

Legal Capacity, Decision-making and Guardianship Interim Report



When a person is not able to make a necessary decision independently, for example, because of an illness or disability, Ontario law allows a “substitute”, usually a family member, to be appointed to make the decision on that person’s behalf. Because this takes the right to make the decision away from the person, this is a serious step to take.

Basic Facts About the Law

A substitute decision-maker may be appointed where a person does not understand the information relevant to a necessary decision, or is not able to appreciate the consequences of a decision.

Substitute decision-makers can be appointed to make decisions about:

- health, dental and other kinds of treatment decisions;
- diet, safety, living arrangements, clothing, hygiene and similar personal matters; and
- property and financial decisions, such as banking, investments, buying or selling a house, and similar matters.

Substitute decision-makers can be appointed in different ways.

- A person can make a “power of attorney” appointing someone else to make decisions for them.
- The courts or government can appoint a “guardian” to make decisions.
- If a decision about treatment is necessary and there is no power of attorney or guardian to make it, a family member will be automatically appointed to do so.

Older persons who develop dementia, persons with mental health or developmental disabilities, persons who have an acquired brain injury, and those with severe illnesses are more likely to be unable to make decisions independently, whether for a short or long time, and to be affected by these laws. Many people will be affected by these laws at some point in their lives, whether because they are unable to make decisions independently, or because they are assisting a family member or friend who cannot make decisions independently.

Concerns have been expressed that these laws are not operating as they should; that substitute decision-makers may misuse their roles; that people may inappropriately lose control over their own decisions; and that it is hard for people to assert their rights.

The Law Commission of Ontario (LCO)’s Interim Report on Legal Capacity, Decision-making and Guardianship proposes 54 draft recommendations for changes to laws, policies and programs relating to legal capacity, decision-making and guardianship.



Concerns about the Law

Families and people directly affected by the law may have difficulty enforcing their rights or resolving disputes, because the court-based system that addresses issues related to powers of attorney and guardianship is seen as costly, complicated and intimidating.

The Interim Report proposes:

- *Transferring decisions about these matters away from the courts to an administrative tribunal, the Consent and Capacity Board;*
- *Reforming the Consent and Capacity Board to help it work effectively in this area;*
- *Strengthening the supports available to individuals, such as Legal Aid and “section 3 counsel”;*
- *Exploring the possibilities for specialized mediation programs; and*
- *Giving the Public Guardian and Trustee more options when it has completed an investigation.*

Many people who interact with this area of the law do not understand it. This includes not only people directly affected and their families, but also professionals and service providers who have to apply the law. This is one of the reasons that the law is not always correctly applied.

The Interim Report proposes:

- *Identifying in the law an institution with a clear role for coordinating the development of information and education in this area;*
- *Creating a central clearinghouse for information;*
- *Strengthening the provision of information to families and individuals directly affected under the Health Care Consent Act;*

- *Strengthening the role of the health regulatory colleges and professional educational institutions; and*
- *Clarifying areas of the law where there is confusion.*

There are concerns about the quality of assessments of legal capacity under the *Health Care Consent Act*, so that people may be incorrectly found incapable or capable of making a decision. When a person is found legally incapable of making a decision, they may not be appropriately told about their rights.

The Interim Report proposes:

- *Creating official guidelines for assessing capacity and minimum standards for providing rights information;*
- *Exploring means of providing expert and independent advice to those that need it most;*
- *Using existing institutions to provide better oversight and monitoring in this area; and*
- *Monitoring and evaluating these changes, to see if more needs to be done to correct the problem.*

It is important that people maintain as much control over their lives as possible, and that the right to make decisions not be taken away unless it is absolutely necessary.

The Interim Report proposes:

- *That service providers and those conducting assessments accommodate the needs of those who may lack the ability to make decisions independently;*
- *Where a substitute decision-maker is appointed, that it be clear that attention must be paid to the values and wishes of the person for whom they are making decisions;*



- That an option be created to allow individuals to appoint someone to help them to make decisions, as opposed to making decisions for them;
- That more attention be paid, when appointing a guardian, to whether there are other, less intrusive options;
- That there be better opportunities to regular review whether a guardian is necessary; and
- That it be possible to appointed more limited guardians; for example, to make even a single decision.

Many people expressed concerns that persons appointed under a power of attorney may misuse or even abuse this appointment, for example, to improperly use the person's money or property for their own benefit.

The Interim Report proposes:

- When a person begins to act under a power of attorney, he or she be required to sign a Statement of Commitment that acknowledges their responsibilities under the law and the consequences of not fulfilling them;
- When a person begins to act under a power of attorney, he or she deliver Notices of Attorney Acting to persons specified under the power of attorney; and
- Individuals creating a power of attorney have the option to also appoint a "Monitor", with specified powers and duties, whose role is to make reasonable efforts to make sure that the person appointed is fulfilling her or his responsibilities.

As society changes, fewer people have family or friends who are willing and able to act as substitute decision-makers, and have the skills to do so. Currently, where this is the case, the Public Guardian and Trustee may take on this role.

The Interim Report proposes:

- Allowing a individuals to specify family members whom they do not want automatically appointed under the Health Care Consent Act;
- Focussing the role of the Public Guardian and Trustee on providing expert and trustworthy services for those who cannot be appropriately served by other options, whether because of their social isolation, their family dynamics, or the challenging nature of their needs;
- Exploring whether community organizations can take on a role in day-to-day decision-making; and
- Exploring whether it is feasible for government to establish a licensing and regulatory scheme for professional representatives, with appropriate safeguards and oversight.

We believe that changes are more likely to be successful if they are based on broad consultations with those affected. In developing our proposals, we consulted with older persons and persons with disabilities, their families, health care workers, lawyers, judges, government, community organizations, service providers, advocates and others. We would like to hear from you, if you have comments about our proposals. If you would like to comment, please see how at "Share Your Feedback" <http://www.lco-cdo.org/en/capacity-guardianship-interim-report-share-your-feedback>.





The LCO's Interim Report on Legal Capacity, Decision-making and Guardianship is available online along with information about the LCO's other projects at www.lco-cdo.org

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