



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

# Legal Capacity, Decision-making and Guardianship: Final Report

## Backgrounder #2

### Capacity Assessments

#### **1. What does the LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* say about Capacity Assessments?**

Capacity assessments determine if an individual has the legal capacity to make decisions regarding their property, health care, admission to long-term care, and other decisions. A determination of legal incapacity can have profound consequences for an individual because it may mean that another person will be authorized to make decisions on the individual's behalf.

Ontario currently has five systems for assessing legal capacity. The LCO heard widespread concerns that capacity assessment systems are complicated, inconsistent, and difficult to navigate.

The LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* makes recommendations that would make Ontario's systems for capacity assessment systems more accessible, consistent, effective, and just. The LCO's recommendations build on the strengths of existing systems while identifying practical measures that would:

- Reduce the inappropriate or unnecessary use of capacity assessments;
- Ensure individual's rights are better protected;
- Improve the quality, consistency, and understanding between and within Ontario's multiple capacity assessment systems; and,
- Provide more supports for professionals and institutions that conduct capacity assessments.

## 2. What Did the LCO Learn About Capacity Assessments?

Ontario currently has five systems for assessing legal capacity.

- Legal capacity is commonly informally assessed by service providers (including legal professionals, financial institutions, and others) as part of their responsibility to determine whether an individual can enter into an agreement, contract or agree to a service.
- Physicians must examine capacity to manage property upon admission/discharge from a psychiatric facility.
- Specialized Capacity Assessors assess capacity to manage property or personal care.
- Health practitioners determine capacity to consent to treatment.
- Designated “capacity evaluators” evaluate capacity to consent to admission to long-term care and to consent to personal assistive services in the context of long-term care.

The LCO learned there is widespread concern that Ontario’s systems for assessing capacity are complicated, inconsistent, and difficult to navigate. The LCO learned that:

- It is important that Ontario's capacity assessments are tailored to their contexts;
- There is a need to improve the understanding, quality and consistency of capacity assessments across Ontario;
- The purpose of capacity assessments is often misunderstood by individuals, families, and service providers. There is widespread confusion about the distinctions between Ontario’s many capacity assessment systems;
- Capacity assessments may be misused by people attempting to control another person’s property, health care decisions, or living arrangements;
- Assessments of capacity to manage property or personal care by designated Capacity Assessors may be inaccessible to low income or marginalized persons. Because such Assessments are often necessary for entry to or exit from guardianship, this may have significant implications for the individual;
- There is no guidance in the *Health Care Consent Act*, its regulations, or in any official forms or policies, for assessing capacity for consent to treatment, personal assistive services or admission to long-term care.
- The lack of clear standards, coupled with shortfalls in training within some professions, creates confusion and anxiety in this area. Many professionals need more supports.

## 3. The LCO’s Recommendations

Chapter Five of the LCO’s *Final Report* includes recommendations that:

- The Government of Ontario clarify and tailor the purposes and proper usage of assessments under the *Substitute Decisions Act* and the *Mental Health Act*;

- The Government of Ontario develop a strategy to improve access to Capacity Assessments under the *Substitute Decisions Act*;
- The standards for capacity assessments under the *Health Care Consent Act* and *Mental Health Act* be clarified;
- Local Health Integration Networks, Health Quality Ontario, and the Ministry of Health and Long-Term Care work to improve the quality, monitoring and oversight of capacity assessments under the *Health Care Consent Act*.

More information about the LCO's *Capacity, Decision-Making and Guardianship: Final Report* is available at <http://www.lco-cdo.org/>.