

LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP Interim Report

PROJECT BACKGROUND

Project Purpose

The law of legal capacity, decision-making and guardianship governs how decisions related to property, treatment and personal care are made in situations where individuals' decision-making abilities are in some way impaired, but decisions must nonetheless be made. The *Substitute Decisions Act* (SDA) and the *Health Care Consent Act* (HCCA) create a complex framework through which decisions are made in such cases by substitutes, appointed in a variety of ways. These substitutes are most often family members, such as the parents, adult children or siblings of the person who requires assistance with decision-making. These laws have a profound impact on the wellbeing of the individuals who fall within their scope, addressing as they must both the protection of the autonomy of the affected individuals and the risks of abuse and exploitation of individuals who may be vulnerable.

During the Law Commission of Ontario's (LCO) two projects on the law as it affects persons with disabilities and the law as it affects older adults, issues about capacity and decision-making were identified as a central priority for reconsideration and reform by people in both communities, reflecting considerable concern about how the law was operating in practice, and its disproportionate impact on the autonomy, security, dignity and inclusion of older adults and persons with disabilities. As well, since the law reforms of the 1990s which resulted in the current statutory framework, there have been significant demographic, social and attitudinal changes, as well as important developments on the international stage. In recent years, many jurisdictions in Canada and abroad have re-examined their laws in this area.

The LCO has therefore undertaken a project to examine and recommend reforms to Ontario's legal capacity, decision-making and guardianship laws related to property, personal care and treatment decisions. In doing so, the LCO will apply the principles and considerations identified in its *Framework for the Law as It Affects Older Adults* and *Framework for the Law as it Affects Persons with Disabilities*.

Key Areas for Reform

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

1. **Improving access to the law**, and in particular addressing concerns regarding the court-based mechanisms under the *Substitute Decisions Act*;

2. **Promoting understanding of the law** among those directly affected by the law, family members and others who are acting as substitute decision-makers, and the professionals and service providers who must apply it in the course of their responsibilities;
3. **Strengthening the protection of rights under the *Health Care Consent Act*** by improving the quality of assessments and the provision of rights information to those found legally incapable;
4. **Reducing inappropriate intervention** by providing more options to persons who cannot make decisions independently, and creating more flexible and limited types of appointments;
5. **Increasing accountability and transparency for personal appointments**, so as to address widespread concerns regarding abuse and misuse use of powers of attorney; and
6. **Enabling greater choice of substitute decision-makers**, in response to the needs of the growing number of individuals who do not have family or close friends who are able, willing and have the skills to take on this important role.

What We Have Done So Far

- The LCO formed a project Advisory Group that includes representatives from government, adjudicative bodies, the legal community, service providers, academics and experts, and a wide range of community and advocacy organizations.
- In 2013, the LCO conducted extensive preliminary consultations in order to identify the scope of the project, including interviews with approximately 70 individuals from a diversity of experiences and perspectives.
- As well as conducting considerable internal research, the LCO commissioned research papers from experts in the field on issues related to this project. Four of these expert papers have been publicly released and are available on the LCO's website.
- In mid-2015, the LCO released a comprehensive *Discussion Paper* outlining issues and options for reform, together with a much shorter *Summary of Issues for Consultation*.
- Throughout the summer and fall of 2015, the LCO conducted extensive public consultation, holding 30 focus groups, receiving written submissions and consultation questionnaires, and holding a full-day consultation event for diverse stakeholders. In all the LCO heard from approximately 600 individuals and organizations.

The Interim Report

The LCO has now released a thorough *Interim Report*, which analyzes issues in this area of the law, reviews feedback and information received through our public consultation and research, and proposes draft recommendations for reform to law, policy and practice in this area. It is accompanied by a much shorter *Summary of Issues and Proposed Recommendations*, which provides a brief overview of the key issues raised in the project, and of the LCO's proposed recommendations.

Next Steps

The LCO will be receiving feedback on the analysis and proposed recommendations outlined in the *Interim Report* until **Friday, March 4, 2016**. This feedback will be considered in the development of a *Final Report*.