

COMMISSIONED RESEARCH OPPORTUNITIES

Call for Research Papers

Legal Capacity, Decision-Making and Guardianship

The Law Commission of Ontario (LCO) has initiated a project that will apply the LCO's *Frameworks* for the law as it affects persons with disabilities and older adults to issues related to legal capacity, decision-making and guardianship in the *Substitute Decisions Act* and the *Health Care Consent Act*, and to those specific provisions of the *Mental Health Act* related to legal capacity, in order to develop specific and practical law reform recommendations. A detailed discussion of the scope of this project, together with other project documents, may be found on the LCO's website at <http://www.lco-cdo.org/en/capacity-guardianship>, and we urge readers to carefully review these documents.

In the fall of 2012 and the early winter of 2013, the LCO conducted preliminary research and consultations in order to understand key contexts in which the law operates and identify core issues for further research, analysis and consultation. Based on this preliminary work, the LCO is now developing a *Discussion Paper* which will analyze the identified issues and set out key questions for public consultation. The *Discussion Paper* and accompanying consultation documents is slated for release in early 2014, and will be followed by extensive public consultation.

As part of the development of the *Discussion Paper*, the LCO will fund a number of research papers, which will inform both the analysis in the *Discussion Paper* and the development of options for reform. The nature of these papers, and the criteria and terms for funding are set out below.

I. RESEARCH TO BE FUNDED

Objectives

The objective of this Call for Research Papers is to obtain expert input on the complex issues raised by the law relating to capacity, decision-making and guardianship. The resulting research will assist the LCO in making reasoned, evidence-based and practical reform recommendations. The Call for Research Papers also aims to create critical debate and promote scholarly work in this area of the law.

Ontario's laws in this area were the subject of a major law reform effort in the 1990s. In considering new reforms, it will be important for the LCO to understand and take into account the evidence regarding the effects of the implementation of the current laws.

The LCO is particularly interested in papers that take into account the diverse experiences of persons with disabilities and older adults across the life course. The LCO takes a holistic approach to law reform and encourages interdisciplinary research and proposals from interdisciplinary research teams. The LCO encourages both applicants with legal backgrounds and those with expertise in other disciplines to make proposals on the topics identified below.

Given that the project will apply the LCO *Framework for the Law as it Affects Older Adults* and the *Framework for the Law as it Affects Persons with Disabilities* to evaluate the current law and any law reform proposals, the LCO will give particular consideration to proposals that take one or both of these *Frameworks* into account.

Researchers are encouraged to employ relevant quantitative or qualitative research that they have already undertaken or, as long as it can be completed within the time frames set out below, to undertake original quantitative or qualitative research that will contribute to their analysis.

Paper Topics

The LCO has identified **eight potential Research Paper topics** and will fund a maximum of **five**, after considering all proposals received. The LCO will also consider proposals on other topics that clearly demonstrate links to and make a contribution to analysis of the issues identified in the LCO's "Scope Summary", available online at <http://www.lco-cdo.org/en/capacity-guardianship>.

The LCO encourages proposals that take into account how the issues under consideration may be affected by various aspects of diversity, including age, culture, language, literacy, gender, sexual orientation, racialization, type of disability, family and marital status, place of residence and other factors.

1. Decision-making models and familial dynamics

Most individuals, whether with or without disabilities, rely considerably on family and other close personal relationships for support and advice. We often assume that families have some responsibility to their members, believe that families will understand each other, and hope that they will uphold the values and safeguard the interests of their members. In other words, at

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both a personal and societal level, we place considerable trust and responsibility in the hands of families.

These roles and responsibilities are even greater where an individual has a disability that affects the ability to understand information and assess risk. In terms of the individual with a disability, there is both greater need and greater vulnerability to exploitation and abuse. For family members, there is greater responsibility and higher expectations. Family dynamics may, however, differ depending on the stage in the life course when disability occurs, the type of disability experienced, and the circumstances and resources of the individual and his or her family.

In all models of decision-making, whether based on a supported, substituted or co-decision-making approach, families and other close personal relationships play a core role. The assumptions about the role of family members, expectations about their abilities and responsibilities, and potential impact on them may differ however. These differences lie close to the heart of many of the issues surrounding models of decision-making.

The LCO seeks a Research Paper that will provide an analysis of:

- **the roles and responsibilities for families or other close personal relationships under various models of decision-making;**
 - **these roles and responsibilities in light of current information about demographics, family structures in Ontario, cultural expectations regarding family and caregiving, and other social science evidence;**
 - **family dynamics and risk factors for abuse under various decision-making models; and**
 - **other issues considered of significant relevance to a full analysis of this topic.**
2. *Understanding the lived experience of those who act as substituted decision-makers or provide support for decision-making*

Providing support and assistance to an individual who has a disability that affects the ability to understand information and assess risk raises complex ethical, legal, practical, emotional and interpersonal issues. This experience may differ depending on a variety of factors, including the kind of relationship between the individual providing supports or substituted decision-making and the individual with a disability; cultural understandings and assumptions; the type of disability; the kinds of supports to which the parties have access; various aspects of identity of those involved, such as gender and age (for example); and the legal framework under which the individuals are operating. The ways in which the individuals providing support or substituted decision-making understand and experience their roles will profoundly shape the implementation of the law.

The LCO seeks a Research Paper that will examine the lived experience of individuals who provide supports to decision-making or substituted decision-making, including how they understand their roles, the types of challenges they experience in carrying out those roles, and the supports that would be of assistance to them in carrying out those roles.

The LCO will give priority to proposals that include original qualitative or quantitative research, that consider how understandings and experiences may be shaped or influenced by various aspects of diversity and by different legal frameworks.

3. Addressing fluctuating capacity

Ontario's *Substitute Decisions Act* and *Health Care Consent Act* essentially operate on a binary model of capacity: an individual either has or has not legal capacity to make independent decisions in a particular area. The determination of legal capacity has very significant implications for an individual. While re-assessments of capacity can be and are undertaken, with resulting implications for guardianships or powers of attorney, these processes are complex, cumbersome and generally costly.

While some forms of disability involve impairments to decision-making capacity that are relatively stable, some types of disability are episodic or progressive and in other cases, decision-making capacities may fluctuate frequently. The current system has difficulty effectively addressing these types of situations.

The LCO seeks a Research Paper that will:

- **Analyze how Ontario's current legal framework aims to and in practice does address issues of fluctuating capacity;**
- **Identify areas for reform;**
- **Evaluate options for changes to law, policy and practice to better address fluctuating capacity; and**
- **Address other issues considered of significant relevance to a full analysis of this topic.**

4. Re-evaluating Ontario's approach to assessing capacity

Assessment of legal capacity is a complex endeavour. In Ontario, whether capacity is assessed (evaluated) under the HCCA, the SDA or the MHA, it is based on the "understand and appreciate" test. However, it is assessed in different contexts, and by professionals with different types of training, supports and oversight. A considerable number of policies, procedures and tools have been developed to assist with assessment of capacity. A range of concerns have been raised regarding assessment of capacity, including the degree to which it is

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sensitive to characteristics such as culture, literacy, communications barriers or the fluctuating nature of some disabilities; whether greater provision or recognition of accommodations and supports during the assessment process might reduce the number of individuals found incapable; whether those conducting assessments (evaluations) received sufficient training and supports and are subject to adequate oversight mechanisms; and whether current protections sufficiently address the power imbalances often inherent in the capacity assessment process, particularly in institutional settings.

The LCO seeks a Research Paper that will:

- **Review critiques of Ontario’s approach to assessing capacity (including capacity evaluations);**
- **Identify current best practices in terms of training, policies, education and supports for those who assess capacity;**
- **Review approaches to capacity assessment in other jurisdictions;**
- **Identify and evaluate options for reform to law, policy or practice;**
- **Address other issues considered of significant relevance to a full analysis of this topic.**

5. *Experiences of families and individuals entering Ontario’s capacity and guardianship system*

Individuals and families resort to Ontario’s laws related to capacity, decision-making and guardianship in response to a wide range of personal, familial and social issues. Most of those who find themselves involved with and attempting to navigate through Ontario’s laws and processes related to capacity and guardianship would not think of themselves as having a “capacity and guardianship issue”; rather, Ontario’s capacity, decision-making and guardianship laws are one tool for attempting to address a variety of complex issues that are not necessarily primarily legal in nature. For example, struggles with inadequate resources and support for aging in the community may lead towards a capacity evaluation for decisions related to long-term care placement, and attempts to make appropriate financial arrangements for adult children with intellectual disabilities may lead to a guardianship application.

The system that these individuals and families enter is complex. For example, depending on the individual’s location and the type of issue, an assessment of capacity may be completed by a physician under the *Mental Health Act*, a capacity assessor under the *Substitute Decisions Act* or a capacity evaluator under the *Health Care Consent Act*. In some cases, there is no fee for an assessment, in others there is, and some individuals may be able to obtain financial assistance from the Capacity Assessment Office. Individuals are able to refuse some types of assessments

and not others, and have access to different types of advice or information in different scenarios. Both individuals and professionals may find the systems in this area difficult to understand and to navigate.

The LCO seeks a Research Paper that will:

- **Identify how individuals and families encounter Ontario’s laws and systems related to capacity, decision-making and guardianship, including the problems that they are attempting to solve through the application of this area of the law;**
- **Identify both barriers and supports to navigation within Ontario’s current system for assessing capacity, taking into account the experiences of persons with differing types of disability, family caregivers and professionals;**
- **Consider in what contexts this area of the law can and cannot provide meaningful assistance with the problems that lead to its application and identify options for other recourse;**
- **Identify and evaluate a range of options for improving the navigability of the capacity and guardianship system, possibly including simplification of the law, policies or processes; provision of additional navigational supports; barrier removal; or other options; and**
- **Address other issues considered of significant relevance to a full analysis of this topic.**

6. Creating powers of attorney and other planning documents: standards and supports

Powers of attorney and other planning tools, such as advance care plans, are powerful legal tools that are intended to enhance the autonomy of those who use them. Individuals are encouraged to develop them as part of their planning for later life, and efforts have been made to ensure that these planning documents may be created with relative ease. For example, forms for powers of attorney are available online, and a number of organizations have devoted resources to developing guidelines, tools or public education related to these documents. The SDA also includes some standards for the creation of powers of attorney in particular.

However, there are widespread concerns that individuals who are creating these planning documents may not understand or take seriously their implications, so that these documents may ultimately be ineffective or create vulnerability to abuse. Concerns have been expressed that requirements and supports surrounding the creation of these documents do not strike the appropriate balance between enhancing accessibility of planning instruments and ensuring adequate understanding and safeguards.

The LCO seeks a Research Paper that will:

- **Explore the standards, information and supports that are currently either statutorily mandated or voluntarily available to those creating, exercising or applying powers of attorney and other planning documents, and consider their efficacy;**
- **Identify and evaluate a range of potential reforms to law, policy or practice to create higher standards for the development of planning documents or provide greater information and supports, on either a mandatory or voluntary basis; and**
- **Address other issues considered of significant relevance to a full analysis of this topic.**

The Paper should take into account accessibility and access to justice issues for older persons and persons with disabilities (including the impact of various aspects of diversity), the tension between ensuring availability of planning options and the avoidance of misuse and abuse, and the practical implications of resource shortages at all levels.

7. Monitoring and accountability for substitute decision makers

The SDA sets clear standards for the appropriate use of powers of attorney and other planning documents, and exercise of the powers of guardians; however, the law has been criticized for its lack of mechanisms for monitoring adherence to those standards and holding those acting under these powers accountable. The extent of misuse and abuse of substitute decision-making powers is unknown, as there is no method of tracking this information, but anecdotally, there are significant concerns. Where there are concerns about misuse or outright abuse of a power of attorney, there are a number of avenues for redress. For example, in some cases, the issue may be one for the criminal justice system. Application may be made to the courts for direction for matters related to the responsibilities of a person exercising a power of attorney. Where other options are not available, the Public Guardian and Trustee has investigation powers under the SDA where an individual may be incapable and serious adverse circumstances are occurring as a result; where the results of the investigation warrant, the PGT may apply to the court to become temporary guardian.

The LCO seeks a Research Paper that will:

- **Consider the forms of misuse or abuse of powers of substitute decision-makers and the extent of the issues;**
- **Identify current mechanisms for monitoring and ensuring accountability, identifying abuse and providing redress, and evaluate their effectiveness and appropriateness, both separately and as a whole;**
- **Identify and evaluate options for reforms to law, policies and practice to strengthen accountability for the appropriate use of substitute decision-making powers; and**

- **Address other issues of significant relevance for a full analysis of this topic.**

The Paper should consider the tensions between the public policy goals of increasing access to planning tools and ensuring meaningful protections against abuse.

8. *Alternative dispute resolution and issues related to capacity, decision-making and guardianship*

Disputes related to legal capacity, decision-making and guardianship arise in multiple contexts, including health care decisions, disputes between family members regarding substitute decision-making, or contested findings of incapacity. In many of these contexts, the disputes are between parties to ongoing relationships. It is also the case that many of these disputes involve fundamental issues of rights or will have significant effects on autonomy or security of vulnerable individuals.

Many have raised concerns that some of the dispute resolution processes available are too expensive, time-consuming and cumbersome to be meaningfully accessible to most individuals, and that dispute resolution processes may be destructive to important relationships. This is particularly so for court-based processes.

The LCO seeks a Research Paper that will examine options for less adversarial dispute resolution mechanisms in the context of legal capacity, decision-making and guardianship. This may include a range of options, including active adjudication and mediation. This paper should take into account the access to justice issues faced by persons with disabilities and older adults, the complex nature of the disputes at issues, the fundamental effect of these decisions on vulnerable individuals, and Ontario's context of limited resources.

II. SUBMISSION PROCESS

Selection Criteria

Proposals will be evaluated on the degree to which they:

1. Further the objectives of this Call for Papers and of the project;
2. Are coherent with the mission of the LCO;
3. Demonstrate professional qualifications and expertise in the area to be studied;
4. Demonstrate a sound analytical framework and research methodology.

Format of Proposals

Submitted research proposals must contain the following materials:

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1. A statement outlining the proposed research, how the research would support the objectives of the Project as outlined in this Call for Papers, and the scope and the type of work envisioned;
2. A workplan that outlines:
 - the proposed research methodology, including any proposed original quantitative or qualitative research;
 - the use of any relevant quantitative or qualitative research already undertaken by the researcher;
 - the steps required to complete the assignment on the dates listed below;
 - an estimate of the resources required to complete the assignment.
3. A cover letter detailing the applicant's qualifications and the reasons why the applicant is interested in undertaking this research;
4. A Curriculum Vitae for each principal researcher.

NOTE: Incomplete proposals may not be considered.

Proposal Deadlines

Research proposals must be submitted by midnight on **June 30, 2013**. Proposals received after this date will not be considered. Authors of successful proposals will be notified by **July 26, 2013**.

Contact Information

Please forward your proposals to:

Mail

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2032 Ignat Kaneff Building, Osgoode Hall Law School, York University,
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Questions should be addressed to Lauren Bates at lbates@lco-cdo.org or (416) 650-8100.

III. TERMS OF THE CALL FOR RESEARCH PAPERS

The Terms of the Call for Research Papers will be as follows:

Budget Guidelines

The selected Applicants will be paid a total of \$15,000 (including GST) for the paper, as allocated to each stage of the paper, when completed in accordance with the agreement as determined by the LCO.

Deliverables and Timetable

Applicants who are successful in contracting to provide a research paper set out above will be required to complete a Detailed Outline, an Interim Research Paper and a Final Research Paper (the “Deliverables”). The Interim Research Paper must be a substantially complete version of the Final Research Paper and subject only to slight revisions. The Interim Research Paper must be formatted and footnoted in accordance with the LCO’s formatting policy. The Interim Research Paper and the Final Research Paper must assess and analyze all of the issues described under the appropriate paper topic in Section I above, “Papers to be Funded”. The LCO reserves the right to determine whether the paper has met the requirements at each stage as explained above and is not obligated to provide payment if those requirements are not met and to terminate the agreement. The LCO will not take this step until after a discussion with the researcher.

A selected applicant must provide the LCO with the Deliverables in accordance with the agreement by these dates:

Date Due	Deliverables that the Researcher Must Provide	Payment
September 13, 2013	Detailed Outline	\$2,500
November 15, 2013	Interim Research Paper	\$5,000
January 6, 2014	Final Paper	\$7,500

Compliance with the above due dates is of critical importance to the LCO. In the event that a due date is not met, the LCO may choose to terminate the agreement. Where the agreement is terminated, the LCO is not obligated to provide payment for any Deliverable that has not been provided to the LCO at the time of termination.

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Copyright

Contract researchers are expected to assign copyright to the LCO, but will retain moral rights to their work. Contract researchers will be given credit for their work when the LCO publishes materials resulting from their work in any format. Contract researchers may write separate materials, such as articles, arising out of their research for the LCO, with acknowledgement that the work was originally carried out for the LCO. Applicants are encouraged to review the LCO's *Policy on Copyright & Attribution*, available on the LCO website at <http://www.lco-cdo.org/en/copyright-attribution-policy>.