legal capacity and decision-making laws among citizens affected by its programs and services. ARCH suggested that in particular, MCSS should encourage and support developmental service providers to better address their responsibilities in relation to legal capacity and decision-making under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (SIPDDA) and its accompanying regulations.<sup>246</sup>

The SIPDDA provides a legislative framework for the delivery of community-based services and supports, and for the provision of direct funding to individuals with developmental disabilities and their families. It includes a wide range of services and supports, including person-directed planning, residential services and supports, professional services, supports for community participation, and support for the activities of daily living. The SIPDDA establishes minimum standards with which service providers and community agencies must comply. Enforcement of these minimum standards takes place through a variety of mechanisms, including mandatory reporting requirements and inspections.

The *Quality Assurance Measures* regulation under the SIPDDA includes requirements that agencies “promote social inclusion, individual choice, independence and rights”, principles that may inform how agencies support persons with developmental disabilities in their decision-making. Centrally, every service agency and application entity must address the “promotion of social inclusion, individual choice, independence and rights” in their policies and procedures and in the development of

individual support plans of persons with developmental disabilities. Service agencies must also develop an annually-reviewed individual support plan that addresses that person's "goals, preferences and needs".<sup>247</sup>

### THE LCO RECOMMENDS:

23: The Ministry of Community and Social Services consider whether, within its oversight functions under the *Supports and Services to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* there are ways in which it can support and encourage the use of positive and autonomy-enhancing approaches to decision-making.

24: The Government of Ontario

- a) actively monitor, evaluate and report on the success of initiatives to:
  - i. improve the quality of assessments of capacity and
  - ii. strengthen meaningful access to procedural rights,
- b) should significant improvement not be apparent, undertake more wide-ranging initiatives.

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.

## 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 4, 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

**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.**

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. These steps include the creation of consistent minimum standards for rights information, and strengthened oversight, monitoring and educational roles for existing institutions, including Health Quality Ontario, the Local Health Integration Networks, and the Ministry of Health and Long-term Care. Over the longer term, it will be important to identify how the most vulnerable individuals can have access to advice about their rights that is independent and expert.

These practical steps will assist in clarifying understandings of the purposes of assessments and the processes associated with them, promote consistency, improve quality, and strengthen access to rights. Overall, this should improve system navigation both for users and professionals, empower individuals and their families, and reduce incorrect assessments, thereby promoting the appropriate use of substitute decision-making in those instances where it is necessary.

The quality of assessments of capacity and the ability of those who are assessed to access their rights are closely associated with concerns regarding education and training, issues dealt with at length in Chapter 10. 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 7, 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 8, as well as some issues related to personal appointments, which are the subject of Chapter 9.







# Legal Capacity, Decision-making and Guardianship

## CHAPTER SIX

# Powers of attorney: enhancing clarity and accountability

## A. INTRODUCTION AND BACKGROUND

### 1. The Importance of Powers of Attorney

Ontario's legislation regarding POAs aims to make these tools widely accessible. As a result, there are relatively few practical or procedural barriers to their creation, as compared with other jurisdictions.

One of the most important reforms included in the *Substitute Decisions Act, 1992* (SDA) was the introduction of powers of attorney (POA). These instruments allow individuals to appoint one or more persons to make decisions for them, including 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.

Since these are personal documents, often self-created, there is little data on their use. However, there is no doubt that they are widespread. POAs are certainly far more widely used than guardianships, and are now common planning tools, often prepared in conjunction with wills. Because they provide appointees with extensive powers over the life of the grantors, they have significant implications for autonomy, security and dignity. And because they potentially affect so many areas of life, including finances, shelter decisions and health care, they affect the daily practices of a very wide array professionals and institutions.

Ontario's legislation regarding POAs aims to make these tools widely accessible. As a result, 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. 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.

As well, as private appointments, these powerful documents are currently 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 powers of attorney and the responsibilities of those appointed, with a view to addressing these concerns. Although the proposed support authorizations are not a form of substitute decision-making, they are also personal appointments and pose risks that are in some ways similar. Therefore, some elements of the discussion in this Chapter are also applicable to these arrangements, should the government decide to add such arrangements to the legislation. These elements are discussed, albeit briefly, in Chapter 4.I.3.

- *Chapter 7, 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.*

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.

## 2. Distinguishing Abuse and Misuse

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.

It is useful to distinguish abuse and misuse of powers of attorney. 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.

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.<sup>248</sup> 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.<sup>249</sup>

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. 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

...[A]buse and misuse of legal capacity and decision-making laws through POAs was a dominating concern at all stages of this project. Concerns were expressed by legal professionals, families, health practitioners, advocates and community organizations, long-term care providers, financial institutions and other service providers...

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

Powers of attorney are powerful legal tools that advance autonomy rights in important ways. It is also true, however, that abuse and misuse of legal capacity and decision-making laws through POAs was a dominating concern at all stages of this project. 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.

## **Misuse and Abuse of Powers of Attorney: Considering the Limited Evidence**

### **The Challenge of Data Collection**

We don't know how many POAs exist:

- POAs are privately created, including through commercial “kits” that are widely available in stores and through forms made available through Ontario's Ministry of the Attorney General.
- As there is no central repository for POAs, we can't know how many have been created.
- Once a POA has been created, it may be many years until it comes into effect, or it may never come into effect at all. The number of POAs in existence does not equal the number in use.

We don't know how frequently POAs are misused or abused:

- While anecdotal reports of abuse of POAs, and particularly POAs for property, are widespread, it appears to be relatively rare for individuals to seek redress through legal processes, for a variety of reasons.

### **Some Data to Consider:**

- A pioneering national survey on elder abuse indicated that 4 per cent of the approximately 2,000 respondents age 65 and older had experienced some form of abuse, with financial abuse being the most common type of abuse, suffered by 2.5 per cent of the sample. The sample included only older persons living in private dwellings and not those living in institutional settings. (Elizabeth Podnieks, “National Survey on Abuse of the Elderly in Canada” (1993) *Journal of Elder Abuse and Neglect* 4)
- A 1998 British Columbia study that focussed exclusively on financial abuse found a rate of eight per cent of older adults indicating that they had experienced financial abuse. The two most common forms of financial abuse in this study were concerted coercion, harassment and misrepresentation, followed by abuse via power of attorney. (Charmaine Spencer, *Diminishing Returns: An Examination of Financial Abuse of Older Adults in British Columbia* (Gerontology Research Centre, Simon Fraser University: 1998))
- A 1999 Manitoba study on financial abuse of incapable adults under an order of supervision by the PGT found a rate of 21.5 per cent suspected financial abuse among subjects over age 60. The most common suspected abuser was an adult child of the subject. (John B. Bond et al, “The Financial Abuse of Mentally Incompetent Older Adults: A Canadian Study” (1999) 11:4 *Journal of Elder Abuse and Neglect* 23)
- Younger persons with disabilities have in general a higher risk of violence and victimization that is exacerbated for those who are living in institutional settings, have severe disabilities or have “mental disorders”. Persons with disabilities are particularly likely to be victimized by someone they know, whether it be family, friends, neighbours or care providers. Statistics Canada, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* by Samuel Perreault (Ottawa, Canadian Centre for Justice Statistics: 2009)

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 [POAs] 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

**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.**

The LCO received a number of very lengthy submissions from family members who felt that their loved ones had been mistreated through POAs 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 under POAs 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, like the one quoted below, 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, as well as for an accessible complaints mechanism.

*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

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.

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”.<sup>250</sup>

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:

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.

*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 choose 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.<sup>251</sup>*

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

Balancing flexibility and accountability is an important challenge for law reform in this area.

Balanced against concerns regarding abuse and misuse was the perceived importance of maintaining the accessibility and ease of use of POAs.

## 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* are linked 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.<sup>252</sup>

The importance of safeguards against abuse of persons who fall within legal capacity and decision-making law is also 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.*

Personal appointments, such as POAs and support authorizations, are 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, can enhance autonomy for grantors.

However, if they are used without proper knowledge or care, these instruments can increase risks of abuse. 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.

Therefore, 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, by diminishing access to these instruments, or reducing 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.

**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.**

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. 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 relationships have been chosen by the individual.

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. Neither the LCO nor anyone else knows how many POAs are in operation in the province. Nor is there much in the way of quantitative evidence regarding the extent of the use, abuse or misuse of POAs. As a result, the LCO’s analysis necessarily relies heavily on the perceptions and experiences of the persons and institutions consulted during this project.

The LCO’s consultations on these issues emphasized two messages: 1) the value of POAs and the corresponding importance that they continue to be accessible to Ontarians across all income levels; and 2) 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.

There appear to be three key issues underlying concerns about misuse of POAs:

1. the widespread lack of knowledge or understanding of the responsibilities associated with these instruments on the part of those who are appointed under them;
2. 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
3. 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;
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 7.

**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.**

## F. RECOMMENDATIONS

Given the current shortfalls in information about the use and misuse of POAs, the reforms proposed below would be enhanced by an accompanying strategy for researching and monitoring abuse, and evaluating the impact of reform.

## 1. Promoting Understanding of Duties and Responsibilities

The need for education and information regarding powers of attorney was raised consistently during the LCO's consultations. 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.

- *General concerns regarding education and information are addressed comprehensively in Chapter 10.*

At present, there are many high quality educational and information resources regarding POAs in Ontario. 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,<sup>253</sup> 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. The difficulty, however, is that these resources rely on persons creating or acting under a 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.

**The difficulty, however, is that these resources rely on persons creating or acting under a 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.**

### Requiring legal counsel for the creation of a valid power of attorney

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.<sup>254</sup> Some jurisdictions have much more stringent requirements related to witnessing: Manitoba restricts witnesses to a list of certain professionals,<sup>255</sup> and Saskatchewan requires that witnesses each sign a witness certificate attesting to their opinion that the grantor could understand the nature and effect of the enduring power of attorney at the time that it was signed.<sup>256</sup>

Canadian jurisdictions generally do not require legal advice to create a valid POA. The exception is Yukon, which requires that enduring POAs be accompanied by a certificate of legal advice.<sup>257</sup> Saskatchewan offers the option of either having two witnesses for the POA, or having a lawyer provide legal advice and a certificate of witness.<sup>258</sup>

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 2014 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.



...[S]uch 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...

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. Accordingly, the LCO does not recommend a requirement for legal advice for the creation of a personal appointment.

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.

- *The LCO has proposed a number of recommendations in Chapter 10 aimed at increasing the reach, accessibility and reliability of the information and education available to individuals regarding legal capacity and decision-making:*

#### **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 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.

There was discussion in some focus groups about making this form or some version of it mandatory. Some participants believed that this would ensure that all individuals creating a POA would at minimum have access to a basic level of correct information. This view has been adopted in a number of jurisdictions, including the Australian state of Victoria, and England and Wales. Other participants suggested that this approach would create a risk that some significant number of individuals would inadvertently create invalid POAs, because they were unaware of the requirement to use the standard form.

The LCO does not recommend the introduction of a mandatory form for powers of attorney. The use of a standard form could reduce the flexibility of these instruments, one of their major benefits. Significant public education resources would also be required for the transition to a mandatory form.

#### **Statements of commitment**

One means of promoting a clear understanding of the responsibilities of persons acting under a personal appointment would be to require them to formally acknowledge these responsibilities as part of the appointment process. This acknowledgement is called a statement of commitment.



Statements of commitment have been used in other jurisdictions and were widely supported during the LCO's public consultations.

British Columbia requires that an attorney sign an acknowledgement of the appointment prior to acting.<sup>259</sup> 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.<sup>260</sup>

Kerri Joffe and Edgar-André Montigny of ARCH Disability Centre recommend the adoption of statements of commitment in Ontario, adding that they should be available for use in any legal or administrative proceedings regarding failure to comply with a particular duty or obligation.<sup>261</sup>

Support for some form of acknowledgement was also voiced during a focus group with lawyers practicing in the area.

...[S]tatements of Commitment would provide some means of informing SDMs 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.

*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... 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.*

Focus Group, Trusts and Estates Lawyers 1, October 14, 2015

Similarly, the Ontario Caregiver Coalition stated that,

*[B]y far the majority of family caregivers act in good faith under POAs and ... being able to appoint someone you trust to make decisions on your behalf must remain a simple thing to do. However, the above- mentioned changes [Statements of Commitment and Notices of Attorney Acting] could deter those who might abuse their powers, thus protecting those who become incapable and are vulnerable. These requirements would be reasonable and beneficial changes to the law. Another beneficial aspect of these requirements would be that an opportunity would be provided at this time to educate the person accepting the appointment about the responsibilities of the role.*

Finally, the Mental Health Legal Committee (MHLC) commented in their submission that in the Statements, "[e]mphasis should also be placed on the autonomy enhancing aspects of the SDA". The MHLC further stressed that these Statements of Commitments should be linked to oversight mechanisms.

The LCO agrees that Statements of Commitment would provide some means of informing SDMs 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 into effect, the LCO believes that on balance, the requirement to complete a statement of commitment upon activation of a POA 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.

There are three options for when Statements of Commitment (and Notices of Attorney Acting) should be completed:

1. when the POA is created,
2. when the appointed person begins to act, or
3. when the grantor loses legal capacity.

It is important to remember that while a power of attorney for personal care only comes into effect when the grantor loses legal capacity, a continuing power of attorney for property may, at the option of the grantor, come into effect immediately and endure into the grantor's incapacity, or "spring" upon a finding of incapacity.

The **first option** has been enacted in British Columbia, where section 17 of the *Powers of Attorney Act* requires the person appointed to sign the document in the presence of two witnesses before "exercising the authority" granted in the document: that is, the ability to act hinges on this signing. The statute further clarifies that the authority of other attorneys is not affected by the failure to sign of one of the attorneys.<sup>262</sup> While this has the benefit of simplicity, it reduces the educational opportunity, as many years may pass between the creation of a POA and any need for its use. There are also practical challenges in assembling all of the necessary parties at the time of creation of the POA, as the Nova Scotia Law Reform Commission has highlighted in its review of powers of attorney.<sup>263</sup>

The Western Canada Law Reform Agencies Report on enduring powers of attorney adopted the **second option**. It recommended that an acknowledgement of responsibilities be required at the time that the grantor becomes incapacitated, as part of the Notice of Attorney Acting.<sup>264</sup> To require the completion of a Statement of Commitment or Notice of Attorney Acting upon the incapacity of the grantor would essentially turn all continuing powers of attorney into "springing" POAs. This would not only reduce the flexibility of these documents, a feature much appreciated by stakeholders, but would also exacerbate the current difficulties surrounding assessments of capacity, which were highlighted in Chapter 5.

The **third option** is to require the completion of these documents upon the activation of a POA. Trusts and estates lawyers have pointed out that this approach does not differentiate the agency and fiduciary aspects of the POA role. As noted above, this double role is inherent in the nature of these documents. However, it would avoid forcing assessments of capacity, and would be more closely in line with the educative

While such a requirement does add some burden to the process of putting a POA into effect, the LCO believes that on balance, the requirement to complete a statement of commitment upon activation of a POA is not an unduly onerous requirement in view of the potential benefit.

and transparency purposes of these reforms than requiring them at the time of creation. The LCO therefore believes that it would be most effective to require the signature of a Statement of Commitment at the time that an attorney begins to use the powers granted by the document.

Another concern raised was with respect to fluctuating capacity. In many cases, a person may have lost legal capacity with respect to some, but not all matters within the scope of a POA. As well, it is not uncommon for individuals to have capacity at some times and not at others. The LCO proposes that the Statement (and the Notices of Attorney Acting) be required only at the first instance and that the attorney be clearly discharged in the legislation from any requirement to undertake repeat these steps should, for example, a POA for personal care be activated by loss of legal capacity, then capacity be regained and lost again.<sup>265</sup> That is, the Statement and Notices would only be required upon a single occasion.

Finally, concerns were raised that failure to complete the Statement of Commitment (or Notices of Attorney Acting) might result in inadvertent invalidation of actions taken under a POA, to the disadvantage of the grantor. It should be noted that the SDA already contains a comparatively liberal saving provisions for non-compliance with execution requirements in sections 10(4) and 48(4), stating that “the court may, on any person’s application, declare the [power of attorney for property or personal care] to be effective if the court is satisfied that it is in the grantor’s interests to do so.” The LCO suggests that this be extended to include the requirements for Statements of Commitment and Notices of Attorney Acting.

...[I]t would be most effective to require the signature of a Statement of Commitment at the time that an attorney begins to use the powers granted by the document.

#### THE LCO RECOMMENDS:

##### 25: The Government of Ontario

- a) develop a standard form, mandatory Statement of Commitment, to be signed by persons accepting an appointment as an attorney under the *Substitute Decisions Act, 1992*, prior to acting for the first time under such an appointment. The Statement of Commitment would specify:
  - 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 appropriate, include this acknowledgement as part of the Notice of Attorney Acting described in Recommendation 26.

## 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 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 troubling stories 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.

**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.**

### Registries

During the consultations, there was considerable discussion of some form of POA registry 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.*

A properly implemented, mandatory registry is likely to be a costly endeavour, which raises the issue of how it would be operated, maintained and 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? As well, the additional

administrative requirements associated with registration would likely be seen as a burden – and additional disincentive – by grantors and attorneys,

More complex yet are issues related to privacy and access to the information in the registry. 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. Would the effect on the privacy of the grantor affect the likelihood that POAs would be created?

Nor would a registry conclusively answer questions surrounding the validity of a POA. 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 concept of Notices of Attorney Act has been considered by several Canadian law reform agencies. These Notices are intended to bring greater transparency to POAs, by ensuring circulation of the document to a pre-determined list of interested parties.

The Western Canada Law Reform Agency Report on *Enduring Powers of Attorney* recommended the adoption of a statutory provision requiring the attorney under a continuing POA to serve a “Notice of Attorney Acting”. This notice would follow a determination that the grantor lacks legal capacity to manage her or his affairs and the commencement of the attorney’s exclusive responsibility to manage the grantor’s affairs. At this point, the grantor no longer has 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.

**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.**

This Report also recommended that the Notice include information about the duties of attorney and legal remedies for abuse or misuse of these instruments, in order to promote transparency and accountability. This is a practical suggestion.

The LCO believes 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. 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 Nova Scotia Law Reform Commission has recommended that grantors ought to be able to explicitly opt-out from the notice requirement, because of the significant privacy issues at stake.<sup>266</sup> Ontario's Mental Health Legal Committee raised concerns about opt-out provisions. Opt-outs could become standard language for POAs and so could reduce the effectiveness of Notices. The MHLC, along with some others, argued that Notices should be mandatory in all cases.

**...[N]otices of Attorney Acting can provide a reasonably low-cost and flexible means of increasing transparency and accountability for persons acting under a POA.**

The LCO proposes a balanced approach, in which certain individuals with a significant stake in the validity and the appropriate implementation must receive a Notice. These would include the grantor him or herself, any monitor named in the instrument, any person who has previously been acting as an attorney for the grantor, and, because the spouse would almost always be directly affected, the spouse of the grantor (if that person is not the attorney). Other persons to receive the Notice may be identified by the grantor.

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.

Notices of Attorney Acting, like Statements of Commitment, raise important questions about timing. The Law Reform Commission of Nova Scotia 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.<sup>267</sup>

In the view of the LCO, the time at which the attorney begins to exercise authority, and therefore assumes liability under a continuing POA is the appropriate point in time at which to circulate a Notice of Attorney Act. 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.<sup>268</sup> 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.<sup>269</sup>

The considerations discussed for Statements of Commitment with respect to fluctuating capacity and to risks of good faith non-compliance with this requirement, apply also to Notices of Attorney Acting. As with Statements of Commitment, the LCO proposes that Notices be required only at the time the attorney first acts, and that the provisions for technical non-compliance in sections 10(4) and 48(4) of the SDA be extended to the completion of these documents.

### THE LCO RECOMMENDS:

26: The Government of Ontario amend the *Substitute Decisions Act, 1992* to require that a person exercising authority under a power of attorney be required to deliver a Notice of Attorney Acting at the time the attorney first begins to exercise authority under the instrument. Notices would include the following characteristics:

- a) the Notice must always be provided to:
  - i. the grantor,
  - ii. any monitor named in the instrument,
  - iii. any attorneys previously acting for the grantor, and
  - iv. the spouse, if any, of the grantor;
- b) the grantor may specify any other individual or individuals to whom the Notice must be delivered, and the attorney must make reasonable efforts to provide the Notice to that person or persons;
- c) 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.

The mechanisms that exist for addressing abuse or misuse are largely “passive” rather than proactive...

## 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 attorneys.



### 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.<sup>270</sup>

In some jurisdictions, guardians and in some cases attorneys for property are required to submit accounts annually.<sup>271</sup> 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.<sup>272</sup>*

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.

In the LCO's view, an annual reporting requirement would raise several of the issues discussed earlier respecting a POA registry. Accordingly, the LCO believes 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

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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.<sup>273</sup> Visitors would consist either of trained volunteers or professionals who provide rights advice to persons whose legal capacity is lacking or in doubt.

It has been suggested that Ontario's legal capacity and decision-making systems would benefit from some form of a random audit program.

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.<sup>274</sup> 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.*<sup>275</sup>

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.

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 “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 services<sup>276</sup> to review and provide reports on the adequacy of services, respect for rights, provision of rights information and the accessibility of complaints procedures, among other matters.<sup>277</sup>

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.<sup>278</sup> 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.<sup>279</sup>

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*.<sup>280</sup> 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 8, 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.<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup> The person receiving the accounting has no duty or liability with respect to the accounting. New York State enables grantors to appoint a monitor or monitors when creating a power of attorney. These monitors have the authority to require the attorney to provide receipts and records of transactions, to request and receive relevant records from third parties, and to receive a copy of the power of attorney document.<sup>284</sup>

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.

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*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

Feedback on the *Interim Report* indicated broad support for the concept of a monitor. The Advocacy Centre for the Elderly (ACE) noted that when abuse through a POA is suspected, it is often very difficult to support the allegations because of inability to obtain records; a rogue attorney may even prohibit family, friends or others from accessing the individual to prevent complaints from being investigated or pursued. The appointment of a monitor authorized to view accounts and visit the person would, in the view of ACE, “vastly improve the situation”.

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 POA, 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”.

The LCO heard concerns that monitors could simply be another means of perpetuating family conflict. The LCO agrees with the comments of the Nova Scotia Law Reform Commission on this point:

*We acknowledge the potential for family members to cause problems for the attorney with unwanted questions, and the potential intrusion upon the donor's privacy. In our view, however, these concerns do not outweigh the need for a stronger system of safeguards - including monitoring - around the use of EPAs, for the benefit and confidence of those who use them. The Act would not give those family members any authority over the attorney's decisions. Whether those family members would be more inclined, or less, to cause difficulty for the attorney with a proper accounting in hand is open to question. Finally, our recommendation is that the donor who is concerned about privacy, or putting the attorney under an undue burden, should be permitted to opt out by appointing someone else to act as monitor, or waiving the duty entirely.<sup>285</sup>*

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.

However, it is important that the liability and responsibilities on monitors be calibrated to their actual abilities and influence, as they will in most cases be private citizens acting for family and friends. Legislation should be clear that the monitor should bear no liability for failure to take action, except in cases of gross negligence or willful misconduct.

In considering the potential role and responsibilities of monitors, it may be helpful to look to the experiences with “trust protectors”, both in Ontario and in other jurisdictions. Trust protectors may be appointed in a trust document, and given a range of powers to ensure that the purpose of the trust is fulfilled.<sup>286</sup> Trust protectors typically do not interfere with the daily running of a trust, but rather ensure that there is no abuse by the trustee, and can provide additional professional expertise. Depending on the contents of the trust instrument, trust protectors may have powers to:

- monitor the lifestyle of the beneficiary to ensure that the trust is distributing sufficient funds,
- demand an accounting from the trust,
- settle disputes between the trustee and the beneficiaries,
- request an annual report from the trustee on accountings,
- advise the trustee on matters concerning the beneficiaries,
- interpret the terms of the trust at the request of the trustee or beneficiary, as a neutral third party,
- and many others.<sup>287</sup>

**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.**

Standardly, trust protectors have standing to go to court and raise issues so they can be quickly and efficiently resolved.<sup>288</sup> Trust protectors may be family members or professionals, and may be able to receive compensation from the trust, depending on the terms of the instrument. Whether or not a trust protector is considered a fiduciary appears to be a contextual analysis, depending on the powers that have been allocated in the trust instrument.<sup>289</sup>

In its response to the *Interim Report*, the MHLC noted that there could be significant difficulty in identifying suitable monitors, and suggested that allowing a POA to authorize compensation for a monitor could encourage corporate or other types of independent monitors. The LCO believes this is a valuable suggestion, but it raises a number of practical challenges: the duties of a monitor are likely to vary significantly, depending on the complexity of the grantor's circumstances. As well, the monitor would be dependent on the attorney for property to provide compensation: where the monitor raises concerns about the activities of the attorney, this could well result in a hold back of compensation to the monitor. The LCO believes that the provision of compensation should be dependent on the specification of the grantor, and that, as with powers of attorney for property, where compensation is taken, the monitor will be held to a higher standard of conduct.

...[T]he provision of compensation should be dependent on the specification of the grantor, and that, as with powers of attorney for property, where compensation is taken, the monitor will be held to a higher standard of conduct.

At a focus group of Trusts and Estates Lawyers, it was suggested that adjudicators be enabled to appoint monitors in certain types of disputes:

*[O]ne place I think the, sort of, monitor role would be useful for the court anyway would be personal care power of attorney disputes. It would be I think useful for the court to have the authority to effectively appoint the monitor. So, you know how in child custody access fights you can have a Section 30 Assessment... But really to put all the parties in a position where some third party was going to see how they were behaving other than the courts – you can't get access to the court fast enough. And the difficulty is there's no authority to do that, right. The idea being where we got the idea was, kind of, importing the idea of parenting coordination for what are effectively adult custody disputes. So, I think, like, that's one area where I thought this would be useful. It doesn't address the who will pay for it problem. But we've got problem on the child's side as well anyway, right. So, it would be nice for the court to be able to do that.*

Focus Group, Trusts and Estates Lawyers, April 11, 2016

The LCO believes that this may be a valuable and practical suggestion.

Chapter 4 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.

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### THE LCO RECOMMENDS:

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

- a) provide grantors of a power of attorney with the option to name at least one monitor;
- b) specify the following duties of a monitor:
  - i. make reasonable efforts to determine whether the attorney 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; and
  - iv. to promptly report concerns to the Public Guardian and Trustee or other appropriate authority where there is reason to believe that:
    - the person appointed under a power of attorney is failing to fulfil their duties or is misusing their role, and
    - serious adverse effects as defined in the *Substitute Decisions Act, 1992* are resulting to the grantor;
- c) enable the grantor of a power of attorney to authorize compensation for the monitor;
- d) specify that monitors will not be liable for activities taken or not taken in the course of their duties, short of gross negligence or willful misconduct, unless they are receiving compensation for their duties;
- e) give monitors the following rights, with appropriate recourse to adjudication in cases of non-compliance:
  - i. to visit and communicate with the person who has appointed them as monitors; and
  - ii. to review accounts and records kept by the attorney.



#### 4. Enable Individuals to Exclude Family Members from Acting 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.

However, 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.

...[T]he 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.

*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.<sup>290</sup>*

Expanding the options for SDMs to allow a broader role for professional representatives and community organizations, as is discussed in Chapter 9, may reduce the number of situations in which this occurs. However, the problem is integral to the structure of the HCCA.

...[A]llowing 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.

In its 2014 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.<sup>291</sup> 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.<sup>292</sup>

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. This recommendation received strong support during the feedback to the *Interim Report*.

It was emphasized in submissions that for this recommendation to be effective, the standard for legal capacity for the creation of this document should be set quite accessibly. Given that the potential negative effects associated with *excluding* a person from the decision-making hierarchy is very low, the LCO agrees.

#### THE LCO RECOMMENDS:

28: The Government of Ontario amend the *Health Care Consent Act, 1996* to enable individuals to create a binding statement in writing to specifically exclude a particular individual or individuals from acting under the hierarchy set out in section 20 of that Act,

- a) through a written document which meets the same execution requirements as a revocation of a power of attorney for personal care under section 53 of the *Substitute Decisions Act, 1992* and which
- b) requires a standard for legal capacity similar to that for creating a power of attorney for personal care.

This statement could not be used to exclude the Public Guardian and Trustee from acting.

## 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 recommendations have focused on identifying practical options that can be implemented at low-cost, and without adding unreasonable burdens on attorneys, while still promoting greater clarity, transparency and oversight. In particular, the LCO recommends that those appointed under a POA 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 an attorney begins to act. As well, the LCO recommends that the role of monitor be formalized and that use of this mechanism be encouraged for a POA. Finally, the LCO recommends that individuals be empowered to identify individuals whom they do *not* wish to act for them under the *Health Care Consent Act's* automatic appointments.

The LCO's proposals are intended as practical steps to improve understanding, strengthen transparency and accountability, and ultimately reduce misuse and abuse of powers of attorney, while preserving the flexibility and accessibility of these instruments.

As was noted at the outset of this Chapter, concerns regarding abuse and misuse of POAs 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 10 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 7, 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 recommendations set out in Chapter 7.

The LCO's proposals are intended as practical steps to improve understanding, strengthen transparency and accountability, and ultimately reduce misuse and abuse of powers of attorney, while preserving the flexibility and accessibility of these instruments.



# Legal Capacity, Decision-making and Guardianship

## CHAPTER SEVEN

# Rights enforcement and dispute resolution: empowering individuals

## A. INTRODUCTION AND BACKGROUND

Throughout the LCO's consultations for this project, one of the dominant areas of concern has been effective access to the law, in order to resolve disputes, enforce rights and address concerns about abuse.

...[E]ffective access to the law will affect every other aspect of the legal capacity, decision-making and guardianship system.

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. Effective and appropriate mechanisms for dispute resolution and rights enforcement are therefore a priority for law reform attention.

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 5 of this *Final Report*. With respect to the operation of the Consent and Capacity Board (CCB), the sense is that overall, the flexibility of the HCCA appointment mechanisms and the existence of the CCB as an accessible tribunal providing speedy and relatively responsive adjudication, is an appropriate approach. Critiques of its operations tend to focus on the inherent tension between promoting therapeutic outcomes and upholding fundamental rights, the challenges it faces in meeting its mandates for timeliness and expertise, and the balance between achieving timely resolutions and supporting less adversarial approaches to dispute resolution.

There was a strong sense throughout the consultations that while mechanisms under the *Substitute Decisions Act, 1992* (SDA) provide high quality adjudication, they are complex and difficult to access, and that as a result, the rights and responsibilities under the SDA are not realized as intended.

Overall, participants conveyed a message that significant reform in this area is warranted. 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.

## 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.

### DISPUTE RESOLUTION AND RIGHTS ENFORCEMENT The Roles of the CCB, Superior Court of Justice and PGT

<b>Consent and Capacity Board (CCB)</b>	<ul style="list-style-type: none"> <li>• Review findings of incapacity, whether by               <ul style="list-style-type: none"> <li>– a health professional with respect to treatment,<sup>293</sup></li> <li>– an evaluator with respect to admission to care facilities or consent to personal assistance services provided in a long-term care home,<sup>294</sup></li> <li>– a Capacity Assessor with respect to property that has resulted in a statutory guardianship; or</li> <li>– a physician with authority to issue certificates of incapacity under the MHA resulting in statutory guardianship.<sup>295</sup></li> </ul> </li> <li>• Appoint a decision-making representative with respect to decisions to be made under the HCCA;<sup>296</sup></li> <li>• Permission for an SDM to depart from the prior capable wishes of a person who lacks legal capacity;<sup>297</sup></li> <li>• Determine whether an SDM is acting in compliance with the requirements of the HCCA as to how decisions are to be made;<sup>298</sup></li> <li>• Directions when the appropriate application of the HCCA with respect to a required decision is not clear; and<sup>299</sup></li> <li>• 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 (note that these latter provisions are not yet in force).<sup>300</sup></li> </ul> <p>Note that the CCB also provides adjudication for issues under the Mental Health Act (MHA), the Personal Health Information Protection Act, 2004, and the Mandatory Blood Testing Act.</p>
<b>Superior Court of Justice</b>	<ul style="list-style-type: none"> <li>• Appointments of guardians for property management and for personal care</li> <li>• Applications for passings of account of either a guardian or an attorney for property</li> <li>• Applications for directions on any question arising in connection with a guardianship or power of attorney</li> <li>• Appeals from the decisions of the CCB</li> </ul>
<b>Public Guardian and Trustee (PGT)</b>	<ul style="list-style-type: none"> <li>• Duty to investigate any allegation that a person is incapable of managing property or personal care, and that serious adverse effects may result</li> </ul>

## 1. The Consent and Capacity Board

**Caseload:** The CCB has a large and growing caseload. In the 2015/2016 fiscal year, the CCB received 7200 applications and convened almost 4000 hearings across the province. In the past five years, applications have increased on average 6.5 per cent annually, and hearings have increased on average 10.5 per cent annually.<sup>301</sup>

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.<sup>302</sup> 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.

**Procedures:** Members of the CCB may hear applications alone or in panels of three or five. Board members include lawyers, psychiatrists and other medical professionals, 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.<sup>303</sup> The legislation gives priority to expeditious resolutions: hearings must commence within seven days of an application and decisions rendered (and reasons provided to the parties) within one day of the conclusion of the hearing.<sup>304</sup> The CCB does not have jurisdiction to inquire into or make a determination with respect to the constitutional validity of a provision of the HCCA or the accompanying regulations.<sup>305</sup> Decisions of the CCB may be appealed to the Superior Court of Justice on questions of both fact and law.<sup>306</sup>

**Supports:** The effectiveness of the CCB is supported by the requirements for rights advice under the MHA, described in Chapter 5, 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.

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.

## 2. The Role of the Ontario Superior Court of Justice

**Caseload:** There are no comprehensive figures available for the Court's caseload for SDA matters. However, the numbers appears to be small, particularly compared to the work of the CCB or the overall caseload of the Court.

Most appointments of guardians are currently through the statutory guardianship process: the Ontario Superior Court of Justice currently appoints between 200 and 260 guardians per year.<sup>307</sup> 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.

There are no figures available regarding the Superior Court of Justice's oversight functions in this area.



...[T]he 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.

**Remedial powers:** 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 dependents and consistent with this Act”.<sup>308</sup> 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.<sup>309</sup>

### 3. Investigations by the Public Guardian and Trustee

The PGT’s serious adverse effects mandate forms a significant aspect of the PGT’s role.<sup>310</sup> The administrative complaints and investigation powers under the SDA 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. As noted earlier, the issue of adult protection legislation is outside the scope of this project.

**Remedial powers:** If the results of a serious adverse effects 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 absence of meaningful access to the law, the objectives and effectiveness of the law can be seriously undermined.

### Activities of the PGT's Investigations Unit: 2013-2014

- Number of recorded communications received: 10,000. 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.
- Investigations opened: 239 investigations were opened.
- Investigations completed during the fiscal year: 214
- Resultant statutory guardianships for the PGT: 61
- Investigations resulting in referrals elsewhere, including to family, a community agency or the policy: 78
- Investigations resulting in determination that an application for temporary guardianship was not required according to the statutory test: 63
- Investigations closed for other reasons such as the death of the allegedly incapable person: 3
- Investigation resulting in an application to court for guardianship by the PGT: 8

## C. AREAS OF CONCERN

In the absence of meaningful access to the law, the objectives and effectiveness of the law can be seriously undermined.

*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.<sup>311</sup>*

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.*<sup>312</sup>

During its consultations, the LCO has heard many concerns about access to the law in this area. Given the LCO's mandate with respect to access to justice, this has been a central area of focus for this project.

## 1. Responding to a Unique Context

It was emphasized to the LCO that the application of the law has profound effects on the lives of individuals whose capacity is lacking or in doubt, as well as on those who surround them. These are issues regarding self-determination, and so call on fundamental rights. As a result, the LCO was repeatedly told that courts and tribunals, and processes for adjudicating rights in this area of the law, must be sensitive to the needs and experiences of the individuals, families, professionals and institutions who appear before them.

These concerns reflect that there are unique and challenging contexts for dispute resolution and rights adjudication in this area, that may not be present in more traditional areas of adjudication.

...[C]ourts and tribunals, and processes for adjudicating rights in this area of the law, must be sensitive to the needs and experiences of the individuals, families, professionals and institutions who appear before them.

- The individuals at the centre of these disputes tend to be vulnerable, and to face very significant barriers to access to justice. The nature of their impairments makes it difficult for them to access information about their rights or to navigate a complex system. Frequently, they are living in low-income, are socially marginalized or are residents in congregate settings, all situations which create challenges to accessing rights.
- The majority of disputes in this area of the law take place within ongoing relationships, whether within families or within ongoing healthcare relationships. There are often complex webs of dependency, personal history and emotion shaping these disputes.
- These legal issues are situated in a broader social context, raising considerations of ethics, law and medicine, and social attitudes towards disability and aging, for example.
- Some of the issues raised are extremely time sensitive, particularly in the health care 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 the individuals appearing before them. The LCO was also told that adjudicators must have the ability to work effectively within the multiple systems that surround this area of the law.

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. One litigant commented,

*Not once [in my experience with the Superior Court of Justice] has any time been spent in hearings trying to get to my mother's competent or current wishes. The court is too removed from the Act and its consequences on the incapable person.*<sup>313</sup>

A related concern was raised by trusts and estates lawyers, who 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".<sup>314</sup>

A related concern was raised by trusts and estates lawyers, who 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.

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. Some spoke movingly of the transformative power of being heard and respected despite their illness, and again, regardless of the ultimate decision. The LCO was told that 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 mental health and that area of the law, reflecting the current mix of cases. Given changing demographics, a broader range of expertise may be desirable.

The Mental Health Legal Committee (MHLC) also raised concerns that the heavy weighting of psychiatrists among CCB members, together with the lack of full time members, results in a lack of consistent adjudicative expertise within the tribunal. The MHLC commented,

*The CCB should be organized along the model of the Workers' Safety and Insurance Tribunals. It should employ both full-time and part-time adjudicators, with work-space for part-time members, as well as a head office providing administrative and legal support for adjudicators. This would permit expertise to develop within the tribunal and would afford members access to legal advice and support, both administratively and substantively, with respect to the writing of decisions. New lawyer members should receive a lengthy period of "on the job" training, learning to write reasons for their decisions with mentoring and regular supervision and review before sitting as the sole lawyer on a panel. This would assist in developing consistency in the Board's own jurisprudence, such that prior decisions would have persuasive value for hearing panels. It would also improve the quality of adjudication.*<sup>315</sup>

...[T]here 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.

The MHLC made extensive suggestions as to the types of expertise, training and supports that CCB adjudicators need to appropriately fulfil their responsibilities, including in adjudication, substantive issues related to mental health and consent, the rules of evidence, and the challenges faced by vulnerable parties.

Concerns were also raised that the CCB's current administrative structure is inadequate to enable it to meet its responsibilities to "schedule hearings in a flexible and responsive fashion, taking into account the availability of the parties and counsel, but respecting vulnerable persons' statutory rights to review".<sup>316</sup>

A final concern regarding responsiveness relates to the potential role of the CCB in light of evolving demographics. Demographics and social trends point to increasing pressures for the CCB 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.<sup>317</sup> As a result, the current structure and composition of the CCB may need adjustments to reflect these emerging realities.

## 2. Reducing Adversarialism

There was considerable comment during the consultations about the need to reduce adversarialism in adjudication of these disputes. These concerns stemmed from a number of different perspectives.

Some comments focused on the impact of adjudication between 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.

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

It was pointed out that relationship dynamics may play a dominating role in how the law is accessed or not accessed. The LCO was told that 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

**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.**

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. As Saara L. Chetner comments in a paper on high conflict guardianships in Ontario:

*[H]igh conflict guardianship cases share some of the best and worse qualities of traditional family law .... Here, as in family law, a guardianship judgment is often not the final chapter. It may do little to promote or heal family disharmony or dysfunction that has sometimes festered for years. Like lawyers who practice family law, elder law lawyers who are engaged by clients in high conflict guardianship litigation are alarmed at the intensity of the underlying conflict afflicting their clients. Parties may return over and over again to the court because of various events or the evolution of the guardianship over years.<sup>318</sup>*

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.<sup>319</sup>*

Overall, these concerns reflect the desire to have an adjudication process that more appropriately reflects the complex and ongoing relationships between parties that extend well-beyond the narrow parameters of the dispute resolution process itself.

### 3. Tension between Medical and Legal Frameworks and Expectations

...[T]here is a significant challenge in reconciling the medical and legal approaches to these issues.

The LCO was told as well that there is a significant challenge 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

### 4. Addressing Concerns Regarding Abuse

Many service providers pointed out that it is unclear how concerns about any but the most evident and serious cases of abuse may be effectively addressed in the current system.

*[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 clear mechanisms for addressing abuse, and of supports for pursuing those mechanisms, 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.**

The lack of clear mechanisms for addressing abuse, and of supports for pursuing those mechanisms, 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.<sup>320</sup>

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 *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*.<sup>321</sup> 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? ... [H]alf 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.

Many felt that only the most serious cases were being investigated.

*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.<sup>322</sup>*

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.<sup>323</sup>

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.

## 5. Complexity and Cost of Court Processes under the *Substitute Decisions Act, 1992*

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*. 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.

Stakeholders widely perceive that the implementation of the SDA is significantly distorted by barriers related to cost and complexity.

- *The contents of the Advocacy Act are described in the Discussion Paper, Part Four Ch IIIB*

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 court 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 cases related to the SDA, 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 of appeals from the CCB and other applications under the SDA. In both cases, access to sufficient resources is essential.*<sup>324</sup>

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.*<sup>325</sup>

...[A]s 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.

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 5. 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.<sup>326</sup> 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.

That is, the barriers to access make the guardianship system as a whole significantly less flexible. Because legal capacity and decision-making needs evolve and fluctuate, this inflexibility undermines the policy goal of tailored and responsive substitute decision-making.

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.

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”.<sup>327</sup> 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.

## 6. Unrepresented Litigants

The LCO has heard informal reports of a growing number of self-represented litigants at Superior Court proceedings related to capacity and guardianship. This accords with broader trends in civil justice proceedings.

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.<sup>328</sup> 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.<sup>329</sup>

While the LCO heard anecdotal reports of growing numbers of unrepresented litigants in this area of the law, there are no studies or numbers available to verify this. Similarly, it is impossible to measure the number of individuals who decided *not* to attempt to enforce their rights through the courts. The LCO heard from multiple

individuals who described their decision to abandon redress under the SDA because of the costs and complexity, and many key stakeholders perceive this to be a widespread phenomenon. ARCH Disability Law Centre has commented that the available court processes are disproportionate to many of the rights enforcement issues that come to its attention, such as overly controlling guardians. As a result, some of the requirements in the SDA, such as the duty to encourage participation by the person lacking legal capacity, are frequently unenforceable.<sup>330</sup>

## 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”.<sup>331</sup> 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.

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. That said, the *Frameworks* help us identify several 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* further 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

The LCO heard from multiple individuals who described their decision to abandon redress under the SDA because of the costs and complexity, and many key stakeholders perceive this to be a widespread phenomenon.



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 application of these various approaches in this particular context is considered in the remainder of this Chapter.

## E. RECOMMENDATIONS

The LCO proposes to strengthen Ontario's dispute resolution and rights enforcement mechanisms through four directions for reform: a tribunal with broad jurisdiction in the area of legal capacity and decision-making, expanded access to mediation and other forms of alternative dispute resolution, strengthening existing supports and structures, and expanding the available types of applications for adjudication.

### 1. A Comprehensive Tribunal

The LCO believes that a tribunal should have comprehensive jurisdiction to address dispute resolution and rights enforcement under the *Substitute Decisions Act, 1992*, the *Health Care Consent Act, 1996*, and Part III of the *Mental Health Act*. This would effectively combine the jurisdictions of the CCB and Superior Court of Justice, and make this tribunal the adjudicative forum for the vast majority of rights disputes in Ontario.

In the Ontario context, where an administrative tribunal dealing with capacity-related issues already exists and has demonstrated its abilities to provide effective, expert and comparatively accessible adjudication, it makes sense to expand the use of administrative justice in the area of legal capacity and decision-making. This reform has the potential to increase the specialization, accessibility, flexibility, proportionality and coordination of rights enforcement and dispute resolution in this area of the law. Ultimately, the goal is to make it easier for individuals directly affected to enforce their rights, for family members and others to address concerns about neglect, misuse or abuse of decision-making powers, and to promote the use of least restrictive solutions to decision-making needs.

#### Benefits of an Expansion of Administrative Justice

Consultees emphasized that for those directly affected by the law, the ability to be meaningfully heard on issues that affect their lives is central to their wellbeing. In evaluating mechanisms for access, the key consideration is whether the proposed forum provides a meaningful, expert and accessible determination.<sup>332</sup>

*[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*

In the Ontario context, where an administrative tribunal dealing with capacity-related issues already exists and has demonstrated its abilities to provide effective, expert and comparatively accessible adjudication, it makes sense to expand the use of administrative justice in the area of legal capacity and decision-making.



*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

As was detailed in the previous sections, current dispute resolution and rights enforcement mechanisms face a number of significant challenges. The Superior Court of Justice process is perceived to be complex, costly, time consuming and intimidating. This has a number of problematic consequences:

- These processes are not well suited to the needs of unrepresented individuals, of whom there may be growing numbers;
- Families and individuals often feel unable to navigate the system without costly legal assistance, which may be well beyond their means: as a result they may abandon hope of redress;
- The process is disproportionate to some of the dispute resolution needs: for example, concerns regarding misuse of substitute decision-making powers that falls short of abuse may not be seen as worthwhile to bring forward;
- There is an incentive to seek plenary solutions in order to avoid the necessity to return to court: as a result, individuals may be subject to unnecessary intervention;
- The system may be challenged to keep the individual who lacks or may lack legal capacity at the centre of the process.

**While the CCB is generally perceived as accessible, it is also seen as facing structural challenges in consistently providing effective and responsive adjudication to meet its mandate.**

While the CCB is generally perceived as accessible, it is also seen as facing structural challenges in consistently providing effective and responsive adjudication to meet its mandate.

These are serious concerns, and have a significant impact on effectiveness of Ontario's legal capacity, decision-making and guardianship system as whole, reducing its ability to meet its policy goals. In the LCO's view, a fundamental review of approaches to dispute resolution in this area is warranted.

The *Interim Report* canvassed at length three options for improving meaningful access to effective adjudication in this area of the law: a specialty court or specialized court processes; an expanded complaints and investigation function; and a tribunal with jurisdiction over matters under both the SDA and HCCA.

Specialty courts are in many ways an appealing option. 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 being two well-regarded examples. The United Kingdom's Court of Protection provides an example of a specialty court operating in the context of legal capacity and decision-making law. These courts clearly offer expert, holistic and accessible adjudication, tailored to their particular contexts.

• *The United Kingdom's Court of Protection is described in the Discussion Paper in Part IV, Ch. II.3.D.*

However, the LCO believes this is likely not a viable solution in Ontario. The numbers of cases would not make it practicable, particularly in rural and remote areas of the province. Moreover, the LCO believes that there are better options for achieving the objectives of this proposal.

The LCO also considered an expanded complaints and investigation function, drawing lessons from the Public Advocate functions in some Australian states, or the broad approach of the Public Guardian in the United Kingdom, as described in the *Interim Report*. 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, an expanded complaints and investigative mechanism would not increase the accessibility of appointments or terminations of guardianship, for example. Further, an administrative complaints mechanism might find it challenging to address the common disputes within families that are the source of many concerns regarding abuse and misuse of powers.

The LCO believes that the most practical and effective option would be the creation of a tribunal encompassing the jurisdictions of the CCB and the Superior Court of Justice in this area.

Tribunals are commonly created as a means of providing less costly, less formal and more specialized adjudication.<sup>333</sup> 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 tribunal system, emphasized the ability of tribunals to address 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.<sup>334</sup> These attributes of simplicity, accessibility, specialized expertise and contextuality have the potential to address many of the key concerns raised regarding dispute resolution under the SDA.

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, but they all have a unified and comprehensive jurisdiction over these matters. 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*

The LCO believes that the most practical and effective option would be the creation of a tribunal encompassing the jurisdictions of the CCB and the Superior Court of Justice in this area.

*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.*<sup>335</sup>

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.<sup>336</sup> 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.”<sup>337</sup>

The ability offered by a tribunal to appoint adjudicators with expertise in this area, and to cultivate deep knowledge through training and accumulated experience, would be beneficial to the quality of decisions and the effectiveness of adjudication.

In Ontario, there is a perception that the creation of the CCB was one of the most positive innovations implemented through the reforms of the 1990s. 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. However, 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.

Finally, the idea of a tribunal with a broad jurisdiction over matters related to legal capacity, decision-making and guardianship received significant support from stakeholders, including ARCH Disability Law Centre, the Advocacy Centre for the Elderly, the Mental Health Legal Committee, some trusts and estates lawyers, and others.

In the LCO’s view, a tribunal with comprehensive jurisdiction would have several potential advantages compared to the current system.

**Specialization:** Legal capacity and guardianship is a very complicated area of the law, affecting populations that tend to be vulnerable and have been historically marginalized, and situated in the complex contexts such as health and long-term care, mental health, and developmental services. The ability offered by a tribunal to appoint adjudicators with expertise in this area, and to cultivate deep knowledge through training and accumulated experience, would be beneficial to the quality of decisions and the effectiveness of adjudication.

**Multi-disciplinary expertise:** Disputes related to capacity and decision-making would benefit from the application of multidisciplinary expertise and supports. These legal issues arise in a broader context of health, social services, and supports for family caregiving. The ability to appoint adjudicators from other professions besides the law

can promote the application of a wider range of expertise to these disputes, and promote a deeper understanding of the issues. The CCB currently appoints as members not only legal professionals, but also health professionals and members of the public: there are matters related to, for example, personal care that could equally benefit from such multidisciplinary expertise. Beyond the composition of the tribunal, a tribunal can act as a hub for a range of user supports, provided by a variety of professionals. As the LCO's *Final Report, Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* emphasizes, multidisciplinary supports can play an important role in resolving conflicts related to family breakdown,<sup>338</sup> a point applicable to many elements of legal capacity and decision-making law.

**Tailored processes:** While there are some issues arising under this area of the law that require extensive processes, there are also many issues that are less grave, though still important to those concerned, and that could be resolved through more informal approaches. In the current system under the SDA, the latter types of issues are often judged not worth pursuing, in light of the complexity and adversarialism involved. A tribunal can develop flexible hearing or dispute resolution processes that are responsive to the varying levels of complexity and gravity in different types of disputes. User-centred approaches may enable persons to engage with the tribunal without always requiring legal representation.

User-centred approaches may enable persons to engage with the tribunal without always requiring legal representation.

A possible risk in delegating adjudication related to the SDA to a tribunal is the trend towards “judicialization” of administrative justice, in which tribunals become more court-like, more formal and more costly.<sup>339</sup> 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.<sup>340</sup> The *International Framework for Tribunal Excellence* observes that “While a degree of structure and formality is required in all hearings, we should repeatedly ask ourselves whether the needs of the tribunal are taking priority over the needs of the people who appear before it”.<sup>341</sup>

**Accessibility:** The LCO believes that a properly structured and funded tribunal would also be more accessible than the current system. Accessibility includes considerations of responsiveness to the diverse needs of those appearing before the tribunal, including needs related to disability, age, culture, language, Indigenous status, low-income and other factors. Given the communities directly affected by this area of the law and the diversity of Ontario’s population, considerations of accessibility take on major significance. Tribunals are generally viewed as having the potential to be more accessible, responsive, faster and less intimidating 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. 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.

...[A]ccess to justice is improved when client pathways are clearer and simpler, and that a tribunal with unified jurisdiction, which could offer a single point of access for users, would reduce some complexity and costs.

**Flexibility:** In his review of guardianship proceedings in Saskatchewan, Surtees suggested that the costs and intimidating procedures associated with court processes may create incentives for families to seek the broadest possible orders, in order to avoid having to return to the Court.<sup>342</sup> In such a context, it is difficult to realize policy goals for tailored and ‘least restrictive’ approaches to substitute decision-making. An accessible tribunal, with proportional processes and user supports, may therefore be in a better position to promote flexible and responsive approaches to decision-making needs.

**System coordination and single pathways:** The LCO believes that access to justice is improved when client pathways are clearer and simpler, and that a tribunal with unified jurisdiction, which could offer a single point of access for users, would reduce some complexity and costs. The current division of jurisdiction does not recognize the close relationships between decisions regarding property, personal care and treatment, or the similarity of principles and challenges across these contexts. 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,<sup>343</sup> so that the core issues must be, in effect, severed. The report on stakeholder consultations organized by the City of Toronto’s System Reform Table on Vulnerability in Toronto commented that “A tribunal with jurisdiction over both the *Substitute Decisions Act* and the *Health Care Consent Act* would be valuable because the issues are invariably complex and interdisciplinary”.<sup>344</sup>

In general, many stakeholders saw a tribunal as potentially offering improved opportunities for access to justice for persons who are low-income, live with disabilities, or face other barriers. Tribunals were also seen as able to provide more proportionate approaches for disputes that do not require the full weight of court-based adjudication, such as concerns about misuse of substitute decision-making powers.

In its 2016 submission in response to the *Interim Report*, the Advocacy Centre for the Elderly emphasized this particular benefit of dispute resolution through a tribunal:

*The courts are not the forum in which these types of cases can be dealt with most efficiently. In ACE’s experience, guardianship applications brought through the courts can take many months, and, in contested applications, years. The costs can be significant and, where the assets of the incapable person are not similarly significant, it may not be practical, cost-effective or proportionate for a person of modest means to apply for guardianship over an incapable person.*

*ACE receives many calls from family members who are being denied access to an older adult by an attorney for personal care. ACE assists only the older adult in these circumstances. The only remedy available for these family members, if negotiation is not possible, is to take the attorney to court and seek directions on the power of attorney for personal care, or apply for guardianship. The legal fees involved place these options beyond the means of many people.*

*Most importantly, the allegedly incapable person does not have easy access to the courts. Where the dispute is regarding a guardian of property or an attorney for property, the funds necessary to bring an application on one's own behalf are likely in the control of the attorney or guardian. If the allegedly incapable person cannot access their own funds, they cannot hire a lawyer. Nor is it likely that this person would have the ability to represent themselves in a complicated guardianship matter.*

*An administrative tribunal offers accessibility and flexibility. Guardianship proceedings could be resolved in weeks rather than in months or years. Applications for directions need not be as prohibitively expensive as going to court. Further, at an administrative tribunal, a simple application made by telephone by the allegedly incapable person could trigger the appointment of counsel, thus ensuring representation for this person.<sup>345</sup>*

Notwithstanding the many advantages of a tribunal model, some consultees expressed concern about the ability of a tribunal to address some of the more challenging matters currently dealt with by the Court under the SDA. Some trusts and estates lawyers pointed out that high stakes litigation will naturally gravitate towards the courts:

*I don't think it will achieve what you are trying to achieve because families will just rehash their disputes in corporate, or in real estate terms, so what they will do is they will still go to court but they will, for instance in a fight over a family company, they'll just bring it as an oppression claim. Or if it's a fight over who's got access to the cottage, they'll just bring it as some kind of, I can't think of the name of the Act... Partition of Sale. They'll find a way to get it in to a courtroom.*

Focus Group, Trusts and Estates Lawyers, April 19, 2016

This type of litigation, carried on in the context of considerable assets and with comprehensive legal representation, does appear to be in general well-served under the current system. However, these cases are hardly typical of the vast majority of families affected by the SDA, most of whom have only modest assets, and could not afford to litigate in this manner. Another lawyer at the same discussion commented,

*So, you know, a lot of people don't have the resources and the money at stake that an oppression remedy, who can hire a clever lawyer who will say, oh well we can still get this before the court with an oppression remedy. A lot of people are fighting about issues and amounts of money that to us may not seem like a lot, but to them mean everything. And, you know, so right now if you can't afford to hire a lawyer your ability to deal with these issues is really almost impossible. If you can't convince the Public Guardian and Trustee to investigate this on your behalf you're going nowhere with your problem. I always say to people who call me, there are no power of attorney police out there, there's nobody checking to make sure that everybody's behaving themselves. So, I mean, I think access is a*

...[S]ome consultees expressed concern about the ability of a tribunal to address some of the more challenging matters currently dealt with by the Court under the SDA. Some trusts and estates lawyers pointed out that high stakes litigation will naturally gravitate towards the courts.



*real issue and I don't, I'm going to just lay out the question... Is the court ever going to be able to give access to everyone, even on power of attorney matters?*

It is true that there are significant adjudicative challenges in effectively managing the dynamics of cases in which the parties are willing to spend immense funds and to take an extremely adversarial approach. 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.

Other consultees pointed out to the LCO 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. That is, tribunals can and do deal effectively with extremely challenging issues, if they are properly designed and supported.

...[T]o 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.

### Key Elements and Considerations in Tribunal Design

The New Zealand Law Reform Commission, in a thorough review of that country's tribunal systems, identified a number of desirable characteristics that individual tribunals or systems of tribunals should exhibit, including:

- Public accessibility, both in terms of costs and in public awareness of opportunities to seek redress;
- Membership and expertise appropriate to the subject matter;
- Actual and apparent independence;
- Procedural rules which secure the observance of natural justice, but which will also be simpler and less formal than the courts (and may be more inquisitorial);
- Sufficient powers to carry out their functions, and which are proportionate to those functions;
- Appropriate avenues for appeal or review of tribunal decisions, in order to ensure oversight and error correction; and
- Speedy and efficient determination of cases.<sup>346</sup>

The *Leggatt Report*, which comprehensively reviewed the United Kingdom's tribunal system, suggests that failure to achieve the advantages inherent to a tribunal system most often arises from inadequacies in tribunal design, and suggests that tribunal design focus on:

1. Structural coherence, involving considerations such as avoiding isolation and narrowness of outlook, sufficient investment in training, attracting and retaining suitable staff, and effective systems of administrative support;
2. Independence, including public perception of independence, which is associated with appointment processes, security of tenure, and whether the tribunal is administered by a department with an interest in the outcome of decisions;



3. User friendliness, which will reduce the need for professional representation, through such elements as information for users and independent help and support for them.<sup>347</sup>

Tribunal design, in Ontario, takes place in the context of the *Statutory Powers Procedures Act* (SPPA), and the *Adjudicative Tribunals Accountability, Governance and Administration Act*. The SPPA sets out basic procedural requirements for tribunals when holding hearings, for example, with respect to notice requirements, written or electronic hearings, admissible evidence, parties to the proceeding and many other matters.<sup>348</sup> The *Adjudicative Tribunals Accountability, Governance and Administration Act* sets out requirements for public accountability documents, such as consultation policies, mandate and mission statements and member accountability frameworks; outlines standards for member appointment processes; permits the creation of tribunal clusters; and includes other requirements aimed at promoting tribunals that are “accountable, transparent and efficient in their operations while remaining independent in their decision-making”.<sup>349</sup>

It is not the intent of the LCO in this section to design a tribunal for legal capacity, decision-making and guardianship matters, but rather to set out some key elements and considerations that should be taken into account in such a design exercise.

In response to the *Interim Report*, the LCO received several submissions which were very thoughtful and attentive to the elements that a tribunal would require to successfully address issues currently with the courts and to more effectively address issues now dealt with by the CCB. It is not the intent of the LCO in this section to design a tribunal for legal capacity, decision-making and guardianship matters, but rather to set out some key elements and considerations that should be taken into account in such a design exercise.

**Further Jurisdictional Issues:** A series of Supreme Court of Canada cases considering section 96 of the *Constitution Act* respecting the superior courts of justice, has laid open the question of the extent of the appropriate jurisdiction of administrative tribunals. The courts have interpreted this section as broadly aimed to “guarantee the core jurisdiction of the provincial superior courts”<sup>350</sup> against incursion. In *Re Residential Tenancies Act (1981)* and again in *Crevier v. Quebec (Attorney General)*, the Supreme Court of Canada set out a three part test for the validity of conferring jurisdiction on an administrative tribunal,<sup>351</sup> which includes a historical enquiry, a functional enquiry as to whether the power in question is in its nature a judicial power, and finally, consideration as to whether the power in its institutional setting still broadly retains the characteristics of a section 96 power. Monahan and Shaw, in their text, *Constitutional Law*, note that this doctrine has been criticized as both vague and arbitrary,<sup>352</sup> and Peter Hogg comments that *Re Residential Tenancies Act* and subsequent decisions have problematically cast doubt on the constitutionality of many provincial administrative tribunals.<sup>353</sup> Monahan and Shaw point out, however, that provinces have none the less continued to create a wide variety of new tribunals with extensive powers, so that the doctrine does not seem to have had a limiting practical effect.<sup>354</sup>

A number of specific questions regarding jurisdiction require further consideration.

First, while there was general comfort with the ability of a tribunal to address matters related to personal care, some stakeholders have raised concerns about whether a

...[S]ome stakeholders have raised concerns about whether a tribunal can be equipped with the powers and adjudicative expertise necessary to effectively manage litigation that involves very significant assets and extremely emotional and litigious families.

tribunal can be equipped with the powers and adjudicative expertise necessary to effectively manage litigation that involves very significant assets and extremely emotional and litigious families. This concern is worthy of careful consideration, whether in form of tribunal design, or in carefully tailored jurisdictional boundaries.

Some suggested to the LCO that there be a property size limit on the jurisdiction of the tribunal, so that financially complex cases would remain with the courts. Setting aside the complexities associated with implementation of such a proposal, the LCO does not believe that the key element distinguishing the more challenging and complex cases is necessarily the extent of the assets at issue. Further, any kind of property limit would have to pay careful attention to the characteristics of the persons who are often involved in guardianship litigation. An older adult who owned a home in the Greater Toronto Area, without any other assets, might easily exceed any property limitation, but this should not automatically exclude such individuals from access to a tribunal.

One suggestion was for the inclusion of a mechanism whereby the tribunal could refer appropriate matters to the courts, whether on its own motion or on application by a party. This may be a promising approach. Careful thought would be required to determine the parameters for such referrals.

Some federal tribunals include judges or persons qualified to be appointed as judges among their sitting members. The Ontario Review Board, for example, requires that its Chairperson be a judge of the Federal Court or of a superior, district or county court of a province, or a person who has retired from or is entitled to be appointed to such a judicial office (i.e. a lawyer with 10 years' experience).<sup>355</sup> The federal Competition Bureau hears applications for orders under the *Competition Act* in panels of three to five members: a judicial member, appointed by the Federal Court on the recommendation of the Minister of Justice, presides at these hearings.<sup>356</sup>

A second issue related to the jurisdiction of the tribunal is its *Charter* jurisdiction. The Mental Health Legal Committee and the Advocacy Centre for the Elderly both took the position, in their submissions, that the tribunal should have express jurisdiction to consider the constitutionality of its enabling statute under the *Constitution Act, 1982* and to grant remedies under section 24(1) of the *Constitution Act, 1982*, arguing that this tribunal will deal significantly with *Charter* protected rights, including liberty and security of the person, and that it should therefore be able to apply the *Charter* meaningfully in its work. One concern to be considered is the potential effect of granting such *Charter* jurisdiction on the ability of the tribunal to resolve issues in a timely manner.

Finally, Chapter 4 discussed the creation of new personal appointments in the form of support authorizations and network decision-making: such reforms would require the identification of dispute resolution and enforcement mechanisms. Should the government take up these recommendations, the tribunal could provide a natural forum for resolution of disputes related to these mechanisms, as well as a means of recourse for monitors who may be appointed under support authorizations or powers of attorney.

In considering specific issues with respect to the appropriate jurisdiction of this tribunal, the key goals should be:

1. improving system coordination and navigation,
2. increasing access to the law for issues addressed under the SDA, and
3. increasing the flexibility and accessibility of appointments, in order to allow for more limited and tailored forms of guardianship.

**Expertise and Efficiency:** The LCO believes that this tribunal will need expert skills to fulfil its mandate effectively. This means that careful consideration must be given to policies and processes related to recruitment, training and panel composition.

Expertise in this context includes a number of aspects, including:

1. *expertise in the relevant areas of the law:* issues related to legal capacity and expertise in the relevant areas of the law: issues related to legal capacity and property differ from those regarding, for example, consent to treatment, although a core understanding of the concepts surrounding legal capacity and decision-making and of the principles animating the legislation must be consistent across the various topics;
2. *expertise in adjudication:* submissions emphasized that strong adjudication skills are frequently required in managing disputes in this area, and this is particularly the case when dealing with high conflict relationships or complex issues. Adjudicators may require considerable expertise in addressing issues related to evidence or appropriate process in these types of situations;
3. *expertise in issues related to disability, aging and the duty to accommodate:* this includes understanding of issues related to Charter and human rights, as well as the broader social context surrounding older persons and persons with various types of disabilities that may affect decision-making, and a commitment to respect the dignity and worth of the individual at the centre of the dispute; and
4. *expertise in the broader context surrounding these issues:* in some cases, it will be important to have expertise in disciplines or contexts related to this area of the law, including medicine, social services, lived experience or community services and supports.

Development of these kinds of expertise will increase the efficiency and effectiveness of the tribunal, by enabling more focused hearings and more targeted use of resources.

Models or templates for this kind of expertise exist in Ontario. For example, the Human Rights Tribunal of Ontario, or the Workers' Safety and Insurance Tribunals have been recognized as providing structures that support and encourage the development of expertise among the membership. The Mental Health Legal Committee suggested that the new tribunal be:

*... organized along the model of the Workers' Safety and Insurance Tribunals. It should employ both full-time and part-time adjudicators, with work-space for part-time members, as well as a head office providing administrative and*

...[T]his tribunal will need expert skills to fulfil its mandate effectively. This means that careful consideration must be given to policies and processes related to recruitment, training and panel composition.

*legal support for adjudicators. This would permit expertise to develop within the tribunal and would afford members access to legal advice and support, both administratively and substantively, with respect to the writing of decisions. New lawyer members should receive a lengthy period of “on the job” training, learning to write reasons for their decisions with mentoring and regular supervision and review before sitting as the sole lawyer on a panel. This would assist in developing consistency in the Board’s own jurisprudence, such that prior decisions would have persuasive value for hearing panels. It would also improve the quality of adjudication.*<sup>357</sup>

Stakeholders also emphasized that in recruiting members, the tribunal should seek a diverse membership with representation from a range of professions, that includes persons with lived experience, provides a strong core of legal expertise, pays close attention to regional representation, and addresses cultural and other forms of diversity.

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**Ability to Serve a Range of Needs:** in designing policies and processes, the tribunal should pay close attention to the goal of proportionality, as a means of meeting a spectrum of needs. While the tribunal must have the means to address complex, high-stakes disputes, it must also have the capacity to effectively address disputes which do not merit the kind of complicated procedures that tend to be associated with courts but which nonetheless have significant impact on the quality of life of individuals and their families. ARCH Disability Law Centre has pointed out that many of the matters that come to its attention are fairly simple disputes regarding the extent of control that a guardian is exerting over an individual. Currently, an application to court is generally not considered a proportionate response: as a result, these matters are often not adjudicated at all. For these types of disputes, relatively simple processes and hearing methods may be appropriate. The concept of proportionality also applies to remedies, addressed below.

**Accessibility:** Accessibility has many aspects. In addition to simplified procedures where appropriate, processes and policies must take into account the particular barriers and challenges faced by the various groups affected by this legislation. Accommodations and barrier-free design for older persons and persons with disabilities, for example, will be vital. The CCB’s current practice of taking hearings to the location of the individual, with the accompanying focus on ensuring that the person at the centre of the dispute has the opportunity to be present and participate, has been widely recognized as an important aspect of accessibility.

**User Centred Approaches:** There is a growing trend in tribunal design towards user-centred approaches, which prioritize the needs of litigants and do not assume that users are represented by counsel. These approaches can increase ease of access to dispute resolution, and so are particularly relevant in developing a tribunal such as this, which would have a core goal of improving access to justice.

As part of a user-centred approach, the LCO believes that the tribunal will require dedicated supports to ensure that it can fulfil its mandate effectively. In particular, supports should aim to ease navigation for users and enhance the accessibility of the tribunal.

Tribunals, of course, being very flexible in design, frequently are accompanied by supports tailored to the context, whether these are operated by the tribunal itself, developed in partnership, or simply associated with the tribunal. For example:

- Ontario's human rights system includes not only the Human Rights Tribunal of Ontario, but also the Ontario Human Rights Commission, which addresses systemic issues such as public education, strategic litigation and policy development, and the Human Rights Legal Support Centre, which provides advice and assistance with respect to the infringement of rights, as well as legal services for proceedings before the HRTO, and enforcement of orders.
- The Landlord and Tenant Board includes among its responsibilities the provision of "information to landlords, tenants, non-profit housing co-operatives and members of non-profit housing co-operatives about their rights and obligations" under the Act.<sup>358</sup> As well as providing a range of standardized information in multiple formats, Landlord Tenant Board customer service officers provide telephone information (though not advice) regarding the legislation. In 2013-2014, the LTB handled 293,351 telephone calls.<sup>359</sup>
- Tenant duty counsel, who are provided through Legal Aid Ontario, are lawyers and community legal workers who are available at most Landlord and Tenant Board hearing locations in the province. They can give advice about legal rights, obligations and the tribunal process; help work out settlements with landlords; review documents, and help prepare forms; provide referrals for other services; and assist tenants at hearings with procedures, such as urgent review applications and requests for adjournments.<sup>360</sup>

...[S]upports should aim to ease navigation for users and enhance the accessibility of the tribunal.

Supports can also include plain language user guides, easy-to-access websites and other informational aids.

Stakeholders emphasized the important role that these kinds of supports can play in assisting individuals in accessing and navigating dispute resolution and rights enforcement in a tribunal system. They saw supports as potentially assisting parties to:

- Understand the relevance of the tribunal to their particular needs for rights enforcement and dispute resolution;
- Obtain information and referrals to other relevant options, services and supports;
- Make informed choices about the avenues for recourse available to them;
- Navigate through tribunal policies and procedures;
- Connecting to accommodations and supports (such as, for example, interpretation services) that are necessary to effectively access tribunal processes; and
- Access at least some legal advice.

**Timeliness:** The CCB's focus on timely adjudication is widely seen as vital. Several stakeholders noted that the CCB's expanding caseload is creating growing pressure on its ability to achieve this timeliness in a way that is both fair and effective, and urged greater supports for the CCB in this respect. Timeliness would continue to be an

important goal in a new tribunal, but the very strict timelines currently associated with CCB hearings may not be appropriate for all types of disputes. The Advocacy Centre for the Elderly commented that,

*In order to promote the timeliness of interventions, there should be strict statutory timelines for conducting hearings on certain types of applications. Timelines for different types of proceedings should reflect the need for a quick turn-around in scheduling hearings, the frequency of statute-mandated review, and the evidentiary requirements. The timelines for guardianship hearings, for example, should not be as short as timelines for hearing challenges to involuntary admission under the Mental Health Act.<sup>361</sup>*

For effective operation, this type of tribunal requires strong administrative supports, to enable it to:

- address the pressures associated with short timeframes and the emergency hearings that are sometimes required;
- enable parties to access the accommodations they need to meaningfully participate in tribunal processes; and
- coordinate the tailored supports and processes required to address this context (as described below); and
- maintain strong pre-hearing processes to ensure that parties are prepared to effectively engage with the tribunal process.

**Timeliness would continue to be an important goal in a new tribunal, but the very strict timelines currently associated with CCB hearings may not be appropriate for all types of disputes.**

**Research and reports:** In keeping with the emphasis throughout this Final Report on the need for developing and maintaining an evidence-base for effective policy and implementation in this area of the law, a tribunal should cultivate the ability to monitor trends, undertake specialized research relevant to its mandate, and share information with the public in reports or other documents.

**Remedies:** A key question in designing the tribunal will be its remedial powers. In SDA matters, the courts regularly make orders based on their inherent jurisdiction. Tribunals do not have *parens patriae* jurisdiction, and so careful consideration would have to be given to the powers that a tribunal would need in order to craft solutions in these cases. It has been suggested that the tribunal have powers to compel non-parties to do things or refrain from doing things affecting a person's assets or personal care, to produce records, or to provide particular forms of evidence that the tribunal desires. Tribunals have been given a wide range of powers, depending on their particular contexts, and in some cases have been given very broad remedial powers. The Human Rights Tribunal of Ontario, for example, has the power to direct "any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act".<sup>362</sup> Similarly, the Landlord and Tenant Board may "include in an order whatever conditions it considers fair in the circumstances".<sup>363</sup>



Stakeholders have recommended expanding the use of mediation and other forms of alternative dispute resolution in this area, in order to reduce costs, make the process less intimidating, and preserve important relationships.

### THE LCO RECOMMENDS:

29: Building on the accomplishments of the Consent and Capacity Board, the Government of Ontario work towards the creation of a tribunal to strengthen dispute resolution and rights enforcement under the *Substitute Decisions Act*, *1992 Health Care Consent Act*, 1996, and Part III of the *Mental Health Act*.

- a) The tribunal would have the following characteristics:
  - i. broad jurisdiction over issues related to legal capacity, decision-making and guardianship;
  - ii. an approach that recognizes the fundamental rights affected by this area of the law, the vulnerability of the persons at the centre of these disputes, and the ongoing relationships that are frequently involved;
  - iii. expertise in this area of the law, as well as in the needs and contexts of those directly affected by this area of the law;
  - iv. strong adjudicative powers, to deal with the range of issues before it;
  - v. flexible and tailored policies and procedures, to promote proportionate, responsive and user-centred access to the law;
  - vi. services and supports, whether provided by the tribunal or in partnership with other organizations, to provide information and referral services, assist with navigation, and connect parties to accommodations and supports necessary to effectively access tribunal processes;
  - vii. administrative structures and supports to enable it to effectively address time-sensitive issues;
  - viii. the ability to expand the evidence base relevant to its mandate; and
  - ix. broad remedial powers.
- b) In defining the jurisdiction of the tribunal, consideration be given to:
  - i. the appropriateness of granting jurisdiction to consider constitutionality of its enabling statute and to grant remedies under the *Constitution Act, 1982*; and
  - ii. the desirability of enabling the tribunal to refer specified matters to the Superior Court of Justice for determination, or other measures to address needs for expertise and proportionality.

## 2. Expanding Access to Mediation and Alternative Dispute Resolution

Throughout this project, stakeholders have recommended expanding the use of mediation and other forms of alternative dispute resolution in this area, in order to reduce costs, make the process less intimidating, and preserve important relationships. In principle, the LCO agrees with this approach. The LCO is mindful, however, of the need to be careful when designing or promoting alternative dispute resolution models in this area of the law. As Chetner aptly notes:



*.... [L]ike family law conflicts that involve a child of marriage, judges in guardianship cases are enjoined to keep the perspective and interests of the person who is the subject of the litigation as the core focus of their deliberations. In my view, such a focus must also be the core of alternative approaches to guardianship conflicts. We owe that respect to individuals who may have lost or are losing their ability to control decisions that affect their fundamental rights and everyday lives.*<sup>364</sup>

Turning first to mediation, many stakeholders saw this as an important area for further exploration. Chetner has commented, in the context of guardianship litigation, that “Whenever possible, mediation outside of the court process should be canvassed as an alternative and potentially less destructive process in terms of the ongoing family relationships”.<sup>365</sup> In the context of the HCCA, the City of Toronto’s *Stakeholder Consultation Results* noted that

*Mediation and dispute resolution supports are badly needed. Currently, the Capacity and Consent Board (CCB) is not experienced as a collaborative process... If the CCB is considered intimidating, then social support services may be disinclined to bring cases forward. This creates a dangerous situation.*<sup>366</sup>

While there was considerable support for expanded use of mediation, stakeholders also noted the risks associated with the use of mediation in issues related to legal capacity, decision-making and guardianship.

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.<sup>367</sup> 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.

While there was considerable support for expanded use of mediation, stakeholders also noted the risks associated with the use of mediation in issues related to legal capacity, decision-making and guardianship. Mediation in general has sometimes been subject to criticism as lacking oversight or scrutiny: the requirement for approvals of settlements affecting persons under disability, under Rule 7 of the *Rules of Civil Procedure* (discussed below), speaks to this concern. 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*.<sup>368</sup> The Advocacy Centre for the Elderly emphasized this point in its 2016 submission, stating,

*It is not possible to mediate capacity. A person is either capable or incapable. A person should not, for example, be determined capable because a settlement is mediated in which they will ‘consent’ to a treatment they may not understand in order to move forward.*<sup>369</sup>

The Mental Health Legal Committee took a slightly different approach, commenting that while “capacity, in itself, is not something that can be negotiated,

capacity may still be raised together with other issues in an SDA proceeding, and mediation provides an opportunity to resolve some or all of the issues raised”. Issues of legal capacity will be routinely raised in almost all cases, because they are part of the context. The issue of legal capacity is not negotiable – it is a matter for a formal finding – but the fact that issues of legal capacity have been raised should not be a bar to mediation of other issues. Because disputes often revolve around complicated family dynamics or the appropriate supports to be offered to a vulnerable individual, there may be solutions available that do not hinge on a determination of capacity.

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.

*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

...[M]ediation 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.

As has been highlighted throughout this *Final 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.

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”,<sup>370</sup> 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.<sup>371</sup>

- 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 dispute resolution in this area of the law, as long as appropriate mediation protocols are observed similar to those recommended by the BCLI's report and listed above.

The Advocacy Centre for the Elderly commented that where the safeguards associated with court approval of settlements are in place, mediation may be acceptable, and indicated that it would support an expansion of mandatory mediation in Estates proceedings outside of Toronto, Ottawa or the County of Essex, as mandated under Rule 75.1 of the *Rules of Civil Procedure*. The Mental Health Legal Committee took a similar view in its submissions.<sup>372</sup>

**It is important to carefully consider the relationship between timelines and alternative dispute resolution.**

Mediation is one form of alternative dispute resolution, along with arbitration, neutral evaluation, expert fact-finding, and a multitude of hybrid forms, including mediation-arbitration.<sup>373</sup> Administrative tribunals in Ontario are exploring many forms of dispute resolution. Mediators at the Workplace Safety and Insurance Tribunal, for example, may use negotiation and neutral evaluation as part of their dispute resolution techniques.<sup>374</sup> At the Human Rights Tribunal of Ontario, mediators may act as both mediator and arbitrator, with consent of the parties.<sup>375</sup> The License Appeals Tribunal uses a case conferencing approach, which may involve settlement of issues, identification of facts or arguments to be agreed upon, narrowing of the issues, accessibility accommodations, timelines and hearing dates, identification of parties, or other matters.<sup>376</sup> These few examples point to the opportunity to creatively develop dispute resolution approaches that address the unique aspects of disputes in this area of the law.

It is important to carefully consider the relationship between timelines and alternative dispute resolution. For example, the LCO heard from several consultees about the impact of tight legislative timelines on alternative dispute resolution at the CCB. The LCO agrees with the 2016 submission of the Advocacy Centre for the Elderly that in limited scenarios (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), there may be a benefit to allowing the parties to deviate from the statutory timelines in order to enable mediation.<sup>377</sup>

The LCO further notes the considerable stakeholder interest in having the tribunal consider offering dispute resolution services *prior* to the filing of an application, possibly through community organizations.

*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

The LCO further notes the considerable stakeholder interest in having the tribunal consider offering dispute resolution services *prior* to the filing of an application, possibly through community organizations.

A further issue to be considered in an expansion of mediation at the CCB or a new tribunal 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.<sup>378</sup> 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 HRTTO 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 HRTTO would not, therefore, make an order approving the proposed settlement.<sup>379</sup> 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”.<sup>380</sup> It will therefore be important to clarify the application of Rule 7 in expanding mediation in a tribunal setting.

In response to the *Interim Report*, a number of lawyers identified challenges with the current operation of Rule 7 in the context of disputes under the *Substitute Decisions Act*. For example, the Mental Health Legal Committee commented that

*The Rules of Civil Procedure respecting settlement approvals require an affidavit from a litigation guardian, but fail to consider that litigation guardians are not necessary or appropriate in SDA matters where the person's capacity is at issue. These rules require clarification and should not require counsel for the incapable person to comment on the best interests of his or her client.*

Many other issues were raised with respect to Rule 7, including:

- While the definition of a “disability” under the Rules references persons who are “mentally incapable” within the meaning of the SDA, there is no indication as to how this is to be assessed;
- It is unclear whether a settlement can be approved for a party under disability who will be receiving damages if there is no substitute decision-maker appointed for the party who will be managing the funds;
- While settlements in SDA matters are subject to court approval, the process for motions for approval in Rule 7 is not aligned with SDA proceedings.

It is therefore the view of a number of lawyers who regularly bring proceedings under the SDA, that a re-examination of Rule 7 in the context of legal capacity and decision-making law would be valuable.

The LCO agrees with Chetner that there is a “need for creative and early judicial file or case management in any case where the pleadings or conduct of the parties hint at the prospect that conflict among the players will take hold of the litigation and drive it in directions that are likely to undermine the very people that the SDA is designed to protect”.<sup>381</sup>

There were also several suggestions from lawyers who have been involved in high conflict guardianship files, that this area of the law could profitably look to some of the solutions that have been developed for contentious family law cases, such as parenting coordinators.

...[A] number of lawyers identified challenges with the current operation of Rule 7 in the context of disputes under the *Substitute Decisions Act*.

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.

### THE LCO RECOMMENDS:

30: The Government of Ontario and any court or tribunal addressing issues of legal capacity, decision-making and guardianship develop programs and policies that expand alternative dispute resolution options, including mediation and emerging approaches, for appropriate cases. These programs/policies would:

- a) be clear that a determination of a person's legal capacity cannot be made through mediation;
- b) identify matters that are appropriate for mediation or other forms of alternative dispute resolution;
- c) develop professionals with core competencies necessary to effective mediation and dispute resolution in this area of the law, including:
  - i. knowledge and skills in capacity and guardianship law and any other specific law at issue;
  - ii. the principles and values underlying capacity and guardianship law and of human rights;
  - iii. the needs and circumstances of individuals who are affected by this area of the law; and
  - iv. alternatives to the use of guardianship or substitute decision-making; and
- d) create a code of ethics and of standards for mediation and other forms of alternative dispute resolution in this area, including guidance on capacity and consent to engage in mediation.

31: The Government of Ontario consider clarifying the application of Rule 7 under the *Rules of Civil Procedures* regarding the approval of settlements for persons under disability in the specific context of the consideration of expanded mediation and alternative dispute resolution of matters under the *Health Care Consent Act, 1996* and the *Substitute Decisions Act, 1992* by the Consent and Capacity Board or other tribunal.

## 3. Strengthening Existing Supports and Structures

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.

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

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.

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 direct the PGT to arrange legal counsel for an individual whose legal capacity is at issue under that Act and who does not have legal representation. Where counsel is appointed, the individual is deemed to have capacity to instruct. In some 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. Section 3 Counsel are not appointed in every case where an individual who may lack legal capacity is not represented.

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.<sup>382</sup> 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”.<sup>383</sup>

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 fairly common 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.<sup>384</sup>

### Strengthening Section 3 Counsel

“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 a tribunal, as the LCO has recommended.

Marshall Swadron has described the complex and important role of Section 3 Counsel as follows:

*Deemed capacity to instruct removes the requirement that the [section 3] lawyer be satisfied that the instructions provided by a client are capable.*



*Where capacity is the issue in the proceeding, a client who wishes to dispute the allegation of incapacity is entitled to do so. For the lawyer to impose a threshold of capacity upon a client in such cases would deprive the client of representation. Moreover, the client may be incapable in some aspects of their decision-making but capable in others. An incapable client may also have prior capable wishes and in most cases will express wishes and preferences, even if incapable, that are applicable to matters in issue in the proceeding. The role of counsel for the incapable person includes advancing those wishes and preferences.*<sup>385</sup>

The LCO has heard that there is widespread confusion about the nature of the appropriate role of Section 3 counsel. Some parties may understand the Section 3 Counsel as having a “best interests” type of responsibility in the role, and others at times may see the role as analogous to an *amicus* appointment.

An individual litigant wrote to the LCO that,

*The whole area of Section 3 is fraught with problems. First, there is no definition of the role beyond the incapable person being ‘deemed incapable to instruct counsel’. From the Act one assumes they are to be an unbiased reporter of the incapable person’s capable or current wishes – but that is not spelled out. It is also not clear whether they are to act as an advocate, litigation guardian or substitute decision-maker. I have seen all three in the last 10 months. And the incapable person has none of the protections a regular client has leaving them open to abuse. They do not choose the lawyer, they cannot fire them, and they are obligated by statute to pay – if they have the means.*

Elder law lawyer Jan Goddard pointed out that “There seems to be some difficulty in recognizing the application of the *Rules* respecting confidentiality and solicitor-client privilege, and advocacy for the client, in the case of section 3 counsel”, and more generally there seems to be a lack of understanding that a person’s ability to make decisions for him or herself is a matter of grave importance to the individual, for which legal representation is appropriate.<sup>386</sup>

Given the complexity of the role, effective training should be available for those appointed as Section 3 Counsel. For example, given the level of confusion evinced about this role, the LCO believes that it would be helpful for there to be clear, standardized information available to all those involved in capacity litigation with respect to the role of Section 3 Counsel.

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,

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.

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. 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.*

Many legal counsel working in this area pointed out that the problems experienced by Section 3 counsel are a subset of those experienced by all those representing persons who may be incapable in proceedings under the SDA.

These concerns are less common for counsel appointed under section 81 of the HCCA, for a number of reasons. Family dynamics surrounding property issues differ from those related to treatment. Another factor is the significant LAO supports surrounding the CCB matters.

Responses to the *Interim Report* agreed that Section 3 Counsel need to be protected from conduct that may prevent or hinder them from fulfilling their functions appropriately; and that those fulfilling this role would benefit from greater information and training related to this role. While similar concerns have not been voiced with respect to counsel under section 81 of the HCCA, it would be important to consider whether provisions to protect Section 3 Counsel should also be extended to these counsel, in order to avoid unintended consequences.

### **Counsel Retained by Persons Who May be Legally Incapable**

Many legal counsel working in this area pointed out that the problems experienced by Section 3 counsel are a subset of those experienced by all those representing persons who may be incapable in proceedings under the SDA. This is a challenging role in general. Lawyers pointed to the complexities of representing clients who are non-communicative, subject to influence by others, or where access has been restricted. As Justice Cullity commented in *Banton v Banton*, “The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the *Substitute Decisions Act, 1992* is potentially one of considerable difficulty... A very high degree of professionalism may be required in borderline cases ...”<sup>387</sup>

Lawyer Jan Goddard, in her submission to the LCO, pointed to a number of areas where lawyers, whether acting under Section 3 or retained directly, would benefit from additional guidance, including:

- How to establish a retainer with a client under disability;
- How to provide accommodation to clients in order to obtain instructions;
- How to distinguish instructions from preferences and wishes, and how the latter should be taken into consideration in determining a case; and
- When the role of counsel should be at an end in capacity proceedings.<sup>388</sup>

Because of the vulnerability of these clients, restriction of access to clients is always a risk. The Advocacy Centre for the Elderly commented in its 2016 submission,

*ACE has encountered numerous instances where a senior contacts ACE for legal help, but the person's attorney for property and/or personal care attempts to restrict our access to the senior, thus preventing us from providing effective counsel. In such instances, there has been no proceeding underway, and yet the allegedly incapable person's right to access counsel has been impeded. ACE proposes expanding the scope of this recommendation to make it an offence to interfere with counsel in any matter where a person's capacity is at issue.*<sup>389</sup>

ACE therefore recommended that the LCO's draft recommendation be broadened to include counsel in any matter where a person's capacity is at issue.

The Mental Health Legal Committee suggested that the Law Society of Upper Canada's *Rules of Professional Conduct* create a positive obligation on lawyers to encourage their institutional clients to facilitate unimpeded access by counsel to vulnerable persons, and to state that interference by counsel with another counsel's access to vulnerable persons should be a specific breach of the *Rules*. The MHLC also suggested amendments to the Rule of Civil Procedure to allow the striking of a party's pleadings in an action or evidence in an application where there has been interference with the ability of section 3 counsel to perform their duties.

The LCO agrees that steps must be taken to protect all those representing clients who may be legally incapable from inappropriate interference with their role, and to support high quality representation of this particular clientele. Given that this issue affects both Section 3 Counsel and the legal profession more broadly, the Law Society of Upper Canada can play an important role.

The LCO agrees that steps must be taken to protect all those representing clients who may be legally incapable from inappropriate interference with their role, and to support high quality representation of this particular clientele.

**THE LCO RECOMMENDS:**

32: 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.

33: The Government of Ontario, working with the Law Society of Upper Canada, lawyer organizations and others, develop a range of supports for lawyers appointed a Section 3 Counsel under the *Substitute Decisions Act, 1992*.

34: The Law Society of Upper Canada consider whether clarification of the *Rules of Professional Conduct* with respect to the appropriate relationship between a lawyer and counsel for persons who lack or may lack legal capacity is required, and if so, that it amend the Rules accordingly.

**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.**

**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.<sup>390</sup> 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.<sup>391</sup>

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 tribunal mandate, 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.

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,<sup>392</sup> committed to expanding access to legal aid by raising the income eligibility

threshold to qualify for legal aid assistance.<sup>393</sup> 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.<sup>394</sup> 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.*<sup>395</sup>

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.<sup>396</sup> Several new certificates for representation before the Consent and Capacity Board and Superior Court of Justice are now 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.

It should be noted that Legal Aid Ontario has developed 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”.<sup>397</sup> The *Mental Health Strategy* commits to, among other initiatives, consult clients, advocates and stakeholders on priorities to expand coverage to issues like representation in guardianship disputes, assistance in drafting powers of attorney for property and personal care, and civil opinion certificates to provide summary and brief services in a wide range of issues.<sup>398</sup>

LAO is also undertaking a number of initiatives to promote systemic rights and advocacy, such as the Mental Health Appeals Program, aimed at expanding access to justice and expediting appeals from tribunals that oversee patients in the civil and forensic mental health system. As well, LAO committed to develop and deliver a mental health training program, available both to LAO employees as well as the private bar and legal clinics, aimed at, among other goals, strengthening understanding of mental health rights and options and promoting best practices for professional ethical issues, fostering the establishment of communities of practice in regions across the province, and providing a foundation for more robust panel standards and the enforcement of higher quality service.<sup>399</sup>

The LCO has below provided recommendations regarding LAO supports within the existing system. Should the LCO’s recommendations related to support authorizations or an expansive tribunal mandate 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.

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.

...[T]he investigative role of the PGT is widely recognized as a vital element in Ontario's legal capacity, decision-making and guardianship system. However, many stakeholders have expressed concerns that this role is overly limited, and that situations that are of genuine concern are not addressed within this mandate.

### THE LCO RECOMMENDS:

35: Legal Aid Ontario consider:

- 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 choice 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) enhancing the supports available to promote the knowledge and skills of lawyers who provide services in this area of the law

### The Public Guardian and Trustee's Investigation Mandate

As was discussed earlier in this Chapter, the investigative role of the PGT is widely recognized as a vital element in Ontario's legal capacity, decision-making and guardianship system. However, many stakeholders have expressed concerns that this role is overly limited, and that situations that are of genuine concern are not addressed within this mandate.

It is the observation of the LCO that some of this discussion arises from confusion about the nature of the PGT's statutory mandate with respect to investigation. As was noted earlier, Ontario does not have an adult protection regime: the PGT's powers are specifically limited to situations where issues of legal capacity are at play. Further, the connection of the PGT's investigative mandate with its power to apply for temporary guardianship indicates the high bar associated with the PGT's powers. In *Ziskos v. Miksche*, Spies J. commented on this role of the PGT as follows:

*The PGT, as a creature of statute, must be authorized either by statute or court order to intervene in an individual's private affairs and must act according to that authorization. Fundamental to the statutory scheme with respect to substitute decision-making in Ontario is the principle that an individual's capable wishes with respect to their personal care and property decisions should be followed to the extent they are feasible. This principle encompasses not only their specific decisions regarding property or personal care, but also their choice of a substitute decision maker...*

*Both the Health Care Consent Act, 1996, ]("HCCA") and the SDA dictate that the PGT is the decision-maker of last resort. Pursuant to the statutory scheme,*



*the PGT is responsible to intervene on behalf of allegedly incapable individuals at risk where there is no other suitable individual able or willing to act.*<sup>400</sup> [emphasis added]

That is, the investigative role of the PGT is a carefully delineated role, attempting to balance concerns for safety and freedom from abuse with respect for privacy and personal choice.

Some stakeholders 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 international precedents for this view. 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”.<sup>401</sup> Investigations may commence either at the instigation of the Victorian Civil and Administrative Tribunal (VCAT) or through a complaint from any person.

...[T]he investigative role of the PGT is a carefully delineated role, attempting to balance concerns for safety and freedom from abuse with respect for privacy and personal choice.

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.”<sup>402</sup> 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.<sup>403</sup>

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.<sup>404</sup> 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”.<sup>405</sup> 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.<sup>406</sup> 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.<sup>407</sup>*

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.

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.<sup>408</sup> 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.<sup>409</sup>

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.

The LCO believes that its proposed reforms to Ontario's adjudicative mechanisms related to the SDA will reduce some of the pressure on the PGT's available mechanisms.

Apart from the subject matter of the investigation, the LCO believes it to be worthwhile to enable a broader range of *responses* to an investigation by 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 approach, the PGT could be given the option of referring a written report to the adjudicative forum, which would be empowered to make a range of less intrusive 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.

Such a power would need to be carefully designed, in order to identify the appropriate parameters for such a referral and to address concerns regarding privacy and fairness to the parties involved.

Together with this, given the ongoing debate among stakeholders regarding the meaning and appropriate application of the PGT's "serious adverse effects" mandate, it would be helpful to provide clarification to key stakeholders and the public about how it is interpreted, to assist with system navigation and to reduce the levels of frustration arising from misapprehensions about the nature of the mandate. This would be particularly useful in the broader context of reforms: given how closely tied the PGT's investigation mandate is to the operation of other aspects of the legal capacity and guardianship system, reforms elsewhere may require adjustments to the PGT's application of this mandate.

...[G]iven the ongoing debate among stakeholders regarding the meaning and appropriate application of the PGT's "serious adverse effects" mandate, it would be helpful to provide clarification to key stakeholders and the public about how it is interpreted, to assist with system navigation and to reduce the levels of frustration arising from misapprehensions about the nature of the mandate.

#### THE LCO RECOMMENDS:

36: The Government of Ontario consider conducting further research and consultation towards developing fair and appropriate processes that provide the Public Guardian and Trustee with the discretion, upon completion of an investigation that does not warrant an application for temporary guardianship but that raises concerns related to misuse of decision-making powers, to forward a written report to an adjudicator who would be empowered to order training, mediation, regular reporting for a substitute decision-maker or other remedies as appropriate.

37: In order to promote understanding and ease of navigation, the Government of Ontario take steps to clarify the interpretation of the Public Guardian and Trustee's 'serious adverse effect' investigation mandate.

## 4. New Applications for Adjudication

As noted in section B1 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).

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

**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.**

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 2014 submissions and this proposal received strong support in the feedback to the *Interim Report*. 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 was proposed in the *Interim Report* 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. This proposal was the subject of a number of thoughtful responses. While opening up this possibility could create options for addressing abuse or neglect of a person found to be legally incapable, it could also become a means of furthering family conflict, or could be used for inappropriate ends. For example, it was pointed out that these applications could be used to gain access to personal information about the individual in question.

The Advocacy Centre for the Elderly suggested that the tribunal should be able to determine who has standing for such an application: an attorney, guardian, substitute decision-maker, the proposed monitors designated under a power of attorney, and the allegedly incapable person should be able to bring such applications as a matter of right, while all others should have to apply to the tribunal for standing.<sup>410</sup> Another suggestion was that such applications should not be brought without taking into account the views of the person at the centre of the dispute. The LCO believes that these applications would be valuable, if appropriately circumscribed.

Guardianship provides a different context for concerns regarding the appropriate application of the legislation or questions as to whether the substitute decision-maker is acting in compliance with the legislation. Guardians are responsible for entire decision-making domains and not only single decisions as under the HCCA. Furthermore, guardians must complete plans for the management of the property or the person, as appropriate, and these plans are reviewed as part of the guardianship appointment process. Where questions do arise, the court has broad powers to “give directions on any question arising in connection with the guardianship or power of attorney” for either property or personal care.<sup>411</sup> An application or motion for directions may be made by “the incapable person’s guardian of the person, attorney under a power of attorney for personal care, dependant, guardian of property or attorney under a continuing power of attorney, by the Public Guardian and Trustee, or by any other person with leave of the court”. The court may also order passings of

accounts for either guardians or attorneys for property. The ability of the court to hear from “any other person with leave” addresses the issue of third parties, and potentially that of the “incapable person”, albeit with leave. If matters under the SDA are transferred to a tribunal that also deals with HCCA issues, it may be worthwhile to consider how best to harmonize these approaches.

It was also suggested that the tribunal be empowered to receive applications from third parties with respect to whether an SDM meets the statutory requirements – and more specifically, whether an SDM is capable – as a way of providing a clear resolution to an issue that many stakeholders find recurs frequently and which is currently subject to no clear mechanism for resolution. This seems to the LCO to be a sensible suggestion.

It was also suggested that the tribunal be empowered to receive applications from third parties with respect to whether an SDM meets the statutory requirements – and more specifically, whether an SDM is capable – as a way of providing a clear resolution to an issue that many stakeholders find recurs frequently and which is currently subject to no clear mechanism for resolution.

### THE LCO RECOMMENDS:

38: The Government of Ontario amend the *Health Care Consent Act, 1996* to

- a) enable individuals to bring applications under sections 37, 54 and 69 to determine whether their substitute decision-maker is in compliance with their decision-making obligations;
- b) enable monitors appointed under a power of attorney to bring applications under sections 35, 37, 52, 54, 67 and 69 to determine whether an attorney is in compliance with decision-making obligations and to seek directions with respect to wishes;
- c) enable other parties to bring applications under sections 35, 37, 52, 54, 67 and 69:
  - i. to determine whether a substitute decision-maker is in compliance with decision-making obligations and to seek directions with respect to wishes;
  - ii. only with leave of the tribunal, and in such cases the tribunal is required to take into account the views of the allegedly incapable person in granting leave;
- d) enable
  - i. health care practitioners proposing treatment, persons proposing admission to a care facility, or staff member responsible for personal assistance service
  - ii. a monitor appointed under a power of attorney, or
  - iii. third parties with leave of the tribunal

to bring applications to determine whether a substitute decision-maker meets the requirements of sections 20(2) of the *Health Care Consent Act, 1996* including whether the substitute decision-maker is capable with respect to the decision

## F. SUMMARY

From the outset of this project, effective access to dispute resolution and rights enforcement 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 under the SDA 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.

Concerns were also voiced as to how current dispute resolution mechanisms address the ongoing relationships that are at the heart of so much of the litigation in this area, and how sensitively and effectively they are able to respond to the unusual features of this context.

The LCO has considered a number of approaches to addressing this issue. The LCO proposes to create a unified access point for matters related to legal capacity, decision-making and guardianship through an expert tribunal with broad jurisdiction, one that can provide specialized adjudication within a holistic system of supports. This 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. Together with this substantial recommendation, the LCO has also proposed a number of measures to broaden the types of applications that can be brought under the HCCA, improve access to mediation and other forms of alternative dispute resolution, and to strengthen existing structures and supports to access to the law, such as Section 3 Counsel and Legal Aid Ontario programs.

Making the adjudication of matters regarding legal capacity, decision-making and guardianship more flexible, effective and accessible has the potential to strengthen Ontario's entire system for legal capacity, decision-making and guardianship, empowering individuals to address concerns regarding abuse and misuse of substitute decision-making powers; enabling more flexible and tailored approaches to appointments of substitute decision-makers, as is discussed in the following Chapter; simplifying system navigation; and allowing for more creative responses to disputes within ongoing relationships.

**From the outset of this project, effective access to dispute resolution and rights enforcement 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.**





# Legal Capacity, Decision-making and Guardianship



## CHAPTER EIGHT

# External appointment processes: increasing flexibility and reducing unnecessary intervention

...[T]he 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.

## A. INTRODUCTION AND BACKGROUND

As was discussed in Chapter 3, 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 in this area 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 5, 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 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. Therefore, this Chapter focusses on the appointment of guardians.

- *Issues related to misuse of powers of attorney are dealt with in Chapter 6 of this Report.*

**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.**

There are a variety of reasons why substitute decision-making may be sought or imposed where it is not 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. Conflicting 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. As a result, they may 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. It may also discourage efforts to terminate guardianships when they are no longer needed.

There are recommendations throughout this *Final Report* that aim to reduce inappropriate or unnecessary interventions and to safeguard autonomy. For example, 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. Recommendations related to alternatives to substitute decision-making, as outlined in Chapter 4, aim to provide options for those for whom other approaches are more appropriate. Recommendations in Chapter 6 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.<sup>412</sup>

Statutory guardianship is the major means through which individuals enter into property guardianship.

#### Property Guardianships in Ontario 2013-2014

Open Court Appointed Guardianships:	3,975
• PGT as guardian	318
• Private guardian	3,657
Open Statutory Guardianships:	12,858
• Private guardians	2,379
• PGT: Certificate under the MHA	4,881
• PGT: Capacity Assessment under the SDA	3,657
• PGT: Resumption under s. 19 of the SDA	31
<b>Total Property Guardianships</b>	<b>16,833</b>

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. 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.

*Processes for capacity assessments are detailed in Chapter 5.*

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.<sup>413</sup> The SDA sets out a number of procedural rights for persons undergoing these assessments,<sup>414</sup> including a right in most circumstances to refuse an assessment;<sup>415</sup> a right to receive information about the purpose, significance and potential effect of the assessment;<sup>416</sup> and a right to receive written notice of the findings of the assessment.<sup>417</sup> 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.<sup>418</sup>

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,<sup>419</sup> 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.<sup>420</sup>

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]”.<sup>421</sup> It is important to note that statutory guardianship applies only to property management, and not to personal care.

**Statutory guardianship is intended to provide an expeditious, relatively low-cost administrative process for entering guardianship.**

Upon a finding of incapacity to manage property, the PGT becomes the statutory guardian, unless there is already a POA for 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 currently a fee in Ontario 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.<sup>422</sup> 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.<sup>423</sup>

An application for guardianship must be accompanied by:

1. 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.<sup>424</sup>

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.<sup>425</sup> 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.<sup>426</sup>

As well, for all applications for court-appointed guardianships, the PGT is a statutory respondent.<sup>427</sup> 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.<sup>428</sup>

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.

**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.<sup>429</sup>

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.<sup>430</sup> 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.<sup>431</sup> 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.”<sup>432</sup>

**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;<sup>433</sup> 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.<sup>434</sup>

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,<sup>435</sup> 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.<sup>436</sup>

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.'*<sup>437</sup>

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.<sup>438</sup>

When an SDA Capacity Assessment is carried out for the purposes of an application for a summary disposition 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.*

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.



*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.*<sup>439</sup>

## C. AREAS OF CONCERN

Concerns have been raised that even where guardians have been appointed for valid reasons, those guardianships may nevertheless be too broad.

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. For example, a person who is legally incapable of making complex property decisions about investments or sale of assets but is able to make day to day spending decisions, may be under a plenary property guardianship.

The importance of tailored and specific approaches to guardianship was recently reinforced in the decision of the Supreme Court of Nova Scotia in *Webb v. Webb*. In that case, which developed from a *Charter* challenge to the *Incompetent Person’s Act*, Justice Campbell commented that

*The object of the Incompetent Persons Act is to protect people who are incapable “from infirmity of mind” from managing their own affairs. That protection is provided by the appointment of a guardian. That is a rational and reasonable way to help that person. The problem is that the legislation is overbroad. It goes too far.*

*Every person with “infirmity of mind” is not incapable of managing their own affairs to the same extent. There is a spectrum of adult “infirmity of mind” that would warrant guardianship in respect of some matters, but not in respect of others. Competency is not an all or nothing thing.*



*The Incompetent Persons Act takes an all or nothing approach. It allows for no nuance. It does not allow a court to tailor a guardianship order so that a person subject to that order can retain the ability to make decisions in respect of those areas in which they are capable.*<sup>440</sup>

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.<sup>441</sup>

It has been hypothesized that the inflexibility and relative inaccessibility of external appointment processes contribute to a tendency for courts to award plenary guardianships.

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.<sup>442</sup>

**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 so 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-André 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, commenting that “Provisions that require an ‘incapable’ person to take legal action against a guardian privilege guardians and disadvantage ‘incapable’ persons attempting to protect their rights”.<sup>443</sup>

**Statutory guardianship:** Statutory guardianship processes were designed to be relatively simple and easy to access, compared to court-based processes. While the Capacity Assessment must be paid for, if the person assessed is found incapable, no further steps or expenses are required in order to create a guardianship.

However, this simplicity comes at a price. Statutory guardianship tightly ties together the assessment of capacity with a need for guardianship. 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 a summary disposition application for a court-appointed guardianship, but do not do so in the context of a statutory guardianship.<sup>444</sup>

Further, statutory guardianship results in automatic appointment of the PGT as guardian. 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.

As a result, a finding of legal incapacity for property under section 16 of the SDA has extremely grave consequences for the autonomy of the individual.

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. 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.

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,

...[S]tatutory guardianship may be seen as inconsistent with some of the values that underlie the legislation as a whole.

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.

As well, should the alternatives to substitute decision-making outlined in Chapter 4, or the more limited forms of guardianship proposed later in this Chapter be implemented, it is difficult to see how an assessment of the potential application of these less restrictive alternatives could be integrated into the statutory guardianship. Opportunities to limit guardianship, and in particular, plenary guardianship, to cases of true necessity, would necessarily continue to be restricted in a system in which the vast majority of guardianships are created under the statutory process.

**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.**

## D. APPLYING THE FRAMEWORKS

Chapter 4 of this *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 4, it is the LCO's view that substitute decision-making is necessary for some individuals in some circumstances. However, it is also 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.

The LCO further believes that 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. Where no such relationships exist, the PGT may provide specialized, skilled and trustworthy professional decision-making where necessary. In addition to other benefits, this approach to guardianship is also a more effective use of resources at all levels.

Throughout this *Final Report*, the LCO has considered the general goal of reducing unnecessary intervention in developing its recommendations. LCO 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 recommendations in this Chapter are only one element of the LCO's overall approach to promoting these goals.

As well, in designing these recommendations, the LCO has considered how they fit into the overall approach to reform in this project – that is, with the recommendations that the LCO has made in other Chapters regarding changes to Ontario's legal capacity, decision-making and guardianship system.

...[S]ubstitute 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.

## F. RECOMMENDATIONS

The LCO is recommending four key initiatives that would more closely target substitute decision-making to need:

- promoting more consistent consideration of alternatives to guardianship;
- re-examining the use of statutory guardianship as a means of external appointments;
- promoting greater opportunities for the use of partial or limited appointments; and

- promoting systematic consideration of time limited appointments and of mandated reviews of the appropriateness of external appointments of substitute decision-makers.

Feedback on the *Interim Report* indicated broad support for these approaches.

## 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 might be found to lack legal capacity, but who nevertheless do not require guardianship, either because the nature of the decisions they make, or because they are receiving effective informal supports and services, and therefore do not need a formal appointment of a substitute decision-maker. 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.

...[T]here are many individuals who might be found to lack legal capacity, but who nevertheless do not require guardianship, either because the nature of the decisions they make, or because they are receiving effective informal supports and services, and therefore do not need a formal appointment of a substitute decision-maker.

In Chapter 4 of this *Final Report*, the LCO proposed the creation of formal alternatives to guardianship, in the form of support authorizations and network decision-making. This Chapter outlines a number of recommendations for more limited forms of guardianship, including guardianships that are reviewable or time limited, limited property guardianships, and the appointment of representatives for single decisions. The implementation of these recommendations would bring into greater prominence and importance the existing provisions of the SDA with respect to consideration of least restrictive alternatives. Without effective mechanisms to ensure that these alternatives are carefully considered prior to the appointment of a guardian, their implementation may be limited and individuals may continue to experience unnecessary or over-broad intervention.

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.<sup>445</sup>

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.<sup>446</sup> 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.*<sup>447</sup>

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 7, 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.

...[I]t 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.

The Coalition on Alternatives to Guardianship, in their 2014 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".<sup>448</sup> In response to this concern, the Coalition recommended 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.<sup>449</sup>

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,



A simple alternative may be to strengthen the existing “least restrictive alternative” provisions by requiring the adjudicator to explicitly address the issue in the decision regarding the appointment, or to require parties to the application to address the issue.

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.

A simple alternative may be to strengthen the existing “least restrictive alternative” provisions by requiring 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.<sup>450</sup> 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.<sup>451</sup>

The Victorian Civil and Administrative Tribunal (VCAT) has similar powers with respect to that state’s Public Advocate Office. The Public Advocate’s Office has a broad array of powers 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.<sup>452</sup> 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.<sup>453</sup>

- *VCAT is described more fully in the Discussion Paper, Part IV, Ch. II, and the Public Advocates Office in the Discussion Paper, Part IV, III, D. 1.*

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.<sup>454</sup>

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.<sup>455</sup>

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 recommendations regarding a tribunal with broad jurisdiction over matters related to legal capacity, consent and substitute decision-making, as detailed in Chapter 7, the creation of some type of Visitor program may be a feasible means of obtaining information about alternatives to guardianship. 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.<sup>456</sup> 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.

As another option, in the Ontario context, there are examples of tribunals with the power to order investigations or make enquiries. For example, the Human Rights Tribunal of Ontario (HRTTO) has the power, at the request to a party to an application, to appoint a person to conduct an inquiry if the HRTTO 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 HRTTO 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.<sup>457</sup> The Landlord and Tenant Board has the power to "conduct any inquiry it considers necessary or authorize an employee in the Board to do so", "request a provincial inspector or an employee in the Board to conduct any inspection it

...[E]valuations 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.

considers necessary”, or “permit or direct a party to file additional evidence with the Board which the Board considers necessary to make its decision”.<sup>458</sup>

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 *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.

The LCO proposed in the *Interim Report* 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.

Another option would be to look to the experience of the courts with *Gladue* Reports. *Gladue* Reports have their origin in a decision of the Supreme Court of Canada interpreting s. 718.2(e) of the *Criminal Code*. The decision in *R. v. Gladue*<sup>459</sup> considered the systemic problem of over-representation of Aboriginal individuals in the Canadian criminal justice system, and required sentencing judges, in cases involving Aboriginal offenders, to consider the particular systemic factors that may have resulted in the engagement of that individual with the criminal justice system and to consider all possible alternatives to imprisonment. *Gladue* has been implemented in a range of ways in the provinces and territories:<sup>460</sup> *Gladue* Reports are one approach. These Reports are prepared by “Gladue Caseworkers”, usually in the context of sentencing or bail hearing, at the request of the judge, defense counsel, or Crown Attorney. These reports contain information about the factors that have brought the individual before the Court and recommendations about community based rehabilitation options.<sup>461</sup> In Ontario, Legal Aid Ontario provides funding for the creation of *Gladue* Reports, for example by Aboriginal Legal Services Toronto and Nishnawbe-Aski Legal Services Corporation.<sup>462</sup>

...[P]roviding 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.

This draft recommendation received some attention in the feedback on the *Interim Report*. The Advocacy Centre for the Elderly (ACE) opposed this proposal, seeing it as supplanting the adjudicator's own expertise in determining whether a less restrictive alternative exists. ACE suggested that such reports could be requested by the parties and presented as evidence in support of a position, and could then be challenged by opposing counsel. While the Mental Health Legal Committee (MHLC) supported the recommendation, it also noted this concern.

On a similar note, while supporting this recommendation as a means of reducing the number of court-appointed guardianships – and indeed, suggesting that such reports be mandatory in *all* guardianship applications – ARCH Disability Law Centre raised concerns about adjudicators inappropriately relying on such reports, and suggested that safeguards be instituted to support adjudicators in determining how much weight to give to such reports, such as requiring adjudicators to assess reports for conflict of interest. ARCH suggested that where professionals undertake such reports, such professionals must be appropriately trained in the area, including on less restrictive alternatives. ARCH also supported providing individuals with the opportunity to identify individuals who might undertake such report, and that it should not be necessary for the reports to be from professionals: persons who know the individual in question, such as family or friends, might in ARCH's view appropriately prepare such reports.

Active adjudication has often been adopted by tribunals, including as a means of reducing power imbalances where there are vulnerable litigants.

Such concerns point to questions as to how such reports might fit into the adversarial process. This proposal might be understood within the context of contemporary adoption of active adjudication approaches, which occupy a middle ground between pure adversarial and inquisitorial approaches. Active adjudication has often been adopted by tribunals, including as a means of reducing power imbalances where there are vulnerable litigants.<sup>463</sup> It should be emphasized that active adjudication is not intended to supplant the role of counsel, particularly counsel for the person who may lack legal capacity.

One of the merits of active adjudication, is, in the words of one commentator, the ability to reduce “the power of the parties to restrict the [decision-maker] to consideration of only such available evidence as they are willing to have taken into account – which is, in truth, little less than the power to force the court into an incorrect decision.”<sup>464</sup>

While there may be concerns that these more interventionist approaches to adjudication may compromise procedural fairness, a review of the operation of the Human Rights Tribunal of Ontario saw that Tribunal's use of active adjudication in appropriate circumstances as meritorious, able to respect fairness, and worthy of further pursuit.<sup>465</sup> In the context of the Ontario Review Board, the Ontario Court of Appeal ruled that it had a “duty to search out” and consider evidence against imposition of restrictions on persons found Not Criminally Responsible.<sup>466</sup>

On balance, the LCO believes that with appropriate safeguards to protect fairness, enabling adjudicators to seek further information about the availability and appropriateness of less restrictive alternatives would strengthen the implementation of the policy priorities underlying the SDA.

...[W]ith appropriate safeguards to protect fairness, enabling adjudicators to seek further information about the availability and appropriateness of less restrictive alternatives would strengthen the implementation of the policy priorities underlying the SDA.

### THE LCO RECOMMENDS:

- 39: The Government of Ontario promote effective consideration of the “least restrictive alternatives” under the *Substitute Decisions Act, 1992* by giving adjudicators who are considering the appointment of a guardian for matters related to property or personal care the authority to:
- a) request submissions from any party regarding the least restrictive alternative;
  - b) request, with appropriate processes and safeguards, a report from a relevant expert or organization, such as the Public Guardian and Trustee, Adult Protective Services Worker, Developmental Services staff or other body, 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 experts or 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.

The statutory guardianship process may be understood as having a number of benefits.

1. As an administrative process, it is intended to be relatively simple compared to a court appointment process.
2. It can be a quick way to create a guardianship, something which can be particularly valuable in urgent situations, such as where there is a risk of dispersal

of assets without immediate action. This is understood to be particularly important for statutory guardianships created through the MHA processes, as a means to prevent significant disadvantages accruing to patients (such as loss of an apartment due to non-payment of rent, for example), during their temporary period of legal incapacity.

3. 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.

However, the statutory guardianship process may not achieve all of the benefits intended, and may have some accompanying disadvantages.

**First**, the automatic appointment of the PGT 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. It is also, arguably, an ineffective use of the resources and expertise of the PGT.

**Secondly**, statutory guardianship by its nature conflates a lack of legal capacity with a need for guardianship. A finding of legal incapacity *automatically* results in the appointment of a guardian. This sits uneasily with the policy goals that underlie the *Substitute Decisions Act*, with the nuanced approach to legal capacity advanced in this *Report*, and with the emphasis in the *Convention on the Rights of Persons with Disabilities* on supporting individuals to exercise legal capacity.

**Thirdly**, statutory guardianship does not allow for tailoring of the scope or duration of guardianship to the needs of individuals. The recent Nova Scotia case of *Webb v Webb*, described earlier in this Chapter, emphasizes the vital significance of tailored and nuanced approaches in ensuring that guardianship systems complies with *Charter* guarantees. While the Nova Scotia legislation differs in several respects from Ontario's, policy-makers may wish to consider the implications of the *Webb v Webb* decision for the statutory guardianship system.

The recommendations in this Chapter focus on reducing the scope or duration of guardianship, to preserve to the greatest extent appropriate the autonomy of individuals. However, these types of recommendations are very difficult to integrate with the statutory guardianship process, which is designed for administrative

...[S]tatutory guardianship does not allow for tailoring of the scope or duration of guardianship to the needs of individuals.

**Statutory guardianship provides no readily identifiable mechanism for consideration of least restrictive alternatives, and assigns the PGT to a role far beyond a “last resort”. In these ways, statutory guardianship may result in excessive intervention.**

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.

In short, the type of reforms recommended in this Chapter and in Chapter 4 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 (at least initially) the PGT. Statutory guardianship provides no readily identifiable mechanism for consideration of least restrictive alternatives, and assigns the PGT to a role far beyond a “last resort”. In these ways, statutory guardianship may result in excessive intervention.

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.<sup>467</sup> Issues related to accessibility to the process were addressed through the Review Officer system, as well as by a number of initiatives to create plain language forms and information.

- *Alberta’s Review Officer system is described in Part Four Ch.III.D of the Discussion Paper.*

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”.<sup>468</sup> That is, at least some of 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 a tribunal, as the LCO recommended in Chapter 7, this would make applications for external appointments less intimidating and costly, and more accessible. In such circumstances, the question of statutory guardianship can be considered afresh. As well, should such a tribunal retain the CCB’s focus on and strength in rapid decision-making, this would reduce concerns that statutory guardianship may be necessary to ensure timely-decision-making in urgent matters. Depending on how such a tribunal would be constituted, 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 9;
- 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.

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In such a system, a finding of lack of legal capacity to manage property by either a designated Capacity Assessor under the SDA or an examining physician under Part III of the MHA would lead, not to the automatic appointment of the PGT as guardian, but to a deemed application for guardianship to the tribunal. Careful attention to notice requirements would be necessary in designing such a process: the notice requirements for applications related to guardianship currently found under s. 69 of the SDA provide a useful starting point.

This proposal received widespread support in responses to the LCO's *Interim Report*, with the exception of the Advocacy Centre for the Elderly (ACE), which disagreed strongly: it was the view of ACE that "It is vital to retain the automatic triggering of guardianship to a neutral organization such as the PGT to ensure that the incapable person's property is managed in a timely and safe manner". ACE recommended instead that the replacement guardianship process be reviewed and streamlined, and that the rights advice requirements for Capacity Assessors be strengthened.

Upon consideration, it is the view of the LCO that the advantages of the statutory guardianship process in terms of rapidity and administrative simplicity do not outweigh its inherent limitations in process protections. Careful design of an accessible and flexible adjudicative appointment process can mitigate concerns regarding timeliness and safety.

The design of these processes will have to consider two common scenarios (which in some situations may co-exist).

First, there will always be some significant number of cases in which rapid appointment of a guardian is necessary in order to end or prevent abuse, secure assets, or undertake urgent decisions. In some cases, potential guardians will be available, but



the necessary scrutiny may cause too much delay. In other cases, no potential guardians will be readily obvious, and it will be necessary to attempt to identify appropriate family members or friends prior to any decision to permanently appoint the PGT as guardian. In such situations, processes for urgent applications resulting in temporary appointments may be helpful.

The Mental Health Legal Committee made the interesting suggestion that the PGT be a mandatory party to a guardianship application triggered by an incapacity finding that would otherwise have resulted in statutory guardianship. Such an application should be returnable on a short time frame, and the initial appearance should provide an opportunity to grant the PGT temporary powers to address any urgent concerns if no one else is available at that time.

The state of California provides another model. This state 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.<sup>469</sup> 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.

**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.**

Secondly, it would be necessary to give thought to the processes by which the PGT would be appointed as a guardian in this new system. In Chapter 9, the LCO has provided an outline of a more focused mandate for the PGT's substitute decision-making role, one centred on providing its expert, professional and trustworthy services to those for whom the particular attributes of the PGT make it the best option. Currently, in situations where family is unavailable, unwilling or inappropriate to act, a guardianship by the PGT may be reasonably easily effected by organizing a Capacity Assessment resulting in a statutory guardianship. As the Table earlier in this Chapter makes clear, the vast majority of guardianships by the PGT are created in this way. 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.

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;<sup>470</sup> 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.<sup>471</sup>

These are cumbersome processes. 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,<sup>472</sup> which could provide a model which could be modified to Ontario’s needs.

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.

Any system for appointing guardians must include some scrutiny of potential guardians...

For example, 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.<sup>473</sup> 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.<sup>474</sup>

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. It would be important to consider whether 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. Further, the PGT currently performs an important role in scrutinizing potential “replacement guardians”, for example by reviewing management plans. Any system for appointing guardians must include some scrutiny of potential guardians: if, in a system modelled on Saskatchewan’s, the PGT defers taking up an appointment, it is not clear where the responsibility for evaluating the potential guardian would lie. If it remained with the PGT, there may be little practical difference between this and the current “replacement guardian” system.

It was also suggested that the system for appointing substitute decision-makers under the *Health Care Consent Act, 1996*, in which a determination of incapacity results in

an automatic appointment from a hierarchical list, be applied to the appointment of guardians for property or personal care.

The LCO does not find this to be an appealing proposal. The very simple and highly informal process under the HCCA works well in that context, where appointments are generally for a single decision and decisions must often be made on an urgent basis. As well, decisions under the HCCA are in most cases ultimately implemented by the health practitioner proposing the treatment: this builds in a certain amount of oversight. Guardians of property and personal care, however, are appointed to make many decisions for an indefinite period of time. These appointments provide the guardians with easy access to the individual's assets or living arrangements, thus placing the individuals in a very vulnerable position. There is little oversight once a guardian has been appointed, and the harms that may be caused by an incompetent or abusive guardian may be difficult or often impossible to remedy. As well, as has been discussed earlier in this Chapter, it is no easy process for an individual under guardianship to challenge the necessity for or choice of a guardian once appointed. It is for this reason that Ontario's current system requires potential guardians to develop thorough management plans, and provides for scrutiny either through the PGT's replacement process or the court appointment process. Certainly, this approach would not facilitate the consideration of less restrictive alternatives, one of the core rationales for eliminating statutory guardianship. The LCO therefore does not recommend that this approach be pursued.

**The very simple and highly informal process under the HCCA works well in that context, where appointments are generally for a single decision and decisions must often be made on an urgent basis.**

#### **THE LCO RECOMMENDS:**

- 40: In order to promote transparent and consistent consideration of less restrictive alternatives in the context of guardianship appointments, and to enable the Public Guardian and Trustee to focus its mandate,
- a) the Government of Ontario conduct further research and consultations towards replacing statutory guardianship with an accessible adjudicative process, in which assessments of capacity under the *Mental Health Act* and *Substitute Decisions Act, 1992* result in deemed applications for guardianship rather than automatic appointments of a guardian.
  - b in designing this adjudicative process, consideration be given to:
    - i. ensuring that applications are heard in a timely fashion;
    - ii. providing a mechanism for urgent applications in appropriate cases;
    - iii. providing the adjudicators with appropriate powers to gather the requisite information to make a determination as to the appropriateness of guardianship and the choice of a guardian; and
    - iv. providing a mechanism for identifying situations where the Public Guardian and Trustee should exercise its mandate as an expert substitute decision-maker.

### 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.

Ontario’s statutory provisions regarding time limits and reviews for external appointments are somewhat limited. The SDA permits the court to impose time limitations when it appoints guardians of the person or of property, but it does not create a preference or presumption to do so. Nor does the SDA require regular reviews of appointments. By way of contrast, 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).

Reassessments of capacity are essential to the review of guardianship appointments. 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.<sup>475</sup> However, 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.

Compared to Ontario, some other jurisdictions have stronger measures 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.<sup>476</sup> 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.<sup>477</sup>

The province of Alberta has included in the *Adult Guardianship and Trusteeship Act* less stringent 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

Ontario’s statutory provisions regarding time limits and reviews for external appointments are somewhat limited.

review.<sup>478</sup> 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.<sup>479</sup>

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.<sup>480</sup>

*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.*<sup>481</sup>

...[O]ntario’s legislation needs stronger provisions governing the review of external appointments.

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.<sup>482</sup>

*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.*<sup>483</sup>

The LCO agrees that Ontario’s legislation needs stronger provisions governing the review of external appointments. Such provisions would provide more appropriate legal protections for individuals. They would also be more consistent with the LCO *Framework* principles, the language of the CRPD and the underlying values of the current legislative scheme.

It is important to note that the LCO does not believe these provisions would be transferrable to POAs. 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.

Nor does the LCO believe that it would be practical 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.

In general, the LCO believes that the Alberta approach is the most practical and cost-effective alternative. This would require the courts to turn their minds to issues of review at the time of appointment. However, the Albertan 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 than Alberta's to review, one which is more compatible with the existing SDA language related both to the need for decision-making and the "least restrictive alternative".

The LCO's draft recommendation to this effect in the *Interim Report* received general support.

The LCO further believes that 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 the requirements for re-assessments should be consistent between guardians appointed through the statutory guardianship process and those appointed by adjudicators. All guardians 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.

These latter two proposals received support from all those commenting on them in response to the *Interim Report*.

...[G]uardians 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.



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.

### THE LCO RECOMMENDS:

#### 41: The Government of Ontario

- a) amend the *Substitute Decisions Act, 1992* to require an adjudicator, when appointing a guardian either of the person or of property, to make the appointment:
  - i. for a limited time,
  - ii. subject to a review at a designated time, or
  - iii. 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,

unless the adjudicator believes that the circumstances warrant an unlimited appointment; and

- b) provide adjudicators with the authority necessary to enable the necessary oversight.

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

43: The Government of Ontario 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 his or her 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”.<sup>484</sup>

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.<sup>485</sup> 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.<sup>486</sup> That is, the legislation would specifically direct the VCAT’s consideration to the very particular decision-making needs of the individual at issue, and indicate that full administration of property-related matters by the substitute decision-maker should be the exception and not the rule.

...[B]ecause 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.

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 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 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.<sup>487</sup> 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 recommendation for an expanded administrative tribunal, this may become a more practical option for appointments. This proposal received support during the *Interim Report* feedback.

### THE LCO RECOMMENDS:

44: Consistent with the current approach to the appointment of guardians for personal care, the Government of Ontario 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.

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.

### 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 very new Irish legislation, 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.<sup>488</sup>

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.<sup>489</sup> 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 7.

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. However, we note that the HCCA currently includes a process whereby the CCB can appoint a representative to make a decision under that statute.<sup>490</sup> 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. This proposal received support in the feedback on the *Interim Report*.

As with the 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.

Guardianship is intended to apply not simply where an individual has a limitation in decision-making abilities, but where that limitation, in the circumstances of that individual, makes substitute decision-making by a guardian necessary in order that required decisions can be made in a way that has legal effect.

#### THE LCO RECOMMENDS:

45: 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 limitation in decision-making abilities, but where that limitation, *in the circumstances of that individual*, makes substitute decision-making by a guardian necessary in order that required decisions can be made in a way that has legal effect. These recommendations are intended to enable guardianship to be tied more closely to the needs and circumstances of each particular individual. The LCO's 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 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 7, 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;
- 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, subject to the creation of a tribunal with broad jurisdiction over *Substitute Decisions Act* matters, as proposed in Chapter 7;
- the *Substitute Decisions Act, 1992* be amended to require adjudicators, at the time of the appointment of a guardian, to determine whether the order could appropriately be time-limited or subject to review at a specific time, and to only make an unlimited guardianship order where such limitations are not warranted;
- 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.

These proposals, taken together, would enhance the ability of Ontario's legal capacity, decision-making and guardianship system to divert individuals away from guardianship where appropriate alternatives can be found, and to ensure that whenever a guardian is appointed, the appointment is as tailored as possible. Ultimately, these proposals would better align Ontario's system with its underlying value of minimizing unwarranted intervention.

**These proposals, taken together, would enhance the ability of Ontario's legal capacity, decision-making and guardianship system to divert individuals away from guardianship where appropriate alternatives can be found, and to ensure that whenever a guardian is appointed, that the appointment is as tailored as possible.**





# Legal Capacity, Decision-making and Guardianship

## CHAPTER NINE

# New roles for professionals and community agencies

## 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, 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)).

In the vast majority of cases, that SDM will be a member of the individual's family or a close friend.

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.

However, it is worth considering whether expanded roles for professionals and community agencies may include roles as monitors under a POA or supported decision-making authorization, as outlined in Chapters 4 and 6.

## 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.



## Who May Act as a Substitute Decision-maker

### Under a Power of Attorney

An attorney must be:

1. Legally capable
2. Eighteen in the case of an attorney for property; sixteen for personal care

An attorney for personal care may not be a person who

- Provides paid health, residential, social, training or support services to the grantor
- Unless that person is the grantor's spouse, partner or relative

The PGT may only be appointed as an attorney with permission in writing.

### Court Appointed Guardians

The court may not appoint:

1. A person who provides paid health, residential, social, training or support services to the individual, with limited exceptions
2. The PGT, unless the application proposes the PGT, the PGT consents, and there is no other suitable person who is available and willing to be appointed

The court must consider:

1. Whether the individual proposed as guardian is already acting under a POA for the person
2. The wishes of the person involved if they can be ascertained
3. The closeness of the relationship between the proposed guardian and the person

### Replacement Statutory Guardians for Property

The PGT may consider applications from the following persons to replace the PGT as statutory guardian:

1. the person's spouse or partner
2. a relative of the person
3. 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
4. a trust company, if the person has a spouse or partner who consents in writing.

The PGT must consider:

1. the legally incapable person's current wishes if they can be ascertained
2. the closeness of the relationship between the applicant and the person

The PGT must be satisfied with the management plan submitted, and that the person is suitable

### Health Care Proxies

The HCCA sets out a hierarchical list of those who may act for those who have been found incapable.

These individuals 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 for this person
4. available, and
5. willing to assume the responsibility

The PGT shall make the decision if no person identified through the list meets the requirements

## 2. The Preference for Family

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 under 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.

**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.**

## 3. The Role of the Public Guardian and Trustee

The PGT may become guardian for a person who lacks legal capacity in two ways:

- statutory guardianships for property, as is detailed in Chapter 8, and
- appointment by the court, as is described in Chapter 7, most frequently following a “serious adverse effects” investigation.

In 2013-2014, the PGT was acting for only 21 clients under personal guardianship (3 on a temporary basis).<sup>491</sup> 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.”<sup>492</sup> It is more common for the PGT to act as guardian of property, most frequently through statutory guardianships: the figures were provided in Chapter 8.<sup>493</sup>

The PGT will also act as a decision-maker of last resort under the HCCA. 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.<sup>494</sup> The PGT may also consent (in rare circumstances) to appointment under a POA.

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,<sup>495</sup> 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.<sup>496</sup>

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. This Chapter will focus on the PGT's role as an SDM of last resort.

### C. AREAS OF CONCERN

The LCO heard a number of concerns about the options for potential SDM appointees available to individuals. These growing challenges create pressure on existing institutions: they also create an opportunity to re-think who may fulfil the role of an SDM.

In addition to the demanding legal requirements, SDMs often face many practical, emotional and ethical challenges.

**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 10, 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.

It was pointed out to the LCO that the role of an SDM is a unique and complex role, requiring a very particular mix of skills. Individuals frequently ask lawyers or accountants to act under powers of attorney for property, assuming that those professional skills will provide adequate preparation for the role, but this is not necessarily the case at all.

...[S]ocial and demographic trends are leaving more individuals without any family or friends who are both appropriate SDMs and willing to undertake the role.

**Individuals who are socially isolated:** As is discussed in Chapter 3, social and demographic trends are leaving more individuals without any family or friends who are both appropriate SDMs and willing to undertake the role. 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. 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 that 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.

Many lawyers who work in this area told the LCO that they are very frequently asked to act under 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. Many stakeholders pointed out that there is a business opportunity here, and that there are organizations and individuals moving to fill the gap, but because there are no checks or oversight mechanisms, the quality of what is provided is extremely uneven.

**The role of the Public Guardian and Trustee:** Consultees appreciated the role of the PGT as a guardian of last resort. They also recognized 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 current 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 kind 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 6 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.

As was noted above, commentators raised concerns that because of the current

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.

shortfalls, individuals who are either without scruples or without skills are moving in to fill the gaps. One trusts and estates lawyer referred to the situation as a potential “Wild West” scenario, where individuals undertake SDM responsibilities as a business, without any meaningful oversight.

*It’s just going to get done, anyway. I mean, there used to be a guy we called the public guardian and trustee of [a particular small city]. He had, like, what? A hundred powers of attorney? And he just sat up there managing a whole bunch of people’s money. You know, like, that’s what’s going to happen is, people are just going to go out there... They’re already doing it, but it’s just going to happen more. Are going to be out there in the market, doing it.*

Focus Group, Trusts and Estates Lawyers, April 11, 2016

Stakeholders argued that new options ought to be structured to fill the gap without substantially comprising the safety of affected individuals.

One trusts and estates lawyer referred to the situation as a potential “Wild West” scenario, where individuals undertake SDM responsibilities as a business, without any meaningful oversight.

## 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.*<sup>497</sup>

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.<sup>498</sup>



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.

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”.<sup>499</sup> 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,<sup>500</sup> and the Court is directed to a similar consideration in the case of court-appointed guardians.<sup>501</sup>

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 role of SDM is complex and challenging, 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 that are 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.

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.

## E. THE LCO’S APPROACH TO REFORM

The LCO’s recommendations are informed by five important considerations:

**First** and foremost, the LCO believes that anyone who lacks legal capacity and requires a substitute decision-maker to make necessary decisions should have meaningful access to one.

**Second**, individuals who lack or may lack legal capacity have a wide range of needs. For example, the 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. Currently, the PGT may be the default option for all of them. A wider range of options may better serve their needs.

**Third**, while family remains important, family members are not always the best choices for SDMs. As has been emphasized throughout this *Final Report*, the role of SDM is a demanding one. Even loving family members may not be suited to this role. Current social and demographic trends accelerate the need to promote non-traditional options and approaches.

**Fourth**, 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. 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 high quality decision-making services to such individuals.

**Finally**, there are 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.

As throughout this area of the law, in implementing these approaches careful thought must be given to balancing respect for personal choice with the institution of adequate and appropriate safeguards. Because individuals must make choices with incomplete knowledge about their future circumstances, and because the very nature of the impairments that bring SDM arrangements into play reduce the ability of individuals to protect themselves against negative outcomes, the balance is especially fraught.

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.

## F. RECOMMENDATIONS

The LCO's recommendations in this area have two broad objectives:

1. Supporting the development of trustworthy options for substitute decision-making, and
2. Providing a “safety net” for individuals for whom other substitute decision-making options are inappropriate.

### 1. Regulated Professional Substitute Decision-makers

Professional substitute decision-makers are an integral part of the legal capacity, decision-making and guardianship landscape in many jurisdictions. In the United States, state governments often have a much more limited role in providing last resort (or any) guardianship, and professionals fill this role for those who do not have family or friends to serve. In England and Wales, the Public Guardian and Trustee does not itself act as a guardian, but instead recruits and supervises a panel of professionals who provide this service.

Professional or for-profit substitute decision-makers may appeal to individuals for two main reasons:

1. Where individuals have no trusting relationship with an appropriate person who is willing and able to act on their behalf, professional SDMs may be an appealing alternative. In Ontario, some individuals may prefer a professional to the services offered by the PGT.
2. Some who have other options find the idea of a professional SDM appealing because their specialized focus gives professional SDMs the opportunity to develop experience and expertise in fulfilling this role, and they are independent of negative family dynamics.

Professional substitute decision-making (as distinguished from the services provided by the PGT) exists in Ontario. Current legislation explicitly enables individuals or institutions can act as SDMs for profit under POAs for property, although there is no parallel provision for personal care. Such professional substitute decision-making is commonly provided by:

1. **Trust companies:** Many trust companies provide highly regulated and expert SDM services to small numbers of clients. Trust companies generally offer their services as attorneys under a 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.
2. **Regulated professionals:** Individuals do appoint various professionals, most commonly lawyers and accountants, to act under their POAs for property. Such are guided in the role by the professional ethics, standards and oversight mechanisms associated with their profession, to the extent that they are applicable. As was highlighted earlier, anecdotally, this seems to be a growing practice. However, it is impossible to determine just how common this kind of service currently is in Ontario.
3. **Others:** Current legislation 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.<sup>502</sup> However, where there is no conflict of interest, it is possible for individuals from a range of backgrounds to take on this responsibility.

...[I]ndividuals who are seeking to appoint a professional as SDM have no easy way of finding such services or assessing their quality or reliability, very important factors in this context.

In the Ontario context, there are currently a number of factors limiting the use of such professional services.

**First**, individuals who are seeking to appoint a professional as SDM have no easy way of finding such services or assessing their quality or reliability, very important factors in this context. 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. The lack of standard qualifications or training for professional substitute decision-making makes assessment difficult.

**Secondly**, the current absence of any meaningful oversight for most professional substitute decision-makers (the obvious exception being trust companies), may make this a less appealing option for some. Whatever the limitations of family or of the PGT, it may seem 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.

**Thirdly**, 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.

**Finally**, professional decision-makers 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, lawyers and accountants, these types of services are just one part of a larger business plan.

Given social and demographic trends, professional substitute decision-making may become an increasingly important part of the landscape in this area of the law. This raises the question of whether steps should be taken to apply standards and oversight to such services, in order to increase the ease of access, make such services more appealing to the public, and prevent abuse of vulnerable individuals.

...[T]hese types of services exist now and can be expected to expand in light of social and demographic trends: the question is not whether they should exist, but whether efforts should be made to regulate and oversee them, in order to prevent the kind of abuse that is easily foreseeable without such regulation.

There may be significant risks associated with some forms of for-profit substitute decision-making. Unscrupulous for-profit substitute decision-makers may reduce their services and increase fees. Some may take the opportunity to commit outright theft. The impact of these risks is significant because the client may not have the ability to terminate the arrangement or to effectively supervise the substitute decision-maker. Absent some kind of oversight regime, there may effectively be no review or monitoring of activities of some kinds of professional SDMs. Experience has demonstrated that these risks are real: in the United States, where professional fiduciary programs are very common, there have been repeated concerns about unethical behaviour on the part of some subset of providers.<sup>503</sup>

Responses to the Interim Report indicated some division of opinion on this issue. The 2016 submission of the Advocacy Centre for the Elderly expressed clear opposition to any expansion of professional SDM services:

*As the Interim Report has identified, for-profit substitute decision-making contains significant risks. Maximization of profit may be seen by these entities as more important than acting in accordance with their clients' best interests. ACE has heard from callers when lawyers or accountants have acted as attorneys for property and charged significant fees to incapable clients. While the mechanism for for-profit substitute decision-making currently exists in the property management sphere, there is no need for a recommendation to make it easier for professionals to act as attorneys for property.*<sup>504</sup>

Others, however, took the position that these types of services exist now and can be expected to expand in light of social and demographic trends: the question is not whether they should exist, but whether efforts should be made to regulate and oversee them, in order to prevent the kind of abuse that is easily foreseeable without such regulation.

*In terms of the number of disputes we currently have, a lot of them erupt because of the fact that there wasn't a good independent choice. Or the people that had been appointed don't really know what their roles are. So a lot of it is really due to, you know, the fact that we don't have a very robust system. Of having well-trained, competent, capable people to take on these roles that people can choose.*

Focus Group, Trusts and Estates Lawyers, April 11, 2016

On balance, the LCO supports a well-supervised and regulated program for professional SDMs for the following reasons.

**First**, a well-designed program could support a broader range of trustworthy options for persons to act as SDMs, and thus 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. That is, it would expand choice so that the system can meet a wider range of needs in a more tailored way.

**Second**, the SDA essentially already permits for-profit substitute decision-making for property. Because of the extreme vulnerability of persons to whom such services are provided and the lack of any meaningful external oversight of personal appointments, the risks of abuse in these scenarios are very high. Given that social and demographic trends point towards expanding use of these types of services, regulation will become increasingly important. Several stakeholders highlighted, in discussing these issues, the spate of scandals related to these services in the United States in the late 1980s: these kinds of problems could certainly happen here.

The following section identifies what the LCO believes to be minimum requirements for such a program.

### Minimum Requirements

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.

Stakeholders responding to the *Interim Report* emphasized the following three key elements of any regime for professional SDMs:

1. Clear and thorough standards for the provision of such services,
2. Minimum levels for knowledge and skills, and
3. Meaningful oversight, with effective recourse in cases of abuse or violation of standards.

On balance, the LCO supports a well-supervised and regulated program for professional SDMs...

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.<sup>505</sup> 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 potentially useful and applicable 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) in the United States, founded in 1988, plays an important role in this area,<sup>506</sup> 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 work of NGA may be of considerable assistance, for example, as a source of standards.

The LCO has examined the experience in the United States for lessons learned...

**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. They must also 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.<sup>507</sup> 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.<sup>508</sup>

**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.<sup>509</sup> 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”.<sup>510</sup> Texas includes criminal record provisions, but not credit checks.<sup>511</sup>

**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 guardian’s care.<sup>512</sup> 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.<sup>513</sup>

**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.<sup>514</sup> 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.<sup>515</sup>

Some states require guardians to have insurance or to post bonds.

**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.<sup>516</sup> Similarly, in California, to renew a license, applicants must complete 15 hours of continuing education,<sup>517</sup> in an education course approved by the Professional Fiduciaries Bureau.<sup>518</sup>

**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.<sup>519</sup> 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.<sup>520</sup>



...[M]inimum 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.

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.<sup>521</sup> 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.<sup>522</sup>

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.<sup>523</sup>

**Professional standards:** Florida sets standards for professional guardians through its statute. For example, guardians must visit each ward once every four months to ensure that their needs are being met.<sup>524</sup> In California, the Professional Fiduciaries Bureau is responsible for the development of a code of ethics for fiduciaries.<sup>525</sup> In Texas, the Judicial Branch Certification Commission is responsible for the creation of the Minimum Standards of Guardianship Services, with which guardians must comply.

Interestingly, these designation and oversight mechanisms for professional SDMs are in many ways reminiscent of those employed for Capacity Assessors designated under the *Substitute Decisions Act, 1992*, as described in Chapter 5. 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. The Ontario experience with designated Capacity Assessors may therefore be valuable in designing a regulatory regime for professional SDMs.

The LCO believes that 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 inform the development 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.

### Appropriate Form of Regulation

A final question is the form which regulation of professional SDMS should take. One option is a licensing regime, in which professional decision-making representatives could not legally practice without meeting specified requirements; another is 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*<sup>526</sup> 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.<sup>527</sup>

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.<sup>528</sup> 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.<sup>529</sup>

It must be recognized that there are incremental “costs” associated with any form of regulation...

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 *Final 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 SDMs 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.

**...[F]or 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.**

A final question 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”.<sup>530</sup> 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,<sup>531</sup> 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.”<sup>532</sup>

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”.<sup>533</sup>

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.<sup>534</sup> 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.<sup>535</sup>

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.

...[I]n 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.

#### THE LCO RECOMMENDS:

46: The Government of Ontario conduct further research and consultation towards the goal of establishing a dedicated licensing and regulatory system for professional substitute decision-makers that includes the following attributes and safeguards:

- a) Licensing and oversight focus on those in the business of providing these services for multiple individuals;
- b) Licensing and oversight be provided by the provincial government or through a government agency potentially funded through fees;
- c) Licensed professional substitute decision-makers be permitted to make both property and personal care decisions, and to be appointed either personally or externally;
- d) The oversight regime address the following safeguards and assurances of quality:
  - i. Ongoing requirements for skills and training;
  - ii. Ongoing professional development requirements;
  - iii. Requirements for credit and criminal records checks;
  - iv. Quality assurance and conduct standards, including prohibitions on conflicts of interests;
  - v. Record keeping requirements;
  - vi. Annual filing requirements; and
  - vii. Requirements for bonds or insurance.

## 2. Developing a Role for Community Organizations

### Should Community Organizations Act as Substitute Decision-makers?

For-profit professional SDMs may provide appropriate options for individuals with sufficient property to justify the expense. It has been suggested that community

...[C]ommunity 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.

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,<sup>536</sup> as well as for Canada Pension Plan (CPP) and Old Age Security (OAS) benefit.<sup>537</sup> 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”.<sup>538</sup> 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,<sup>539</sup> 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.<sup>540</sup> 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”.<sup>541</sup> 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 clients, 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.<sup>542</sup>

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. These kinds of concerns were reiterated by the Advocacy Centre for the Elderly in their 2016 submission:

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.

*[A]lthough community organizations, as suggested in recommendation 44, may provide a not-for-profit alternative to for-profit substitute decision-making, these organizations already have significant control over the day-to-day lives of the people who live within their walls or use their programs. Where these organizations provide accommodations (i.e. not-for-profit long-term care homes), they may be involved in providing health care, personal support services, food, and transportation for these individuals. This creates a significant conflict of interest where they are providing personal care services and making decisions about paying bills for, and accessing, these same care services. In ACE's experience, this is fertile ground for abuse given the limited ability to monitor the provision of these services. It was this recognition of conflict that led to the SDA prohibition of those who provide health care, residential, social, training or support services for compensation from acting as attorneys for personal care for the person.*<sup>543</sup>

The draft recommendation in the *Interim Report* received support from a significant number of organizations, including ARCH Disability Law Centre, the Mental Health Legal Committee, and OASIS (Ontario Agencies Supporting Individuals with Special Needs). A number of community organizations 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.<sup>544</sup> 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 a 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

City of Toronto consultations with service providers indicated that this role for community agencies was feasible if implementation was carefully addressed, and saw a “huge opportunity” here to bring services and supports to populations with specific needs, including cultural, religious and linguistic groups, youth, LGBT persons, and persons with different types of disabilities. This group highlighted the opportunity to build on existing practices and expertise: “Some agencies already have expertise or infrastructure related to this role, or do “bits and pieces”. For example, case managers already help with day-to-day decision-making, including budgeting, checking in and following up.”<sup>545</sup>

...[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.

Those organizations and stakeholders 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.*<sup>546</sup>

There were some suggestions 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

In the City of Toronto consultation with service providers, it was suggested that the PGT structure and mandate be revamped to enable it to work in partnership with community agencies in this aspect of its role.<sup>547</sup>

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]t was suggested that the PGT structure and mandate be revamped to enable it to work in partnership with community agencies in this aspect of its role.

*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

One lawyer thought that there could be merit in examining social enterprise models to meet this need:

*[I]f you could partner a community agency with some kind of for-profit model, so that you were doing some of both. And your profits were being used to subsidise the work for the people who can't afford it. You might be able to come up with some kind of model.*

Focus Group, Trusts and Estates Lawyers, April 11, 2016

Others cautioned against the spectre of, for example, for-profit retirement homes setting up “friendly” associated non-profit organizations to undertake decision-making for residents, a set-up which would create significant conflicts of interest and levels of risk for residents.

It should also be noted that the PGT, trust companies and the proposed professional SDMs 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, although the example of the Bloom Group does highlight the capacity for community agencies to develop such specialized expertise.

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:

...[C]ommunity 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.

1. 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.
2. 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.
3. 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.<sup>548</sup>

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. For 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.

...[T]he role of community organizations in decision-making should be tailored both to the expertise and to the existing responsibilities of these organizations.

If, as the LCO has recommended, an accessible means is created for application to a 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.

### Standards and Safeguards

Stakeholders identified a number of key elements necessary to an effective and appropriate role for community agencies in substitute decision-making, including clear standards, partnership approaches, and meaningful oversight mechanisms.

**Clear Standards:** Submissions broadly emphasized the importance of clear standards to promote consistency, ethical practice, and quality:

*ARCH believes that this recommendation can be substantially strengthened by highlighting the need for provincial standards to be applied if community organizations take on a larger role in day-to-day decision-making. Without clear provincial standards and expectations, it is likely that the level and quality of decision-making support provided by community organizations will vary greatly across the province.*<sup>549</sup>

Standards should address such matters as metrics for service provision, conflicts of interest, and processes for responding to misconduct. It was commented that, because many agencies have experience with similar types of work, development of standards of care and scope of responsibility can build on existing models. Careful attention to

the potential tension between the need for flexible delivery models and the need for strict accountability frameworks and standards will be necessary.

**Training and Skills Development:** Because of the unique aspects of this role, agency staff would benefit from training and skills development in this area. This is an area in which government may be in a position to provide the support. It was also suggested that interagency partnerships could be beneficial, so that agencies with successful program models can provide training and mentoring for others.

**Partnership Approaches:** As has been highlighted throughout this section, partnership approaches, whether between agencies or between agencies and government, can assist in increasing reach and access, capacity building and oversight, and quality assurance. Community agencies emphasized the importance of receiving adequate support from government in taking on this role.

**Accountability and Oversight:** As with the proposal to regulate professional for-profit SDMs, strong accountability and oversight mechanisms will be essential to the viability of this new role for community agencies. Stakeholders saw this as including:

- some process for selecting and qualifying community agencies;
- reporting requirements, which are tied to clear standards;
- some mechanism for regular auditing of activities; and
- some designated means for resolving disputes.

Questions of accountability and oversight are closely connected to issues of liability: without a clear and fair framework surrounding liability, it is unlikely that community agencies would see themselves as in a position to move forward with this role. Some models for accountability and oversight are briefly described below.

### 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,<sup>550</sup> 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

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.

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.

...[I]t 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.

**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.<sup>551</sup> 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.<sup>552</sup> 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.<sup>553</sup>

**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.<sup>554</sup> A 2009 review of Florida’s public guardianship program concluded that it was highly cost-efficient,<sup>555</sup> 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”.<sup>556</sup>

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.<sup>557</sup>*

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.

**Delegation of the decision-making powers of the Public Guardian and Trustee would raise challenging questions of legal liability, oversight and risk management.**

**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.<sup>558</sup> In practice, such appointments are extremely rare.<sup>559</sup> 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.<sup>560</sup> 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.<sup>561</sup> The Office of the Public Guardian has published “Deputy Standards”, for these professional deputies and public authority deputies.<sup>562</sup> 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.



**THE LCO RECOMMENDS:**

47: The Government of Ontario conduct further research and consultations towards the goal of enabling community agencies to provide substitute decision-making for day-to-day decisions, such as basic budgeting, bill paying and accessing supports and services, through a program which includes:

- a) a process for identifying appropriately qualified community agencies;
- b) clear standards for quality assurance, accountability, avoidance of conflicts of interest, and responding to abuse;
- c) oversight mechanisms, including reporting and audit requirements; and
- d) dispute resolution mechanisms.

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.

### 3. 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 whose 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 8, 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.*<sup>563</sup>

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.

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 Recommendation 40, 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.

#### THE LCO RECOMMENDS:

48: Subject to the implementation of Recommendations 41, 47 and 48, the Government of Ontario work towards focusing the mandate of the Public Guardian and Trustee on sustainably providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.

## 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.

**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 work towards developing a licensing and regulatory regime for professional, for-profit substitute decision-makers.

These measures would expand the appropriate options for individuals, reduce the risks of abuse from unregulated options, respond to demographic trends affecting the availability of family members as substitute decision-makers, reduce the "personal care gap", and more effectively focus the mandate and resources of the Public Guardian and Trustee.

# 10 Legal Capacity, Decision-making and Guardianship

## CHAPTER TEN

# Education and information: understanding rights and responsibilities

## A. INTRODUCTION AND BACKGROUND

**D**uring the LCO's 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 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 every issue affecting this area of the law. Nor is information the same thing as advice, and on its own does not create the ability to act on it. Nor can education and information themselves create solutions to difficult situations: they can only assist in identifying and accessing what is available.

...[D]espite its importance, the provision of information and education is not a panacea for every issue affecting this area of the law.

## 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 by the law** will be the most profoundly affected by the quality and extent of the information they receive about the law. The information that they receive 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.

**The employees of third parties** such as banks, trust companies, community agencies or many government departments are unlikely to have specialized expertise in this area. 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.

**Professionals who must apply or provide advice on the law as part of their professional duties** 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.

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.

## 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, 1992* (the predecessor to the *Health Care Consent Act, 1992*) 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 Consent and Capacity Board (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, 1992* replaced by the current *Health Care Consent Act, 1996* (HCCA). While the current legislation contains some provisions related to the provision of information (as is described below), they are minimal compared to the original legislative requirements.

### 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.

While the current legislation contains some provisions related to the provision of information (as is described below), they are minimal compared to the original legislative requirements.

**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 5.*

**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 5, and are the subject of several 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 currently includes several provisions that promote information about rights and assistance. For example, 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).

...[E]ven 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.



It is important to note, however, that these provisions are limited: For example, there is no formal mechanism for ensuring that the duties under sections 32(2) and 66(2) are carried out. Nor does the SDA include formal requirements or supports to inform or educate SDMs, or third parties. 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.

#### 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 advising on, applying or supporting the application 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:** Government does not legislatively or otherwise mandate training or education except in very limited circumstances. 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. Capacity Assessors who are designated under the SDA, must also complete certain training and requirements to maintain qualification, as is described in Chapter 5 of this *Final Report*.

**Professional associations:** Professional associations may also provide materials or continuing education opportunities. For example, the Canadian Medical Association's

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.

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.

*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 and geriatric educational curricula; interest new students in specializing in geriatric care; and effect positive policy changes for the care of older adults.<sup>564</sup>

## 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.<sup>565</sup>

## 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

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.

ARCH Disability Law Centre, in its 2014 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.<sup>566</sup>

As was discussed in Chapter 5, there was considerable and widespread concern that rights information, as required under the HCCA, is provided inconsistently, cursorily, or not at all. The Advocacy Centre for the Elderly 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.”<sup>567</sup>

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 2014 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.

**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.**

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.

#### **LCO Consultation Surveys: Responses of Family Members on Information and Education**

Based on self-reports by family members indicating that they assisted a loved one with decision-making needs:

- 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.
- 59 of 98 respondents either agreed or strongly agreed that they had a good understanding of their legal role and responsibilities as someone providing assistance with decision-making.

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.<sup>568</sup>*

The role of a supporter is potentially even more complex and challenging than that of a substitute decision-maker, and in many cases may require supporters to change deeply embedded practices.

Should government implement the LCO's recommendations with respect to supported decision-making, education and information for supporters would be vital. The role of a supporter is potentially even more complex and challenging than that of a substitute decision-maker, and in many cases may require supporters to change deeply embedded practices. As was highlighted in Chapter 4, pilot projects in Israel and Australia emphasized that for this approach to be meaningful and successful, supporters themselves require supports.

### Professionals and Other Service Providers

The 2014 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.*

**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.**

ACE, in the commissioned paper jointly completed with Dykeman Dewhirst O'Brien for this project, in its 2014 submission to the LCO, and in a 2016 paper completed by Mary Jane Dykeman and Tara Walton, 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".<sup>569</sup>

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.

And again, should the LCO's recommendations with respect to supported decision-making and network decision-making be adopted, professionals and service providers would need significant education and information to enable them to appropriately advise on and apply the law.

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.*<sup>570</sup>

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. Both *Frameworks* ask 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”.

...[N]eeds 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.

The *Frameworks* also emphasize the importance of ensuring that information and education is truly accessible to a diverse population and individual needs. 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.<sup>571</sup>

The *Frameworks* remind 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 proper implementation 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.

As a result, the LCO's 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.

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.

## F. RECOMMENDATIONS

Overall, the draft recommendations put forward by the LCO in the *Interim Report* received strong support from a broad range of stakeholders, including the Alzheimer

Society of Ontario, the Advocacy Centre for the Elderly, the Ontario Caregiver Coalition, the Mental Health Legal Committee, Elder Abuse Ontario and others.

## 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

There is no central or single institution in Ontario with a dedicated mandate to promote education and information on legal capacity and decision-making. As a result, there is confusion among stakeholders and the public as to authoritative sources of information, and a lack of coordination in the development of information and education. The LCO's consultations revealed widespread confusion among almost all key stakeholder groups about where the information that they needed could be found. Consultations also revealed that system users are regularly relying on information that is inaccurate, outdated, or simply inapplicable to Ontario. Given that this legislation 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.

...[T]here is confusion among stakeholders and the public as to authoritative sources of information, and a lack of coordination in the development of information and education.

Many stakeholders advocated for the benefits of a strong, central coordinating body for this area of the law. 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.<sup>572</sup>*

The LCO believes that the provincial government should establish a clear, statutory mandate to improve access to education and information related to this area of the law. This reform would:

- Help 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;

- Improve 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; and
- Promote 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.

This proposal 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.

This proposal received strong support during the LCO's consultations. The Alzheimer Society of Ontario, for example, commented,

*This recommendation should be enacted as early as possible since this mandate is a foundation for improving the application of law in this area. While other parts of the report may require "progressive" or gradual implementation, this should be acted upon early in the process.*

Similarly, the City of Toronto's *Stakeholder Consultation Results* emphasized that "education and creating a 'one stop shop' for authoritative information will go a long way, right away, to correcting misunderstanding and potential for abuse". Service provider stakeholders at the City of Toronto highlighted the value of consistent messaging and standardized, accessible information.<sup>573</sup>

It is not uncommon in other jurisdictions to provide a statutory mandate for education and information in this area of the law. The 2015 Irish legislation that reforms that nation's legal capacity and decision-making laws specifically tasks the new Director of the Decision Support Service with promoting "public awareness of matters (including the United Nations Convention on the Rights of Persons with Disabilities...) relating to the exercise of their capacity by persons who require or may shortly require assistance in exercising their capacity."<sup>574</sup> More specifically, the statute gives the Public Guardian and Trustee responsibility for establishing a website or otherwise providing for electronic dissemination of information to members of the public. The Public Guardian and Trustee is also responsible for promoting public awareness of the law to persons directly affected, as well as those who have responsibilities under the Act.

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

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.

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.<sup>575</sup> 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.<sup>576</sup>

Ontario already has several examples of legislation that include a dedicated mandate to promote education.<sup>577</sup> That is, this proposal is not unusual in the context of legislation that directly affects rights, as does this area of the law.

...[T]he central coordinating office should not supplant, but coordinate, support and enhance the valuable work already being done by community, advocacy and service organizations that have direct ties to those using or implementing the laws.

#### **Examples of Ontario legislation including mandates for education and training**

*Provincial Advocate for Children and Youth Act, 2007:* the Provincial Advocate is responsible to “educate children, youth and their caregivers regarding the rights of children and youth”.

*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”.

*Human Rights Code:* the functions of the Ontario Human Rights Commission include developing and conducting programs of public information and education and promoting awareness and understanding of, respect for and compliance with the *Code*.

The LCO does not take a position on which organization or government department should be given this legislative mandate. The provincial government will be in the best position to decide this issue. The LCO notes, however, that there are at least four potential options: the PGT, a new department, an expanded and re-envisioned Capacity Assessment Office, or the tribunal proposed in chapter 7. Each option may have benefits and drawbacks which will require further review.

It is the LCO’s view that the central coordinating office should not supplant, but coordinate, support and enhance the valuable work already being done by community, advocacy and service organizations that have direct ties to those using or implementing the laws. These organizations 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.

### Priorities for education and information

The LCO's research and consultations demonstrate that there are at least four pressing educational and informational priorities 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. 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.<sup>578</sup>
- **Developing a more strategic, proactive 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.

...[T]he creation of a visible, accessible, authoritative source of information would make a significant contribution, given the widespread confusion among those interacting with the law.

The LCO believes that the creation of a visible, accessible, authoritative source of information would make a significant contribution, given the widespread confusion among those interacting with the law. For the organization allocated responsibility for education and information, the creation and maintenance of such a clearinghouse should be a priority, whether it creates it in-house or works organizations with relevant expertise, such as Community Legal Information Ontario.

### General Informational and Educational Needs

While particular groups will have specific needs to be addressed, in general, 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*;

- autonomy-enhancing decision-making practices; and
- resources and supports available to persons directly affected, to family caregivers and to those acting as supporters or substitutes.

In a province as large and diverse as Ontario, there will always be challenges to disseminating and accessing information, challenges thoughtfully considered in the Law Foundation of Ontario's *Connecting Across Language and Distance* Report.<sup>579</sup> Consistency in the content of information is central, but dissemination may be local, rely on partnerships and community networks, and respond to the needs and strengths of particular communities.

Many consultees highlighted the value of creating 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.

In addition to general priorities and needs for information and education, the LCO also heard about priorities and needs for specific audiences.

### **Persons Directly Affected**

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.

### **Families and Substitute Decision-makers**

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;

**Consistency in the content of information is central, but dissemination may be local, rely on partnerships and community networks, and respond to the needs and strengths of particular communities.**



- 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 and respecting existing decision-making abilities, 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.**

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. The Alzheimer Society of Ontario commented “These materials should help families as a whole understand substitute decision-making processes and reasonable expectations family members may have in terms of information sharing”.

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.



**THE LCO RECOMMENDS:****49: The Government of Ontario**

- a) assume a dedicated statutory mandate to:
  - i. identify strategies and priorities for outreach, education and information;
  - ii. coordinate and develop ongoing outreach, education and information initiatives;
  - iii. develop and distribute materials regarding legal capacity and decision-making;
- b) delegate this mandate to an appropriate institution.

**50: The education and informational materials referred to in Recommendation 49 address the information and education needs of:**

- a) persons directly affected by the law;
- b) family members and substitute decision-makers and supporters;
- c) professionals who advise on and apply the law; and
- d) service providers who interact with the law.

**51: In developing education and information strategies and materials, the responsible institution:**

- 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) and digital formats;
- b) address the needs of linguistic and cultural communities;
- c) 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;
- d) consult persons directly affected by the law, families, and those who work with or represent these individuals.
- e) work in partnership with other institutions and stakeholders with interests or expertise in this area;
- f) identify opportunities to work with and build on the strengths of community institutions, including religious and cultural institutions; and
- g) develop and maintain a central clearinghouse for education and information materials.

## 2. Improving Information for Substitute Decision-Makers and Supporters

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, in its 2014 submission, the Mental Health Legal Committee (MHLC) recommended mandatory education respecting the roles and obligations of attorneys and guardians. Completion of qualifications or a course ought, in the view of the MHLC, to be part of the appointment process or required on the commencement of the appointment. The MHLC noted 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.*

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.

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.<sup>580</sup>*

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.<sup>581</sup>

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.

**THE LCO RECOMMENDS:**

52: Information provided in materials for those acting as substitute decision-makers or supporters include instruction on the legislation, statutory duties and the rights of the affected individual, effective and autonomy-enhancing decision-making practices, tools (for example, for maintaining records) and resources where further information and 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.

...[S]tandard 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.

**THE LCO RECOMMENDS:**

53: The Government of Ontario include appropriate information materials on the standard forms for personal appointments.

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.<sup>582</sup> 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 Consent and Capacity Board (CCB) and the powers of the CCB 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*.<sup>583</sup> The Court of Appeal overturned this ruling, finding 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 5, 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.

#### THE LCO RECOMMENDS:

54: The Government of Ontario amend the *Health Care Consent Act, 1996* to create a clear and specific duty for 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.

...[T]he 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.

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.

#### THE LCO RECOMMENDS:

55: 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 recommendations in Chapter 5 regarding the role of Health Quality Ontario, the compliance mechanisms related to the Long-term Care Home Act 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 recommendations outlined below should be understood in concert with those recommendations.*

Educational institutions provide the foundation for professional understandings and attitudes, as well as often providing access to ongoing information and education programs. Service providers participating in the City of Toronto's consultations commented that "Service providers should not have to go to law school to understand capacity issues. This kind of education could be embedded in the training of social workers, nurses, etc."<sup>584</sup> 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: this is a point emphasized in the submission of the College of Audiologists and Speech Language Pathologists of Ontario (CASLPO).

...[T]he health regulatory colleges can play a strong role in the education of health professionals in this area.

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.<sup>585</sup>

Section 4 of the RHPA creates a *Health Professions Procedural Code*, which is deemed to be part of each health profession act.<sup>586</sup> The responsibilities of the colleges include, regulating the practice of the profession and governing the members; developing, establishing and maintaining standards of qualification; developing, establishing and maintaining programs and standards of practice; and developing, establishing and maintaining standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members.<sup>587</sup> 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".<sup>588</sup>

As well, the RHPA has institutionalized the concept of "quality assurance" in the regulation of Ontario's health professionals.<sup>589</sup> 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.<sup>590</sup>

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”.<sup>591</sup> 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”.<sup>592</sup>

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.<sup>593</sup>

**The educational efforts of the health regulatory colleges can play a very important role in improving the effective implementation of this area of the law.**

Professional colleges also play very significant roles in the ongoing education of their members. The health regulatory colleges develop educational tools, guidelines, courses and other materials to assist their members with their professional responsibilities. The range of activities and materials is very wide, as is to be expected given the diversity of contexts in which health professionals operate, and may include videos, webinars, interactive tools, conferences and presentations, practice guidelines, practice advice services and more. This educational mandate may of course include information or tools related to capacity and consent. For example, the College of Audiologists and Speech Language Pathologists of Ontario has developed an interactive “Consent Tool”, which provides suggestions for discussion points in various contexts.<sup>594</sup> The College of Physicians and Surgeons has regularly used its publications to communicate with members regarding frequently occurring issues related to consent and capacity. The educational efforts of the health regulatory colleges can play a very important role in improving the effective implementation of this area of the law. While capacity and consent are important across the health care spectrum, the contexts in which these issues arise vary considerably from profession to profession. The law and the principles which animate it should be consistently applied, but health regulatory colleges can play an essential role in identifying effective approaches for implementation in their particular context.

The Royal College of Dental Surgeons of Ontario commented in its submission on the *Interim Report*,

*Each college will have to work with their quality assurance departments and committees to produce educational material and other resources that help health care providers to better understand the rights and responsibilities surrounding legal capacity and decision-making. Depending on how the Ministry of Health directs health regulatory colleges to address this issue, these colleges will have to work collectively and separately to ensure their members are educated about legal capacity and decision-making rights and responsibilities through their quality assurance programs. RCDSO believes that consideration should also be given to the consistency of this information*

*among regulatory colleges and the various health care providers they oversee. Consideration should also be given to the time and resources required for regulatory health Colleges to implement such changes.*

Stakeholders pointed out that, for many family caregivers who act as SDMs, health professionals and social workers are their key points of contact and sources of information: it is therefore essential that these professionals are well-equipped, not only to apply the law correctly, but to provide at least basic assistance to individuals directly affected and their families.

The Law Society of Upper Canada which regulates lawyers and paralegals in the public interest, also has a strong educational mandate. In addition to licensing requirements, lawyers and paralegals who are practising law or providing legal services must complete in each calendar year at least 12 Continuing Professional Development Hours in “Eligible Educational Activities”. The aim of this requirement is the maintenance and enhancement of a lawyer’s or paralegal’s professional knowledge, skills, attitudes and professionalism throughout the individual’s career. The LSUC itself provides a wide range of educational offerings on many subjects, including issues related to legal capacity and decision-making.

...[F]or many family caregivers who act as SDMs, health professionals and social workers are their key points of contact and sources of information: it is therefore essential that these professionals are well-equipped, not only to apply the law correctly, but to provide at least basic assistance to individuals directly affected and their families.

#### THE LCO RECOMMENDS:

56: Institutions responsible for educating lawyers, health practitioners, social workers and other professions involved in this area strengthen their activities with a view to devoting greater focus to issues related to legal capacity, decision-making and guardianship, as they affect their particular profession, and in particular:

- a) Professional educational institutions re-examine their curricula in order to strengthen coverage of issues related to legal capacity, decision-making and consent, particularly in the context of training in ethics and professionalism; and
- b) Professional regulatory bodies examine their educational offerings and consider developing further practice guidelines or standards.

57: 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.

58: The Ministry of Health and Long-term Care support and encourage the health regulatory colleges in developing quality assurance programs related to legal capacity and consent that promote legal rights and advance best practices.



## G. SUMMARY

Based on the results of public consultations and research, the LCO has identified as a priority for reform the 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.

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:

- identifying 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 a 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 recommendations should be understood in the context of the recommendations in Chapter 5 to improve the quality of assessments of capacity under the HCCA and in Chapter 6 to promote understanding of persons acting under personal appointments of the responsibility which they are undertaking.

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.



# Legal Capacity, Decision-making and Guardianship

## CHAPTER ELEVEN

# Priorities and timelines

...[T]he 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.

As is evident throughout this *Final 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. As part of a progressive realization approach to implementation, the LCO has identified priorities for reform, recommendations which have the greatest potential to transform this area of the law. The LCO has also categorized recommendations according to the relative ease of implementation.

The LCO's identified priorities are not necessarily the 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 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

In this *Final Report*, the LCO has made fifty eight recommendations for reform to laws, policies and practices. A list of these recommendations, organized by topic, can be found in Appendix A.

The LCO believes the following recommendations are the highest priority:

**The creation of an expert, independent, specialized tribunal able to provide flexible, accessible and timely adjudication and navigational supports in this area of the law. (Chapter 7).** 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* (SDA). An appropriately designed tribunal provides the most viable means of addressing these issues.

**Recommendations 29 – 38** address this priority, including:

- 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 to an expert and accessible tribunal;
- Providing this tribunal with broad jurisdiction to meaningfully address concerns, including new forms of applications;
- Expanding access to mediation and other forms of alternative dispute resolution; and
- Strengthening existing supports for applicants, including Section 3 Counsel and Legal Aid Ontario supports.

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 8 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 10).** It is clear to the LCO 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.

**Recommendations 49 – 58** address this priority, including:

- 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; and
- 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 promoting access to basic procedural rights for those found incapable under the *Health Care Consent Act*,**

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...

**1996 (Chapter 5).** The LCO is very concerned about the widespread lack of basic procedural and quality assurance protections for individuals whose right to independently make decisions for themselves may be or has been taken away. 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.

**Recommendations 10 – 24** address this priority, including:

- Creation of official Guidelines for assessments of capacity under the HCCA and MHA;
- Development of statutory minimum standards for the provision of rights information under the HCCA;
- Creation of a strategy to expand access to independent and expert advice about rights to persons found incapable under the HCCA;
- Refining the use of capacity examinations under the MHA;
- Expanding access to Capacity Assessments under the SDA;
- 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.

The implementation of the recommendations for the three priorities identified above would have a transformative effect throughout this area of the law, in that addressing the priorities would have an overarching impact on this area of the law.

## B. SPECIFIC PRIORITIES

The implementation of the recommendations for the three priorities identified above would have a transformative effect throughout this area of the law, in that addressing the priorities would have an overarching impact on this area of the law.

This initial priorities do not, however, 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.

**Reducing or tailoring the use of guardianship (Chapters 4, 8):** 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.

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 attorneys.

**Recommendations 3 – 9 and 40 – 46** address this priority, including:

- 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;
- Research and consultations towards the development of a statutory legal framework for network decision-making;
- Supporting decision-making practices that promote autonomy and participation;
- Strengthening the provisions of the SDA regarding the consideration of less restrictive alternatives prior to the appointment of a guardian;
- Replacing the statutory guardianship process with adjudicative processes for appointment of a guardian, in association with the implementation of the recommendations for a new tribunal;
- 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 6):** 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 attorneys. The LCO has proposed reforms intended to bring greater transparency and accountability to these instruments, while maintaining their simplicity and ease of use.

**Recommendations 21 – 23** address this priority, including:

- Requiring persons accepting appointment under a power of attorney 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 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

Appendix B sets out the LCO's preliminary analysis of the relative cost, complexity and difficulty of the recommendations in this *Final Report*. This document is best understood as the LCO's preliminary analysis of the relative ease of implementation, rather than their impact or priority. This categorization is intended to assist policy-makers to develop an incremental, progressive approach to comprehensive reform.

*Short-term* recommendations include those that could be implemented immediately, or comparatively soon. 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* recommendations include those that either require some investment of resources, or involve sufficient complexity that additional work would be needed to implement. Medium-term recommendations therefore cannot be implemented immediately, but should be undertaken as soon as resources or time permit.

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

# Legal Capacity, Decision-making and Guardianship

## APPENDICES

# Appendix A

## LIST OF RECOMMENDATIONS

### The LCO recommends:

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

- 1: The Government of Ontario include in reformed legal capacity, decision-making and guardianship legislation provisions that are informed by the LCO Frameworks for the law as it affects persons with disabilities and the law as it affects older adults, and which set out
  - a) the purposes of the legislation; and
  - b) the principles to guide interpretation of the legislation.
- 2: The Government of Ontario
  - a) initiate a strategy to reform legal capacity, decision-making and guardianship law;
  - b) collect, review and publicly share information and data related to this area of the law;
  - c) publicly report on the progress of its strategy for reform; and
  - d) commit to ongoing review and evaluation of this area of the law and the effect of reforms.

#### **Chapter IV: Concepts of Legal Capacity and Approaches to Decision-Making: Promoting Autonomy and Allocating Legal Accountability**

- 3: In order to clarify that a person has legal capacity where the test can be met with appropriate accommodations and to assist service providers in providing such accommodations, the Government of Ontario:
  - a) define the scope and content of the human rights duty to accommodate in this area of the law, as it applies to service providers,
  - b) and in doing so, consult broadly with individuals; community agencies; a wide range of service providers, including in the health, financial and private sectors; and other key stakeholders.
- 4: The Government of Ontario 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 for capacity with appropriate accommodations, and
  - b) the requirement that assessments of capacity be carried out in accordance with the approach to accommodation developed under domestic human rights law.
- 5: The Government of Ontario 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) while retaining the existing list of priorities for property expenditure, require that when resources are allocated to the first priority of the individual's support, education and care, that consideration be given to prior capable wishes regarding the individual's well-being and quality of life, or where these have not been expressed, to the values and wishes currently held.

6: The Government of Ontario

- a) develop pilot projects that evaluate autonomy-enhancing approaches to decision-making among persons with impaired decision-making abilities and their families;
- b) in developing these pilot projects, work in partnership with a broad array of stakeholders and account for the specific needs of a range of communities, including persons with a range of disabilities and decision-making needs, those who are socially isolated as well as those with existing networks, and members of various linguistic and cultural communities; and
- c) broadly circulate the results of these pilot projects.

7: The Government of Ontario 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 individuals to appoint one or more persons to provide assistance with decision-making;
- 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) These authorizations would be created through a standard and mandatory form;
- d) Through a support authorization, the individual would be able to receive assistance with day-to-day, 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 must 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 Recommendation 26, and supporters must complete a Statement of Commitment, as described in Recommendation 25;
- g) The duties of supporters 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 as required:
  - 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.

8: The Government of Ontario conduct further research and consultation towards the development of a statutory legal framework for network decision-making. This framework would:

- a) permit formally established networks of multiple individuals including non-family members, to work collectively to facilitate decision-making for individuals who may not meet current tests for legal capacity;
- b) identify formal requirements for the creation of networks, including accountability documents, decision-making processes and record-keeping requirements;
- c) create a registration process for networks as well as annual filing requirements; and
- d) determine the legal authority and accountability of these networks, including signing authority.

9: The Government of Ontario commit to an ongoing program of research and evaluation of national and international developments in positive decision-making practices and legal and social frameworks for capacity and decision-making, with a view to identifying and implementing approaches that:

- a) promote the *Framework* principles;
- b) address considerations related to appropriate legal accountability; and
- c) address the needs of third parties for clarity and certainty.

## Chapter V: Assessing Legal Capacity: Improving Quality and Consistency

10: The Government of Ontario design and implement a statutory process for decision-making with respect to detention for those who lack legal capacity, do not fall within the *Mental Health Act* and whose detention is required in order to address vital concerns for security or safety. This statutory process would:

- a) balance the competing considerations of safety and fundamental liberty rights, in keeping with a least restrictive approach to issues related to legal capacity and decision-making;
- b) provide meaningful procedural protections, taking into account the significant barriers to access to justice experienced by those directly affected;
- c) consider the potential for conflicts of interest on the part of substitute decision-makers;
- d) take into account the reasonable needs of those administering the law, so as to avoid unnecessary or ineffective administrative burdens; and include a strategy for data collection, public reporting, and monitoring and evaluation.

11: The Government of Ontario

- a) amend the *Substitute Decisions Act, 1992* to provide a clear statement as to the appropriate purposes of Capacity Assessment; and
- b) review forms under the *Substitute Decisions Act, 1992* to ensure that the forms promote the use and conduct of Capacity Assessments in accordance with the purposes and principles underlying the statute.

12: Consistent with the presumption of capacity, the Government of Ontario amend section 54 of the *Mental Health Act* with respect to examinations of capacity to manage property, to require physicians to conduct such examinations only where there are reasonable grounds to believe that the person may lack legal capacity to manage property.

- 13: The Government of Ontario amend section 54(6) of the *Mental Health Act* to clarify that a physician may only dispense with an examination of capacity to manage property that would be otherwise required if the existing continuing power of attorney covers all of the patient's property.
- 14: The Government of Ontario develop and implement a strategy for improving access to Capacity Assessments under the *Substitute Decisions Act, 1992*. Such a strategy would consider how to remove informational, navigational, communication and other barriers for persons in remote and First Nation communities; newcomer communities; youth in transition from care; 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.
- 15: The Government of Ontario review the list of professionals eligible to conduct Capacity Assessments under the *Substitute Decisions Act, 1992*.
- 16: The Government of Ontario create official *Guidelines* for assessments of capacity under the *Health Care Consent Act, 1996*, incorporating basic principles, procedural rights, and guidance for appropriate assessments of particular populations, including the provision of accommodation.
- 17: The Government of Ontario create official *Guidelines* for examinations of capacity to manage property under Part III of the *Mental Health Act*, including in addition to matters listed in Recommendation 16, guidance on the appropriate application of section 54(6).
- 18: To strengthen Ontario's rights information regime,
  - a) The Government of Ontario amend sections 17, 47.1 and 62.1 of the *Health Care Consent Act, 1996* to include clear and effective common standards for the provision of rights information to the individual who has been found to lack legal capacity, which will protect fundamental rights and will ensure that:
    - i. notice is 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 is provided in a manner that accommodates the needs of the affected individual, including alternative methods of communication; and
    - iii. the health practitioner provides 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) Consistent with Recommendations 57 and 58, the health regulatory colleges strengthen 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 and Capacity Evaluators, upon a finding of incapacity, to complete a simple regulated form, analogous to Form 33 "Notice to Patient" under the *Mental Health Act*, which would indicate the requirements for informed consent and rights information, and the practitioner's confirmation that these requirements had been adhered to.

- 19: In order to strengthen the protection of legal rights under the *Health Care Consent Act, 1996*, the Government of Ontario develop a strategy to expand and evaluate the provision of independent and expert advice about rights to individuals who have been found to lack legal capacity; considerations in developing such a strategy include:
- a) building on partnerships with organizations in the justice sector;
  - b) focusing on those most vulnerable or whose rights are most gravely at risk, including persons subject to
  - c) evaluations of capacity with respect to admission to long-term care; and
  - d) developing and evaluating pilot projects in a range of settings.
- 20: To improve the quality of assessments of capacity in health care settings, Health Quality Ontario:
- a) Within the scope of its mandate, take the following steps to encourage the improvement of the quality of assessments of capacity in accordance with legal standards in health care settings:
    - i. encourage health care organizations to include issues related to assessment of capacity and the accompanying procedural rights in their Quality Improvement Plans;
    - ii. encourage the inclusion of issues related to the assessment of capacity and the accompanying procedural rights in patient surveys conducted by health care organizations;
    - 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) promote approaches to quality that include respect for patient autonomy, a thorough understanding of the legal foundations of capacity and consent, and the promotion of patient rights.
- 21: The Ministry of Health and Long-Term Care further promote the ability of 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 their staff training.
- 22: 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 under the *Mental Health Act* and *Health Care Consent Act, 1996*;
  - b) ensure effective provision of rights information; and
  - c) support the provision of information and resources to substitute decision-makers regarding their roles and responsibilities under the *Health Care Consent Act, 1996*.
- 23: The Ministry of Community and Social Services consider whether, within its oversight functions under the *Supports and Services to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* there are ways in which it can support and encourage the use of positive and autonomy-enhancing approaches to decision-making.



## 24: The Government of Ontario

- a) actively monitor, evaluate and report on the success of initiatives to:
  - i. improve the quality of assessments of capacity and
  - ii. strengthen meaningful access to procedural rights,
- b) should significant improvement not be apparent, undertake more wide-ranging initiatives.

**Chapter VI: Powers of Attorney: Enhancing Clarity and Accountability**

## 25: The Government of Ontario

- a) develop a standard form, mandatory Statement of Commitment, to be signed by persons accepting an appointment as an attorney under the *Substitute Decisions Act, 1992*, prior to acting for the first time under such an appointment. The Statement of Commitment would specify:
  - 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 appropriate, include this acknowledgement as part of the Notice of Attorney Acting described in Recommendation 26.

26: The Government of Ontario amend the *Substitute Decisions Act, 1992* to require that a person exercising authority under a power of attorney be required to deliver a Notice of Attorney Acting at the time the attorney first begins to exercise authority under the instrument. Notices would include the following characteristics:

- a) the Notice must always be provided to:
  - i. the grantor,
  - ii. any monitor named in the instrument,
  - iii. any attorneys previously acting for the grantor, and
  - iv. the spouse, if any, of the grantor;
- b) the grantor may specify any other individual or individuals to whom the Notice must be delivered, and the attorney must make reasonable efforts to provide the Notice to that person or persons;
- c) 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.

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

- a) provide grantors of a power of attorney with the option to name at least one monitor;
- b) specify the following duties of a monitor:
  - i. make reasonable efforts to determine whether the attorney 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; and
  - iv. to promptly report concerns to the Public Guardian and Trustee or other appropriate authority where there is reason to believe that:
    - the person appointed under a power of attorney is failing to fulfil their duties or is misusing their role, and
    - serious adverse effects as defined in the *Substitute Decisions Act, 1992* are resulting to the grantor;

- c) enable the grantor of a power of attorney to authorize compensation for the monitor;
- d) specify that monitors will not be liable for activities taken or not taken in the course of their duties, short of gross negligence or willful misconduct, unless they are receiving compensation for their duties;
- e) give monitors the following rights, with appropriate recourse to adjudication in cases of non-compliance:
  - i. to visit and communicate with the person who has appointed them as monitors; and
  - ii. to review accounts and records kept by the attorney.

28: The Government of Ontario amend the *Health Care Consent Act, 1996* to enable individuals to create a binding statement in writing to specifically exclude a particular individual or individuals from acting under the hierarchy set out in section 20 of that Act,

- a) through a written document which meets the same execution requirements as a revocation of a power of attorney for personal care under section 53 of the *Substitute Decisions Act, 1992* and which
- b) requires a standard for legal capacity similar to that for creating a power of attorney for personal care.

This statement could not be used to exclude the Public Guardian and Trustee from acting.

## **Chapter VII: Rights Enforcement and Dispute Resolution: Empowering Individuals**

29: Building on the accomplishments of the Consent and Capacity Board, the Government of Ontario work towards the creation of a tribunal to strengthen dispute resolution and rights enforcement under the *Substitute Decisions Act, 1992*, *Health Care Consent Act, 1996*, and Part III of the *Mental Health Act*.

- a) The tribunal would have the following characteristics:
  - i. broad jurisdiction over issues related to legal capacity, decision-making and guardianship;
  - ii. an approach that recognizes the fundamental rights affected by this area of the law, the vulnerability of the persons at the centre of these disputes, and the ongoing relationships that are frequently involved;
  - iii. expertise in this area of the law, as well as in the needs and contexts of those directly affected by this area of the law;
  - iv. strong adjudicative powers, to deal with the range of issues before it;
  - v. flexible and tailored policies and procedures, to promote proportionate, responsive and user-centred access to the law;
  - vi. services and supports, whether provided by the tribunal or in partnership with other organizations, to provide information and referral services, assist with navigation, and connect parties to accommodations and supports necessary to effectively access tribunal processes;
  - vii. administrative structures and supports to enable it to effectively address time-sensitive issues;
  - viii. the ability to expand the evidence base relevant to its mandate; and
  - ix. broad remedial powers.
- b) In defining the jurisdiction of the tribunal, consideration be given to:
  - i. the appropriateness of granting jurisdiction to consider constitutionality of its enabling statute and to grant remedies under the *Constitution Act, 1982*; and
  - ii. the desirability of enabling the tribunal to refer specified matters to the Superior Court of Justice for determination, or other measures to address needs for expertise and proportionality.

- 30: The Government of Ontario and any court or tribunal addressing issues of legal capacity, decision-making and guardianship develop programs and policies that expand alternative dispute resolution options, including mediation and emerging approaches, for appropriate cases. These programs/policies would:
- a) be clear that a determination of a person's legal capacity cannot be made through mediation;
  - b) identify matters that are appropriate for mediation or other forms of alternative dispute resolution;
  - c) develop professionals with core competencies necessary to effective mediation and dispute resolution in this area of the law, including:
    - i. knowledge and skills in capacity and guardianship law and any other specific law at issue;
    - ii. the principles and values underlying capacity and guardianship law and of human rights;
    - iii. the needs and circumstances of individuals who are affected by this area of the law; and
    - iv. alternatives to the use of guardianship or substitute decision-making; and
  - d) create a code of ethics and of standards for mediation and other forms of alternative dispute resolution in this area, including guidance on capacity and consent to engage in mediation.
- 31: The Government of Ontario consider clarifying the application of Rule 7 under the Rules of Civil Procedures regarding the approval of settlements for persons under disability in the specific context of the consideration of expanded mediation and alternative dispute resolution of matters under the *Health Care Consent Act, 1996* and the *Substitute Decisions Act, 1992* by the Consent and Capacity Board or other tribunal.
- 32: 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.
- 33: The Government of Ontario, working with the Law Society of Upper Canada, lawyer organizations and others, develop a range of supports for lawyers appointed as Section 3 Counsel under the *Substitute Decisions Act, 1992*.
- 34: The Law Society of Upper Canada consider whether clarification of the Rules of Professional Conduct with respect to the appropriate relationship between a lawyer and counsel for persons who lack or may lack legal capacity is required, and if so, that it amend the Rules accordingly.
- 35: Legal Aid Ontario consider:
- 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 choice 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) enhancing the supports available to promote the knowledge and skills of lawyers who provide services in this area of the law.
- 36: The Government of Ontario consider conducting further research and consultation towards developing fair and appropriate processes that provide the Public Guardian and Trustee with the discretion, upon completion of an investigation that does not warrant an application for temporary guardianship but that raises concerns related to misuse of decision-making powers, to forward a written report to an adjudicator who would be

empowered to order training, mediation, regular reporting for a substitute decision-maker or other remedies as appropriate.

37: In order to promote understanding and ease of navigation, the Government of Ontario take steps to clarify the interpretation of the Public Guardian and Trustee's 'serious adverse effect' investigation mandate.

38: The Government of Ontario amend the *Health Care Consent Act, 1996* to

- a) enable individuals to bring applications under sections 37, 54 and 69 to determine whether their substitute decision-maker is in compliance with their decision-making obligations;
- b) enable monitors appointed under a power of attorney to bring applications under sections 35, 37, 52, 54, 67 and 69 to determine whether an attorney is in compliance with decision-making obligations and to seek directions with respect to wishes;
- c) enable other parties to bring applications under sections 35, 37, 52, 54, 67 and 69:
  - i. to determine whether a substitute decision-maker is in compliance with decision-making obligations and to seek directions with respect to wishes;
  - ii. only with leave of the tribunal, and in such cases the tribunal is required to take into account the views of the allegedly incapable person in granting leave;
- d) enable
  - i. health care practitioners proposing treatment, persons proposing admission to a care facility, or staff member responsible for personal assistance service
  - ii. a monitor appointed under a power of attorney, or
  - iii. third parties with leave of the tribunal
 to bring applications to determine whether a substitute decision-maker meets the requirements of sections 20(2) of the *Health Care Consent Act, 1996* including whether the substitute decision-maker is capable with respect to the decision.

## **Chapter VIII: External Appointment Processes: Increasing Flexibility And Reducing Unnecessary Intervention**

39: The Government of Ontario promote effective consideration of the "least restrictive alternatives" under the *Substitute Decisions Act, 1992* by giving adjudicators who are considering the appointment of a guardian for matters related to property or personal care the authority to:

- a) request submissions from any party regarding the least restrictive alternative;
- b) request, with appropriate processes and safeguards, a report from a relevant expert or organization, such as the Public Guardian and Trustee, Adult Protective Services Worker, Developmental Services staff or other body, 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 experts or institutions with appropriate powers and responsibilities for the preparation of such reports.

40: In order to promote transparent and consistent consideration of less restrictive alternatives in the context of guardianship appointments, and to enable the Public Guardian and Trustee to focus its mandate,

- a) the Government of Ontario conduct further research and consultations towards replacing statutory guardianship with an accessible adjudicative process, in which assessments of capacity under the *Mental Health Act* and *Substitute Decisions Act, 1992* result not in deemed applications for guardianship rather than automatic appointments.
- b) in designing this adjudicative process, consideration be given to:
  - i. ensuring that applications are heard in a timely fashion;
  - ii. providing a mechanism for urgent applications in appropriate cases;
  - iii. providing the adjudicators with appropriate powers to gather the requisite information to make a determination as to the appropriateness of guardianship and the choice of a guardian; and
  - iv. providing a mechanism for identifying situations where the Public Guardian and Trustee should exercise its mandate as a substitute decision-maker.

41: The Government of Ontario

- a) amend the *Substitute Decisions Act, 1992* to require an adjudicator, when appointing a guardian either of the person or of property, to make the appointment:
  - i. for a limited time,
  - ii. subject to a review at a designated time, or
  - iii. 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,unless the adjudicator believes that the circumstances warrant an unlimited appointment; and
- b) provide adjudicators with the authority necessary to enable the necessary oversight.

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

43: The Government of Ontario 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 his or her guardianship order terminated.

44: Consistent with the current approach to the appointment of guardians for personal care, the Government of Ontario amend the *Substitute Decisions Act, 1992* to permit adjudicators to make appointments for limited property guardianships, where an assessment of needs for decision-making indicates that a partial guardianship would meet the needs of the individual within the time limits of the order.

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

## Chapter IX: New Roles for Professionals and Community Agencies

- 46: The Government of Ontario conduct further research and consultation towards the goal of establishing a dedicated licensing and regulatory system for professional substitute decision-makers that includes the following attributes and safeguards:
- a) Licensing and oversight focus on those in the business of providing these services for multiple individuals;
  - b) Licensing and oversight be provided by the provincial government or through a government agency potentially funded through fees;
  - c) Licensed professional substitute decision-makers be permitted to make both property and personal care decisions, and to be appointed either personally or externally;
  - d) The oversight regime address the following safeguards and assurances of quality:
    - i. Ongoing requirements for skills and training;
    - ii. Ongoing professional development requirements;
    - iii. Requirements for credit and criminal records checks;
    - iv. Quality assurance and conduct standards, including prohibitions on conflicts of interests;
    - v. Record keeping requirements;
    - vi. Annual filing requirements; and
    - vii. Requirements for bonds or insurance.
- 47: The Government of Ontario conduct further research and consultations towards the goal of enabling community agencies to provide substitute decision-making for day-to-day decisions, such as basic budgeting, bill paying and accessing supports and services, through a program which includes:
- a) a process for identifying appropriately qualified community agencies;
  - b) clear standards for quality assurance, accountability, avoidance of conflicts of interest, and responding to abuse;
  - c) oversight mechanisms, including reporting and audit requirements; and
  - d) dispute resolution mechanisms.
- 48: Subject to the implementation of Recommendations 40, 46 and 47, the Government of Ontario work towards focusing the mandate of the Public Guardian and Trustee on sustainably providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.

## Chapter X: Education and Information: Understanding Rights and Responsibilities

- 49: The Government of Ontario
- a) assume a dedicated statutory mandate to:
    - i. identify strategies and priorities for outreach, education and information;
    - ii. coordinate and develop ongoing outreach, education and information initiatives;
    - iii. develop and distribute materials regarding legal capacity and decision-making;
  - b) delegate this mandate to an appropriate institution.

50: The education and informational materials referred to in Recommendation 49 address the information and education needs of:

- a) persons directly affected by the law;
- b) family members and substitute decision-makers and supporters;
- c) professionals who advise on and apply the law; and
- d) service providers who interact with the law.

51: In developing education and information strategies and materials, the responsible institution:

- 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) and digital formats;
- b) address the needs of linguistic and cultural communities;
- c) 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;
- d) consult persons directly affected by the law, families, and those who work with or represent these individuals.
- e) work in partnership with other institutions and stakeholders with interests or expertise in this area;
- f) identify opportunities to work with and build on the strengths of community institutions, including religious and cultural institutions; and
- g) develop and maintain a central clearinghouse for education and information materials.

52: Information provided in materials for those acting as substitute decision-makers or supporters include instruction on the legislation, statutory duties and the rights of the affected individual, effective and autonomy-enhancing decision-making practices, tools (for example, for maintaining records) and resources where further information and supports can be found.

53: The Government of Ontario include appropriate information materials on the standard forms for personal appointments.

54: The Government of Ontario amend the *Health Care Consent Act, 1996* to create a clear and specific duty for 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.

55: 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.

56: Institutions responsible for educating lawyers, health practitioners, social workers and other professions involved in this area strengthen their activities with a view to devoting greater focus to issues related to legal capacity, decision-making and guardianship, as they affect their particular profession, and in particular:

- a) Professional educational institutions re-examine their curricula in order to strengthen coverage of issues related to legal capacity, decision-making and consent, particularly in the context of training in ethics and professionalism; and



- b) Professional regulatory bodies examine their educational offerings and consider developing further practice guidelines or standards.

57: 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.

58: The Ministry of Health and Long-term Care support and encourage the health regulatory colleges in developing quality assurance programs related to legal capacity and consent that promote legal rights and advance best practices.

# Appendix B

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

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

### Short Term

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

- 1: The Government of Ontario include in reformed legal capacity, decision-making and guardianship legislation provisions that are informed by the LCO Frameworks for the law as it affects persons with disabilities and the law as it affects older adults, and which set out
  - a) the purposes of the legislation; and
  - b) the principles to guide interpretation of the legislation.
- 2: The Government of Ontario
  - a) initiate a strategy to reform legal capacity, decision-making and guardianship law;
  - b) collect, review and publicly share information and data related to this area of the law;
  - c) publicly report on the progress of its strategy for reform; and
  - d) commit to ongoing review and evaluation of this area of the law and the effect of reforms.
- 5: The Government of Ontario 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) while retaining the existing list of priorities for property expenditure, require that when resources are allocated to the first priority of the individual's support, education and care, that consideration be given to prior capable wishes regarding the individual's well-being and quality of life, or where these have not been expressed, to the values and wishes currently held.

6: The Government of Ontario

- a) develop pilot projects that evaluate autonomy-enhancing approaches to decision-making among persons with impaired decision-making abilities and their families;
- b) in developing these pilot projects, work in partnership with a broad array of stakeholders and account for the specific needs of a range of communities, including persons with a range of disabilities and decision-making needs, those who are socially isolated as well as those with existing networks, and members of various linguistic and cultural communities; and
- c) broadly circulate the results of these pilot projects.

9: The Government of Ontario commit to an ongoing program of research and evaluation of national and international developments in positive decision-making practices and legal and social frameworks for capacity and decision-making, with a view to identifying and implementing approaches that:

- a) promote the Framework principles;
- b) address considerations related to appropriate legal accountability; and
- c) address the needs of third parties for clarity and certainty.

11: The Government of Ontario

- a) amend the Substitute Decisions Act, 1992 to provide a clear statement as to the appropriate purposes of Capacity Assessment; and
- b) review forms under the Substitute Decisions Act, 1992 to ensure that the forms promote the use and conduct of Capacity Assessments in accordance with the purposes and principles underlying the statute.

12: Consistent with the presumption of capacity, the Government of Ontario amend section 54 of the Mental Health Act with respect to examinations of capacity to manage property, to require physicians to conduct such examinations only where there are reasonable grounds to believe that the person may lack legal capacity to manage property.

13: The Government of Ontario amend section 54(6) of the Mental Health Act to clarify that a physician may only dispense with an examination of capacity to manage property that would be otherwise required if the existing continuing power of attorney covers all of the patient's property.

15: The Government of Ontario review the list of professionals eligible to conduct Capacity Assessments under the Substitute Decisions Act, 1992.

16: The Government of Ontario create official Guidelines for assessments of capacity under the Health Care Consent Act, 1996, incorporating basic principles, procedural rights, and guidance for appropriate assessments of particular populations, including the provision of accommodation.

17: The Government of Ontario create official Guidelines for examinations of capacity to manage property under Part III of the Mental Health Act, including in addition to matters listed in Recommendation 16, guidance on the appropriate application of section 54(6).

20: To improve the quality of assessments of capacity in health care settings, Health Quality Ontario:

- a) Within the scope of its mandate, take the following steps to encourage the improvement of the quality of assessments of capacity in accordance with legal standards in health care settings:
  - i. encourage health care organizations to include issues related to assessment of capacity and the accompanying procedural rights in their Quality Improvement Plans;
  - ii. encourage the inclusion of issues related to the assessment of capacity and the accompanying procedural rights in patient surveys conducted by health care organizations;
  - 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) promote approaches to quality that include respect for patient autonomy, a thorough understanding of the legal foundations of capacity and consent, and the promotion of patient rights.

21: The Ministry of Health and Long-Term Care further promote the ability of 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 their staff training.

22: 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 under the Mental Health Act and Health Care Consent Act, 1996;
- b) ensure effective provision of rights information; and
- c) support the provision of information and resources to substitute decision-makers regarding their roles and responsibilities under the Health Care Consent Act, 1996.

23: The Ministry of Community and Social Services consider whether, within its oversight functions under the Supports and Services to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 there are ways in which it can support and encourage the use of positive and autonomy-enhancing approaches to decision-making.

28: The Government of Ontario amend the Health Care Consent Act, 1996 to enable individuals to create a binding statement in writing to specifically exclude a particular individual or individuals from acting under the hierarchy set out in section 20 of that Act,

- a) through a written document which meets the same execution requirements as a revocation of a power of attorney for personal care under section 53 of the Substitute Decisions Act, 1992 and which
- b) requires a standard for legal capacity similar to that for creating a power of attorney for personal care.

This statement could not be used to exclude the Public Guardian and Trustee from acting.

- 30: The Government of Ontario and any court or tribunal addressing issues of legal capacity, decision-making and guardianship develop programs and policies that expand alternative dispute resolution options, including mediation and emerging approaches, for appropriate cases. These programs/policies would:
- a) be clear that a determination of a person's legal capacity cannot be made through mediation;
  - b) identify matters that are appropriate for mediation or other forms of alternative dispute resolution;
  - c) develop professionals with core competencies necessary to effective mediation and dispute resolution in this area of the law, including:
    - i. knowledge and skills in capacity and guardianship law and any other specific law at issue;
    - ii. the principles and values underlying capacity and guardianship law and of human rights;
    - iii. the needs and circumstances of individuals who are affected by this area of the law; and
    - iv. alternatives to the use of guardianship or substitute decision-making; and
  - d) create a code of ethics and of standards for mediation and other forms of alternative dispute resolution in this area, including guidance on capacity and consent to engage in mediation.
- 31: The Government of Ontario consider clarifying the application of Rule 7 under the Rules of Civil Procedures regarding the approval of settlements for persons under disability in the specific context of the consideration of expanded mediation and alternative dispute resolution of matters under the Health Care Consent Act, 1996 and the Substitute Decisions Act, 1992 by the Consent and Capacity Board or other tribunal.
- 32: 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.
- 33: The Government of Ontario, working with the Law Society of Upper Canada, lawyer organizations and others, develop a range of supports for lawyers appointed as Section 3 Counsel under the Substitute Decisions Act, 1992.
- 34: The Law Society of Upper Canada consider whether clarification of the Rules of Professional Conduct with respect to the appropriate relationship between a lawyer and counsel for persons who lack or may lack legal capacity is required, and if so, that it amend the Rules accordingly.
- 35: Legal Aid Ontario consider:
- 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 choice 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) enhancing the supports available to promote the knowledge and skills of lawyers who provide services in this area of the law.

37: In order to promote understanding and ease of navigation, the Government of Ontario take steps to clarify the interpretation of the Public Guardian and Trustee's 'serious adverse effect' investigation mandate.

41: The Government of Ontario

- a) amend the Substitute Decisions Act, 1992 to require an adjudicator, when appointing a guardian either of the person or of property, to make the appointment:
  - i. for a limited time,
  - ii. subject to a review at a designated time, or
  - iii. 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,unless the adjudicator believes that the circumstances warrant an unlimited appointment; and
- b) provide adjudicators with the authority necessary to enable the necessary oversight.

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

43: The Government of Ontario 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 his or her guardianship order terminated.

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45: 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.

49: The Government of Ontario

- a) assume a dedicated statutory mandate to:
  - i. identify strategies and priorities for outreach, education and information;
  - ii. coordinate and develop ongoing outreach, education and information initiatives;
  - iii. develop and distribute materials regarding legal capacity and decision-making;
- b) delegate this mandate to an appropriate institution.

50: The education and informational materials referred to in Recommendation 49 address the information and education needs of:

- a) persons directly affected by the law;
- b) family members and substitute decision-makers and supporters;
- c) professionals who advise on and apply the law; and
- d) service providers who interact with the law.

- 54: The Government of Ontario amend the Health Care Consent Act, 1996 to create a clear and specific duty for 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.
- 56: Institutions responsible for educating lawyers, health practitioners, social workers and other professions involved in this area strengthen their activities with a view to devoting greater focus to issues related to legal capacity, decision-making and guardianship, as they affect their particular profession, and in particular:
- a) Professional educational institutions re-examine their curricula in order to strengthen coverage of issues related to legal capacity, decision-making and consent, particularly in the context of training in ethics and professionalism; and
  - b) Professional regulatory bodies examine their educational offerings and consider developing further practice guidelines or standards.
- 57: 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.
- 58: The Ministry of Health and Long-term Care support and encourage the health regulatory colleges in developing quality assurance programs related to legal capacity and consent that promote legal rights and advance best practices.

## Medium Term

*Medium-term 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 recommendations therefore cannot be implemented immediately, but should be undertaken as soon as resources or time permit.*

- 3: In order to clarify that a person has legal capacity where the test can be met with appropriate accommodations and to assist service providers in providing such accommodations, the Government of Ontario:
- a) define the scope and content of the human rights duty to accommodate in this area of the law, as it applies to service providers,
  - b) and in doing so, consult broadly with individuals; community agencies; a wide range of service providers, including in the health, financial and private sectors; and other key stakeholders.
- 4: The Government of Ontario 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 for capacity with appropriate accommodations, and
  - b) the requirement that assessments of capacity be carried out in accordance with the approach to accommodation developed under domestic human rights law.



- 7: The Government of Ontario 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 individuals to appoint one or more persons to provide assistance with decision-making;
  - 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) These authorizations would be created through a standard and mandatory form;
  - d) Through a support authorization, the individual would be able to receive assistance with day-to-day, 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 must 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 Recommendation 26, and supporters must complete a Statement of Commitment, as described in Recommendation 25;
  - g) The duties of supporters 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 as required:
    - 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.
- 8: The Government of Ontario conduct further research and consultation towards the development of a statutory legal framework for network decision-making. This framework would:
- a) permit formally established networks of multiple individuals including non-family members, to work collectively to facilitate decision-making for individuals who may not meet current tests for legal capacity;
  - b) identify formal requirements for the creation of networks, including accountability documents, decision-making processes and record-keeping requirements;
  - c) create a registration process for networks as well as annual filing requirements; and
  - d) determine the legal authority and accountability of these networks, including signing authority.

- 10: The Government of Ontario design and implement a statutory process for decision-making with respect to detention for those who lack legal capacity, do not fall within the *Mental Health Act* and whose detention is required in order to address vital concerns for security or safety. This statutory process would:
- a) balance the competing considerations of safety and fundamental liberty rights, in keeping with a least restrictive approach to issues related to legal capacity and decision-making;
  - b) provide meaningful procedural protections, taking into account the significant barriers to access to justice experienced by those directly affected;
  - c) consider the potential for conflicts of interest on the part of substitute decision-makers;
  - d) take into account the reasonable needs of those administering the law, so as to avoid unnecessary or ineffective administrative burdens; and
  - e) include a strategy for data collection, public reporting, and monitoring and evaluation.
- 14: The Government of Ontario develop and implement a strategy for improving access to Capacity Assessments under the Substitute Decisions Act, 1992. Such a strategy would consider how to remove informational, navigational, communication and other barriers for persons in remote and First Nation communities; newcomer communities; youth in transition from care; 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.
- 18: To strengthen Ontario's rights information regime,
- a) The Government of Ontario amend sections 17, 47.1 and 62.1 of the Health Care Consent Act, 1996 to include clear and effective common standards for the provision of rights information to the individual who has been found to lack legal capacity, which will protect fundamental rights and will ensure that:
    - i. notice is 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 is provided in a manner that accommodates the needs of the affected individual, including alternative methods of communication; and
    - iii. the health practitioner provides 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) Consistent with Recommendations 57 and 58, the health regulatory colleges strengthen 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 and Capacity Evaluators, upon a finding of incapacity, to complete a simple regulated form, analogous to Form 33 "Notice to Patient" under the Mental Health Act, which would indicate the requirements for informed consent and rights information, and the practitioner's confirmation that these requirements had been adhered to.

## 24: The Government of Ontario

- a) actively monitor, evaluate and report on the success of initiatives to:
  - i. improve the quality of assessments of capacity and
  - ii. strengthen meaningful access to procedural rights,
- b) should significant improvement not be apparent, undertake more wide-ranging initiatives.

## 25: The Government of Ontario

- a) develop a standard form, mandatory Statement of Commitment, to be signed by persons accepting an appointment as an attorney under the Substitute Decisions Act, 1992, prior to acting for the first time under such an appointment. The Statement of Commitment would specify:
  - 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 appropriate, include this acknowledgement as part of the Notice of Attorney Acting described in Recommendation 26.

## 26: The Government of Ontario amend the Substitute Decisions Act, 1992 to require that a person exercising authority under a power of attorney be required to deliver a Notice of Attorney Acting at the time the attorney first begins to exercise authority under the instrument. Notices would include the following characteristics:

- a) the Notice must always be provided to:
  - i. the grantor,
  - ii. any monitor named in the instrument,
  - iii. any attorneys previously acting for the grantor, and
  - iv. the spouse, if any, of the grantor;
- b) the grantor may specify any other individual or individuals to whom the Notice must be delivered, and the attorney must make reasonable efforts to provide the Notice to that person or persons;
- c) 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.

## 27: The Government of Ontario amend the Substitute Decisions Act, 1992 to:

- a) provide grantors of a power of attorney with the option to name at least one monitor;
- b) specify the following duties of a monitor:
  - i. make reasonable efforts to determine whether the attorney 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; and
  - iv. to promptly report concerns to the Public Guardian and Trustee or other appropriate authority where there is reason to believe that:
    - the person appointed under a power of attorney is failing to fulfil their duties or is misusing their role, and
    - serious adverse effects as defined in the Substitute Decisions Act, 1992 are resulting to the grantor;
- c) enable the grantor of a power of attorney to authorize compensation for the monitor;

- d) specify that monitors will not be liable for activities taken or not taken in the course of their duties, short of gross negligence or willful misconduct, unless they are receiving compensation for their duties;
- e) give monitors the following rights, with appropriate recourse to adjudication in cases of non-compliance:
  - i. to visit and communicate with the person who has appointed them as monitors; and
  - ii. to review accounts and records kept by the attorney.

36: The Government of Ontario consider conducting further research and consultation towards developing fair and appropriate processes that provide the Public Guardian and Trustee with the discretion, upon completion of an investigation that does not warrant an application for temporary guardianship but that raises concerns related to misuse of decision-making powers, to forward a written report to an adjudicator who would be empowered to order training, mediation, regular reporting for a substitute decision-maker or other remedies as appropriate.

38: The Government of Ontario amend the Health Care Consent Act, 1996 to

- a) enable individuals to bring applications under sections 37, 54 and 69 to determine whether their substitute decision-maker is in compliance with their decision-making obligations;
- b) enable monitors appointed under a power of attorney to bring applications under sections 35, 37, 52, 54, 67 and 69 to determine whether an attorney is in compliance with decision-making obligations and to seek directions with respect to wishes;
- c) enable other parties to bring applications under sections 35, 37, 52, 54, 67 and 69:
  - i. to determine whether a substitute decision-maker is in compliance with decision-making obligations and to seek directions with respect to wishes;
  - ii. only with leave of the tribunal, and in such cases the tribunal is required to take into account the views of the allegedly incapable person in granting leave;
- d) enable
  - i. health care practitioners proposing treatment, persons proposing admission to a care facility, or staff member responsible for personal assistance service
  - ii. a monitor appointed under a power of attorney, or
  - iii. third parties with leave of the tribunal
 to bring applications to determine whether a substitute decision-maker meets the requirements of sections 20(2) of the Health Care Consent Act, 1996 including whether the substitute decision-maker is capable with respect to the decision.

39: The Government of Ontario promote effective consideration of the “least restrictive alternatives” under the *Substitute Decisions Act, 1992* by giving adjudicators who are considering the appointment of a guardian for matters related to property or personal care the authority to:

- a) request submissions from any party regarding the least restrictive alternative;
- b) request, with appropriate processes and safeguards, a report from a relevant expert or organization, such as the Public Guardian and Trustee, Adult Protective Services Worker, Developmental Services staff or other body, 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 experts or institutions with appropriate powers and responsibilities for the preparation of such reports.

51: In developing education and information strategies and materials, the responsible institution:

- 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) and digital formats;
- b) address the needs of linguistic and cultural communities;
- c) 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;
- d) consult persons directly affected by the law, families, and those who work with or represent these individuals.
- e) work in partnership with other institutions and stakeholders with interests or expertise in this area;
- f) identify opportunities to work with and build on the strengths of community institutions, including religious and cultural institutions; and
- g) develop and maintain a central clearinghouse for education and information materials.

52: Information provided in materials for those acting as substitute decision-makers or supporters include instruction on the legislation, statutory duties and the rights of the affected individual, effective and autonomy-enhancing decision-making practices, tools (for example, for maintaining records) and resources where further information and supports can be found.

53: The Government of Ontario include appropriate information materials on the standard forms for personal appointments.

55: 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.

## Long Term

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

19: In order to strengthen the protection of legal rights under the Health Care Consent Act, 1996, the Government of Ontario develop a strategy to expand and evaluate the provision of independent and expert advice about rights to individuals who have been found to lack legal capacity; considerations in developing such a strategy include:

- a) building on partnerships with organizations in the justice sector;
- b) focusing on those most vulnerable or whose rights are most gravely at risk, including persons subject to evaluations of capacity with respect to admission to long-term care; and
- c) developing and evaluating pilot projects in a range of settings.

- 29: Building on the accomplishments of the Consent and Capacity Board, the Government of Ontario work towards the creation of a tribunal to strengthen dispute resolution and rights enforcement under the *Substitute Decisions Act*, 1992 *Health Care Consent Act*, 1996, and Part III of the *Mental Health Act*.
- a) The tribunal would have the following characteristics:
    - i. broad jurisdiction over issues related to legal capacity, decision-making and guardianship;
    - ii. an approach that recognizes the fundamental rights affected by this area of the law, the vulnerability of the persons at the centre of these disputes, and the ongoing relationships that are frequently involved;
    - iii. expertise in this area of the law, as well as in the needs and contexts of those directly affected by this area of the law;
    - iv. strong adjudicative powers, to deal with the range of issues before it;
    - v. flexible and tailored policies and procedures, to promote proportionate, responsive and user-centred access to the law;
    - vi. services and supports, whether provided by the tribunal or in partnership with other organizations, to provide information and referral services, assist with navigation, and connect parties to accommodations and supports necessary to effectively access tribunal processes;
    - vii. administrative structures and supports to enable it to effectively address time-sensitive issues;
    - viii. the ability to expand the evidence base relevant to its mandate; and
    - ix. broad remedial powers.
  - b) In defining the jurisdiction of the tribunal, consideration be given to:
    - i. the appropriateness of granting jurisdiction to consider constitutionality of its enabling statute and to grant remedies under the Constitution Act, 1982; and
    - ii. the desirability of enabling the tribunal to refer specified matters to the Superior Court of Justice for determination, or other measures to address needs for expertise and proportionality .
- 40: In order to promote transparent and consistent consideration of less restrictive alternatives in the context of guardianship appointments, and to enable the Public Guardian and Trustee to focus its mandate,
- a) the Government of Ontario conduct further research and consultations towards replacing statutory guardianship with an accessible adjudicative process, in which assessments of capacity under the *Mental Health Act* and *Substitute Decisions Act*, 1992 result not in deemed applications for guardianship rather than automatic appointments.
  - b) in designing this adjudicative process, consideration be given to:
    - i. ensuring that applications are heard in a timely fashion;
    - ii. providing a mechanism for urgent applications in appropriate cases;
    - iii. providing the adjudicators with appropriate powers to gather the requisite information to make a determination as to the appropriateness of guardianship and the choice of a guardian; and
    - iv. providing a mechanism for identifying situations where the Public Guardian and Trustee should exercise its mandate as a substitute decision-maker.
- 46: The Government of Ontario conduct further research and consultation towards the goal of establishing a dedicated licensing and regulatory system for professional substitute decision-makers that includes the following attributes and safeguards:
- a) Licensing and oversight focus on those in the business of providing these services for multiple individuals;
  - b) Licensing and oversight be provided by the provincial government or through a government agency potentially funded through fees;

- c) Licensed professional substitute decision-makers be permitted to make both property and personal care decisions, and to be appointed either personally or externally;
- d) The oversight regime address the following safeguards and assurances of quality:
  - i. Ongoing requirements for skills and training;
  - ii. Ongoing professional development requirements;
  - iii. Requirements for credit and criminal records checks;
  - iv. Quality assurance and conduct standards, including prohibitions on conflicts of interests;
  - v. Record keeping requirements;
  - vi. Annual filing requirements; and
  - vii. Requirements for bonds or insurance.

47: The Government of Ontario conduct further research and consultations towards the goal of enabling community agencies to provide substitute decision-making for day-to-day decisions, such as basic budgeting, bill paying and accessing supports and services, through a program which includes:

- a) a process for identifying appropriately qualified community agencies;
- b) clear standards for quality assurance, accountability, avoidance of conflicts of interest, and responding to abuse;
- c) oversight mechanisms, including reporting and audit requirements; and
- d) dispute resolution mechanisms.

48: Subject to the implementation of Recommendations 40, 46 and 47, the Government of Ontario work towards focusing the mandate of the Public Guardian and Trustee on sustainably providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.



# Appendix C

## ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

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

During the course of its consultations, the LCO heard from well over 300 organizations and experts. The following list includes organizations and experts who:

- provided written submissions to the consultations, some at multiple stages of the project (32),
- provided practical support to the Fall 2014 Public Consultations (17),
- attended one of the Focus Groups following the release of the *Discussion Paper* (over 170)
- attended one of the Focus Groups following the release of the *Interim Report* (35)
- attended the Fall 2014 Consultation Forum (35), or
- were interviewed by LCO staff (98).

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

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

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2. Donna Abbink, Limestone District School Board
3. Teresa Acs, Scotia Private Client Group
4. Laura Addington, BMO Financial Group
5. Adult Protective Service Association of Ontario
6. Advocacy Centre for the Elderly
7. Ann Elise Alexander, CIBC Trust Corporation
8. Alisha Alladina, Toronto Central Community Care Access Centre
9. Dr. Federico Allodi, Psychiatrist
10. Alternative Dispute Resolution Institute
11. Alzheimer Society of Ontario
12. Tom Archer, Developmental Services Ontario, Niagara
13. Peggy Armstrong, Grey Flag Campaign
14. Michael Bach, Canadian Association for Community Living
15. David Baker, BakerLaw
16. Jan Barduzzi, Brain Injury Services
17. Deborah Barker, Alzheimer Society of Grey-Bruce
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19. Sally Bean, Sunnybrook Health Sciences Centre
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52. Dr. Ranjith Chandrasena, The Chatham-Kent Health Alliance
53. Paula Chidwick, William Osler Health Systems
54. Howard Chodos, Mental Health Commission of Canada
55. Christian Horizons
56. Bob Clark, Humber River Hospital
57. Georgie Clarke, Concerned Friends of Ontario Citizens in Care Facilities

58. John Clegg, Scotia Private Client Group
59. Coalition on Alternatives to Guardianship
60. Audrey Cole (advocate)
61. College of Audiologists and Speech Language Pathologists of Ontario
62. Barbara Collier, Communications Disabilities Access Canada
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64. Nancy Cooper, Ontario Long-term Care Association
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78. Dawn Eccles, Registered Nurse
79. Dr. Virginia Edwards, Psychiatrist
80. Elder Abuse Ontario
81. Duncan Embury, Neinstein & Associates
82. Orville Endicott, Community Living Ontario
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89. Dr. Ian Ferguson, Providence Health Care
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164. Paul McGarvey, Extend a Family Kingston
165. Sally McMackin, Toronto Central Community Care Access Centre
166. Elizabeth McNab, Ontario Coalition (Society) of Senior Citizens' Organizations
167. Jane Meadus, Advocacy Centre for the Elderly
168. Douglas Melville, Ombudsman for Banking Services and Investments
169. Mental Health Legal Committee
170. Isfahan Merali, Consent and Capacity Board
171. Estrella Mercurio, ParaMed Home Health Care-Toronto Central
172. Suzanne Michaud, Royal Bank of Canada
173. Audrey Miller, Elder Caring
174. Anita Miller, Preferred Health Care Services

175. Ministry of Community and Social Services Partnership Roundtable
176. Edgar-Andre Montigny, ARCH Disability Law Centre
177. Dr. Elizabeth Moore, Psychologist, Providence Health Care
178. Dr. Rick Morris, College of Psychologists
179. Katherine Mortimer, Ontario Seniors Secretariat
180. Rikin Morzaria, McLeish Orlando
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224. Sheri Scott, Community Living Kingston and District
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226. Jenny Shickluna, Niagara Region Seniors Services
227. Roslyn Shields, Centre for Addiction and Mental Health
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253. Frank Wagner, Joint Centre for Bio-ethics
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262. Carla Whillier, Barrister and Solicitor
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264. Ruth Wilcock, Ontario Brain Injury Association
265. Kim Wilson, Canadian Coalition for Seniors Mental Health
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267. Christine Wray, Toronto Central Community Care Access Centre
268. David Wright, Human Rights Tribunal of Ontario
269. Anna Zachariah , Ontario Coalition (Society) of Senior Citizen's Organizations
270. Joanna Zymont, Centre for Addiction and Mental Health

## Private Individuals

In accordance with our mandate, and reflecting the nature of this project, the LCO made efforts throughout to not only make participation accessible to individuals directly affected by this area of the law and their family members, but to actively encourage their participation.

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

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

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

## Commissioned Research Papers

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

**Advocacy Centre for the Elderly and Dykeman Dewhirst O'Brien LLP:** *Health Care Consent and Advance Care Planning: Standards and Supports*, online at: [LINK](#)

**ARCH Disability Law Centre:** *Decisions, Decisions: Promoting And Protecting The Rights Of Persons With Disabilities Who Are Subject To Guardianship*, online at: [LINK](#)

**Canadian Centre for Elder Law:** *Understanding the Lived Experience of Assisted and Supported Decision-making in Canada*, online at: [LINK](#)

**Dr. Bonnie Lashewicz:** *Understanding and Addressing Voices of Adults with Disabilities Within Their Family Caregiving Contexts: Implications for Legal Capacity, Decision-making and Guardians* online: [LINK](#)

The following papers were also of assistance to the LCO:

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

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

# Appendix D

## LIST OF FOCUS GROUPS

### 2014 – 2015 Consultations

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

21. **Family Members of Persons Living with Dementia, Owen Sound**, in partnership with Alzheimer Society Grey – Bruce (October 21, 2014)
22. **Psychiatrists and Consent and Capacity Board Vice Chairs**, in partnership with the Consent and Capacity Board (October 23, 2014)
23. **Judiciary** (November 3, 2014)
24. **Toronto Community Care Access Centre Staff**, in partnership with Toronto Community Care Access Centre (November 4, 2014)
25. **Persons with Acquired Brain Injuries**, in partnership with the Ontario Brain Injury Association (November 7, 2014)
26. **Persons Living in Long-Term Care**, in partnership with the Ontario Association of Residents Councils (November 11, 2014)
27. **Persons with Aphasia**, in partnership with the March of Dimes York Aphasia Centre (November 19, 2014)
28. **Seniors Organizations**, in partnership with Ontario Seniors Secretariat Liaison Group (November 26, 2014)
29. **Families of Persons with Developmental Disabilities**, in partnership with WoodGreen Community Services Development Disability Program (December 3, 2014)
30. **Seniors Living in the Community**, in partnership with WoodGreen Community Services (January 14, 2015)

## 2016 Consultations

1. **Clinicians**, in partnership with the Centre for Addiction and Mental Health (March 3, 2016)
2. **Elder Abuse Ontario**, provincial regional consultants (February 5, 2016)
3. **Mental Health Bar**, in partnership with the Mental Health Legal Committee (February 9, 2016)
4. **Rights Advisers and Advocates**, in partnership with the Psychiatric Patient Advocate Office (February 25, 2016)
5. **Trusts and Estates Lawyers**, in partnership with Goddard, Gamage Stephens LLP (April 11, 2016)

# Appendix E

## THE LCO'S FRAMEWORK PRINCIPLES

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

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

#### Principles for the Law as It Affects Persons with Disabilities

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

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

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

1. **Respecting the Dignity and Worth of Persons with Disabilities:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every person with a disability. All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
2. **Responding to Diversity in Human Abilities and Other Characteristics:** This principle requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.
3. **Fostering Autonomy and Independence:** This principle requires the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
4. **Promoting Social Inclusion and Participation:** This principle refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.

5. **Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
  6. **Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.
- *For more information on the principles, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.C*

### Implementing the Principles

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

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

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

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

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

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

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

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

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

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

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



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

### Principles for the Law as It Affects Older Adults

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

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

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

1. **Respecting Dignity and Worth:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family are full persons, unique and irreplaceable. The principle therefore includes the right to be valued, respected and considered; to have both one's contributions and one's needs recognized; and to be treated as an individual. It includes a right to be treated equally and without discrimination.
2. **Fostering Autonomy and Independence:** This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.
3. **Promoting Participation and Inclusion:** This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. An important aspect of participation is the right of older adults to be meaningfully consulted on issues that affect them, whether at the individual or the group level.
4. **Recognizing the Importance of Security:** This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access basic supports such as health, legal and social services.
5. **Responding to Diversity and Individuality:** This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal identity, immigration or citizenship status, disability or health status, sexual orientation, creed,

geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.

**6. Understanding Membership in the Broader Community:** This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and obligation and work towards a society that is inclusive for all ages.

• *For more information on the LCO's Principles for the Law as It Affects Older Adults, see the Final Report, Chapter III.B.*

### **Implementing the Principles**

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

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

While aging is often popularly viewed as an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about growing older and about older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have lived prior to entering "old age". Any description of aging and older adults is therefore necessarily complex, as is the case for all life stages.

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

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

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

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

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

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

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

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

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

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

# Appendix F

## CONSULTATION QUESTIONNAIRES

### Consultation questionnaire for individuals receiving assistance with decisions

#### About This Questionnaire

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

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

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

#### Completing This Questionnaire

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

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

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

#### To contact us

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E-mail: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)  
Follow us on Twitter @LCO\_CDO  
Tel: (416) 650-8406  
Toll-Free: 1 (866) 950-8406  
Fax: (416) 650-8418  
TTY: (416) 650-8082

## Background Information

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

- ☐ Yes  
☐ No

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

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

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

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

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

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

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

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

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

☐ Yes

☐ No

How did this come about? What happened?

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### **Your Experiences With Decision-making**

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

☐ Yes

☐ No

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

☐ Yes

☐ No

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

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

☐ Yes

☐ No

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

☐ A lawyer

☐ A community agency

☐ A health professional, such as a doctor, nurse, occupational therapist or other professional

☐ The person helping me with decisions

☐ A family member or friend

☐ A government official

☐ Written materials or the internet

☐ Other (please tell us who): \_\_\_\_\_

If you received information, was it helpful?

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

7. I have a good understanding of my legal rights when someone is helping me with decision-making.

☐ Strongly agree

☐ Agree

☐ Neither agree nor disagree

☐ Disagree

☐ Strongly disagree

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

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8. The person who is supposed to help with my decision-making provides the kind of help that I need.

☐ Strongly agree

☐ Agree

☐ Neither agree nor disagree

☐ Disagree

☐ Strongly disagree

What kind of help do you need with making decisions?

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

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

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

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

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

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

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

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

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

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

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

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

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

- ☐ Yes
- ☐ No

If yes, who helped you? \_\_\_\_\_

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

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**Some Information about You**

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

14. What is your age?

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

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

- ☐ Yes
- ☐ No

Please identify your disability or disabilities: \_\_\_\_\_

16. What is your gender? \_\_\_\_\_

17. How would you describe your race or ethnicity? \_\_\_\_\_

18. Do you identify as an Aboriginal person? If so, with which Aboriginal nation(s) or community(ies) do you identify? \_\_\_\_\_

19. What language do you mostly speak at home? \_\_\_\_\_

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

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

- ☐ On my own
- ☐ With my parents
- ☐ With a spouse or partner
- ☐ With my children
- ☐ With extended family

☐ In a group setting (e.g., a retirement home, a group home)

☐ Other (please tell us where) \_\_\_\_\_

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

☐ Yes

☐ No

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

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

☐ Yes

☐ No

### **Your Contact Information**

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

☐ Yes, please add me to your mailing list

☐ No, please do not contact me

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

Name: \_\_\_\_\_

Address \_\_\_\_\_

E-mail address: \_\_\_\_\_

Telephone Number (optional): \_\_\_\_\_

## Consultation questionnaire for families, friends, supporters and substitute decision-makers

### About This Questionnaire

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

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

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

### Completing This Questionnaire

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

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

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

### To contact us

Law Commission of Ontario  
2032 Ignat Kaneff Building  
Osgoode Hall Law School, York University  
4700 Keele Street  
Toronto, Ontario, Canada  
M3J 1P3

Web: [www.lco-cdo.org](http://www.lco-cdo.org)  
E-mail: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)  
Follow us on Twitter @LCO\_CDO  
Tel: (416) 650-8406  
Toll-Free: 1 (866) 950-8406  
Fax: (416) 650-8418  
TTY: (416) 650-8082

## Background Information

1. Do you assist another adult with making decisions?

- ☐ Yes  
☐ No

If yes, how do you provide assistance?

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

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

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

2. The person I assist with decisions is my:

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

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

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

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

- ☐ Acting on my own  
☐ Acting with others

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

☐ Yes

☐ No

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

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

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### **Your Experiences With Decision-making**

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

☐ Yes

☐ No

If yes, what made you decide that?

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If not, who did decide? 

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

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6. Did a lawyer help you with this process?

☐ Yes

☐ No

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

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

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

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

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

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

☐ Yes

☐ No

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

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

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

☐ Yes

☐ No

If yes, I received information from:

☐ A lawyer

☐ A community agency

☐ A health professional, such as a doctor, nurse, occupational therapist or other professional

☐ A family member or friend

☐ A government official

☐ Written materials or the internet

☐ Other (please tell us who): \_\_\_\_\_

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

☐ Strongly agree

☐ Agree

☐ Neither agree nor disagree

☐ Disagree

☐ Strongly disagree

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

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

☐ Strongly agree

☐ Agree

☐ Neither agree nor disagree

☐ Disagree

☐ Strongly disagree

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

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

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

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

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

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

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

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

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### Some Information About You

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

15. What is your age?

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

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

- ☐ Yes
- ☐ No

Please identify your disability or disabilities: \_\_\_\_\_

17. What is your gender? \_\_\_\_\_

18. How would you describe your race or ethnicity? \_\_\_\_\_

19. Do you identify as an Aboriginal person? If so, with which Aboriginal nation(s) or community(ies) do you identify? \_\_\_\_\_

20. What is the primary language of the person you help? \_\_\_\_\_

21. How do you self-identify with respect to your sexual orientation? \_\_\_\_\_

22. What is the highest level of education that you have attained?

- ☐ Some high school
- ☐ High school diploma
- ☐ Some college or university
- ☐ College or university diploma
- ☐ Graduate or professional schooling

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

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

Do you live with the person you help?

- ☐ Yes
- ☐ No

If no, how far away from that person do you live? \_\_\_\_\_

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

- ☐ Yes
- ☐ No

### **Your Contact Information**

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

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

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

Name: \_\_\_\_\_

Address: \_\_\_\_\_

E-mail address: \_\_\_\_\_

Telephone Number (optional): \_\_\_\_\_

# Legal Capacity, Decision-making and Guardianship

# Endnotes

1. Law 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*].
2. Law 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>.
3. 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*].
4. Law 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. Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Interim Report* (Toronto: October 2015), online: <http://lco-cdo.org/en/capacity-guardianship-interim-report> [LCO, *Interim Report*].
6. For a brief overview of this law reform process, see LCO, *Legal Capacity and Decision-making Discussion Paper*, note 3.
7. *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Schedule A [HCCA].
8. *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [SDA].
9. *Mental Health Act*, R.S.O. 1990, c. M.7 [MHA].
10. The 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](http://www.bcli.org/wordpress/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf).
11. *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A [PHIPA].
12. 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.
13. LCO, *RDSP Final Report*, note 2.
14. Advisory 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].
15. David N. Weisstub, *Enquiry on Mental Competency: Final Report* (Toronto: Publications Ontario, 1990), 55 [Weisstub Report].
16. Fram Report, note 14, vii.
17. Fram Report, note 14, 39-47.
18. Review 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.
19. SDA, note 8, s. 2; HCCA, note 7, s. 4(2).
20. HCCA, note 7, ss. 10, 40.
21. SDA, note 8, s. 3; HCCA, note 7, s. 81.
22. SDA, note 8, ss. 32(1), 38.
23. SDA, note 8, ss. 66(2)-(3).



24. SDA, note 8, ss. 32(2)-(5).
25. Information on this project may be found online at <http://www.lco-cdo.org/en/last-stages-of-life>.
26. 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.
27. *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].
28. 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>.
29. City of Toronto, *Toronto Facts: Diversity*, online: <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=dbe867b42d853410VgnVCM10000071d60f89RCRD&vgnextchannel=57a12cc817453410VgnVCM10000071d60f89RCRD>.
30. 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.
31. Some proponents of supported decision-making have proposed that government should have a role to play in fostering support relationships or (for some proponents) in providing paid supports that can approximate this kind of intimate and trusting relationship. 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>.
32. Margaret Isabel Hall, "Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability" (2012) 58:1 McGill L. J. 61, 65.
33. *Webb v Webb*, 2016 NSSC 180 (CanLii) 6 [Webb].
34. SDA, note 8, s. 78.
35. MHA, note 9, s.59.
36. SDA, note 8, ss. 22(3) and 55(2).
37. SDA, note 8, ss. 32(3), 66(3), (4), and (5); HCCA, note 7, s.21.
38. 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 8, s. 50; HCCA, note 7, s. 32(2).
39. LCO, *Framework for the Law as It Affects Older Adults*, note 1, 87-88.
40. 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.
41. 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.
42. HCCA, note 8, s. 1.
43. See for example the description of the purposes of supported decision-making: *Adult Protection and Decision-making Act*, S.Y. 2003, c. 21, Sched. A, [Adult Protection and Decision-making Act], s. 4.
44. *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 43,

- s. 2; *Mental Capacity Act 2005*, (UK), c. 9, [*Mental Capacity Act*], s. 1; *Assisted Decision-Making (Capacity) 2015*, No. 64 of 2015, Minister for Justice and Equality (July 13, 2012), [Irish Act 2015], s. 8.
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45. 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>.

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  46. *Long-Term Care Homes Act 2007*, S.O. 2007, c.8, [LTCHA], s. 1.

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  47. LCO, *Framework for the Law as It Affects Older Adults*, note 1, 107.

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  48. Information about the Ontario Government's Open Government initiative can be found online at <https://www.ontario.ca/page/open-government>. On April 14, 2016, the LCO co-hosted, with Legal Aid Ontario and the Canadian Forum on Civil Justice, a forum on Open Data in the Justice System.

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  49. *Open by Default* (March 2014), online: <https://www.ontario.ca/page/open-default-new-way-forward-ontario>.

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  50. Available online: <https://www.ontario.ca/page/ontarios-open-data-directive>.

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  51. Policy Horizons Canada, "The Case for Evidence Based Policy", 2013, online: <http://www.horizons.gc.ca/eng/content/case-evidence-based-policy>.

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  52. 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.

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  53. *An Act to amend the Human Rights Code*, S.O. 2006, c. 30, s. 57.

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  54. 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/h/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](https://www.attorneygeneral.jus.gov.on.ca/english/h/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf) [*Pinto Report*].

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  55. *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 [AODA], s. 41.

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  56. 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.

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  57. Weisstub Report, note 15.

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  58. CRPD, note 27.

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  59. 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>, [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.

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  60. HCCA, note 7, s. 4.

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  61. SDA, note 8, 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>.

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  62. *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32, [Starson], para. 80.

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  63. CRPD, note 27.

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  64. CRPD, note 27, Article 1.

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65. CRPD, note 27.
66. 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](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en).
67. 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](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en).
68. 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://chrgj.org/wp-content/uploads/2012/07/blake.pdf>.
69. Irish Act 2015, note 45, s. 3.
70. A decision-making assistance agreement may be made by a person who understands "the information as to the effect of making the appointment". The assistant may obtain relevant information, provide advice to the appointer by explaining relevant information or considerations, ascertain the will and preference of the appointer and assist the appointer in communicating this, assist the appointer to make and express a decision, or assist in the implementation of a decision. The decision is that of the appointer. Irish Act 2015, note 45, s. 14.
71. The supporter may assist the person in obtaining information, understanding information and alternatives, and in implementing decisions. *Capacity and Guardianship (Amendment No. 18) Law, 5776-2016*, s. 30, adding section 67B.
72. AGTA, note 44, s. 13; *Adult Guardianship and Co-Decision-making Act*, note 44, ss. 13, 39.
73. Irish Act 2015, note 44, Part IV.
74. Advocacy Centre for the Elderly, written submission to the LCO, October 17, 2014, [ACE Submission Legal Capacity 2014], 8.
75. Coalition on Alternatives to Guardianship, written submission to the LCO, March 14, 2016, [Coalition Submission 2016] 3.
76. Coalition Submission 2016, note 75, 2.
77. The full figures for 2013-2014 are included in LCO, *Legal Capacity and Decision-making Discussion Paper*, note 3, 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.
78. Consultation questionnaire. Excerpts from questionnaires have been edited to remove identifying information and for typographical errors.
79. SDA, note 8, ss. 33(1), (2), (3).
80. *General Comment*, note 67, para 8.
81. The *General Comment* (note 67) 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.
82. Advocacy Centre for the Elderly, Written submission to the LCO on the RDSP Project, February 28, 2014, 9.
83. *Adult Protection and Decision-Making Act*, note 43, ss. 5(2), 11; AGTA, note 44, s. 6(2).
84. Advocacy Centre for the Elderly, written submission to the LCO on the Interim Report,

- March 3, 2016, [ACE Submission Legal Capacity 2016] 4.
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85. Coalition on Alternatives to Guardianship, *Brief*, note 31, 26.
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86. Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 [Human Rights Code], ss. 11 and 17.
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87. *Human Rights Code*, note 87, s. 47(2).
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88. Ontario Human Rights Commission, *Policy on Preventing Discrimination on the Basis of Mental Health Disabilities and Addictions* (Toronto: June 18, 2014), online: [http://www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions\\_ENGLISH\\_accessible.pdf](http://www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf), 69.
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89. Written submission of the Royal College of Dental Surgeons to the LCO, March 21, 2016, 3.
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90. Communication Disabilities Access Canada, written submission to the LCO, October 2015.
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91. Canadian Bankers Association, written submission to the LCO, March 4, 2016, [Canadian Bankers Association] 2.
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92. *Human Rights Code*, note 87, O. Reg. 290/98, *Business Practices Permissible To Landlords In Selecting Prospective Tenants For Residential Accommodation*.
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93. 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>.
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94. City of Toronto, *Stakeholder Consultation Results, Reforms to Ontario's Legal Capacity, Decision-making and Guardianship Laws: Implications for Toronto's Vulnerable Residents and the Service Providers Who Support Them* (May 16, 2016) [City of Toronto, *Stakeholder Consultation Results*] 5.
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95. MAG, *Guidelines*, note 62, Section III.2 and VII.2.
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96. MAG, *Guidelines*, note 62, Section VI.
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97. SDA, note 8, ss. 33(3),(4), (5); 66(5),(6),(7), (8).
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98. SDA, note 8, ss. 66(2.1), (3), (4).
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99. SDA, note 8, ss. 66(8) and (9).
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100. HCCA, note 7, s. 21.
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101. SDA, note 7, s. 37.
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102. SDA, note 7, s. 32(1). The Public Guardian and Trustee's *Duties and Powers of a Guardian of Property* (online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/guardduties.php>) emphasizes the importance of this connection for the way in which property decisions are carried out. It states: You must manage the property in a way that accommodates the decisions made about the incapable person's personal care. For example, if the person wants to live in a certain place and can afford it, it would be your duty to arrange to pay for this choice of residence. If the person wants to take a vacation and can afford it, it would be your duty to make arrangements to pay for it. However, there is one exception to this obligation. You may make a financial decision that overrides a personal care decision only if to do otherwise would result in negative consequences with respect to property that heavily outweigh the personal care benefits of the decision. For example, the person may want to remain living in his or her own house, but may require 24 hour care and not have enough money to pay for it without selling the house and moving to another residence. In that case, the need to sell the house in order to have enough money to pay for the person's care may heavily outweigh the person's wish to remain living in the house."
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103. SDA, note 7, s. 31(1).
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104. See for example, Laschewicz, note 59.
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105. See, for example Gill Westhorp, *Supported Decision Making Program 2014-2015: Evaluation Report* (Health & Community Services Complaints Commissioner South Australia), online: <http://www.hcscs.sa.gov.au/wp-content/uploads/2015/11/HCCSC-SDM-Project-2015-Evaluation-Report1.pdf>.
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106. Tal Cahana and Dr. Shira Yalon-Chamovitz, *Article 12 Supported Decision-making Pilot, Study of Assessment Study Findings* (December 2015) [Cahana & Yalon-Chamovitz]. Cahana & Yalon-Chamovitz, 47. There have been a number of small scale pilot projects examining supports for decision-making. Most focused on persons with intellectual disabilities, although some also included persons with psychosocial disabilities, acquired brain injury or autism. None of the pilot projects included persons with dementia. Some focused on persons with existing supports, while others centred on socially isolated individuals. Many examined the possibilities for strengthening positive decision-making practices within the context of existing guardianship orders, while some excluded persons under guardianship. See Margaret Wallace, *Evaluation of the Supported Decision Making Project, Final Independent Evaluation* (Office of the Public Advocate, South Australia: November 2012) [Office of the Public Advocate]; Gill Westthorp, *Supported Decision Making Program 2014-2015: Evaluation Report* (Health & Community Services Complaints Commissioner South Australia), online: <http://www.hcscs.sa.gov.au/wp-content/uploads/2015/11/HCSCE-SDM-Project-2015-Evaluation-Report1.pdf>; ACT Disability, Aged and Carer Advocacy Service (ADACAS), *Spectrums of Support: A Report on a Project Exploring Supported Decision making for People with Disability in the ACT* (September 2013), online: [http://www.adacas.org.au/decision-support/copy\\_of\\_SupportedDecisionMakingProjectFinalReport.pdf](http://www.adacas.org.au/decision-support/copy_of_SupportedDecisionMakingProjectFinalReport.pdf) [ADACAS 2013]; Kate Rea and Fiona May, *Self Determination and Cultural Change: A Report on Supported Decision Making for People Experiencing Psychosocial and Intellectual Disability* 2014), online: [http://www.adacas.org.au/decision-support/ADACAS\\_recommendations\\_SDM\\_psychosocial\\_and\\_intellectual\\_disabilty.pdf](http://www.adacas.org.au/decision-support/ADACAS_recommendations_SDM_psychosocial_and_intellectual_disabilty.pdf) [ADACAS 2014]; Westwood Spice, *My life, my decision – an independent evaluation of the Supported Decision Making Pilot* (New South Wales Department of Family and Community Services: April 2015), online: [https://www.adhc.nsw.gov.au/\\_\\_data/assets/file/0009/346194/sdm\\_pilot\\_project\\_evaluation\\_report.pdf](https://www.adhc.nsw.gov.au/__data/assets/file/0009/346194/sdm_pilot_project_evaluation_report.pdf) [Westwood Spice];
107. See for example, Office of the Public Advocate, note 107, 51; ADACAS 2013, note 107, 33-40; ADACAS 2014, note 107, 15; Westwood Spice, note 107.
108. See for example Cahana & Yalon-Chamovitz, note 107, 47.
109. LCO, *Legal Capacity and Decision-making Discussion Paper*, note 3, Part III, Ch1.D.2.
110. 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>.
111. For an outline of Alberta's supported decision-making authorizations see LCO, *Legal Capacity and Decision-making Discussion Paper*, note 3, 126-128.
112. James & Watts, note 110, 57-62.
113. City of Toronto, *Stakeholder Consultation Results*, note 94, 5.
114. The 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 support authorizations, the multiple safeguards built into the RDSP program itself, 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 the broader context of this project. LCO, *RDSP Final Report*, note 2, section IV.C.3.
115. AGTA, note 44, s. 4(2); *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).
116. AGTA, note 44, s. 4(2); *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).
117. AGTA, note 44, s. 4(2); *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).



118. *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).
119. *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).
120. *Adult Protection and Decision Making Act*, note 43, s. 5(1), Irish Act 2015, note 44, s. 14(1).
121. Irish Act 2015, note 44, s. 11.
122. *Adult Protection and Decision Making Act*, note 43, ss. 5(2), 11, AGTA, note 44, s. 6(2).
123. As defined by Ministry of Community and Social Services, person-directed planning “helps people with a developmental disability prepare life plans that lay out their distinct needs and goals. These plans can help them make the most out of funding and outline ways they can participate in community activities”: online: [http://www.mcscs.gov.on.ca/en/mcscs/programs/d\\_evelopmental/servicesupport/person\\_directed\\_planning.aspx](http://www.mcscs.gov.on.ca/en/mcscs/programs/d_evelopmental/servicesupport/person_directed_planning.aspx).
124. 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>.
125. Nunnelley, *Personal Support Networks*, note 124, 103.
126. Irish Act 2015, note 44, Part IV.
127. HCCA, note 7, s. 10.
128. 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>.
129. LCO, *RDSP Final Report*, note 2.
130. Canadian Bankers Association, note 91.
131. MHA, note 9, ss. 54-60.
132. 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 9, s. 54(6).
133. MHA, note 9, s. 54(2).
134. 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/sbforms.nsf/GetFileAttach/014-6442-41~1/\\$File/6442-41E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/sbforms.nsf/GetFileAttach/014-6442-41~1/$File/6442-41E.pdf).
135. MHA, note 9, s. 57(2).
136. MHA, note 9, s. 54(4).
137. SDA, note 8, s. 15.
138. Consent and Capacity Board, *Review of Capacity to Manage Property (Form 18)*, 2, online: [www.ccboard.on.ca/english/publications/documents/form18.pdf](http://www.ccboard.on.ca/english/publications/documents/form18.pdf).
139. SDA, note 8, 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.”

140. See *Roy v Furst*, [1999] OJ 1490 (SCJ), in this decision, 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.
141. This is indicated by the use of binding language ("a physician shall examine" as opposed to "the physician may examine"): MHA, note 9, s. 54(1).
142. MHA, note 9, s. 59(1).
143. MHA, note 9, s. 59(2).
144. MHA, note 9, s. 60(1).
145. SDA, note 8, s. 16(1).
146. SDA, note 8, s. 79.
147. SDA, note 8, 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.
148. *Capacity Assessment*, O. Reg. 460/05 [Capacity Assessment Reg], ss. 2(1)(a), 2(2).
149. *MAG, Guidelines*, note 6.
150. *Capacity Assessment Reg*, note 148, ss. 3(1)-(2).
151. *Capacity Assessment Reg*, note 148, s. 3(3).
152. SDA, note 8, ss. 78(1)-(3).
153. SDA, note 8, ss. 78(5), 16(4).
154. SDA, note 8, ss. 16(5)-(6).
155. SDA, note 8, 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.
156. Hiltz & Szigeti, note 155, 194. It should be noted that the cost of long-term care is regulated, and may be subsidized.
157. HCCA, note 7, s. 2.
158. *Evaluators*, O. Reg. 104/96, s. 1.
159. 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.
160. *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 62, 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).
161. 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 155, citing *I.L.A. (Re)*, 2004 CanLII 29716 (ON CCB).
162. HCCA, note 7, ss. 50(1)-(2).
163. HCCA, note 7, s. 10.
164. HCCA, note 7, s. 4(3).
165. HCCA, note 7, s. 15(1).
166. HCCA, note 7, s. 15(2).



167. 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](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.cpsso.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.cpsso.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](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](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](http://ccholive.v51.com/site_documents/S-013%20Consent.pdf).
168. 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](http://www.nicenet.ca/files/NICE_Capacity_and_Consent_tool.pdf).
169. MHA, note 9, ss. 38, 59.
170. HCCA, note 7, s. 32.
171. *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.
172. *Abrams*, note 171, para. 50.
173. Sarita Verma & Michel Silberfeld, "Approaches to Capacity and Competency: The Canadian View" (1997) 20:1 Int JL & Psychiatry 35, [Verma & Silberfeld] 42.
174. Henry Olders, "Comprehensive Assessments of Competence: A Psychiatrist's Perspective" (2011) 5:2 McGill JL & Health 283, [Olders] 285.
175. Michel Silberfeld and others, "Capacity Assessments for Requests to Restore Legal Competence" (1995) 10:3 International Journal of Geriatric Psychiatry 191, 196.
176. See, for example, *Koch (Re)*, note 163, 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.

177. Verma & Silberfeld, note 173, 41.
178. ARCH Disability Law Centre, written submission to the LCO, March 4, 2016 [ARCH Submission 2016] 8.
179. Olders, note 174, 283 - 284.
180. *V. (Re)*, 2009 CanLII 13471 (ON CCB).
181. 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.
182. Capacity Assessment Office Brochure, online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp#pays>.
183. Written submission to the LCO from the Ontario Brain Injury Association, October 2014, 2 [OBIA Submission].
184. 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>.
185. Focus Group, Rights Advisers and Advocates, September 25, 2014.
186. Written submission to the LCO from Centre for Addiction and Mental Health, October 16, 2014, [CAMH Submission] 3.
187. See note 159, above.
188. 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.
189. 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>.
190. 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>.
191. In *Koch (Re)*, note 163, 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.
192. *Saunders*, note 160, para 18.
193. Wahl, Dykeman & Gray, note 184, 260 – 261; Judith Wahl, Mary Jane Dykeman and Tara Walton, *Health Care Consent and Advance Care Planning Tools, Policies and Practices: The Challenge to Get it Right* (Toronto: Law Commission of Ontario, November 2016) [Wahl, Dykeman & Walton], forthcoming.
194. OBIA Submission, note 183, 2.
195. Wahl, Dykeman & Gray, note 184, 263-264.
196. ACE Submission Legal Capacity 2014 Some states require guardians to have insurance or to post bonds., note 74, 9.

197. HCCA, note 7, s. 17.
198. College of Occupational Therapists of Ontario, *Consent*, note 167, 1.6 and 1.7.
199. 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 167, 12.
200. For example, College of Respiratory Therapists, "Responsibilities Under Consent Legislation", note 167, 15; CASLPO, *Obtaining Consent*, note 167, 12 "The CASLPO member has an obligation to inform the patient/client in a manner appropriate to the patient/client's capacity".
201. See, for example, College of Physicians and Surgeons, *Consent to Treatment*, note 167, 7; CASLPO, *Obtaining Consent*, note 167, 12, College of Dieticians, "Guidelines", note 167, 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 167, Appendix B: Advocating for Clients).
202. For example, neither the College of Physicians and Surgeons *Consent to Medical Treatment*, note 167, 7 or the College of Nurses of Ontario's *Practice Guideline: Consent*, note 167, provides any exceptions with respect to informing the incapable person of the finding and its consequences.
203. For example, College of Respiratory Therapists, "Responsibilities Under Consent Legislation", note 167, 15.
204. College of Dieticians, "Guidelines", note 167, 4.
205. College of Respiratory Therapists of Ontario, "Responsibilities under Consent Legislation", note 163.
206. College of Physicians and Surgeons, *Consent to Medical Treatment*, note 167, 7. See also CNO, *Practice Guideline: for Consent*, note 167, which requires the nurse to use "professional judgment to determine the scope of advocacy services to assist the client in exercising his/her options".
207. Written submission to the LCO by the Mental Health Legal Committee, November 28, 2014, [MHLC Submission 2014] 9-10.
208. VLRC, *Final Report*, note 45, Ch. 15, 318.
209. 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.
210. See *Conway v Fleming*, [1996] 1242 ACWS (3d) 62, para 282-285; W (Re), 2006 CarswellOnt 9390 (ON CCB) para 28 and 30.
211. HCCA, note 7, s. 7; *R. v. Thomas*, 2000 CarswellOnt 1173; [2000] OJ No 1308; 46 WCB (2d) 59, para 4.
212. MHA, note 9, s. 20.
213. *R v. Webers* 95 CCC (3d) 334; [1994] OJ No 2 (QL); 25 WCB (2d) 305 1994 CanLII 7552 (ON SC).
214. LTCHA, note 46, s. 32.
215. *Retirement Homes Act, 2010*, S.O. 2010, c. 11, s. 70.
216. HCCA, note 7, ss. 53.1, 54.2.
217. See *R v. Bournemouth 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.
218. *Mental Capacity Act*, note 44, Sched. A.1, "Hospital and Care Home Residents: Deprivation of Liberty".
219. VLRC, *Final Report*, note 45, Ch. 15.
220. HCCA, note 7, s. 4(3).
221. MAG, *Guidelines*, note 61, 1.2.

222. ARCH Submission 2016, note 178, 8.
223. AGTA, note 44; Alta Reg 219/2009, s. 3(1)(a).
224. AGTA, note 44; Alta Reg 219/2009, s. 4(2)(a).
225. Written submission of the College of Audiologists and Speech Language Pathologists, March 3, 2016, 3.
226. 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](http://www.health.gov.on.ca/en/common/ministry/publications/reports/seniors_strategy/docs/seniors_strategy_report.pdf).
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276. *Guardianship and Administration Act 2000* (QLD) [Guardianship and Administration Act], ss. 222-24.



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294. HCCA, note 7, ss. 50, 65.
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296. HCCA, note 7, ss. 33, 51, 66.
297. HCCA, note 7, ss. 35, 53, 68.
298. HCCA, note 7, ss. 37, 54, 69.
299. HCCA, note 7, ss. 35, 52, 67.
300. HCCA, note 7, ss. 34, 53.1, 54.2. Note that the provisions with respect to secure units are not yet in force.
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304. HCCA, note 7, s. 75.
305. HCCA, note 7, s. 70.1.
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307. 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.
308. SDA, note 8, ss. 39(4), 68(4).
309. SDA, note 8, ss. 42(7)-(8).

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317. *Cuthbertson v. Rasouli*, [2013] 3 SCR 341, 2013 SCC 53.
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318. Saara L. Chetner “Can’t Buy Me Love: Lessons Learned from High Conflict Guardianships In Ontario”, Conference Paper, 2010 Canadian Conference on Elder Law (October 29, 2010) online: <http://www.lco-cdo.org/en/ccel-2010-papers> [Chetner].
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320. LTCHA, note 46: 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.
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321. LTCHA, note 46; *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities*, 2008, S.O. 2008, c. 14.
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326. Doug Surtees, “How Goes the Battle? An Exploration of Guardianship Reform” (2012) 50:1 Alta. L. R. 115-27 [Surtees].
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329. LCO, *Increasing Access to Family Justice*, note 328, 24-25. There are ongoing initiatives to improve family law processes, although issues remain.
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330. Joffe & Montigny, note 28, 107-108
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331. 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.
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336. VLRC, *Final Report*, note 45; QLRC R67, note 56, Chapter 20.
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338. LCO, *Increasing Access to Family Justice*, note 329.
339. Judith McCormack, "Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change" (1995) 59 Sask Law Review 385 at 5-6, 9-10.
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344. City of Toronto, *Stakeholder Consultation Results*, note 94, 9.
345. ACE Submission 2016, note 85, 13, also see MHLC Submission 2016, note 315, 6.
346. New Zealand Law Reform Commission, *Tribunals in New Zealand* (January 2008) 2.67, online: <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP6.pdf>
347. Andrew Leggatt, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals*, March 2001, para. 1.2 [Leggatt Report].
348. *Statutory Powers Procedures Act*, R.S.O. 1990, c. 22.
349. *The Adjudicative Tribunals Accountability, Governance and Administration Act*, S.O. 2009, c. 33, Sched. 5, s. 1.
350. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, at para. 29, per McLachlin C.J.
351. *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.
352. Patrick J. Monahan and Byron Shaw, *Constitutional Law*, 4th Edition, (Toronto: Irwin Law, 2013) 154 [Monahan & Shaw].
353. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2015) 7.49-7.50.
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355. *Criminal Code*, R.S.C. 1985, c. c-46, s. 672.4(1).
356. *Competition Tribunal Act*, R.S.C. 1985, c. 19(2nd Supp), s. 3(2), 4(1).
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358. *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 177(1) [*Residential Tenancies Act*].
359. Social Justice Tribunals, *Annual Report 2013 – 2014*, online: <http://www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.html#ltb-2>.
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361. ACE Submission Legal Capacity 2016, note 84, 15.
362. *Human Rights Code*, note 87, ss. 45.2, 45.3.
363. *Residential Tenancies Act*, note 358, s. 204(1).
364. Chetner, note 318, 2.
365. Chetner, note 318, 21.
366. City of Toronto, *Stakeholder Consultation Results*, note 94, 9.

367. SDA, note 8, s. 88.
368. Canadian Centre for Elder Law, *Elder and Guardianship Mediation Report*, (Vancouver, B.C.: 2011) [CCEL, *Elder and Guardianship Mediation*] 32, online: [http://www.bcli.org/sites/default/files/EGM\\_Report\\_Jan\\_30\\_2012.pdf](http://www.bcli.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.
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370. CCEL, *Elder and Guardianship Mediation*, note 370, 134.
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374. Workplace Safety and Insurance Appeals Tribunal, "Mediation" online: <http://www.wsiat.on.ca/english/appeal/mediation.htm>.
375. Human Rights Tribunal of Ontario, *Rules of Procedure* (May 2016) online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedure.html#15> [HRTO Rules].
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377. ACE Submission Legal Capacity 2016, note 84, 19.
378. 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.
379. *Lang v. Ontario (Community and Social Services)*, 2005 HRT0 5, para 8, 52, 57, 63, 64, 70.
380. 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.
381. Chetner, note 318, 20.
382. 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> [CCB, *Policy Guideline 2*].
383. CCB, *Policy Guideline 2*, note 382.
384. 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.
385. Marshall Swadron, *Representing the Incapable Client in Capacity Proceeding*, (Law Society of Upper Canada, 12 Annual Estates and Trusts Summit, November 13, 2009) [Swadron] 4-5.
386. Written submission to the LCO from Jan Goddard, July 1 2016 [Goddard].

387. *Banton v Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. Gen Div.), 218.
388. Written submission to the LCO from Jan Goddard, July 1 2016 [Goddard].
389. ACE Submission 2016, note 85, 16.
390. *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, s. 13.
391. 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>.
392. Ontario Ministry of Finance, 2014 Ontario Budget, online: <http://www.fin.gov.on.ca/en/budget/ontariobudgets/2014/ch1d.html#s1-71>.
393. Ontario Ministry of Finance, 2014 Ontario Budget, note 350.
394. Legal Aid Ontario, *2015 Questions and Answers: Legal Eligibility*, [LAO, *Legal Eligibility*], online: [http://www.legalaid.on.ca/en/info/legaleligibility\\_qanda.asp](http://www.legalaid.on.ca/en/info/legaleligibility_qanda.asp).
395. LAO, *Legal Eligibility*, note 394.
396. LAO, *Legal Eligibility*, note 394.
397. LAO, *Mental Health Strategy*, note 391, 19.
398. LAO, *Mental Health Strategy*, note 391, 19.
399. LAO, *Mental Health Strategy*, note 391, 38.
400. *Ziskos v. Miksche*, 2007 CanLII 46711 (ONSC), para 227, 229.
401. *Guardianship and Administration Act*, note 285, s. 16.
402. VLRC, *Final Report*, note 45, 447.
403. VLRC, *Final Report*, note 45, 455.
404. *Guardianship and Administration Act*, note 285, s. 180.
405. *Guardianship and Administration Act*, note 285, s. 183(1).
406. *Guardianship and Administration Act*, note 285, s. 193.
407. QLRC R67, note 56, Vol 4, 176.
408. *Mental Capacity Act*, note 44, s. 58(1).
409. COP, note 228, 250-51.
410. ACE Submission 2016, note 85, 14-15.
411. SDA, note 8, ss. 39, 68.
412. 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.
413. Capacity Assessment Reg, note 148, ss. 2(1)(a), 2(2).
414. SDA, note 8, ss. 78(1)-(3).
415. SDA, note 8, ss. 78(1)-(3).
416. SDA, note 8, s. 78(2).
417. SDA, note 8, ss. 78(5), 16(4).
418. SDA, note 8, ss. 16(5)-(6).
419. MHA, note 9, s. 59(2).
420. 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](http://www.sse.gov.on.ca/mohltc/ppao/en/Documents/PPAO%20Annual%20Report%202011.pdf).
421. Fram Report, note 14, 104.
422. SDA, note 8, ss. 24, 57.

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423. SDA, note 8, s. 59.
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424. SDA, note 8, s. 70.
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425. SDA, note 8, s. 69.
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426. 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 8, ss. 72, 77-78.
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427. SDA, note 8, s. 69.
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428. 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).
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429. SDA, note 8, ss. 72-77.
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430. Consultation with Brendon Pooran.
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431. Consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
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432. 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/>.
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433. SDA, note 8, ss. 25(1), 58(1).
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434. SDA, note 8, ss. 24, 57.
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435. See for example, *Covello v. Sturino* [2007] O.J. No. 2306 158; *Deschamps*, note 176.
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436. *Koch (Re)*, note 161.
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437. 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 8, s. 50; HCCA, note 7, s. 32(2).
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438. Michael Bach & Lana Kerzner, *Fulfilling the Promise, Ensuring Alternatives to Guardianship*, unpublished paper, received March 2014, 17-18.
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439. MAG, *Guidelines*, note 61, Part VI.
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440. *Webb*, note 33, 6.
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441. 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.
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442. *Surtees*, note 326, 115-27.
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443. *Joffe & Montigny*, note 28, 62.
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444. MAG, *Guidelines*, note 61, Part VI.
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445. *Koch (Re)*, note 161.
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446. [1997] O.J. No. 4894 (Ont. Gen. Div.).
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447. *Deschamps*, note 176, para. 11.
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448. Coalition on Alternatives to Guardianship, *Brief*, note 31, 28.
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449. Coalition on Alternatives to Guardianship, *Brief*, note 31, 28.
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450. *Mental Capacity Act*, note 44, c.9, s. 49.
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451. Court of Protection, *Rules of Procedure 2007*, Rule 117, Reports Under Section 49 of the Act.
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452. *Guardianship and Administration Act*, note 285, s. 16(1)(d); VLRC, *Final Report*, note 45, 470.
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453. 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>.
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454. Utah Courts, "Court Visitor Volunteers", online: <https://www.utcourts.gov/visitor/>.
455. 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](http://courts.oregon.gov/Deschutes/docs/form/court_visitor/VisitorInstructions.pdf).
456. 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.
457. *Human Rights Code*, note 87, s. 44.
458. *Residential Tenancies Act*, note 358, s. 201(1).
459. *R. v. Gladue*, [1999] 1 S.C.R. 688.
460. A helpful overview can be found in Sebastien April and Mylene Magrinelli Orsi, *Gladue Practices in the Provinces and Territories* (Research and Statistics Division, Department of Justice Canada, 2013).
461. Legal Services Society, *Gladue Primer* (February 2011), 6-7.
462. "Gladue Report Services to expand in Ontario (June 27, 2014), online: [http://www.legalaid.on.ca/en/news/newsarchive/1406-26\\_gladuereportservices.asp](http://www.legalaid.on.ca/en/news/newsarchive/1406-26_gladuereportservices.asp); "Legal Aid Ontario expands Gladue Funding", March 12, 2015, [http://www.legalaid.on.ca/en/news/newsarchive/1503-12\\_newgladuefunding.asp](http://www.legalaid.on.ca/en/news/newsarchive/1503-12_newgladuefunding.asp); "Gladue Report Services to Expand in Ontario's North" (November 27, 2014), online: [http://www.legalaid.on.ca/en/news/newsarchive/1411-25\\_gladuereportservices.asp](http://www.legalaid.on.ca/en/news/newsarchive/1411-25_gladuereportservices.asp).
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464. J.A. Jolowicz, "Taking a Reflective Turn: Non-Adversarial Justice and Mental Health Review Tribunals" (2011) 37 *Monash UL Rev* 81, 289.
465. *Pinto Report*, note 54, section 6(a).
466. *R v LePage* 2006 CanLII 37775 (ONCA) 22.
467. 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 44, Divisions 3 and 4.
468. California *Probate Code* §2920(a)(1).
469. California *Probate Code*, §2952-2955.
470. SDA, note 8, ss.27, 62.
471. SDA, note 8, ss. 24(2.1), 55(2.2).
472. The application form for referral can be found at <http://humanservices.alberta.ca/documents/PT0002.pdf>.
473. *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.
474. *The Public Guardian and Trustee Act*, note 487, 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>.



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