

Legal Capacity, Decision-making and Guardianship

EXECUTIVE SUMMARY

March, 2017



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Executive summary

INTRODUCTION

This is the Executive Summary of the Law Commission of Ontario's (LCO) *Final Report* on legal capacity, decision-making and guardianship in Ontario. The *Final Report* contains the LCO's analysis and recommendations regarding provincial legislation, policies and practices in this far-reaching and important area of law.

Legal capacity, decision-making and guardianship laws can have a profound influence over some of the most important and intimate legal decisions and choices in a person's life. Persons who have been determined to lack legal capacity may lose their right to make decisions about their personal care, their finances, their living arrangements, or many other decisions that each of us must make every day.

Legal capacity, decision-making and guardianship laws affect thousands of Ontarians and their families every day. Most obviously, these laws affect the approximately 17,000 Ontarians who are currently subject to some kind of a guardianship order or the thousands of others whose capacity is assessed as part of obtaining consent to health care treatments, for admission to residency to a long term care home, or as part of the provision of many other services. In addition, every Ontarian who has ever granted or been given a power of attorney is affected by this area of law.

Legal capacity, decision-making and guardianship touches upon some of the most profound and consequential issues in law. It is suffused with questions and controversies regarding personal independence, a person's right to make choices and take risks, legal accountability for decision-making, and the balance between a person's autonomy and his or her safety and security. The law also touches upon the some of our most intimate and close personal relationships.

The *Final Report* is the most comprehensive analysis of Ontario's legal framework in this area in almost thirty years. The *Final Report* assess the objectives, policies, structures, legal instruments, and procedures governing capacity, decision-making and guardianship in Ontario. The *Final Report* makes recommendations that build on the strengths of the current system and improve areas where necessary. The LCO's recommendations are practical, achievable, and should benefit persons affected, their families, institutions, and service providers across the province.

THE LAW COMMISSION OF ONTARIO

The LCO is Ontario's leading law reform agency. The LCO provides independent, balanced, and authoritative advice on some of Ontario's most complex and far-reaching legal policy issues. The LCO evaluates laws impartially, transparently and broadly. The LCO's work is informed by legal analysis; multidisciplinary research; public consultations; social, demographic and economic conditions; and the impact of technology.

LCO reports include principled, practical, “problem-solving” recommendations informed by broad consultations and tested through a transparent, comprehensive review process that engages a broad range of individuals, experts, and institutions. The LCO gives a voice to marginalized communities and others who should have an important role in law reform debates and discussions.

More information about this project and the LCO is available on the LCO's website at www.lco-cdo.org.

LAW REFORM AND LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

Ontario's current statutory regime for legal capacity, decision-making and guardianship took shape as a result of a comprehensive and thoughtful law reform effort spanning the late 1980s and early 1990s.

Ontario's legislative regime for capacity, decision-making and guardianship is set out in three statutes: the *Substitute Decisions Act, 1992* (SDA), the *Health Care Consent Act, 1996* (HCCA), and, to a lesser extent, the *Mental Health Act* (MHA). In addition, there are also countless policies, guidelines, and practices designed to implement this legislation. These laws and policies are administered by a wide range of government ministries, health care institutions, community agencies, professionals, financial institutions, courts and tribunals, and many others across the province.

ISSUES CONSIDERED

This LCO considers several important and overlapping questions in this project:

Does the System Reflect Contemporary Law and Values?

Several important and far-reaching choices underpin Ontario's legal capacity, decision-making and guardianship laws. New ideas and developments both within and outside Ontario challenge many of these choices. For example, many agree with the current law's conceptual framework but believe that the system can do more to promote autonomy, social inclusion, rights protection, and participation in decision-making. Others are urging a fundamental re-examination of the Ontario's substitute

decision-making model. The LCO considers these and related questions at length in the *Final Report*.

Does the System Reflect Contemporary Needs?

Over the years, Ontarians have developed increasingly nuanced and sensitive understandings of the needs and capabilities of the individuals, families, and others affected by these laws. The *Final Report* considers whether the system in Ontario reflects and responds to these understandings. The LCO considers needs from multiple perspectives, including persons directly affected, families, service providers and professionals, and others. The LCO also considers needs in light of demographic and social trends, changing family structures, and Ontario’s cultural and linguistic diversity.

Is the System Working on the Ground?

The LCO’s *Final Report* discusses the legislative framework and objectives of Ontario’s capacity, decision-making and guardianship system at length. The *Final Report* considers whether Ontario achieves these objectives in practice. In other words, the project considers whether there is gap between the formal law – as expressed in statutes – and lived experience of the legislation. Understanding and addressing the “implementation gap” is an important theme in the *Final Report*.

Are the System’s Legal Protections Adequate and Accessible?

Meaningful access to justice underpins the entire legal capacity, decision-making and guardianship system. Effective and appropriate mechanisms for dispute resolution and rights enforcement are therefore a priority in the *Final Report*.

LCO APPROACH AND PROCESS

The LCO’s analysis and recommendations in the *Final Report* are independent, evidence-based, and impartial. The research and consultations on this project were the most extensive and complex in LCO history. The Report builds upon and extends the analysis in three earlier LCO projects, the *Framework for the Law as It Affects Older Adults*, the *Framework for the Law as It Affects Persons with Disabilities* and the LCO’s recently completed *Capacity and Legal Representation for the Federal RDSP*.

The LCO wishes to extend special thanks to the project’s Advisory Group; to the dozens of agencies and institutions involved in the project; to the authors of the project’s commissioned research papers; and, most importantly, to the thousands of Ontarians who participated in meetings, consultations, or focus groups.

FINDINGS

Ontario has now had almost a generation's worth of experience with its capacity, decision-making and guardianship laws. The LCO was able, with the benefit of extensive research and consultations, to make many important observations and findings about the objectives and operation of this system. These findings are the basis for the LCO's final recommendations.

Strengths and Attributes

The LCO has concluded that the legal capacity, decision-making and guardianship regime in Ontario has many important strengths or attributes. These include:

- Ontario's capacity, decision-making and guardianship laws aim to promote self-determination and personal autonomy.
- The system promotes a nuanced and contextual approach to legal capacity.
- Ontario has clear and largely appropriate legal duties for substitute decision-makers.
- There are many important legal protections for persons lacking or who may be lacking legal capacity.
- Powers of attorney are simple and accessible.
- The legislation acknowledges the important role of families.
- The Consent and Capacity Board is an accessible forum for dispute resolution.
- The Public Guardian and Trustee is a necessary and important institution.

Areas of Concern

The LCO's research and consultations also revealed several important areas of concern. This is perhaps not surprising, given the complexity of the system and the length of time since the last major law reform effort. The LCO's areas of concern will be familiar to many of the individuals and institutions who work in the system today. Many of these concerns overlap with one another. These include:

- The system is confusing and complex.
- The system lacks coordination.
- There is a lack of clarity and consistency for capacity assessments.
- There is a need for legal tools that are less binary and more responsive to the range of needs of those directly affected.
- Individuals, families, and service providers need more supports.
- Guardianships are insufficiently limited, tailored and flexible.
- Oversight and monitoring mechanisms for substitute decision-makers need to be improved.
- There are significant barriers to Capacity Assessments under the *Substitute Decisions Act, 1992*.

- There is a lack of meaningful procedural protections under the *Health Care Consent Act, 1996*.
- The rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992* are inaccessible to many Ontarians.
- There is a need for statutory provisions regarding detention of persons lacking capacity.
- The system needs to promote pilots, monitoring, research and evaluation.

FINAL REPORT: SUMMARY AND RECOMMENDATIONS

The LCO has concluded that many of the fundamental objectives, policy choices, structures, legal instruments, and procedures governing capacity, decision-making and guardianship in Ontario remain sound. In some cases, there are opportunities to learn from experiences with the current legislation. As a result, the LCO's recommendations identify practical solutions that maintain and build on the strengths of the current system while addressing areas that need improvement. The LCO believes that its recommendations are practical, achievable, and will benefit persons affected, their families, institutions, and service providers across the province.

The *Final Report* includes detailed recommendations of a range of issues. The following section summarizes the discussion and major recommendations in each chapter of the *Final Report*. Appendix A to this Executive Summary and the *Final Report* itself set out the LCO's specific and final recommendations.

Chapters 1-3

Chapters 1 to 3 establishes the groundwork for the *Final Report*. Chapter 3, for example, discusses the two LCO Framework projects – the *Framework for the Law as It Affects Older Adults* and the *Framework for the Law as It Affects Persons with Disabilities* – and establishes a set of principles and purposes to guide the legislation and its implementation.

In these chapters, the LCO recommends (**Recommendations 1-2**) that:

1. The Ontario government identify purposes and principles for capacity, decision-making and guardianship legislation consistent with the LCO *Frameworks*; and,
2. The Ontario government develop an overall strategy for reform that includes data collection, reporting and evaluation.

Chapter 4: New Approaches to Decision-Making

This area of the law centres on a functional and cognitive approach to legal capacity, paired with a substitute decision-making approach. This approach is consistent with other common law jurisdictions. Emerging approaches rooted in disability-rights frameworks and which find expression in Article 12 of the *Convention on the Rights of Persons with Disabilities*, propose a move towards “supported decision-making”. This

approach aims to preserve the legal capacity of persons with impaired decision-making abilities through the appointment of “supporters” who will assist those persons to make decisions. The concept and operation of supported decision-making raises both challenges and opportunities for law reform.

The *Final Report* emphasizes the importance of increasing self-determination for all persons affected by these laws. The *Final Report* identifies the diversity of needs and goals among persons directly affected and notes the potential benefits of supported decision-making approaches to meet the needs of some individuals and some communities. The *Final Report* identifies new processes, tools and legal instruments to meet these needs. Consistent with the LCO’s emphasis on evidence-based policy-making, the *Final Report* discusses the need for ongoing pilots and evaluation of any new models or approaches. The LCO recommendations would place Ontario at the forefront of decision-making issues internationally.

In this chapter, the LCO recommends (**Recommendations 3-9**) that:

1. The human rights concept of accommodation be incorporated into approaches to legal capacity;
2. The Government of Ontario develop pilot projects on autonomy-enhancing decision-making practices and undertake continued monitoring and study of emerging practices and laws;
3. The existing requirements for autonomy-enhancing practices be strengthened;
4. The Government of Ontario develop legislation to enable individuals to enter into support authorizations for day-to-day decision-making needs; and
5. The Government of Ontario and others work towards the development of a statutory framework for network decision-making.

Chapter 5: Assessing Legal Capacity: Improving Quality and Consistency

Chapter 5 of the *Final Report* discusses capacity assessments, another fundamental issue in this area of law. The *Final Report* summarizes and analyzes the multiple systems for analyzing capacity in Ontario today. Each assessment system has its own approach to balancing the competing needs for accessibility and accountability, and preservation of autonomy versus the protection of the vulnerable.

During our consultations, the LCO heard many concerns that the overall system for assessing capacity is complicated, inconsistent and difficult to navigate. Most importantly, the LCO heard serious concerns about the quality of some forms of capacity assessments. The LCO heard concerns about specific forms of assessment, such as the barriers to accessing assessments under the *Substitute Decisions Act, 1992* (SDA), and the lack of quality assurance measures for assessments under the *Health Care Consent Act* (HCCA). There was also particular concern about the lack of procedural protections for persons assessed for capacity to consent to admission to long-term care and for health care consent more generally.

The *Final Report's* recommendations build on the strengths of existing systems, while identifying practical measures to improve the quality, consistency and rights protections between and within Ontario's capacity assessment systems.

In this chapter, the LCO recommends (**Recommendations 10-24**) that:

1. The Government of Ontario design and implement a statutory process for decision-making respecting detention for persons who lack capacity but who do not fall within the MHA;
2. The Government of Ontario clarify and tailor the purposes and proper usage of assessments under the SDA and MHA;
3. The Government of Ontario develop a strategy to improve access to Capacity Assessments under the SDA;
4. The standards for capacity assessments under the HCCA and MHA be clarified, including the development of minimum standards for the provision of rights information under the HCCA;
5. The Government of Ontario develop a strategy to expand access to independent and expert advice about rights for individuals found incapable under the HCCA;
6. 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 HCCA.

Chapter 6: Powers of Attorney: Enhancing Clarity and Accountability

Chapter 6 of the *Final Report* discusses powers of attorney (POA). POAs are important because they are very common forms of substitute decision-making. They are also probably the most “private” in that POAs in practice are rarely subject to outside scrutiny.

It is widely acknowledged that POAs are important legal tools for individuals, families, health care professionals, institutions, and many others. From the inception of this project, however, there have been widespread concerns about misuse and outright abuse of POAs. There is particular concern about financial abuse of older persons through POAs.

In developing recommendations to address these concerns, the LCO is mindful of the need to preserve the key benefits of POAs: their accessibility, flexibility and enhancement of choice for Ontarians. Our recommendations, therefore, focus on increasing clarity and understanding among both grantors and attorneys, and providing more options for accountability. The *Final Report* does not adopt proposals to create a mandatory registry, require the involvement of a lawyer to create a POA for property, or create mandatory reporting or random audits for attorneys.

In this chapter, the LCO recommends (**Recommendations 25-28**):

1. A mandatory, standard-form Statement of Commitment to be signed by persons accepting an appointment as an attorney, prior to acting for the first time under the appointment;

2. The delivery of Notices of Attorney Acting at the time that the attorney first begins to act: these would be required to be delivered to the grantor, the spouse, any previous attorney and any monitor appointed, as well as for any other persons identified in the POA instrument;
3. The option to name a monitor, who would have statutory powers to visit and communicate with the grantor, and to review accounts and records kept by the attorney.

Chapter 7: Rights Enforcement and Dispute Resolution

Chapter 7 of the *Final Report* discusses access to justice, rights enforcement and dispute resolution. The *Final Report* states that access to justice and rights enforcement underpin the entire system. This chapter includes the LCO's analysis of the jurisdiction of the Consent and Capacity Board (CCB) and Superior Court.

The LCO heard repeatedly that the current Superior Court-based system for resolving issues under the SDA is inaccessible to all but a few, and as a result, the rights under the law are frequently not enforced and the promise of the legislation is unfulfilled. Stakeholders expressed wishes for a system that is more accessible, flexible, responsive, specialized and holistic. They also argued for greater use of approaches that can respect the ongoing relationships that are at the heart of so much litigation in this area. The *Final Report* proposes significant reforms in this area. The *Final Report* also makes further recommendations to improve access to justice.

In this chapter, the LCO recommends (**Recommendations 29-38**) that:

1. The Government of Ontario work towards the creation of a specialized, expert tribunal with broad jurisdiction in this area of the law, and the ability to provide flexible and holistic approaches to disputes;
2. The use of alternative dispute resolution approaches be strengthened;
3. Supports for litigants be strengthened, including Section 3 and Legal Aid Ontario supports;
4. The mandate of the Public Guardian and Trustee be updated to clarify its powers respecting "serious adverse effects" investigations;
5. HCCA rights enforcement be improved through allowing a broader range of individuals to bring certain applications to the Consent and Capacity Board.

Chapter 8: External Appointment Processes

Chapter 8 of the *Final Report* discusses the law, policy and practice for external appointments of guardians. Guardians are appointed through two processes: court appointments, and the much more common statutory appointments. Statutory appointments, available only for property guardianships, result in automatic appointments for the Public Guardian and Trustee (PGT), with families able to apply to act as replacement guardians.

External appointments of guardians should be a last resort due to their extraordinary impact on the autonomy of the individuals affected. The *Final Report* includes several recommendations to divert individuals from guardianship where it is not necessary, and to make guardianship more flexible and tailored to the needs of individuals.

In this chapter, the LCO recommends (**Recommendations 39-45**) that:

1. The Government of Ontario strengthen existing requirements for consideration of a “least restrictive alternative” by enabling adjudicators to request expert reports;
2. The Government of Ontario conduct research and consultations towards replacing statutory guardianship with an adjudicative process;
3. The Government of Ontario develop time-limited or reviewable guardianship orders;
4. The Government of Ontario create limited property guardianships, in parallel with existing limited personal care guardianships; and
5. The Government of Ontario amend the SDA to permit adjudicators to appoint representatives to make a single decision.

Chapter 9: New Roles for Professionals and Community Agencies

Currently, almost all substitute decision-makers are family members, with the Public Guardian and Trustee filling a vital role where family members do not act. Shifts in demographics and family structures, together with the challenges associated with this role, make this approach increasingly tenuous. There are growing pressures on the role of the PGT. LCO staff heard many concerns about a “personal care gap”, where individuals who are socially isolated increasingly find themselves with no one to act as their substitute decision-maker for personal care. There are concerns that unregulated for-profit substitute decision-makers are stepping into the gap.

The *Final Report* proposes the reforms that would provide individuals with greater choice, allow the PGT to more effectively focus its role, and reduce risks of abuse.

In this chapter, the LCO recommends (**Recommendations 46-48**) that:

1. Further research and consultation be conducted towards establishing a dedicated licensing and regulatory system for professional substitute decision-makers;
2. Further research and consultation be conducted towards allowing community agencies to provide substitute decision-making for day-to-day decisions;
3. The Government of Ontario focus the mandate of the PGT on providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.

Chapter 10: Education and Information

Stakeholders agreed that improved education and access to information about rights and responsibilities is central to effective implementation of the law in this area. The *Final Report* emphasizes partnership and collaboration between the many institutions that interact with this area of the law, with government providing a focal point for coordination and strategic development.

In this chapter, the LCO recommends (**Recommendations 49-58**) that:

1. The assumption by the Government of Ontario of a statutory mandate to identify strategies and priorities, coordinate and develop initiatives, and develop and distribute materials, including through the creation of a central clearinghouse;
2. Strengthened roles for professional educational institutions, professional regulatory bodies, and the Ministry of Health and Long-term Care;
3. Clarification of the duty of health practitioners to provide information to substitute decision-makers upon a finding of incapacity;
4. Empowering adjudicators under the SDA to order substitute decision-makers to obtain education on specific aspects of his or her duties.

Chapter 11: Priorities and Timelines

The final chapter of the *Final Report* sets out a short, medium, and long-term implementation plan for the report's recommendations, as well as identifying priorities for reform.

MORE INFORMATION

More information about the project, including the project's final report, background papers, and other important documents are available on the LCO's website at www.lco-cdo.org. The LCO can be contacted at:

Law Commission of Ontario

2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3

Web: www.lco-cdo.org

E-mail: LawCommission@lco-cdo.org

Follow us on Twitter @LCO_CDO

Tel: (416) 650-8406

Toll-Free: 1 (866) 950-8406

TTY: (416) 650-8082

**Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3**

Web: www.lco-cdo.org

E-mail: LawCommission@lco-cdo.org

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Toll-Free: 1 (866) 950-8406

TTY: (416) 650-8082



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