LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Legal Capacity, Decision-Making and Guardianship

Interim Report: Summary of Issues and Draft Recommendations

October 2015

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

SUMMARY OF ISSUES AND DRAFT RECOMMENDATIONS

October 2015

Available online at www.lco-cdo.org
ISBN: 978-1-926661-78-0

Contents

I. REFORMING LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHP LAW: AN INTRODUCTION AND OVERVIEW 1
Main Point of the Chapters 1
Background 1
Issues 2
II. TESTS FOR LEGAL CAPACITY: BALANCING AUTONOMY AND LEGAL ACCOUNTABILITY 4
Main Point of the Chapter 4
Background 4
Issues 4
III. ASSESSING LEGAL CAPACITY: IMPROVING QUALITY AND CONSISTENCY 6
Main Point of the Chapter 6
Background 6
Issues 7
IV. SUBSTITUTE DECISION-MAKING AND ALTERNATIVES: STRENGTHENING DECISION-MAKING PRACTICES AND PROVIDING OPTIONS FOR DIVERSE NEEDS 9
Main Point of the Chapter 9
Background 9
Issues 10
V. PERSONAL APPOINTMENT PROCESSES: ENHANCING CLARITY AND ACCOUNTABILITY 13
Main Point of the Chapter 13
Background 13
Issues 13
VI. RIGHTS ENFORCEMENT AND DISPUTE RESOLUTION: EMPOWERING INDIVIDUALS 15
Main Point of the Chapter 15
Background 15
Issues 16
VII. EXTERNAL APPOINTMENT PROCESSES: INCREASING FLEXIBILITY AND REDUCING UNNECESSARY INTERVENTION 18
Main Point of the Chapter 18
Background 18
Issues 18

VIII. EXPANDING CHOICE OF DECISION-MAKING REPRESENTATIVE 20
Main Point of the Chapter 20
Background 20
Issues 20
IX. EDUCATION AND INFORMATION: UNDERSTANDING RIGHTS AND RESPONSIBILITIES 23
Main Point of the Chapter 23
Background 23
Issues 24
X. PRIORITIES AND TIMELINES 26
XI. NEXT STEPS: RESPONDING TO THE INTERIM REPORT 28

I. REFORMING LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHP LAW: AN INTRODUCTION AND OVERVIEW

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapters I, II, and III
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapters

Chapter I of the *Interim Report* provides an overview of the project process, scope and themes, which focus on reducing unnecessary and inappropriate intervention, improving access to the law and enhancing the clarity and coordination of the law. Chapter II describes in brief Ontario's legal capacity and decision-making laws, and identifies their core strengths and shortcomings. Chapter III analyzes the application of the LCO *Frameworks* to these laws, including the implications of the principles, and analysis of the contexts in which the law operates and the differential impact on particular groups.

Background

The Law Commission of Ontario (LCO) has undertaken a project to examine and recommend reforms to Ontario's legal capacity, decision-making and guardianship laws, and in particular the *Substitute Decisions Act* and the *Health Care Consent Act*.

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. The result was legislation which was progressive and innovative in its approach to the issues, largely philosophically consistent and reasonably well coordinated. It is also extremely complicated, with multiple layers, pathways, tests and institutions. Stakeholders have identified a number of ways in which implementation of these laws has fallen significantly short of the legislative intent. As well, since the passage of this legislation, there have been significant demographic, social and attitudinal changes, as well as important developments on the international stage.

These laws affect a substantial portion of Ontario's population, including persons with significant temporary or chronic illnesses, with aging related disabilities such as dementia, with mental health disabilities, acquired brain injuries or developmental disabilities. These laws of course also have a major impact on families and caregivers, as well as on a wide array of professionals and service providers. Most Ontarians will, at some point in their personal or professional lives, encounter this area of the law.

In carrying out this project, the LCO is applying 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.* These are available on the LCO's website at http://www.lco-cdo.org/en/older-adults-final-report-framework and http://www.lco-cdo.org/en/disabilities-final-report.

The LCO conducted preliminary consultations and extensive research, both internal and commissioned, throughout 2013, and released a comprehensive *Discussion Paper* in mid-2014. This was the subject of extensive public consultation. 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 recommendations for reform to law, policy and practice in this area. The LCO will consider feedback on the content of the *Interim Report* and the draft recommendations in developing a *Final Report* for release.

This *Summary of Issues and Draft Recommendations* provides a brief overview of the key issues raised in the project, and of the LCO's draft recommendations. Those seeking more information about the issues and options raised in this *Summary of Issues and Draft Recommendations* are encouraged to refer to the full *Interim Report* http://www.lco-cdo.org/en/capacity-guardianship-interim-report or to its *Executive Summary*, which can be found at http://www.lco-cdo.org/en/capacity-guardianship-interim-report-executive-summary. **This document provides only summaries of the draft recommendations. Readers are encouraged to review the full text of those draft recommendations in which they have an interest, which can be found at http://www.lco-cdo.org/en/capacity-guardianship-interim-report-appendixA.**

Issues

The LCO *Frameworks* are centred on six principles, which are aimed at an overarching goal of substantive equality for persons with disabilities and older adults. These principles are:

1. Respecting dignity and worth;
2. Promoting inclusion and participation;
3. Fostering autonomy and independence;
4. Respecting the importance of security/facilitating the right to live in safety;
5. Responding to diversity; and
6. Understanding membership in the broader community/recognizing that we all live in society.

The principles are to be interpreted in the context of the lived experience of older adults and persons with disabilities. In applying the principles, it should be understood that they may both support each other and at times be in tension.

These principles assist in identifying issues and guiding law reform. They may also assist in interpreting and applying laws, policies and practices in this area.

The *Frameworks* incorporate the concept of progressive realization as a means of advancing towards fulfilment of the principles. The concept of progressive realization involves an understanding that achievement of the principles is an ongoing process, as circumstances, understandings and resources develop. Reforms 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.

Allied to this focus on progressive realization is an emphasis on actively monitoring the outcome of reforms. This assists in determining whether laws continue to be in harmony with the principles and whether their aims are being achieved. This is also in keeping with the current emphasis in government on evidence-based policy.

Here is a summary of the LCO's draft recommendations in this area:

1. **The Ontario government include in reformed laws provisions that are informed by the LCO *Framework* principles and which set out the purposes of the legislation and principles to guide interpretation of the legislation.**

2. **The Ontario government accompany reforms with a strategy for reviewing their effect within a designated period of time.**

II. TESTS FOR LEGAL CAPACITY: BALANCING AUTONOMY AND LEGAL ACCOUNTABILITY

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter IV
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Chapter IV addresses the foundational concept of legal capacity, and the debates regarding the continuing appropriateness of its use as a foundation for this area of the law. It considers proposals to move to an approach in which all have a right to legal capacity in all circumstances, and outlines a proposed approach based on the human rights concept of accommodation.

Background

The concept of "legal capacity" underlies this entire area of the law, providing both its threshold and its rationale. This concept is both complex and contested. Under the *Substitute Decisions Act* and *Health Care Consent Act*, where a decision must be made and an individual lacks "legal capacity" to make that decision, a substitute decision-maker is appointed to do so. This means that concepts of legal capacity are closely connected to concerns about autonomy, personhood and security, in that it is tied to the ability to make independent decisions and take responsibility for their consequences.

Ontario has adopted a functional and "cognitive" approach to legal capacity. This means that capacity is determined by an individual's ability to "understand and appreciate" the information relevant to the decision. Legal capacity does not depend on an individual's medical status or on the wisdom of her or his decisions. The *Substitute Decisions Act* and *Health Care Consent Act* set out specifically what information an individual must understand and appreciate in order to have capacity to make different decisions, such as decisions about admission to long-term care, to make decisions about health care treatments, or to make a power of attorney for property, for example. This means that tests for legal capacity are specific to their particular "domain" or issue.

Issues

There are concerns that Ontario's approach to legal capacity is, in practice, poorly understood and applied. As a result, individuals may, for example, inappropriately have rights removed. These concerns are addressed throughout the *Interim Report.*

There is also a fundamental critique of Ontario's approach to legal capacity. This is connected to some interpretations of the Article 12 of the *Convention on the Rights of*

Persons with Disabilities and the concept of supported decision-making, both of which are subjects of considerable debate and controversy.

Some have proposed that legal capacity is an irremovable right of all individuals in all circumstances and that it is in fact a human right attributable to all. In this view, the removal of legal capacity is a denial of human rights. This approach proposes that substitute decision-making is never acceptable, and must be abolished: instead, all individuals must be provided with the supports that they need to enable them to make decisions that have legal effect. Individuals also must have the right not to exercise their right to supports, and to terminate or change a support relationship at any time.

This view has itself been subject to criticism. It is seen as proposing a legal framework in which individuals with significant impairments to their decision-making abilities may be highly vulnerable to abuse with no meaningful recourse. As well, critics see it as in some cases inappropriately allocating responsibility for potentially significant negative legal consequences for decisions to individuals who never understood the risks or negative outcomes. Service providers have also raised concerns regarding clarity and accountability for transactions in situations where all have legal capacity.

The LCO's draft recommendations propose that the functional and cognitive approach to legal capacity be retained. However, the human rights concept of accommodation should be integrated into this approach, so that individuals are understood to have legal capacity where the test can be met by the individual with the provision of appropriate supports and accommodations short of undue hardship.

Here is a summary of the LCO's draft recommendations in this area:

3. **Ontario retain a functional and cognitive approach for legal capacity.**

4. **Ontario's legal capacity and decision-making legislation be amended to clarify that legal capacity exists where an individual can meet the test with appropriate accommodations, and to require that assessments of capacity be carried out with appropriate accommodations.**

III. ASSESSING LEGAL CAPACITY: IMPROVING QUALITY AND CONSISTENCY

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter V
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Chapter V outlines Ontario's multiple, overlapping systems for assessing legal capacity, under the *Substitute Decisions Act*, *Health Care Consent Act* and *Mental Health Act*. It identifies barriers and challenges within each of these systems, as well as in the ways in which they relate to each other. Particular concerns have been raised regarding access to Capacity Assessments under the *Substitute Decisions Act* and the lack of meaningful rights protections under the *Health Care Consent Act*.

Background

In keeping with its domain-specific approach to legal capacity, Ontario has several systems for assessing the legal capacity to make particular types of decisions. These differ in terms of who carries out the assessment, the procedural rights of individuals being assessed, information and supports available to those assessed, the costs for assessment and the consequences of a finding of incapacity. The four formal mechanisms are:

1. Examination by treating physician of capacity to manage property upon admission to and discharge from a psychiatric facility *(Mental Health Act*);
2. Assessment by specialized Capacity Assessor of capacity to manage property or personal care (*Substitute Decisions Act*);
3. Evaluation by health practitioner of capacity to consent to treatment (*Health Care Consent Act*); and
4. Evaluation by capacity evaluator of capacity to consent to admission to long-term care and of capacity to consent to personal assistive services (*Health Care Consent Act*).

Legal capacity is also commonly informally assessed by service providers, as part of their responsibility to determine whether a particular individual can enter into an agreement or contract, or agree to a service.

These various mechanisms for assessing capacity overlap and interact in complicated and sometimes confusing ways.

Issues

A number of concerns have been identified regarding the various mechanisms for assessing legal capacity.

Misuse of assessments: The purpose of assessments may be misunderstood. They may also be misused as means of controlling others, furthering family disputes or attempting to achieve goals beyond the purposes of the legislation.

Barriers to Assessments of Capacity: Assessments by designated Capacity Assessors under the *Substitute Decisions Act* are provided on a consumer choice model. Persons seeking such an Assessment select an Assessor from a list maintained by the Capacity Assessment Office and are responsible for the cost of the Assessment. Low income or marginalized persons may find it difficult to navigate this system or to fund an Assessment. Because such Assessments are often necessary for entry to or exit from guardianship, this may have significant implications.

Interaction between systems of assessment: There is widespread confusion about the roles and operation of Ontario's multiple mechanisms for assessing capacity.

Lack of clear standards for assessments under the *Health Care Consent Act:* There is no guidance in the *Health Care Consent Act*, regulations or official policies, forms or training materials for assessing capacity for consent to treatment, personal assistive services or admission to long-term care. Standards are set by the multiple health regulatory colleges. As well, some organizations have taken the initiative to develop training materials or guides. The lack of clear standards, together with shortfalls in training or education within some professions, creates confusion and anxiety in this area, and may leave some professionals without the supports they require to effectively carry out this important role.

Rights protections for assessments under the *Health Care Consent Act:* Individuals found to lack legal capacity under the *Health Care Consent Act* are entitled to receive rights information, to enable them to access procedural protections around this important determination. However, many stakeholders raised significant concerns about widespread inadequate provision of rights information, across all *Health Care Consent Act* settings. This includes concerns that in many cases, rights information is not being provided at all.

Here is a summary of the LCO's draft recommendations in this area:

5. **Include in the *Substitute Decisions Act* a clear statement of purposes of Capacity Assessment, and amend Form C accordingly.**

6. **Amend the *Mental Health Act* to require an examination of capacity to manage property where there are reasonable grounds to believe that the person may lack legal capacity and negative consequences may result.**

7. **The Ontario Government develop and implement a strategy for removing barriers and increasing access to Capacity Assessments under the *Substitute Decisions Act*.**

8. **Create official *Guidelines* for assessments under the *Health Care Consent Act*.**

9. **Include in the *Health Care Consent Act* minimum standards for the provision of rights information to persons found to lack legal capacity.**

10. **The Ontario Government explore means of providing independent and expert rights advice for persons found incapable under the *Health Care Consent Act*, for example by developing targeted programs.**

11. **Health Quality Ontario take steps, within its mandate, to improve the quality of assessments in the health care setting.**

12. **The Ministry of Health and Long-Term Care encourage and support long-term care homes to better address their responsibilities under the Bill of Rights regarding consent, capacity and decision-making.**

13. **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 address issues identified by the LCO.**

14. **Should the recommendations related to capacity and consent in the health care setting be implemented, the Government of Ontario actively monitor and evaluate their success with a view to taking more wide-ranging initiatives if necessary.**

IV. SUBSTITUTE DECISION-MAKING AND ALTERNATIVES: STRENGTHENING DECISION-MAKING PRACTICES AND PROVIDING OPTIONS FOR DIVERSE NEEDS

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter VI
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

This Chapter explores alternatives to substitute decision-making, in response to desires for less restrictive approaches to decision-making impairments. Particular attention is paid to proposals to either replace or supplement substitute decision-making with an approach termed "supported decision-making".

Background

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* and *Health Care Consent Act, 1996*, where a person does not meet the threshold for legal capacity and a decision is required, another person – a substitute decision-maker – will be in some way appointed to make that decision.

In recent years, as the social model of disability has been more widely accepted and human rights approaches have continued to grow in influence both internationally and domestically, 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". The creation of the *Convention on the Rights of Persons with Disabilities,* which addresses the issue in Article 12, has added urgency to the discussion. The issues raised here are closely linked to calls for re-evaluation of the concept of legal capacity, discussed in the previous section.

This is one of the most controversial issues in this area of the law, as well as one of the most difficult, raising profound conceptual and ethical questions, as well as considerable practical challenges. Complicating this discussion further are the highly variable meanings given to "supported decision-making", even among its proponents. Various forms of supported decision-making have been enacted in some Western Canadian jurisdictions and several European countries, and have been proposed in a number of commonwealth jurisdictions.

Some propose a future in which all substitute decision-making, including through powers of attorney, is abolished and replaced by a system of supports. Others see supported decision-making as a less restrictive alternative to substitute decision-making and more suited to some circumstances than others. Some believe that supporters can be appointed through external appointments, while others see this as fundamentally incompatible with the philosophy underlying the concept. Some propose a highly formal mechanism with extensive checks and balances, while others hope for something flexible and informal.

The LCO has considered supported decision-making as involving the following four elements:

1. Supported decision-making does not require a finding of lack of capacity;
2. In such arrangements, legal responsibility for the decision remains with the supported individual;
3. These arrangements are based on the consent of the individual who may require assistance in making decisions; and
4. It is based on relationships of trust and intimacy.

Consideration of these proposals requires that attention be paid to two linked issues. The first is decision-making practices, which includes all of those values and daily practices through which those who surround a person with impaired decision-making abilities approach the practical realities of reaching particular decisions. The second is legal accountability frameworks, which come into effect when decisions reached through decision-making practices must be put into effect in the public sphere, for example, by entering into a contract.

In the more private realm of decision-making practices, considerations of autonomy, security and dignity are pre-eminent, although even decisions in this realm might affect others (such as other family members) and this may also have to be considered. In the more public realm of decision-making where decisions may have significant practical and legal consequences, not only for the individual but for third parties, considerations of clarity, certainty, and appropriate apportionment of accountability and liability must also be given significant weight.

Issues

Supported decision-making was the subject of strong opposing views during the LCO's public consultations. 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. The key concerns raised centred on the potential for

abuse of such a system by family members and third parties, the question of its suitability for all groups affected by this area of the law, and on what was perceived to be the lack of clarity surrounding responsibility and liability inherent in such a system.

It was also pointed out that Ontario's laws already include a number of provisions requiring substitute decision-makers to support the participation of individuals in decision-making to the greatest degree possible, and to take into account wishes, values and beliefs when making decisions. It was recommended that these provisions be strengthened and their implementation improved, so as to better promote the autonomy of individuals who fall under these laws.

The issues in this area raise considerable challenges. The legislation applies to all, but the needs of those affected vary considerably from group to group, across time and across types of decisions. Desires for non-marginalizing approaches and for greater autonomy may sit uneasily with needs for clarity and accountability and with concerns about abuse and misuse. The effort to find new approaches that will better meet needs may result in risks to individuals who tend to be marginalized and vulnerable, and for whom errors in approaches may have serious, long-term consequences.

The LCO's proposed approach to reform in this area centres on:

- Ensuring that **substitute decision-making is more truly a last resort**: proposed reforms to this end are found throughout the *Interim Report*;
- Promoting **positive decision-making practices**, such as further encouraging the involvement of individuals in decisions to the greatest degree practicable and ensuring that decisions are attention to and reflect to the greatest degree possible the values, preferences and life goals of the individual;
- Ensuring that **legal accountability structures mirror, as closely as possible, the actual decision-making process**;
- Providing **options to meet the diverse needs** of those affected by this area of the law;
- Taking a **progressive realization approach** by building on existing good practices, providing new options with carefully considered safeguards, and evaluating the evidence on which reform is based.

Here is a summary of the LCO's draft recommendations in this area:

15. **The Government of Ontario implement a statutory process that addresses consent to detention in long-term care or retirement homes for persons who lack legal capacity and for whom detention is required to address vital concerns for security or safety.**

16. **Statutory requirements for substitute decision-making with respect to property be clarified with respect to the purpose of such decision-making and attention to the values and wishes of those for whom decisions are made.**

17. **Terminology related to substitute decision-making be clarified to emphasize that the substitute decision-maker is not intended to impose his or her own values in a pure best interests approach.**

18. **The Ontario Government take steps to clarify the scope and content of the human rights duty to accommodate as it applies to service providers with respect to legal capacity and decision-making.**

19. **The Ontario Government enact legislation to enable individuals to enter into support authorizations, with appropriate safeguards, for routine or day-to-day decisions related to property and personal care, where the individual has the ability to understand and appreciate the nature of the authorization.**

20. **The Ontario Government examine the practicalities of a statutory legal framework for network decision-making which would permit the formal establishment of networks of multiple individuals, including non-family members, to work collectively to facilitate decision-making for individuals who may not meet the test for legal capacity, with a view to developing and implementing such a legal framework if feasible.**

V. PERSONAL APPOINTMENT PROCESSES: ENHANCING CLARITY AND ACCOUNTABILITY

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter VII
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Concerns about abuse and misuse of powers of attorney have been a dominating concern among stakeholders for this project. Chapter VI examines proposals for increasing transparency and accountability for those acting under powers of attorney.

Background

Powers of attorney allow individuals to choose for themselves who will make decisions for them if necessary, and to create tailored instructions or restrictions for those decision-makers. They are highly valued tools. However, the flexibility and accessibility that make powers of attorney so valuable also make them susceptible to abuse and misuse. Indeed, the LCO heard widespread concern about the abuse of powers of attorney.

Powers of attorney rely on the creator to screen potential appointees to ensure that they are capable of undertaking the associated duties, and are willing and suitable to do so. Ontario's legislation regarding powers of attorney aims to make these tools widely accessible. As a result, there are relatively few practical or procedural barriers to their creation. There is a risk is that those creating powers of attorney may not fully understand the implications, and may put themselves at risk of abuse, neglect or exploitation.

As well, as private appointments, these powerful documents are amenable to very little scrutiny. 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 powers of attorney also make it harder for those individuals to monitor the activities of the attorney or to identify or seek help regarding inappropriate or abusive behaviour.

Those appointed as 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. They may not understand their statutory responsibilities, or may not have the skill to appropriately carry them out, and so may inadvertently misuse their powers.

Issues

There appear to be three key issues underlying misuse of powers of attorney:

- the widespread lack of knowledge or understanding of the responsibilities associated with these instruments;
- a lack of transparency about the contents or existence of these documents which makes it difficult to ensure that they are being implemented as intended; and
- a lack of meaningful mechanisms for accountability when misuse is suspected.

It is important to prevent abuse and misuse. However, in doing so, it is important that reforms make efficient use of limited government resources and do not:

- overly increase burdens for family caregivers who are often carrying out challenging responsibilities with very few supports and are in most cases doing the best they can, or
- make powers of attorney inaccessible to those who would benefit from them.

Weighing these factors, the LCO has *not* recommended:

- requiring powers of attorney to be completed with the assistance of a lawyer,
- the creation of a registry, or
- mandatory reports or regular audits of persons acting under these documents.

Here is a summary of the LCO's draft recommendations in this area:

21. **Persons accepting appointment under a personal appointment within the *Substitute Decisions Act* be required to sign, prior to acting under the appointment, a Statement of Commitment that specifies the statutory responsibilities of the appointee, the consequences of failure to fulfil those responsibilities, and acceptance by the appointee of these responsibilities and the accompanying consequences.**

22. **Persons acting under a power of attorney be required to deliver, at the time they begin to exercise authority under the document, a Notice of Attorney Acting to persons specified in the power of attorney, unless the grantor has opted out of the Notice of Attorney Acting provisions.**

23. **Creation in the *Substitute Decisions Act* of a specified role of "Monitor", with powers to review records and to visit and speak with the person in question, and responsibilities to make reasonable efforts to ensure that statutory responsibilities are being complied with: this role would be optional for a power of attorney, but mandatory for a personal support authorization.**

VI. RIGHTS ENFORCEMENT AND DISPUTE RESOLUTION: EMPOWERING INDIVIDUALS

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter VIII
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Access to the law is fundamental to the effective functioning of all aspects of legal capacity, decision-making and guardianship laws. Improvements in accessibility can increase the flexibility, effectiveness and coordination of this area of the law. Chapter VIII examines barriers to access to the law, particularly for issues under the *Substitute Decisions Act*.

Background

Currently, most issues under the *Substitute Decisions Act*, including the processes for the appointment, variation and termination of guardianships and the oversight of powers of attorney, fall within the jurisdiction of the Ontario Superior Court of Justice.

The Consent and Capacity Board, an expert, specialized administrative tribunal, is responsible for reviewing findings of incapacity. It also oversees a wide range of issues under the *Health Care Consent Act*, including determining whether a substitute decision-maker under that Act is acting in compliance with the requirements of the legislation, providing directions when the appropriate application of the *Health Care Consent Act* is not clear, and appointing decision-making representatives under that legislation.

Effective access to the law affects every other aspect of legal capacity, decision-making and guardianship laws. Lack of accessibility may create incentives for families to adopt riskier informal approaches or to attempt to solve their problems in creative ways that are not in harmony with the intent of the legislation, for individuals to abandon attempts to enforce their rights, or for parties with superior access to resources necessary to navigate the system to misuse it for their own ends.

Throughout this project, access to the law has been a dominant concern. This is especially true for the processes and dispute resolution mechanisms under the *Substitute Decisions Act*. There are concerns with the operations of the Consent and Capacity Board, such as the ongoing debate as to whether it is overly focussed on legal rights or insufficiently so. Overall, however, the Consent and Capacity Board is seen as an appropriate forum for addressing these issues, and as providing relatively accessible and timely adjudication.

The court-based adjudicative mechanism under the *Substitute Decisions Act* has been critiqued as:

- being complex and difficult to navigate,
- having limited ability to tailor its processes to the specialized needs of those affected by this area of the law, and
- because of its relative inaccessibility, lacking in the flexibility needed to address the fluctuating or evolving nature of legal capacity.

As well, most disputes in this area of the law involve parties who have had and may continue to have ongoing relationships: a number of participants in the LCO's consultations expressed a desire for greater use of less adversarial approaches in appropriate contexts.

Issues

The LCO considered a number of potential approaches to improving the accessibility of the law under the *Substitute Decisions Act*, including:

- expansion of the Public Guardian and Trustee's investigative mandate,
- the creation of a specialty court, and
- the provision of expanded advocacy and navigational supports to those directly affected by these laws.

All approaches have both benefits and downsides. The LCO's proposed approach is centred on moving oversight of the *Substitute Decisions Act* to a reformed and expanded Consent and Capacity Board. This is a significant step, and would involve start-up costs in the short-term. However, the LCO believes that this is, over the longer term, the most forward looking, cost-effective, realistic and practical option for reducing barriers to accessing the law.

Such a reform would enable the development and application of specialized expertise in this area. If properly implemented, the move to an administrative tribunal could provide a more accessible and less intimidating form of justice for the often vulnerable individuals affected by this area of the law. Bringing together all matters related to legal capacity and decision-making could also improve system coordination.

Here is a summary of the LCO's draft recommendations in this area:

24. **Jurisdiction over matters under the *Substitute Decisions Act* be transferred to a reformed and expanded Consent and Capacity Board.**

25. **This transfer of jurisdiction be accompanied by amendments to the Rules of Procedure and composition of the Consent and Capacity Board, to strengthen its expertise and enable it to tailor its process to these new responsibilities.**

26. **The Consent and Capacity Board be provided with additional powers, including enabling it to provide directions with respect to the wishes of the person and to determine compliance of substitute decision-makers with obligations under the *Substitute Decisions Act.***

27. **The Ontario Government explore the benefit of giving the Public Guardian and Trustee discretion, upon the completion of a "serious adverse effects" investigation, to forward a written report to the Consent and Capacity Board, which would be empowered to order training, mediation or regular reporting.**

28. **The legislation be amended to make it an offence to impede or interfere with "section 3 counsel" in the fulfilment of their responsibilities.**

29. **Clear qualification standards, including minimum training, be developed for lawyers appointed as "section 3 counsel".**

30. **Legal Aid Ontario consider enhancing its initiatives in this area, including expansion of funding of matters under the *Substitute Decisions Act* and additional supports for lawyers who provide Legal Aid funded services in this area.**

31. **If adjudication for matters under the *Substitute Decisions Act* remains with the courts, expansion of access to specialized mediation in this area be explored.**

32. **In preparing the Consent and Capacity Board for an expanded role, consideration be given to whether more flexible time limits, to permit greater scope for alternative dispute resolution, should be available for some specific matters.**

33. **The Consent and Capacity Board develop a pilot project to explore the possibilities of a specialized mediation program for selected types of applications.**

VII. EXTERNAL APPOINTMENT PROCESSES: INCREASING FLEXIBILITY AND REDUCING UNNECESSARY INTERVENTION

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter IX
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Chapter IX considers reforms to make Ontario's external appointments (guardianships) more flexible, more tailored to the particular needs of individuals, and more truly a last resort.

Background

One of the values underlying the current legislation is the avoidance of unnecessary intervention. Currently, this value is imperfectly achieved. In particular, significant concerns have been expressed about the inappropriate use of guardianship. Guardianship is the most significant and least flexible form of intervention available in Ontario's legal capacity, decision-making and guardianship system. The *Interim Report* contains many draft recommendations that aim to reduce inappropriate or unnecessary interventions and to safeguard autonomy. Chapter IX focusses specifically on changes to external appointment processes to help ensure that guardianships are used only where and to the extent that no other alternative is available and appropriate.

Currently, guardians are appointed in two ways. Guardians for either property or personal care may be appointed by the court. Statutory guardianship, an administrative mechanism, is available for property matters. A statutory guardianship results in guardianship by the Public Guardian and Trustee: family members may then make an application to the Public Guardian and Trustee to replace it as guardian. The majority of Ontario's guardianships are entered into through the statutory guardianship process. Personal guardianships may be for specific areas of personal care only, while property guardianships are plenary.

Issues

Concerns have been voiced that the inflexibility and relative inaccessibility of external appointment processes may contribute to overly broad use of guardianships. Individuals under guardianship may face many barriers when attempting to regain their legal ability to make decisions independently. Many of the available mechanisms for challenging guardianships are passive, in that they require the person who has been found legally incapable to understand and actively assert their rights.

Statutory guardianship processes are intended to be relative simple and low cost as compared to court-based appointments. However, they tightly tie together the assessment of legal capacity not only with guardianship, but with guardianship by the Public Guardian and Trustee. There is no clear avenue for considering whether there may be a less intrusive means of meeting the individual's needs.

The LCO's draft recommendations focus on three goals:

1. identifying means to divert individuals from guardianship where appropriate;
2. limiting the scope of guardianships to those areas where decision-making assistance is truly necessary; and
3. limiting guardianships to those time periods when they are truly required.

Here is a summary of the LCO's draft recommendations in this area:

34. **Adjudicators considering the appointment of guardians be empowered to request submissions from any of the parties to the application on the potential for a less restrictive alternative or a report from a relevant organization 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.**

35. **Statutory guardianship be repealed and replaced by applications to the Consent and Capacity Board.**

36. **Adjudicators be required, when appointing a guardian, to consider whether that appointment should be for a limited time, be subject to a review at a designated time, or subject to a requirement that the guardian submit an affidavit at regular intervals indicating whether the need for guardianship has changed.**

37. **Court appointed guardians be required, upon request by the individual, to assist with the arrangement of re-assessments of capacity, no more frequently than every six months.**

38. **Guardians be required, should they believe an individual has regained legal capacity, to assist the individual to have the guardianship order terminated.**

39. **Adjudicators be permitted to make appointments for limited property guardianships where appropriate.**

VIII. EXPANDING CHOICE OF DECISION-MAKING REPRESENTATIVE

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter X
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

Chapter X examines the desirability and feasibility of expanding the options for professional or expert substitute decision-makers. Currently, the vast majority of substitute decision-makers are family members and close friends, with the Public Guardian and Trustee playing an important role where family or friends do not act. There are individuals who do not have meaningful or appropriate options in the current situation, and demographic and social changes suggest that challenges will continue to grow.

Background

Ontario laws give preference to family members to act as substitute decision-makers. 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, as well as often having a profound commitment to the wellbeing of the individual.

In keeping with this legislative preference, currently the vast majority of those who act as substitute decision-makers in Ontario are family members or close friends of those receiving assistance. There are a relatively small number of individuals who have as their substitute decision-makers a professional (such as a lawyer), or an organization (such as a trust company). The Public Guardian and Trustee acts as substitute decision-maker where:

- it has been appointed through a statutory guardianship for property and no replacement guardian has been appointed;
- it has been appointed by a court, usually in the context of a "serious adverse effects" investigation; and
- no person is identified through the hierarchical list in the *Health Care Consent Act*.

Issues

Changes in demographics and family structure have left growing numbers of individuals without family or close friends who are willing and able to act: trends indicate that these numbers are likely to continue to grow. As well, the challenges and burdens of the role of a substitute decision-maker mean that for some Ontarians, choosing among family or friends leaves them choosing the "least bad option", as lack of necessary skills or family dynamics

leave them without good choices. Finally, the current system of statutory guardianship leaves Ontario's Public Guardian and Trustee as often the guardian of first, rather than last, resort, a system which has been critiqued by some families and which may not make the most effective use of the Public Guardian and Trustee's expertise and resources.

The LCO has proposed as goals for reform in this area:

- ensuring that all those who lack legal capacity and require a substitute decision-maker to make necessary decisions have meaningful access to such assistance;
- ensuring that a range of options with appropriate safeguards be available to address the diverse needs of those who lack or may lack legal capacity, including a broader range of options beyond the family; and
- identifying a more effective focus for the vital role of the Public Guardian and Trustee.

Licensed and regulated professional guardians (also sometimes referred to as professional fiduciaries or professional representatives) have been proposed as a means of expanding choices for substitute decision-makers among those who are looking for expert and professional services or who do not have appropriate and available friends or family members to act for them. Such services are widely used in some other jurisdictions, most notably the United States. Experience in those jurisdictions highlights the risks of abuse and the importance of strong safeguards.

There may also be an appropriate role for community organizations. Community organizations already play a similar role as trustees for certain types of social benefits. These organizations are close to the community, provide a range of supports and have the ability to develop a deep understanding of the contexts and needs of the particular populations they serve. They therefore may have the ability to provide a more personal and holistic approach to the role of substitute decision-maker. They may also be able to serve populations that would not be able to access for-profit services or that might be challenging for families to adequately support. However, close attention must be paid to the potential for conflicts of interest and to the limitations in resources and expertise for these organizations.

Here is a summary of the LCO's draft recommendations in this area:

41. **The *Health Care Consent Act* be amended to allow individuals to exclude a particular individual or individuals from appointment under the hierarchy set out in that statute;**

42. **The role of the Public Guardian and Trustee be focussed on providing expert services for those who cannot be appropriately served by other options, whether because of their social isolation or family dynamics, or because their needs are so challenging that the expertise and professionalism of the Public Guardian and Trustee is required: this will require the implementation of a number of the other proposed draft recommendations;**

43. **Government explore the potential for community organizations to play a greater role in low-stakes, day-to-day decision-making, again with appropriate criteria and oversight;**

44. **Government explore the feasibility of establishing a licensing and regulatory system for professional decision-making representatives, as a means of offering a greater range of trustworthy options for those who prefer expert and professional substitute decision-making services and have the means to pay for such services, contingent on the inclusion of appropriate safeguards and oversight.**

IX. EDUCATION AND INFORMATION: UNDERSTANDING RIGHTS AND RESPONSIBILITIES

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter XI
For the full text of draft recommendations, see the accompanying document

Main Point of the Chapter

This is a complex area of the law. Ignorance and misunderstandings of the law, across multiple stakeholder groups and those directly affected, contribute to shortfalls in its implementation. Chapter XI considers reforms to improve the coordination, accessibility, effectiveness and strategic focus of education and information initiatives in this area.

Background

Reflecting the nature of the issues at stake and the diversity of those affected, this is a highly complicated and multifaceted area of the law. Misunderstandings are not surprising, but given the fundamental rights at issue, the consequences of ignorance or misunderstandings may be grave. Ontario law currently includes only limited entitlements to rights information or rights advice for persons found to be lacking or potentially lacking legal capacity. Ontario's laws were originally accompanied by the *Advocacy Act*, since repealed, which envisioned an extensive system for the provision of rights advice to persons affected by these laws.

There are numerous organizations that provide information on various aspects of Ontario's legal capacity and decision-making laws. However, there is no central, authoritative source for information. Organizations create and provide information relevant to their particular mandates and the needs of the specific groups they serve. It is not clear to those seeking information where they should look, or whether the information they find is accurate or appropriate to their needs: there is, for example, considerable mistaken application of information based on laws from other jurisdictions.

Nor is there any comprehensive strategic focus to the development and dissemination of information, so that efforts may be replicated or the needs of some groups overlooked. There are no required proactive means of informing substitute decision-makers about their duties and responsibilities: unless they take the initiative to research the law, they are unlikely to be aware of all of their obligations, or to have access to guidance in carrying out their significant responsibilities.

Issues

It is clear to the LCO, both from its own research and consultations, and from concerns expressed by key stakeholders, that there is widespread ignorance and misunderstanding of this area of the law. This ignorance and misunderstanding substantially contributes to shortfalls in implementation. Reforms to promote better understanding (and therefore better implementation) of the law, must consider the needs of four groups:

- persons directly affected (*i.e.,* those whose legal capacity is either lacking or in doubt);
- persons providing assistance as substitutes or, if the LCO's recommendations are implemented, supporters;
- professionals who are expected to provide expert implementation of the law (including health practitioners expected to assess capacity and obtain consent, and lawyers expected to create powers of attorney or to assist with disputes or rights enforcement); and
- third parties who interact with the law in the context of providing services or contracting with respect to a transaction.

The needs of these groups will differ, as will the most effective methods of reaching them.

The LCO's proposed recommendations aim to make more effective use of existing resources and expertise, by:

- promoting the accessibility and trustworthiness of the information available,
- supporting a collaborative approach to the development of resources, and
- increasing the coordination of the provision of education and information.

It should be noted that, despite its importance, the provision of information and education is not a panacea for all of the issues affecting this area of the law. Information on its own does not create the ability to act on it. The draft recommendations for reform in this area must be understood in conjunction with other draft recommendations throughout the *Interim Report*, particularly including those related to monitoring and oversight, and dispute resolution and rights enforcement.

Here is a summary of the LCO's draft recommendations in this area:

45. **Legislation include a clear statutory mandate for coordination and strategic development of information and education.**

46. **The institution identified for this statutory mandate develop, either independently or in collaboration, education and information strategies, initiatives and materials to address information and education needs in this area.**

47. **Strategies and materials take into account the needs of diverse communities and be developed with consultation with individuals, families and those who work with or represent these individuals.**

48. **A central, coordinated information clearinghouse be created for substitute decision-makers and persons directly affected by the law.**

49. **Standard forms for personal appointments contain information on how readers can access further information, for example, through the proposed clearinghouse.**

50. **The provision of information to substitute decision-makers under the *Health Care Consent Act* be strengthened.**

51. **Adjudicators be empowered to order education for guardians, persons acting under a power of attorney, or supporters.**

52. **Professional educational institutions re-examine their curriculums and consider strengthening information on these issues.**

53. **Health regulatory colleges strengthen the ways in which their quality assurance programs address this material.**

54. **The Ministry of Health and Long-Term Care support and encourage the health regulator colleges in implementing draft recommendation 53.**

X. PRIORITIES AND TIMELINES

FOR MORE INFORMATION ON THIS TOPIC, SEE *INTERIM REPORT*, Chapter XII

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.

There are two ways of approaching the implementation of the proposed reforms in this *Interim Report.* The first approach addresses the comprehensive impact and ultimate goals of the draft recommendations. As an aid to implementation and as part of its progressive realization approach to law reform in this area, the LCO has identified key priorities for reform, those draft recommendations which have the greatest potential to substantially transform this area of the law and address the most serious, systemic issues. **The LCO's key priorities for reform are:**

1. Expansion and reform of the Consent and Capacity Board to create an expert, independent, specialized administrative tribunal able to provide flexible, accessible and timely adjudication with respect to appointments of substitute decision-makers, resolve disputes related to the roles of these decision-makers, and enforce the rights under the legislation.
2. Strengthening information and education for individuals affected, families, and professionals and service providers involved with legal capacity and decision-making law.
3. Improving the quality of assessments of capacity and promoting access to basic procedural rights for those found legally incapable under the *Health Care Consent Act*.

The second approach provides a practical framework for how to achieve this comprehensive reform over time. For this purpose, the LCO has identified draft recommendations which are relatively straightforward to implement, and so can be addressed in a shorter time frame, as well as those which require more time, thought or resources for implementation. The LCO's proposed recommendations, organized according to timeframes, can be found at http://www.lco-cdo.org/en/capacity-guardianship-interim-report-appendixB.

XI. NEXT STEPS: RESPONDING TO THE INTERIM REPORT

The LCO invites your comments on one or more of the issues raised by this *Interim Report.* The LCO will consider all comments we receive and we may alter or amend our draft recommendations based on the feedback we receive. Our final recommendations will appear in our *Final Report*. The *Final Report* with recommendations is subject to approval by the LCO's Board of Governors.

There are many ways to express your views or help us hear from those affected by this project:

1. Send us your comments in writing, by fax, in an email or through our online comment box at http://www.lco-cdo.org/en/content/get-touch
2. Call or email us to arrange a time to talk about your experiences, ideas and comments in person or on the telephone.
3. You may have other suggestions for how you can best express your views or help others tell us their experiences.

You can mail, fax or e-mail your comments by **Friday, March 4, 2016** to:

Law Commission of Ontario
Legal Capacity, Decision-making and Guardianship
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.