LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP

DISCUSSION PAPER

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. It is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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EXECUTIVE SUMMARY

INTRODUCTION

The Law Commission of Ontario (LCO) has undertaken a project to review Ontario's statutory framework related to legal capacity, decision-making and guardianship, with a view to developing recommendations for reform to law, policy and practice in this area. This project has its roots in two of the LCO's completed projects: the *Framework for the Law as It Affects Older Adults* and the *Framework for the Law as It Affects Persons with Disabilities.* During the course of those projects, the LCO heard considerable concern about how the laws in this area were operating in practice, and their impact on the autonomy, security, dignity and inclusion of older adults and persons with disabilities.

This project will focus on the core statutory framework of the *Substitute Decisions Act* (SDA) and *Health Care Consent Act* (HCCA), as well as the provisions of Part III of the *Mental Health Act* (MHA) related to assessment of legal capacity to manage property. It will not address the common-law, other statutes that touch upon consent and capacity issues, or the broader provisions of the MHA. Within this scope, the project will concentrate on the following broad issues:

1. The **standard for capacity**, including tests for capacity and the various avenues and mechanisms for assessing capacity under the SDA, HCCA and MHA;
2. **Decision-making models**, including an examination of the desirability and practical implications of alternatives to substitute decision-making, including supported and co-decision-making;
3. **Processes for appointments** (for example of substitute decision-makers), whether through personal appointments or a public process, with a focus on appropriate use and on improving efficiency and accessibility;
4. The **roles and responsibilities of guardians and other substitute decision-makers**, including potential for more limited forms of guardianship and consideration of options for those who do not have family or friends to assist them;
5. **Monitoring, accountability and prevention of abuse** for substitute decision-makers or supporters, however appointed, and of misuse by third party service providers, including mechanisms for increasing transparency, identifying potential abuse and ensuring compliance with the requirements of the law; and
6. **Dispute resolution**, including reforms to increase the accessibility, effectiveness and efficiency of current mechanisms.

In evaluating the current law and developing recommendations, the LCO will apply the *Frameworks* it has developed for the law as it affects persons with disabilities and older adults, as well as taking into account developments in international law, experiences in other jurisdictions, and concerns about practicality and implementability.

The *Discussion Paper* is based on the research and public consultations that the LCO has completed to-date, including a series of commissioned papers. It synthesizes information gathered to this point, identifies key issues and sets out potential directions for reform. It is intended as a foundation for public consultation and discussion of the issues identified. It is accompanied by a *Summary of Consultation Issues* intended to support the consultation process. Following the completion of public consultations, the LCO will release an *Interim Report*, containing analysis and draft recommendations.

PART ONE: REFORMING ONTARIO'S LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP LAW

I. BACKGROUND AND CONTEXTS IN WHICH THE LAW OPERATES

This Chapter sets out some of the background and contextual information that is helpful in understanding the operation of Ontario's laws related to legal capacity, decision-making and guardianship.

Making decisions is an important part of our personal growth, as well as an expression of our values and identity. At this personal level, decision-making is connected to our autonomy, dignity, security and other fundamental values. Decision-making also has a public aspect, in that when others are being asked to rely on or implement our decisions, it is important for them to be sure that they understand the decision that has been made, that they can rely on the finality of that decision, and that all parties can be held to account to uphold their part of the decision. In this way, decision-making is also connected with the objectives of clarity, certainty and accountability. It is also important to understand decision-making as not only an outcome, but a process. A "good" decision-making process is often seen as having a value in itself, quite apart from the merits of the outcome.

The key elements of Ontario's approach to legal capacity, decision-making and guardianship may be described as the presumption of capacity; a cognitive and decision-specific approach to the assessment of capacity; a tendency towards professionalized assessment of capacity; a substitute decision-making approach where a formalized approach to decision-making is required; a focus on the provision of procedural rights; and a preference for private relationships when individuals require assistance in decision-making.

While neither the HCCA nor the SDA refers to any particular class of persons, it is clear that some classes of persons will be more likely to be found legally "incapable" under one of these statutes. Persons with intellectual, developmental, mental health or cognitive disabilities are both more likely to be found to be legally incapable to make specific decisions within the definitions of these statutes and to be informally *assumed* to be incapable and therefore subject to assessments and other provisions of the statutes. In understanding the impact of these laws, it is important to consider the particular circumstances and needs of these groups, and to understand that while persons with disabilities will have in common the experience of attitudinal, systemic and other barriers to equality, their experiences may differ significantly in many ways. That is, the way in which an older person with dementia encounters the law and the needs he or she brings to it may be considerably different from those of a young person with an intellectual disability or of a person who acquires a brain injury or develops a mental health disability in mid-life, and this will significantly shape the law reform needs that are identified.

Laws in this area must understood in their larger context, including the complexities of family dynamics; the challenges raised by shortages in resources available to older adults and persons with disabilities and their families; problematic attitudes towards persons with disabilities and older adults; and the ethical issues raised for service providers and families in their relationships with individuals who may be at risk for exploitation or abuse or who may have difficulty in speaking or advocating for themselves. Inevitably, these laws are partial responses to complex practical, ethical and social issues.

Ontario's laws in this area are the result of a comprehensive law reform effort in the late 1980s and early 1990s, including the *Advisory Committee on Substitute Decision-making*, the *Enquiry on Mental Competency* and the *Review of Advocacy for Vulnerable Adults.* As a result, Ontario has a modern, comprehensive and relatively coordinated legislative scheme. It is important to note, however, that the SDA and the *Consent to Treatment Act* (the predecessor to the HCCA) were developed in the context of the *Advocacy Act*, which created an ambitious institutional framework for advocacy for vulnerable individuals, but which was repealed late in the development of the legislative framework.

Pressures for reform in this area arise from a number of recent developments, including demographic shifts that are resulting in an increasing prevalence of dementia and other cognitive disabilities that may affect decision-making abilities; profound shifts in attitudes towards aging and disability; international developments such as the creation of the *Convention on the Rights of Persons with Disabilities* (CRPD); and acute pressures on resources at all levels. As well, the current statutory framework marked a profound transformation in Ontario law,

and as carefully thought out as it was, there have been unanticipated consequences in some areas.

PART TWO: LEGAL CAPACITY

I. "LEGAL CAPACITY": SETTING THE STANDARD

The concept of "capacity" is foundational to the law related to decision-making. Under both the SDA and the HCCA, where a decision must be made and an individual is found to lack the "capacity" to make that decision or that kind of decision, a substitute decision-maker (SDM) must do so in his or her place. Generally, those who are considered to have legal capacity are entitled to make decisions for themselves and are held responsible for those decisions, including decisions that others may consider reckless or unwise. On the other hand, persons who have been determined to lack legal capacity in a particular domain (or area of decision-making) or for a particular decision may lose the right to make decisions for themselves independently in that area: others will be responsible for making decisions on their behalf, and can in theory be held accountable for how those decisions are made. The implications for an individual of a determination of legal capacity are therefore momentous.

The concept of capacity is complex and contested, and has been understood in different ways at different times. It is closely related to concepts of autonomy and independence, in that it is intimately tied to the ability to make independent decisions and take responsibility for their consequences. It is also closely related to our assessments of and tolerance for not only risk but actual harm to individuals who are marginalized or disadvantaged.

Approaches to legal capacity have varied over time. The dominant current approach, which underpins Ontario's legislative framework, is functional and cognitive. It focuses on the ability to make a specific decision or type of decision, at the time the decision is to be made, and in particular on the reasoning process involved in making decisions. This includes the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences) and to weigh that information in the balance to reach a decision.

All of Ontario's tests for capacity are based on the ability to "understand and appreciate" the relevant information. The HCCA and SDA create specific tests for each domain, setting out what information in particular the individual must be able to understand and appreciate. The major domains in Ontario are those for managing property, personal care, treatment, admission to a long-term care home, and creation of powers of attorney (POAs). The type of information involved in making a decision varies between subject areas; for example, the test for capacity is much more demanding for creating a POA for property than for a POA for personal care.

Any approach to capacity will result in some implementation issues. Ontario's approach to legal capacity is subject to a number of critiques. While the test focuses on the *ability* to understand and appreciate the relevant information as opposed to *actual* understanding and appreciation, there are concerns that in practice this distinction may tend to blur. Similarly, there is a risk of the "appreciation" branch of the test collapsing into an outcomes-based approach, as in practice it may be difficult to distinguish between an inability to appreciate the consequences of a decision from an assessment of the nature and level of risk that differs from that of the person carrying out the assessment. As well, while legal capacity as it is understood in Ontario may fluctuate, so that a person who has legal capacity at one time may not have it at another, because determinations of incapacity may have long-term consequences (as with guardianship, for example), it may be difficult to ensure that substitute decision-making arrangements are only in place where they are truly necessary.

Options for improving Ontario's cognitive test for capacity included strengthening or clarifying the wording of the statutory tests, or incorporating some of the material currently found in the Ministry of the Attorney General's capacity assessment guidelines into the statute or regulation, or expanding their applicability to all forms of capacity assessment.

As well as these implementation challenges, Ontario's approach to capacity is also subject to a more fundamental critique as being inconsistent with a disability-rights lens. Some have argued that *any* functional approach to capacity is incompatible with a disability-rights lens, in that the right to make decisions should not be restricted on the basis of diversity in capabilities associated with some types of disabilities, and that these types of distinctions are discriminatory. Others argue that the type of cognitively based test for capacity adopted in Ontario disproportionately disadvantages persons with intellectual, cognitive and psychosocial disabilities, and is improperly based on medically defined cognitive abilities (and in this sense retains many of the problematic aspects of a status-based approach). As noted above, the "understand and appreciate" test creates a threshold for who can and cannot make decisions for themselves based on cognitive abilities. Thus, although it is not a disability-based test, it will have a disproportionate effect on individuals whose disability affects their cognitive abilities, such as persons with intellectual, mental health or neurological disabilities.

Some have suggested that a test for capacity based on the individual's "will and intent" would better reflect a disability-rights approach to capacity than the current "understand and appreciate" approach. In a "will and intent" approach, legal capacity would be based on the ability of an individual to act in such a way that at least one other person with personal knowledge of that individual is able to reasonably ascribe personal will or intentions, memory, and coherence through time, and communicative abilities to that effect. Such a shift would mark a radical departure from Ontario's current approach. Careful thought would be required

as to who would assess capacity based on such a test, and what types of procedural safeguards and supports would be appropriate. It would also have broader implications for who might act in a decision-making context, and the types of safeguards required to detect and address abuse. Such an approach also raises questions regarding individuals who do not currently have the kind of close and trusting relationships that is necessary to discern will and intent.

II. SYSTEMS FOR ASSESSING CAPACITY

While Part One, Chapter I focused on tests for legal capacity, Chapter II considers the ways in which assessments of capacity are carried out. Ontario's system for assessing capacity is complex. Indeed, it is best understood as a set of interlocking systems. The SDA, HCCA and MHA set out five avenues for assessment:

1) examinations of capacity to manage property upon admission to or discharge from a psychiatric facility (MHA)
2) assessments of capacity to make treatment decisions (HCCA);
3) evaluations of capacity to make decisions about admission to long-term care or for personal assistance services (HCCA):
4) assessments of capacity to make decisions regarding property or personal care (SDA); and
5) assessments of capacity to make a power of attorney (SDA).

There are areas of commonality among these assessment mechanisms, but they differ from each other considerably in terms of factors such as the following:

1) who conducts the assessment;
2) the training and standards imposed on persons conducting the assessment;
3) information and supports for persons undergoing assessments;
4) documentation required for the assessment process; and
5) mechanisms and supports for challenging an assessment.

Some of these systems are relatively informal while others are quite formal and involve significant procedural protections and supports. This variance among assessment systems reflects to some degree the variations in the contexts and consequences of different assessments. However, it results in considerable complexity and confusion, raising the question of whether Ontario would benefit from greater harmonization, coordination or simplification of its various capacity assessment systems.

There are a number of challenges which all capacity assessment systems must address.

Translating the concept of capacity into practical terms: The slippery and multi-dimensional nature of the concept of capacity means that its application will always be challenging. While

there will be individuals who clearly either do or do not meet the threshold, there will also be a significant number of individuals who fall within a grey zone or whose abilities require considerable care to determine. Because the consequences of a determination with respect to capacity are so significant, there is an added pressure to "get it right". Capacity assessment mechanisms must therefore carry a heavy burden: given the stakes and the possibility of error, it is important to have a process that is transparent, fair and perceived to be fair, and open to correction. Given the risks of abuse or other negative outcomes where a person lacks capacity and requires the supports provided by legislation, it is also important that the process be reasonably timely.

Who should assess capacity? The complex and multi-faceted nature of capacity assessment naturally raises the question of what type of person should carry out assessments, and what qualifications, training and standards they should be required to maintain. Ontario's approach to capacity assessment is heavily professionalized, reflecting a desire to ensure that the legal concept is well understood by those applying it, and that it is applied carefully, thoughtfully and accordingly to consistent standards. Indeed, one of the most common suggestions for reform to Ontario's capacity assessment systems is to increase the level of education, training and standards for those who carry out assessments. As well, there are suggestions that complaint and oversight mechanisms for capacity assessment should be strengthened.

However, persons with disabilities have often raised concerns about the medicalization of their experiences and the resultant control over their lives by medical professionals, arguing that a social and human rights understanding of the experience of disability is more appropriate. These types of concerns may be seen to indicate the preferability of a more professionalized approach to capacity. However, persons with disabilities have often raised concerns about the medicalization of their experiences and the resultant control over their lives by medical professionals, arguing that a social and human rights understanding of the experience of disability is more appropriate.

Adequate procedural protections for those assessed: Given the potentially grave consequences of an assessment, it is important that adequate procedural protections be accorded to the person assessed. Of course, what are considered "adequate procedural protections" will vary depending on the context and potential consequences of a particular assessment. Concerns have been raised that some forms of capacity assessment lack adequate procedural protections to match the potential gravity of their outcomes, and in other cases, there are gaps or shortfalls in the implementation of existing procedural protections. One area of particular concern is improving access to information, advocacy and supports related to capacity assessment.

Ensuring flexible responses to changing levels of capacity: Since legal capacity, at least as understood from a functional cognitive approach, may vary over time, it is essential that assessment mechanisms retain considerable flexibility and accessibility so that individuals can be reassessed with reasonable ease. This may be easier said than done, as capacity assessment may be a resource-intensive process, and a balance must be struck between ensuring access to review and reassessment and preventing endless and unnecessary cycles of reassessment. While Ontario's capacity assessment systems do contain mechanisms for re-assessment, in several cases they are potentially costly or cumbersome, or rely on the affected individual to initiate the process.

PART THREE: DECISION-MAKING

I. NEW DECISION-MAKING ARRANGEMENTS: SUPPORTERS AND CO-DECISION-MAKERS

Among the most significant issues raised in the LCO's preliminary consultations for this project were those related to newly developing approaches to decision-making, such as supported and co-decision-making. These approaches represent a fundamental shift in approaches to the law, and have significant implications for almost every aspect of this area of the law. Advocates for these forms of decision-making would like to see one or both of them included in Ontario's laws, whether as one option among a number, as a preferential option, or as replacing substitute decision-making altogether. These newer approaches to decision-making are closely related to the shifts in conceptions of capacity that were outlined in Part One, Chapter I, and have their basis in a social model of disability and a human rights critique of existing approaches to legal capacity, decision-making and guardianship.

This Chapter examines the basic elements of supported and co-decision-making approaches, drawing some comparisons with substitute decision-making; outlines some specific models for these forms of decision-making; and considers some implications and implementation challenges.

Central to this discussion is the CRPD, which Canada has ratified, and in particular Article 12, which explicitly addresses capacity to make decisions, including requirements for States Parties to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and to take appropriate measures to provide access for persons with disabilities to the supports they may require in exercising their legal capacity. There has been considerable debate as to the implications of Article 12. Canada's Declaration and Reservation on the CRPD states that "Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives". It declares Canada's understanding that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports "in appropriate circumstances and in accordance with the law", and reserves the right for Canada "to continue their use in appropriate circumstances and

subject to appropriate and effective safeguards". A recently released General Comment on Article 12 by the United Nations Committee on the Rights of Persons with Disabilities interprets Article 12 as requiring recognition of universal legal capacity and prohibiting the use of "best interests" approaches.

As supported decision-making is a relatively recent legislative innovation, there is no standard model for it, and indeed there are many differences of approach as to its appropriate and effective implementation. Limited forms of supported decision-making have been implemented in some Canadian jurisdictions, including Alberta, British Columbia, the Yukon and Manitoba.

There are a few elements common across models, however. First, supported decision-making does not require a finding of lack of capacity: in fact, the intent of a supported decision-making arrangement is to avoid any such finding or assessment. The focus of supported decision-making is not on the presence or lack of particular mental attributes, but on the supports and accommodations that can be provided to assist individuals in exercising control over decisions that affect them. Secondly, in supported decision-making arrangements, legal responsibility for the decision remains with the supported individual. The supported individuals retain control over their decisions, and those decisions are theirs, and not their supporters'. Thirdly, supported decision-making arrangements are based on consent. An imposed arrangement is antithetical to the notion of supported decision-making: these arrangements must be entered into freely in order to function. Finally, supported decision-making is based on relationships of trust and intimacy. For supported decision-making to function, any supporter must have significant personal knowledge of the individual, in order to assist her or him in understanding and consequentializing her or his values and preferences.

There are very significant differences among proponents of supported decision-making regarding for whom such arrangements are appropriate, with some taking the position that legal capacity is a basic right, and cannot be removed regardless of the circumstances, even where support must be total. Others see supported decision-making as a type of accommodation in which various types of supports are provided to enable the person at the centre to in effect make the decision themselves (with differing viewpoints as to what "making the decision" means in this context). This approach accepts that in some cases, individuals will be unable to make their own decisions, regardless of the amount of support that is provided, and that in those circumstances, practically speaking, another person must make the decision, although that decision must take into account the fundamental dignity and personhood of the individual on whose behalf it is made. That is, in some circumstances, something that resembles what we currently call substitute decision-making is inevitable, although there should be an emphasis on ensuring that this is truly a last resort.

Critiques of supported decision-making focus on concerns about clarity, certainty and accountability for third-parties who are asked to rely on decisions made through supported decision-making arrangements, risks for abuse and misuse of such arrangements, the merits of formalizing what some perceive to be an inherently informal approach to decision-making, and whether these types of arrangements are appropriate for all those currently falling under capacity and guardianship laws.

Co-decision-making has been less widely explored than supported decision-making. Currently, both Alberta and Saskatchewan provide access to some form of co-decision-making. Under such arrangements, joint decision-making between the adult and the appointed co-decision-maker is mandated, such that the individual only has capacity when the co-decision-maker provides assistance. A key concern is that co-decision-making creates an inherently unequal partnership, so that the appointed co-decision-maker may heavily influence the decision of the individual. As a result, co-decision-making arrangements might not differ all that substantially from substitute decision-making. In addition, these types of arrangements may be susceptible to abuse. As well, the complexity of these novel arrangements may lead to confusion.

II. WHO MAY ACT IN A DECISION-MAKING ROLE?

Currently, the vast majority of those acting as substitute decision-makers (SDMs) under Ontario law are family and friends of the person who requires assistance with decision-making. Trust companies may act as SDMs in some circumstances. As well, the Public Guardian and Trustee (PGT) will act as a decision-maker of last resort, and as a statutory guardian of property. The court may also appoint the PGT as temporary guardian following a "severe adverse effects" investigation.

Demographic and social trends mean that fewer individuals have family and close friends who are able and willing to act for them, and who could appropriately fill the role. As well, the responsibilities associated with acting as an SDM are significant, and many individuals would find it challenging to fill these roles well. Chapter VI reviews current law as to who may act as an SDM in Ontario, and considers some options for expanding who may act in these circumstances, as well as highlighting the need for better supports for family and friends who act in these roles. Options for expanding who may act include:

Professional fiduciaries: some jurisdictions have created a specialized licensed profession of fiduciaries, who may act under powers of attorney. Professional fiduciaries might be seen as an appealing source of substitute decision-making in two circumstances. Where individuals have no trusting relationship with an appropriate person who is willing and able to act on their behalf, professional fiduciaries might be an alternative to the PGT. As well, some might find the idea of a professional fiduciary appealing because their specialized focus gives them the

opportunity to develop experience and expertise in fulfilling this role. However, without extensive regulation, there may be considerable risk in allowing professionals access to the funds or persons of individuals who may be very vulnerable due to a combination of disability and social isolation.

Volunteers: A number of jurisdictions have instituted volunteer programs through which members of the public may act for individuals who are socially isolated and do not have family or friends to assist them. In some cases, these volunteer programs are developed and supervised directly by government, while in others this role is contracted to community agencies.

Community organizations: Currently, under some informal trusteeship programs for certain types of social supports (such as the Ontario Disability Support Program payments or Canada Pension Plan payments), community organizations may receive funds on behalf of individuals and make decisions for them. An expansion of this type of role into decisions under capacity and guardianship legislation may expand options for those who are socially isolated. The LCO has heard that some community organizations are able to provide very good informal trusteeship services as part of a more holistic package of services that they provide to clients that they know well and with whom they regularly interact. However, consideration would have to be given to screening organizations for appropriateness, avoiding conflicts of interest and providing for accountability.

Personal support networks: Formalized personal support networks, such as "microboards" have been used in some Canadian jurisdictions to receive and manage certain types of funds for persons with disabilities. A microboard is a small group of committed persons who join together with a person with a disability to create a non-profit society which provide a variety of personal support services for the person, including the management of direct individualized funding to the individual.

III. APPOINTMENT AND EXIT PROCESSES FOR SUBSTITUTE DECISION-MAKING

Chapter III focusses on the process by which individuals are appointed to and removed from their roles in the decision-making process. Any form of appointments and exit process must balance a number of goals, some of which may be in tension with the others. These include accessibility, efficiency, flexibility, provision of choice to the individual, transparency and accountability, responsiveness to context, susceptibility to scrutiny and preservation of privacy.

Ontario's law employs three means of identifying substitute decision-makers:

1. **Personal appointments**, in which the individual independently identifies his or her SDM through a power of attorney (POA) for property or for personal care;

2. **Public appointments**, where a court, tribunal or administrative body appoints the SDM. This takes the form of statutory or court-appointed guardianships under the SDA, and representatives appointed by the Consent and Capacity Board (CCB) under the HCCA and
3. **Automatic appointments** under the HCCA, where SDMS are appointed through a hierarchical statutory list.

Stakeholders have identified major concerns regarding abuse of powers of attorney, particularly powers of attorney for property. The private nature of these appointments does, by its nature, tend to reduce scrutiny and increase the risk that abuse may be carried out undetected. The challenge is to balance the concerns regarding abuse with the importance of ensuring the continued accessibility of these instruments. A second major concern related to POAs is the difficulty faced by third parties in locating and validating them: as a result, these documents may be improperly applied or not applied at all.

Options for reform include those aimed at increasing understanding of the risks and responsibilities associated with these powerful instruments, for example through more stringent requirements related to their creation; or mechanisms to increase the potential for monitoring and oversight, such as registries, duties to account and monitors.

Critiques of current public appointments processes include concerns that it may be excessively employed, resulting in unnecessary guardianships, and that the processes are insufficiently flexible and accessible to ensure that individuals are able to enter and exit guardianship as appropriate.

Options for reform include those aimed at reducing the scope of powers allocated to appointees as appropriate (for example, through partial guardianships or appointments for specific decisions only); creation of time-limited guardianships and regular mandatory reviews of guardianship orders; streamlined entrance and exit processes; and additional procedural safeguards to promote thorough consideration of less restrictive alternatives to guardianship.

PART FOUR: ACCESS TO THE LAW

I. THE PROBLEM OF ABUSE AND MISUSE OF SUBSTITUTE DECISION-MAKING POWERS

Issues related to abuse and exploitation form a persistent theme in laws related to legal capacity, decision-making and guardianship, and in the debates about them. These laws have their inception, in part, in the desire to prevent abuse of persons who are at risk due to impairments in their cognitive abilities. The very nature of the impairments that result in the

loss or diminishment of the "ability to understand and appreciate" and that thereby result in the appointment of SDMs, may be considered to increase the risk that unscrupulous individuals will be able to abuse these individuals without being detected or without the victims being aware of and able to exercise avenues for recourse. As well, because legal capacity, decision-making and guardianship laws give some people power over others, the laws themselves may create opportunities for abuse. Because the law and the roles of SDMs are often poorly understood, and because substitute decision-making powers are often exercised in the context of complex interdependent relationships, these powers may also be misused or misapplied, without any negative intent on the part of the SDM.

Current Ontario law includes a range of mechanisms for preventing, identifying and addressing abuse and misuse of substitute decision-making powers. However, there are considerable concerns about levels of abuse, with focus on three main areas: lack of understanding of the law by SDMs and by those falling under substitute decision-making powers; lack of effective mechanisms for monitoring and oversight of the activities of SDMs, and a lack of effective means of redress where abuse or misuse is identified.

Options for reform include increased provision of information and education for SDMs, whether voluntary or mandatory; a requirement for signed undertakings by SDMs at the time of appointment; requirements for regular proactive reporting by SDMs; creation of "Visitor" programs with powers to supervise or support SDMs; creation of a "Monitoring and Advocacy Office" or expanded supervisory responsibilities for the PGT; expanded powers for the PGT or another body to receive and investigate complaints; or provisions to limit loss of funds through abuse, such as limits on conflict transactions or expanded requirements for SDMs to post bonds or security.

II. DISPUTE RESOLUTION AND RIGHTS ENFORCEMENT

Many stakeholders find themselves in agreement with the essential approach of the current legislative regime, but are concerned that in practice, the legislation does not deliver on its promise. Some significant portion of the responsibility for that shortfall is attributed to gaps and shortcomings in the mechanisms for rights enforcement and dispute resolution. Concerns regarding dispute resolution and rights enforcement in this area must be understood in the context of other concerns in this area of the law, including shortfalls in monitoring and oversight mechanisms, the complexity of the system, and limits in information and education for all those involved in this area of the law. As well, these concerns should be understood in the context of broader concerns about access to the law in general. Those directly affected by this area of the law are often marginalized or at risk in some way, and so may face particular challenges in understanding and accessing their rights.

The Consent and Capacity Board (CCB) received strong support from stakeholders during the preliminary consultations as a generally effective and accessible forum for what may be difficult issues. However, there are ongoing questions as to whether the best balance has been struck with respect to proceduralism, adversarialism and meaningful resolution of the issues.

Concerns with the court-based processes for resolution of disputes and rights enforcement under the SDA focused on the challenges of addressing warring families who make these processes the venue for bitter disputes that have little to do with the well-being of the individual who is supposedly at the centre, costs and other barriers to accessibility, and complexity. Options for reform include provision of additional specialized supports or services for individuals attempting to access their rights in this area, or examining the experience with tribunal systems in other jurisdictions.

III. SUPPORTS TO ACCESSING THE LAW: NAVIGATION, PROBLEM-SOLVING AND VOICE

One of the key priorities for reform identified during the LCO`s preliminary consultations was the provision of supports to enable individuals to more effectively access their rights under the law. Particular emphasis was placed on developing systems, policies or practices that would ensure that:

- individuals whose rights were potentially affected by these laws had meaningful access to information about the law, its potential impact on them, and their options for pursuing their rights;
- both individuals directly affected and those who provide them with supports receive assistance in navigating the often complex systems for capacity assessment, entering or exiting guardianship, or challenging the activities decisions or activities of SDMs;
- individuals with disabilities that affect their abilities to identify or articulate their needs and wishes receive supports and accommodations to assist them in this respect; and
- where individuals must deal with lengthy, procedurally demanding or multi-layered legal structures in order to resolve disputes or enforce their rights, that they receive the assistance necessary to ensure that they can meaningfully advocate for their rights.

These issues are addressed in this Chapter of the *Discussion Paper.*

There are a number of important supports and advocacy services within the current system, such as rights advisers under the MHA; “section 3 counsel” who may be appointed to provide representation to persons who are subject to proceedings related to legal capacity under the SDA and who do not have counsel; legal aid services, particularly with respect to CCB hearings; and specialty legal clinics such as the Advocacy Centre for the Elderly and ARCH Disability Law Centre. These services are valuable, but are limited in scope and fragmented. One option for reform is to examine how these support services may be strengthened or expanded.

As well, one might consider the creation of new, specialized support services, such as exist in other jurisdictions or areas of the law. Examples include the Office of the Public Advocate in the Australian state of Victoria, the Independent Mental Capacity Advocates provided in the United Kingdom to persons who have may lack legal capacity and require supports with respect to serious medical or significant accommodation decisions (such as admission to long-term care); Alberta's Review Officers who provide services as part of the process of applications for guardianship or co-decision-making; and Ontario's Adult Protective Services Workers who provide supports to persons with developmental disabilities though government funding of appropriate community service providers.

IV. ACCESS TO INFORMATION AND EDUCATION

One of the dominant issues throughout this *Paper* is the effect of the pervasive lack of knowledge and understanding of this area of the law on its meaningful and effective implementation. This affects every aspect of the law, and every group that comes into contact with it. This chapter gathers together material from throughout the *Paper* to provide a focused examination of this problem.

There are four groups who must understand the law in order for it to be implemented as envisioned:

1. those who are directly affected (those who may or have been determined to lack legal capacity, or who are attempting to create authorizations, such as powers of attorney, to address future decision-making arrangements);
2. those who act for others who have been determined to lack legal capacity: as noted above, these are mostly family and friends, but may include others;
3. those who provide information, advice and support to those who interact with Ontario's legal capacity and guardianship system, such as advocates, community agencies and social service providers; and
4. those professionals who are responsible for implementing the law, such as professionals who assess capacity, obtain consent, or are responsible for ensuring compliance with the law.

Each of these groups has different information needs, and will face different opportunities and barriers in accessing information and education.

With respect to professionals and institutions, while considerable effort has been invested in assisting these groups to understand the law in this area and their obligations under it, it is generally believed that much more is needed. The law is complex, the issues are difficult and personnel regularly change over. As well, there is no central repository of information on this area of the law. For those looking for information or resources, there is no one obvious place to

look. While many organizations identify information gaps based on their own experiences and attempt to fill them, there is no central mechanism for identifying needs on an ongoing basis. Further, while many organizations provide information and education, no organization has a clear and specific mandate to do so.

PART FIVE: ADVANCING EFFECTIVE LAW REFORM

I. ENSURING AN EFFECTIVE SYSTEM: COORDINATION, SYSTEM MONITORING AND TRANSPARENCY

One underlying theme running through many of the issues raised in this *Paper* is the decentralized nature of Ontario's system, with multiple institutions and processes reflecting a diversity of needs, and a focus on individual action to access the system and its supports. A recurring concern throughout this initial phase of the project has been the challenge in coordinating all of the many institutions and aspects of this area of the law, and ensuring that they are working well together towards the achievement of the ultimate purposes of the law. This concern may be understood as the result of three significant and interrelated gaps in the current regime:

1) There is a pervasive lack of data, and even of the potential to gather data, relating to the effective functioning of current processes and requirements, and as a result, there is a lack of transparency and accountability for the system as a whole.
2) Ontario's approach to this area of the law has been relatively decentralized, with a focus on the responsibilities of affected individuals, families and professionals in ensuring that the system operates effectively and as envisioned, and as a result, there is little coordination or oversight of broader system functions such as education or monitoring of SDMs.
3) As a result, it is difficult to identify flaws or implementation issues in the system as whole, and therefore to evaluate whether the law is having its intended effect.

II. PARTICIPATION IN THE LAW REFORM PROCESS: THE LCO'S PUBLIC CONSULTATIONS

The laws of legal capacity, decision-making and guardianship directly affect a large and growing number of Ontarians. Most Ontarians will at some point encounter this area of the law, whether in a professional role or through their own illness or disability, or that of a loved one. The impact of these laws on the rights and basic quality of life of those directly affected, and on the lives of their families and friends, is profound. For law reform to be effective, it is important to hear from those affected, to understand both how the law currently works in practice and how it can be improved to be more meaningful, accessible, just and effective.

The LCO encourages you to participate in its public consultations. Information about consultations and how you can contribute is found in Part Five, Chapter II.

INTRODUCTION

A. The Law Commission of Ontario's Project on Legal Capacity, Decision-making and Guardianship

The law of legal capacity, decision-making and guardianship has a profound impact on the lives of the individuals who fall within its scope. The opportunity to make decisions for ourselves is fundamental to our autonomy, our security and our conceptions of ourselves, and we generally think of the ability to choose for ourselves as a fundamental right that can only be restricted where well-justified.

Ontario has a relatively modern and sophisticated legal regime addressing situations where decisions are needed but decision-making abilities may be at issue. Ontario's law on legal capacity, decision-making and guardianship is the result of extensive and thorough law reform work carried out in the late 1980s and early 1990s.

Nonetheless, during the Law Commission of Ontario's (LCO) two projects on the law as it affects persons with disabilities and the law as it affects older adults, issues in this area were identified as a central priority for reconsideration and reform by people in both communities, reflecting considerable concern about how the law was operating in practice, and its impact on the autonomy, security, dignity and inclusion of older adults and persons with disabilities. As well, since the law reforms of the 1990s, there have been significant demographic, social and attitudinal changes, as well as important developments on the international stage. In recent years, many jurisdictions have re-examined their laws in this area, including the province of Alberta, the Yukon, Ireland, the Australian states of Victoria and Queensland, and others.

In September 2011, the LCO's Board of Governors approved a project to review Ontario's statutory framework related to legal capacity, decision-making and guardianship, with a view to developing recommendations for reform to law, policy and practice in this area. The project will take as its analytical foundation the *Framework for the Law as It Affects Older Adults*[1] and the *Framework for the Law as It Affects Persons with Disabilities*,[2] the final reports for which were released by the LCO in the latter half of 2012. Work on this project commenced very late in 2012, and the project was officially launched at the LCO's Symposium in January 2013. This *Discussion Paper* is the first publication in this project, to be followed by *Interim* and *Final Reports.*

B. The Scope of the Project

The law related to legal capacity, decision-making and guardianship is very broad. As well as the statutory core of the *Substitute Decisions Act*[3] (SDA) and the *Health Care Consent Act*[4] (HCCA), law related to capacity and decision-making can be found in the common-law, health

information and privacy laws, mental health law and many other areas. It touches on almost every area of life, including consent to treatment, financial matters, marriage, wills and estates, the ability to pursue litigation, participation in research, and more. The full scope of this area of the law is beyond what can be tackled in any one project. It was important in developing this project that the LCO focus on those areas where law reform is most urgent.

1. Determining the Project Scope

Therefore, following the approval of this project by the Board of Governors, the LCO conducted considerable preliminary research and consultation, including approximately 70 interviews with a wide range of organizations and individuals, to assist in the following:

- Understanding the key contexts in which the law operates and how the effects of the law differ for various populations and in different contexts;
- Identifying the areas where review and law reform would be most beneficial;
- Understanding the goals which law reform should attempt to promote; and
- Identifying other current initiatives that may in the near future impact on this area of the law and on the LCO's project.

Based on the above, and the input of the LCO's Advisory Group for this project, the LCO has defined the scope of this project.

The LCO's project on legal capacity, decision-making and guardianship will concentrate on the provisions of the SDA and the HCCA. It will not address the common-law on legal capacity and decision-making, or the provisions of the *Personal Health Information Protection Act*[5] (PHIPA).

The project will consider some specific aspects of the *Mental Health Act* (MHA).[6] This is a complex statute that addresses a wide range of issues, only some of which directly relate to legal capacity and decision-making. It is in many ways integrally connected with the SDA and the HCCA. There are many individuals who fall within the ambit of all three statutes, and the experiences of those individuals cannot be properly understood without carefully considering the relationship between the three statutes. **The focus of this project is on legal capacity and decision-making, and it is not its aim to reform the MHA in general. This project will not, for example, deal directly with the complex issues associated with involuntary admission under the MHA.** However, the LCO will specifically examine those provisions of the MHA directly referencing legal capacity and decision-making, most importantly Part III relating to assessment of capacity to manage property. As well, in analyzing the impact of the SDA and HCCA, it will recognize the operation of the MHA as an important context for many individuals.

Within the ambit of the SDA and the HCCA, the LCO will focus on the following broad issues:

1. The **standard for capacity**, including tests for capacity and the various avenues and mechanisms for assessing capacity under the SDA, HCCA and MHA;
2. **Decision-making models**, including an examination of the desirability and practical implications of alternatives to substitute decision-making, including supported and co-decision-making;
3. **Processes for appointments** (for example of substitute decision-makers), whether through personal appointments or a public process, with a focus on appropriate use and on improving efficiency and accessibility;
4. The **roles and responsibilities of guardians and other substitute decision-makers**, including potential for more limited forms of guardianship and consideration of options for those who do not have family or friends to assist them;
5. **Monitoring, accountability and prevention of abuse** for substitute decision-makers or supporters, however appointed, and of misuse by third party service providers, including mechanisms for increasing transparency, identifying potential abuse and ensuring compliance with the requirements of the law; and
6. **Dispute resolution**, including reforms to increase the accessibility, effectiveness and efficiency of current mechanisms.

2. Project Themes

Analysis of these issues will be informed by a number of overarching themes, in particular:

1. **Diversity in the experiences and needs of those who are directly affected by this area of the law:** While those who are directly affected by Ontario's legal capacity, decision-making and guardianship laws will share some experiences and circumstances in common, there is considerable diversity as well. The differences in the life courses, support networks, and impairments of, for example, a young adult with an intellectual disability, a person who experiences a traumatic brain injury in mid-life, and older person who develops dementia will profoundly shape how they encounter this area of the law, and the needs that the law is expected to meet. As well, other forms of identity or life experience will also affect how the law is experienced. For example, the ways in which individuals demonstrate decision-making abilities (and therefore how their legal capacity is assessed) will be affected by cultural norms. This diversity will, on some issues, pose challenges in determining the most appropriate approach to law reform.
2. **Attitudes, understanding and the role of education:** the application of this area of the law is significantly influenced by the attitudes of individuals, families, professionals and institutions towards disability, aging, risk and autonomy, and the role of families, among

other issues, as well as understanding of the purposes and provisions of the law. Law may both reflect and shape attitudes. Effective implementation of law reform may require a focus not only on the substance of the law, but on providing education and information to all those it touches.

3. **Families and interdependent relationships:** At the heart of many of the issues raised by the law in this area of the law are the families and other close personal relationships of those directly affected. Family dynamics are complex. The social supports that we provide to persons with disabilities rely heavily on the supports provided by families, but many individuals do not have such supports, for a variety of reasons. Families may be profound sources of support and empowerment; they may also be sources of mistreatment and abuse. It is also important to recognize that family members have their own needs, which may sometimes conflict with those of the individual with a disability. How we conceive of families, and what we think appropriate and realistic to expect of them will significantly affect the options available for law reform.
4. **Public and private roles:** Related to the previous theme, is the question of the appropriate role of public institutions with respect to providing supports, oversight or interventions. To what degree is this an area where individuals should be free to make ill-informed or ill-advised choices (e.g., in developing a power of attorney) and then to suffer the sometimes very serious consequences? In what circumstances is it appropriate for public institutions to intervene in private family dynamics? What is the responsibility of government for providing information and supports to ensure that individuals have appropriate options, and the resources to understand their options and to access them?
5. **The implementation gap:** In many aspects of the laws of capacity, decision-making and guardianship, concerns arise not so much from the specific wording of the statute, as from the way in which it has been implemented. This includes concerns regarding lack of sufficient information and education for those operating in the system, inadequate monitoring and oversight mechanisms, lack of coordination between different parts of the system, and a shortage of resources at a number of levels.
6. **Access to advocacy and supports:** Because this area of the law affects individuals who may be vulnerable or marginalized in a variety of ways, and because the law is extremely complex, many have pointed to a need for greater supports for affected individuals in understanding options, navigating systems and problem-solving.
7. **Simplification and proportionality in process design:** In attempting to respond to multi-dimensional issues and diverse experiences, systems may become complex, fragmented and cumbersome. Such complexity can be a significant barrier to accessing the law, a concern raised both with respect to assessment of capacity and for processes for entering and exiting guardianship. In designing laws and processes for addressing this

area of the law, careful thought must be given to balancing the degree of process and procedural protections with the gravity of the issue at stake, and where possible and appropriate, to simplifying processes to make them more accessible and efficient.

8. **Monitoring and evaluation of the legislation:** It is important for the success of any law reform to include mechanisms for transparency, accountability and regular evaluation of the effectiveness of the law in achieving its purposes. This includes building opportunities for public feedback and for gathering meaningful data about the operation of the law.

3. Taking a System Perspective

The issues and themes identified above are all inter-related and interdependent. For example, the challenges related to processes for appointments have implications for monitoring, accountability and the prevention of abuse, and both are related to concerns regarding dispute resolution processes. Potential reforms to any one of these issues cannot be analyzed in isolation: they will have implications across legal capacity, decision-making and guardianship laws. That is, each issue or theme must be approached as one part of a larger system.

This is true for efforts to understand the operation of Ontario's current law, and the potential impact of any particular change on the law as a whole. It is also true for analyzing other capacity and guardianship systems as sources of ideas for potential reforms to Ontario's laws. In considering the United Kingdom's thorough registry system for all substitute decision-makers, or the operation of the Australian state of Victoria's Visitor programs, it is important to understand how these particular features fit into the overall picture of their jurisdiction's legislation in the area, as well as into that jurisdiction's broader scheme for providing services and supports for those who are disproportionately affected by legal capacity and decision-making laws, such as persons with mental health disabilities, intellectual disabilities or cognitive disabilities associated with aging.

In considering Ontario's laws in this area as a system, one might think of it as having two components. At the core are a set of approaches to the central issues: what is "capacity" and what should the role of this concept be with respect to decision-making? Who should determine whether a particular individual has this quality of "capacity" and how should this be done? Who should be able to assist persons who face challenges in making decisions, and what should their role be? What type of legal arrangement should be required to formalize these assistive roles? Surrounding this core are mechanisms for implementing these approaches: systems for oversight, for education and training, for supports and for dispute resolution. Underlying all of this are assumptions about the fundamental principles and priorities that should guide the system, the relative roles of families and the state in providing supports, the

nature of disability and aging, for example. These underlying assumptions will differ to some degree in every system, and will reflect the history, economy, culture and social structures of that jurisdiction.

In considering Ontario's laws related to legal capacity, decision-making and guardianship, then, one must consider not only how *particular* aspects of the law operate, whether effectively or ineffectively, appropriately or inappropriately, one must consider how the system operates as a whole. This is a broad concern, going beyond any particular issue, although it will affect the way in which particular issues can be analyzed and addressed. Some important questions to consider when analyzing Ontario's system for legal capacity, decision-making and guardianship are briefly identified below.

1. **How well are we able to examine the system?** Is the system as a whole transparent and accountable, so that users and stakeholders are able to determine, relatively effectively, whether it is meeting its goals and whether it is doing so appropriately and efficiently? For example, are there "feedback mechanisms" within the law, so that the operation of the system can be assessed? Are there means for gathering data about the particular functions of the system? Is information about the functioning of the system available to stakeholders and the public?
2. **How well does the law operate as a system?** Is it internally coordinated? Are there effective means of sharing skills and information across various parts of the system? Are there ways of identifying problems that cut across various parts of the system and enabling cooperative efforts to address those problems? That is, are there mechanisms to promote the efficient and effective functioning of the law as a coordinated whole?
3. **Are there mechanisms for ongoing monitoring and evaluation of the law, so as to address problems affecting the system as a whole?** Is there capacity or are there mechanisms to monitor the system, both in terms of its effectiveness in meeting its goals and in terms of the continued appropriateness of those goals?

These questions are briefly considered at the close of the *Paper*, in Part Five.

- **QUESTION FOR CONSIDERATION: Within the identified scope of this Project, are there additional issues or themes that should be considered?**

C. Applying the LCO *Frameworks*

As was noted above, this project grew out of the LCO's two "framework" projects on the law as it affects older persons and the law as it affects persons with disabilities, which were completed in 2012. These two sister projects aimed, not to create specific recommendations for changes to particular laws, but to develop approaches to law reform relating to these two groups. These projects resulted in comprehensive *Reports*, as well as the *Frameworks,* which set out step-by-

step approaches to evaluating laws, policies, practices and law reform proposals related to the two groups, based on a set of principles and considerations.

The application of the *Frameworks* to the LCO's project on legal capacity, decision-making and guardianship has a number of implications for this project:

- The *Frameworks* are based on the recognition that persons with disabilities and older adults, in their different ways, face marginalization, discrimination and barriers to accessing justice; and that these realities must be taken into account in developing law reform proposals;
- The *Frameworks* are founded on a overarching value of substantive equality that applies to a set of principles; this project will evaluate the current law and proposals for reform against these principles with this overarching value in mind;
- The "implementation gap" between laws as written and as they are implemented was a key theme for both *Frameworks*, and the LCO's research and consultations to date indicate that this is an important factor for this project as well; this highlights the importance of considering not only the law as written, but also the policies and practices through which it is implemented;
- The application of both *Frameworks* will assist in focussing attention on how the law in this area is experienced differently by affected individuals depending on the nature of the disability and the point along the life-course at which it is incurred, reflecting the importance of a life-course analysis;
- The *Frameworks* recognize that the *process* of law reform is itself important, and will significantly shape the outcome; the process for this project will be guided by the recommendations of the *Frameworks.*

Appendix A of this *Paper* sets out the Principles and Considerations for Implementation of each of the *Frameworks* for easy reference. The full *Frameworks* also contain a step-by-step process for evaluating laws, policies and practices, including a set of questions that assist in identifying and analyzing the application of the principles and considerations to the law. It should be noted that this project will seek to apply all aspects of the *Frameworks*, and not only the elements summarized in the Appendix. The full *Frameworks* can be accessed through the LCO website at www.lco-cdo.org.

While the *Frameworks* will form the analytical foundation for this project, it is important to keep in mind that there are a significant number of individuals directly affected by capacity and decision-making laws who are neither older persons nor persons with disabilities – they are individuals who have temporarily lost legal capacity due to a short-term illness or medical crisis that does not result in a disability. The experiences of individuals in this group may tend to be obscured by the use of the *Frameworks* as an analytical lens: it will be important not to lose sight of them.

It is also important to recollect that neither older adults nor persons with disabilities are subject to capacity and guardianship laws merely by those characteristics. These laws will disproportionately affect certain groups of older adults and persons with disabilities whose capacity is in question. As well, a broader group of older adults and persons with disabilities may be affected by the *assumption* that they may lack legal capacity and may fall within the ambit of the legislation. However, it is crucial that older age or disability not be conflated with a lack of legal capacity.

Finally, this project brings into focus the intersection between older age and persons with disabilities. As was discussed at length in both *Framework* projects, there are continuing differences of opinion as to who is or should be included in the definition of an "older adult" or a "person with a disability". The LCO recognizes that definitions have different purposes in different contexts. **The *Framework* projects adopted broad and inclusive definitions of "older adult" and "person with a disability" and the LCO will continue to do so for the purposes of this project. There is thus considerable overlap between the two groups, and the intersection will have important consequences for the experiences of individuals. For example, for a person who develops dementia later in life, their older age will have a significant impact on the way in which they experience their disability.**

D. Project Methodology

In keeping with the approaches adopted in the *Framework* projects and in response to the issues and contexts raised by this project, the LCO has adopted the following approaches for this project:

1. **Principles-based:** in keeping with the approach of the *Frameworks*, the issues raised by various aspects of the law of legal capacity, decision-making and guardianship will be analyzed on the basis of the principles identified in the *Frameworks*, with a view to advancing substantive equality and with attention to the concept of progressive realization.[7]

2. **Attention to lived experience**: the experiences of those who are directly affected by the current legal framework are essential to understanding the strengths and weaknesses of the current system and the options and goals for reform.
3. **Interdisciplinarity:** given the complex human problems and experiences at the core of this area of the law, the LCO will look, not only to legal sources and literature, but broadly to other disciplines, including medicine and other health sciences, philosophy, ethics, social sciences, and critical gerontology and disability studies.
4. **Practicality and implementability:** in view of the significance of the "implementation gap" in this area of the law and of the reality of constrained resources at multiple levels, the LCO will focus on developing recommendations that while forward-looking, are practical and implementable. It will also consider how existing resources and skills can be most efficiently and effectively used, for example through improved coordination.
5. **Supporting connection and discussion:** while the issues raised in this project apply in many contexts and affect many different individuals and organizations, there have been relatively few opportunities for discussion across contexts and groups. The LCO will be aim to facilitate conversations across disciplines, contexts and perspectives.
6. **Inclusivity and accessibility:** recognizing the great diversity among those affected by this area of the law and that significant groups of those so affected may face barriers in access to justice, the LCO will strive to carry out this project in a way that is accessible and inclusive of many kinds of diversity.
7. **Evidence-based:** in formulating recommendations, the LCO will be attentive to the qualitative and quantitative evidence available relating not only to Ontario's experience, but to that in other jurisdictions in Canada and around the world.

This *Discussion Paper* marks a third phase for this project, following a project scoping phase that involved considerable preliminary research and consultation, and an intensive research phase that included the commissioning of five research papers. This *Discussion Paper* will be followed by intensive public consultation. Information about the LCO's public consultations and opportunities for input can be found in Part Five, Ch II, "Participating in the Law Reform Process: the LCO's Public Consultations". The response to these consultations, together with further research by the LCO, will provide the foundation for an interim report, which will set out draft analysis and recommendations. That interim report will be circulated for further feedback, prior to the development of a final report with recommendations.

- **QUESTION FOR CONSIDERATION: What considerations should the LCO be aware of to ensure that law reform proposals in this area will be practical and implementable?**

E. This Discussion Paper

1. The Contents of This Paper

This *Discussion Paper* is based on the research and public consultation that the LCO has completed to-date, including the completed commissioned papers, as well as preliminary consultations with a diverse group of stakeholders.

The *Paper* synthesizes the information gathered to this point, identifies key issues in this area of the law, and sets out some potential directions for reform, based on a review of laws in other jurisdictions, recommendations from other law reform initiatives, and the analysis of experts and advocates. It is intended as a foundation for public consultation and discussion on the issues identified. It is accompanied by a set of shorter, simplified documents intended to support the consultation process.

Part I of the *Discussion Paper* provides background about the project and about Ontario's laws regarding capacity, decision-making and guardianship. Part II focuses on the concept of capacity, examining approaches to and tests for legal capacity, as well as mechanisms for carrying out capacity assessments. Part III explores issues related to decision-making, including questions regarding who may act in situations where a person is determined to lack legal capacity, alternative approaches to decision-making, and processes for appointing decision-makers. Part IV considers issues related to how the law is meaningfully accessed, including concerns about information, education and training; rights enforcement and dispute resolution; and identifying and addressing abuse. Finally, Part V highlights issues for ensuring effective law reform in this area, including how to incorporate monitoring and accountability mechanisms into new laws, and information on how to participate in the LCO's public consultations.

2. How to Use This Paper

This *Paper* is one of a number of documents released by the LCO to support public consultations on reforms to Ontario's laws on legal capacity, decision-making and guardianship.

It is accompanied by a much shorter *Summary of Consultation Issues*, which summarizes the key issues identified by the LCO through its research and preliminary consultation and includes questions to guide consultation. The *Summary of Consultation Issues* may be used to orient readers to the structure and topics of this extensive *Paper.*

The structure of this *Discussion Paper* mirrors that of the *Summary of Consultation Issues*. However, it examines the issues in considerably more depth, providing in each chapter a summary of the current law, an outline of the issues of concern along with background and context related to those issues, some analysis of the issues in light of the LCO's *Frameworks*, and a description of options for reform that includes comparable programs from other

jurisdictions. This material is intended to assist in identifying and weighing priorities and options for reform.

This area of the law is broad and raises many issues. Many readers will be interested in only selected topics, rather than the entire range of issues raised. It is not necessary to read this *Paper* in order or completely to respond to it. Each Chapter can be read as a standalone piece; however, since the issues are interconnected, there are also many references to other Chapters.

Each Chapter includes Questions for Consideration. These are intended to promote and guide discussion. In responding to this *Paper*, readers not need understand these questions narrowly, or understand them as exhausting all possible responses to the contents of the *Paper.* Questions are situated in the text of the Chapters, close to the discussion to which they are related. For convenience, they are also gathered at the end of each Chapter and in an Appendix at the end of this *Paper.*

F. Questions for Consideration

1. **Within the identified scope of this Project, are there additional issues or themes that should be considered?**
2. **What constraints and opportunities should the LCO be aware of to ensure that law reform proposals in this area will be practical and implementable?**

PART ONE

REFORMING ONTARIO'S LEGAL CAPACITY, DECISION-MAKING AND GUARDIANSHIP LAWS

This Part of the Discussion Paper provides background and contextual information to assist in understanding Ontario's current statutory framework for legal capacity, decision-making and guardianship, and in assessing options for reform. It includes information about the importance of this area of the law and how it affects some particular groups of Ontarians, Ontario's current legal framework in this area, demographic and other pressures that may shape reform needs and options and the application of the LCO Framework principles to this area of the law.

I. BACKGROUND AND CONTEXTS IN WHICH THE LAW OPERATES

This Chapter sets out some of the background and contextual information that is helpful to understanding the operation of Ontario's laws related to legal capacity, decision-making and guardianship, and to analyzing some of the issues related to reform of the law. It begins by providing some background information about decision-making. It then sets out some basic information about Ontario's statutory scheme and its history, and provides some general information about the individuals affected by this area of the law and the contexts in which it operates.

A. Decision-making and the Law

1. The importance of decision-making

We make decisions all the time. Decisions may be large or small, routine or life-changing, complicated or straightforward, but regardless they are important as expressions of our values and identity, as opportunities to learn from both our successes and mistakes, and as the fundamental means through which we shape our lives. As the Queensland Law Reform Commission has commented, "Making decisions … empowers people by allowing them to express their individuality. It enables people to control their lives and gives them a sense of self-respect and dignity."[8] At this personal level, decision-making is connected to autonomy, dignity, security and other fundamental values.

> Decision-making has a public as well as a personal aspect. When we are interacting with other individuals or organizations, decision-making is also associated with other values, such as clarity, certainty and accountability. When others are being asked to rely on or implement our decisions, it is important for them to be sure that they understand the decision that has been made, that they can rely on the finality of that decision, and that all parties can be held to account to uphold their part of the decision. In this public realm, law plays an important role, for example in determining when an agreement is valid and we are entitled to rely on it, and when a party is liable for a breach of the agreement.

Decision-making involves both a process and an outcome. In both the private and the public realm, considerable importance may be attached to the quality of the decision-making process. In the legal realm, for example, a contract is voidable where "undue influence" has tainted a party's decision-making process, leading to an unjust result. In the private realm, the process of decision-making has a value in itself, apart from the merits of the ultimate decision: a "good" decision-making process (whatever one might consider that to be) may be viewed as enhancing

the dignity of the decision-maker, promoting personal growth, or asserting their beliefs, individuality and autonomy.

2. Purposes of capacity and guardianship law

As the laws related to legal capacity, decision-making and guardianship have a very long history, they not surprisingly have been seen as fulfilling a number of different goals. Modern law reform in this area has articulated a number of purposes for capacity and guardianship law. The *Health Care Consent Act* (HCCA) clearly articulates its purposes in its opening section; while the purposes of the *Substitute Decisions Act* (SDA) must be inferred from an examination of the statute as a whole. Generally, the law's purposes may be articulated as follows:

1. facilitating, where necessary, decision-making for persons who have been determined to lack legal capacity;
2. preventing undue interference in the lives and decisions of persons who have legal capacity;
3. recognizing and promoting the role of supportive family and friends in the lives of persons who have been determined to lack legal capacity, as well as providing last resort decision-making mechanisms for those who do not have supportive family or friends;
4. supporting individuals in planning for the possibility that they may be found to lack legal capacity at some point in the future;
5. providing safeguards against abuse of persons who have been found to lack legal capacity;
6. providing rules and principles for substitute decision-making that are clear and that promote both the autonomy and the basic security of persons who have been determined to lack legal capacity;
7. ensuring basic procedural protections for persons whose legal capacity is lacking or in question.

3. The limits of the law

Laws related to capacity, decision-making and guardianship are and can be only partial responses to complex practical, ethical and social issues. In understanding this area of the law, it is important to take into account the complexities of family dynamics, the challenges raised by the shortages of resources available to persons with disabilities and their families, the ethical issues raised for families and service providers in their relationships with persons who are at risk for exploitation or abuse or who have difficulty in speaking or advocating for themselves, among other issues.

These laws exist in a larger context of social attitudes and structures that enhance or limit their effectiveness. Many of those interviewed by the LCO during the preliminary consultation process emphasized the severe shortage of community resources for older adults and persons with disabilities. Institutions and services such as hospitals, community mental health services

and home care often lack the resources to provide sufficient supports to persons who are ill, frail or have disabilities. Family and friends, acting as unpaid caregivers, are often stretched to their limits in attempting to support their loved ones to live independently and with dignity in the community. In these circumstances, difficult decisions must be made, and the laws relating to legal capacity, decision-making and guardianship may be seen as or attempted to be used as tools to address painful and difficult issues.

The application of laws will be influenced by social norms and attitudes, in this case related to disability, aging and risk. As the LCO's *Framework* projects emphasized, both older adults and persons with disabilities have been the subject of persistent paternalism and limiting attitudes with respect to their abilities to do and choose for themselves. These attitudes may influence the application of laws related to capacity, decision-making and guardianship, limiting the effectiveness of some of the provisions aimed at protecting the autonomy of those who fall within its reach. While law can have some effect in shifting norms, it cannot by itself transform them. The implementation of new laws will also likely be affected by the attitudes that currently shape the application of existing ones.

No legislative regime can *on its own* fully address all of these issues. No law reform can provide supportive family members for all those who are isolated and vulnerable, prevent all abuse of at-risk individuals, or ensure that persons who are frail, ill or disabled always receive the supports that they deserve and require. Law reform in this area may be best understood as one thread, albeit a vital one, in a larger conversation about the rights and roles of persons with disabilities and older persons; the responsibilities of families, communities and government to provide supports; and the level and type of risk that we are comfortable with individuals, particularly vulnerable individuals, assuming.

- **QUESTION FOR CONSIDERATION: What should be the primary purpose or purposes of this area of the law?**

B. A Little Legislative History

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. Ontario's laws at that point, as found in the *Mental Incompetency Act*, the *Mental Health Act*, the *Powers of Attorney Act* and the *Public Hospitals Act*, were generally considered to be fragmented, dated, unwieldy, and unsuited to modern realities.[9] Three separate law reform initiatives were undertaken during this time. As is evident from the current legislation, outlined in Section C of this Chapter, while this work profoundly influenced Ontario's current laws, not all aspects of the recommendations of the various committees were finally adopted. In

particular the final legislation contained much more minimal mechanisms for advocacy, supports and oversight.

1. The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons ("Fram Committee"): In 1984, the Attorney General appointed a committee, headed by Stephen Fram, to "review all aspects of the law governing, and related to, substitute decision making for mentally incapacitated persons and to recommend revision of this law where appropriate".[10] The *Final Report* of this Committee ("the *Fram Report*"), released in 1987, identified as underlying values for this area of the law freedom from unnecessary intervention; self-determination; and community living through access to support.[11] Key approaches included:
    - An understanding of the role of substitute decision-maker that aimed to maximize the autonomy of those determined to be incapable, including requirements related to respect for prior capable wishes, and a duty to support the participation of those found incapable in the decision-making process;
    - Greater emphasis on and empowerment of family members as substitute decision-makers, particularly through reforms to the law related to powers of attorney, with guardianship as a last resort;
    - Provision of advocacy and supports for those falling under the law, including rights advice in a wide range of circumstances and access to publicly funded advocacy services, with the intent to ensure that the values underlying the law were upheld; and
    - A role for the Public Guardian and Trustee (PGT) as a "public safety net" that would have supervisory powers over attorneys and private guardians, act as a decision-maker of last resort, undertake an educative function, and have the power to act in emergency situations involving neglect, abuse or exploitation of persons lacking capacity.

2. Committee on the Enquiry on Mental Competency ("*Weisstub Enquiry*"): In 1988, the Ministry of Health created an Enquiry on Mental Competency, with Professor David N. Weisstub as its Chair. The Committee was given the task of developing a set of recommended standards for determining the mental competence of individuals to make decisions with respect to health care, management of financial affairs and appointment of a substitute decision-maker. The Final Report of the *Weisstub Enquiry* concluded that the process for testing capacity must respect both the principle of autonomy and that of best interests, as well as reflecting the importance of proportionality, administrative simplicity and relevance.[12] The Final Report recommended codification of a presumption of capacity, a cognitive approach to the

nature of capacity, situation-specific tests for capacity, time limitations on capacity assessments, and procedural protections for individual in the capacity assessment process.[13]

3. Review of Advocacy for Vulnerable Adults ("the *O'Sullivan Report*"): In late 1986, the Attorney General of Ontario announced a Review of Advocacy for Vulnerable Adults, to be chaired by Father Sean O'Sullivan, to respond to concerns regarding "an unmet need for non-legal advocacy for vulnerable adults living in institutional care settings and in the community".[14] The Review identified a number of goals for an advocacy system for Ontario, including: providing safeguards against unnecessary guardianship; being independent; encouraging self-advocacy (self-determination) where possible; enhancing the role of family and friends; educating, delabeling and destigmatizing; being flexible; being responsive; promoting cooperation with providers and Ministries; being accessible; being reformative (seek improvements in programs); having clout; and being accountable.[15] The *O'Sullivan Report* recommended the development of an Advocacy Commission, which would develop standards and procedures, as well as regional offices which would be directed by community-based boards and staffed by advocacy coordinators. These regional offices would assist in the development and appropriate funding of local programs tailored to the needs of the vulnerable adults in their particular communities.

This thorough law reform work provided the foundation for Ontario's legislative reforms in the early 1990s, and as a result, Ontario has one of the most comprehensive and coherent schemes of the law governing capacity and decision-making in Canada. It has been described as "modern, internally coordinated and fairly thorough".[16]

In 1991, three new statutes governing legal capacity, decision-making and guardianship were introduced by the Ontario government: the *Consent to Treatment Act*, the *Substitute Decisions Act* (SDA), and the *Advocacy Act*.[17] The *Consent to Treatment Act* and the *Advocacy Act* were both subjects of considerable debate and controversy. Critics expressed concerns that the advocacy initiative was "a bureaucratic mess, costly (in a time of increasing fiscal restraint), and intrusive into both the private lives of families and the prerogatives and competencies of professional groups".[18] The *Advocacy Act* was repealed in 1995 following a change in government, and the *Consent to Treatment Act* replaced by the current *Health Care Consent Act* (HCCA). Some aspects of the current legislative scheme are better understood if one takes into consideration that originally it was envisioned as including the ambitious and comprehensive advocacy scheme set out in the *Advocacy Act.* The *Advocacy Act* provided extensive entitlement to rights advice, as well as creating a publicly funded Advocacy Commission mandated to provide both individual and systemic advocacy on behalf of adults whose mental or physical

difficulties created barriers for them in expressing or acting on their wishes, or in determining or accessing their rights. That is, the system was predicated on the provision of significant resources aimed at supporting the autonomy of persons with disabilities and safeguarding their rights.

The resulting statutory scheme, consisting of the SDA, the HCCA and Part III of the *Mental Health Act* (MHA) is described briefly in the following section.

C. Ontario's Current Legal Context

It is not the purpose of this section to give a detailed overview of Ontario's statutory regime for capacity, decision-making and guardianship. Rather, it aims to provide an overview of the foundational elements of the key statutes and its general approaches. Specific provisions are detailed in the relevant chapters where necessary to understand particular law reform issues and potential approaches to reform.

1. Foundational Law

Ontario's statutory regime for legal capacity, decision-making and guardianship must be understood in the light of several foundational domestic laws and international instruments that govern the law or shape its interpretation and application.

The *Convention on the Rights of Persons with Disabilities*

The most significant of the instruments that the international legal community has created to advance the rights of persons with disabilities is the *Convention on the Rights of Persons with Disabilities* (CRPD).[19] The CRPD codified the commitments of the international community with respect to the rights of persons with disabilities, detailing the rights that all persons with disabilities enjoy and outlining the obligations of States Parties to protect those rights. Its purpose is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". It reflects social and human rights models of disability and therefore highlights the need for society to adapt to the specific circumstances and realities of persons with disabilities in order to ensure respect and inclusion. It recognizes a wide range of specific rights, including rights to:

- live in the community;
- life, liberty and security of the person;
- freedom from exploitation, violence and abuse;
- respect for mental and physical integrity;
- privacy;
- expression of opinion;
- an adequate standard of living; and

- participate in political, public and cultural life.

Canada ratified the CRPD in March 2010 and is bound to "undertake … [t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRPD]."[20] However, the manner in which Canada implements the treaty in domestic law is flexible and legislators "retain full control over domestic law and can choose to ignore Canada's international obligations, even though doing so would result in breaching these international obligations."[21]

Implementation of the CRPD in Canada is further complicated by the constitutional division of powers between the federal and provincial governments. Whereas the former negotiates international agreements on behalf of the country as a whole, the latter is often charged with the task of bringing them into effect in provincial law. The issue of legal capacity traditionally falls within the jurisdiction of the provinces for the purposes of implementation.[22] There was extensive consultation between the provincial and federal governments during the negotiation of the CRPD.[23]

Especially important for this project is Article 12, reproduced below. The implications of this provision for Ontario's laws are considered as relevant throughout this *Paper*, but it should be briefly noted here that Canada entered a Declaration and Reservation with respect to Article 12, declaring its understanding that this Article permits substitute decision-making arrangements as well as those based on supports in appropriate circumstances. The Committee on the Rights of Persons with Disabilities has recently issued a General Comment setting out their interpretation of Article 12.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ARTICLE 12

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The *Charter of Rights and Freedoms*

The *Charter of Rights and Freedoms* is, of course, fundamental law, applying to any body exercising statutory authority or pursuant to government objectives. Section 52 gives the *Charter* overriding effect, such that any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. Under section 24(1), anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedies as the Court considers appropriate and just in the circumstances.

The *Charter* guarantees civil and political rights, legal rights, language rights, expressive rights and equality rights. These rights are limited by section 1, which allows for such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and interference with physical freedom. Thus, liberty includes the right to an irreducible sphere of personal autonomy regarding matters that "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[24] Security of the person has been interpreted by the Supreme Court

of Canada as including an individual's "psychological integrity" where the interference is sufficiently serious.[25]

The Ontario Court of Appeal applied a section 7 analysis to Ontario's substitute decision-making scheme for consent to treatment in *Fleming* v *Reid.* The case involved two psychiatric patients who were not capable with respect to treatment, but who had expressed prior capable wishes regarding particular treatments and whose substitute decision-maker (SDM) was refusing to consent to treatment based on the prior capable wishes. The Court of Appeal found that the statutory provisions that at that time enabled the health care provider to override the prior capable wishes violated the right to security of the person under section 7, holding that

> The right to personal security is guaranteed as fundamental in our society. Manifestly, it should not be infringed any more than is clearly necessary. In my view, although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state has not demonstrated any compelling reason for entirely eliminating this right, without any hearing or review, in order to further the best interests of involuntary incompetent patients in contravention of their competent wishes. To completely strip these patients of the freedom to determine for themselves what shall be done with their bodies cannot be considered a minimal impairment of their Charter right. Safeguards can obviously be formulated to balance their wishes against their needs and ensure that their security of the person will not be infringed any more than is necessary.[26]

The *Charter* also guarantees the equality rights of individuals. Specifically, section 15(1) provides for equality before and under the law without discrimination on the basis of a number of grounds, including age and mental or physical disability. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those experiencing disadvantage due to disability or age.[27]

The Ontario *Human Rights Code*

Under the "primacy clause" of the Ontario *Human Rights Code* ("the *Code*") section 47(2), where a provision of an Act or regulation appears to require or authorize conduct that would violate the *Code*, the *Code* prevails unless the Act or regulation specifically states otherwise.[28]

The purpose of the *Code,* as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.[29] The *Code* prohibits discrimination on the basis of age, as well as of disability, broadly defined, in the areas of employment, services, housing accommodation, contracts, and professional and occupational associations. Where it is necessary in order to ensure equal treatment without discrimination on the basis of age or

disability, individuals have the right to accommodation to the point of undue hardship for needs associated with their age or disability.[30]

There does not appear to be any domestic caselaw directly addressing whether or how the duty to accommodate may apply to decision-making supports. The Commissioner for Human Rights for the Council of Europe has recommended the creation of an explicit legal obligation for government and key institutions (such as health care and financial service providers) to "provide reasonable accommodation to persons with disabilities who wish to access their services. Reasonable accommodation includes the provision of information in plain language and the acceptance of a support person communicating the will of the person concerned".[31] The Ontario Human Rights Commission has noted, in the context of its work on mental health disabilities, the argument that to achieve true substantive equality, providing supports to help people make decisions should be recognized as part of an organization's legal duty to accommodate under human rights laws.[32]

The *Accessibility for Ontarians with Disabilities Act*

Also of relevance is the *Accessibility for Ontarians with Disabilities Act* (AODA),[33] which has as its central purpose the recognition of persons with disabilities as a group that has experienced disadvantage and the removal of barriers in order to achieve their full equality and participation. The AODA requires organizations to take proactive steps across a range of areas to achieve accessibility and inclusion for persons with disabilities, including the removal of physical, attitudinal, technological, informational or communications barriers for persons with disabilities, with a goal of a fully accessible Ontario by 2025.

- **QUESTION FOR CONSIDERATION: What do the principles and commitments found in the CRPD, *Charter*, *Human Rights Code* and AODA tell us about the key elements of reforms to of Ontario's legal capacity, decision-making and guardianship laws? How might they affect the interpretation and application of these laws?**

D. Legal Capacity, Decision-making and Guardianship Laws

The core of Ontario's statutory regime for legal capacity, decision-making and guardianship is found in three statutes: the *Substitute Decisions Act* (SDA), the *Health Care Consent Act* (HCCA) and the *Mental Health Act* (MHA). These statutes are closely related and have significant areas of overlap.

The *Health Care Consent Act*

The HCCA governs consent to treatment in all settings, as well as decision-making related to admission to long-term care and personal assistance services in a long-term care home. It also establishes the Consent and Capacity Board (CCB) as an innovative mechanism for resolving

disputes related to these issues. The purpose of the HCCA, as described in its opening section, is to

- Provide consistent rules for consent to treatment;
- Facilitate treatment, admission to care facilities and personal assistance services for persons lacking capacity to make decisions about these matters;
- Enhance the autonomy of individuals by providing procedural rights, permitting incapable persons to request that the CCB appoint a representative of their choice to make decisions on their behalf in the areas falling under the HCCA, and requiring respect for prior capable wishes of individuals;
- Promote communication between health practitioners and patients;
- Ensure a significant role for supportive families when a person lacks capacity to make decisions falling under the Act; and
- Permit the Public Guardian and Trustee (PGT) to intervene in decisions as a last resort.[34]

Health practitioners may not administer treatment without consent, with narrow exceptions for emergencies.[35] The HCCA sets a standard for capacity to consent to treatment, and the health practitioner proposing the treatment must assess whether the individual meets that standard.[36] If the individual is not capable to make a decision regarding consent to treatment, the decision must be made by a substitute decision-maker, identified through a hierarchical list.[37] The substitute decision-maker must comply with any prior capable wishes expressed by the individual, whether orally or in writing. Where no prior capable wishes exist, the HCCA sets out considerations which the substitute decision-maker must apply when making a decision on behalf of the individual; these include the values and beliefs the individual held while capable, current wishes, and the potential impact of the treatment on the individual's well-being.[38]

The HCCA also sets out processes for consent to personal assistance services provided in a long-term care home and to admission to long-term care.[39] Capacity to consent for these decisions is assessed by "capacity evaluators".[40] Where capacity is lacking, the same hierarchical list of decision-makers and principles for decision-making as for consent to treatment come into play.

The HCCA creates the CCB as a specialized independent administrative tribunal.[41] Among its powers, it can review determinations of incapacity by capacity evaluators (who assess capacity to consent to admission to long-term care), capacity assessors (who assess capacity under the SDA) and health practitioners (who assess capacity to consent to treatment), hear applications to appoint a representative for the purposes of substitute decision-making under the HCCA, provide directions to substitute decision-makers under the HCCA, and determine whether the substitute decision-maker is complying with their responsibilities under the Act. The CCB must

begin hearings within seven days of receiving an application and render a decision within one day after the day that the hearing ends.[42]

The *Substitute Decisions Act*

The SDA addresses decision-making related to property and personal care, which includes decisions regarding health care, nutrition, shelter, clothing, hygiene and safety. It sets out separate standards for legal capacity to make decisions about property and about personal care. Where a person does not have legal capacity to make decisions in one of these realms, decisions may instead by made by a person exercising a power of attorney, or by a guardian appointed for that purpose.

Under the SDA, individuals may create powers of attorney for property that take effect immediately and may continue to operate if the grantor becomes legally incapable (a "continuing power of attorney"), as well as ones which take effect on a specific date or when a particular event happens (a "springing power of attorney"). These powers of attorney may authorize the attorney to do anything that the grantor could do if capable, except make a will.[43] Powers of attorney for personal care may not be continuing: they may only come into effect in situations of legal incapacity.[44] A power of attorney may be in any form and does not require preparation by a lawyer, but the grantor must have the requisite capacity to give the power of attorney or to revoke it.[45]

The SDA creates a class of designated "capacity assessors", who may be requested to assess an individual's legal capacity with respect to property.[46] Where a person is found legally incapable with respect to property decisions by this assessment, the PGT becomes the statutory guardian for property, although there is an administrative process through which family members may replace the PGT.[47] Guardians for property or personal care may also be appointed through direct application to the Court: in such circumstances, the PGT will only be appointed as guardian where there is no person suitable and willing to act.[48]

The SDA sets standards for the activities and decisions of substitute decision-makers, including both guardians and attorneys. Substitute decision-makers must act for the benefit of the individual, honestly, diligently and in good faith, must encourage the individual to participate in decision-making to the best of his or her abilities, foster regular personal contact between the individual and supportive family and friends, and must consult from time to time with those supportive family and friends.[49]

The *Mental Health Act*

The MHA applies to psychiatric facilities, and regulates voluntary and involuntary admission to these facilities, including setting standards for assessments to determine whether involuntary

admission is required. It also sets out requirements related to community treatment orders, discharge, and access to personal health information within this setting.

Issues of capacity and guardianship are not the core focus of the MHA. However, some of the provisions of the MHA are central to this area of the law, particularly Part III of the Act, which requires, upon admission to a psychiatric facility, a prompt examination by a physician of the patient's capacity to manage property.[50] If the patient is found incapable, the physician must issue a certificate of incapacity to the PGT, who will assume management of the patient's property. Where such a finding of incapacity is made, there is provision for rights advice and application to the CCB.[51]

Also important are the complex intersections between consent to treatment under the HCCA and involuntary admission under the MHA. Unlike some other jurisdictions, Ontario sets separate standards for involuntary admission and for consent to treatment (although incapacity to consent to treatment under the HCCA is one factor in the test for involuntary admission)[52] so that patients may be involuntarily hospitalized for considerable periods, while maintaining the capacity to refuse consent to treatment. This dual standard continues to be a source of considerable controversy. Involuntary admission is not a focus of this project, but is an important context to take into account in understanding the operation of this area of the law.

General Approaches

While the three statutes deal with different areas of decision-making or different settings, they embody a consistent approach to legal capacity, decision-making and guardianship. The following aspects of this approach are of particular importance in understanding the legislative regime:

1. **Presumption of capacity:** Individuals are presumed capable to make their own decisions, and others are entitled to rely on that presumption unless there are reasonable grounds for believing otherwise.[53]
2. **Cognitive and decision-specific approach to capacity**: The test for capacity to make a particular decision is not whether the individual will make a wise decision, or whether the individual has a particular disability that may affect memory, understanding or reasoning, but whether the individual has the *ability* to "understand and appreciate" the relevant information. As is discussed at more length in Part Two, Chapter I.B, it is not necessary for the individual to *actually* understand and appreciate the information, but only that they have the ability to do so. Further, capacity is understood not as a global quality, but as particular to specific types of decisions: an individual may have capacity for some types of decisions and not others. He or she may also have capacity at some times and not others.

3. **Tendency towards a professionalized assessment of capacity:** Capacity is in some important areas assessed by persons who have some specialized knowledge or experience in the areas. The SDA creates a class of "capacity assessors" who are required to have particular professional backgrounds and to meet certain training requirements. The HCCA similarly creates a class of "capacity evaluators" for decisions related to admission to long-term care and personal assistance services provided in a long-term care home, although these professionals must meet less rigorous requirements than assessors. Capacity related to decisions regarding treatment must be made by the health practitioner seeking consent.
4. **Substitute decision-making approach:** Where an individual is found to lack capacity to make a particular decision or type of decision specified under the SDA or HCCA, and a decision must nonetheless be made, that decision must be made by a substitute, such as a guardian, individual acting under a power of attorney, or individual identified through a hierarchical list. Ontario's statutory scheme makes no provision for supported or co-decision-making.
5. **Procedural rights:** The reforms of the 1990s included provision of a number of basic procedural rights for persons potentially falling within these laws. For example, individuals examined for capacity to manage property under the MHA are entitled to rights advice. Capacity assessors must explain the purpose and significance of an assessment, and the individual has the right to refuse the assessment. Determinations of capacity may be reviewed by the CCB; as well, the affected individual may request a fresh assessment on a regular basis. Both the SDA and the HCCA include provisions for the appointment of counsel for persons whose legal capacity is at issue.[54]
6. **Preference for the private realm:** Ontario's statutory regime encourages the use of family and friends as substitute decision-makers. The SDA makes powers of attorney relatively simple and inexpensive to create and to exercise, while the HCCA uses a hierarchical list of appointees, with the PGT acting only if no individual identified through that list is capable, of appropriate age, available and willing. While the MHA automatically creates a property guardianship by the PGT for incapable persons without a valid power of attorney, it also provides what was intended to be a relatively simple and inexpensive mechanism under the SDA through which family members can replace the PGT as guardians.

E. The Broader Legal Context

This section very briefly highlights some areas of the law with which Ontario's statutory regime for capacity, decision-making and guardianship overlaps or frequently intersects. These will not be specifically reviewed as part of this project, but form part of the context in which the laws under reviewed as understood and implemented.

The Common Law

The common law remains an important element of the laws of capacity and decision-making, governing a wide range of issues, including capacity to marry, to make a will, to enter into contracts, to instruct counsel and others. The common law related to capacity and decision-making, while forming an important context for this project, is beyond its scope. However, it was the subject of a recent and comprehensive review by the British Columbia Law Institute.[55] Capacity to instruct counsel will significantly affect access to justice for persons who fall within the scope of the SDA and HCCA. Issues related to capacity to enter into a contract will overlap with the provisions of the SDA related to management of property.

Privacy Laws

Laws regarding legal capacity, decision-making and guardianship frequently interact with privacy laws, and that interaction is often an area of confusion or concern. As was noted above, the MHA includes specific provisions related to personal health information and access to clinical records. The *Personal Health Information Protection Act* (PHIPA) regulates the collection, use and disclosure of personal health information, and provides individuals with a right of access to that information, as well as a means of requiring its amendment or correction. Personal health information includes identifying information about individuals that relates to individual's mental or physical health, the provision of health care to individuals, plans of service under the *Home Care and Community Services Act*, payments or eligibility for health care, health numbers, or the identity of a substitute decision-maker.[56] Many individuals affected by the HCCA will also fall within the PHIPA. PHIPA is consistent in its approach with the HCCA, including in its use of a cognitive approach to capacity, the use of substitute decision-makers, and procedural rights that include oversight by the CCB. As is discussed at greater length in Part Three, Chapter III and Part Four, Chapter I, banking institutions, as federally regulated businesses, fall under the *Personal Information Protection and Electronic Documents Act* (PIPEDA),[57] and the PIPEDA provisions related to disclosure of information have significant impact on the response of these institutions to concerns about potential financial abuse.

Laws Regulating Social Services and Supports

Laws related to social services and supports, particularly those that are targeted to older adults or persons with disabilities, also frequently address or interact with issues related to capacity and decision-making. Most significantly, income support programs such as the Ontario Disability Support Program (ODSP) and Old Age Security (OAS), as well as the Canada Pension Plan (CPP), provide support to groups that are disproportionately likely to fall under capacity, decision-making and guardianship law, and have "trusteeship" provisions that enable third parties, most frequently family members, to manage funds on behalf of the individual, where a functional evaluation indicates that this is required.

In understanding the practical operation of Ontario's legal capacity and guardianship laws, it is also important to take into account their interaction with laws governing long-term care as there is considerable intersection in terms of the populations served. According to recent figures, 73 per cent of the residents of Ontario's long-term care homes have a mental disorder, including Alzheimer's or other form of dementia, and 31 per cent have severe cognitive impairment.[58] The HCCA explicitly addresses capacity to consent to admission to long-term care as a specific domain of decision-making. There is therefore a significant and important interaction between the provisions of the *Long-Term Care Homes Act, 2007*[59] and capacity and guardianship laws. Long-term care homes have developed a range of policies and protocols intended to address issues of capacity and substitute decision-making.

Similarly, persons with some kinds of impairments or disabilities are more likely to make use of some types of social supports and programs. The *Social Inclusion Act*,[60] for example, is specifically targeted to individuals who have life-long and early developing limitations in their adaptive and cognitive functioning.[61] It aims to provide services and supports to these individuals in the areas of residential services, activities of daily living, community participation, caregiver respite, professional and specialized services, person-directed planning and other areas.[62] That is, this statute creates a scheme for the provision of fundamental supports and services to individuals who are disproportionately likely to fall within the scope of capacity and guardianship legislation. The supports and services provided through the *Social Inclusion Act* may affect the context and supports available to them in making decisions, and the provisions of capacity and guardianship law may affect how they are able to access services under that Act.[63]

- **QUESTION FOR CONSIDERATION: Are there specific reforms to the *Substitute Decisions Act* or *Health Care Consent Act* that would support better coordination with other laws, such as the *Mental Health Act,* privacy laws, income or social support laws or others?**

F. Understanding the Context in Which the Law Operates

To evaluate how well a law is working, it is important to understand whom it affects, and the areas of life on which it impacts. The laws of legal capacity, decision-making and guardianship have a very broad impact on Ontarians. As the brief description of the law above indicates, most people will encounter this law at some point in their lives, whether through their professional responsibilities, as a person with a disability or someone planning for a future in which legal incapacity is a possibility, or as a family member or friend who must act for someone who has been found to lack legal capacity and requires assistance with decision-making. The following sections give a brief overview of the circumstances and contexts for those affected by the law, thereby assisting us in understanding how the law operates in practice.

1. Who Is Affected by the Law?

Neither the SDA nor the HCCA specifically refers to any particular class of persons. The SDA provides mechanisms for the appointment for an SDM for any person who is or may be determined to be "incapable" within its provisions and requires decision-making assistance . The HCCA applies very broadly to any person whose consent is required for treatment, admission to a care facility or with respect to personal assistance matters. Particularly with respect to treatment matters, any citizen of Ontario who falls ill may potentially find themselves not meeting the standard of capacity for consent to treatment: in such circumstances the HCCA provides mechanisms for the appointment of and guidance for the decisions by SDMs.

However, it is clear that some persons will be more likely to be found legally "incapable" under one or the other of these statutes. Persons with developmental, intellectual, neurological, mental health or cognitive disabilities are both more likely to be found legally incapable to make specific decisions within the definitions of these statutes, and to be informally *assumed* to be incapable and therefore subject to assessments and other provisions of the statutes. Because older persons are disproportionately affected by some types of cognitive disabilities, older persons may also be disproportionately affected by this area of the law.

There are little empirical data available regarding the application of the SDA and the HCCA. For example, powers of attorney are private matters: there is no mechanism for tracking how many powers of attorney have been created, how many are in effect, or who is affected by them. Similarly, the provisions under the HCCA setting out a hierarchy of SDMs for consent to treatment are not easily amenable to tracking.

> It is important to note that, while persons with disabilities will have in common the experience of attitudinal, systemic and other barriers to equality, their experiences may significantly differ in many ways. The stage in the life course at which impairment is incurred; the type of stigma and negative attitudes associated with a particular disability; the way in which the disability affects employment, housing or personal relationships; the way in which it intersects with other aspects of identify, such as age or gender or racialization – all of these will affect the experience of particular groups of persons with disabilities and how they encounter the law related to legal capacity, decision-making and guardianship. There will be both commonalities and differences in experiences with and attitudes towards this area of the law by those most immediately affected, and these differences and commonalities must be taken into account when analyzing current laws and developing law reform options.

The following sections do not pretend to provide a full description of the characteristics of the various groups that may be affected by the laws of capacity, decision-making and guardianship: this would require a book of considerable length. Rather, they highlight some of the key aspects of the experiences of these groups that may shape the way in which they experience this area of the law.

In any consideration of the experiences of older adults or persons with disabilities, attention must be given to the immense diversity within these groups, and the effect that diversity has on their experiences of any law, practice or policy. For example, gender dynamics will have a profound influence on the experience of persons with cognitive, mental health or intellectual disabilities with substitute decision-making, as will cultural patterns and assumptions. Persons who are LGBT may have particular concerns with the default assumptions towards biological families in the HCCA hierarchical list of decision-makers and the SDA replacement guardian provisions. Linguistic minorities may have additional barriers in accessing information about their rights and obtaining meaningful assessments of their legal capacity.

It should be noted that there is ongoing discussion and debate about the language used to describe persons with particular disabilities and their experiences. The LCO recognizes that there is a range of views about the most appropriate language. The LCO does not intend its use of particular terms to be construed as definitive, and recognizes that persons with disabilities themselves are in the best position to identify the most appropriate language.

- **QUESTION FOR CONSIDERATION: How does the experience of this area of the law differ depending on gender, sexual orientation, gender identity, racialization, immigration status, Aboriginal identity, family or marital status, place of residence, geographic location, language or other forms of diversity?**

Loss of Capacity Due to Illness

One group that is commonly affected by capacity and decision-making laws but that is extremely amorphous in its makeup, is that of persons who temporarily lose legal capacity to make decisions in the context of treatment for an acute illness, whether brief or over a longer term. Illness or disease such as stroke or progressive neurological diseases may of course result in a long-term disability, but for many, a temporary period of extreme illness may bring them under the provisions of the HCCA for a short period of time, without the necessity for more significant engagement with legal capacity and guardianship law. Anyone, in any stage or condition of life, may find themselves in these circumstances. Where this occurs at the end of life, loss of legal capacity may necessitate sometimes agonizing decisions by substitute decision-makers, in circumstances of extreme emotion and often under time pressure.

Persons with Intellectual and Developmental Disabilities

The incidence of developmental or intellectual disabilities is relatively small: Statistics Canada's 2006 *Participation and Activity Limitations Survey* (PALS) found approximately 0.5 per cent of Canadians age 15 or older living with a developmental disability,[64] defined as "Cognitive limitations due to an intellectual disability or developmental disorder such as Down's syndrome, autism or an intellectual disability caused by a lack of oxygen at birth".[65]

There is a range of experience within this category: the experiences of individuals with autism may differ very considerably from those of a person with Down's syndrome for example, and there may also be very considerable variation in experience within each type of disability. Certainly, not all persons with intellectual or developmental disabilities will fall within the capacity and guardianship laws, although they may be subjected to limiting presumptions about their abilities.

A key element in the experience of persons with intellectual or developmental disabilities is that these disabilities will be identified at birth or during early childhood. The experience of disability will follow these individuals throughout their lives, substantially influencing their access to education and employment, and shaping their personal relationships, expectations and opportunities.

Historically, the lives of persons with intellectual disabilities were limited by negative and limiting societal attitudes:

> Society's treatment of people with intellectual disabilities can be captured by the common terminologies that were used to describe them, including "imbeciles", "idiots", the "feeble-minded" and "morons". The medical community restricted its examination of people with intellectual disabilities to the "degree of idiocy" suffered by the individual. This language illustrates that people with intellectual disabilities were considered different than "normal" people, consequently it was acceptable to treat them differently. Such treatment was almost always accompanied by stereotypes about abilities (or lack thereof), and in particular, the assumption that people with disabilities were unable to lead independent lives.[66]

These attitudes resulted in extreme restrictions on the autonomy of persons with intellectual disabilities, including institutionalization and forced sterilization.

Persons with milder developmental disabilities may now live as long as the general population. This means many will outlive their parents, who are often primary care givers. Deinstitutionalization of persons with developmental disabilities and population aging have given rise to situations where parents in their eighties and nineties are still primary care providers for their developmentally disabled adult child in who is now in late middle age. The

death of or onset of disability for these parents may result in a loss of crucial supports for these individuals.[67]

Persons with intellectual or developmental disabilities are particularly likely to experience low-income. Accordingly to PALS 2006, the median income for persons with a developmental disability age 15 and older was $10, 415, the lowest for all categories of disability, and as compared to a median income of $27,496 for persons without disabilities.[68] While persons with developmental disabilities do face barriers to employment, they are more frequently employed than in the past. In 2006, the unemployment rate for persons with disabilities was approximately 9 per cent.[69] However, persons with developmental disabilities usually find themselves on the lower end of the pay spectrum. This means that if they collect employment insurance or pension payments, which are based on the level of income, they receive lower payments.[70]

Persons with developmental disabilities often have few opportunities to make decisions for themselves, which may limit the capacity for self-determination and lead to unnecessary dependency.[71] Adults and children with developmental disabilities are not only at greater risk of abuse and neglect, but face a range of barriers to getting help where abuse occurs, including their complaints not being understood or believed; or the failure to educate individuals with developmental disabilities about appropriate behaviours so that they may not recognize abuse when it occurs.[72]

Older Persons and the Late-in-Life Development of Cognitive Disabilities

It is important not to conflate aging with disability: many older adults consider themselves to be and are in very good or excellent health.[73] However, aging is generally associated with a decline in health and the onset of some types of activity limitations. Of particular interest for this project is the association between aging and the development of certain types of cognitive disabilities.

Alzheimers' disease and other forms of dementia are relatively rare at any age, but the risk increases significantly with age. In 2008, 7 per cent of Canadians age 60 and older lived with some degree of dementia, while 49 per cent of those over age 90 do so.[74] As the population continues to age over the next 30 years, issues related to consent, capacity and decision-making are likely to become more pressing. As noted above, the Alzheimer's Society of Canada recently released a report estimating that the prevalence of dementia will more than double over the next 30 years, up from 1.5 percent of Canada's population in 2008 to a projected 2.8 per cent of the population in 2038.[75]

It is often popularly assumed that older age is synonymous with poor health and cognitive decline. For example, forgetfulness is often referred to as "having a senior moment". During the

LCO's consultations for its project on the law as it affects older adults, many participants raised concerns about the tendency of service providers to assume incapacity on the part of an older person and to defer to younger family members or even to fail to address the older person at all.[76] Combined with the tendency toward paternalism in the treatment of older persons, with the assumption that they are less capable of exercising their autonomy and in more need of protection, these assumptions mean that capable older adults are at some risk of being assumed to be incapable or of being treated as if they are incapable.[77]

The experiences of those who have developed disability later in life are likely to differ in some significant respects from those who have lived with a disability throughout their lives. For example, older adults who have not experienced disability prior to the onset of older age are likely to have accumulated some assets, such as a pension, some savings or a house. Certainly not all older adults are wealthy or well-off: many live on limited incomes.[78] However, their assets will influence the dynamics of their access to justice and of their interpersonal relationships. For example, one of the most common types of abuse of older adults is financial abuse:[79] the assets of older adults, however modest, may create a significant temptation to abuse once an older person becomes in some way vulnerable, and the fact that substitute decision-makers may also expect to be beneficiaries of an estate may create conflicts of interest.

The vast majority of older adults – 93 per cent – live in private households.[80] "Aging in place" is the goal of the vast majority of older adults; they wish to remain in their homes and communities for as long as possible.[81] However, as age increases, so does the likelihood of living in a congregate setting, such as a retirement home or long-term care home: approximately one-third of individuals over the age of 85 live in such a setting.[82] As was noted earlier in the Chapter, persons with dementia make up a very significant percentage of those living in long-term care facilities. While long-term care homes are homes, they are also institutions: they are heavily regulated, populated by individuals who are by definition vulnerable, removed (to greater and lesser extents) from the larger community, and under significant resource pressures. This is also true to a lesser and variable degree for persons living in retirement homes. Persons living in congregate settings experience particular barriers to access to justice that differ from those for individuals living in the community.[83] As a result, those who live in congregate settings will have a significantly different experience of the laws of capacity, decision-making and guardianship. And of course, the HCCA creates a specific system for assessing capacity in relation to the decision to transition into a long-term care home.

Where older persons develop activity limitations or disabilities, their caregivers are most likely to be their spouses or their adult children.[84] The caregiving dynamic is therefore somewhat different than for younger persons with disabilities, where supports may be provided by parents

or siblings. Some have commented on the disorientation and difficulties that may be experienced when adult children provide care for individuals who once provided care and were authority figures for them. As families are increasingly geographically scattered, the provision of care and supports from adult children to parents may become increasingly challenging.[85]

As lifespans extend, as more adults divorce or remain single throughout their lives, and as individuals have fewer or no children,[86] and as families become more geographically dispersed, the number of individuals who have no family member or close friend who is both willing and able to provide supports or act as a substitute decision-maker continues to grow. Given the heavy reliance of Ontario's capacity, decision-making and guardianship law on unpaid caregivers and the nature of the work Public Guardian and Trustee as a government service and an organization of last resort, this trend is likely to pose a challenge to the system.

Persons with Mental Health Disabilities

Mental health disabilities encompass a wide range of conditions of greater and lesser severity, only some of which will result in impairments to the ability to understand information and to appreciate the risks and benefits of various courses of action.

Mental health disabilities differ from other types of disabilities that may affect capacity in that they are often episodic, as compared to intellectual disabilities which tend to be stable and cognitive disabilities associated with later life which tend to be progressive. The episodic nature of mental health disabilities has a number of consequences for the experience of capacity and guardianship law. Persons with mental health disabilities may cycle in and out of the capacity and guardianship system. They may need considerable supports and interventions at some periods, and relatively little or none at others. As a result, any lack of flexibility in processes for entering into and exiting from the capacity and guardianship system will have a particular impact on these individuals. Significant costs or slow and difficult processes may prevent individuals from accessing supports when they need them or in regaining their full autonomy when they are ready to do so. The episodic nature of mental health disabilities also means that some persons with mental health disabilities may have the opportunity and ability to gain considerable insight into their disabilities and to identify what does and does not work for them. Advance care planning may be particularly valuable for these individuals: having experienced a range of treatments, they may be able, while they are capable, to identify what was and was not positive and develop meaningful plans for those times when they are not capable. As well, the episodic disabilities may affect family and treatment dynamics.

Of course, for some persons with mental health disabilities who find themselves falling within the provisions of the *Mental Health Act,* the experience of the legal capacity, decision-making and guardianship system will be heavily influenced by the provisions of that legislation,

including requirements related to involuntary admission and community treatment orders. Persons with mental health disabilities are subject to heavy stigma. The Ontario Human Rights Commission (OHRC) conducted very extensive consultation in the development of its *Minds That Matter* report, and heard many concerns from persons with mental health disabilities about the stigmas and stereotypes that they face:

> Some submissions told of being considered a security risk based on assumptions about their disability. Where there is no real evidence of risk, this type of behaviour may be a form of "profiling" based on mental health. For example, one service provider was concerned about hospitals that routinely called security personnel to be present if patients' files revealed a mental health diagnosis.
>
> Other stereotypes about people with mental health disabilities or addictions are that they lack credibility, are not able to accurately assess situations, and cannot make decisions about their own lives....
>
> People said that pervasive paternalistic attitudes devalue their experiences, thoughts and choices, and lead to society having low expectations of people with mental health issues or addictions. It is hard to complain or assert yourself or your rights because your experiences are minimized and attributed to your disabilities, we were told.[87]

The evidence with respect to the association of mental health disabilities with violence is complex, and of course varies with the particular type of disability. As the OHRC has noted, the concern that persons with mental health disabilities may do harm to themselves or to others is a significant force in the perceptions of persons with mental health disabilities and in the public perception of justifications for limitations on the autonomy of these individuals.

A disproportionate number of persons with mental health disabilities experience low-income.[88] This is a result, not only of the effects of their disabilities, but also of the results of stigma and discrimination.[89] Unemployment and underemployment, lack of access to safe and affordable housing and to appropriate educational opportunities may all contribute to poverty among persons with mental health disabilities, as well as exacerbating their illness and reducing the options that they have available to them in terms of housing and services. As well, as is highlighted elsewhere in this *Paper*, low-income = creates barriers to access to justice.

<u>Persons with Acquired Brain Injuries</u>

Compared to other groups affected by capacity and guardianship law, there is relatively little information available about persons with acquired brain injuries and their experiences with this area of the law.

Information about the number of Ontarians living with an acquired brain injury is difficult to come by, particularly since the available data use varying terminology, and may include individuals with mild brain injuries or those who die as a result of their injuries. *The Ontario*

Trauma Registry 2012 Report reported 2,637 traumatic brain injury hospitalizations in the reporting year 2010-2011. Of these, 58.4% were diagnosed as mild, 6.1 per cent as moderate, 10.4 percent as severe, and 25.2 per cent as unknown or inappropriate (for whom there was not enough information available).[90]

Injuries and their effects will vary widely, of course. The Canadian Institute for Health Information reports that

> Head injury may affect memory, mood, communication, mobility, concentration and problem-solving, and cause impulsivity, loss of control of anger, emotional instability and depression. . . . Individuals with head injury may have physical disabilities, such as paralysis of the limbs or loss of vision and/or hearing, while some may lose the sense of smell, suffer from headaches or have seizures.[91]

A survey by the Ontario Brain Injury Association of 596 individuals living with a brain injury found that 95 per cent had trouble with their memory, 93 per cent had trouble concentrating, and 91 per cent had trouble making decisions, 80 per cent experienced anxiety, and most reported depression, trouble controlling their anger and mood swings.[92]

Acquired brain injuries may have a significant effect on functioning and on participation: the survey mentioned above found that while 75 per cent of the respondents had been employed for pay prior to their accident, only 13 per cent were so engaged afterwards. A brain injury may have a significant impact on family finances, circumstances and relationships.

- **QUESTION FOR CONSIDERATION: What reforms to the law in this area are needed to ensure that it takes into account the characteristics of affected older persons and persons with disabilities?**

G. The Role of Family and Friends

Ontario's current statutory regime for legal capacity, decision-making and guardianship gives priority to family and friends to act as substitute decision-makers where they are needed, whether as guardians, or through powers of attorney or the HCCA hierarchical list. Systematic information is not gathered about substitute decision-makers in Ontario: it is impossible to know how many private individuals are currently or have in the past acted as substitute decision-makers, what their relationship is with the person for whom they are acting, or much about how they experience that role.

There is likely some significant overlap between persons who act for others under the HCCA and SDA, and those who provide unpaid caregiving supports for older adults and persons with disabilities: both types of supports arise out of the same context of intimate, interdependent caring relationships. In many cases, the same individual(s) will be acting as both unpaid

caregiver and substitute decision-maker. The roles of substitute decision-makers are highly significant, responsible and potentially quite stressful, as well as subject to substantial legal regulation. These roles may have a significant effect on their life courses, and the law will certainly shape how they carry out those roles. The ways in which laws either support or create barriers for persons providing unpaid supports will have a substantial influence on the effectiveness with which these individuals are able to provide supports to those who do fall under capacity and guardianship law.

It is important not to place these roles in a negative light. Research on unpaid caregivers has found that most of those in these roles take them on because they wish to do so,[93] find meaning in them,[94] and do not experience their relationships with those to whom they provide care as "one-way". However, at the same time it is essential to acknowledge that unpaid caregivers may be carrying out their roles under conditions of difficulty and may perceive that they are receiving insufficient supports in carrying out what is a vital function. For example, a recent study by the World Health Organization and Alzheimer's Disease International found that primary caregivers may experience significant strain in terms of time pressures, the challenges of responding to behavioural or cognitive symptoms, and managing multiple roles. These caregivers tend to be prone to depression and anxiety, as well as social isolation. When caregiver resources and wider network are overwhelmed, this can result in mental and physical health issues.[95] Where insufficient supports are provided, informal networks may collapse under the strain, resulting in institutionalization for persons with a disability.[96]

The roles of substitute decision-makers are challenging, often requiring difficult ethical, practical and emotional choices. This is particularly true where, as commonly happens, the substitute decision-maker is also providing care and support. Any close personal relationship brings with it complex histories, dynamics and interdependencies, and these will influence the way in which families carry out any role in decision-making. In some cases, these dynamics will be clearly inappropriate or abusive. In many cases, it may be more apt to refer to misuse of the role, rather than abuse. Family members may believe that they are acting out of love and concern, but still be inappropriately exercising power and denying autonomy to the individual concerned.

In a paper prepared for the LCO, Laschewicz *et al* examine the ways in which families may either facilitate the voices of members with developmental disabilities, or obscure those voices. Families may be extremely effective in supporting the voices of members with disabilities, for example, by making space in the conversation, reinforcing ideas that are expressed, and prompting the expression of new ideas.[97] On the other hand, families may also inadvertently repress those voices. In part, parents of adult children with developmental disabilities may simply fail to evolve their ideas of what their adult children can do and decide, and continue to

attach to them a "young chronological age".[98] In other cases, these adult children will have developed habits of passivity and compliance, so that they hesitate to express their desires or to attempt to make their own choices.[99] As well, parental caregivers who have had to shape their lives and identities around their advocacy for their children may be reluctant to abandon this ingrained and symbiotic lifestyle. In one case study, a sibling of an adult with a developmental disability indicates that because their mother has not had an opportunity to develop her life outside of her caregiving identity, she is threatened by any indication that her daughter could function successfully in any other arrangement. The sibling believes that his sister's potential for independence is constrained by his mother's long established caregiver identity. The mother presents herself as an authority on her daughter's needs to the extent that her daughter's voice about her own needs is often overridden or ignored.[100]

It is therefore important to take a balanced view of family involvement in decision-making, keeping in mind the variable and shifting nature of these dynamics.

H. Contexts in Which the Law Operates

Issues of legal capacity and decision-making potentially affect almost every area of life. However, the statutory regime with which this project is concerned is focussed on five core areas: property management, health care ("treatment"), personal assistance services provided in a long-term care home, admission to long-term care and personal care, which includes issues related to housing, nutrition, safety, clothing and hygiene. Together, these areas touch on almost every aspect of life, highlighting the potentially profound impact of these laws on individuals to whom they are applied.

Most of these areas involve decisions which may be complex, fundamental and life-changing, as well as decisions which are relatively routine and everyday decisions. The routineness of a decision may not dictate its importance to an individual: the everyday decisions about what to eat or to wear are intimately connected to our identity, and may shape our lives as much as major decisions about where to live, for example.

The dynamics of decisions in these various domains differ in significant ways. Admission to long-term care is a single decision (albeit subject to re-visitation), though one with life-altering consequences; property management generally requires ongoing, multiple decisions. Treatment decisions tend to involve some degree of urgency, while other types of decision-making will more frequently permit a greater degree of deliberation. Some types of decision-making take place almost entirely in the private realm – this will frequently be the case for day to day decisions about property management and personal care – while other decisions, such as those regarding treatment or admission to long-term care, will necessarily involve professionals and potentially institutional service providers, so that there is some accompanying level of public scrutiny.

Reflecting these differences, Ontario's legal capacity, decision-making and guardianship laws treat these decision-making domains differently in many important respects. For example, substitutes for decisions about treatment, admission to long-term care and personal assistance services provided in a long-term care home may be identified relatively expeditiously through the HCCA's hierarchical list of substitutes, while the process for identifying substitutes for personal care and property management is more complex. Substitutes for treatment decisions are authorized through the list for that particular decision, while substitutes for personal care and property management are appointed on a longer-term basis. The test for capacity to create a power of attorney for personal care is much less rigorous than that for a power of attorney for property. These and other differences reflect an effort by the legislature to respond to the particular contexts of decision-making.

However, it is also true that in practice, decision-making in one area is likely to have significant effects on other areas. Decisions about admission to long-term care, for example, are likely to have significant implications for financial and property matters. The person who is making day-to-day decisions about money is likely to have considerable *de facto* control over an individual's personal life. The SDA attempts to promote coordination between the domains. For example, guardians or attorneys for property must manage a person's property in a manner consistent with decisions concerning the individual's personal care that are made by the person who has authority to make those decisions,[101] and must consult from time to time with those who provide personal care to the individual.[102]

I. Pressures for Reform

As is illustrated by the brief history and outline of Ontario's capacity and guardianship laws provided above, these laws are comprehensive, of relatively recent origin, and were the result of careful and extensive research and consultation. Nevertheless, as was discussed in the Introduction and was notable in the LCO's preliminary consultations, there is considerable interest in and pressure for law reform in this area. There are a number of reasons for this.

As was briefly noted above, this is an area of the law that raises complex and difficult ethical, social and legal questions. It is closely tied to broader concerns related to the rights and treatment of older persons and persons with disabilities, the role of government and individual and familial responsibilities, the operation of Ontario's healthcare system and many other issues. The challenges that underlie this area of the law are not easily solvable, or at least are not solvable by solely legal mechanisms. No legal mechanism related to legal capacity, decision-making and guardianship will ever completely resolve the competing needs, experiences and interests that it attempts to address: this is an area of the law that will likely always be subject to some challenge and controversy.

There are, however, some trends and pressures that are increasing current levels of interest in this area of the law. Demographic trends are one such factor. It is not novel to note that we live in a rapidly aging society. The proportion of Canada's (and Ontario's) population that is over age 65 is increasing, and the population over age 85 is doing so particularly rapidly:[103] as a result, there is an increasing prevalence of dementia and other illnesses and disabilities related to aging that may affect cognitive functioning.[104] Less well noted is the increasing prevalence of individuals who identify as having a disability: this increase is partly but not wholly associated with the aging demographic.[105] The end result is that a growing number of individuals and families are directly affected by this area of the law.

At the same time, attitudes towards aging and towards disability are undergoing a profound shift. The experience of disability, once conceptualized almost wholly through a biomedical model, is increasingly understood through social and human rights lenses, shifting the emphasis from individual impairment to social and environment barriers to full participation.[106] Paired with this has been a growing disability rights movement, aimed at empowering and bringing equality to persons with disabilities. A similar, though less marked shift has affected the experience of aging and older age, with an increasing emphasis on positive aging, age-friendly communities and elder rights. Laws related to capacity and guardianship are being reviewed through new perspectives, with an increasing emphasis on due process, advocacy and supports, and self-determination.[107] These trends are not confined to Ontario (or Canada), and are related to a wave of interest and reform across Canada and around the world.[108] The creation of the CRPD, and in particular Article 12 as described above, was both a result of and a spur to interest in reform to this area of the law.[109]

Complicating these trends are the acute pressures exerted by resource shortages at all levels. While there is greater need in these areas and growing calls for increased rights and supports, there is considerable constraint in Ontario government finances, healthcare and legal systems, social services, families and at the individual level. The resources required to make the current system work optimally, or to make substantial transformations to the system, are in short

supply. Some (though certainly not all) of the shortcomings of the current statutory framework can be attributed to the effects of resource pressures at these multiple levels. Law reform in this area must take these pressures into account, identify creative solutions, seek to maximize existing resources and ensure that they are used as efficiently as possible, and apply the concept of progressive realization to make the maximum progress within existing limitations.

Finally, the current statutory framework marked a profound transformation in Ontario law. As carefully thought out and coordinated as it was, there have been unintended or unanticipated results in some areas. For example, the dispute resolution mechanisms currently available where families disagree over the exercise of substitute decision-making were not designed to manage bitter and protracted family conflicts that may resemble those found in family law.[110] There was a focus in previous reform on making powers of attorney widely accessible, for example, through the forms available on the Ministry of the Attorney General website;[111] however, during the LCO's preliminary consultations, many of those interviewed raised concerns that individuals completing powers of attorney do not fully understand the ramifications of these powerful legal instruments, and that this may be a factor in the financial abuse of vulnerable individuals.

The LCO's extensive preliminary consultations revealed widespread agreement regarding the need for reform. There was general consensus on some priorities for reform, but significant divergence on other issues.

Many felt that the fundamental approach of the current legislative framework is, at its core, sound, but raised concerns about the extent to which the legislation's foundational principles and basic rights are being meaningfully implemented. In particular, concerns were raised regarding:

- Failure of substitute decision-makers to understand and respect their roles and responsibilities under the statutes;
- Failure on the part of some institutional services and professionals to adequately understand the law and carry out their statutory responsibilities; of particular concern is the adoption by some institutions of policies and practices that do not comply with the law, raising systemic issues;
- Inadequate mechanisms to prevent, identify and address abuse and misuse by substitute decision-makers;
- Complexity and multiple barriers to users in understanding and navigating through the law and the system: this was a concern both for individuals and service providers;
- Challenges in adequately addressing the experiences of persons with fluctuating or evolving levels of capacity.

In these areas, the desire was for law reform that could advance the effective implementation of current laws. Two areas for potential fundamental transformation in approach were identified.

- While most consultees raised concerns that current provisions of the law intended to protect the autonomy of individuals affected and to keep these individuals "at the centre" were not being adequately respected, some saw the answer to these shortfalls in respect for autonomy not in improvements to existing approaches, but in a transition away from substituted decision-making towards a supported decision-making model (some also pointed to possibilities related to co-decision-making).
- There was widespread significant desire for a fundamental re-thinking with regards to rights enforcement overall, as well as with dispute resolution mechanisms under the SDA where resolutions are perceived to be excessively costly, complex and adversarial, and therefore to be inaccessible on a practical basis to many of those who need them.

J. Applying a Principles-Based Approach to Law Reform in This Area

In understanding this area of the law and identifying law reform options, it is essential to pay careful attention to the lived experience of individuals who fall within the law, as well as their family members and caregivers, and the professionals who work within the different aspects of the system. As the *Frameworks* emphasize, it is also helpful to situate the issues within a set of principles: this can help us to understand how current law, policy and practice affect substantive equality for older adults and persons with disabilities, and to identify how law reform could advance substantive equality for these groups.

The impact of the statutory regime for legal capacity, decision-making and guardianship is potentially very broad, keeping in mind that it affects not only those individuals who are found to lack capacity (who will disproportionately be older or persons with particular types of disabilities or both), but also those groups who are *perceived* to be more likely to lack legal capacity as they will be more likely to have their capacity to make decisions actually questioned. It is important to note that these are groups that tend to be vulnerable or marginalized, facing disproportionate levels of stigma and socio-economic challenges. For those directly affected, the law potentially impacts on almost every area of life, affecting decisions both large and small related to place of residence, finances, health care and other support services, and daily decisions about such matters as clothing, hygiene and food. The impact is both intimate and profound. This area of the law will therefore have significant impact on respect for the dignity and worth of persons with disabilities and older adults, and on their ability to fully participate in and be included by the broader society.

The implications of particular principles for specific law reform issues will be explored more fully throughout the remainder of this *Paper*. However, it is important to note from the outset that decision-making, and therefore determination of capacity to make decisions, is clearly closely tied to the principle of autonomy. As the *Framework for the Law as It Affects Older Adults* states, the principle of autonomy recognizes "the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy fo choice". The parallel principle from the *Framework for the Law as It Affects Persons with Disabilities* further emphasizes "the *creation of conditions* to ensure that persons with disabilities are able to make choices for themselves" [emphasis added]. It should be noted here that in both *Frameworks*, the LCO has defined the principle of autonomy and independence in a way that recognizes that humans are by their nature interdependent and acknowledges that we may require supports in order to achieve autonomy and independence.

Laws relating to legal capacity, decision-making and guardianship have their inception, in part, in a concern to avoid abuse or exploitation of individuals whose ability to receive, retain or understand information is limited, and who are therefore more vulnerable to manipulation or deceit. The *Framework for the Law as it Affects Persons with Disabilities* recognizes a right to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety. The *Framework for the Law as it Affects Older Adults* recognizes a right to be free from physical, psychological, sexual or financial abuse or exploitation.

In the literature about this area of the law, this right to live in safety/security is often positioned in tension with the principle of autonomy highlighted above. In considering these issues, it is important to acknowledge that the notions of autonomy and security are themselves complex and are interdependent. There are also risks to the security of individuals where legal structures or other barriers reduce opportunities for individuals to express their needs and wishes, and thereby create opportunities for abuse or exploitation by unscrupulous third parties. Depending on how laws related to decision-making are structured and implemented, they may either increase or reduce personal safety and security. And lack of safety and security can affect the ability to express autonomy and independence: individuals who are subject to abuse or exploitation may find that not only their security and safety are compromised, but also their freedom to make choices and live as they will. That is, autonomy and security are not necessarily at opposite poles: frequently, they are intimately connected, so that one cannot be achieved without the other.

Both *Frameworks* include principles related to diversity, which highlight the importance of recognizing not only the particular characteristics, needs and circumstances of older adults and persons with disabilities, but also the diversity among older adults and persons with disabilities.

The brief discussions in this Chapter of the ways in which older persons and persons with various types of disabilities may encounter this area of the law make clear that may experience this law very differently. Differences in the nature of their impairments, their life courses, their socio-economic status and their access to various types of supports mean that they may need different things from the law, and that a provision that may have helpful implications for one group might have a negative impact on another.

Finally, the *Frameworks* include principles that highlight that all members of society have reciprocal rights and obligations to each other. Laws related to decision-making must recognize that those directly affected have not only rights but obligations to others, and support the fulfillment of those obligations. As well, the law must take into account the needs not only of those directly affected, but those surrounding them, including family and other unpaid carers, recognizing that we are all interdependent.

- **QUESTION FOR CONSIDERATION: What do the *Framework* principles tell us about designing effective reform for this area of the law?**

K. Questions for Consideration

1. **What should be the primary purpose or purposes of this area of the law?**
2. **What do the principles and commitments found in the CRPD, *Charter*, *Human Rights Code* and AODA tell us about the key elements of reforms to Ontario's legal capacity, decision-making and guardianship laws? How might they affect the interpretation and application of these laws?**
3. **Are there specific reforms to the *Substitute Decisions Act* or *Health Care Consent Act* that would support better coordination with other laws, such as the *Mental Health Act,* privacy laws, income or social support laws or others?**
4. **How does the experience of this area of the law differ depending on gender, sexual orientation, gender identity, racialization, immigration status, Aboriginal identity, family or marital status, place of residence, geographic location, language, various forms of disability, or other forms of diversity? What reforms to the law in this area are needed to ensure that it takes into account the characteristics of affected older persons and persons with disabilities?**
5. **What do the *Framework* principles tell us about designing effective reform for this area of the law?**

PART TWO

LEGAL CAPACITY

This Part of the Discussion Paper examines the concept of capacity in Ontario law. In particular, Chapter I reviews the standards for and tests of capacity, considering the possibility of modifying the current cognitive approach to capacity or of replacing it with an approach based on the will and preference of the individual. Chapter II considers the various mechanisms for assessing capacity in Ontario, including examinations for capacity to manage property under the Mental Health Act, *assessments by capacity assessors under the* Substitute Decisions Act*, evaluations of capacity to consent to admission to long-term care or to personal assistance services provided in a long-term care home, and assessments by health practitioners of capacity to consent to treatment.*

I. "LEGAL CAPACITY": SETTING THE STANDARD

A. Introduction

The concept of "capacity" is foundational to the law related to decision-making. Under both the *Substitute Decisions Act* (SDA) and the *Health Care Consent Act* (HCCA), where a decision must be made and an individual is found to lack the "capacity" to make that decision or that kind of decision, a substitute decision-maker (SDM) must do so in his or her place. Generally, persons who are considered to have capacity are entitled to make decisions for themselves and are held responsible for those decisions, including decisions that others may consider reckless or unwise. On the other hand, persons who have been determined to lack legal capacity in a particular domain or for a particular decision may lose the right to make decisions for themselves independently in that area: others will be responsible for making decisions on their behalf, and can in theory be held accountable for how those decisions are made. The implications for an individual of a determination of legal capacity are therefore momentous.

1. The Concept of Capacity

The concept of capacity is both complex and contested. The term has been understood in different ways at different times and places. It has been said that "there are as many different operational definitions of mental (in)capacity as there are jurisdictions."[112] To further complicate matters, there are multiple terms, such as "mental capacity" "competence", "decision-making ability" (and their opposites, including "mental *in*capacity" and "*in*competence"), which are sometimes used as synonyms or near synonyms of "capacity", and sometimes used to make important conceptual distinctions. For instance, "competency" may denote "acceptable" behaviour, the ability to take on tasks, standing in a legal proceeding, or a cognitive process of decision-making.[113]

As a legal construct, capacity must be understood as a "socio-legal" concept, to adopt the language of the *Weisstub Report.*[114] As Prof. Lawrence Frolik has stated, "incapacity exists only after we define it".[115] In other words, governments regulate the meaning of "capacity" with a view to meeting goals that are informed by our social needs and values: it is an operational construct, the criteria for which vary. Understandings of and approaches to the concept of capacity have varied over time, and will no doubt continue to evolve.

The concept of capacity is closely connected to other important and difficult concepts. It is strongly related to conceptions of autonomy and independence, in that it is intimately tied to the ability to make independent decisions and take responsibility for their consequences. Margaret Hall notes,

> Capacity, in law, serves as the effective threshold of autonomy, dividing the autonomous, on the one side, from the non-autonomous, on the other, on the basis of an individual's ability to engage in the process of rational (and therefore autonomous) thought, explained as the ability to exercise one's will to reflect upon, and choose between desires, and to adopt those chosen as one's "own".[116]

In practical terms, a determination of incapacity legitimates intervention in the life of the individual so identified. Sabatino and Wood argue that capacity is a “legal fiction” necessary to “tell us when a state legitimately may intrude into an individual’s affairs and take action to limit an individual’s rights to make decisions about his or her own person or property”.[117] It is closely related to our assessments of and tolerance for, not only risk but actual harm to individuals who are marginalized or disadvantaged. As such, it is also linked to notions about the role of the state in protecting those who are vulnerable. As Hiltz and Szigeti note, “Once we become sufficiently incapacitated that we or others are at serious risk of harm, the State owes us a duty to protect our interests and that of the community. The legislation [in this area] governs how these protections are afforded to incapable persons”.[118]

The concept of capacity must be understood in the context of the lives of those it most profoundly affects: those persons, older or younger, who live with a disability that affects their ability to independently receive, understand, assess and retain information, and those who are presumed to have impairments in such abilities. Because the lives of persons with disabilities and older persons have been historically and continue to be heavily marked by paternalism, negative assumptions about their abilities and restrictions on their independence, the concept of capacity and the particular ways in which it is operationalized are heavily freighted. The disability rights and elder rights movements have been driven in large part by an effort to assert the right to control their own lives and to reassert their dignity and full human worth, and so conceptions of capacity take on a fundamental importance, both practically and as representations of the rights and status accorded to these groups.

2. Legal Capacity and the Framework *Principles*

As the above brief introduction makes clear, the concept of capacity is intimately tied to all of the *Framework* principles, affecting as it does aspirations to and understandings of dignity, autonomy, inclusion, diversity, security, and the ways in which we relate to and are held accountable to others.

As discussed previously, debates about capacity and how it is defined are often described in terms of competing principles of autonomy and “beneficience” or safety. While it is useful to consider tensions between principles, it may be unhelpful to reduce the issue to a zero-sum competition between two principles, where increased focus on safety inevitably reduces autonomy or vice versa. Such a framing distracts attention from the ways in which autonomy and security are profoundly linked, as well as from the important contributions of other

principles to understanding the issues in this area. For example, the principle of participation and inclusion can help us in thinking about the effects of the social and economic marginalization of older persons and persons with disabilities on their ability to access supports in making choices and on the availability of concerned and involved individuals to monitor for abuse or exploitation.

The principles of diversity (as defined somewhat differently in each *Framework*), together with the focus of the *Frameworks* on the importance of lived experience in understanding the principles, reminds us that the experiences and needs of persons who may be affected by this area of the law will vary significantly: in adopting approaches to and standards for capacity, these differences must be taken into account, to the extent possible.

As well, both *Frameworks* emphasize the importance of the implementation gap both in understanding the operation of the law in the lives of those affected and in designing law reform. The LCO's preliminary discussions and consultations have highlighted the enormous gap that may exist between the abstract concepts captured in the statute and the everyday understanding and implementation of the law by individuals. Everyday practical needs and popular "common-sense" understandings of the law drive much of its current implementation. Because this area of the law relies so much on the efforts and understandings of private individuals, the gap between the statute and lived experience is wide, and is a challenge for law reform.

- **QUESTION FOR CONSIDERATION: What are the most important implications of the *Framework* principles for the approaches to and standards for legal capacity in Ontario law?**

3. A Few Words About Terminology

As was briefly noted above, the concept of capacity is a challenging one, with a convoluted history, so it is perhaps not surprising that the terminology surrounding this concept is complex. The terms are often value laden, and may themselves be points of controversy. Disentangling the terms is linked to disentangling the various approaches to the concept. Some key terms are briefly set out here.

"Legal Capacity": In international documents, "legal capacity" has been treated as having two aspects: 1) the capacity to hold rights and obligations, and 2) the capacity to exercise those rights and obligations.[119] Sometimes these two elements are referred to as "capacity to hold rights" and "capacity to act". The first aspect may be considered as a "static element" that entitles individuals to recognition under the law as a bearer of specified rights and obligations, including a broad range of rights established in international treaties and domestic constitutional laws such as rights to equality, liberty, education, mobility, and so on.[120]

Historically, a number of groups, including women, have been excluded from the capacity to hold rights and obligations.[121]

In common-law systems such as Canada's, typically the *status* of legal capacity (the first element) is presumed, and the term "legal capacity" is reserved for the *exercise* of that capacity, that is, the second aspect identified above (the "capacity to act"). As the "static element" is not at issue in this project, unless otherwise specified, this *Paper* will use the term "legal capacity" as including both elements (what has sometimes been referred to as "full legal capacity"). The use of the term "legal capacity", rather than simply referring to "capacity" (as is currently the usage in the SDA and HCCA) also serves to emphasize the socio-legal aspects of the concept.

"Mental Capacity": The term "mental capacity" has sometimes been used in distinction to "legal capacity". When used in this way, "legal capacity" refers to "full legal capacity" as described above, that is, the entitlement to hold and exercise certain legal rights and responsibilities, while "mental capacity" is used as a descriptor of the mental or cognitive abilities that have been identified as pre-requisites to the exercise of legal capacity.[122]

"Competence": The term "competence" or "mental competence" was used historically in Ontario, and remains in use in other jurisdictions. The term "competence" was explicitly rejected by Weisstub in his *Report*, in favour of the term "capacity", in order to "minimize the unwanted and unintended intrusion of social stigma, and to more clearly focus attention on functional parameters and the abilities of the person in the context of the decision to be made".[123] The LCO will not use the term "competence" in referring to the Ontario system, but will do so as appropriate in discussing other jurisdictions that continue to employ the term.

4. Approaches to Capacity

Approaches to capacity have generally been divided into three broad types (although various legislative schemes may combine elements of these approaches): status, outcome and functional.[124] The status and outcome approaches were historically predominant. Most modern capacity and guardianship legislation adopts some version of a functional approach, although elements of the status and outcome approaches arguably continue to influence capacity assessment in practice. A fourth approach, the "will and intent" approach has been raised as an alternative, and will be discussed later in this Chapter.

Status Approaches

A "status" approach to the concept of capacity identifies capacity with the presence or absence of particular conditions or disabilities. Under a "status" approach, the presence of a particular disability, such as, for example, dementia, schizophrenia or Downs Syndrome would be associated with a lack of legal capacity. A status approach underlay much of historical

guardianship laws, with the status of being a "lunatic" or "idiot" resulting in the appointment of a guardian of some sort.[125] Under this approach, capacity is essentially identical with a medical diagnosis and the identification of disability. This tends to be a pure all-or-nothing approach, is not specific to particular types of decisions, and is unhelpful in addressing conditions that are episodic or where abilities may fluctuate. Historically, status-based approaches to capacity were common. Pure status approaches to capacity are less common today, although some jurisdictions retain a combined approach that includes a diagnosis of disability as part of a broader definition of incapacity.[126] A status-based approach was rejected in the *Weisstub Report* and Ontario's legislative language does not support such an approach. It is difficult to see how a pure status-based approach could be made consistent with the provisions of the *Convention on the Rights of Persons with Disabilities* (CRPD), as was briefly discussed in Part One, Chapter I. In practice, persistent attitudes about certain types of disabilities may lead to inappropriate presumptions of incapacity, and thus may influence the application of capacity assessments.

Outcome Approaches

"Outcome" approaches to capacity focus on whether the individual in question is making "good" decisions – that is, whether the decisions that the individual is making are within the bounds of what might be considered reasonable. This is approach is not the basis for modern capacity and guardianship regimes and it generally rejected as a legal approach, because of its inherent paternalism. However, on a practical level, there may be a tendency for family members or service providers to apply some version of an outcome test in assessing the capacity of an individual to make decisions, so that the application of the law may be affected by outcomes-based mindsets, a concern that was raised by several stakeholders during the LCO's initial consultations.

Functional and Cognitive Approaches

Contemporary approaches to capacity generally adopt some version of a "functional" or "cognitive" approach. The Queensland Law Reform Commission has described this approach as follows:

> The functional approach is based on the cognitive (functional) ability to make a specific decision, including a specific type of decision, at the time the decision is to be made. It focuses on the reasoning process involved in making decisions. This encapsulates the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences) and to weigh that information in the balance to reach a decision.[127]

This is the dominant approach in contemporary legal tests of capacity. As will be discussed below, Ontario's legislation reflects a highly developed version of a cognitive functional approach to capacity.

B. Standards and Tests for Capacity in Ontario Law

1. Key Elements of Ontario's Current Approach to Legal Capacity

Ontario's approach to legal capacity has its roots in the 1990 *Weisstub Report*,[128] which was briefly introduced in Part One, Chapter I of this Paper. This *Report* made the following recommendations with respect to Ontario's approach to legal capacity,[129] which were ultimately reflected in the provisions of the SDA and HCCA.

1. **Legislative presumption of capacity:** codification of the common-law presumption of capacity and placing the burden of proof on the party asserting incapacity, with a standard of proof of the balance of probabilities. Both the SDA and HCCA make explicit the presumption of capacity.[130] Legal capacity can only be removed through specific mechanisms outlined in the legislation, and subject to robust procedural rights. Where capacity is in doubt, the presumption must operate in favour of capacity, until these processes have been completed.
2. **Functional basis for assessment of capacity:** basing the assessment of decisional capacity on the *specific functional requirements of that particular decision*, rather than on the assessment of an individual's abilities in the abstract, the individual's status or the probably outcome of the individual's choice.
3. **Domain or decision-specific capacity:** avoiding a global approach to capacity, so that determinations of capacity are restricted to the assessment of capacity to make a specific decision or type of decision. As is described below, the SDA and HCCA provide specific tests of capacity for property management, personal care, creation of powers of attorney for property and for personal care, and consent to treatment, personal assistance services provided in a long-term care home and admission to long-term care.
4. **The "understand and appreciate" test:** Weisstub recommended that tests for capacity be based on the individual's *ability* to understand the particular information relevant to that decision, and to appreciate the consequences of making that decision. It is worth emphasizing that the understand and appreciate test focuses on the *ability* to process information and to reason, as opposed to *actual* understanding and appreciation.[131] There may be a variety of reasons for a lack of actual understanding or appreciation that may not be related to the ability to understand or appreciate. Weisstub notes the importance of this distinction for "patients who would be able to

understand their situation if sedated somewhat less, or, of course, for those who have not received complete information about their situation".[132]

5. **Time limited determinations of capacity:** since capacity may vary or fluctuate over time, Weisstub recommended that the validity of any one determination of incapacity be limited to the period during which, on clinical assessment, no significant change in capacity is likely to occur.

2. Statutory Tests for Capacity in Ontario

The SDA and HCCA include multiple tests for capacity, reflecting the domain/decision specific approach advocated in the *Weisstub Report.* While all are variants on the "understand and appreciate" test, in practice the requirements for meeting the test may be substantially different: for example, the information that must be understood and appreciated to create a power of attorney for personal care is substantially different (and less rigorous) from what must be understood and appreciated for managing property. In this way, the "understand and appreciate test" can operate with great flexibility, responding to application in different contexts and for different purposes. However, the underlying basis for the test – the requirement to understand and appreciate particular information – is consistent and coherent across the various areas.

It should be noted, however, that some statutory provisions refer to capacity, while others refer to *in*capacity. Health care practitioners, for example, have an affirmative duty to take reasonable steps to ensure that the person *is capable* and has given consent. The HCCA therefore defines "capacity". Similarly, under the SDA, grantors must have capacity in order to create a valid POA. On the other hand, for the management of property and personal care, statutory guardianship and POAPCs take effect only when the person is assessed as *in*capable and the definitions in the statute are for incapacity, reflecting the different dynamics of these decision-making domains.

Ontario's statutory tests for legal capacity and incapacity are set out below.

Management of property (SDA): A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.[133]

Powers of attorney for property (SDA): To have capacity to create a valid power of attorney (POA) for property, the individual must:

- Know what property he or she has, and its approximate value;

- Be aware of obligations owed to her or his dependents;
- Know the powers that the attorney will have;
- Know that the attorney must account for her or his dealings with the property;
- Know that he or she can revoke the power of attorney, if capable;
- Appreciate that if the attorney does not manage the property well, its value may decline; and
- Appreciate that the attorney might misuse the authority granted.[134]

Powers of attorney for personal care (SDA): To create a valid POA for personal care, the individual must have the ability to understand whether the proposed attorney has a genuine concern for her or his welfare, and appreciate that the individual may need to have the proposed attorney make decisions for her or him.[135]

Personal care (SDA): a person is incapable with respect to personal care if he or she is unable to understand information relevant to making a decision concerning her or his "health care, nutrition, shelter, clothing, hygiene or safety",[136] or to appreciate the reasonably foreseeable consequences of making or not making a decision.

Treatment, admission to long-term care, and personal assistance services (HCCA)**:** To be capable with respect to these decisions, the individual must understand "the information that is relevant to making a decision" about treatment, admission to long-term care, or personal assistance, and appreciate the reasonably foreseeable consequences of a decision or lack of a decision.[137]

3. Challenges in Operationalizing This Approach to Capacity

The concept of "capacity" is complex, and so it is not surprising that it is difficult to implement.[138] As was emphasized throughout the LCO's preliminary consultations, the operationalization of the concept of capacity may differ significantly from legal theory and requirements. This section focuses on challenges to the operationalization of capacity that are arguably inherent to the conceptual approach that Ontario has selected. The following chapter will examine at length the actual systems and requirements for the capacity assessment *process*.

Distinguishing "ability "from "actual" understanding and appreciation: The distinction between the *ability* to understand and appreciate and *actual* understanding and appreciation is "subtle but important".[139] Theoretically, the use of the auxiliary verb "is able" in the capacity test allows for more patients to pass the test as they must only display the *potential* for understanding and appreciating, and need not reach the level of *actual* understanding/appreciating. As such, this interpretation of the test is meant to protect the

patient from, for example, not being able to understand the information due to poor explanation from a physician,[140] or being better able to understand if under less sedation.[141] The individual may weigh or value the information differently than does the professional and may disagree with the recommendation, but so long as she or he appreciates the parameters of the decision to be made, that amounts to an ability to appreciate.[142]

As the Supreme Court of Canada noted in *Starson* v Swayze, described below,

> While the difference between ability to understand and appreciate and actual understanding and appreciation is easily stated, it may be less easy to apply in practice. Capacity is an abstract concept. The primary means of ascertaining capacity or ability, in any context, is to look at what an individual in fact says and does.[143]

In practice, there is some question as to whether assessment can always adequately distinguish between the two.[144] According to Jessica Berg, when it comes to testing patients for their "ability" to understand, clinicians are, in reality, testing for actual understanding.[145] The patient is posed with questions about the risks, benefits, and alternatives to treatment, and the physician continuously provides more information while trying to notice if the patient comprehends the information.[146] Recognizing the difference between ability to understand in this scenario and actual understanding seems to be difficult. Since the same testing process is used when testing for ability to appreciate, the same difficulty in recognizing the distinction between "ability" and "actual" arises.[147]

Appreciating consequences: Some commentators have raised concerns about the ability to effectively apply the "appreciation" branch of the test in practice. The Supreme Court of Canada has considered and set out the "appreciation" requirement in *Starson* v *Swayze* in some detail. Starson had applied to the CCB for review of a physician determination that he lacked legal capacity with respect to treatment, and subsequently sought review of the CCB's decision to uphold the physician's determination. The case turned on Starson's ability to appreciate the consequences of his decision with respect to treatment. The SCC ruled that this branch of the test "requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof".[148] This requires the individual to be able to be able to apply the relevant information to his or her own circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack of decision. The individual need not agree with the diagnosis in order to apply the relevant information to his or her own circumstances, but must be able to recognize the possibility that he is affected by the manifestations of his condition.

The majority of the SCC found that Starson was capable with respect to treatment on the basis that while Starson did not conceive of his condition as an illness, he conceded that his brain did

not function normally and understood the intended effects of the proposed medication. The dissent, on the other hand, stated that while Starson did not deny all of his difficulties and symptoms, he did not see them as an illness or a problem relevant to the proposals for treatment.

One academic, Monique Dull has argued that an examination of the caselaw following the Supreme Court of Canada decision in *Starson v Swayze* indicates that in practice, decisions by the courts have in a number of instances, while not explicitly abandoning the approach set out by the majority in *Starson*, in practice applied a higher threshold to the "ability to appreciate" than was applied in that case. Dull argues that this case review demonstrates that subsequent decisions applying the capacity test are tending to justify their findings of incapacity by striving to uncover factual distinctions from *Starson* where none really exist. In effect, she argues that subsequent decisions are substantively following the dissent's higher threshold standard in *Starson*, even while claiming to follow the majority's lower threshold standard.[149]

One stakeholder commented to the LCO that there was some risk of the "appreciation" requirement collapsing into an outcomes-based test for capacity, as in practice it may be difficult to distinguish between an inability to appreciate the consequences of a decision and an assessment of the nature and level of risk that differs from that of the person assessing.

Challenges in addressing fluctuating levels of capacity: Legal capacity as it is defined and understood in Ontario can be a fluctuating quality, so that an individual who lacks legal capacity at one time may have capacity at another time. This reflects the rejection of a status-based approach to legal capacity, something that is generally lauded, as well as the recognition that capacity is domain-specific and contextual. However, one effect of this approach to capacity is difficulty in its use as a legal threshold for decision-making domains. This is not an issue to the same degree in the realm of health care consent, where capacity, at least as the law is written, is generally reassessed for each decision, but does raise issues for those areas where legal incapacity has longer-term consequences, such as when it triggers the operation of a power of attorney or the appointment of a guardian. Guardianship is, by its nature, a relatively costly and complex process. Where loss of legal capacity is temporary or episodic, it may be relatively difficult to ensure that substitute decision-making structures are in place only where they are truly necessary.

Ontario's operationalization of its concept of capacity may therefore be uneven, and in practice maintain aspects of status or outcome-based approaches that the legislation on paper clearly rejects.

4. The Human Rights Critique

Cognitive approaches to capacity were adopted, in part, as more closely adhering to human rights concepts, particularly in moving away from the stereotypical and medicalized assumptions that underlie the status approach, and what many felt was the excessive paternalism of an outcomes based approach. However, the functional and cognitive approach adopted in Ontario's current legislation scheme is also the subject of human rights critiques, with some arguing that it is incompatible with the provisions of the CRPD, which was described in Part One, Chapter I.

Some have argued that *any* functional approach to capacity is incompatible with a disability-rights lens, in that the right to make decisions should not be restricted on the basis of diversity in some capabilities associated with some types of disabilities, and that these types of distinctions are discriminatory.[150]

Others argue that the type of cognitively based test for capacity adopted in Ontario disproportionately disadvantages persons with intellectual, language, cognitive and psychosocial disabilities, and is improperly based on medically defined cognitive abilities (and in this sense retains many of the problematic aspects of a status-based approach). As noted above, the "understand and appreciate" test creates a threshold for who can and cannot make decisions for themselves based on cognitive abilities. Thus, although it is not a disability-based test, it will have a disproportionate effect on individuals whose disability affects their cognitive abilities, such as persons with intellectual, mental health or neurological disabilities. Individuals without disabilities will certainly be affected, but the majority of those who are found to be unable to understand and appreciate the requisite information for a particular type of decision will be individuals with some type of disability that has recurrent or ongoing effects on their cognition.[151]

It is further argued that cognitive and functional approaches do not take into account that we all tend to be interdependent, and to make decisions in consultation with and with support from others whom we trust and who are close to us. As Bach and Kerzner have stated, "We do not exercise our self-determination as isolated, individual selves, but rather 'relationally', interdependently and intersubjectively with others."[1] These relationships and supports towards autonomy, although important to us all, are particularly important to persons who have disabilities related to communication and understanding. Through these relationships and supports, it is argued, individuals who may not on their own be able to achieve a competent decision-making process can do so in cooperation with others. In this view, a cognitive approach to capacity places the individual in isolation and ignores the network of supports and relationships that may support a strong decision-making process.

As well, it is argued that a cognitive approach does not sufficiently value other attributes that people employ to make decisions, such as preferences, emotions and intuition. Bach and Kerzner have argued that intention is the basis of human action and reflects human agency, and that the foundation for capacity to make decisions should lie, not in cognition, but in the ability of individuals to express intent or make evident their will in a way that can guide those who know them well. Will and intent can be communicated through behaviour as well as language.[152]

C. Standards and Tests for Legal Capacity: Options for Reform

Given these challenges to Ontario's approach to and tests for capacity, what are the options for reform? There are two main approaches to reform: making adjustments to the current cognitive approach, or adopting alternative approaches that attempt to address the fundamental critiques of cognitive approaches. **It is important to keep in mind that it is possible for Ontario to incorporate into its legislation more than one approach. That is, it is possible that there may be some situations where a cognitively-based approach is most appropriate and others where an alternative approach is the best way to reach the goals of the law**. Though this would certainly add complexity to an already complicated legislative scheme, Ontario does already set different tests for capacity for different types of decisions.

1. Adjustments to Cognitively-Based Capacity Tests

The "understand and appreciate" test, together with other hallmarks of a functional approach to capacity, such as decision-specific assessments, a presumption in favour of capacity, and a focus on abilities rather than outcomes, is found in many common law jurisdictions, including the United States, Australia and the United Kingdom, and other Canadian jurisdictions.

As was detailed above, while all of Ontario's capacity tests are based in the "understand and appreciate" test, the legislation takes pains to specify exactly what information must be "understood and appreciated". Some jurisdictions do not include in the legislation particular requirements for what must be understood and appreciated, but simply employ a broad requirement that the individual must understand the information relevant to the decision and appreciate the reasonably foreseeable consequences of a decision or lack of decision, leaving to the assessment process the application of the test to specific contexts.[153] This has the benefit of simplicity and flexibility, but leaves to the expertise and judgment of assessors the determination of what information must be understood and appreciated.

Some jurisdictions provide further amplification in the statute as to the requirements for "understanding" or "appreciating". For example, in the United Kingdom, the *Mental Capacity Act 2005* (UK) specifies that a person is unable to make a decision if he or she is unable to:

- understand the information relevant to the decision;
- retain that information;

- use or weigh that information as part of the process of making the decision.[154]

This adds some clarity to the test, particularly in terms of what is intended by the ability to "appreciate" the relevant information. In a similar fashion, it might be desirable to amend Ontario's test to specifically include the ability to "apply the relevant information to his or her circumstances" and to "weigh the foreseeable risks and benefits of a decision or lack thereof", (to use the language of the Supreme Court of Canada in *Starson* v *Swayze*).

The test for capacity under the SDA is considerably amplified and illuminated in the Ministry of the Attorney General's capacity assessment guidelines, which capacity assessors under the SDA are required to use in their assessments (as is further outlined in the following Chapter). These guidelines include key tenets for capacity assessment, and clarification of the terms "understand" and "appreciate". For example, the *Guidelines* make clear that assessments of capacity must give consideration "not only to what the individual can accomplish, but to whether the person acknowledges any personal limitations, knows his or her options, and has considered the merits of obtaining appropriate assistance to meet his or her decision-making needs".[155] As another example, the *Guidelines* emphasize that when assessing an individual with factual knowledge deficits, the assessor must consider whether the person has been exposed to the necessary training or learning opportunities to acquire the relevant facts.[156] Given that the *Guidelines* apply only to capacity assessors under the SDA, the importance of assessments of capacity, and the confusion related to capacity that was identified by many of those that the LCO spoke with, it may be useful to consider whether some of the clarifications of the tests for capacity in the *Guidelines* might usefully be incorporated into the statute or regulations, or applied to other mechanisms for assessing capacity.

- **QUESTION FOR CONSIDERATION: Are there specific ways in which the current "understand and appreciate" test for legal capacity should be clarified in order to improve its application? Or are there other means through which further guidance on its proper application could be provided? Are there specific ways in which the legislative test should be amended so that it better reflects the social and contextual aspects of legal capacity?**

2. A Non-Cognitive Approach: The "Will and Intent" Test

Other potential approaches to capacity have been identified that would not simply make adjustments to the "understand and appreciate" test, but would move the test for capacity in a significantly new direction. These maintain the concept of capacity, but attempt to rework it in a way that broadens it to include persons with disabilities that may disproportionately affect their status under current laws relating to legal capacity and guardianship.

Michael Bach and Lana Kerzner, in developing a thoroughly elaborated proposal for a paradigm shift in capacity and guardianship law, propose a move away from the rationality-based "understand and appreciate" test to one that focuses on the concepts of "will and intention" as

the basis for human agency and action. Bach and Kerzner define these proposed criteria for decision-making ability as:

> 1) My capacity to express my will and/or intentions, at least to others who know me well, and who can then 'confer' or ascribe agency to my actions in their descriptions of me to others; and
> 2) Being able to tell 'who' I am, my life story of values, aims, needs and challenges, or having my community of knowing and valuing others do that for me, and using that narrative coherence of my life to help direct the decisions that give effect to my intentions. ...
>
> This minimum threshold of human agency we might characterize as: *to act in a way that at least one other person who has personal knowledge of an individual can reasonably ascribe to one's actions, personal will and/or intentions, memory, coherence through time, and communicative abilities to that effect*.[157]

In a somewhat similar fashion, the British Columbia *Representation Agreement Act* provides that in deciding whether an individual is incapable of making, changing or revoking a standard representation agreement, all relevant factors must be considered, including:

> (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
> (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
> (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
> (d) whether the adult has a relationship with the representative that is characterized by trust.[158]

This standard is for the most part non-cognitive, based as it is on the ability of the individual to indicate choices and preferences and to express trust. It does require the adult to be "aware" of some of the potential effects of a representation agreement. In this way, it is more rigorous or exclusive than the standard proposed by Bach and Kerzner, although it has some important commonalities.

A legal capacity test based on some version of will and intention would mark a radical departure from Ontario's current cognitive approach. Careful thought would be required as to who would assess capacity based on such a test, and what types of procedural safeguards and supports would be appropriate. It would also have broader implications for who might act in a decision-making context, and the types of safeguards required to detect and address abuse. As is discussed in Part Three, Chapter II, such an approach also raises questions regarding individuals who do not currently have the kind of close and trusting relationships that are fundamental to this proposal. Proposals related to "will and intention" tests for legal capacity are generally part of a broader advocacy for the inclusion of supported decision-making approaches in laws

related to legal capacity, decision-making and guardianship. These approaches and their implications are described at length in Part Three, Chapter I of this *Paper*.

- **QUESTION FOR CONSIDERATION: Should a test for legal capacity based on "will and intention" of the individual be adopted for some or all aspects of Ontario's decision-making and guardianship laws? If so, in what circumstances would such a test be appropriate, and how would this standard for capacity be assessed?**

3. Some Practical Considerations for Reform

In considering reforms to Ontario's approach to or tests for capacity, it is important to keep in mind both the advantages of simplicity and comprehensibility in a single, unified approach, and the possibilities for addressing diversity and providing nuance through approaches or tests tailored to specific circumstances.

In considering the merits of any test for capacity, its implications for operationalization must be taken into account. For any particular test of capacity, how would it be measured? Who would carry out the assessment? What kinds of processes would be appropriate? The account of Ontario's current capacity assessment mechanisms in the following chapter of this *Paper* highlights the complexities and challenges of putting concepts of capacity into practice.

It is also essential to keep in mind that understandings of capacity are intimately connected with understandings of disability, aging, autonomy and accountability. While legislation can have influence in shifting norms, the experience with Ontario's current legislation highlights the challenges: stakeholders have emphasized how slow and still incomplete has been the process of shifting from status and outcome based approaches to capacity to a functional and cognitive approach. Effective changes to capacity approaches or tests will require changes to attitudes, and will require extensive and persistent training and education, as well as support from shifts in broader cultural attitudes.

D. Questions for Consideration

1. **What are the most important implications of the *Framework* principles for the approaches to and standards for legal capacity in Ontario law?**
2. **Are there specific ways in which the current "ability to understand and appreciate" test for legal capacity should be clarified in order to improve its implementation? Or are there other means through which practical guidance on its application could be provide? Are there specific ways in which the legislative test should be amended to better reflect the social and contextual aspects of legal capacity?**
3. **Should a test for legal capacity based on "will and intention" of the individual be adopted for some or all aspects of Ontario's decision-making and guardianship laws? If so, in what circumstances would such a test be appropriate, and how would this standard for capacity be assessed?**

II. SYSTEMS FOR ASSESSING CAPACITY

A. Background and Introduction

Part Two, Chapter I of this *Paper* considered approaches to and tests for "legal capacity". This Chapter focuses on the ways in which the concept of capacity has been operationalized, specifically through mechanisms for assessing capacity. That is, what systems and processes do we use to apply the statutory tests and determine whether or not a person has legal capacity? This includes the required qualifications for persons who assess capacity, the standards and requirements surrounding the capacity assessment, oversight of the capacity assessment process, and the rights and recourse available to those who are assessed.

Because capacity provides the threshold for the application of the decision-making and guardianship laws, the mechanisms that are in place for assessing it are central to their effective and just application. Capacity assessment mechanisms that are difficult to navigate, overly costly or insensitive to the needs of persons with disabilities and their families will reduce the ability of the system to address fluctuating or evolving capacity, and lead to the inappropriate application of the law. For example, accessible and meaningful mechanisms for capacity assessment are essential to the ability of persons under guardianship or powers of attorney to assert their abilities and their autonomy. Capacity assessments that are of poor quality or offer inadequate procedural protections may lead to the removal of rights and autonomy from persons who are capable of making their own decisions.

It is important to keep in mind that capacity assessments may be triggered for a range of reasons, not all of them based on a strong understanding of the purpose and possibilities of the legislation. Families may unrealistically hope that a capacity assessment will somehow solve difficult practical or ethical issues. Some parents of young adults with developmental disabilities may incorrectly believe that guardianship is a necessary and inevitable next step as their child nears adulthood. Professionals may also misunderstand what can be achieved through a capacity assessment process. This is a challenge for those given the task of assessing capacity.

Capacity assessment is in many cases the entry point to the *Substitute Decisions Act* (SDA) or the *Health Care Consent Act* (HCCA): the level of supports, options and navigational assistance available at this stage will significantly shape how individuals and families experience this area of the law.

The focus of this Chapter is on requirements relating to assessment of statutory tests for capacity, that is, processes under Part III of the *Mental Health Act* (MHA), the *Substitute Decisions Act* (SDA) and the *Health Care Consent Act* (HCCA). Legal capacity is commonly

assessed in many other contexts – for example, lawyers must assess the capacity of clients to instruct counsel – but these assessments fall outside the scope of this project.

Ontario's mechanisms for assessing capacity include "Capacity Evaluations" under the HCCA, "Capacity Assessments" for property and personal care under the SDA, and "Examinations for Capacity" under the MHA, as well as less formal mechanisms for assessing capacity to consent to treatment or to create a power of attorney (POA). When this Chapter refers to "capacity assessment" or "assessing capacity", it includes all Ontario mechanisms for assessing capacity, unless it is otherwise specified. When the Chapter refers to "Capacity Assessments", it is referring specifically to assessments carried out under the SDA regarding property and personal care.

As was outlined in Part Two, Chapter I, legal capacity is a multidimensional concept: it is not surprising that it is difficult to develop meaningful and effective systems for assessing it. It should be acknowledged at the outset that there is no perfect system for assessing capacity, although there are certainly better and worse ones.

There are a number of different approaches to capacity, as was discussed in the previous Chapter. The processes for assessing capacity will of course be closely linked to the underlying concept of capacity which the processes are intended to apply. The process for assessing capacity under a status-based model (such as one based on a medical diagnosis) would necessarily be considerably different from that under a functional or cognitive model (such as an "understand and appreciate" test), which would differ again from a process that reflected a concept of capacity based on a non-cognitive model such as "will and intent". Ontario's current legislative framework is based on a cognitive model of capacity. If Ontario were to shift towards a non-cognitive model, there would be very significant ramifications for its capacity assessment systems, particularly for the decision as to who assesses capacity.

However, all capacity assessment systems must grapple with certain fundamental issues. Is the selected method of assessment appropriate for the particular context or for this particular purpose? What kind of recourse should be available to an individual who disagrees with the results of a capacity assessment? How often should capacity be reassessed? What kinds of skills or knowledge should people who assess capacity have? What kind of information or supports should persons who are being assessed expect? What are the barriers to capacity assessment? How can vital procedural protections and supports be appropriately balanced with resource limitations and needs for efficiency?

In applying a principles-based approach to the law of legal capacity, decision-making and guardianship, it is important to keep in mind that the principles are equally applicable to the "procedural" aspects of the law (such as capacity assessment mechanisms), as to the

"substantive" provisions. For example, effective mechanisms for complaint and redress are essential to respecting the dignity and worth of those affected by the law; processes should be designed in a way that reflects diversity in ability and other characteristics; the autonomy and independence of persons affected should be promoted through the provision of information and supports that are sufficient to ensure meaningful choice.

B. Challenges in Developing Effective Mechanisms for Assessing Capacity

In writings related to capacity assessment mechanisms, there are a number of recurring themes or concerns, which may be helpful to keep in mind when reviewing Ontario's capacity assessment mechanisms and considering potential reforms. These issues must be addressed by any capacity assessment system.

1. The challenges of translating the concept of capacity into practical terms

As the Victorian Law Reform Commission noted in its 2012 *Final Report* on Guardianship, capacity assessment is, by its nature, challenging:

> Assessing capacity is a very complex undertaking. There are no definitive, objective tests and relatively few professionals are specially trained to conduct capacity assessments. Professionals with decades of experience have suggested to the Commission that capacity assessment actually gets harder over time, as practitioners become more aware of the complex and individualised nature of cognitive ability and inability.[159]

The slippery and multi-dimensional nature of the concept of capacity means that its application will always be challenging. Assessments of capacity, if they are properly engaged in, are not simple, cut-and-dried endeavours. While there will be individuals who clearly either do or do not meet the threshold, there will also be a significant number of individuals who fall within a grey zone or whose abilities require considerable care to determine. Because the consequences of a determination with respect to capacity are so significant, there is an added pressure to "get it right". Capacity assessment mechanisms must therefore carry a heavy burden: given the stakes and the possibility of error, it is important to have a process that is transparent, fair and perceived to be fair, and open to correction. Given the risks of abuse or other negative outcomes where a person lacks capacity and requires the supports provided by legislation, it is also important that the process be reasonably timely.

As well, given how closely assessments of capacity are tied to the operation of complex and overburdened systems such as hospitals, long-term care and social services for vulnerable individuals, there is also pressure to ensure that the mechanisms for assessments provide efficiency and certainty for those charged with providing services and operating these systems. The challenges in designing capacity assessment mechanisms that appropriately balance all of these factors are significant.

2. Who should assess capacity?

The complex and multi-faceted nature of capacity assessment naturally raises the question of what type of person should carry out assessments, and what qualifications, training and standards they should be required to maintain.

The type of answer that one provides to this question is intimately linked to the concept of capacity that one adopts. A concept of capacity that centres on the ability of an individual to evince "will and intent" will tend to lead away from specialized experts, and towards those who have a profound and intimate knowledge of the person in question – those who are able to "read" the actions and reactions of the individual to see intention and preferences. A concept of capacity that focuses on cognition will point towards the employment of those who have specialized knowledge of cognitive abilities and how they may be evinced – that is, experts in health related professions. Since most common-law jurisdictions appear to have adopted some form of a functional or cognitive approach to capacity, it is not surprising that there is generally a tendency to place the assessment of capacity largely in the hands of health professionals. Capacity is a legal threshold with a defined legal test; however, initial determinations are often made by health professionals, and where determinations of legal capacity are reviewed by tribunals or courts, considerable weight will be given to medical evidence.

In light of this dynamic, it is worth noting that the province of Alberta, in its recent reforms to guardianship law, explicitly created room for non-professional assessment of capacity in some circumstances. Under the *Personal Directives Act*, an individual, when making a personal directive, can designate a person or persons to assess capacity (the ability to understand and appreciate the relevant information) for the purpose of determining when the directive comes into effect.[160] This might include family or a trusted friend.[161] This person or persons must consult with a physician or psychologist in making a determination of capacity, and complete a detailed form, as must the consulting professional.[162] Where no person is named in the personal directive, the assessment of capacity must be carried out by two service providers, one of whom must be a physician or psychologist.[163]

Ontario's current approach to capacity is cognitive, and, as described below, is heavily professionalized. Weisstub refers to this in the *Final Report* on the 1990 *Enquiry on Mental Competency*, stating that "Almost all submissions which addressed the point suggested that physicians ought to have a central role in the process, although there was broad agreement that the guidelines now extant for the exercise of physician discretion were not clear enough".[164]

Because Ontario's approach to capacity is cognitive – whether or not a particular individual at a particular time is able to make specific decisions – in theory at least, specific expertise may not necessarily be required to determine whether an individual has legal capacity in a particular area. In Ontario law, some capacity assessments require specialized professionals, while others,

such as assessment of capacity to make a POA, do not. In many cases, those interacting with persons whose legal capacity may be in doubt are not necessarily experts in this area of the law, or in the social and medical aspects of the concept of capacity. However, because the concept draws on a variety of medical, psychological and social disciplines, there is a tendency to rely on specialized expertise for assessing capacity, even where the use of such specialized expertise is not required by law.[165]

The level of professionalization required for assessing capacity draws mixed responses. For many who are not experts in this area, status or outcome approaches may seem "natural" and so pervasive gaps in awareness and understanding of the law may contribute to results that are not in harmony with Ontario's approach to capacity. In less formal and regulated settings, assessments of capacity may still be based on or influenced by a medical diagnosis or outcomes (a *de facto* best interests test). As one commentator notes,

> Conclusions about capacity and the right to make certain decisions are too often really backdoor assessments about the reasonableness of the decision rather than the capacity of the person to make it in the first place.[166]

These types of concerns may be seen to indicate the preferability of a more professionalized approach to capacity. However, persons with disabilities have often raised concerns about the medicalization of their experiences and the resultant control over their lives by medical professionals, arguing that a social and human rights understanding of the experience of disability is more appropriate. Such a critique may have some resonance with respect to the application of Ontario's approach to capacity.

An emphasis on the decision-specific nature of capacity, such as is found in Ontario and many other jurisdictions, may point towards the employment of different knowledge or expertise for assessment of capacity in different subject areas. During the LCO's preliminary consultations, some psychiatrists noted that doctors not infrequently attempted to obtain their opinion as to capacity to consent to some particular treatment, such as surgery; this is not only contrary to the current state of the law, which requires the person proposing treatment to ensure capacity to consent, but it was the view of the psychiatrists that it was the doctor proposing the treatment who was in the best position to understand whether the individual understood the nature and consequences of *that particular* proposed treatment.

In keeping with this, in many cases capacity assessments are carried out by professionals providing services, such as lawyers determining whether a client has capacity to instruct counsel, or create a will or a power of attorney. Service providers of all sorts, including financial and social service providers, must often informally assess the ability of an individual to enter into an agreement or provide consent.

The *Mental Capacity Act 2005* (UK) takes this approach to its furthest logical extent: there is no system of designated capacity assessors or qualified professionals for certain assessments; rather, the question of who assesses capacity is determined by the specific circumstances in which the need to assess arises:

> The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times. For most day-to-day decisions, this will be the person caring for them at the time a decision must be made. For example, a care worker might need to assess if the person can agree to being bathed. Then a district nurse might assess if the person can consent to have a dressing changed.[167]

Notably, under the *Mental Capacity Act*, for most day-to-day actions or decisions, where a person is found to be incapable, the decision will be made by the "carer" most directly involved with the person at the time, for example, health care staff responsible for carrying out the particular treatment or procedure.[168] In practice, this means that the person assessing capacity is often the person who will then make a decision on the person's behalf and will provide care or service to the person. To redress the power imbalance that this may create, the legislation creates a system of "independent mental capacity advocates" who are appointed for persons who do not have informal supports or a Lasting Power of Attorney or deputy, and whose task is to obtain and evaluate all relevant information pertaining to the person's wishes and feelings and report to the decision-maker; they also have the power to challenge a decision in regards to the person to whom they are assigned, including a decision regarding capacity.[169]

Linked to the question of qualifications for capacity assessment is that of standards and of training requirements. In some capacity assessment systems, medical or other health-related expertise is considered in itself sufficient training for capacity assessment, without the imposition of further standards (beyond the legal test for capacity) or training. As will be discussed below, Ontario's requirements for Capacity Assessors under the SDA include testing, regular education requirements, and extensive explicit mandatory guidelines, and create one of the most formalized and comprehensive sets of requirements in the English-speaking world. The province of Alberta followed this lead in its recent reforms, requiring assessments by designated capacity assessors prior to court orders for guardianship, trusteeship or co-decision-making. These designated capacity assessors must meet specific educational or training requirements or both, and develop thoroughly documented capacity assessment reports.[170]

When considering who should assess capacity, another element to be considered is accessibility. Barriers to assessment may deter necessary assessments or re-assessments, putting autonomy or security at risk. An important element of accessibility is cost. For example, as referenced above, Capacity Assessments under the SDA are notable for the level of standards

and training required. However, as they are a private service, there are costs associated with them. While Ontario's Capacity Assessment Office (CAO) does have some ability to cover costs for low-income individuals, the funding for this program is relatively limited, and for some Ontarians, the costs associated with one or more Capacity Assessments may be a deterrent. Concerns have been raised that this may lead to inappropriate use of Capacity Examinations under the MHA, or that persons with fluctuating or evolving levels of capacity may find themselves inappropriately categorized as either having or lacking legal capacity.

Related to the issue of accessibility raised above is that of accommodation of the many forms of diversity found in a province as large, multicultural and multi-lingual as Ontario. Given the social and contextual aspects of the concept of capacity, it is important that assessors be equipped to be sensitive to and to take into account this diversity so that, for example, culturally specific behaviours are not misinterpreted as a signs of a lack of legal capacity. Carling-Rowland and Wahl comment with respect to communication and language barriers that,

> By necessity the current capacity evaluation is highly dependent on the patient's proficient use of language, because it is through the spoken or written word that we reveal our ability to take in and weigh information and formulate a response. People with communication barriers are particularly vulnerable to being … excluded from decision making because their inability to converse masks their inherent competence.[171]

Carling-Rowland and Wahl go on to note that while professional interpreters are impartial, have knowledge of culture and customs, and can be expected to follow policies regarding confidentiality, the same cannot be expected of *ad hoc* interpreters or family members, who are commonly used in the healthcare system.[172]

- **QUESTION FOR CONSIDERATION: How does the experience of capacity assessment differ depending on gender, sexual orientation, racialization, language, culture, socio-economic status, Aboriginal status, geographic location, various forms of disability, or other forms of diversity?**

3. Procedural protections for those assessed

An individual may experience an assessment of capacity as a significant invasion of privacy; for some it may be a very upsetting experience. Courts have recognized that a capacity assessment is an "intrusive and demeaning process"[173] and a "substantial intervention into the privacy and security of the individual".[174] It also has very significant and long-term ramifications for the autonomy of the individual should it result in a finding that the individual lacks legal capacity. Accordingly, it is important that adequate procedural protections be associated with the assessment of capacity: "a certain basic respect must be paid to the client, the client's knowledge of and right to control his or her body, and the client's right to be informed of the processes being performed".[175]

Of course, what are considered "adequate procedural protections" will vary depending on the context and the potential consequences of the particular assessment. An assessment that may result in guardianship and therefore has long-term implications for an individual's autonomy may require more rigorous procedural protections than one that may result in a one-time treatment decision made by a substitute decision-maker; a one-time decision may have life-changing consequences, as with a decision regarding admission to long-term care. There may be opportunity for more extensive review where the need for decisions is less time-sensitive. Weisstub argued that:

> Variations in the expected duration of an individual's incapacity and in the extent and consequences of incapacity suggest that different procedures be employed in different contexts. In this regard it would be desirable to provide both full 'due process' and abbreviated versions of the procedure for decision making capacity determination.[176]

However, he recommended that when designing processes for capacity assessment, consideration be given in all cases to fundamental issues such as the following:

- choice of assessor;
- notice to the individual;
- rights advice and right to counsel;
- rights of appeal; and
- the time period between reviews.

The Victorian Law Reform Commission emphasized in its *Final Report* the importance of ensuring that there is a valid trigger present to justify any capacity assessment, and taking steps to "engage the person in the assessment process by seeking agreement and informing the person about the process as far as possible".[177]

Alberta legislation requires that there be a valid cause for concern in order to necessitate a capacity assessment, that is, an event that puts the individual or others at risk and that seems to be caused by an inability to make decisions.[178] Assessors must know the reason that a capacity assessment has been requested and familiarize themselves with the circumstances leading to the request.[179]

Alberta also includes a number of other novel statutory rights during the capacity assessment process, including rights to

- have a person present during an assessment to assist the adult to feel comfortable and relaxed,
- to have the assistance of an interpreter or use of a device to assist the person to communicate and thereby fully demonstrate her or his capacity, and

- to undergo the assessment at a time when and under circumstances in which the adult will be likely to be able to demonstrate his or her full capacity.[180]

4. Ensuring flexible responses to changing levels of capacity

As is widely acknowledged, legal capacity may fluctuate over time. Some individuals will have a single brief episode where they lack legal capacity. Others will cycle in and out of legal capacity. Some who did not have legal capacity will develop it; and some who have had legal capacity will lose it. Because guardianship or forms of substitute decision-making are generally considered as significant intrusions on individual autonomy, it is important that individuals do not retain a status as legally lacking capacity when they do not. It is equally important, because of the significant risks that some individuals may face when independently making decisions for which they do not have capacity, that lack of legal capacity be identified when necessary.

It is therefore vital that legal processes surrounding assessment of capacity retain flexibility, so that individuals can be reassessed with reasonable ease. Weisstub noted, in the Final Report of the *Enquiry on Mental Competency*, that "as an individual's capacity may change over time, it is agreed that a finding of capacity ought to be easily reviewable. A finding of legal incapacity should not be perpetual, but should merely extend as long as the actual incapacity of the subject persists."[181] Notably, Article 12 of the CRPD explicitly requires that measures related to legal capacity "apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body".

This may be easier said than done, of course. Capacity assessment may be a resource-intensive process. A balance must be struck between ensuring access to review and reassessment, and preventing endless and unnecessary cycles of reassessment.

Some assessments of capacity are decision-specific, of course. For example, under the HCCA, capacity is required to be reconsidered each time a new treatment proposal is made. In such circumstances, there is in theory no concern regarding "review" of assessments, as a fresh assessment should be conducted for each specific decision. In practice, however, there are concerns that the results of a finding of lack of capacity may bias perceptions and undermine the presumption of capacity, so that in effect a finding of incapacity for a single decision may result in ongoing substitute decision-making. Concerns about reassessments arise most strongly where there are long-term ramifications arising from an assessment; for example, where a finding of lack of legal capacity activates a springing power of attorney or gives rise to guardianship. The more a particular regime addresses legal capacity only in the context of specific, particular decisions rather than through long-term arrangements, the fewer concerns about reassessment will arise. It is likely not practical in all contexts, however, to treat legal capacity as totally decision-specific and to reassess capacity for each and every decision.

Alberta's new capacity and guardianship legislation provides an interesting example of measures to address returned capacity and end decision-making orders and agreements. The *Adult Guardianship and Trusteeship Act* (AGTA) and the *Personal Directive Act* (PDA) contain numerous provisions aimed at recognizing the possibility that a person may regain capacity. This was one of the developments heralded in legislative debates as responding to concerns among Albertans, especially in regards to older adults who had suffered a stroke.[182] For example, capacity assessors must assess whether the adult is likely to regain capacity. The Court has the ability, and in some cases the duty, to include a review date in an Order for guardianship or trusteeship. The AGTA also creates a system for urgent short-term guardianships and trusteeships, as well as a process to take a Personal Directive out of effect.[183] In addition, the PDA requires that a service provider providing services related to a personal matter such as health care, accommodation, participation in social, educational or employment activities, or other similar matters must consider the capacity of a maker, even if they have previously been found to be incapable with respect to the decision. Before providing a personal service, they must "make a reasonable effort to determine if the maker continues to lack capacity".[184]

In the Australian state of Victoria, the Victorian Civil and Administrative Tribunal (VCAT) orders for guardianship (personal or financial) are subject to regular re-assessment. Under the legislation, a reassessment must occur within 12 months after VCAT makes an order, and at least once within each three year period after an order is made, unless VCAT orders otherwise. Upon reassessment, VCAT has the power to continue, revoke, vary or replace the order, as it finds appropriate.[185] In practice, VCAT often orders reassessments of personal guardianship orders every 12 months, and of administration (property) orders every three years. VCAT also has the power to issue a self-executing order that expires after a designated period or event, unless an application is made to extend the order. These are more common for guardianship than administration orders.[186]

C. Ontario's Systems for Assessing Capacity

1. Overview

Ontario might best be described as having, not *a* capacity assessment system but a *set* of systems for assessing capacity. In keeping with the general approach of the reforms that lead to Ontario's current legislation, capacity assessment systems are specific to particular types of decisions. The SDA, HCCA and MHA collectively set out five main systems for assessing capacity under those statutes:

6) examinations of capacity to manage property upon admission to or discharge from a psychiatric facility (MHA);
7) assessments of capacity to make treatment decisions (HCCA);

8) evaluations of capacity to make decisions about admission to long-term care or for personal assistance services (HCCA):
9) assessments of capacity to make decisions regarding property or personal care (SDA);
10) assessments of capacity to make a power of attorney (SDA).

There are areas of commonality among these assessment mechanisms, but they differ from each other considerably in terms of factors such as the following:

6) who conducts the assessment;
7) the training and standards imposed on persons conducting the assessment;
8) information and supports for persons undergoing assessments;
9) documentation required for the assessment process; and
10) mechanisms and supports for challenging an assessment.

Each system has its own set of checks and balances for the overarching tensions between accessibility and accountability, preservation of autonomy and protection of the vulnerable that underlie this process. The key features of each system are briefly summarized below, but it should be noted that a comprehensive description and discussion of each is not intended.

While the various capacity assessment systems vary in complexity of process and navigation as among themselves, the existence of five separate systems does inevitably result in considerable complexity in the system as a whole.

The different systems tend to affect different populations, although there may be considerable overlap, particularly for persons with mental health disabilities or for individuals who interact with issues of capacity at various points over the life course. Professionals tend to work in mainly one of the assessment systems: that is, persons who conduct capacity evaluations under the HCCA regarding admission to long-term care would not commonly also be capacity assessors under the SDA. However, as professionals may also act informally to assist individuals in navigating through the legal capacity, decision-making and guardianship system, professionals operating in one assessment system may find themselves attempting to provide information about other assessment systems to individuals or their families. As well, there may be confusion as to which assessment system appropriately applies in a particular instance. In practice, there is considerable confusion related to the intersection and interaction of the systems.

It is beyond the scope of this *Paper* to provide an exhaustive description of all of Ontario's capacity assessment systems. The following sections will provide brief general overviews of the five systems, focussing on procedural issues identified above.

2. Examinations for Capacity to Manage Property Upon Admission to a Psychiatric Facility

These assessments (referred to in the statute as "examinations") are governed by Part III of the *Mental Health Act* (MHA).[187] These assessments were intended to provide a speedy and simple mechanism for ensuring that those admitted to psychiatric institutions did not thereby lose their property due to temporary inability to manage it.

Triggering the Assessment: When a person is admitted to a psychiatric facility, an examination of capacity to manage property is mandatory, unless the person's property is already under someone else's management through a guardianship for property under the SDA or a continuing power of attorney for property.[188] A re-examination of the patient *may* take place at any time while the patient is in the facility,[189] and *must* do so prior to discharge. At the time of discharge, the certificate must either be canceled[190] or a notice of continuance ordered.[191]

Who Performs the Assessment: These examinations are performed by a treating physician, usually a psychiatrist.

Documentation: Upon completion of the examination, the physician must make a notation in the patient's file of the finding and reasons for the decision.[192] A certificate of incapacity must be issued using Form 21, which requires the physician to provide the patient's name and address, the physician's name, the name of the psychiatric facility, the date of the examination, facts indicating incapacity observed by the physician and facts indicating incapacity communicated to the physician by others.[193] The physician must also complete a Financial Statement Form (Form 22).[194] Form 22 is quite lengthy, and asks for information pertaining to the patient's family members and dependents, property, insurance protection, personal estate, stocks and bonds, personal property, money secured by mortgage, debts and promissory notes, and any other liabilities, information which, practically speaking, is unlikely to be available to the physician and as a result is frequently left incomplete or is inaccurate. The form for a continuance of a certificate of incapacity is Form 24, and requires exactly the same information as Form 21.[195]

Consequences of the Assessment: A physician who determines that a person lacks capacity to manage property must issue a certificate of incapacity, which must be transmitted to the Public Guardian and Trustee (PGT).[196] The PGT then becomes the patient's statutory guardian of property,[197] unless the patient has a springing POA. It is also possible for a family member or spouse to apply to the PGT to take over the guardianship.[198] If the physician fails to re-examine the patient prior to discharge, the guardianship of the PGT or any replacement will terminate.

Guidelines or Training Requirements: The MHA does not explicitly define incapacity to manage property, and the regulations offer no additional guidance in this regard. However, the

definition set out in the SDA[199] is referenced for the purposes of determining the capacity to manage property under the MHA. Although the Ministry of the Attorney General has published guidelines on assessing capacity, they are aimed at Capacity Assessments under the SDA. Guidelines for assessing capacity published by medical professional colleges, on the other hand, focus on capacity to consent to treatment. It seems that examinations to determine capacity to manage property performed by physicians in psychiatric facilities are relatively unregulated and under-analyzed. The LCO's research did not uncover any policies, tools or training manuals specifically tailored to this type of assessment, although it is certainly possible that such materials have been developed for use within facilities.

With the lack of statutory, regulatory or professional guidelines for these examinations, Consent and Capacity Board (CCB) decisions regarding appeals of Form 21 certificates and Form 24 continuations are useful in identifying criteria for these assessments. These decisions have relied on the common-law, the *Weisstub Report* and the decisions of the Psychiatric Review Board in establishing that these assessments should: (1) presume capacity; (2) focus on the patient's ability to understand rather than their actual understanding; (3) not rely solely on the patient's psychological diagnosis; (4) not rely on the physician's opinion of what constitutes wise or unwise decisions; (5) take account of the patient's ability to implement skills to overcome any deficiencies they may have; and (6) take account of the size and nature of the patient's estate.[200]

Rights and Recourse for Those Assessed: Patients admitted to a psychiatric facility are not entitled to refuse the examination to determine their capacity to manage property.[201] However, they are afforded the following substantial procedural rights:

1. the right to receive notice that a certificate of incapacity has been issued.[202]
2. the right to timely provision of a rights adviser.[203] The rights adviser will meet with the patient and inform her or him of the significance of the certificate and of the right to appeal to the Consent and Capacity Board (CCB). If requested, the rights adviser will assist the patient to apply for a hearing before the Board, obtain a lawyer or apply for Legal Aid.[204] The legislation sets standards for knowledge, skills and training for rights advisers.[205] Most rights advisers are provided by the Psychiatric Patient Advocate Office (PPAO); all rights advisers receive the legislatively required training through the PPAO.[206]
3. the right to apply to the CCB to review the assessment.[207] Applications to the CCB for review of a certificate may be made no more often than every six months.[208] If a patient makes such an application, but is discharged from the facility while the review is underway the Board may continue to deal with it under the MHA.[209] However, if a patient makes the application *after* they have been discharged, they are no longer considered a "patient" under the Act (defined as an inpatient), and the application will

be subject to the *SDA,* and a "fresh" assessment of capacity will be required in order to apply to the Board for review, which the individual would have to pay for her or himself.

In practice, concerns have been voiced that discharge often happens without rights advice, and that failure to ensure compliance with procedural rights does not result in meaningful consequences for the non-complying physician.

Concerns and Critiques

Examinations under the MHA have received relatively little attention in the literature. The most important areas of concern seem to be misuse of the legislation to achieve purposes not intended, and problematic interactions between the MHA and SDA.

It has been pointed out that those conducting the examinations may face temptations to employ them in ways that address institutional pressures.[210] The case of *Re V* provides an example of these dynamics. In this case, V's physician was of the opinion that V could be discharged if there were financial resources available to support him. V had no financial means and did not want to apply for ODSP or other financial assistance: his physician thought that if he were found incapable of managing property, the PGT could apply for financial assistance on his behalf and V could be discharged. The physician had not examined V upon his admission to the facility, but had just assumed his incapacity to manage property at that time. The CCB overturned the physician's finding of incapacity to manage property and admonished the attempt to use the PGT in order to force V to comply with their discharge plan.[211]

Concerns have also been raised that these examinations may be used as an "end run" around the requirements surrounding assessments to manage property under the SDA. Jude Bursten, a patient rights advocate with the PPAO, reports that some physicians have requested that clients be admitted to a facility in order to force an examination of their capacity to manage property when these patients have exercised their right under the SDA to refuse an assessment.[212]

There are issues arising from the way this aspect of the MHA relates to the SDA, particularly in the transition from "patient" under the MHA to coverage under the SDA. Patients who did not apply for a review of a continuance prior to their discharge, but who later want to have the decision reviewed must have a fresh Capacity Assessment completed at their own expense. Bursten identifies this as a barrier to patient rights, particularly in the case of patients who are discharged to the community while on a leave of absence from the hospital. These patients, he reports, often do not receive rights advice or written notice.[213] They therefore are not always aware of their right to challenge this assessment, and may not be made aware until a later date. The requirement of a fresh Capacity Assessment also creates a financial barrier which is

especially concerning given the disproportionate poverty and unemployment experienced by persons with mental illnesses.

Bursten also notes that the interaction between the two statutes is frustrating for treating physicians outside of psychiatric institutes, who do not have the obligation or even the authority to assess their patients' financial capacity or to revoke a prior certificate of financial incapacity issued while their patient was in a psychiatric facility.[214]

There are some legislative gaps in terms of regained capacity. While the MHA allows a physician to re-examine a patient for their capacity to manage property and requires a re-examination prior to a patient's discharge, there is no requirement that a physician re-examine a patient if they have reason to believe their capacity has changed (although this may be the purpose of allowing for re-examinations, whether a re-examination occurs is left to the physician's discretion), no right of the patient to request a re-examination, and no requirement that the physician re-examine the patient every six months to match the limit on how often a patient can apply to the CCB. This means that a patient's certificate of incapacity may remain in place while their capacity has changed, and if they have already applied to the Board in the previous six months, they would have no obvious way of challenging the certificate.

3. Assessing Capacity to Make Treatment Decisions

Assessment of capacity to make treatment decisions is regulated under Part II of the *Health Care Consent Act.* The HCCA requires that treatment not be administered unless consent to treatment has been provided by the patient, if capable, or by a substitute decision-maker, if the patient is found to be legally incapable.[215]

Triggering the Assessment: If a health practitioner proposes treatment and has reasonable grounds to believe the patient is not legally capable with respect to making a decision about the proposed treatment, the patient's legal capacity must be assessed in order to ensure that valid consent is obtained. For patients who are legally capable, the health practitioner must get their consent to treatment, and if they are not, they must get consent from the appropriate SDM. This must take place any time a medical treatment is proposed; the legislation applies equally inside or outside of a hospital, long-term care facility or doctor's office.

A health care practitioner can rely on the presumption of capacity in obtaining consent to treatment unless she or he has reasonable grounds to believe the person is legally incapable with respect to the decision at hand.[216] Unlike the now-repealed *Consent to Treatment Act, 1992*,[217] the HCCA and guidelines do not contain guidance on what constitutes reasonable grounds to believe the person is incapable.

Assessments to determine capacity to make treatment decisions are specific to time and treatment. An individual may be legally capable with respect to one treatment but not another[218] or capable with respect to a treatment at one time and not at another.[219] The treatment-specific nature of legal capacity means that a new assessment must be done if a new type of treatment is proposed. The HCCA defines treatment as "anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan".[220]

Who Performs the Assessment: Health practitioners are responsible for obtaining consent to treatment, and therefore responsible to assess capacity to consent to treatment, as necessary. Health practitioners are defined as members of a college under the *Regulated Health Professions Act, 1991* (*RHPA*)[221] or as prescribed by the regulations.

Consequences of the Assessment: If an individual is found legally incapable with respect to a health care decision, an SDM is appointed to make the decision on their behalf. In making decisions, the SDM must abide by certain guidelines designed to ensure they take into account the individual's beliefs and prior capable wishes and act in the best interests of the individual.[222]

Guidelines or Training Requirements: There is no specific required training outlined in the HCCA or regulations. However, each college regulates the mandatory qualifications for membership. These may of course vary considerably from college to college. Using the College of Physicians and Surgeons of Ontario (CPSO) as an example, O Reg 865/93, which governs the requirements for a qualifying medical degree for the purposes of joining the College, does not require any specific training in ethics, consent or capacity.[223] However, most medical colleges have guidelines or publications that address the importance of obtaining consent before administering treatment.[224]

Health practitioners may also receive training from their employers. The type of training they receive in these settings will vary greatly depending on the employment setting and the specific employer. Examples of training manuals include the *CCAC Client Services Manual,*[225] the Dr. E. Etchells' *Aid to Capacity Evaluation (ACE)*,[226] and *A Practical Guide to Mental Health and the Law in Ontario*, a toolkit prepared by Borden Ladner Gervais LLP for the Ontario Hospital Association.[227]

There are also a number of publications by advocacy organizations and experts that can be used by practitioners. A notable example is the National Initiative for the Care of the Elderly's (NICE) short guide to capacity to consent to treatment in *Tool on Capacity & Consent: Ontario Edition*.[228]

Rights and Recourse for Those Assessed: A finding of lack of capacity to consent to a treatment must be communicated to the patient. If the individual is a patient in a psychiatric facility, they are entitled to written notice under the MHA.[229] Outside a psychiatric facility, a patient is not statutorily entitled to written notice of a finding of incapacity to consent to a treatment. The form of notice a health practitioner must give and whether a patient must be informed of their right to apply to the CCB for review of the finding is governed by the regulating College to which the health practitioner belongs. Generally, colleges require that the health practitioner inform an individual who has been found legally incapable who their SDM is and the requirements regarding their substitute decision-making role (if they are capable of understanding this information), as well as informing them about their right to apply to the CCB.

An individual can apply to the CCB for review of a finding of incapacity to consent to a treatment unless they have a guardian of the person who has authority to give or refuse consent to the treatment or an attorney for personal care under a POA that waives his or her right to apply to the CCB for review.[230] Patients may apply to the CCB no more than once every six months for review of a health practitioner's finding that they are incapable with respect to a treatment decision, except under a special application when there has been a material change in circumstances justifying a reconsideration of the person's capacity.[231] There are also circumstances where a person is deemed to have applied for a review of the finding of incapacity, such as an application to appoint a representative for the incapable person or an application to interpret an SDM's decision-making obligations. An individual has the right to apply to the CCB for every specific assessment, meaning that they have the right to apply in regards to capacity to consent to a new treatment, regardless of whether they have applied in regards to a different treatment in the prior six months. Hiltz and Szigeti report that historically, less than 10 per cent of applicants have been found capable of consenting to treatment upon appeal to the CCB.[232]

Oversight is mainly performed by the health professional colleges. Health professionals are overseen by their respective colleges, which are in turn overseen by the Health Professions Regulatory Advisory council. Patients can make a complaint to the health practitioner's regulatory college if they believe the practitioner did not follow the proper procedure or over-stepped their authority.

Concerns and Critiques

Commentators have identified a number of concerns with the implementation of the legislation.

Many of the concerns arise from pervasive misunderstandings of the law. Judith Wahl of the Advocacy Centre for the Elderly identifies several misconceptions on the part of a variety of

players—health professionals, community workers, and older adults and their families—that have to do with an assumption that capacity is more global than is intended by the legislation. The first is that a single capacity assessment may be applied to multiple health care decisions.[233] Second, health practitioners may take any existing POA as an indication to consult only the attorney, not the patient, or not to consult at all and simply follow directions in the POA, foregoing a capacity assessment altogether and assuming the patient's incapacity in regards to the proposed treatment. Third, the ability to gain consent to a "plan of treatment" may be abused by writing these plans in very general terms, thereby foregoing required capacity assessments.[234]

Particular concerns have been voiced about the failure to properly apply the statutory presumption of capacity. Assumptions about the characteristics of some groups may lead, in practice, to a contrary presumption of *in*capacity for older adults, persons with disabilities and long-term care residents.[235] There may also be a *de facto* presumption that consent to treatment indicates capacity, while refusal to consent indicates incapacity.[236]

Some have argued that the capacity assessment process is inherently subjective. Daniel J Dochylo and Michel Silberfeld argue that "[t]rained assessors may come to different decisions about capacity" and that "[a]ssessors can also differ about the relevance of and weight to be given to specific psychiatric symptoms in relation to particular decisions".[237]

Concerns have been raised about the adequate provision of rights information, a concern which applies also to other mechanisms such as capacity evaluations for admission to long-term care. The Advocacy Centre for the Elderly writes that,

> Unfortunately, many health care practitioners fail to satisfy even the minimal requirement of providing rights information to individuals: residents [of long-term care homes] are not informed when they are found incapable nor are they made aware of their statutory rights and the procedures available to exercise these rights. There are also problems with the policies of the various health Colleges respecting rights information. By requiring health practitioners to follow the policies of their Colleges, they could be subject to discipline proceedings if they fail to provide rights information. However, the policies of the Colleges do not necessarily ensure that the patient would have the information necessary for the purpose of due process. As well, it is questionable as to whether the Colleges enforce this requirement or discipline practitioners who fail to comply.[238]

There are also a number of concerns regarding the appeals process, which will be addressed in Part Four, Chapter II dealing with dispute resolution mechanisms under the HCCA.

4. Evaluations of Capacity to Make Decisions Regarding Admission to Long-Term Care and Personal Assistance Services

The HCCA sets up a specific assessment process for decisions related to admission to long-term care homes (as defined in the *Long Term Care Homes Act 2007*) (Part III) and consent to personal assistance services (Part IV). Personal assistance services are defined as "assistance with or supervision of hygiene, washing, dressing, grooming, eating, drinking, elimination, ambulation, positioning or any other routine activity of living, and includes a group of personal assistance services or a plan setting out personal assistance services to be provided to a person".[239]

Triggering the Assessment: An evaluation of capacity with regards to an admissions decision happens when an individual's family or health professional believes they should move into long-term care, and there is reason to believe the individual lacks legal capacity to make a decision on this issue. As with decisions regarding treatment, legal capacity is not supposed to be associated with the individual's consent or refusal of consent. However, individuals are usually evaluated when they disagree with their family's or health practitioner's opinion. These evaluations can happen when a person is living in the community (at home, either alone or with someone) or when the person is in a short-term facility. Often, the discussion about long-term care follows an incident such as a fall that raises concerns over the individual's well-being in their current living situation. In practice, numerous capacity determinations often occur at once, such as assessment of capacity to make admissions decisions and capacity to manage property, since a decision to move into long-term care will often require a decision to sell one's home to finance the long-term care.[240] For an inpatient in a psychiatric institution, the CCB has held that an actual evaluation may not be necessary, if the patient's treating psychiatrist is able to determine the patient's capacity based on their ongoing interaction and the patient's chart.[241]

Who Makes the Assessment: Unlike assessments of capacity to make treatment decisions, which can be performed by any health professional, evaluations of capacity to make personal assistance services decisions and admissions decisions are performed by a special category of health professionals who are called capacity evaluators. Capacity evaluators must be members of the college of a limited list of health professionals: audiologists and speech-language pathologists, dietitians, nurses, occupational therapists, physicians and surgeons, physiotherapists, psychologists[242] and social workers.[243] These health professionals were chosen for conducting evaluations of capacity to make admissions decisions because they are the ones who are most likely to be serving seniors, the population most often in need of evaluations of these capacities.[244] Jeffrey Cole and Noreen Dawe report a study that found that most evaluations were completed by social workers, and that social workers found this to be the most challenging aspect of their jobs.[245] Alexandra Carling-Rowland and Judith Wahl similarly

report that the majority of evaluations are conducted by CCAC case managers, who tend to be trained as social workers or registered nurses.[246] Moreover, they report that in a survey of audiologists and speech-language pathologists, only 19 per cent knew they were qualified to conduct evaluations of capacity to make admission decisions, 11 per cent had conducted an evaluation with another health professional and 6 per cent had conducted an independent evaluation.[247] The prevalence of the other listed professionals in performing evaluations is unknown. However, if they are similar to the figures concerning audiologists and speech-language pathologists, there is reason for concern about under-awareness and lack of training of these health professionals in conducting capacity evaluations. As is noted below, there has been in some quarters considerable effort put into training and the creation of standards beyond that required by statute: the College of Audiologists and Speech Language Pathologists have developed a Consent and Capacity learning module, and the CCAC *Training Manual for Evaluators* referenced below providing an example.

Documentation: There is no guidance in the HCCA or regulations with respect to the conduct of capacity evaluations. Nor are there guidelines, official policies or training materials, or mandatory forms. This forms a striking contrast with the detailed guidance for capacity assessors under the SDA, as described in the following section. There is, however, a five-question form known as the "evaluator's questionnaire, so ubiquitous as to be almost standard practice.[248] The evaluator is instructed to record the answers to these questions and to check a box indicating capable, incapable, or no communication was possible, and boxes verifying that they have informed an individual of their finding of incapacity, that they have been given a rights information sheet and to indicate whether the applicant intends to apply to the CCB. The form also includes a two-page evaluator questionnaire assist, which recommends that evaluators inform clients of the purpose of the evaluations and the effect of a finding of legal incapacity, provides a few sample additional questions and outlines the evaluator's post-interview responsibilities. The CCB and the courts have repeatedly held that simply asking the five questions on the form and recording the answers does not constitute a proper capacity evaluation.[249]

Consequences of the Assessment: Where an individual is assessed as lacking capacity to make decisions about admissions or personal assistance services, these decisions will be made by an SDM, appointed in the same way as SDMs for treatment decisions.

Guidelines and Training Requirements: The above-listed health professionals are capacity evaluators by virtue of being a member of the health college. They are not required to undergo any specialized training in performing capacity evaluations. Although in reality, those who perform evaluations may undergo additional training, there is no legal requirement that they do so. Judith Wahl comments,

> [T]he evaluators receive no specific training on capacity assessment. They get the authority to assess capacity in respect to consent to admission into long term care homes simply from being a member of one of the Health Colleges that are listed in the definition of evaluator.[250]

Cole and Dawe report that social workers in the study they referred to did not feel they had adequate training and supervision in completing evaluations of capacity to make admissions decisions.[251]

In addition to the Ministry form, numerous guides have been created to provide additional guidance for those conducting evaluations of capacity to make admissions decisions. However, since none of these guides is endorsed by the legislation or regulations, evaluators are not required to use them. It is also unclear how much buy-in these guides have or how widely they are distributed. The most comprehensive of these is *Assessing Capacity for Admission to Long-Term Care Homes: A Training Manual for Evaluators,* prepared for the CCAC.[252] There are also specialized tools, such as the *Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease* by the Dementia Network of Ottawa,[253] and the *Communication Aid to Capacity Evaluation* (CACE), developed by Alexandra Carling-Rowland.[254]

As is the case with assessments regarding consent to treatment, oversight of capacity evaluators is carried out through the regulated health colleges, with sections 47.1 and 62.1 of the HCCA requiring evaluators, like treating health practitioners, to follow the guidelines of their profession's governing body with respect to the information to be provided to the individuals they evaluate regarding the effects of their findings.

Rights and Recourse for Those Assessed: An individual undergoing a capacity evaluation is entitled to the same rights as with an assessment of capacity to consent to treatment. In the admissions decisions context, there is no statutory right to be informed of the purposes of the evaluation, to refuse the evaluation, to have a lawyer or friend present, or to be informed of these rights prior to the evaluation. However, the standard evaluation form includes an information sheet that is to be given to individuals found to be incapable and boxes the evaluator should check indicating that he has informed the person of the finding of lack of capacity and of their right to apply to the CCB.[255]

Despite the lack of rights spelled out in the HCCA, individuals undergoing capacity evaluations may be entitled to some procedural rights based on the common law notion of natural justice.[256] For example, in *Saunders* v *Bridgepoint Hospital,* Spies J. commented (in *obiter*) that

> The HCCA does not have a comparable provision to s. 78 of the SDA. With respect to the right to refuse an assessment, that seems to me to be a matter beyond the scope of procedural rules of fairness and is reviewable only in the context of a constitutional challenge. I am however, of the

> view, that as a matter of procedural fairness, a patient must be informed of the fact that a capacity assessment, for the purpose of admission to a care facility, is going to be undertaken, the purpose of the assessment and the significance and effect of a finding of capacity or incapacity. Given what is at stake for the patient, this seems to be a minimal requirement for procedural fairness. Furthermore, this will ensure that the information collected from the patient, which forms the basis of the assessment, is reliable.[257]

Individuals can apply to the CCB for a review of a finding of incapacity to consent to admission or personal assistance services, unless they have a guardian of the person who has the authority to give or refuse consent to admission to a care facility or an attorney for personal care under a POA that waives the right to apply to the CCB.[258] If someone wishes to challenge a finding of incapacity to make admissions decisions after admission has occurred, the CCB has no jurisdiction to hear an application regarding compliance by the SDM with the requirements of the HCCA under section 54(1). However, they have ruled that they will review the decision through an application for directions pursuant to section 52(1).[259]

Concerns and Critiques

During the LCO's preliminary consultations, this form of capacity assessment raised the greatest concerns, particularly with respect to admission to long-term care. These evaluations take place at a nexus where institutions and systems (health care, long-term care, home care) and informal supports such as family and friends are under very considerable strain, and often at a point where the individual in question is vulnerable – for example, when they are recovering from an illness that has left them hospitalized. The consequences of an erroneous determination of capacity in this area will likely be life-changing and long-term, profoundly affecting individuals and their families. While admission to long-term care may be necessary, and may result in improvements to health and well-being, most of those admitted would prefer to remain in the community if possible.

Some of the key issues are readily apparent from the discussion above. There are considerable concerns that the 5-question form is being misused. Instead of applying it as a starting point, evaluators may ask only those five questions, and may fail to "probe and verify" or to take into account factors that might influence the assessment (such as stress, difficulties with communication or cultural differences).[260] Carling-Rowland and Wahl, looking at the specific concerns of individuals with communications disabilities, raised concerns that persons with these disabilities may be more likely to be found incapable, particularly since the tool is not designed to take into account communications barriers. This is particularly of concern because of the wide range of practitioners who may carry out evaluations, and the lack of mandatory training for these evaluators.[261]

While a determination that an individual lacks capacity to make a decision with respect to admissions does not result in guardianship or similar ongoing loss of decisional autonomy, the consequences of a determination of lack of capacity in this area may be life-changing and permanent. However, individual access to information and supports around this process are relatively minimal.

As well, there are concerns that existing protections are not adequately implemented. Similarly to the concerns it has expressed related to capacity to consent to treatment, the Advocacy Centre for the Elderly has noted that,

> The *Health Care Consent Act …* does not specifically require evaluators, a specified category of health practitioners, to provide rights information to the individuals they find incapable of consenting to admission a care home. The practice of most evaluators is to give a rights information sheet to incapable individuals, although the information may be unclear and misleading. There is no guarantee that the person will be assisted by the evaluator in obtaining legal assistance or contacting the Consent and Capacity Board to initiate the process to challenge the finding of incapacity.
>
> Statistics obtained from the Consent and Capacity Board indicate that only 61 people in 2007 and 81 people in 2008 had a hearing to dispute the finding of incapacity respecting admission to long-term care. Considering that there are approximately 76,000 long-term care residents in the province and such a small number of applications, it leads us to speculate that many older adults are not receiving rights information.[262]

5. Assessments of Capacity to Make Decisions Regarding Property or Personal Care

MHA examinations of capacity to manage property on admission to a psychiatric facility were discussed above. All other assessments of legal capacity to manage property are governed by the SDA, as are assessments of capacity to manage personal care, which includes decisions related to health care, clothing, nutrition, shelter, hygiene or safety.

Triggering the Assessment: Assessments of capacity to manage property or personal care may be triggered in a variety of ways and for a number of different purposes. An assessment may be carried out for the following purposes:

1. to trigger a statutory guardianship for property, upon request by the individual to be assessed, or by another individual;[263]
2. to bring into effect a power of attorney for personal care or property that is contingent on a finding of incapacity;
3. to challenge or reverse a previous finding of incapacity (for example, where an individual believes that his or her status has changed and wishes to challenge their court-appointed or statutory guardianship);
4. to provide evidence in an application for court-appointed guardianship;
5. when ordered by a court.[264]

Who Carries Out the Assessment: Only a qualified Capacity Assessor can conduct an assessment under the SDA.[265] In order to be a Capacity Assessor, a person must be a member of one of the following regulated colleges of Ontario: Physicians and Surgeons, Psychologists, Occupational Therapists, Social Workers and Social Service Workers (and hold a certificate of registration), or Nurses (and hold a certificate of registration).[266] Assessors must meet training requirements, as outlined below. The Capacity Assessment Office of the Ministry of the Attorney General maintains a list of approved capacity assessors.

Consequences of the Assessment: Assessments of capacity to manage property or personal care under the SDA can result in a broad range of outcomes for the assessed individual, from having no legal effect to triggering a statutory guardianship, the form of substitute decision making most limiting on the individual's autonomy.

Following a finding of lack of capacity to manage property, the Capacity Assessor must advise the PGT, who immediately becomes the individual's guardian for property unless the individual already has a court-appointed guardian for property or a continuing POA for property that empowers the attorney to manage all of their financial affairs. Another person may apply to the PGT to take over a guardianship after the fact. However, only certain individuals can do so: the legally incapable person's spouse or partner, a relative, an attorney under a continuing POA for property who does not have power over all of the legally incapable person's property or a trust corporation if the legally incapable person's spouse or partner consents in writing.[267] An application to be a court-appointed guardian does not carry the same limitation on who may be appointed. However, the court will look to whether the proposed guardian is already the individual's attorney under a continuing power of attorney, the person's current wishes, if ascertainable, and the closeness of the proposed guardian to the person.[268]

An assessment of capacity for personal care decisions is only legally relevant for the purposes of activating a POA for personal care or for providing evidence to the court in an application for guardianship for personal care.[269]

Guidelines and Training: Qualified Capacity Assessors must have completed the requisite training and requirements to maintain qualification. This includes a qualifying course approved by the Attorney General that includes instruction in the SDA, best practices for completing forms and reports under the Act, standards for the performance of Capacity Assessments, and procedures for determining if a person needs decisions made on their behalf. They must be evaluated on their mastery of the training.[270] An approved Capacity Assessor must also complete continuing education courses every two years.[271]

In addition to the continuing education course, an approved Capacity Assessor must provide the Capacity Assessment Office (CAO) with copies of two recent assessments (with personal

information removed) every two years for review and feedback[272] and must perform a minimum of five assessments in every two-year period in order to maintain their approved status.[273]

Capacity Assessors must comply with the *Guidelines for Conducting Assessments of Capacity*[274] established by the Attorney General.[275] The *Guidelines* attempt to create a standard assessment protocol that will prevent inconsistent or bias-laden assessments. Failure to comply with the *Guidelines* may lead to a complaint to the Assessor's college of regulated health professionals.[276] The *Guidelines* set out key principles that should inform Capacity Assessments, such as the right to self-determination and the presumption of capacity; outline the conceptual underpinnings of Capacity Assessments; elaborate on and explain the test for capacity; and set out a five-step process for Capacity Assessment.

Rights and Recourse for Those Assessed: The SDA sets out a number of procedural rights for persons undergoing these assessments.[277]

1. A right to refuse an assessment, with the exception of court-ordered assessments and those mandated through special provisions in a power of attorney for personal care.[278]
2. A right to receive information about the purpose, significance and potential effect of the assessment.[279]
3. A right to receive written notice of the findings of the assessment; for situations involving incapacity to manage property for the purposes of a statutory guardianship, there is an additional requirement to provide a copy of the certificate of incapacity.[280]
4. For cases involving a finding of incapacity to manage property for the purposes of establishing a statutory guardianship in favour of the PGT, the PGT must, upon receipt of the certificate of incapacity, inform the individual that the PGT has become their guardian of property and that they are entitled to apply to the CCB for a review of the finding of incapacity.[281]
5. For persons who become subject to statutory guardianship, the right to apply to the CCB for a review of the finding of incapacity, within six months of that assessment.[282]

<u>Concerns and Critiques</u>

There is considerable literature addressing SDA assessments for capacity to make decisions about property and personal care. The dynamics of SDA assessments are significantly affected by their potential to lead to long-term solutions, such as the exercise of powers of attorney or the appointment of a guardian, together with the resultant access to finances or control over the personal life of the individual.

Because there are costs associated with SDA assessments, there may be accessibility issues. While the Capacity Assessment Office has some funds available towards Capacity Assessments

for those who cannot afford them, these are limited. The cost of assessment may be a deterrent to assessment or to re-assessment. There may also be other types of accessibility issues, for example in remote communities, or for persons from linguistic or cultural minorities, although the CAO does attempt to ensure the availability of Capacity Assessors in all Ontario regions and will assist families in finding Capacity Assessors with appropriate language capabilities.

A major concern has been attempts to use assessments to control others or to further family disputes. Capacity Assessments under the SDA have the potential to result in transfer of long-term control over the individual or his or her assets, creating an incentive for abuse. While the SDA allows individuals to request a Capacity Assessment of themselves (as well as of another person), Verma and Silberfeld report that "[p]eople rarely refer themselves for assessment".[283] Rather assessments are often requested by a family member or a lawyer acting on behalf of a family member. While it is likely that in most cases the family member may be genuinely concerned for the individual's well-being, it is also possible that they may be looking to benefit personally from a finding of legal incapacity, or may be using the assessment in an ongoing rivalry with another family member.[284] Similarly, Silberfeld *et al* identify potential conflicts of interest in the context of requests for reassessments to restore capacity, suggesting that third parties who are not legal decision-makers for an individual may pressure the individual to request a reassessment so that the third party can informally take over the decision-making authority.[285] The potential for these kinds of issues is apparent from the caselaw.[286] The burden of dealing with potentially conflicting agendas and the possibility of nefarious purposes falls on the Capacity Assessor.[287]

Another concern is that SDA assessments may be unnecessarily triggered: family members of vulnerable individuals may unnecessarily trigger the assessment and guardianship process because they do not know how else to protect that family member from perceived or actual harms. They may not be aware of non-legal options, or the family may not be sufficiently cohesive to implement them. Family members may feel frustrated at a lack of information or options available to address the particular situation they face, especially if they are unable to consult a lawyer, and the assessment process under the SDA may be comparatively easy to launch for those who have the means to do so, even when requesters may not understand the implications.

The SDA assessments have the most extensive system for training and oversight of Ontario's capacity assessment mechanisms, reflecting the significant consequences of a finding of incapacity for the purposes of managing property or personal care. Indeed, as was noted earlier in this Chapter, the training and oversight requirements, together with the comprehensive guidelines for SDA assessors, are exceptional when compared to most other jurisdictions. Even

so, concerns have been raised that these training and oversight requirements could be more rigorous.

6. Assessments of Capacity to Create a Power of Attorney

To create a power of attorney, one must meet the legal test of capacity for doing so. As was discussed in Part Two, Chapter I, the SDA sets out specific tests for capacity to make powers of attorney for property and personal care, with the test for the latter being set quite low, and for the former, quite high.

Triggering the Assessment: While the SDA does not contain a presumption of capacity specific to making POAs, capacity to enter into a contract is presumed for persons over eighteen[288] and to make personal care decisions for those over sixteen,[289] and a person (such as a lawyer asked to prepare a POA) can rely on this presumption of capacity unless she or he has reasonable grounds to believe that the individual is incapable of entering into the contract or of giving or refusing consent.[290]

There is therefore no legislative requirement that an individual undertake a capacity assessment in order to make a POA, unless the client wants to create a POA for personal care with certain extraordinary clauses.[291] However, some lawyers require their clients who are older adults or who appear to have a mental disability to undergo such an assessment. During the LCO's preliminary consultations, staff spoke with a number of Capacity Assessors who indicated that this kind of non-statutory assessment made up a considerable portion of their assessments.

Who Carries Out the Assessment: With limited exceptions, a Capacity Assessment is not required for entering into a POA. If challenged, the final arbiter of capacity will be a judge, who will consider any assessments as evidence. Professional credentials are thus only one component that a lawyer will look to when asking for an assessment of a client's capacity to make a POA. Cohen and Shulman point out that the expertise of such an assessor will affect the weight their opinion is given in a potential court battle at a later date. Lawyers requesting that their clients undergo an assessment will therefore likely refer them to a clinician with whom they are familiar, who has expertise and experience with capacity to make POAs, who makes a good expert witness and who has an impressive list of credentials.[292]

Requirements for the Assessment: These assessments are not subject to specific statutory requirements. Since many of them are completed by persons who are also Capacity Assessors for property under the SDA, the MAG *Guidelines* may be in practice applied.

Rights and Recourse for Those Assessed: Assessments of capacity to make a POA are generally undertaken at the behest of the person being assessed, and usually when they are confident they will be assessed as capable. However, a finding of incapacity to make a POA is not

reviewable by the CCB.[293] Since these assessments do not carry legal weight, except as they are likely to be interpreted by a court, someone in this position would only be able to argue against the assessment in court, and only in a proceeding in which the assessment was being used, that is, someone cannot just apply to the court to have an assessment invalidated or overturned.

In *Knox v Burton*,[294] Mrs. Knox wished to make a new POA for property in favour of her nephew, revoking the existing POA in favour of her son. She was assessed by one assessor as incapable of making a POA for property. She then underwent two more assessments by two other assessors, both of whom found her capable of making a POA for property. When her son challenged the new POA, the court considered all three assessments, recognized that capacity can fluctuate, and held the POA to be valid.

Concerns and Critiques

Some concerns have been expressed as to whether formal assessments of capacity to make a POA are really necessary. For example, Judith Wahl questions whether these assessments really provide the best evidence of capacity. She suggests that affidavit evidence from others who know the client and have observed their actions might provide better evidence of specific capacity.[295] Similarly, Spar and Garb argue that contemporaneous assessments do not provide much additional assistance to courts, as they are usually able to get a clear inferential picture of legal capacity using medical records, financial records, business records, any writing by the testator at the time of execution (such as diaries or letters) and information provided by the person's friends, family, business associates and service providers.[296] At the most, contemporaneous Capacity Assessments are just one piece of evidence the court can consider in a challenge of a POA; a Capacity Assessment in this context does not in itself prove capacity.

A second concern is that it may be unclear who "owns" the assessment, or whom it is for, the lawyer or the assessed individual. An assessment in this context must satisfy multiple goals: giving an objective evaluation of the person's capacity to make a POA, creating a document that will provide useful evidence in the event of a challenge of the POA, and satisfying the lawyer that they can proceed with preparing the documents. Olders asks: "What allegiance does the assessor owe to lawyers? The latter may exert pressure on the assessor to be part of an adversarial process, whereas the assessor, who has been consulted only to provide expertise, may view his or her role as impartial".[297]

As with assessments for capacity to manage property or to make decisions about personal care, the cost of an assessment may be prohibitive for some, and so may form a barrier for older persons or persons with disabilities to accessing important legal tools such as POAs, particularly when it is kept in mind that older adults are often living on a fixed income, and younger persons with disabilities are disproportionately likely to live in poverty.

D. General Themes and Concerns

Ontario's approach(es) to capacity assessment were the result of thorough law reform efforts in the late 1980s and early 1990s, and as a result reflect a relatively advanced attempt to address the challenges inherent in designing processes and standards for assessing capacity. Almost two decades worth of experience with the current capacity assessment mechanisms has revealed some general tensions and concerns with the current approach. Some of these challenges are particular to the inherent difficulties of designing processes for capacity assessment. Issues such as qualifications and requirements for persons assessing capacity, responding to the shifting nature of capacity, and striking the right balance of procedural protections are fundamental, and while improvements can be made, there are likely no perfect solutions. Others issues are ones that arise in many areas of the law and, as indicated by the research for the *Framework* projects, tend to be of persistent concern to older persons and persons with disabilities in relating to the law.

1. Issues Specific to Capacity Assessment Mechanisms

Diversity and Standardization Across Multiple Approaches to Capacity Assessent

While the underlying concepts of capacity are consistent across all of Ontario's capacity assessment systems, this review of these systems under the SDA, HCCA and MHA reveals the diversity of approaches to capacity assessment processes within Ontario law and practice. Some systems, such as assessment of capacity to make a treatment decision, are relatively informal, while others, such as assessment of capacity to manage property under the SDA, are quite formal. Some assessments are for specific decisions (such as a particular treatment decision), while others are for decisional domains. Some include reasonably extensive procedural protections and supports, such as the rights advisers provided under the MHA, while others, such as assessments for management of property under the SDA, rely on what might be characterized as a consumer model with a right of refusal. Assessments of capacity to manage property or personal care under the SDA are subject to fairly extensive standards and guidelines, while capacity evaluations are guided by voluntary or institution-specific best practices and standards, and others, such as assessments related to property under the MHA, are treated as a matter of professional judgement.

This variance among assessment systems reflects, to some degree, the variation in the contexts and consequences of different assessments, an approach recommended in the Weisstub *Enquiry on Mental Competency*.[298] Although the underlying concept of capacity is consistent across all of Ontario's capacity assessment systems, its applications to different circumstances and types of decisions varies. It is a question worth considering, whether the various systems could be simplified or consolidated, without losing some of the attention to context. Could, for example, some standardization in training or protocols be profitably imposed across the various

mechanisms? For example, the Victorian Law Reform Commission recommended that clear principles inform the process of capacity assessment and that these principles "should provide guidance *when anyone* – including clinicians, tribunal members, or persons appointed under enduring powers – is required to determine whether another person has capacity to engage in a particular activity" [emphasis added].[299] The *Mental Capacity Act 2005,* which applies in England and Wales, aims to create a unified approach to capacity assessment. It governs powers of attorney, advance directives, assessments of capacity for one-time health, personal welfare or finance and property decisions, and appointments of decision-makers for ongoing decision-making needs, and binds all to a set of standard practices through a plain language Code of Practice.[300]

- **QUESTION FOR CONSIDERATION: Would Ontario benefit from greater harmonization, coordination or simplification of its various capacity assessment systems? If so, what are some specific suggestions for how this might be achieved?**

Who Assesses

As compared to other jurisdictions, Ontario has opted for a largely professionalized and formalized approach to capacity assessment. With the exception of assessments for capacity to create a power of attorney, those who conduct statutory capacity assessments are drawn from the regulated professions. Interestingly, during the LCO's preliminary consultations, several designated capacity assessors told the LCO that assessments for capacity to create powers of attorney or to create a will make up a significant and growing portion of their workloads, indicating a trend towards professionalization even where it is not statutorily required.

Indeed, the most frequent concern that the LCO heard about capacity assessment in Ontario was that it is still insufficiently specialized and formalized. The LCO heard significant concerns about the lack of mandatory specialized training for capacity evaluators, about the misunderstandings about the legal concept and test for capacity among health practitioners assessing for the purposes of obtaining consent, about insufficiencies in training requirements for designated Capacity Assessors, and about the need for clear, specific mandatory guidelines for those who assess capacity and are not currently bound by the MAG *Guidelines.*

One area for further exploration is that of skills and training for the various forms of capacity assessors in issues related to diversity, including cultural competence and sensitivity to dynamics related to racialization, sexual orientation and other aspects of identity. As well, as with other issues related to service provision and access to the law in a province as large as Ontario, timely access to skilled professionals and services will be more challenging in rural or remote areas, something which must be taken into account when designing law reform recommendations.

- **QUESTION FOR CONSIDERATION: Who should carry out the various types of capacity assessments required? What types of training and education should they receive? How should this training be delivered?**

Flexibility and Reassessment

The issue of reassessment applies mainly to provisions for capacity examinations under the MHA and for assessments of capacity to manage property or personal care under the SDA, as these are the assessments that have longer-term consequences, as potentially leading to guardianship or the activation of powers of attorney. Under the MHA, physicians *may* reassess at any time, and *must* do so prior to discharge. However, for patients who make lengthy stays in a psychiatric facility, the gap between re-assessments may be lengthy, and may not reflect shifts in the condition of the patient, who may only apply to the CCB every six months.

Under s. 20.1 of the SDA, a statutory guardian of property must assist in arranging a re-assessment at the request of the legally incapable person, if at least six months have passed since the guardianship was created or since the last assessment. However, this requires that the individual in question (as well as the guardian) be aware of the right to have a reassessment carried out, and leaves the individual dependent for access to rights on the person whose control they wish to terminate. As well, there are no similar provisions for court-appointed guardians or those acting under a power of attorney. ARCH Disability Law Centre, in a paper commissioned by the LCO, identified this lack of a statutory requirement for court-appointed guardians to arrange new capacity assessments as a significant issue:

> A major weakness of the current substitute decision-making regime is that court-appointed guardians are not required to arrange for the 'incapable' person's capacity to be reassessed within any particular period of time. The only way to ensure that a person subject to a court-appointed guardianship is reassessed is for this requirement to be included in the order appointing the guardian. If no such order is made, there is little an individual can do to compel a court-appointed guardian to arrange for a capacity assessment. If a court-appointed guardian refuses to arrange or pay for an assessment, the 'incapable' person could bring a motion to court to obtain an assessment. However, where an individual subject to a court-appointed guardianship lacks sufficient resources to pay for an assessment, there is no guarantee that any other public authority would do so.[301]

- **QUESTION FOR CONSIDERATION: Do Ontario's capacity assessment systems deal adequately with fluctuating levels of capacity? If so, what are some specific suggestions for how they might be improved in this respect?**

Procedural Protections

All of the mechanisms contain some balance of procedural protections. For example, while MHA examinations of capacity to manage property do not include the right to refuse the assessment, there are fairly robust supports in the form of rights advisers for challenging the

results of the assessment. Persons assessed for capacity to manage property or personal care under the SDA have some significant procedural protections, whether through the statute or through the mandatory *Guidelines*, including the right to refuse an assessment, to receive information about the assessment, to receive written notice of the findings, and in some cases, to review by the CCB; however, they do not have access to supports analogous to the rights advisers. It is a valid question as to whether the correct balance has been struck in each case.

The greatest concerns about procedural protections have been identified for evaluations of capacity to consent to admission to long-term care. An assessment that a person lacks capacity, while a one-time assessment, is likely to have very significant consequences; however, the statutory protections are sparse. This, combined with the relatively low requirements for training, raise concerns about the protection of basic rights of individuals in this assessment process. As well, there are several situations where individuals have no straightforward recourse to challenge an assessment, other than by paying for a new assessment, which may well be beyond their means.

As is noted elsewhere, there may also be problems with the implementation of existing procedural protections: for example, the Advocacy Centre for the Elderly has raised concerns with the provision of rights information to persons found legally incapable with respect to treatment or admission to long-term care, particularly since the policies regarding the provision of rights information are largely left to the regulatory colleges.[302]

- **QUESTION FOR CONSIDERATION: For each of Ontario's systems for assessing capacity, does it strike the appropriate balance between formality, procedural protections, accessibility and efficiency?**

2. Issues Frequently Arising in the Law as It Affects Persons with Disabilities and Older Adults

A review of Ontario's capacity assessment systems reveals patterns of challenges that are consistent with barriers identified in the LCO's two *Framework* projects. These are challenges that will tend to arise in designing any set of laws, policies or practices affecting persons with disabilities or older persons, but of course they manifest in particular ways in the context of the laws of legal capacity, decision-making and guardianship, and of capacity assessment systems.

<u>Complexity and Navigation</u>

The diversity of Ontario's multiple capacity assessment systems aims to respond to particular contexts and types of decisions, but does itself raises issues. It adds considerably to the complexity of the system, for both individuals and families, and for professionals. It may not

always be clear through which avenue a particular individual should be proceeding: for example, during preliminary consultations, a number of individual raised concerns that some older adults might be finding themselves inappropriately examined for capacity to manage property under the MHA, rather than by a Capacity Assessor under the SDA. As well, one individual might find her or himself assessed multiple times in different systems, particularly those individuals whose needs are complex or multiple.

As well, many of the capacity assessment systems are in themselves fairly complex, in part due to well-intentioned efforts to respond to diversity in particular circumstances and to provide an adequate balance of procedural protections and efficient operation.

As the *Final Report: A Framework for the Law as it Affects Persons With Disabilities* notes,

> [C]omplexity can itself create a challenge, both for persons with disabilities and for service providers and advocates who attempt to assist individuals in navigating the system. Laws that are well-intended may fail to achieve their purposes, because they are effectively inaccessible for persons with disabilities who do not have the supports and resources necessary to understand and make use of them. Persons with disabilities may not be able to make meaningful choices because they are not aware of the options available to them, or perceive them to be too difficult to exercise.[303]

The response to complexity is not necessarily to simplify systems (although this is obviously one alternative); another approach may be to increase the formal provision of information, supports, oversight and advocacy for those who are likely to have difficulty in navigating the system, options for which are described in Part IV of this *Paper*.

- **QUESTION FOR CONSIDERATION: Are standards for the assessment of capacity under the various systems sufficiently clear, consistent and stringent? If not, what are some specific suggestions for how they might be improved?**

Complaints and Oversight

Oversight of the various capacity assessment systems occurs, generally speaking, in two ways: through the education programs, policies and standards of the various regulated health professions and the associated complaints mechanisms of the health colleges, and through challenges to capacity assessments either through the CCB, or through a section 39(1) application to the court under the SDA for persons who have a continuing power of attorney for property and who have been found legally incapable. For those who are assessed by an approved Capacity Assessor, there are additional safeguards, in that the assessor must provide the CAO with copies of two recent assessments each second year for review and feedback, and must perform a minimum number of assessments in order to retain their status. For some types of assessments, some level of practical oversight may be provided through the large institutional employers with whom the professional conducting the assessment is affiliated.

Oversight therefore takes place largely through complaints. It appears that it is relatively rare for complaints regarding assessments to be made to the regulated health colleges. The Advocacy Centre for the Elderly has commented that "the complaints process is lengthy and, if legal counsel is retained, expensive. Some of our clients opt not to make a complaint because it will take too long to address a problem that needs to be addressed immediately."[304] While a discussion of the strengths and limitations of the CCB will be undertaken in Part Four, Chapter II on dispute resolution mechanisms, the CCB provides an impartial and expert avenue for review of assessment, and as an administrative tribunal, it is relatively less cumbersome and costly than a court-based review would be. It is of note that it is relatively rare for assessments to be overturned by the CCB: as was noted above, Hiltz and Szigeti have commented that that historically, less than 10 per cent of applicants have been found capable of consenting to treatment upon appeal to the Board.[305]

While it is important to provide avenues whereby individuals may seek redress for their particular issues, both the *Framework* projects identified risks and disadvantages where systems that serve vulnerable populations rely entirely on complaints as a means of oversight. The *Final Report: A Framework for the Law as It Affects Older Adults* notes that,

> Complaint-based systems leave decisions about action to the initiative of older adults. This may be understood as respecting the autonomy of older adults. In some circumstances, however, complaint-based systems may be problematic, particularly where older adults are at-risk or marginalized due to disability, low-income, immigration status or other issues ... As well, complaint systems may involve expenses, bureaucratic obstacles, or delays beyond the capacity of vulnerable older persons to absorb ... Where services are targeted to at-risk older adults ... systems that rely entirely on older adults to identify issues and pursue remedies may fall short of addressing needs.[306]

The possibilities for oversight vary considerably from mechanism to mechanism. Some types of assessments take place in heavily regulated settings, such as hospitals, and are carried out by professionals who are highly professionalized and bound by relevant standards and ethical codes. Other types of assessments take place in private settings and are much less amenable to oversight.

- **QUESTION FOR CONSIDERATION: Is there sufficient monitoring and oversight of the various types of capacity assessments in Ontario? If not, what are some specific suggestions for how the various capacity assessment systems could be improved in this respect?**

<u>Access to Information, Advocacy and Supports</u>

Access to information about laws, policies and programs, about their potential impact and how to access them, is fundamental to access to justice. All of us may face challenges in accessing and understanding this information, but as was noted in the *Frameworks* for older adults and

for persons with disabilities, individuals who are older or who are living with a disability or both may face additional barriers to accessing information. Some of these barriers may arise from a lack of disability accessibility – for example, a lack of information in alternative formats or websites that post information only in a PDF format. Some populations will have lower levels of print or technological literacy than the population at large, due to historical trends (for example, older women will generally have faced in their youth reduced expectations and opportunities related to education) or particular educational barriers (as have been widely documented for persons with some types of disabilities). The trend away from the provision of information by individuals (whether by telephone or in person) towards online information will therefore create disadvantages for some. As well, increasingly complex telephone information systems will also create barriers to access for some. Persons living in long-term care homes will, by the nature of the setting, have some reduced access to information.[307] During the LCO's public consultations towards the development of its *Framework for the Law as It Affects Older Adults*, one of the most pervasive themes was the lack of knowledge among older adults about their rights and how to access them. During focus groups, many participants had difficulty in identifying where they might go to access information about rights and responsibilities.

Where laws, policies and practices are complex or have high-stakes results or both, the importance of access to information becomes particularly acute. Law, policy and practice related to the assessment of capacity is both complex and high stakes. It is positive to note, therefore, that the legislative framework has included some requirements (varying between mechanisms) that aim to address this issue. Examples include the duty to inform individuals about the nature of an assessment and its potential impact, the provision of rights advisers in some cases, or the duty to provide information about rights to challenge an assessment in others.

However, concerns remain about access to information for those who are being assessed. Some difficulties are inherent to the nature of the law: many of those affected by capacity assessment will be in crisis (for example, ill and hospitalized), vulnerable or marginalized, or needing extra information supports due to the nature of the disability that has triggered the assessment. Provision of information takes on extra importance in these circumstances; it also takes on extra challenges.

For this reason, the provision of information itself may be seen as insufficient without the provision of additional formal individual advocacy and supports. Issues related to advocacy and supports will be dealt with at some length in Part Four, Chapter III. It is sufficient to note here that the current legislative scheme was originally envisioned as including extensive independent advocacy through the Advocacy Commission; the repeal of the *Advocacy Act* without the

creation of thorough-going compensating changes elsewhere in the legislation has been seen by some as fundamentally 'unbalancing' the legislative scheme.

This is not to say that there have not been considerable efforts put into advocacy and information provision within the confines of the current legislation. Many organizations, including the Capacity Assessment Office, the ARCH Disability Law Centre and the Ontario Network for the Prevention of Elder Abuse among many others, have put considerable effort into public legal education. There are plain language materials available from a variety of sources; for example, some hospitals have developed plain language brochures and fact sheets about capacity assessment and the roles of substitute decision-makers, which they provide to those that need them. The Psychiatric Patient Advocate Office (PPAO) plays a vital role in the current system, as do the specialty legal clinics that provide both individual and systemic advocacy on these issues as they are able. Nevertheless, a significant gap has been identified, and remains of concern.

- **QUESTION FOR CONSIDERATION: Are there barriers to accessing Ontario's capacity assessment systems? If so, what are some specific suggestions for how these systems can be made more accessible?**

E. Questions for Consideration

1. **How does the experience of capacity assessment differ depending on gender, sexual orientation, racialization, language, culture, socio-economic status, Aboriginal status, geographic location, various forms of disabiity or other forms of diversity?**
2. **For each of Ontario's mechanisms for assessing capacity, does it strike the appropriate balance between formality, procedural protections, accessibility and efficiency?**
3. **Who should carry out the various types of capacity assessments required? What type of training and education should they receive? How should this training be delivered?**
4. **Is there sufficient monitoring and oversight of the various types of capacity assessments in Ontario? If not, what are specific suggestions for how the various capacity assessment mechanisms could be improved in this respect?**
5. **Are standards for the assessment of capacity under the various mechanisms sufficiently clear, consistent and stringent? If not, what are specific suggestions for how they might be improved?**
6. **Would Ontario benefit from greater harmonization, coordination or simplification of its various capacity assessment mechanisms? If so, what are specific suggestions for how this might be achieved?**
7. **Do Ontario's capacity assessment mechanisms deal adequately with fluctuating levels of capacity? If not, what are specific suggestions for how they might be improved in this respect?**
8. **Are there barriers to accessing Ontario's capacity assessment mechanisms? If so, what are specific suggestions for how they can be made more accessible?**

PART THREE

DECISION-MAKING

This Part examines a range of issues associated with the process of decision-making under Ontario's statutory framework. Chapter I considers alternatives to substitute decision-making, including various approaches to supported decision-making and co-decision-making. Chapter II considers the growing problem of individuals who have no close family or friends who are able and willing to assist them with decision-making activities, and examines a variety of potential options, including professional fiduciaries, an expanded role for community agencies, volunteer programs and personal support networks. Chapter III considers the processes, both public and personal, for appointing substitute decision-makers, including issues of simplicity, accessibility and proportionality.

I. NEW DECISION-MAKING ARRANGEMENTS: SUPPORTERS AND CO-DECISION-MAKERS

A. Introduction

Among the most significant issues raised in the LCO's preliminary consultations for this project are those related to newly developing approaches to decision-making, such as supported and co-decision-making. These approaches represent a fundamental shift in approaches to the law, and have significant implications for almost every aspect of this area of the law. Advocates for these forms of decision-making would like to see one or both of them included in Ontario's laws, whether as one option among a number, as a preferential option, or as replacing substitute decision-making altogether.

This chapter will examine the basic elements of supported and co-decision-making approaches, drawing some comparisons with substitute decision-making; outline some specific models for these forms of decision-making; and consider some implications and implementation challenges.

These newer approaches to decision-making are closely related to the shifts in conceptions of capacity that were outlined in Part Two, Chapter I, and have their basis in a social model of disability and human rights critique of existing approaches to legal capacity, decision-making and guardianship.

> The various approaches to decision-making are based in differing assumptions and experiences about the nature of decision-making, the role of law, the characteristics of intimate relationships, and the nature of disability and aging. Those who spend much time on issues related to disability, aging and legal capacity tend to share a strong commitment to the principles of dignity, autonomy, inclusion and participation, and the right to be free from exploitation and abuse. However, in practice there may be profound differences in how these principles are understood and on the best way to achieve them.

Some of these differences in approach are rooted in the divergences in experience and circumstance among those affected by the law of legal capacity, decision-making and guardianship. The needs and aspirations of a young adult with an intellectual disability in this area will be very different from those of a widow who is living with mid-stage Alzheimer's Disease and residing in a long-term care home, and these will differ again from those of a person who has been living for a number of years with a severe and recurring mental health disability that has significantly affected his or her social and economic resources. The nature of

an impairment, the life stage at which it occurs and the point in the life course at which resort must be made to legal capacity and decision-making laws will have very significant implications for the extent and nature of a person's relationships, the financial resources available (and the resultant temptations to abuse), and the nature and availability of appropriate supports and resources. All of these will in turn have significant implications for the way in which individuals will encounter the laws in this area. It is essential, then, that thoughtful and respectful attention be paid to these differences in perspective and experience in considering approaches in decision-making, and that the possibility be explored that one size may not, in fact, fit all those who fall under these laws.

It is also very important to take into account the grounded experience of those who provide daily supports to those whose disabilities may have affected their ability to access, retain, assess and communicate information. While laws play a fundamental role in expressing and shaping values and norms, those who are providing decision-making supports of various kinds are not likely to have an in-depth awareness of the legislation or to regularly resort to it in resolving their practical challenges. Often, they will be guided by their own values and set of ethics, the practicalities of the situation, the skills they have and the nature of their relationships,. And of course, their own contexts will shape how they understand and carry out these roles: their cultures, their socio-economic status, the family and social supports they themselves have, the resources available in the communities in which they lives, and many other factors. Many family and friends who are acting under a power of attorney or as a guardian will in practice be carrying out their role in a way that looks very like what is envisioned by advocates of supported decision-making; equally, those acting as supporters may at times find themselves performing their roles in ways that functionally differ very little from those of substitutes. In considering particular law reforms, a key consideration should be the practical impact on the lives of persons who lack legal capacity and those surrounding them.

Finally, Part One, Chapter I of this *Paper* included a brief discussion of the multiple aspects of decision-making. Decision-making includes both processes and outcomes, and both a public and a private aspect. In theory, an ideal approach to decision-making would maximize all of these aspects; in practice, they are not always so easily reconciled. Different approaches to decision-making will balance and prioritize these aspects differently.

These new forms of decision-making are still evolving. Terminology varies, sometimes widely: multiple terms are often used to describe the same concept and conversely, the same terms are frequently used to refer to approaches that have very different practical implications. There are ongoing conceptual and philosophical debates. The role of the LCO is to develop practical, implementable and forward-looking proposals for law reform in this particular context, in light of the principles and considerations in the *Frameworks*. The purpose of this Chapter is not to

exhaustively explore the concepts of supported and co-decision-making and the philosophy underlying them, but to consider potential practical implications for reform to Ontario's law, a law which is grounded in a particular history and which operates in the context of a specific set of institutions, resources and constraints.

As a starting point for the discussion of alternative approaches, this Chapter will discuss the provisions of the *Convention on the Rights of Persons with Disabilities* (CRPD) related to approaches to decision-making, and then will briefly outline the key aspects of Ontario's current substitute decision-making approach, prior to more in-depth examinations of supported and co-decision-making.

B. The *Convention on the Rights of Persons with Disabilities*

Central to this discussion is the CRPD which Canada has ratified, and in particular Article 12, which has been reproduced and discussed in Part One, Chapters I and Part Two, Chapter I. Article 12 requires States Parties to:

- Recognize persons with disabilities as persons before the law;
- Recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- Take appropriate measures to provide access for persons with disabilities to the supports they may require in exercising their legal capacity;
- Ensure that all measures related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. These safeguards must ensure that measures related to the exercise of legal capacity respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person's circumstances; apply for the shortest time possible; and are subject to regular review by a competent, independent and impartial authority or judicial body.
- Take all appropriate and effective measures, subject to the provisions of the Article, to ensure the equal rights of persons with disabilities in a range of areas, including owning or inheriting property; controlling their own financial affairs; having equal access to bank loans, mortgages and other forms of financial credit; and ensuring that persons with disabilities are not arbitrarily deprived of their property.

There has been considerable debate about the implications of Article 12 for approaches to decision-making. For the purposes of this Chapter, the key issue is whether the CRPD is best understood as recognizing an inalienable and non-derogable right for persons with disabilities to be considered legally capable at all times, or whether it protects them from discriminatory determinations of incapacity based on disability status. The consequences arising from these

two interpretations are quite different. The first interpretation would eliminate substitute decision-making as a valid approach. A person would retain the ultimate legal authority to make decisions in all circumstances and the receipt of supports would be premised on consent.[308] The second interpretation would require governments to design and apply capacity laws in a non-discriminatory manner.[309] Opinions differ as to what specifically this second approach entails, although at minimum it would seem to include protection of specified equality rights, access to supports to decision-making, and provision of appropriate safeguards against abuse related to the exercise of legal capacity.

Canada's Declaration and Reservation on the CRPD states that "Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives".[310] It declares Canada's understanding that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports "in appropriate circumstances and in accordance with the law",[311] and reserves the right for Canada "to continue their use in appropriate circumstances and subject to appropriate and effective safeguards".[312]

C. Substitute Decision-Making in Ontario

1. Approaches to Substitute Decision-making in Ontario

Substitute decision-making remains the most common approach to decision-making in common-law jurisdictions. However, it varies quite significantly between jurisdictions. Due to the thorough law reform efforts of the 1980s and 1990s, Ontario's approach to substitute decision-making is relatively modern, coherent and progressive. The key elements of Ontario's system, for the purpose of this Chapter, are outlined below. As they are discussed in detail in other chapters, these elements are referred to in summary fashion here.

Cognitive capacity threshold: As is outlined in Part Three, Chapter I, the threshold for legal capacity is based on the individual's ability to "understand and appreciate" the information relevant to a particular decision. While legal capacity may evolve or fluctuate, and while it is specific to particular decisions or types of decisions (i.e., it is not "plenary"), it is an all-or-nothing quality. A person either has legal capacity to make a particular decision or does not. Where an individual does not have legal capacity to make a particular decision or type of decision, a surrogate (the "substitute decision-maker" or SDM) will make the decision on behalf of that person, taking with it related responsibilities.

Procedural protections for persons who may lack legal capacity: While protections may not be complete or ideal, as is described in Part Three, Chapter II, Ontario's statutory scheme pays considerable attention to procedural protections for persons who may lack capacity, including

mechanisms for providing information to the individual and for challenging decisions about legal capacity.

Opportunities for individuals to choose or have input in the selection of a substitute: Part Three, Chapter II describes the process of identification of an SDM. Ontario's legislation aims to make it relatively simple and inexpensive for individuals who are legally capable to select their own SDM for property, personal care or treatment decisions through the creation of powers of attorney (POA). Ontario places relatively few restrictions on the content of POAs or requirements for their valid creation. As well, when guardians are identified, either through the statutory guardianship process's replacement provisions or through court-appointments, the Public Guardian and Trustee (PGT) and the court respectively are required to consider the wishes of the person who is being placed under guardianship.

Focus on trusting relationships as the foundation of substitute decision-making: As is described in Part Three, Chapter II, Ontario's statutory scheme includes a number of mechanisms intended to give priority in identifying SDMs to existing relationships of trust and intimacy. For example, the hierarchical list of SDMs in the *Health Care Consent Act* (HCCA) gives priority, where an SDM does not already exist, to family members. Similarly, the replacement provisions for guardianships under the SDA focus on family members.

Duties of substitute to promote participation and consider wishes and preferences: Under the SDA, both attorneys under a POA and guardians are directed to promote the participation in decision-making of the person. For personal care decisions under the SDA and for all decisions under the HCCA, SDMs must consider the "prior capable wishes" of the individual, the values and beliefs held while the person was capable, and current wishes where they can be ascertained.

2. Critiques of Substitute Decision-making

In considering critiques of substitute decision-making as an approach, it is important to focus on those that are relevant to Ontario's system of substitute decision-making and thus to this project. Further, this section will focus on critiques of substitute decision-making as an approach, as opposed to concerns about how substitute decision-making is implemented in practice, as these concerns are dealt with throughout other Chapters of this *Paper*.

It should be noted that for the majority of those consulted during the LCO's preliminary consultation, the issues of concern were not with the substitute decision-making approach *per se* but with its implementation on the ground. That is, these consultees did not take issue with how the statutes defined the roles of SDMs or detailed their responsibilities. Rather, concerns focussed on whether the statute and its accompanying policies and practices ensured that these roles and responsibilities were actually carried out as specified. From this point of view, if SDMs

had the supports and oversight to ensure that they thoroughly carried out their duties as outlined in the SDA and the HCCA, the system would work well.

Other consultees expressed foundational concerns about the substitute decision-making approach, arguing that it violates the fundamental rights of persons with disabilities. To a significant degree, critiques of substitute decision-making overlap with criticisms of the functional and cognitive approach to capacity, outlined in section B.4 of Chapter III; in fact, most critics do not separate the two. In this view, substitute decision-making is (to greater or lesser degrees, depending on the critic and the particular form of substitute decision-making being examined) inherently paternalistic and disempowering for persons with disabilities, based on ableist attitudes, and violating the equality and non-discriminatory guarantees in the *Charter of Rights and Freedoms* and other human rights instruments.

There is also a therapeutic critique of substitute decision-making. These critiques of modern substitute decision-making systems raise concerns about whether such a system, based as it is on the transfer of a person's decision-making authority to another, can achieve the right balance between autonomy and other aspects of well-being. Substitute decision-making rests on the assumption that the substitute decision-maker can make decisions that will better promote the well-being of the individual who has been determined to be legally incapable than that individual can make for his or her self, coupled with the belief that this transfer of decision-making authority will not, in and of itself, "involve excessively high costs to the wards' [meaning the persons under guardianship] well-being simply by virtue of pre-empting the wards' decision-making power."[313] However, some have argued that substitute decision-making can have negative effects on the well-being of a person simply because of the transfer of the 'locus of control' to another. The loss of autonomy can, in and of itself, have negative consequences for well-being, potentially resulting in depressive symptoms, feelings of helplessness, and the perpetuation of stigma about the individual. Therefore, rather than strengthen well-being, the appointment of a substitute decision-maker can be "anti-therapeutic."[314]

There are also concerns, explored in Part Three, Chapter I, that substitute decision-making, based as it is on an "all or nothing" approach to capacity, is an imperfect means of dealing with a quality as fluctuating and imprecise as capacity can be, particularly for those on the margins of capacity, so that individuals who are in fact capable within the requirements of the law, may find themselves nonetheless under substitute decision-making.

D. Supported Decision-making

1. Concepts of Supported Decision-making

The concept of supported decision-making is based on a social model of disability, the understanding that, as the CRPD states, "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others".[315] It is aimed at promoting the full equality of persons with disabilities, including their dignity, autonomy and ability to participate in society on an equal basis with others. From the perspective of advocates of supported decision-making, the loss of legal capacity by persons with intellectual, mental health, cognitive or other disabilities is a legacy of the long history of discrimination, devaluation and exclusion of persons with disabilities, and a symptom of a world view that accords persons with disabilities a lesser moral and legal status.

> The aim of supported decision-making is to enable individuals with disabilities that may affect their ability to receive, assess and retain information to exercise control over decisions that affect them through supports provided by persons with whom they have relationships of trust and intimacy, and without any loss of legal capacity.

<u>The Basic Elements of Supported Decision-making</u>

As supported decision-making is a relatively recent legislative innovation, there is no standard model for it, and indeed as is outlined below, there are many differences of approach as to its appropriate and effective implementation. There are some basic elements which are common across all approaches to supported decision-making; however, as can be seen from the remainder of this section, their proposed implementation and implications vary significantly, particularly depending on the proposed scope of application of this decision-making method, and the level of formalization and government responsibility proposed.

Supported decision-making does not require a finding of lack of capacity. In fact, the intent of a supported decision-making arrangement is to avoid any such finding or assessment. The focus of supported decision-making is not on the presence or lack of particular mental attributes, but on the supports and accommodations that can be provided to assist individuals in exercising control over decisions that affect them.

In supported decision-making arrangements, legal responsibility for the decision remains with the supported individual. The supported individuals retain control over their decisions, and those decisions are theirs, and not their supporters'.

Supported decision-making arrangements are based on consent. An imposed arrangement is antithetical to the notion of supported decision-making: these arrangements must be entered into freely in order to function.

Supported decision-making is based on relationships of trust and intimacy. For supported decision-making to function, any supporter must have significant personal knowledge of the individual, in order to assist her or him in understanding and consequentializing her or his values and preferences.

Putting Supported Decision-making into Practice

Supported decision-making along the lines of the elements described above already exists as an informal practice. Family and friends of those who require assistance with decision-making may provide such supports, avoiding any determinations of legal capacity and without accessing the provisions of the SDA or HCCA. As is discussed later in this Chapter, however, more formal approaches to decision-making may be required when interacting with institutional or legal requirements; for example, to meet the needs of health care or financial institutions for clarity, certainty and accountability. The issue is not then so much one of developing supported decision-making practices, but of whether and how such practices should be formalized.

It has also been noted that in practice, family and friends may carry out their formal roles as substitute decision-makers in a way that adopts many of the practical elements of supported decision-making, such as respecting the personhood, will and preferences of the individual, supporting autonomy and the development or maintenance of decision-making abilities, and providing control over decision-making to the individual to the greatest possible extent. Current legislation does not prevent such an approach to decision-making, and in some respects encourages it. However, at a formal and legal level, the decisions remain those of the SDM and not those of the individual in question.

As supported decision-making is still a relatively new concept, debates remain among its supporters as to what precisely it means in practice, and how best to move towards implementation.

Developing the evidence base: There is as of yet little agreement on how to include supported decision-making in legal frameworks. Several jurisdictions have included some limited forms of supported decision-making into their capacity and decision-making laws, but these are recent innovations, and there is not yet a sense of what might be successful models or "best practices" in this area. Nor have there been thorough evaluative studies of supported decision-making practices, although some trial pilot projects in Australia have yielded some interesting preliminary results.[316] A number of experts in the area have emphasized the importance of

conducting additional research to better understand whether and how the aspirations articulated for supported decision-making (in its various models) take effect in practice.[317] As one commentator has noted,

> there is almost no evidence as to how decisions are actually made in supported decision-making relationships; the effect of such relationships on persons in need of decision-making assistance; or the quality of the decisions that result. Without more information, it is impossible to know whether supported decision-making actually empowers persons with cognitive and intellectual disabilities.[318]

Similarly, little work appears to have been done regarding the implications of cultural diversity for supported decision-making, although it should be noted that substitute decision-making itself may be an uneasy fit in some cultural contexts. The Canadian Centre for Elder Law paper on supported decision-making comments, "Many cultures have a more communal sense of decision-making and supported decision-making may be a good option for those with these types of cultural norms,"[319] and goes on to note that there is a paucity of evidence related to supported decision-making and literacy levels, indigenous culture and regionality.

This note of caution resonates with the common experience of the "implementation gap" whereby well-intentioned reforms to law either fail to have their intended positive effect or in some cases have unintended negative effects, and reinforces the importance of careful evaluation of law reform initiatives.

Is supported decision-making for everyone? There are multiple models of supported decision-making. One of the core unresolved debates underlying these models is whether supported decision-making is an approach that is meaningful for everyone.

Some argue that legal capacity must be retained in all circumstances, even where support must be total.[320] That is, substitute decision-making, with its attendant loss of legal capacity to act, is unacceptable in all circumstances. For example, Bach and Kerzner have proposed three legal statuses within a framework that recognizes and promotes supported decision-making and recognizes a right to retention of legal capacity for all:

1. Legally independent status: the person is able to understand information and appreciate consequences of a decision, as well as to communicate that understanding and decision to a third party, with the support or assistance of chosen others.
2. Supported decision-making status: support persons are appointed in some manner to assist the person in making decisions and communicating them to others, with the activities of the supporters acting on the discerned will or intention or both of the person. For this status to apply, the person must be able to act in such a way that at least one other individual can, on the basis of personal knowledge, discern the will or intention or both.

3. Facilitated status: where individuals do not, for a range of reasons, have others who are able to discern their will and intention, a facilitator may be appointed, either through a planning document or a tribunal, to act for the person on the best interpretation of the will and preferences of that person.[321]

Others see supported decision-making as a type of accommodation in which various types of supports are provided to enable the person at the centre to in effect make the decision themselves (with differing viewpoints as to what "making the decision" means in this context). This approach accepts that in some cases, individuals will be unable to make their own decisions, regardless of the amount of support that is provided, and that in those circumstances, practically speaking, another person must make the decision, although that decision must take into account the fundamental dignity and personhood of the individual on whose behalf it is made. That is, in some circumstances, something that resembles what we currently call substitute decision-making is inevitable, although there should be an emphasis on ensuring that this is truly a last resort.[322]

Within this second approach, there is considerable variation, with some believing that for legal capacity to be retained, support must be able to assist the individual to achieve some identified level of "understanding and appreciation", and others arguing that a decision may be based on the individual's "will and preference", even if the person concerned may not fully understand all aspects or consequences of a decision or lack of decision.

The position that one takes on these debates has extensive implications for the practical implementation of supported decision-making, including whether supported decision-making arrangements can be made through a public appointments process, or whether some form of public body can provide some form of supported decision-making where personal trusting relationships do not exist.

Apportioning legal responsibility: A difficult question is the apportionment of legal responsibility for decisions made through supported decision-making. Responses are to some degree linked to the model of supported decision-making adopted, and the role that supporters are expected to play. One approach is to say that the decision is that of the person, and that therefore that person bears the full responsibility for the decision: critics argue that this approach can lead to troubling moral outcomes where some persons with significant levels of vulnerability may be liable to suffer substantial legal consequences despite not having understood the risks associated with the decision. Another approach is to emphasize the interdependent nature of decisions made through a supported decision-making approach:

> [I]f decision-making is an *interdependent* process and if a person has a support network assisting them to make decisions, it can be argued that the members of the support network should bear at

> least some ethical responsibility for the decisions made, unless they formally distance themselves from the decision. The question of legal responsibility arises if decisions with legal ramifications are being made, for example decisions involving a financial contract, decisions requiring formal consent or decisions that may result in a person having a civil action brought against them.[323]

As is discussed at greater length later in this section, questions of legal responsibility are important, not only for individuals who enter into supported decision-making arrangements, but for third parties who interact with these individuals, who are expected to rely and act on decisions made through these arrangements, and for whom clarity, certainty and accountability are pre-eminent concerns.

2. Supported Decision-making in Canada

A number of Canadian jurisdictions have recognized supported decision-making in some form. There are three types of recognition: recognition of legal capacity where achieved with supports; supported decision-making agreements; and representation agreements. There is not space here to fully examine all of these systems, but this section briefly describes their core features.

Recognition of capacity where achieved with supports

In some cases, there is no formal mechanism for creating, validating and monitoring supported decision-making arrangements. Rather, the legislation simply implicitly acknowledges that informal supported decision-making arrangements exist. For example, the *Mental Capacity Act* of England and Wales incorporates as one of its general principles, "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success".[324] The Northwest Territories takes a similar approach: it states that when considering an order for guardianship or trusteeship, the Court must consider "the ability of the adult, by himself or herself *or with assistance*, to understand information that is relevant to making a decision … and to appreciate the reasonably foreseeable consequences of a decision based on this information or a lack of such a decision" [emphasis added].[325] This approach essentially recognizes what Bach and Kerzner have classified as a "legally independent status".

Supported decision-making agreements

The Yukon and Alberta permit adults to execute personal appointments in order to formalize the role of their informal supports to decision-making. These are called supported decision-making agreements or authorizations, respectively. The Yukon's *Adult Protection and Decision-Making Act*[326] explains the purpose of supported decision-making agreements as

> (a) to enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs, but whose ability to

> make or communicate decisions with respect to some or all of those affairs is impaired; and
>
> (b) to give persons providing support to adults … legal status to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information.[327]

In both jurisdictions, a supporter is prohibited from making decisions on behalf of an adult, and a decision made or communicated with assistance is considered a decision of the adult.[328] An adult's decision-making capacity is explicitly preserved.[329] In Alberta, an adult must have capacity to make his or her own decisions before receiving assistance. The process is recommended only for "capable individuals who face complex decisions, people whose first language is not English and people with mild disabilities".[330] In the Yukon, "[t]hese agreements are for adults who can make their own decisions with some help".[331]

To enter into a supported decision-making agreement or authorization, the individual must "understand the nature and effect of a supported decision-making authorization".[332]

In the Yukon, supported decision-making arrangements are available for personal care and financial matters including banking, monthly budgeting, dietary expenses and other financial matters. In Alberta, they are available for personal care but not financial affairs.[333]

Supported decision-making may provide supporters with a number of powers and responsibilities, including:

- accessing or obtaining information, or assisting the individual in doing so;[334]
- assisting the person in the decision-making process;[335]
- communicating or assisting the person in communicating the decision to others;[336]
- endeavouring to ensure that the decision is implemented;[337]
- advising the individual by providing relevant information and explanations;[338] and
- ascertaining the wishes of the individual.[339]

The Yukon specifies that the supporter must not exert undue influence, and where the laws related to fraud, misrepresentation or undue influence are contravened, the decision will not be recognized as belonging to the individual.[340] In Alberta, if there are reasonable grounds to believe that a decision communicated by or made with the assistance of a supporter was the result of undue influence, or that there is fraud or misrepresentation, a person may refuse to recognize that decision.[341]

Under both statutes, supporters are protected for acts or omissions carried out in good faith.[342] The Yukon further specifies that the supporter is not liable for a decision made by the person if the supporter did not agree with it and advised against it,[343] and significantly, an agreement

with a third party may be declared void where the person failed to consult the supporter prior to entering into the agreement, on an issue that falls within the supported decision-making agreement.[344]

Government representatives in the Yukon and Alberta have indicated that the creation of these types of appointments was primarily a response to ideological concerns about definitions of capacity voiced in the disability community.[345] In Alberta, it also responded to a pragmatic need to formalize trusting relationships in the healthcare context in order to grant supporters access to confidential information.[346] Because agreements are not registered in either jurisdiction, their uptake is not known. The Office of the Public Guardian in Alberta has stated that they have been very popular.[347] In contrast, in the Yukon, it is believed that they have received limited use due, in part, to the lack of trusted or available supporters.[348]

Representation agreements

Representation agreements (RAs) in the Yukon and British Columbia are another form of personal appointment but one that permits a "representative" to make legally enforceable decisions on an adult's behalf with respect to the routine management of financial affairs. RAs are often characterized in the literature as facilitating supported decision-making[349] or as a less restrictive alternative to POAs and guardianship.[350]

RAs in the Yukon sit at a midpoint between supported decision-making agreements and POAs. RAs give a representative authority to make decisions over prescribed financial matters, including signing negotiable instruments, taking steps to obtain benefits, investing and withdrawing funds, receiving and depositing pension or other money, and purchasing goods and services for day-to-day living.[351] RAs differ from POAs in that they cannot grant plenary powers over financial management,[352] and they expire at the earlier of three years or when an adult's capacity declines. Therefore, they "are not for adults who have a degenerative disease like Alzheimer's" or for those whose decision-making abilities fluctuate.[353]

The threshold for capacity to execute these RAs requires the adult to understand the nature and effect of the agreement. Because RAs contemplate more complex transactions, the threshold is effectively higher than supported decision-making agreements. Depending on the powers that are awarded to the representative, it can be lower or potentially the same as for a POA. Since POAs are recognized more readily by banks and across jurisdictions, where the purpose of an RA is the same as a POA, the Yukon Seniors' Services and Adult Protection Unit promotes enduring POAs.[354] Because in the Yukon, an adult's lawyer must prepare a POA,[355] the RAs operate as a more accessible option.

With a small population of just over 35,000 people, the Yukon has had approximately 30 RAs in place.[356] They have been used to apply for and manage funds on behalf of adults who were

eligible for the Indian Residential School Settlement Agreement common experience payments (CEP).[357] In that context, they were intended as a protective measure for adults who could be vulnerable to financial abuse because their receipt of this funding would likely have been known to the community.[358]

British Columbia's *Representation Agreement Act* came into force in 2001 after years of "unprecedented broad based community-government collaboration",[359] and has a complex legislative history. Initially intended to supplant POAs, following a review of both regimes commissioned by the Attorney General, both regimes continue in operation.[360]

While the *Representation Agreement Act* initially permitted an adult to authorize his or her representative to "do, on the adult's behalf, anything that can be done by an attorney acting under a power of attorney….",[361] under 2007 amendments, the scope of a representative's powers now includes such areas as the payment of bills, receipt and deposit of pension income, and making investments, health care, obtaining legal services, personal care and admission to a care home.[362]

RAs in British Columbia straddle supported and substitute decision-making: "an adult may authorize his or her representative to help the adult make decisions, or to make decisions on behalf of the adult...."[363] While some interpret this as meaning an adult can choose *either* to ask for assistance or to have decisions made on his or her behalf, others say that this provision is meant to be interpreted as a holistic arrangement that captures the dynamics of the decision-making process: an adult may require more or less assistance depending on his or her abilities with respect to the decision at hand.[364] An RA in British Columbia can endure into an adult's incapacity.[365]

The decision-making process that is mandated under the *Representation Agreement Act* is, thus, targeted at adults who may have fluctuating, diminishing and issue-specific capacity. The definition of capacity to create an RA substantially differs from the cognitive test for capacity used throughout Ontario's laws, reflecting a very different approach to capacity and decision-making, as is described in Part Three, Chapter I of this *Paper*.[366] The factors are:

a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
d) whether the adult has a relationship with the representative that is characterized by trust.[367]

A study conducted by the Nidus Personal Planning Resource Centre and Registry, a voluntary registration and advocacy support service, found that 989 RAs were made and registered between 2006 and 2009, 70 per cent of which included authority over financial affairs. The majority of adults executing RAs were between the ages of 19 and 29, followed by those between 80 and 89, but people of all ages have accessed these arrangements.[368] The LCO also heard during our preliminary consultations that RAs have been recommended as a tool to assist adults in managing government income supports and social benefits in the developmental disability sector.[369]

However, legal practitioners have been hesitant to embrace representation agreements. RAs originally required a lawyer to validate the agreement and the discrepancy between the statutory threshold for capacity and the common law capacity to instruct counsel has been a source of unease. Despite eliminating a lawyer's participation in the process of validating an RA, this tension has not been resolved for adults wishing to access legal advice.[370]

3. Other Approaches to Supported Decision-making

As the brief review of supported decision-making in Canada reveals, the adoption of this approach has relied on personal appointments, and frequently has placed restrictions on the types of decisions that can be made through these arrangements. With the exception of British Columbia's RA regime, they have continued to rely on some version of a cognitive capacity test. There are other approaches to supported decision-making that take the concept in a somewhat different direction: two of these are briefly outlined below.

Sweden's Mentorship System

Sweden's "*god man*" (goodman) or mentor system provides an example of a supported decision-making system that operates through a public appointments process. This process is explicitly required to be a first choice, prior to the last-resort option of a *forvaltare* (administrator), which has more of the features of a substitute decision-making model. The appointment of a mentor has no impact on the legal capacity or civil rights of the person for whom the appointment is made.[371] The mentor is required to act in consultation and with the consent of the individual for whom he/she has been appointed,[372] and acts as a "counsellor", informing and discussing decisions and transactions with the individual.

For persons with disabilities, most appointments are by consent; however, a mentor may also be appointed for a person incapable of giving consent.[373] Only where an individual objects to the appointment of a mentor, or to the decisions of a mentor and the individual's property or personal interests are in serious jeopardy will an administrator (substitute decision-maker) be appointed. The procedure for the appointment of a mentor is informal, fast, and free, and is established in the *Code of Parenthood and Guardianship*.[374] The Code states:

> if, because of sickness, arrested mental development, a weakened state of health or the like, a person needs assistance in safeguarding his/her rights, administering his/her property or providing for his/her needs, the Court shall, if needed, appoint a custodian or "good man" for him/her.[375]

An application for the appointment of a mentor can be made to the court by the person for whom the mentor is to be appointed, a close relative of such person or the public trustee.[376] As Herr notes, "[s]ince most cases are based on direct consent and a review of the documents by the court, no personal appearance or hearing is necessary. In routine cases, the appointment process takes only two to three weeks to complete with the judge writing the court order in about ten minutes."[377] An application has to be accompanied by a social welfare report stating why the application for the appointment of a mentor is being made.[378] If the application has not been filed by, or with the consent of the person for whom the mentor is being appointed, it must be accompanied by a doctor's certificate, stating that the person is unable to give his/her consent.[379]

Appointments are made by a district court, and can be tailored to the specific needs of the individual.[380] The duties of a mentor can be limited to representation for individual rights, such as making application for special services; supervision of financial matters, or attending to the person's other needs for support and guidance.[381]

While relatives are most often appointed as mentors, professionals such as lawyers, accountants and social workers may act as mentors for multiple clients.[382] If the person for whom a mentors is appointed lacks the resources to pay the mentor for his/her services, then the state will pay the mentor*,* and this is true even with respect to mentor*s* who are relatives of the person for whom they are appointed.[383]

Michael Bach and Lana Kerzner's Law Reform Proposals

In 2010, Michael Bach and Lana Kerzner developed a paper, commissioned by the LCO, setting out a very thorough framework for a legal capacity and decision-making law centred on the concept of supported decision-making.[384] The application of that framework to Ontario's context, and particularly to the process for the appointment of guardians and of decision-makers under the HCCA, was the subject of a 2014 paper.[385] While the proposals cannot be rehearsed in full in this limited space, the essential components are outlined below. Specific proposals are dealt with in more depth at the appropriate points in this *Paper.*

Concept of decision-making ability based on "will and intent": as discussed in Part Three, Chapter I, Bach and Kerzner propose a minimum threshold of decision-making ability as the ability to "act in such a way that at least one other person who has personal knowledge of that

individual can reasonably ascribe to that individual's actions: personal intention or will; memory; coherence of the individual's memory through time; and communicative abilities to that effect".

Right to decision-making supports: individuals have a right to access a range of decision-making supports, accompanied by a duty of parties in a decision-making process to accommodate the need for these supports.

Least restrictive alternative: as was briefly outlined above, Bach and Kerzner identify three decision-making statuses: legal independent, supported, and facilitated. Legal capacity can not be removed, but the decision-making status through which it is exercised may be changed. In each case, the status ascribed to each individual should be the one least restrictive. In their unpublished paper, Bach and Kerzner propose a new class of "alternative course of action assessors" to ensure that less restrictive alternatives are considered at each step of the processes which currently can result in the appointment of SDMs through guardianship or under the HCCA.

Formalized recognition of supported decision-making: this proposal recommends the legal recognition and formalization of supported decision-making status, which may be attained either through personal planning documents or through a formalized application process by potential supporters.

Provision of individual advocacy: ensuringe against the unnecessary imposition of restrictive decision-making practices, requires that that recognition of the right to advocacy be embedded in legislation, and be completely independent, an entitlement for anyone at the point that his orher right to legal capacity is to be restricted, and not a matter of discretionary social assistance programs or charity.

Safeguards against abuse: as a safeguard against abuse, persons who are not decision-making supporters or in a conflict of interest, could be appointed to monitor a supported decision-making arrangement. In most cases, monitors would be unpaid persons, known to the individual or decision-making supporters or both, but a roster of paid monitors could be developed by a public body as well.

Government-provided supports and resources: Bach and Kerzner recommend that there be clear statutory government responsibility for ensuring that individuals have access to the supports and accommodations they need to exercise their legal capacity. This could be implemented through a community-based approach. In their 2010 Paper, they recommend the establishment of a community-based resource office to provide assistance both to individuals and their supporters. They also recommend ministerial responsibility for carrying out public education on supported decision-making among professionals, individuals and community

organizations, and an "Office of the Provincial Advocate for the Right to Legal Capacity**",** which would provide a central point for both individual and systemic advocacy.

Dispute resolution tribunal: finally, they recommend that the mandate of the Consent and Capacity Board (CCB) be expanded to address dispute resolution and rights enforcement issues related to supported decision-making.

4. Critiques and Concerns

Supported decision-making approaches have been the subject of a number of concerns and critiques, which are briefly outlined below. Several of these overlap.

Provision of clarity and certainty for third parties: As was noted earlier in this *Paper*, decision-making is both a personal and a public act. When others are being asked to rely on or implement our decisions, it is important for them to be sure that they understand the decision that has been made, that they can rely on the finality of that decision, and that all parties can be held to account to uphold their part of the decision. In this public realm, law plays an important role, for example in determining when an agreement is valid and we are entitled to rely on it, and when a party is liable for a breach of the agreement. Concerns have been raised that supported decision-making, relying as it does on multiple persons, provides insufficient clarity for third parties, who must be able to easily pinpoint those persons who are authorized to enter into legally binding transactions.

Identifying and addressing abuse: Concerns about abuse are a major component of critiques of supported decision-making. Persons whose ability to receive, retain and assess information is impaired will be at some greater risk of abuse or exploitation regardless of the legal framework adopted: issues related to abuse have always had a prominent place in this area of the law, and as is dealt with elsewhere in this *Paper,* there are considerable concerns about abuse and exploitation under the Ontario's current statutory framework for guardians and powers of attorney. Part Four, Chapter I will deal at length with the problem of abuse and avenues for reform. It is important to note here, however, that the innovative legal frameworks associated with some forms of supported decision-making raise particular issues related to abuse.

It may be more difficult to hold supporters to account for misusing their role. In a substitute decision-making system, it is substitute decision-makers who are ultimately responsible for final decisions, and in most modern systems, the legislation sets out clear parameters for acceptable decisions against which the substitute can be held to account. Where, for example, a person exercising a POA for personal care makes a decision regarding shelter or safety that clearly has a significant negative impact on the wellbeing of the individual, the attorney may be held to account to demonstrate that that decision was made in accordance with the prior capable wishes of the individual, or where these were not expressed, factors such as the individual's

values and beliefs while capable, current wishes and quality of life.[386] Similarly, the SDA sets out a clear set of priorities for financial decision-making, as well as restrictions on loans or gifts and directions on other matters. In supported decision-making arrangements, however, the decision remains that of the individual. Laws regarding supported decision-making do not set standards or considerations for decisions made under a supported decision-making arrangement; those making decisions with supports are entitled, like any of us, to make decisions that are unwise, risky, or result in negative consequences. As supporters are intended to have less of a role in the decisions, they are accorded less responsibility for the outcomes of decision-making, and the lack of an objective standard makes it more challenging to hold them to account where their influence on the supported person has led to an inappropriate outcome.

Supporters are responsible for their own behaviour in the decision-making process: in both Alberta and the Yukon, laws related to supported decision-making arrangements explicitly address issues of misrepresentation, undue influence or fraud on the part of supporters. In both cases, decisions may not be recognized as belonging to the individual where these were at play. However, it may be difficult to obtain evidence of misrepresentation or undue influence on the part of a supporter. The private decision-making process is something of a "black box", whether under a substitute or supported regime. It is an essentially private and informal process, and not the subject of documentation. Where close personal relationships are involved, there are likely to be complex webs of power and interdependence: it may be quite difficult, both practically and psychologically, to disentangle the interests and motives of "supporters" from those of the individual they are intended to support. Some persons who lack legal capacity may have considerable difficulty identifying the motives of those who are supporting them, communicating what the decision-making process was like from their perspective, or reliably remembering what that process was. In such circumstances, it may be very difficult to demonstrate that misrepresentation or undue influence were at work, except in the most egregious of cases.

The Advocacy Centre for the Elderly (ACE), in a submission to the LCO's related project on *Capacity of Adults with Mental Disabilities and the RDSP*, comments that,

> The difficulty with this [supported decision-making] arrangement is that it creates a risk of undue influence by a legally designated support person. While this risk also exists in more traditional arrangements involving attorneys and guardians for property, we are concerned that actual abuse by a support person will be more difficult to detect as the true identity of the decision-maker, and the factors influencing each decision, may become opaque.[387]

Formalizing an inherently informal process: Supported decision-making has its roots in the informal personal support networks that family and friends create around persons with disabilities, and is based on these relationships of trust and their day-to-day practices. ARCH

Disability Law Centre notes that the inherent flexibility of informal decision-making arrangements can promote respect for dignity, autonomy and independence.[388] When such networks wish to act in realms where increased levels of formality are required, such as health care, major financial decisions and legal issues, they encounter different sets of expectations. This disjunction underlies some of the challenges surrounding the legal implementation of supported decision-making. As the Canadian Centre for Elder Law commented in a paper commissioned by the LCO,

> The act of supported decision-making is inherently an informal process. The laws governing supported decision-making are often making the flexible, trust-based relationships formal and binding in some way. It is not always an easy fit.[389]

There are questions as to the extent to which this formalization is desirable, or whether

> the unintended consequence may not be so much the intended one of diversion of cases back down into the lower echelons of the hierarchy, but instead, of 'net widening', where cases previously dealt with *less* formally (indeed perhaps entirely 'informally') are unnecessarily brought up a level or two.[390]

In its *Background and Discussion Paper* on supported decision-making, Victoria's Office of the Public Advocate notes the concern that legalization of formal supports could undermine respect for informal supports, but comments that "[t]his is not an inevitable consequence".[391] ARCH Disability Law Centre comments that,

> It will be important to ensure that any changes to legislation consider the prevalence and experiences of persons who are subject to informal substitute decision-makers. Designing a new legal capacity regime is an opportunity to formalize some of these arrangements, thereby offering greater protection to 'incapable' persons. However, the advantages of flexibility and limited decision-making powers that are inherent in well-functioning informal substitute decision-making arrangements must not be lost. Moreover, informal substitute decision-making is attractive to some because it involves little in the way of costs and legal or bureaucratic processes. Great care must be taken to develop decision-making arrangements that will be appropriate for persons who are currently subject to informal substitute decision-making.[392]

Adequately addressing the range of experiences of those falling within capacity and decision-making law: As was alluded to at the opening of this Chapter, the various groups who fall under legal capacity, decision-making and guardianship law will encounter the law from a range of circumstances, perspectives, aspirations and experiences. The concept of supported decision-making has its roots mainly in the intellectual disability community, and it is this community which has tended to embrace it. Many of those working in the area see supported decision-making as a more challenging fit for persons with mental health disabilities or older persons with age-related disabilities such as dementia: certainly, where forms of supported decision-making have been implemented in Canada, there appears to have been less interest or uptake

within these groups.[393] As supported decision-making is still so new, it is not clear whether this reflects something essential to its nature, whether its appeal will spread over time, or whether new alternatives will emerge to reflect evolving human rights understandings. However, this does have implications for whether, at this time, supported decision-making approaches, if implemented in Ontario law, should be considered the sole permissible approach to decision-making, as some have advocated; a preferential or default approach, as others prefer; or one among a menu of options, as is currently the approach in jurisdictions where it exists.

Understanding and addressing decision-making practices "on the ground": Recognition of supported decision-making in Ontario legislation in some form would have a number of clear effects. It would mark (to a greater or lesser degree depending on the form of recognition) a symbolic shift in understandings of legal capacity and decision-making. For those who accessed supported decision-making, it would also mark a change in the formal legal status accorded their decisions. It is less clear the degree to which it would, on its own, shift practices on the ground. As many have remarked to the LCO, many, if not most, of those family and friends who currently act as substitute decision-makers under the SDA and HCCA have only a very general understanding of the legislation, their roles and the concept of substitute decision-making.[394] In practice, many who are substitute decision-makers under the current legislative framework are acting more as supporters than as SDMs. Conversely, there is concern about "slippage" under supported decision-making systems, whereby persons designated to provide support may in fact act as substitutes.[395] Without significant shifts in societal attitudes and available resources, can supported decision-making legislation achieve its intended goals?

> But are we deluding ourselves by nomenclature changes which do not alter the underlying social substance? Is the brokerage role of a modern decisional assistant under the supported decision-making model actually just the *functional* equivalent to that of a *traditional* guardian or administrator discharging their statutory duty to first act as an advocate (or the "eyes, ears and voice") for the person they represent?[396]

Concerns about the impact of limited resources on the meaningful implementation of supported decision-making have resonance in the current Ontario climate. Not only are there limited resources at all levels of government and public services, but community agencies and families themselves are pressed. While supported decision-making may work well for those who have the requisite familial, social and practical resources, its application may be challenging for those who are isolated and marginalized, a concern that is highlighted in Part Four, Chapter II, "Who May Act?"

- **QUESTION FOR CONSIDERATION: What are the advantages and risks of formalizing supported decision-making in Ontario law?**

- **QUESTION FOR CONSIDERATION: If formal supported decision-making is incorporated into Ontario law:**
  a) **To whom should it apply?**
  b) **What should be the test for capacity to be part of such an arrangement or to end it?**
  c) **Should this type of decision-making be available for all types of decisions or only for some?**
  d) **Should these arrangements be a presumed default arrangement, as opposed to substitute decision-making arrangements? If so, in what circumstances?**
  e) **Should appointments and terminations of these arrangements be personal (like a power of attorney) or public (like the appointment of a guardian)? What should the appointment and termination processes require?**
  f) **Who should be able to act as a supporter?**
  g) **What should be the responsibilities of supporters?**
  h) **What type of monitoring and oversight mechanisms should operate for these decision-making arrangements?**
  i) **What other mechanisms should be incorporated to guard against abuse through these decision-making arrangements?**
  j) **What should be the obligations of third parties with respect to these arrangements? What legal protections should be in place for third parties when transacting with persons who are in such arrangements?**

E. Co-Decision-making

1. The Concept of Co-Decision-making

Co-decision-making, sometimes referred to as joint or shared decision-making, is another alternative to substitute decision-making. Co-decision-making has been described as "a new legal concept whereby joint decision-making between the adult and the appointed co-decision-maker is mandated. The actual decision-making process is no longer a solo exercise."[397] The Victorian Law Commission has described co-decision-making as follows:

> Like the appointment of a 'supporter', the appointment of a co-decision maker recognises that while a person may struggle to make decisions alone, they may be able to make decisions with assistance from a trusted family member or friend. However, the appointment of a co-decision maker is more restrictive than the appointment of a supporter. Under a co-decision-making arrangement, the person loses some autonomy because they must make decisions about particular matters jointly with a co-decision maker. Under this arrangement, a decision made by the person alone would not be legally valid.[398]

It appears that under this model, the individual only has capacity when the co-decision-maker provides assistance. When acting alone, the individual does not have capacity to make decisions.[399] In this way, the co-decision-making model is a significant departure from both the substitute and supported decision-making models, both of which see the capacity to make a decision as ultimately resting with a single individual – either the substitute decision-maker

where the individual lacks capacity (under a substitute model) or with the individual her or himself (in the supported model) – even though the decision-making process may include consultation or assistance.

2. Co-Decision-making in Canada

Both Alberta and Saskatchewan have incorporated co-decision-making into their statutory schemes. These arrangements are intended for adults who can make decisions for themselves with assistance.[400]

In both cases, co-decision-making is available only through a judicial appointment, as opposed to a private process. In Saskatchewan, a judge may appoint a co-decision maker as a less restrictive alternative to guardianship, where his or her "capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions ... and is in need of a property co-decision-maker".[401] Alberta specifies that a co-decision-making order may only be made where the court finds that the individual's decision-making capacity with respect to the personal decisions for which the order is proposed is significantly impaired, the adult would have the capacity to make decisions about the personal matters that are to be referred to in the order if the adult were provided with appropriate guidance and support, less intrusive measures have been considered or implemented and would not meet the identified need, both the individual and the proposed co-decision-maker consent, and the court is satisfied that it would be in the individual's best interests.[402]

The Victorian Law Reform Commission recommended the inclusion of co-decision-making arrangements as an option in that jurisdictions decision-making legislation, commenting that "Though co-decision making would limit the decision-making autonomy of a person with impaired decision-making ability, the appointment would expand possibilities for their participation because it would allow the person to remain involved in the decision-making process."[403] The Commission recommended a public appointments process for these arrangements. In its view, co-decision-making is best suited to address current decision-making needs, rather than use as future planning mechanisms.[404] Because the individual who needs a co-decision-maker will have diminished ability to make their own decisions, his or her ability to "make a sound choice to enter into a co-decision-making arrangement and to appoint a responsible person", will be in question, and a personal appointment would therefore place too much responsibility upon the potential co-decision-maker to both assess the level of capacity and the appropriateness of the arrangement.[405]

In Saskatchewan, co-decision making is available for personal care and financial matters, while in Alberta, it is available for personal care but not financial affairs.

While co-decision makers share legal authority to make decisions with the adult, they must "acquiesce in a decision made by the adult and shall not refuse to sign a document … if a reasonable person could have made the decision in question and no loss to the adult's estate is likely to result from the decision".[406] A co-decision maker's authority may, therefore, simply consist of advising the adult and giving effect to his or her decision. A co-decision maker can sign a contract in the banking context and a contract signed by either person alone may be voidable.[407]

3. Critiques and Concerns

Co-decision-making has received relatively little attention compared to either supported or substitute decision-making.

Interestingly, the Victorian Law Reform Commission noted that, in public consultations related to proposed reforms to guardianship laws, there was more support for the creation of a supported decision-making alternative to substitute decision-making than for a co-decision-making system.[408] A key concern of stakeholders was that co-decision-making creates an inherently unequal partnership, so that the appointed co-decision-maker may heavily influence the decision of the individual. As a result, co-decision-making arrangements might not differ all that substantially from substitute decision-making.[409] This kind of unequal partnership also raises concerns about the susceptibility of these types of arrangements to abuse. The Commission noted in response that because co-decision-making requires the agreement of *both* co-decision-makers, it essentially mandates the inclusion and participation in decision-making of the individual in question, a significant potential benefit.[410]

Another concern is the potential complexity associated with this novel type of decision-making arrangement:

> One of the main concerns is the added complexity, and potential confusion, these new legal appointments could create. The same concern was expressed in relation to the Commission's proposal to introduce the appointment of 'supporters' in Chapter 8. This concern is greater for co-decision makers because the relationship itself is more complex. Defining the meaning of a 'joint' decision, identifying the potential users of these arrangements, and describing the responsibilities of third parties who transact with co-decision makers are all important challenges.[411]

In their review of alternative decision-making arrangements in Canada and abroad, Terry Carney and Fleur Beaupert remark,

> Redolent of the fine distinctions between ownership rights under joint tenancies and tenancies in common (whether co-owners do or do not acquire a 'share'), these options are among the most problematic in terms of *public* understanding of their social and legal function: they risk failing to pass the 'corner shopkeeper's understanding' test.[412]

The potential for confusion and uncertainty has been cited as one reason why, in Alberta, co-decision making does not apply to financial management.[413]

- **QUESTION FOR CONSIDERATION: What are the advantages and risks of formalizing co-decision-making in Ontario law?**
- **QUESTION FOR CONSIDERATION: If co-decision-making is incorporated into Ontario law:**
    a) **To whom should it apply?**
    b) **What should be the test for capacity to be part of such an arrangement or to end it?**
    c) **Should this type of decision-making be available for all types of decisions or only for some?**
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    e) **Should appointments and terminations of these arrangements be personal (like a power of attorney) or public (like the appointment of a guardian)? What should the appointment and termination processes require?**
    f) **Who should be able to act as a co-decision-maker?**
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    h) **What type of monitoring and oversight mechanisms should operate for these decision-making arrangements?**
    i) **What other mechanisms should be incorporated to guard against abuse through these decision-making arrangements?**
    j) **What should be the obligations of third parties with respect to these arrangements? What legal protections should be in place for third parties when transacting with parties who are in such arrangements?**

F. Questions for Consideration

1. **What are the advantages and riskS of formalizing supported decision-making in Ontario law?**
2. **If formal supported decision-making is incorporated into Ontario law:**
   a) **To whom should it apply?**
   b) **What should be the test for capacity to be part of such an arrangement or to end it?**
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   j) **What should be the obligations of third parties with respect to these arrangements? What legal protections should be in place for third parties when transacting with persons who are in such arrangements?**
3. **What are the advantages and risks of formalizing co-decision-making in Ontario law?**
4. **If co-decision-making is incorporated into Ontario law:**
   a) **To whom should it apply?**
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II. WHO MAY ACT IN A DECISION-MAKING ROLE?

A. Introduction

As was thoroughly discussed in the preceding Chapter, under current Ontario law, where an individual is determined to lack legal capacity to make a particular type of decision, but a decision nonetheless must be made, a substitute decision-maker (SDM) will be appointed to make the decision on behalf of the individual. While the Public Guardian and Trustee (PGT) and trust companies can act as SDMs in certain circumstances, in the vast majority of cases, SDMs are family or close friends of the individual requiring assistance. This Chapter will review current law as to who may act as an SDM in Ontario, and consider some options for expanding who may act in these circumstances, as well as highlighting the need for better supports for family and friends who act in these roles.. Some of the considerations explored below may also be applicable to the question of who may act as a supporter or co-decision-maker, should Ontario legislation be amended to formalize such roles.

The role of an SDM is a demanding one, not to be taken lightly. The legislation makes this clear. Under the *Substitute Decisions Act* (SDA), guardians and those acting under a power of attorney (POA) are held to a high standard. A guardian, as well as a person acting under a POA for property, is a "fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit",[414] while guardians and those exercising POAs for the person must exercise their duties "diligently and in good faith".[415] Both the *Health Care Consent Act* (HCCA) and the SDA set out detailed and relatively complex requirements guiding how decisions are to be made on behalf of another person.[416] Guardians and persons acting under a POA have a number of procedural duties, such as explaining their powers and duties to the person for whom they are acting, encouraging the individual's participation in decision-making, fostering contact between the individual and supportive family and friends, and consulting from time to time with family and friends.[417] Guardians and those acting under a POA must also keep detailed records of their activities.[418] Under the SDA, substitute decision-makers may be held liable in some circumstances for damages resulting from a breach of their duties.[419]

Beyond the legal responsibilities, SDMs often face many practical, emotional and ethical challenges. In some contexts, such as treatment, decisions may be high-stakes, involve complex information and require rapid response. Decisions about property management may have long-term consequences for the well-being of the person involved, while decisions about personal care may affect the most intimate aspects of an individual's life. Decisions about admission to long-term care are rarely made in cheerful circumstances, and while admission may be

necessary, such a decision will often be made over the objections of the person whom it is intended to benefit. Not infrequently, despite the guidance of the legislation, it will be far from clear what the "right" thing is to do in a particular circumstance. In addition, the reality is that there are relatively few practical supports for those taking on the role of substitute decision-maker.

It is not surprising then, that family members and close friends are often viewed as being those best equipped to tackle these challenges: they can often bring the profound commitment to the wellbeing of the individual that is necessary to perform this role well, together with a deep personal knowledge of the individual that can guide decision-making and assist with the practical and emotional aspects of the task.

> It is also true, that not every individual will have family or friends who are able and willing to perform this role to the standard that is required. Not every family has the practical, ethical and emotional skills to perform this role, let alone the level of intimacy and commitment that is desired. Other families may be willing, but may be already overburdened with other challenges, and unable to take on another significant responsibility. And as is discussed briefly in Chapter II, demographic changes mean that a growing number of people have no family or close friends who are willing and able to act for them. This may be because a person has outlived all of her or his family and close friends, because geographical mobility has dispersed relationships, or because stigma and social isolation associated with some types of disabilities have eroded support networks. In all of these cases, alternatives beyond family and friends must be identified.

Currently, Ontario's Public Guardian and Trustee (PGT) fulfils an important role as decision-maker of last resort. Under both the HCCA and SDA, where there is no suitable person who is available and willing to act and decisions are required, the PGT can be appointed to do so. While this role is vital, the PGT cannot of course reproduce the type of intimate personal relationship that is often thought of as the ideal foundation for substitute decision-making, and some persons with disabilities may dislike the idea of having decisions made for them by "the government", viewing it as intrusive. As well, the demographic changes referenced above are likely to create increasing demand for last-resort decision-making.

Advocates of supported decision-making, an evolving approach to decision-making described in the previous chapter, have acknowledged the challenge to the implementation of this approach posed by individuals who lack relationships of trust and intimacy. While substitute decision-making may often be best carried out through close personal relationships, supported decision-making is fundamentally premised on the presence of one or more supporters who have deep familiarity and commitment to the individual requiring assistance. By its nature, supported

decision-making requires the existence of close personal relationships. In some cases, these do not exist. As was noted by Michael Bach and Lana Kerzner in their 2010 paper for the LCO,

> Many individuals with significant intellectual, cognitive and psychosocial disabilities simply do not have others in their lives with whom they are in a trusting relationship based on shared life experience and personal knowledge. A life of discrimination and exclusion has left them without such relationships. This does not mean that such relationships cannot be developed. There is a large body of good practice and tools to assist people with more significant disabilities in developing personal relationships with others. However, this work takes time, intentional relationship building, and community-based supports to facilitate the process, identifying individuals who can play this role and provide the person with a support network.
>
> For people with significant disabilities the outcome of relationship-building supports is the development of relationships and support networks which can provide representational supports at some point in the future. In their case, the access to representational supports maximizes exercise of their legal capacity.[420]

The *Framework* principles of promoting participation and inclusion point to the importance of designing society in such a way that older persons and persons with disabilities have meaningful connections to their communities and are well-integrated in society. The growing number of individuals who do not have such connections, who are marginalized and isolated and do not have family and friends to assist with decision-making needs, highlights broader societal shortfalls in promoting participation and inclusion. These broader social, economic and attitudinal barriers are beyond the scope of this project to address, but are part of the context that must be understood in evaluating legal capacity and decision-making laws and identifying options for reform.

Certainly, the law should respect and recognize existing mechanisms for participation and inclusion, and should not create barriers to the development and maintenance of the relationships that are essential to the decision-making processes for those affected by this area of the law. The challenges experienced by those individuals who have no family and friends to assist them with decision-making needs highlight the close connection between the principles – in this case, between the inclusion and participation in society of persons with disabilities and older persons and the ability of these individuals to develop and exercise autonomy and independence. For example, a person who has, as a result of the stigma and discrimination associated with his or her disability, had limited opportunities to participate in education, employment or social activities and as a result has a limited social network, will be less likely to have the close and trusting relationships that can best support decision-making, whether through supported or co-decision-making or through substitute decision-making that is committed to participation and close attention to the values and wishes of the person for whom the decision is made. As well, the principle of recognizing that we all live in society highlights the importance of paying attention to the needs and circumstances of those who

have relationships with persons who fall within this area of the law, and who are currently or might possibly take on a formal decision-making role. As was explained in the previous chapter, those family and friends who assist with decision-making needs face responsibilities that may be heavy and have significant impact on their own lives: while they may be committed to this role, the way that role is structured and the supports that they receive in carrying it out will have a significant effect on their own wellbeing and ability to participate in the broader society.

B. The SDA and HCCA: Who May Act

This section reviews the current statutory requirements surrounding who may act as a substitute decision-maker (SDM). A review of the current provisions reveals:

- a clear preference for close and trusting relationships as the basis for any substitute decision-making arrangement, with provisions designed to make it relatively easy for family members to take up this role, should they wish;
- an effort to restrict the role of the PGT to those situations where immediate action may be required to prevent long-term negative consequences, or where there are no appropriate and willing individuals who have a close relationship with the individual;
- an effort to take into account, wherever practicable, the wishes or expressed preferences of the individual for whom decisions are to be made; and
- attention to potential problems of conflict of interest.

1. Appointments of Individual Substitute Decision-makers

As was noted above, most SDMs are private individuals, family and friends. This section briefly outlines the mechanisms through which private individuals may be appointed as SDMs, whether under the SDA or the HCCA.

The *Substitute Decisions Act*

As is explained more fully in Part Three, Chapter III, under the SDA, where an individual requires assistance with decision-making, SDMs may be appointed through two routes: personal appointments through a POA, and public appointments resulting in guardianship. Appointments for guardianship are made through statutory appointments and court appointments. In relatively rare situations, the PGT may be appointed by the court as a temporary guardian following a "serious adverse effects" investigation.

Powers of Attorney: POAs are personal appointments, and as such provide individuals with both the choice and the responsibility to consider potential substitute decision-makers and select the person or persons they believe are best suited to that role. The SDA places no restrictions on who may be appointed to act under a POA except that,

- The attorney must meet a minimum age requirement (age 18 for property, and 16 for personal care).[421]
- The attorney must him or herself be capable with respect to property or personal care (depending on the type of POA in question).[422]
- The PGT may only be named as attorney with consent in writing of the PGT.[423]
- For POAs for personal care, the attorney may not be a person who provides health care, residential, social, training or support services to the grantor for compensation, unless the service provider is also the grantor's spouse, partner or relative.[424]

Statutory Guardianship and Replacement Applications: As is detailed in Part Three, Chapter III, statutory guardianship for property may result either from an Examination for Capacity under Part III of the *Mental Health Act* (MHA) or from a Capacity Assessment by a designated capacity assessor under the SDA. Where a person is found to lack capacity to manage property under either process, and there is no existing continuing POA for property or guardianship, the PGT will become the statutory guardian of property upon receipt of the certificate of incapacity. An application to replace the PGT as statutory guardian of property may be made by:

- the person's spouse or partner;
- a relative of the person;
- an individual holding a continuing POA for property for that person, if that POA was completed prior to the certificate of incapacity and did not give the attorney authority over all of the person's property; or
- a trust company, if the person has a spouse or partner who consents in writing.[425]

The PGT reviews the application, and if the PGT is satisfied that the management plan submitted by the applicant is appropriate and that the applicant is suitable, the PGT shall appoint the applicant as the replacement statutory guardian. The SDA directs the PGT to consider, in reviewing the application, the legally incapable person's current wishes if they can be ascertained and the closeness of the relationship between the applicant and the person.[426]

Court-appointed Guardians: Guardianship of either the person or of property may also be obtained through application to the Superior Court of Justice. A court-appointed guardianship may be made on the application of *any* person.[427] In appointing a person to act as court-appointed guardian, the court must comply with the following statutory directions.

- The court shall *not* appoint a person who provides health care or residential, social, training or support services to the incapable person for compensation, with limited exceptions, such as if the individual providing services is the person's spouse or partner, or the attorney under the POA.

- The court shall *not* appoint the PGT unless the application proposes the PGT as guardian, the PGT consents, and there is no other suitable person who is available and willing to be appointed.
- The court *shall* consider whether the individual being proposed as guardian is already acting under a POA for the person, the wishes of the person involved if they can be ascertained, and the closeness of the relationship between the proposed guardian and the person.[428]
- A guardian for property must reside in Ontario, unless the out-of-province resident provides security in a manner approved by the court for the value of the property to be managed.[429]

The *Health Care Consent Act*

As befits the time-sensitive nature of decision-making related to health care, the HCCA sets up a simple system for determining the identity of the SDM where one is required. The statute lists, in descending order of preference, those who may act as decision-makers where a person has been found to lack capable for a particular necessary decision, as follows:

1. the person's guardian of the person, if the decision required falls within the guardian's scope of authority;
2. the person's attorney for personal care, if the decision required falls within the attorney's scope of authority;
3. a representative appointed by the Consent and Capacity Board (CCB), if the decision falls within the representative's scope of authority;
4. the person's spouse or partner;
5. a child or parent of the person, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of a parent;
6. a parent of the person who has only rights of access;
7. a sibling of the person;
8. any other relative of the person (including those related by blood, marriage or adoption).[430]

An SDM appointed through this hierarchical list must be

1. capable with respect to the decision to be made;
2. at least 16 years of age, unless he or she is the parent;
3. not prohibited by court order from having access to or giving or refusing consent on behalf of the person;
4. available; and
5. willing to assume the responsibility.[431]

If no person identified through the list meets the requirements, the PGT shall make the decision.[432]

2. The Public Guardian and Trustee as Substitute Decision-maker

The SDA and HCCA empower the PGT to act as decision-maker, either as a guardian under the SDA, or for specific decisions under the HCCA, in a limited number of circumstances.

The PGT may become guardian for a person who lacks legal capacity in three ways:

1. **Statutory Guardianships for Property:** as is described above, where a statutory guardianship results from a finding of legal incapacity to manage property under Part III of the MHA, or by a capacity assessor under section 16 of the SDA, the PGT will *automatically* become the guardian of property, unless there is an SDM already in place through a valid POA or guardianship. The PGT will continue as guardian so long as one is required, unless a replacement is approved, as described above.
2. **"Last resort" appointments by the court:** The PGT may become the guardian of property or personal care through court-appointment, in the limited circumstances described above.
3. **Serious adverse effects investigations:** This *Paper* deals at greater length elsewhere with powers of the PGT to conduct investigations where there are concerns that a person lacks capacity and serious adverse effects may or are occurring as a result. The important point here is that if, as a result of the investigation, the PGT has reasonable grounds to believe that the person is incapable with respect to property or personal care, and that the prompt appointment of a temporary guardian is necessary to prevent adverse effects, the PGT must apply to the court for an order appointing it as temporary guardian.

The PGT will also act as a decision-maker of last resort under the HCCA, as described above, and may consent (in rare circumstances) to appointment under a POA.

What is important to note from the above is that the PGT acts as decision-maker in two broad circumstances: where there is no other appropriate, available and willing person to act, and where, as with statutory guardianships and guardianships resulting from investigations, there is perceived to be a need for an entity that can act quickly to prevent dispersal of property (as with statutory guardianships) or to end ongoing abuse, neglect of exploitation.

In 2013-2014, the Public Guardian was acting for 21 clients under personal guardianship (3 on a temporary basis).[433] The PGT notes that the court will appoint it to make personal care decisions only "very occasionally" and in most cases to "remove the individual from a situation of harm or to prevent access by third parties who are abusing the person".[434]

It is more common for the PGT to act as guardian of property, most frequently through statutory guardianships. In 2013 – 2014, the PGT was a court-appointed guardian of property for 318 individuals. It was a statutory guardian for property for 4881 individuals who had received certificates under the MHA, and for 5567 individuals who had received a certificate of incapacity through a capacity assessment in the community. As well, it was acting for a small number of individuals (31) where a replacement statutory guardian had died, resigned or become legally incapable with respect to property management.[435] In 2013 - 2014, the PGT opened 1888 new property guardianship files, 841 through MHA certification and 1032 through capacity assessments.[436]

As guardian of property, the PGT will stream the client's income into a special account, from which it will review and pay bills, provide funds for day-to-day purposes, and arrange payment for goods and services requested by the client that are affordable and of good value. The PGT will invest money that is not needed for day to day expenses, and may sell items that are no longer needed.[437]

The PGT has an internal complaints process through which clients can raise concerns, as well as being amenable to the oversight of the courts as are other guardians.. In addition, as the PGT is a government service, complaints regarding PGT activities may be made to the Ontario Ombudsman. The PGT has implemented extensive internal financial controls and information systems. Internal audits are conducted to assess management practices, and the PGT's financial statements are reviewed by the Office of the Auditor General.

C. Expanding the Options for Who May Act

This section considers four options for expanding the pool of potential SDMs: creating a class of specialized and regulated professional fiduciaries, engaging the general public through volunteer or other programs, creating a role for community organizations and recognizing personal support networks.

1. Professional Fiduciaries

A fiduciary relationship is one in which "the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion."[438] As noted above, under the SDA, SDMs for property are considered to have a fiduciary obligation to the person represented. A professional fiduciary is a person who provides fiduciary services in a professional rather than a personal capacity. A professional fiduciary may or may not charge a fee for services: individuals, for-profit corporations and non-profits can all act as professional fiduciaries.

Professional fiduciaries differ from personal ones in two important respects: their motivation for taking up the responsibility associated with the role, and the likelihood that they will be acting for more than one individual at any given time. These differences may have implications for the types of responsibilities they can most appropriately take on, or for the requisite nature and level of oversight for their activities.

Professional fiduciaries might be seen as an appealing source of substitute decision-making in two circumstances. Where individuals have no trusting relationship with an appropriate person who is willing and able to act on their behalf, professional fiduciaries might be an alternative to the PGT. As well, some might find the idea of a professional fiduciary appealing because their specialized focus gives them the opportunity to develop experience and expertise in fulfilling this role.

Under current Ontario law, trust companies may act as guardians, trustees and attorneys under a power of attorney. Under the SDA, the replacement provisions for statutory guardians explicitly permit trust companies to be appointed by the PGT under certain circumstances. Trust corporations are already heavily regulated, which provides some assurance and protection to members of the public who entrust their assets or decision-making to them. Without such extensive regulation, there may be considerable risk in allowing professionals access to the funds or persons of individuals who may be very vulnerable due to a combination of disability and social isolation.

The question is whether it would be beneficial to permit other types of professionals to offer professional fiduciary services. For example, social workers or members of similar helping professions might be well suited to providing some types of substitute decision-making for some groups.

An interesting phenomenon to consider in this regard is the development of partnerships between trust companies and non-profits in order to provide more affordable fiduciary services. An example is the collaboration between the non-profit organization, Support & Trustee Advisory Services (STAS) and Royal Trust.[439] The purpose of the collaboration is to provide families of children with disabilities affordable access to trustee services.[440] The actual Trustee is Royal Trust, which manages the trust funds put aside for the beneficiary. Parents enter into a "Participation Agreement" with STAS, which has a standing agreement with Royal Trust. Through this arrangement, parents with relatively small amounts of money (a minimum of $10,000) are able to gain access to professional trustee services. As the "Advisor" which is party to the trust agreement, STAS maintains contact with the beneficiary of the trust and the beneficiary's family and support circle, and provides guidance and advice to Royal Trust based on its knowledge of the beneficiary's financial needs. [441]

The state of California provides an example of a comprehensively regulated professional fiduciary scheme. Under California's *Professional Fiduciaries Act,* professional fiduciaries are required to obtain a license before they can act.[442] In order to get licensed, applicants must complete 30 hours of pre-licensing education in approved education courses.[443] To renew a license, applicants must complete 15 hours of continuing education.[444] An approved education course must be "relevant to fiduciary responsibilities of the person or of estate management for conservators, guardians, trustees, or agents under durable power of attorney, or of the court system or ethics for fiduciaries". [445]

The Act also establishes the Professional Fiduciaries Bureau (PFB) to license, oversee, and regulate professional fiduciaries.[446] The PFB's role is to license professional fiduciaries, approve classes/courses that fulfill pre-licensing and continuing education requirements, administer licensing exams, and develop a code of ethics for professional fiduciaries.[447] The bureau must not issue a licence to persons who have been convicted of a crime that is "substantially related to the qualifications, functions, or duties of a fiduciary", who have "engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary", who have been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or who have "demonstrated a pattern of negligent conduct".[448]

The bureau is also required to investigate complaints; and, where appropriate, to refer complaints to law enforcement.[449] It is empowered to revoke a license based on complaints and to take action on unlicensed activity.[450] The PFB maintains a list of qualified, licensed private professional fiduciaries, which can be found on their website.[451] It is also required to provide information regarding any sanctions imposed on licensees, including, but not limited to, information regarding citations, fines, suspensions, and revocations of licenses or other related enforcement action taken by the bureau relative to the licensee.[452]

Licensees are required to keep complete and accurate records of client accounts, and to make those records available for audit by the bureau.[453] They must also file an annual statement with the PFB. The statement must provide the PFB with, amongst other things, the following information:

- whether the licensee has been removed as a conservator, guardian, trustee, or personal representative for cause;
- the case names, court locations, and case numbers for all matters where the licensee has been appointed by the court;
- whether she has been found by a court to have breached a fiduciary duty;

- whether she has resigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations;
- any licenses or professional certificates held by the licensee;
- any ownership or beneficial interests in any businesses or other enterprises held by the licensee or by a family member that receives or has received payments from a client of the licensee; and
- whether the licensee has been convicted of a crime.[454]

As is evident, the regulatory regime in California is fairly specific in terms both of the requirements for obtaining a license to operate as a professional fiduciary, and the requirements to remain licensed. However, unlike in Ontario and Saskatchewan, where trust companies are subject to capital requirements, neither the statute nor the regulations prescribe similar requirements for professional fiduciaries in California, nor do they seem to require professional fiduciaries to provide a bond or obtain insurance coverage.

- **QUESTION FOR CONSIDERATION: Should Ontario expand the role that specialized professionals may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:**
  - **a) For what types of decisions should these professionals be authorized to act?**
  - **b) What types of training, licensing or educational requirements should be required of these professionals?**
  - **c) What types of oversight and monitoring should be put in place for these professionals? Who should carry out this oversight and monitoring?**
  - **d) What should be the responsibilities and liability of these professionals?**
  - **e) What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?**

2. Engaging the Public

A number of jurisdictions have instituted volunteer programs through which members of the public may act for individuals who are socially isolated and do not have family or friends to assist them. In some cases, these volunteer programs are developed and supervised directly by government, while in others this role is contracted to community agencies. In a third approach, government may directly fund individuals to provide the necessary services.

Government Appointed and Supervised Volunteers

One example of a government-run volunteer guardianship program is the "Community Guardianship Program" established in the Australian state of Victoria. This is a small program – in the fiscal year 2012 – 2013, 62 community guardians provided supports to 75 individuals – but a thoroughly developed one.[455] In Victoria, the Office of the Public Advocate is the guardian of last resort. Where the Victorian Civil and Administrative Tribunal (VCAT) has appointed the

Public Advocate as guardian, the Public Advocate may delegate that power to a volunteer community guardian. A volunteer guardian "assists a person with a disability to make reasonable decisions about some aspects of their lifestyle".[456] The decisions that may be made by a community guardian include matters related to where the person lives, access to services, who may access the person, health care and employment. The community guardian is also expected to provide individual advocacy for the person where they are at risk of or are experiencing abuse or neglect, and must provide oral or written reports to VCAT as required. A community guardian generally only works with one person at a time.[457]

Community guardians are expected to work closely with others who are involved with or working to support the person, including family members, social workers, care providers, and professionals who are involved with the person.[458]

Community guardians must be over 18 years of age and meet other standards set by the Public Advocate. As delegates of the Public Advocate, community guardians are bound by the same legal responsibilities, liabilities and protections as that body.[459] They may receive an honorarium for their contributions and may claim expenses.[460]

A program coordinator provides training, support and advice for those who wish to act as community guardians. Community guardians must complete training prior to commencing their duties, and are expected to complete a minimum of two in-service training sessions per year, as well as having access to other training opportunities. Program coordinators provide resources, and are available to provide advice, attend case conferences and reviews, assist with accessing information and accompany guardians on visits.[461] The Public Advocate has a set of minimum standards for guardians, including for the level of personal contact with the individual, working with family members and other key people, taking into account the views of the person and maintaining records.[462] For the first five years, guardians receive an annual performance management and review; after that period, reviews occur at least every second year.

Ireland's draft bill reforming its capacity and decision-making laws appears to envision something similar: it requires the Public Guardian to establish a panel of "persons willing and able to act as decision-making representatives" for individuals who require someone to act in such a role, but who have no suitable persons willing to act. The Public Guardian will nominate persons to the court for appointment as decision-making representatives, and the court will select from among those nominees.[463]

Section 87 of the SDA permits the PGT to appoint volunteers to provide "advice and assistance under this Act". The PGT does not currently and has not in the past administered a volunteer program under this section.

Community Agencies and Volunteer Programs

In some jurisdictions, community agencies are given the task of recruiting, training and overseeing volunteers to act for persons who have no relatives or close friends to do so. One example is the German Betreuer system. In Germany, guardianship and curatorship have been replaced by one flexible measure, namely the '*betreuung*', who may be appointed from among a range of private or public individuals.[464] In selecting a *betreuer,* the Guardianship Court must accept any preference that the individual for whom the *betreuer* is to be appointed expresses.[465] If the individual has no preference, the courts follow a hierarchical list of appointees, beginning with relatives or other persons with a close relationship to the individual, followed by professional guardians, and finally public guardians of the local ''Betreuung-Authority".[466] Under the regime, private, non-profit advocacy organizations (called Betreuungsverein) are created in each city and county. Their primary role is to recruit, orient, train and advise volunteer *betreuers.*[467] These organizations may also accept appointments as *betreuers* for individuals for whom individual volunteer *betreuers* are not available.[468] As well, the Betreuungsverein are required to recruit, train and provide supports to individual *betreuers*.[469] The court oversees the *betreuer,* with the support of the local Betreuung-Authority,[470] and the *betreuer* has to deliver an annual report.[471]

In an unpublished paper prepared for the LCO, Michael Bach and Lana Kerzner similarly recommend the engagement of community agencies in provision of decision-making supports to persons who are socially isolated.

> [T]his report recommends a largely community-based approach to ensuring proactive measures for alternative courses of action are in place, which could be delivered by designating existing transfer payment agencies already contracted by either the Ministry of Community and Social Services or the Ministry of Health and Long-term Care, and associated structures such as Community Care Access Centres. At the same time, provision should be available for application directly to the Minister responsible, or the Minister's agents when existing community resources do not suffice.[472]

In their vision, these community agencies would provide services, both to individuals who require decision-making supports, and to decision-making supporters and to third parties to legal relationships with persons who may require such support in order to ensure effective alternative courses of action are in place to appointment of substitute decision makers and guardians.

Government-Funded "Mentors"

The Swedish system of "mentors" was described in Part Three, Chapter I. Suffice it to note here that mentors act as "counsellors" to those who need them, on a consent basis, and through court appointment. While relatives are most often appointed as mentors, professionals such as lawyers, accountants, and social workers may act, and may do so for multiple individuals.[473] Interestingly, if the person for whom a mentor is appointed lacks the resources to pay the

mentor for her or his services, then the state will pay, and this is true even with respect to mentors who are relatives of the person for whom they are appointed.[474] It has been noted, however, that recruitment of suitable candidates to act as mentors is a problem.[475] Another shortcoming identified in the Swedish model is the lack of training for mentors, as well as inadequate attention being paid to the personal, non-financial aspects of the roles that mentors have to perform.[476]

- **QUESTION FOR CONSIDERATION: Should Ontario expand the role that volunteers or other community members may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:**
  - **a) For what types of decisions and in what types of circumstances should these individuals be authorized to act?**
  - **b) Who should be responsible for recruiting, selecting and overseeing these individuals?**
  - **c) What types of training or supports should be provided to these individuals?**
  - **d) What types of oversight and monitoring should be put in place? Who should carry out this oversight and monitoring?**
  - **e) What should be the responsibilities and liability of these individuals?**
  - **f) What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?**

3. Creating a Role for Community Organizations

Another means of expanding the options for those who can act in a decision-making role is to permit non-profit community or advocacy organizations to take on this role. The German Betreur system briefly described above permits the Betreuungsverein to directly act for individuals requiring assistance with decision-making where individual volunteer can not be found, for example.

In Saskatchewan, *The Powers of Attorney Act* permits the appointment of corporations other than trust corporations, as attorneys under a power of attorney.[477] This provision was adopted in 2002, after the Law Reform Commission of Saskatchewan recommended that the appointment of corporate attorneys be permitted under the law, so that advocacy groups and "not-for-profit organizations dedicated to assisting vulnerable adults" will be able to act as attorneys.[478] As well, *The Adult Guardianship and Co-decision-making Act* permits the Minister to designate corporation, agencies or categories of these as eligible applicants for the role of substitute or co-decision-makers, and on occasion, non-governmental organizations such as the Saskatchewan Association for Community Living, have at times been appointed through this means.[479]

Ontario has some experience with the use of community organizations to make decision on behalf of others, as community organizations already can and do act as informal trustees for recipients of Ontario Disability Support Program payments. Section 12 of the *Ontario Disability Support Program Act, 1997* (ODSPA) permits the Director to "appoint a person to act for" an ODSP recipient where

- there is no guardian of property or trustee already appointed for the recipient; and
- the Director is "satisfied that the recipient is using or is likely to use his or her income support in a way that is not for the benefit of a member of the benefit unit".[480]

The same section provides that the Director may pay the recipient's income support to her or his guardian or trustee should she or he have one, or to a person appointed by the Director to act on her or his behalf.[481] In some ways the function of these informal trustees are analogous to the duties that may be undertaken by a guardian for property or a person acting under a POA for property, although it should be noted that these trustees are dealing only with one relatively limited income source, and that the nature of the ODSP program creates some opportunity for monitoring and reasonably timely corrective action should an informal trustee misuse funds. While concerns have been raised about various aspects of the ODSP informal trusteeship provisions, including insufficient oversight and a lack of effective recourse for individuals to challenge the appointment of a trustee, the LCO has heard that some community organizations are able to provide very good informal trusteeship services as part of a more holistic package of services that they provide to clients that they know well and regularly interact with. It is also true, however, that community organizations may be reluctant to take on this role due to pressures on budgets or staff.

Experience with the employment of community organizations does indicate that steps are necessary to carefully screen organizations for appropriateness, avoid conflicts of interest, and provide for accountability. In the extensive American Representative Payee program, which permits organizations to administer payments on behalf of social security benefit recipients, conflicts of interest have been identified where recipient organizations have included employers and operators of group and care homes who are providing food, shelter and services while controlling benefits.[482] The screening and reporting provisions set out in the Directives for the ODSP informal trustee program provide an example of how such concerns may be addressed.

- **QUESTION FOR CONSIDERATION: What role might community organizations play for individuals who have been determined to lack legal capacity for a particular type of decision? If community agencies were to act as substitute decision-makers, what lessons**

could be learned from the experiences with informal trusteeships, or with the use of community agencies in this role in other jurisdictions?

4. Recognizing Personal Support Networks

Another form of decision-making supports may be provided by personal support networks. These are, of course, already operating informally and flexibly. The experience of individuals with disabilities with the types of support that can be provided by these networks provides a foundation for the concept of supported decision-making, described at some length in the previous chapter. Bach and Kerzner discuss the important role that personal support networks have played for persons with disabilities in supporting choice, empowerment, inclusion in the community and preventing violence and abuse, commenting,

> Research has found that intentional building of personal networks of families and friends to assist in ongoing individual planning, building connections to the broader community, and providing opportunities for inter-personal relationships and caring, contribute positively to individual health and well-being. Research has found that support networks address the social isolation of individuals, the major factor that leaves individuals with developmental disabilities vulnerable to violence and abuse in both institutional facilities and the community.[483]

An example of formalized personal support networks can be found in what are called in British Columbia "Microboards". A Microboard is a small group of committed persons who join together with a person with a disability to create a non-profit society.[484] Microboards may provide a variety of personal support services for persons with disabilities, including the management of direct individualized funding to the individual with a disability. The key elements of a Microboard have been described as:

1. An unencumbered focus on the identity, needs and express wishes of the person who is supported;
2. Development and maintenance of an active, diverse and fully engaged citizen-based circle of support;
3. Retaining all possible elements of control, especially including the role of employer-of-record.[485]

Membership of Microboards is based on close, personal, trusting relationships, and founded on the belief that all individuals have the capacity for self-determination and the commitment to respect that capacity. Members have a role in supporting the participation of the individual in the community.[486] Microboards may have different levels of formality, depending on the requirements in the jurisdiction in which they are operating and the needs they are intended to meet. In British Columbia, Microboards have been explicitly recognized in government policy as eligible to receive funding for the purposes of the provision of direct individualized funded services.

The Office of the Public Advocate in the Australian state of Victoria has suggested that some version of formalized personal support networks could provide a mechanism for recognized supported decision-making, commenting, "An alternative form of supported decision-making is to establish the support network as an Incorporated Association. Under this arrangement, all the members of the network take responsibility" for decisions that have legal ramifications.[487]

- **QUESTION FOR CONSIDERATION: What role might personal support networks play in a reformed Ontario capacity, decision-making and guardianship system? How might this role be formalized in law?**

D. Improving Supports for Family Members and Friends

As was noted at the outset of this Chapter, the role that family and friends play as substitute decision-makers is often extremely challenging, requiring considerable commitment and skill as well as the investment of significant emotional and practical resources. Recognizing the importance of the role and the vulnerability of the individuals for whom SDMs act, the legislation sets out stringent requirements and standards for the activities of SDMs.

WHO MAY ACT IN A DECISION-MAKING ROLE?

While the extent and nature of the responsibilities of an SDM will vary from situation to situation, to perform the role as envisioned by the statutes, SDMs may be required to:

- Understand Ontario's complex statutory scheme and its accompanying systems (for example, related to capacity assessment) sufficiently to be able to navigate them, both on their own behalf and on behalf of the person they represent;
- Understand their role, responsibilities and accountability under the statute;
- Understand, at an everyday and practical level, the concept of capacity and the principle of autonomy and independence;
- Have the skills, as well as the emotional resources, to communicate well with the person they represent, support his or her participation in the decision-making process and respect his or her autonomy and capacity to the widest extent possible, and to work positively and cooperatively with others close to the represented person;
- Have the skills to research options, locate resources, and navigate complex legal or social systems on behalf of the individual, often in a context of limited or rationed resources, and sometimes related to financial or personal issues of considerable complexity;
- Maintain a trusting personal relationship with the individual, so as to understand his or her circumstances, needs, values and preferences and take these into account in carrying out the role;
- Have the time and ability to carry out the decisions that have been made – for example, overseeing the purchase or sale of property, locating and gaining admission to an appropriate residential setting; hiring and overseeing necessary support or professional staff, and similar tasks; and
- Have the psychological and emotional resources to manage the responsibility for sometimes very difficult or ethically challenging decisions.

In many cases, all of this takes place in and is exacerbated by a context of limited resources for persons with disabilities and older persons.

There are many organizations and professionals that make significant efforts to provide Information and supports either to SDMs, or to informal caregivers who often act as SDMs, including legal clinics, advocacy organizations, government agencies and ministries such as the PGT and the Seniors Secretariat and others. However, these supports are fragmented and most frequently rely on SDMs to seek them out. Options for increasing access to information and education, navigational assistance and advocacy services are considered elsewhere in this *Paper*: it is important to consider how reforms to these or other aspects of Ontario's legal capacity and guardianship law may strengthen the ability of families and friends to ensure that the vision underlying the legislation is implemented in a meaningful way.

- **QUESTION FOR CONSIDERATION: Where family or friends are acting for a person who has been determined to lack capacity to make a particular decision, are there supports that would enable them to more effectively fulfil this role?**

E. The Role of the Public Guardian and Trustee

The PGT plays a number of essential roles in Ontario's legal capacity, decision-making and guardianship system, with its role as SDM among its most prominent. The section below briefly addresses some suggestions for reform to this role of the PGT.

Last resort SDM: There is a broad acknowledgement that a decision-maker of last resort is required in any legal capacity, decision-making and guardianship system: currently the PGT performs this vital role. Both a desire to ensure that this role is truly undertaken as a last resort, and an anticipation of growing pressures on this role due to social and demographic change suggest the importance of considering whether there are alternative sources of SDMs that may appropriately and effectively address some of the need. Realistically, it is likely that the government will need to continue providing some last resort services, but the suggestions regarding professional fiduciaries, volunteers and community agencies point to some potential means of expanding the options available to individuals who need assistance with decision-making. As well, the alternative forms of decision-making discussed in Part Three, Chapter I and the restricted forms of guardianship considered in Part Three, Chapter III may also assist in ensuring that the PGT is required to act only when it is truly needed.

Statutory guardianship: The role of the PGT as statutory guardian is somewhat more controversial than its last resort role. The automatic appointment of the PGT as guardian for property in these circumstances (subject to later applications for replacement) serves to ensure that a decision-maker is able to step in immediately upon a declaration of incapacity to deal with urgent decisions related to property, and that the individual does not experience significant disadvantage or difficulties due to a "gap" period when no person is authorized to make decisions. The replacement process is intended to be a relatively simple and inexpensive means for family members to take up this responsibility, if they so wish, within a reasonable period of time. Nonetheless, it is true that this role for the PGT fits uneasily with the often expressed belief that guardianship by the state should be a "last resort", with substitute decision-making through close relationships occurring in all other circumstances.

Statutory guardianship is best understood in the larger context of issues around appointment processes, something considered at length in the following chapter. Court-based hearings can provide transparency and careful, objective scrutiny of appointments, important values where rights are at stake. However, they are also perceived as relatively inaccessible due to costs and complexity: most modern systems do not rely entirely on court hearings for guardianship-type appointments. Statutory guardianships provide one alternative pathway to court appointments, but there are also other ways to meet this need: not all jurisdictions have a process analogous to statutory guardianship. Administrative processes, such as Alberta's "desk applications", described in the next Chapter, are one approach. Tribunal systems for appointments, such as the CCB currently provides for representatives under the HCCA, and as are common in Australia, provide another avenue for relatively rapid and low-cost appointment processes.

Oversight for the PGT's role as SDM: As was briefly described above, the work of the PGT is subject to a number of oversight mechanisms, including an internal complaints procedure, cthe standard oversight of the courts with respect to guardians, complaints to the Ombudsman, and various auditing processes. ARCH Disability Law Centre, in their paper, *Decisions, Decisions, Promoting and Protecting the Rights of Persons with Disabilities Who are Subject to Guardianship*, suggests that while the PGT has an internal complaints system to address concerns about the ways in which it exercises its function as a decision-maker, an independent "Monitoring and Advocacy Office" which could receive and resolve complaints about the activities of substitute decision-makers, including the PGT, would better address the needs of persons with disabilities, including the inevitable power imbalance between the PGT and its clients.[488]

- **QUESTION FOR CONSIDERATION: Are reforms required to strengthen oversight and monitoring of the role of the Public Guardian and Trustee as substitute decision-maker? If so, what reforms would be most appropriate and effective?**

F. Questions for Consideration

1. **Should Ontario expand the role that specialized professionals may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:**
    a) **For what types of decisions should these professionals be authorized to act?**
    b) **What types of training, licensing or educational requirements should be required of these professionals?**
    c) **What types of oversight and monitoring should be put in place for these professionals? Who should carry out this oversight and monitoring?**
    d) **What should be the responsibilities and liability of these professionals?**
    e) **What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?**
2. **Should Ontario expand the role that volunteers or other community members may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:**
    a) **For what types of decisions and in what types of circumstances should these individuals be authorized to act?**
    b) **Who should be responsible for recruiting, selecting and overseeing these individuals?**
    c) **What types of training or supports should be provided to these individuals?**
    d) **What types of oversight and monitoring should be put in place? Who should carry out this oversight and monitoring?**
    e) **What should be the responsibilities and liability of these individuals?**
    f) **What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?**
3. **What role might community organizations play for individuals who have been determined to lack legal capacity for a particular type of decision? If community agencies were to act as substitute decision-makers, what lessons could be learned from the experiences with informal trusteeships, or with the use of community agencies in this role in other jurisdictions?**
4. **What role might personal support networks play in a reformed Ontario capacity, decision-making and guardianship system? How might this role be formalized in law?**
5. **Where family or friends are acting for a person who has been determined to lack capacity to make a particular decision, are there supports that would enable them to more effectively fulfil this role?**
6. **Are reforms required to strengthen oversight and monitoring of the role of the Public Guardian and Trustee as substitute decision-maker? If so, what specific reforms would be most appropriate and effective?**

III. APPOINTMENT AND EXIT PROCESSES FOR SUBSTITUTE DECISION-MAKING

A. Introduction

This *Discussion Paper* has previously examined how decisions may be made within legal capacity and decision-making laws, and who may participate in the decision-making process. This Chapter will focus on the process by which individuals are appointed to and removed from their roles in the decision-making process.

Any form of appointments and exit process must balance a number of goals, some of which may be in tension with the others. These include the following:

- **Accessibility**: can those who need to enter into a decision-making arrangement or end one access the process with reasonable ease? This involves issues of cost, complexity, cultural sensitivity and disability accessibility. Considerations of accessibility are important in any legal process but take on extra resonance here, where the majority of those affected are persons with some kind of disability, many will encounter the law at a time of vulnerability and the law affects a broad cross-section of the population, many of whom have little experience or comfort with it.
- **Efficiency**: can the process be completed within a reasonable period of time, and without unnecessarily burdening available resources? Issues of timing will often be of particular importance in this area, because of concerns about fundamental rights or the security of those involved.
- **Flexibility**: as has been noted elsewhere in this *Paper*, legal capacity frequently fluctuates. Some people will develop greater decision-making abilities over time as they learn and acquire access to social resources, others will experience declines in their decision-making abilities, and others will cycle in and out of legal capacity. It is therefore important that processes be sufficiently responsive and flexible that those who actually have legal capacity do not find themselves under substitute decision-making, and those who require assistance are able to access it in a timely manner.
- **Choice**: Given the nature of substitute decision-making, it is important to provide individuals with choice about their substitute decision-maker (SDM), wherever possible. This not only respects the dignity and autonomy of the individual in question, but may improve the quality of appointments because individuals often have the best knowledge of who has the understanding and commitment take their values and interests into account. One aspect of choice may be the ability to plan ahead, and to make and communicate decisions about future contingencies.

- **Susceptibility to scrutiny/preservation of privacy:** concerns about abuse and misuse of substitute decision-making powers are a recurring theme throughout this area of the law, and the susceptibility of the appointment to scrutiny may be one means of preventing abuse. On the other hand, appointment or removal of an SDM will often involve highly sensitive and personal information, and individual privacy interests may dictate that these processes are placed in the public view only where necessary.
- **Transparency and accountability:** transparency and accountability in appointment processes can assist in preventing and identifying abuse of substitute decision-making powers, and where public processes are in issue can help to ensure that discretion is exercised appropriately and responsibly. However, these goals must be balanced against the natural desire of individuals to preserve the privacy of the personal details of their lives.

➢ **Responsiveness to context:** The relative importance of these goals and the most appropriate means of achieving them will depend on the particular context for the processes. The type of process that is appropriate and effective in the healthcare context may differ from that best suited for decisions dealing with property; a process that works well for single decisions or those that must be made under time pressure will differ from that appropriate for longer-term situations.

On this point, it should be noted that the focus of this Chapter will be on Ontario's existing substitute decision-making model; however, many of the considerations will also be appropriate to take into account should Ontario implement supported decision-making.

As the LCO's *Frameworks* emphasize, the process by which substantive rights and benefits are accessed is equally important to those substantive issues. The above list of goals for appointment and exit processes highlights their connection with the *Framework* principles. Not only are effective and appropriate processes vital for the ability of persons falling within this area of the law to achieve and preserve their dignity, autonomy, participation and security/safety, the processes themselves must reflect these principles. For example, a lack of accessibility in the appointments process will undermine the principle of respect for diversity and individuality, and a failure to take into account the choice of an individual regarding the identity of a SDM will impinge on autonomy.

Ontario's law employs three means of identifying substitute decision-makers:

4. **Personal appointments**, in which the individual independently identifies his or her substitute decision-maker (SDM). This takes place through a power of attorney (POA) for property or for personal care.
5. **Public appointments**, where a court, tribunal or administrative body appoints the SDM. This takes the form of statutory or court-appointed guardianships under the *Substitute*

Decisions Act (SDA), and representatives appointed by the Consent and Capacity Board (CCB) under the *Health Care Consent Act* (HCCA).

6. **Automatic appointments** under the HCCA, where SDMS are appointed through a hierarchical statutory list.

The LCO's preliminary consultations identified concerns mainly with respect to the appointment of attorneys under a POA and of guardians. Concerns about automatic appointments under the HCCA focussed mainly on problems of implementation arising out of widespread misunderstandings of the hierarchical list.[489] This Chapter will therefore focus on personal and public appointments, rather than on automatic appointments. However, stakeholders are encouraged to bring significant concerns regarding automatic appointments to the attention of the LCO as part of the public consultation process.

- **QUESTION FOR CONSIDERATION: Are there concerns regarding the appointments process for substitute decision-makers under the *Health Care Consent Act* that should be addressed in reforming this area of the law?**

B. Personal Appointment Processes

1. Ontario's Power of Attorney Regime

Introduction

In Ontario, personal appointments are made through continuing or springing POAs for property or personal care. A continuing POA is one that takes effect immediately, and endures into the grantor's incapacity, while a springing POA takes effect only upon the grantor's incapacity. POAs are extremely powerful instruments. A POA for property, for example, enables the holder to do anything that the grantor could do, except to make a will. A person exercising a POA for property can make or cash-out investments, buy or sell property (including the grantor's home), make purchases both large and small, and transfer financial assets between accounts. The holder of a POA for personal care (POAPC) has considerable control over the most intimate details of daily life, including where the grantor lives, what kind of health care he or she receives, as well as decisions about hygiene, nutrition and safety. This flexibility allows the attorney to act effectively on behalf of the grantor. It also gives the attorney considerable control over the well-being of the grantor. That is, the POA can be exercised either for good or for ill; the quality of the attorney will have a considerable impact on the life of the grantor. Notably, once an individual has lost legal capacity, she or he may also lose the ability to revoke the POA.

Historically, personal appointments as a means of addressing loss of legal capacity are a relative novelty. Until relatively recently, public appointments were the only option for the

identification of substitute decision-makers.[490] The development of more flexible and accessible arrangements, such as hierarchical lists for specific, one-time decisions (for example, health care consents) and continuing or springing POAs has been an important development in this area of the law.

Personal appointments tend to differ in a number of key respects from public mechanisms for appointment of substitute decision-makers or supporters:

- Personal appointments tend to be more accessible. There is inevitably a certain level of cost and time associated with a public appointment process, particularly where a court or tribunal is involved and therefore legal representation is required. Personal appointments may involve minimal or no costs, depending on statutory requirements for their creation.
- Personal appointments tend to be more flexible than public appointment processes. It is relatively simple for individuals to create or revoke powers of attorney, while the guardianship process tends to be more complex and time-consuming, making it more difficult to either enter into or exit from.
- Personal appointments may allow for forward planning. For example, continuing and springing powers of attorney may allow individuals to select ahead of time who they would like to act as a substitute decision-maker should they lose legal capacity. Public processes such as guardianship proceedings aim to respond to circumstances at the time of application.
- Public appointments processes by their nature tend to allow for greater scrutiny of the individual appointed, and create the opportunity for greater monitoring of the activities of that individual. Personal appointment processes rely on the good judgment of the individual to know who is best suited to take her or his interests and values into account. For the most part monitoring of the exercise of powers granted via personal appointments relies on informal mechanisms and enforcement will arise from individual complaints rather than proactive mechanisms.

It is important not to confuse the mechanism for appointment with *who* may be appointed. Public appointment mechanisms may appoint private individuals, such as family or friends, to act for the individual. As was highlighted in the previous Chapter, personal appointment mechanisms may, in very limited circumstances, result in the appointment of the Public Guardian and Trustee (PGT).[491] Most often, those designated under POAs are those with whom the grantor has an ongoing close personal relationship of trust, such as family members or close friends. These are the individuals who know the grantor best, and who might be expected to best understand their values and hopes, to have their well-being at heart, and to have the

requisite dedication and commitment to carry out the sometimes extensive responsibilities associated with this role.

Ontario has a comprehensive scheme for powers of attorney, which sets out the requirements for creating them, the roles and responsibilities of those acting under them, and some mechanisms for addressing concerns about improper usage. This is set out in the SDA.[492] There are two types of POAs, those for the management of property, and those related to personal care. The requirements for the two differ in certain key respects, and therefore they are described separately below.

Power of Attorneys for Property

Scope of the power: A continuing POA for property may authorize the attorney to do anything on the grantor's behalf, with respect to property, that the individual granting the POA could do if capable, except make a will.[493] The person granting the POA must be at least 18 years old.[494]

Capacity to Give and Revoke a Continuing Power of Attorney for Property: As was discussed in Part Two, Chapter I, the SDA sets the standard for capacity to create a continuing POA for property. That standard is a high one. For the POA to be valid, the grantor must

a) know what kind of property he or she has and its approximate value;
b) be aware of obligations owed to his or her dependants;
c) know that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
d) know that the attorney must account for his or her dealings with the person's property;
e) know that he or she may, if capable, revoke the continuing power of attorney;
f) appreciate that unless the attorney manages the property prudently its value may decline; and
g) appreciate the possibility that the attorney could misuse the authority given to him or her.[495]

It is not necessary that the person creating the POA be at that time capable of managing property.[496] Any person who is capable of creating a continuing POA is also capable of revoking it.[497]

Who May Act as an Attorney: To act as an attorney under a POA for property, an individual must be at least 18 years old.[498] An individual may name two or more individuals as attorneys, who must act jointly unless the POA specifies otherwise.[499] If these attorneys are acting jointly, and one dies, resigns or becomes incapable, the other(s) may continue to act under the POA.[500]

The PGT may act as attorney for property, but only if consent is obtained prior to the execution of the POA.[501]

The SDA makes provision for the resignation of an attorney,[502] or the termination of the POA through death or incapacity of the attorney, appointment of a guardian of property, execution of a new POA for property, revocation of the POA or the death of the grantor.[503]

Creating the POA: There is no required form for a continuing POA for property,[504] although individuals may use the form that has been made available through the Ministry of the Attorney General.[505] For a POA for property to continue past the grantor's legal incapacity to manage property, the document must state that it is a continuing power of attorney, or express the intention that the powers it grants may be exercised when the individual granting the POA has become incapable of managing property.[506] Two witnesses to the execution of the POA are required. The SDA lists a number of types of individuals excluded from acting as witnesses, including persons under age 18, spouses or partners of either the attorney or the grantor, the attorney, a child of the grantor, or a person who has a guardian for property or of the person.[507]

Coming into Effect of the POA*:* A continuing POA for property may come into effect at the time it is created. Alternatively, the grantor may specify that it comes into effect at the point where the grantor becomes incapable of managing property. In the latter case, the grantor may specify a method of assessing capacity; if such a method is not specified, the POA may be triggered by an assessment by a Capacity Assessor under the SDA, or an assessment of capacity to manage property under the *Mental Health Act.*[508]

Powers of Attorney for Personal Care

Scope of the POA: A POA for personal care (POAPC) may deal with issues including those related to health care, nutrition, shelter, clothing, hygiene and safety.[509] The POAPC may include conditions or restrictions for its use, or instructions with respect to the decisions that the attorney is authorized to make.[510] A grantor can, in a POAPC, in carefully limited circumstances, authorize the use of force by the attorney or other persons under the direction of the attorney.[511]

Capacity to Give a Power of Attorney for Personal Care: To create a power of attorney for personal care, one must be at least 16 years old.[512] As noted in Part Two, Chapter I, the test for capacity to create a POAPC is the easiest to meet of all of the capacity tests in the SDA and HCCA. To create a POAPC, the individual must have the ability to understand whether the proposed attorney has a genuine concern for her or his welfare, and appreciates that they may need that person to make decisions for them. The individual need not have the ability to manage their own personal care at the time of the creation of the POAPC in order to have the capacity to create that document. Any instructions in the POAPC with respect to particular

decisions will be valid if, at the time of the execution of the POAPC, the individual had the capacity to make that decision. Any person who has the capacity to create a POAPC also has the capacity to revoke it.[513]

Creating the POAPC: As with a POA for property, a POAPC need not be in any particular form, but may employ the form made available for public use by the Ministry of the Attorney General.[514] Execution of the POAPC must take place in the presence of the two witnesses. The list of excluded witnesses is the same as that for POAs for property.[515]

Coming into Effect of the POAPC: It is important to note that POAPC only come into effect upon the incapacity of the grantor with respect to personal care decisions. Decisions for personal care cannot be made on behalf of others who are capable of making those decisions.[516] A POAPC comes into effect for decisions that fall within the HCCA where the individual is determined to be legally incapable within the meaning of that Act, and an attorney is authorized to make the necessary decision. In other circumstances, the POAPC comes into effect where the attorney has reasonable grounds to believe that the person is legally incapable of making the decision, meaning that the individual is not able to understand information related to the issue (e.g., hygiene, shelter) or is not able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.[517]

The grantor may, in the POAPAC, require that incapacity for non-HCCA decisions be confirmed. The grantor may specify the method of confirmation; if not, legal incapacity must be determined by a Capacity Assessor.[518]

Who May Act as an Attorney: To act as an attorney for personal care, a person must be at least 16 years old.[519] The PGT may act as an attorney for personal care if consent is obtained prior to the execution of the POA.[520] Persons who provide health care, residential, social, training or support services to the grantor for compensation may not act as attorneys, unless they are the spouse, partner or relative of the grantor.[521] Two or more individuals may be named as attorneys; if so, they must act jointly unless the POAPC specifies otherwise.[522] If these attorneys are acting jointly, and one dies, resigns or becomes incapable, the other(s) may continue to act under the POA.[523] The SDA makes provision for the resignation of an attorney,[524] or the termination of the POA through death or incapacity of the attorney, appointment of a guardian for personal care, execution of a new POAPC, revocation of the POA or the death of the grantor.[525]

2. Concerns and Critiques

The use of continuing and springing POAs has generally been considered a very positive element of Ontario's legislative scheme, for the reasons noted above. POAs allow individuals to

plan ahead, to choose for themselves who will assist them should they become legally incapable, and to do so in a way that is flexible and accessible.

However, stakeholders have identified major concerns regarding abuse of powers of attorney, particularly powers of attorney for property. The private nature of these appointments does, by its nature, tend to reduce scrutiny and increase the risk that abuse may be carried out undetected. This is not to say that persons appointed through a public process (guardianship) never abuse their powers: as is discussed in Part Four, Chapter I, abuse is a concern with *all* forms of appointments. However, there are risks that are peculiar to or exacerbated for private arrangements. The challenge is to balance the concerns regarding abuse with the importance of ensuring the continued accessibility of these instruments. As was stated by the Alberta Law Reform Institute:

> It is necessary to recognize that, short of a comprehensive and completely state-administered and state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no person who administers the affairs of an incapacitated person, including an attorney appointed by an EPA [enduring power of attorney], will abuse the powers given to that person. Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of the cases in which it is utilized.[526]

Part Four, Chapter I will consider a number of measures that may assist in identifying and redressing abuse through POAs. For the purposes of this Chapter, it is sufficient to observe that the processes for creating POAs must balance the fundamental purpose of these instruments to enable forward planning and to empower individuals to chose their own SDMs, with the need to ensure that grantors sufficiently understand the nature of the powers that they are granting and the risks associated with the them. The effectiveness of POAs depends on the ability of grantors to make an informed decision as to who is best equipped in terms of skills, availability, commitment and ethics to carry out these responsibilities. A grantor who does not sufficiently understand the effect of a POA is more likely to choose an attorney for reasons that have little to do with the nature of the responsibility involved.

The concern of many of those with whom the LCO spoke during the preliminary consultation was that, in fact, frequently neither grantors nor attorneys sufficiently grasp the nature of these instruments and the duties of attorneys, the gravity of the responsibilities associated with them or the risks associated with their use. Most opportunities for increasing grantor understanding occur at the stage when the instrument is created, both because this is a crucial juncture (for example, the person who created a power of attorney may later lose legal capacity and be unable to revoke it) and because this is one of the few moments where the law can relatively easily impose requirements for information and understanding.

A second major concern related to POAs is the difficulty faced by third parties in locating and validating them. Healthcare and other social service providers may be required to provide services and obtain consent in emergency or time-sensitive situations, and may not be able to easily determine whether a POA that is relevant to the context has been completed. It is even more difficult for third parties to determine whether a POA is valid – for example, whether it was completed at a time when the individual had legal capacity to do so, or whether it has since been revoked or superseded. This can pose significant challenges for third parties, as well as for the effective implementation of the law. Third parties may rely on invalid appointments, over-apply limited appointments, or failure to respect valid appointments. Service providers have expressed frustrations to the LCO about the current state of affairs, but have adopted widely varying approaches to attempt to manage the problem. Some financial service providers encourage clients to complete special purpose banking powers of attorney to address some of these issues, a practice that has raised concerns because of the potentially significant effect that completing a banking POA may have on the effectiveness of pre-existing POAs.

Finally, practical issues have been raised regarding the coming into effect of POAs for property. It is generally the intent of grantors that POAs not come into effect until the grantor no longer has legal capacity to manage property. Under the SDA, grantors may, as highlighted above, create “springing” POAs that only take effect upon legal incapacity. However, there may be practical problems regarding the assessment of capacity for this purpose. Some POAs may provide for an assessment of capacity by a family doctor: however, most doctors receive little training on assessing capacity, and this is not necessarily a task that doctors will be willing or able to undertake. Alternatively, the POA may specify that the assessment must be undertaken by a designated Capacity Assessor under the SDA; however, as described in Part Two, Chapter II, access to these assessors may be constrained by cost, location or availability, and the assessment may only be carried out with the assent of the person assessed. As an added wrinkle, however capacity is assessed for the purpose of “springing” a POA for property, third parties such as financial institutions may be reluctant to act on such a POA without documentation that demonstrates that the POA has indeed been triggered. These problems

may limit the useability of this form of POA. As a result, many individuals instead use continuing POAs which come into effect immediately, but attempt to take steps to ensure that the POA is not used before it is required, for example by giving it to a third party for safekeeping. This approach obviously carries its own risks with it. [527]

- **QUESTION FOR CONSIDERATION: What practical reforms to law, policy or practice would be most effective in providing grantors of powers of attorney for property with more effective means of appropriately triggering the operation of these documents?**

3. Options for Reform

Jurisdictions vary in the extent and onerousness of their requirements for the creation of a POA or other personal appointment. Generally, there is perceived to be a trade-off at this stage between promoting the accessibility of these instruments (and thereby enhancing the ability of individuals to plan forward and to chose their own arrangements), and ensuring that those creating these powerful documents are aware of their effects and of their attendant risks, and are not being coerced or mislead into creating them. As described above, Ontario already has a number of safeguards incorporated into its requirements for creation of a power of attorney, including requirements for two independent witnesses, and a statement of intent for the creation of a continuing power of attorney, as well as barring certain individuals who may have a clear opportunity for coercion or undue influence from acting as attorneys for personal care. Some other potential safeguards are briefly outlined below. Several of them are focussed on ensuring that the individual creating the appointment understands the risks as well as the benefits of the appointment; others are focussed on ensuring that coercion has not been applied to the person making the appointment.

<u>Capacity requirements</u>

The law may set a high bar for the legal capacity to create a personal appointment in order to ensure that the associated risks have been well understood and taken into account in making the appointment. Of course, setting the bar too high will unnecessarily deprive individuals of the benefits associated with these appointments. This issue in many ways goes to the heart of the debates about law reform in this area, as is clear from the preceding chapters.

The tradeoff between accessibility and prevention of abuse is clear on this issue; the two may and have been balanced in different ways. For example, recognizing that the nature of the powers and the risks associated with administration of property are different from those associated with personal care, Ontario has made the capacity requirements for POA for property considerably more rigorous than those for POAPC. The test for capacity for a POAPC is set at a level that is relatively easy to meet; the test for capacity for a POA for property is stringent compared to that of many other jurisdictions. One might also balance a more

accessible capacity requirement with more rigorous mechanisms for monitoring and scrutiny during the operation of the personal appointment.

Requirement to seek legal advice

Another mechanism for ensuring that those making a personal appointment understand the risks of such an undertaking is to require that they obtain legal advice in order to create a valid document. This ensures that these individuals obtain accurate and appropriate information about the impact of a continuing or springing POA, and can help ensure that the document is valid and fully reflects the wishes of the grantor. Yukon's *Enduring Power of Attorney Act* requires that an enduring POA be accompanied by a certificate of legal advice, attesting that the grantor had the capacity to create the document and voluntarily signed it.[528]

The downside of these types of requirements is that, except for those few individuals who have access to legal aid, there is a cost to obtaining legal advice. This may be a deterrent, or even an absolute barrier to the creation of these appointments. Low income individuals might well be effectively barred from the option to make their own personal appointments, unless special measures were adopted to provide free or very low-cost access to legal advice for personal appointments for these individuals. For this reason, the Western Canada Law Reform Agencies and the Law Reform Commission of Nova Scotia each, in their reports on powers of attorney, ultimately rejected proposals for mandatory legal advice.[529]

The Alberta Law Reform Institute (ALRI) does not recommend requiring legal advice for the creation of a valid enduring POA, but instead recommends that the grantor must either appear before a lawyer, who must certify that the requirements for a valid EPA have been met, or one of the witnesses must sign an affidavit to the same effect – a regime similar to that currently in effect in Saskatchewan.[530] ALRI believes that a lawyer's certificate would provide better quality control and would provide an opportunity for useful legal advice, but the second option would provide the grantor with a less formal choice and maintains the accessibility of the instrument.[531]

Mandatory information

Considerable information is available for individuals in Ontario who are considering granting a power of attorney, or are acting under one. The Ministry of the Attorney General and the PGT provide information on the internet, and the optional POA forms available through the government website include a considerable amount of useful information and advice. Advocacy and service organizations have created documents outlining key characteristics of powers of attorney, and service providers often have available simplified or plain language publications specific to their users. Significant public education about POAs has been undertaken by the PGT and by organizations like Elder Abuse Ontario and the Advocacy Centre for the Elderly.

Information about POAs is relatively accessible for those who seek it out. However, this information is not mandatory. Many of those affected by these laws will not seek it out, whether because they "do not know what they do not know", because they do not know where to look for information, because there are informational barriers (such as language, literacy or a learning-related disability) or for other reasons.

Some jurisdictions have a mandatory form, which must be used in order to ensure the validity of the instrument. One advantage of such a mandatory form is that it may include information about the requirements, implications and risks of a power of attorney, ensuring that grantors (and attorneys) have access to this information. The state of Queensland in Australia is one such jurisdiction. In its review of the mandatory from, the Queensland Law Reform Commission noted concerns that the inclusion of extensive information on the mandatory form made it long and cumbersome, and considered separating the information out into a separate booklet or kit. Ultimately, it recommended that the forms be re-drafted, but that they continue to include the information on the form itself, as well as in a perhaps expanded stand-alone booklet, reflecting the perceived importance of ensuring that grantors have access to the necessary information and warnings. As one stakeholder commented to the QLRC,

> In many ways, this helps to ensure that adults who are signing the form have a better opportunity to be properly informed about the pros and cons of signing such an important document. It also means that adults are less vulnerable to being tricked into signing a form they do not understand, or which they think is to be used for some other purpose. The presence of the 'fine print' throughout the form itself is a useful warning device.[532]

- **QUESTION FOR CONSIDERATION: Are there practical reforms that should be made to the requirements or options for the creation of a power of attorney to improve the understanding or grantors or attorneys or both of the risks, benefits and responsibilities associated with these powerful documents?**

<u>Registry Systems</u>

Registry systems are frequently suggested as a means of addressing either or both concerns about POAs – verification and validation, and the prevention and identification of abuse. The Grey Flag campaign states,

> A registry of POAs is the first step in repairing the broken system. Currently, there is no way for concerned relatives to confirm if a POA truly has the power they claim or what the POA document says without going to court. As soon as someone claims to be POA, it should be able to be checked in a government registry by agencies, health care professionals, banks, and family and friends of the affected person. Without it, the life savings and the standards of living of the elderly are put at risk.[533]

Registration to some extent moves POAs into a more public realm, where interested parties can identify them, review their use and determine whether an attorney is acting in accordance with the terms of the instrument. In its 1972 Report, the Ontario Law Reform Commission recommended the creation of a registry for powers of attorney, noting the benefit of putting the "power of attorney on public record, and more importantly publicly identify[ing] the attorney. This not only protects the attorney, but also enables interested parties to inform themselves of the existence of the power."[534] This recommendation was not implemented.

Several Canadian jurisdictions have voluntary registries, generally with the Public Trustee. These include Manitoba,[535] Nunavut,[536] and the Northwest Territories[537]. British Columbia does not have a statutory registry; however, it does have a privately-run registry known as the Nidus E-Registry. Nidus is run by a charitable organization, the Nidus Personal Planning Resource Centre.[538] As the Nidus Registry is not statutorily authorized, it is dependent on the consent of all of those whom wish to register their EPAs in the Registry. It costs $25 to register a document. Thereafter designated individuals and approved service providers (i.e. hospitals) have access, although it should be noted that service providers must pay a fee for this access.

There are mandatory registry systems in a number of jurisdictions, including Scotland, Ireland, some Australian states and Hong Kong. The most comprehensive mandatory registry system appears to be that of England and Wales. Under the *Mental Capacity Act 2005,* a lasting power of attorney is not valid unless it is registered with the Public Guardian.[539] The registration includes, not just information about the parties to the POA, but the instrument itself. Registration may take place either at the time of the creation of the instrument, or at the time when the grantor loses capacity. Once registration is accepted, all named parties (including the grantor) are officially notified by the Public Guardian that the instrument has been registered and is effective, or will be upon incapacity of the grantor. Any person can apply to search the register for a modest fee, and can receive basic information about the appointment, including the date of birth of the grantor; the names of any deputies or attorneys; the date the instrument was made, registered, revoked or cancelled (if applicable); the type of instrument; and whether there are conditions or restrictions on the instrument (but not the substance of those conditions or restrictions). For further information, a special application must be submitted, with reasons for the request.

The Victorian Law Reform Commission has recently recommended a comprehensive online registry scheme, noting that this proposal received very strong support from stakeholders and the public, both as supporting the effective implementation of POAs, and as reducing risks of abuse. The register would include associated instruments, such as advance health directives and supported decision-making appointments, as well as powers of attorney and guardianships. Registration would be mandatory, but the Victorian Civil and Administrative Tribunal would

have corrective powers in appropriate cases of non-registration. Only authorized persons and organizations would have access to the register; grantors and attorneys would be able to view information relevant to their own instrument.[540]

Private members bills to create a registry system have been introduced in the Ontario legislature, most recently in February 2013. Bill 9, the *Protection of Vulnerable and Elderly People from Abuse Act*, would have created a public register of all continuing powers of attorney for both property and personal care, to be maintained by the PGT. Information included in the registry would include contact information for the grantor and the grantor's attorney, the date that the attorney's authority took effect and any restrictions on that authority, and the names of persons or groups of persons whom the grantor has identified in the power of attorney as persons to whom the PGT may disclose information. Bill 9 did not proceed past first reading. A very similar Bill was put forward unsuccessfully in 2011.

Critiques of Bill 9 and its 2011 predecessor focussed on preserving the privacy of those who create powers of attorney, and on the accessibility of powers of attorney. One MPP commented,

> If, as this bill proposes, I'm required, if I give someone a power of attorney, to call up a bureaucrat, the public trustee's office, and say, "I've asked so-and-so to be my attorney," and I've got to file various papers and, not only that, the public trustee has to maintain a public registry where everybody is listed, who has power of attorney and so on, that is an invasion of my privacy. I'm quite capable of taking that decision at the same time I create my power of attorney, because, by definition, I can only create a power of attorney when I'm fully capable. So I know who I want to know who has my power of attorney.[541]

Another MPP commented on the 2011 Bill that,

> I think it's very complex; it's not as easy as you think. We're going to create more layers of bureaucracy. We're going to make it more difficult for seniors to act alone, independently, if we force them to register the power of attorney. According to all the professionals in this field, they said to me-and I read many different analyses about this bill-that it will make it more difficult for seniors to act.[542]

Certainly, the privacy issues are complex. Designing a registry system that would be in compliance with both the *Personal Health Information Protection Act* and the *Personal Information and Protection of Electronic Documents Act* would be challenging, particularly if the registry was mandatory or contained a copy of the instrument itself.

- **QUESTION FOR CONSIDERATION: Would a registry system for powers of attorney improve the ability to verify and validate these documents, or to prevent and identify abuse? What would be the benefits and disadvantages of a registry system?**

- **QUESTION FOR CONSIDERATION: If a registry system for powers of attorney should be created,**
  - **a) Should it be voluntary or mandatory?**
  - **b) What information should be maintained in the registry?**
  - **c) Who should have access to the information in the registry and under what circumstances?**
  - **d) Who should operate the registry?**
  - **e) What would be required to ensure its compliance with privacy legislation?**

Requirement for multiple attorneys

In some jurisdictions, the grantor is required to name multiple attorneys. This may provide some monitoring for potential abusers. Realistically, however, many individuals have difficulty finding even one person who is appropriate, capable and willing to act as an attorney; to require multiple attorneys may not be feasible. ALRI notes that this would be a cumbersome arrangement, and that likely one attorney would delegate most of the power to the other, and on this basis declined to make such a recommendation.[543] Ontario provides the option for individual to appoint multiple attorneys, but does not require it.

Duty to Account, Notices of Attorney Acting and Monitors

A number of jurisdictions have adopted or recommended measures that either encourage or require individuals creating POAs to identify in those documents persons who will provide monitoring or other types of oversight for the attorney.

Manitoba, following recommendations of the Manitoba Law Reform Commission, created an obligation on attorneys to provide an accounting as to property matters upon demand by any person named in the power of attorney as a recipient of such an accounting or, where no person is named or the named person is deceased or mentally incompetent, to the nearest relative (with some exceptions). The person receiving the accounting does not have a duty or liability in respect of the accounting.[544] Saskatchewan has implemented a system similar to this; the system is not mandatory for attorneys that are not being compensated for their activities, and is triggered only upon a request.[545] The Northwest Territories and Nunavut also make provision for these informal accountings to recipients named in the power of attorney document.[546]

In its report, the Alberta Law Reform Institute (ALRI) combined a recommendation for identification of individuals to receive reports with one requiring attorneys to provide notice to certain individuals or organizations upon commencing their responsibilities. ALRI's Report, *Enduring Powers of Attorney: Safeguards Against Abuse,* recommends that attorneys must, before or within 30 days of exercising an enduring power of attorney, give notices of their intention to act to persons designated in the power of attorney and to specified family members. These persons would thereafter be entitled to request, at reasonable intervals and at

their own expense, an opportunity to inspect the lists and records that the law requires the attorney to maintain. This is intended to create a mechanism for ongoing supervision of the attorney. It removes the necessity for interested persons who are concerned about the grantor to make an application to court in order to review the conduct of the grantor's affairs by the attorney.[547] ALRI saw this as a more practical alternative than assigning a responsibility to a public official, such as the Public Trustee, to review the accounts of an attorney on an annual basis, or a requirement to pass accounts with the court.[548] A very similar recommendation was adopted in the Western Canada Law Reform Agencies' 2008 Report on *Enduring Powers of Attorney: Areas for Reform.*[549]

The New Zealand Law Commission, in dismissing a recommendation that near relatives be informed both of the grant of the POA and of the point at which it came into effect, has argued that grantors are sometimes estranged from their near relatives, and may not wish that their relatives be informed of their affairs.[550] That is, where grantors have not specified a person to receive the notice (and the accounts) in their power of attorney, there may be concerns about violation of the privacy of the grantor. The Queensland Law Reform Commission expressed concerns about the privacy implications of a notification scheme. They also commented that it was a restriction on the autonomy of the grantor, who could voluntarily include such a requirement in the power of attorney if so desired.[551]

The British Columbia *Representation Agreements Act* creates a much more comprehensive system of informal supervision, through the institution of "monitors". The law requires that any "adult who makes a representation agreement… must name as monitor in that agreement an individual who… is at least 19 years of age and [is] willing and able to perform the duties and powers of a monitor."[552] A monitor may resign, but if they do (or become unable to discharge their duties), the representative's authority is suspended until a new monitor can be appointed or the court determines a monitor is not necessary.[553] The duties and powers of a monitor are significant, and include being required to make "reasonable efforts to determine whether a representative" is acting honestly and in good faith, within the boundaries of the representation agreement.[554] The monitor has the power to visit the grantor of the agreement at any time, and cannot be prevented or hindered from doing so by anyone with custody or control of the grantor.[555] The monitor can require the representative to produce accounts and records if they suspect the representative is not acting responsibly, though if they do so they must notify the grantor and all representatives named under the agreement.[556] If after reviewing said records, the monitor still believes the representative is not complying with their responsibilities, the monitor is required to inform the Public Guardian and Trustee.[557]

The Victorian Law Reform Commission expressed caution about a mandatory requirement for monitors. It noted that current law did not prevent grantors from appointing monitors, and that

it might be best left to individuals to determine the role, if any, that should be played by a monitor.[558]

On the other hand, the Queensland Law Reform Commission stated that it believed encouraging individuals to include provisions for monitors within their powers of attorney was preferable to options involving public review of accounts, such as periodic reviews of the attorney's activities by the Public Guardian or the Civil and Administrative Tribunal, or a system of random audits:

> Instead, the Commission considers it preferable to encourage people who make enduring powers of attorney to establish their own protections within the enduring power of attorney. This could be done by making provision in the approved forms for an enduring power of attorney for the principal to nominate one or more persons to whom the attorney must, on a regular basis, provide a summary report of records and accounts of all dealings and transactions made by the attorney under his or her power for the adult. Ideally, the principle would nominate a person who the principal trusts and is independent of the attorney. It is anticipated that this approach would not add greatly to the attorney's load, given that the attorney is required to keep those records in any event. The person who receives the accounts should not have any duty or liability to take any action regarding the accounts. However, it is hoped that a nominated person who suspects or finds financial mismanagement would take appropriate action to resolve the situation, for example, by making an application to the Tribunal for the removal of the attorney or by making a complaint to the Adult Guardian.[559]

- **QUESTION FOR CONSIDERATION: Are there mandatory requirements or options that should be added to the creation or provisions of powers of attorney, such as duties to account, monitors or notices of attorneys acting, to improve monitoring and accountability for attorneys?**

C. The Public Appointments Process

In Ontario, public appointments processes are available where an SDM is required and the individual does not have the legal capacity to create a personal appointment through a POA. A personal appointments process assumes that the individual, through knowledge of his or her own circumstances, and of the character and circumstances of his or her family or friends, has the motivation and ability to carefully screen and select the most appropriate SDM. A public appointments process must provide external scrutiny both of the necessity for the appointment and the individual selected for the role. While the SDA does make provision for the appointment of the PGT through a POA, in practice this is extremely rare, and in almost all cases the PGT will be appointed through a public appointments process.

The section below focuses on public appointments under the SDA. It should be noted that there is also a public appointments process under the HCCA. Under that Act, the Consent and

Capacity Board (CCB) has the power to appoint (or terminate the appointment of) a representative to make a decision for a person who is legally not capable with respect to treatment, admission to long-term care or personal assistance services, upon application by the person for whom the decision is to be made, or by a person who wishes to act as a representative.[560]

1. Appointing a Guardian

In Ontario, guardians may be appointed through three means: statutory guardianship for property, court-appointed guardianship and temporary court-appointed guardianship following a PGT investigation. Each of these is briefly described below.

Statutory Guardianship

Statutory guardianship is intended to provide an expeditious, relatively low-cost administrative process for entering guardianship. It was included in the SDA in accordance with the recommendations of the *Fram Report*, which characterized it as a process intended to "allow families to avoid unnecessary applications to court in situations where there is no doubt about an individual's incapacity, and the person does not object to having a [guardian]".[561] It is important to note that statutory guardianship applies only to property management, and not to personal care.

Statutory guardianships are triggered automatically through a finding of a lack of capacity, either through an Examination for Capacity under Part III of the *Mental Health Act* (MHA), or through a Capacity Assessment under section 16 of the SDA. A detailed description of these capacity assessment processes can be found in Part Two, Chapter I of this *Paper.* In summary, a Capacity Assessment takes place in the community, as a request and assent-based process performed by a specialized and privately-paid designated capacity assessor. An Examination of Capacity under the MHA is mandatory upon admission to a psychiatric facility, with procedural protections provided through rights advice and access to Legal Aid-funded counsel for an appeal to the CCB.

Initially, the statutory guardian for property is the PGT. However, as is detailed in Part Three, Chapter II, designated individuals may apply to the PGT to become replacement guardians of property, and where the applicant is suitable and has submitted an appropriate management plan, the PGT may appoint the person. There is a fee for a replacement application: in 2013, that fee was $382 plus applicable taxes.

If the PGT refuses an application to act as a replacement statutory guardian, it must give reasons in writing for its decision. If the applicant contests the decision of the PGT in writing, the PGT must apply to the Court to resolve the matter.[562]

Court-Appointed Guardianship

Application process and procedural protections: Any person may apply to the Superior Court of Justice to appoint a guardian of property or personal care.[563] It is important to note that guardianships of the person can *only* be obtained through a court order, and not through a statutory process. Further, guardianship of the person may be full or partial, and full guardianship may be ordered only if the court finds that the individual is incapable with respect to all issues contained within this area, including health care, nutrition, hygiene, safety, shelter and clothing.[564]

An application for guardianship must be accompanied by

1. the consent of the proposed guardian;
2. a plan for guardianship (if the application is for personal guardianship) or for management of property (if the application is for guardianship of property);
3. a statement from the applicant indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or if it was not possible to give the person this information, an explanation of why it was not possible.[565]

The SDA contains additional measures to ensure an adult's due process rights in these applications. It requires that notice of the application be served with accompanying documents on the adult alleged to be incapable, specified family members and the PGT, among others.[566] The SDA also requires at least one statement of opinion by a capacity assessor that an adult is incapable and, as a result, the same measures of due process that apply to capacity assessments for statutory guardianship appointments also apply to those for summary disposition applications. These include that a capacity assessor must provide information to the adult about the purpose and effect of the assessment and that the adult is entitled to refuse the assessment.[567]

As well, for all applications for court-appointed guardianships, the PGT is a statutory respondent.[568] The PGT reviews these applications, and will send a letter addressing the issues raised by the application to counsel for the applicant as well as to the Registrar for the Superior Court of Justice. In most cases, issues are clarified and resolved prior to hearing, but in rare cases, the PGT may appear at the hearing to submit responding evidence or make submissions or both.[569]

Summary procedures: The SDA provides for summary procedures for both applications for and termination of guardianship. This allows the applications to be addressed on the basis of the documents provided, without a hearing or any appearances, where all parties agree to do so. In such summary applications, the judge may grant the relief sought, request the parties to

provide further evidence or make representations, or order the matter to proceed to a hearing.[570]

There is little evidence about how summary dispositions operate in practice. The LCO heard from one lawyer that in some cases summary disposition applications have worked effectively and expeditiously as a streamlined process. They minimize the possibility of a court appearance, which makes them more cost-effective. They have particularly worked well in the developmental disability community, when the relationship between the adult and his or her family members is "straightforward" and the application is not contested.[571] However, summary disposition applications are not used frequently. The LCO has heard that one explanation for the low usage of summary disposition applications in Ontario is that appointing a guardian without a hearing has raised concerns regarding due process, given the gravity of the rights at issue.[572] The Law Society of Upper Canada states that "it should be noted that not all jurisdictions or members of the bench allow guardianship matters to proceed in this fashion, citing that the seriousness of the relief requested requires a hearing".[573]

As well, while summary dispositions are less costly than a regular application with a hearing, costs remain an issue: the costs of summary disposition applications can range between approximately $7,500 and $10,000 in urban centres. Documentation from capacity assessors makes up a large portion of these costs, possibly $3,000 to $4,000 in more complex matters.[574] Additionally, if a judge is not satisfied that a proposed appointment is appropriate based on evidence in the application, he or she may order further information or a hearing.[575]

Least restrictive alternative: Under the SDA a guardian may only be appointed by the court where:

- The individual has been determined to lack capacity to make decisions related to property or to personal care, and as a result of that lack of capacity needs decisions made on her or his behalf by a person authorized to do so,[576] and
- The court is satisfied that there is no alternative course of action that would not require a finding of incapacity and would be less restrictive of the person's decision-making rights.[577]

The term "alternative course of action" is not defined in the legislation, and in practice, these provisions have received limited use. Powers of attorney have been recognized as important alternatives to guardianship,[578] as well as the importance of informal supports. Notably in *Koch (Re)*, the Court found Koch capable of managing property, commenting that mental capacity exists if the individual is able to carry out decisions with the help of others, and that the appellant had access to a number of services and supports that allowed her to function in her environment.[579]

The wording of the legislation indicates that guardianship is meant to be used as a last resort: even if a person is found to lack legal capacity, a guardian will only be appointed if there is a need for decisions to be made, and there is no less restrictive alternative available. Stephen Fram commented about these provisions to the Standing Committee that held hearings regarding what became the SDA that,

> It has always been the intention of the various governments that guardianship, because it takes away all rights in connection with a person, be the last alternative when you can't use powers of attorney for personal care, when you can't use a Ulysses contract[580], where you can't use other forms of a *Consent to Treatment Act*. The last thing in the world we want is too much guardianship in the province. This really says, 'Guardianship is the last resort. If you can't get the decisions in another way, court-appoint the guardian, but otherwise look to less restrictive means.[581]

Bach and Kerzner make the case that the least restrictive alternative and alternative course of action provisions were originally intended specifically to "address the needs of a very specific group – those individuals with significant intellectual and cognitive disabilities who were unlikely to meet the threshold to appoint a power of attorney for personal care", and who wish to make decisions without a finding of incapacity, in the context of their trusting relationships.[582]

Temporary Guardianship Following a Serious Adverse Effects Investigation

One of the responsibilities of the PGT is to undertake an investigation where there is an allegation that a person is incapable of managing either property or personal care, and that incapacity is resulting or may result in serious adverse effects.[583] Where a PGT investigation provides the PGT with reasonable grounds to believe that a person is incapable and that prompt action is necessary to prevent serious adverse effects, the PGT must apply to the court for temporary guardianship.[584] The court may appoint the PGT as guardian for a period of not more than 90 days, and may suspend the powers of an attorney under a POA during the period of the temporary guardianship. The order must set out the powers and any conditions associated with the temporary guardianship. At the end of the period of temporary guardianship, the PGT may allow the guardianship to lapse, request the court to provide an extension or apply for a permanent guardianship order.

Notice of the application must be served on the allegedly incapable person, unless the court dispenses with the notice in view of the nature and urgency of the matter. If an order is made and notice was not served, the order must be served as quickly as possible.

2. Exiting From Guardianship

The methods for exiting from guardianship will depend on the type of guardianship that is applied to the individual. There are a number of avenues by which the identity of the guardian

may be changed (e.g., upon the death of a statutory guardian); the focus here is rather on the process by which an individual may regain the right to make her or his own decisions independently.

Review by the CCB: Where a statutory guardianship is triggered through an assessment by a designated capacity assessor or under Part III of the MHA, the individual has a right to apply to the CCB for review of the assessment, within six months of the assessment. If the CCB determines the person capable of managing property and that decision is either not appealed or upheld on appeal, the guardianship will terminate.[585]

Reassessment of Capacity: For statutory guardianships, a fresh capacity assessment demonstrating capacity will automatically terminate a guardianship. For statutory guardianships entered into through the community process, the statutory guardianship for property will automatically terminate upon the provision of notice to the guardian by a designated capacity assessor, expressing the opinion that the person has the capacity to manage property.[586] It is important to note here that statutory guardians have a duty to facilitate a re-assessment every six months, at minimum, upon the request of the individual under guardianship.[587]

For those who entered into a statutory guardianship through the MHA, the guardianship will be terminated where notice is provided to the guardian that the attending physician cancels the certificate of incapacity, or that the patient has been discharged without a notice of continuance of incapacity, or that after a notice of continuance the attending physician has become of the opinion that the individual is capable of managing property.[588]

Application to Court: Guardianships, whether statutory[589] or court-appointed,[590] may also be terminated or suspended by application to the court. As with applications to appoint guardians, motions to terminate may be carried forward by summary disposition.

3. Concerns and Critiques of the Public Appointments Process

Guardianship has been generally acknowledged to be a measure that, while it may at times be necessary, nevertheless significantly impinges on the fundamental rights of those on whom it is imposed. In the words of Michael Bach and Lana Kerzner,

> Determining a person as incapable or incompetent to manage his or her affairs in some or all respects removes a person's authority over their own lives and vests this authority in another. While usually done in the name of protection, such removal of an individual's legal personhood is increasingly seen from a disability rights perspective as a violation that brings social and legal harm to individuals. The concern is that individuals are no longer addressed as persons in their own right when their legal capacity to act is restricted, and thus their moral and legal status is more likely to be diminished in the eyes of those in close personal relationships, caregivers, community members, health and human services, and public institutions. This diminishment contributes to the risk of stereotyping, objectification, negative attitudes and other forms of exclusion which people with

> disabilities disproportionately face; and which increase powerlessness and vulnerability to abuse, neglect and exploitation.[591]

For this reason, modern guardianship legislation, including that of Ontario, aims to impose guardianship only where necessary, where other alternatives, formal or informal, are not available, and only for as long as necessary. As noted above, the SDA specifies that court-appointed guardianship will only be appropriate where no less restrictive course of action is available.

However, concerns remain that in practice, guardianship may still be excessively employed. Kohn *et al*, writing about guardianship in the United States, note that while guardianship reform has emphasized that it is to be used only as a last resort, research has indicated that guardianships may be imposed without sufficient scrutiny, and rather than being treated as an extraordinary proceeding are being used as a routine part of "permanency planning".[592] Surtees, in considering the empirical evidence related to guardianship reform in Saskatchewan, notes that despite the positive principles included in that jurisdiction's 2001 reforms, including the presumption of capacity and a legislative preference for the least restrictive alternative, the overwhelming majority of guardianship orders continue to be virtual plenary orders. Surtees proposes that a lack of knowledge of the legislation on the part of the bench and bar may underlie the issue; as an alternative, applications for guardianship may be delayed too long, so that they are only brought at the point where plenary orders are in fact the least restrictive alternative.[593]

No research has been undertaken specifically for the province of Ontario to determine whether the underlying principles of the legislation with respect to guardianship are being effectively applied in practice. However, these types of concerns have been brought to the fore in Ontario, including in the LCO's preliminary consultations.

For context, it appears that there are 1838 open personal guardianship files in Ontario as of the fiscal year 2013 – 2014, based on information from the registry of guardians maintained by the PGT. However, it should be noted that unless the PGT is informed of the termination of the guardianship, for example due to the death or incapacity to manage personal care on the part of the guardianship, the file remains open, so that these numbers may be greater than the number of actual active guardianships in the province. Similar caution must be exercised in interpreting the figures related to property guardianships provided below. Section 15 guardianships are statutory guardianships by the PGT resulting from MHA certificates, while section 16 guardianships are statutory guardianships by the PGT resulting from capacity assessments. Under section 19, the PGT may resume a role as statutory guardian where the replacement guardian dies, resigns or becomes incapable of managing property.

Table 1: Count of open property guardianship files by jurisdiction type as at the end of fiscal 2013/14[594]

Status	PGT Court-appointed	PGT S15 SDA	PGT S16 SDA	PGT S19 SDA	PRIVATE Court-appointed	PRIVATE Statutory
Open Total	318	4881	5567	31	3657	2379

Part Three, Chapter I of this *Paper* considered alternative forms of decision-making that could form alternatives to guardianship, while Chapter II of that Part considered expanding options for who could provide decision-making assistance. This section of this Chapter focuses on the role of processes in ensuring guardianship is imposed only as necessary. In particular, concerns have been expressed that there are insufficient checks in guardianship processes to ensure that it is employed only as a last resort; that barriers to accessibility in processes make it difficult for individuals to have guardianship removed (or to enter it where needed); that processes are insufficiently flexible to be responsive to changes in circumstances or levels of capacity; and that some of the processes lack sufficient transparency and accountability.

Guardianship as a last resort: As was highlighted above, in an application for a court-appointed guardianship, the court is required to consider whether there are less restrictive alternatives available. No such provision applies to statutory guardianship, and in fact, these processes lead directly to what some consider the most intrusive form of guardianship, that exercised by the state in the form of the PGT.

Bach and Kerzner, in an unpublished paper, have further argued that the provisions related to "least restrictive alternative" for court-appointed guardians have limited applicability in practice. They point out that:

> Counsel rarely make these arguments or provide relevant evidence to substantiate the existence of alternatives. It would not be in the applicant's interest to raise such arguments, as these arguments are in opposition to their desired result, which is to obtain guardianship of the alleged incapable person. Many respondents who are alleged incapable, and would benefit from alternative course of action arguments, are unrepresented and often do not appear at the hearings so they do not have the opportunity to raise such arguments and provide evidence of their existing life circumstances allowing them to effectively make decisions in the absence of guardianship, through alternative avenues such as accessing supports.[595]

Accessibility: Concerns have been raised about the accessibility of guardianship processes. These apply both to processes for entering and for exiting guardianship. Concerns are related to costs and to the reactive nature of many of the provisions related to challenging guardianship.

As was described above, the costs for entering or exiting statutory guardianship are more modest than those for a court-appointed guardianship. For an MHA initiated guardianship, the costs for a family member wishing to act as statutory guardian are limited to the replacement application fee. For community-based statutory guardianships, the major cost in addition to the replacement application fee is that of the capacity assessment. The cost of such an assessment may vary considerably depending on the assessor and the complexity of the case, and may range from several hundred to several thousand dollars. The Capacity Assessment Office does have some funding to cover the costs of assessments for low-income individuals. The cost of a capacity assessment is generally also the major component of the cost of exiting statutory guardianships. The court-based process is of course more expensive, including not only the cost of the capacity assessment, but also the expense of legal fees, which may very significant, particularly for those of modest means.

The LCO has heard that some third parties may not see guardianship as a viable option for some individuals who lack legal capacity, due to cost and process barriers, even where it is the legally appropriate course of action, and may, with the best of intentions, seek to do an "end run" around the legislation, for example, by allowing families to exercise powers beyond those set out in an existing POA. Families may seek to obtain guardianship powers beyond those needed at the present time, because they do not wish to go through the trouble or expense of re-applying to the court as circumstances change.[1] On the other hand, families may also seek to avoid the costs and trouble of formal proceedings by such means as sharing PIN numbers or creating joint accounts, thereby exercising considerable powers with no mechanism for oversight or ability to impose legal responsibility for abuse.

ARCH Disability Law Centre, in their paper on protecting the rights of persons subject to guardianship, notes the barriers that persons with disabilities may face in attempting to assert their capacity and exit guardianship. Litigation to pursue a court order may be beyond their means, particularly where the guardian is controlling access to funds. The lack of a duty on a court-appointed guardian to facilitate re-assessments was of particular concern:

> There is no requirement in the SDA that a person subject to a court-appointed guardian be offered an opportunity to be re-assessed to establish that they have regained their capacity. Even if the 'incapable' person requests an assessment, there is no explicit obligation on a court-appointed guardian to comply with such a request.[596]

These problems are exacerbated by the lack of effective mechanisms to ensure that persons under guardianship are aware of their rights and the recourse available to them. ARCH notes one case where a woman with an acquired brain disability who was attempting to re-assert her independence said she was told by her guardian that "since the court had granted him

guardianship over her, the court would always do as he requested; and that if she caused trouble he could ask the court to put her in jail".[597]

Flexibility: As was noted earlier in this Chapter, the frequently fluctuating or evolving nature of legal capacity means that flexible processes are necessary to protect the autonomy and security of affected individuals. The SDA contains a number of provisions intended to promote ease of re-assessment of persons who are found incapable, including the requirement for pre-discharge re-examinations of the capacity of individuals found incapable under Part III of the MHA and the requirement on statutory guardians to facilitate re-assessments upon request, every six months at minimum. As well, the temporary nature of "serious adverse effects" guardianships ensures some balance between the need for action in urgent cases and protection of the fundamental rights of those who fall under this type of guardianship. However, concerns have been raised that outside of these relatively limited provisions, there are no regular requirements for review of findings of incapacity or of the necessity for guardianship, and that this, combined with the relative inaccessibility of mechanisms for challenging guardianship, may compromise the rights of persons with disabilities who are under guardianship.

4. Options for Reform

It should be noted that many of the issues related to the processes for creating or ending public appointments are closely tied to those associated with dispute resolution. For example, some have suggested that a tribunal-based system for creating and reviewing appointments, as well as for resolving disputes and enforcing rights might be preferable to a court-based system. There have also been suggestions that public appointments process might be strengthened by expanded access to rights advice or individual advocacy, or expanded requirements and mechanisms for provision of information and education. These issues are dealt with in Part IV of this *Paper*, as they relate not only to appointments processes, but to the overall functioning of Ontario's legal capacity, decision-making and guardianship laws. Therefore, the options for reform outlined below are focussed on either limiting the scope of the authority provided to guardians, or to strengthening processes.

<u>Reducing the Scope or Extent of Powers Accorded to Appointees</u>

Extending the application of partial guardianships: Ontario's approach to decision-making is domain-specific. It clearly distinguishes between decisions for property and personal care, and as noted above, for court-appointed guardians of the person, there is a strong legislative preference for partial guardianships. While the SDA permits courts, in appointing guardians of property, to impose such conditions as they deem appropriate, there is not the same strong legislative language directing the consideration of and preference for partial guardianships for property. Nor does the legislation specifically address the possibility of partial guardianships for statutory guardians of property. One option for reform, then, may be to strengthen provisions

related to partial guardianships for property, whether those guardianships occur through court or statutory appointments.

Some jurisdictions provide explicitly for partial guardianships for property matters. In Alberta, when the court addresses trusteeships for property matters, the court may provide that the order applies "only to property or financial matters specified in the order".[598]

Stronger provisions were recommended by the Victorian Law Reform Commission, in its review of that Australian state's capacity and guardianship laws. It recommended that for both personal and financial matters, a non-exhaustive list of types of decisions be created. In particular, it suggested a very specific list of financial matters, including such things as paying sums of money to the person for their personal expenditure, receiving and recovering money payable to the person, carrying on a trade or business of the person, performing contracts entered into by the person, investing for the person, undertaking a real estate transaction for the person, withdrawing money from, or depositing money into, the person's account with a financial institution, and many others.[599] For any guardianship order, the Victorian Civil and Administrative Tribunal (VCAT) would stipulate in the order which specific powers the guardian or administrator should have or, in rare circumstances, that the guardian is able to exercise powers related to all matters in the list.[600] That is, the legislation would specifically direct the VCAT's consideration to the very particular decision-making needs of the individual at issue, and indicates that full administration of property-related matters by the substitute decision-maker should be the exception and not the rule.

Because a significant number of property guardianships in Ontario are created through statutory appointments, if partial guardianships for property are considered desirable, it may also be important to consider mechanisms for directing consideration of partial guardianships in these circumstances, for example, by directing the PGT to consider this as an issue during the replacement application process.

It should be noted that, because the range of decisions that may fall within property management is so extensive, and needs will often evolve as an individual moves through the life cycle, there is a risk with partial guardianships for property of unexpected and problematic gaps in the guardianship order. The nature of the state of Victoria's tribunal system, which, as is noted below, emphasizes regular review of orders, likely makes this a less pressing concern in their context.

Appointments for specific decisions only: In some jurisdictions, the court or tribunal has the power to make a specific necessary decision for an individual, rather than appoint a substitute decision-maker or supporter. For example, in the Bill currently before the Irish parliament, where the court has made a finding of incapacity, and a co-decision-making order is

inappropriate, the court has the power to make the necessary decision or decisions on behalf of the individual, "where it is satisfied that the matter is urgent or that it is otherwise expedient for it to do so". The court may also appoint a decision-making representative solely for the purpose of making a single decision, where appropriate.[601]

- **QUESTION FOR CONSIDERATION: Should Ontario consider reforms to create or strengthen options for more limited forms of guardianship, such as partial guardianships or appointments for specific decisions only? If so, what would be the most practical and effective reforms?**

Time-limited guardianships and mandatory reviews: A second potential area of reform involves time limitations or regular reviews of guardianship orders or both. Notably, Article 12 of the CRPD explicitly requires that measures related to legal capacity "apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body". The SDA permits the court to impose time limitations when it appoints guardians of the person or of property, but it does not create any preference for time limited guardianships, or mandate regular review. The legislation does not explicitly reference time limitations for statutory guardianships. Temporary guardianships arising from "serious adverse effects" investigations are specifically limited to 90 days (although the court has the power to extend the term, as well as reducing or terminating it).

In the Australian state of Victoria, VCAT orders for guardianship (personal or financial) are subject to regular re-assessment. Under the legislation, a reassessment must occur within 12 months after the VCAT makes an order, and at least once within each three year period after an order is made, unless the VCAT orders otherwise. Upon reassessment, the VCAT has the power to continue, revoke, vary or replace the order, as it finds appropriate.[602] In practice, VCAT often orders reassessments of personal guardianship orders every 12 months, and of administration (property) orders every three years. The VCAT also has the power to issue a self-executing order that expires after a designated period or event, unless an application is made to extend the order. These are more common for guardianship than administration orders.[603]

The province of Alberta has included in the *Adult Guardianship and Trusteeship Act* somewhat weaker requirements for review: where the court appoints a guardian (who may deal only with personal matters) or trustee (who deals with financial matters), if the capacity assessment report indicated a likelihood of improvement in capacity, the order *must* include a date for application for a review; if the capacity assessment report does not so indicate, the order *may* include a date for application for a review.[604]

ARCH Disability Law Centre recommends that all substitute decision-making arrangements be time-limited, with provisions for review and potential renewal upon expiry of the term of the

appointment.[605] As well, ARCH recommends that all persons subject to substitute decision-making be notified of a right to have their capacity reassessed on a regular basis, and of the existence of public funds to cover the costs for those who cannot afford an assessment. As well, where-ever the court orders a substitute decision-making arrangement, it must require the decision-maker to offer or arrange a capacity assessment at regular intervals.[606]

Special orders regarding persons with fluctuating capacity: In its comprehensive review of Queensland's guardianship legislation, the Queensland Law Reform Commission highlighted the issues associated with orders related to persons with fluctuating capacity, and questioned whether guardianship or administration orders for persons with fluctuating capacity ought to be limited in some way, such as, for example, providing that the powers are exercisable only during those periods where the individual lacks capacity. The Commission noted that such orders would raise complex issues, such as who should have the burden of proving capacity in particular circumstances, and how and in what circumstances capacity should be assessed. Further, third parties, particularly financial service providers, might find that such orders provided insufficient clarify and certainty regarding the legal authority for any specific decision.[607] However, the Commission ultimately concluded that the interest in protecting the autonomy of adults with fluctuating capacity outweighed these difficulties. It therefore recommended that in those specific instances where individuals have fluctuating capacity, the Civil and Administrative Tribunal should have the power to make an order that the powers are exercisable only in those periods where capacity is lacking, that the guardian or administrator in these circumstances must apply the presumption of capacity in exercising their powers, and that the powers could be exercised only where that presumption was rebutted.[608]

- **QUESTION FOR CONSIDERATION: Are there reforms that should be made to law, policy or practice to ensure regular review of the need for a guardian, such as requirements for time limited guardianships, mandated regular guardianship reviews or special orders for persons with fluctuating capacity? If so, what would be the most practical and effective reforms?**

Procedural Adaptations

Streamlining Processes for Entry to and Exit from Guardianship: During the LCO's initial consultations, several interviewees raised the possibility of streamlined processes for entering and exiting guardianship. As was noted above, Ontario already has a number of reasonably simplified mechanisms, including entry to guardianship through statutory appointments together with the replacement application process, and the summary disposition procedures for entering and exiting guardianship.

When considering further simplification of the processes for entering and exiting guardianship, one must keep in mind the seriousness of the rights at issue. There are risks to the individual in both entering and exiting guardianship, including concerns about fundamental principles of autonomy and security are at play. Due process protections should not lightly be dispensed with.

Some of the concerns with Ontario's existing streamlined processes were discussed earlier in this Chapter, particularly concerns about whether such processes may provide insufficient safeguards and whether they adequately address the costs issue.

Concerns regarding due process in the context of streamlined court applications have been noted in other jurisdictions. For instance, Professor Surtees informed the LCO that in Saskatchewan, the majority of court orders are made through an application without a hearing. Although this procedure was designed to be accessible, he believes it does not consistently safeguard an adult's rights. Professor Surtees reports that the process is difficult to navigate, the adults who are the subjects of an application are infrequently consulted with respect to their wishes and they may not be thoroughly apprised of the process.[609]

Alberta's desk applications for guardianship and co-decision-making provide an example of a streamlined court process with enhanced oversight and support from a government agency. In Alberta, a self-help kit has been made available to members of the public with forms that have been designed to be user-friendly.[610] Applicants forward the desk application documents to specialized review officers within the Office of the Public Guardian who ensure proper completion of the documents and fulfill other duties including providing notice of the application to appropriate parties, drafting a review officer's report and forwarding the documents to the court. The review officers typically meet with the adult who is subject of the application to consult with them about their wishes. The LCO heard that in Alberta, desk applications have generally been regarded as a success in terms of the number of persons using the process and reducing the need for a lawyer.[611]

- **QUESTION FOR CONSIDERATION: Are there reforms to law, policy or practice that would result in a better balancing of accessibility and responsiveness of guardianship procedures with the necessity for adequate procedural protections for such a weighty decision? If so, what would be the most practical and effective reforms?**

Expanded approach to "alternative course of action" and the principle of "least restrictive alternative" to facilitate non-guardianship options: As was noted earlier, court-appointed guardianships are permitted only where the court is not satisfied that the need for decisions to be made can be met by an "alternative course of action" that does not require a finding of

incapacity and that is "less restrictive of the person's decision-making rights" than guardianship.[612] Importantly, there is no similar provision for statutory guardianships, considering the quite different process that they entail.

Alberta's capacity and decision-making regime includes supported decision-making authorizations, as well as public appointments of co-decision-makers, as described in Part Three, Chapter I. Alberta has no provisions parallel to Ontario's statutory guardianship appointments: all appointments of guardians and trustees are made through the Court, although the "desk application" process for these applications is a significant contrast with Ontario's court-appointment process. When considering appointments of either guardians or trustees, courts must, like Ontario's Superior Court of Justice, first be satisfied not only that the individual lacks capacity to make the requisite decisions, and that the appointment is in the individual's best interests, but also whether "less intrusive and less restrictive alternative measures than the appointment" would not adequately protect the adult's financial interests in the case of trusteeships, or have been considered or implemented and have not or would not likely be effective to meet the needs in the case of a guardianship application.[613] In considering the individual's "best interests", the court must consider any personal directive or supported decision-making order made by the adult, or any co-decision-making order that is in effect. Another mechanism to reduce unnecessary guardianships or trusteeships may be found in the requirements for capacity assessments. Capacity assessments are explicitly made two-step processes. Prior to conducting any assessment, the assessor must

- ensure that he or she has been advised of the reasons for the request for an assessment and been provided with a description of the events that gave rise to the request;
- ensure that a medical evaluation has been conducted within the last three months and that that evaluation did not indicate any reversible medical condition that appeared likely to have an effect on capacity;
- make reasonable efforts to meet with the adult in person to provide information about rights and the significance of the procedure and see if the individual requires any accommodations for the effective conduct of the assessment.[614]

Further, a capacity assessor may conduct an assessment only if the assessor is satisfied that an assessment with respect to that matter is warranted.[615]

Bach and Kerzner, in an unpublished paper commissioned by the LCO, argue for a broad re-envisioning of the concept of alternative course of action and the principle of least restrictive course of action, as part of a shift towards a supported decision-making approach. Several aspects of this proposal were highlighted in Part Three, Chapter II and elsewhere in this *Paper.* Importantly, they emphasize that "what is really needed for fulsome recognition of alternatives and supports is not simply a provision, but a legislatively recognized process which gives

evidence and direction as to how the exploration of alternatives is to take place, and which seeks to maximize access to alternatives and supports". [616]

Bach and Kerzner recommend a statutory definition of "alternative course of action" that includes recognition of a range of supports, including supported decision-making planning documents and a statutory form of supported decision-making, and a reformed statutory and court-appointed guardianship process that includes "alternative course of action assessors" and assessments. These "ACA Assessors" would be separate from the current designated capacity assessors. Their task would be to assess alternatives to findings of incapacity and appointment of SDMs. These ACA assessors would have their own set of guidelines and certification procedures. ACA assessments would be required to accompany any application for either statutory or court-appointed guardianships, to provide evidence on which the "least restrictive alternative" requirement could be verified. [617]

- **QUESTION FOR CONSIDERATION: Are there reforms to law, policy or practice that could more effectively ensure that guardians are appointed for individuals only as a last resort, where no less restrictive alternatives are available? If so, what would be the most practical and effective reforms?**

D. Questions for Consideration

1. **Are there concerns regarding the appointments process for substitute decision-makers under the *Health Care Consent Act* that should be addressed in reforming this area of the law?**
2. **What practical reforms to law, policy or practice would most effectively provide grantors of powers of attorney for property with more effective means of appropriately triggering the operation of these documents?**
3. **Are there reforms that should be made to the requirements or options for the creation of a power of attorney to improve the understanding or grantors or attorneys or both of the risks, benefits and responsibilities associated with these powerful documents? If so, what would be the most practical and effective reforms?**
4. **Would a registry system for powers of attorney improve the ability to verify and validate these documents, or to prevent and identify abuse? What would be the benefits and disadvantages of a registry system?**
5. **If a registry system for powers of attorney should be created,**
    a) **Should it be voluntary or mandatory?**
    b) **What information should be maintained in the registry?**
    c) **Who should have access to the information in the registry and under what circumstances?**
    d) **Who should operate the registry?**
    e) **What would be required to ensure its compliance with privacy legislation?**
6. **Are there mandatory requirements or options that should be added to the creation or provisions of powers of attorney, such as duties to account, monitors or notices of attorneys acting, to improve monitoring and accountability for attorneys? If so, what would be the most practical and effective reforms?**
7. **Should Ontario consider reforms to create or strengthen options for more limited forms of guardianship, such as partial guardianships or appointments for specific decisions only? If so, what would be the most practical and effective reforms?**
8. **Should Ontario consider reforms to guardianship procedures to ensure regular review of the need for a guardian, such as requirements for time-limited guardianships or mandated regular guardianship reviews? If so, what would be the most practical and effective reforms?**
9. **Are there reforms to law, policy or practice that would result in a better balancing of accessibility and responsiveness of guardianship procedures with the necessity for adequate procedural protections for such a weighty decision? If so, what would be the most practical and effective reforms?**
10. **Are there reforms to law, policy or practice that could more effectively ensure that guardians are appointed for individuals only as a last resort, where no less restrictive alternatives are available? If so, what would be the most practical and effective reforms?**

PART FOUR

ACCESS TO THE LAW

Part Four considers the various systems and processes within the Substitute Decisions Act *and* Health Care Consent Act *for ensuring that the law is implemented as intended, and for providing affected individuals with access to rights enforcement and dispute resolution. Chapter I has a particular focus on abuse and misuse of substitute decision-making powers, which was identified as a pressing concern during preliminary consultations. It identifies concerns regarding widespread misunderstandings of the law and a lack of effective monitoring and oversight mechanisms, and it outlines a range of potential reforms to both guardianship and powers of attorney. Chapter II focuses on dispute resolution through the Consent and Capacity Board and the Superior Court of Justice, examining issues related to access to the law, challenges in dealing with bitter family disputes, and the appropriate level of procedural protection where such fundamental rights are at stake. Chapter III reviews supports for accessing these laws, including rights advice and advocacy supports, and Chapter IV considers means for providing information and education about the law to all those who need it, including individuals directly affected, those who assist them with decision-making, those who implement the laws and service providers.*

I. THE PROBLEM OF ABUSE AND MISUSE OF SUBSTITUTE DECISION-MAKING POWERS

A. Introduction

1. The Framework *Principles and the Problem of Abuse of Substitute Decision-making Powers*

Issues related to abuse and exploitation form a persistent theme in laws related to legal capacity, decision-making and guardianship, and in the debates about them. These laws have their inception, in part, in the desire to prevent abuse of persons who are at risk due to impairments in their cognitive abilities. The very nature of the impairments that result in the loss or diminishment of the "ability to understand and appreciate" and that thereby result in the appointment of substitute decision-makers (SDMs), may be considered to increase the risk that unscrupulous individuals will be able to abuse these individuals without being detected or without the victims being aware of and able to exercise avenues for recourse. As Community Living Manitoba commented in a research study on mistreatment of women with intellectual disabilities,

> The cognitive limitations experienced by women with a severe level of intellectual disability can render them unaware that they are in harm's way. That is, they are unable to read the cues in others' behaviours as menacing, exploitative or as potentially dangerous. Moreover, after the fact they may not be able to appreciate that they have been mistreated.[618]

As well, as disability is often associated with marginalization, persons with disabilities that affect their legal capacity may be in positions of economic or social vulnerability, increasing their risk of abuse. As is stated in the *Vulnerable Adults and Capability Issues in BC: Provincial Strategy Document* (the Vanguard Project),

> The higher the level of social vulnerability or incapability, the greater the dependence that adult has on someone else. The greater the dependence is, the greater the risk for abuse or mistreatment exists.[619]

However, because legal capacity, decision-making and guardianship laws give some people power over others, the laws themselves may create opportunities for abuse. As the Vanguard Project Report notes,

> The corollary of trust and power is that it always creates a potential for abuse. Thus, ironically, the very instruments designed to protect a person from some forms of abuse also create an opportunity for mistreatment. [620]

Given the significant restrictions on autonomy associated with substitute decision-making, and the power imbalances that such an order creates between the individual and his or her SDM, it

is essential that any legal capacity, decision-making and guardianship system include meaningful mechanisms for preventing and addressing abuse and misuse. The imposition of a substitute decision-making regime, and particularly of a guardianship regime, without sufficient safeguards would raise significant issues of fundamental human rights. Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) specifically addresses concerns regarding abuse of persons who fall within legal capacity and decision-making law. Paragraph 4 of that Article states that,

> States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

The LCO's *Framework for the Law as It Affects Older Adults* adopted a principle of recognizing the importance of security which recognizes "the right to be free from physical, psychological, sexual or financial abuse or exploitation", as well as the right to access basic supports such as health, legal and social services. The *Framework for the Law as it Affects Persons with Disabilities* includes the principle of facilitating the right to live in safety, emphasizing the "right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety". During discussions and public consultations leading to both *Frameworks*, a central tension was identified between the principles of safety andsecurity on the one hand, and the principle of fostering autonomy and independence on the other hand, with concerns raised that the principles of safety andsecurity not be employed to reduce the autonomy and independence of older persons and persons with disabilities, so that persons with disabilities and older persons may, as others do, choose to live with some degree of risk without undue interference from others.

As was noted above, abuse, neglect and exploitation of older persons and persons with disabilities have some roots in the marginalization and devaluation of members of these groups. Negative attitudes and stigma, social isolation, economic precarity that reduces choice – all of these can contribute to the risk of abuse. In this way, the problem of abuse of persons through capacity and guardianship law is closely connected to a broader societal failure to sufficiently advance the principles of dignity and respect, and of participation and inclusion. This context also highlights that while good law is important to the prevention, identification and response to abuse and exploitation, law alone can only be a partial solution.

2. Situating the Problem of Abuse in Capacity, Decision-making and Guardianship Law

The focus of this Chapter is on the misuse and abuse of substitute decision-making powers, safeguards against such abuse and misuse, and potential amendments to laws related to legal capacity, decision-making and guardianship in this regard. The problem of abuse of vulnerable persons is tied to many broader issues in law and policy, including provision of adequate social services, oversight and enforcement mechanisms for public services, and the criminal justice system. It is not the purpose of this Chapter, or indeed of this project, to address these other areas of the law.

It should be remembered that the *Substitute Decisions Act* (SDA) and *Consent to Treatment Act* (the predecessor to the *Health Care Consent Act*) were initially drafted in tandem with the *Advocacy Act*, as described in Part One, Chapter I. That Act provided a quite extensive publicly financed system for ensuring support and advocacy for those falling within the scope of capacity and guardianship laws. It is the opinion of some that the repeal of the *Advocacy Act* "unbalanced" the legislation, leading to some of the problems with implementation and abuse. The role of supports and advocacy for persons who have been determined to lack or may lack legal capacity to make decisions in a particular domain is an overarching issue that was strongly raised in both of the LCO's *Framework* projects and will be dealt with in the following Chapter of this *Paper*.

Issues of abuse through the law and of misuse of the law are connected to every aspect of legal capacity, decision-making and guardianship laws, and thus to many other aspects of this *Discussion Paper.* Concerns about opportunities for abuse and misuse motivate both advocacy for and many of the objections to new decision-making arrangements such as supported decision-making (Part Three, Chapter I), and are a significant factor in considering who may act in a decision-making role (Part Three, Chapter II). As appointment processes provide a key opportunity for screening out potential abusers and ensuring that SDMs understand their responsibilities, considerations related to abuse are a significant factor in the design of appointment processes (Part Three, Chapter III). Effective mechanisms for rights enforcement and dispute resolution, which are addressed in the remaining Chapters in Part Four, are vital for identifying and addressing abuse. The problem of abuse must thus be considered in weighing almost every aspect of law reform in this area.

In identifying options for reform, this Chapter will not repeat materials from these other Chapters; rather it will focus on how these overarching issues apply to the specific problems of abuse, with particular focus on administrative mechanisms for addressing these challenges. These options should be considered in light of the full range of issues and options presented

throughout this *Paper*. For example, a very rigorous screening process for appointments might be balanced by less onerous reporting or oversight processes or *vice versa*, or a strong complaints mechanism might reduce the pressures on current dispute resolution systems.

B. Understanding the Problem: Abuse through Appointments and Misuse of Statutory Powers

1. Clarifying Scope: Abuse, Abuse through Appointments, and Misuse of Statutory Powers

Abuse through substitute decision-making powers is a subset of a broader set of issues related to elder abuse and abuse of persons with disabilities. These are large issues, with multiple dimensions, and cannot be adequately addressed here. However, concerns about abuse through substitute decision-making powers must be understood in this larger context.

Definitions of what constitutes "abuse" and "elder abuse" vary. The National Initiative for the Care of the Elderly (NICE), with funding from Human Resources Development Canada, has been working towards the development of a consensus definition of elder abuse that could be used for a national prevalence study. Abuse may include physical, sexual, psychological or financial abuse, as well as neglect.[621] Abuse may be perpetrated by institutions or by individuals – as the Vanguard Project notes by, "anyone who may be in a position of intimacy with or power over the vulnerable adult". It generally includes an element of violation of trust and dependency.[622]

The focus of this project is on Ontario's legal capacity, decision-making and guardianship regime, and so the focus of concern in this Chapter is not abuse of persons with disabilities or older adults in general, but specifically the use of substitute decision-making powers, such as powers of attorney or guardianship, as a tool for abuse or to facilitate the abuse. For example, a person holding a power of attorney (POA) may directly use that document to carry out financial transactions that impoverish the individual granting the POA and enrich the attorney, or may use a power of attorney for personal care (POAPC) to isolate the individual (the grantor) and thereby carry out abuse undetected.

Abuse through a POA or guardianship is not necessarily the same as misuse or misapplication. A well-intentioned individual may be unaware of or misunderstand their role and obligations under the appointment. As a result, they may, for example, use a guardianship for purposes beyond those intended, may fail to carry out important obligations such as consulting the person or keeping accounts, or may inappropriately apply a paternalistic or best interests approach to decision-making where the legislation indicates another approach is required. This type of misuse is perceived to be very common, and is problematic. The outcomes may be highly negative for the person under substitute decision-making, and contrary to the clear

intent of the legislation. ARCH Disability Law Centre has identified a number of common forms of misuse of guardianship powers, including:

- Failure to carry out their legal obligations;
- Asserting broader powers than what is provided for under the SDA;
- Failure to consider the individual's wishes or make decisions contrary to those wishes;
- Having insufficient contact with the individual and sharing insufficient or incorrect information;
- Failing to assist the individual to re-assert legal capacity through capacity assessments or termination of an unnecessary or inappropriate guardianship.[623]

These types of issues are also relevant to substitute decision-making powers exercised through a POA. This project will consider both abuse through and misuse of substitute decision-making powers.

This type of misunderstanding and resultant misuse is a broader issue than pure abuse or exploitation. It is a problem not only for SDMs, but also for a wide range of organizations and institutions that rely on capacity and guardianship law in the course of their activities, such as health care or financial institutions and government service providers. There may be some commonalities in the mechanisms for preventing and identifying and addressing this type of misuse with those for deliberate abuse, but there may also be differences, something to be considered when evaluating various options for reform.

2. Prevalence of Abuse

Perhaps surprisingly given the relatively widespread use of substitute decision-making, particularly through POAs and the levels of concern about abuse and misuse of these powers expressed, not only during the LCO's preliminary consultations but in other law reform reports from Canadian jurisdictions, there is relatively little literature specifically related to abuse through substitute decision-making appointments.

As was highlighted in the previous Chapter, the number of individuals under guardianship is relatively small, and is understudied. The number of individuals on whose behalf a POA is being exercised is much larger, but information about this group is hard to come by. In part this springs from the nature of POAs. They are privately created, including through commercial "kits" that are widely available in stores and through forms made available through Ontario's Ministry of the Attorney General. There is no central repository for POAs, so it is impossible to know how many continuing or springing POAs have been created, let alone how many are actually in effect at any period in time. While anecdotal reports of abuse of POAs, and particularly POAs for property, are widespread, it appears to be relatively rare for individuals to seek redress through legal processes, for reasons touched on below. Even if we knew in

absolute numbers how many cases of abuse of POAs occurred in Ontario on an annual basis, we would not have a "denominator" to tell us the relative frequency of abuse compared to the extent of use of POAs. It is therefore difficult to say with any level of certainty how extensive the problem of abuse of POAs really is. However, it is clear that it is a serious and significant concern from the perspective of those who regularly work with older persons and persons with disabilities.

In general, there is a dearth of Canadian literature on abuse of persons with disabilities and elder abuse. A groundbreaking 1989 national survey on elder abuse indicated that 4 per cent of the approximately 2,000 respondents age 65 and older had experienced some form of abuse, with financial abuse being the most common type of abuse suffered by 2.5 per cent of the sample. Those experiencing financial abuse were disproportionately likely to describe themselves as having poor health and as having no one in whom they could trust and confide. The next most common type of abuse was chronic verbal aggression, followed by physical abuse and neglect. It should be noted that the sample included only older persons living in private dwellings and not those living in institutional settings.[624] A British Columbia study that focussed exclusively on financial abuse found a much higher rate of eight per cent of older adults indicating that they had experienced financial abuse. The two most common forms of financial abuse in this study were concerted coercion, harassment and misrepresentation, followed by abuse via power of attorney.[625] Some populations are more vulnerable to abuse than others: a Manitoba study on financial abuse of incapable adults under an order of supervision by the Public Guardian and Trustee found a rate of 21.5 per cent suspected financial abuse among subjects over age 60.[626] The most common suspected abuser was an adult child of the subject. Studies have found that cognitive impairment is an especially potent predictor of elder abuse.[627]

Younger persons with disabilities have in general a higher risk of violence and victimization that is exacerbated for those who are living in institutional settings, have severe disabilities or have "mental disorders". Persons with disabilities are particularly likely to be victimized by someone they know, whether it be family, friends, neighbours or care providers.[628] A study by Community Living Manitoba of mistreatment of women with intellectual disabilities heard concerns about a wide range of abuses, including sexual, physical, emotional and financial abuse, and identified a number of significant factors that either elevated risks of abuse for these women, or placed barriers in the path to addressing abuse. For example, those experiencing abuse may be concerned that reporting abuse may lead to a loss of independence and control.[629] They may not have the self-confidence to report abuse, or have been taught how to recognize and address abuse. As well, authorities may not understand the impact of what might seem to them to be minor victimizations:

> For example, a woman with an intellectual disability on social assistance is likely to be poor, particularly if not living with her parents or siblings …. The theft of twenty dollars from such a woman may not seem 'significant' to the law, its interpreters or the wider public, but may mean the difference between eating and not eating for several days. Women in such circumstances could well experience such a theft as a most significant loss of personal property and even as traumatic – particularly if it happens more frequently than once or twice in a long while.[630]

3. Family Dynamics, Substitute Decision-making and Abuse

Abuse and misuse of substitute decision-making powers must be understood in the context in which they occur, which most frequently is that of close personal relationships. As was discussed in Part Three, Chapter II, "Who May Act?", while the Public Guardian and Trustee (PGT) or trust companies do act as SDMs, the vast majority of those acting as SDMs are family and close friends. This has a significant impact on the dynamics of the abuse and misuse.

Our close personal relationships are important, not only to our practical needs but to our emotional well-being. Individuals may be reluctant to question or argue with family members, for fear of destroying the relationship. Family members are often anxious to think well of each other, and may be very reluctant to believe that a loved one might be taking advantage of them or acting in disregard for their well-being. Young adults may be in the habit of deferring to parents and other older family members; parents may be exceedingly reluctant to take actions that might be harmful to their adult children, even where well-deserved.[1] Laschewicz, in her paper on the voices of adults with disabilities in their family contexts, comments that for young adults with intellectual disabilities,

> [F]amily members may attach a young "chronological age": "It doesn't matter that they're legally eighteen. It's very, very, shocking and hard for them (families) to understand and cope with that whole mentality that they're legally an adult and can make their own decisions". Indeed, many adults with disabilities have lived their entire lives in their parents' homes and "under" their parents' care resulting in entrenched roles for both care receiver and caregiver.[1]

And of course, family histories of dysfunction will play out in the context of substitute decision-making, just as in any other context.

A person who has been determined to lack legal capacity may well have needs for support that extend beyond the realm of personal or financial decision-making. The individual may, for example, be reliant on family members or other informal care providers for practical supports in a variety of tasks, such as interacting with service providers, errands, housework or activities of daily living, supports that may be vital to the individual's ability to remain in a community setting. This is particularly true where formal supports are costly or in limited availability. For example, in the *Framework* projects the LCO examined in some detail barriers to and

inadequacies in access to home care and attendant services for older adults and persons with disabilities.[631] As a result of lack of formal community care, persons needing home care or attendant care services may be heavily reliant on the assistance of family or friends in order to maintain an independent life in the community. The resulting dependence on the informal supports provided by family members or friends may create a power imbalance that makes individuals vulnerable to abuse through POAs or guardianships.

As was highlighted in Part One, Chapter I, the experiences and risks of abuse for older adults, persons with developmental disabilities and persons with mental health disabilities who are determined to lack legal capacity may differ somewhat. For example, whereever there is money, there is a temptation to financial abuse: during preliminary consultations, social service providers emphasized that it is not uncommon to see low-income vulnerable individuals being abused by family or "friends" in order to gain access to relatively small levels of sums of money, such as ODSP or OAS payments. However, older adults who have been found to lack capacity are more likely than younger persons with disabilities to have access to relatively substantial assets and income, such as a pension or a house (particularly given the association of disability with the experience of low-income), and so the temptation to financial abuse tends to be greater, likely one reason why there is relatively little written about financial abuse of younger persons with disabilities. As another example, as a natural consequence of the life course as well as demographic changes, older adults are particularly likely to find themselves with a very reduced circle of friends and family members who are willing or able to either act as attorneys or to be in a position to identify and address abuse or both. Younger persons with developmental disabilities are more likely not to have had the opportunity or the support to develop decision-making skills or to have gained experience in identifying who should and should not be trusted.

Substitute decision-making powers can be used to facilitate any type of abuse (including physical, psychological, sexual, financial or neglect), as they can serve to control the person who lacks legal capacity by restricting access to money or other financial resources, family and friends, or the broader community. Substitute decision-making for property can provide a direct instrument for carrying out financial abuse, as holders of powers of attorney for property can use their extensive powers to transfer money to their own names, sell assets, cash in investments, or otherwise strip assets from the grantor of the power of attorney.

The type of substitute decision-making at issue will affect the nature and dynamic of abuse. For example, with issues related to property, access to income streams and assets creates a direct incentive for some types of abusers: a number of social services providers commented that the easiest way to get rid of most abusers is to remove access to money – when the money disappears, so does the abuser. However, it should be kept in mind that despite the theoretical

separation of domains of decision-making, power over personal care creates an opportunity to exert control over property matters, and *vice versa*. For example, ARCH Disability Law Centre outlines in one case study how a statutory guardian for property used her ability to control the individual's finances to restrict his independence in his personal life, for example by refusing to release funds to allow him to rent an apartment with friends or to engage in social activities, and by controlling his access to assistive devices and communication equipment.[632]

Risks of abuse differ not only based on the type of decision made, but also by the context for the decision. In some contexts, there are other parties present or aware of the transaction, who could potentially identify and address abuse. In other cases, the context of the decision is essentially one of isolation, which makes abuse easier to carry out. For example, where decisions are made in the health care context, health care professionals will know the individual (the patient) as well as the substitute or supporter and will be aware of the decision as it is made. For example, a decision to transfer money from one bank account to another may not be within the view of anyone else at all, particularly now that so many financial transactions are made online. The control over day-to-day activities provided by a POAPC may enable the attorney to isolate the grantor and carry out abuse undetected. There may therefore be measures for identifying and addressing abuse that are specific to particular contexts.

4. Service Providers and the Problem of Abuse by Substitutes or Others

Third party service providers may play an important role in detecting and addressing abuse through substitute decision-making powers. The level of responsibility for identifying and addressing abuse varies between types of service providers. In some cases, there is a clear legal duty to monitor and to report, while in other cases it may be a matter of institutional policy or of personal ethics. In any of these cases, concerns about abuse may pose complex challenges for service providers.

Abuse is often difficult for third parties to detect. In one report on financial abuse and persons with dementia, professionals commented that it was "difficult to distinguish the line between caring, resource sharing and abuse". As well, the perception of finances as personal and private matters, with the resultant reluctance to discuss them or to admit to abuse, was a significant barrier to detecting problems.[633] Gathering evidence about abuse may be quite difficult: for example, where persons with dementia are involved, the person's symptoms may mean they think they are being stolen from when they are not, so that allegations of abuse may require significant corroboration.[634]

In some cases, service providers may be concerned or confused about the requirements of privacy laws. As is discussed in Part Three, Chapter III, privacy law is governed by multiple statutes at both the federal and provincial level. Banking institutions, as federally regulated businesses, fall under the *Personal Information Protection and Electronic Documents Act* (PIPEDA).[635] The purpose of PIPEDA is to establish "rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances".[636] The general rule is that the knowledge and consent of the individual are required for the disclosure of personal information;[637] however, an organization may disclose information without the knowledge or consent of the individual to an investigative body, a government institution or a part of a government institution where the organization "has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed".[638]

Some have raised concerns that this exception is too narrow. For example, disclosure is only permitted where required "by law"; since Ontario does not require mandatory reporting of abuse except in the limited circumstances noted earlier, this would seem to indicate that banks ought not to release such information of its own initiative. However, the SDA makes it clear that banks and other financial institutions must disclose relevant information where requested as part of an investigation by the PGT.[639] There has been some movement towards reform of section 7(3) of PIPEDA, to permit broader disclosure of information without consent, in order to address concerns regarding financial abuse.[640]

Service providers may find themselves caught in a difficult position when attempting to address or prevent abuse. For example, in a common scenario, a person acting under a POA may attempt to undertake a transaction which is clearly improper, such as transferring assets from the grantor to him or herself in order to avoid probate fees. When the bank blocks the transaction, the person acting under the POA may then sue the bank because the additional costs of the estate have diminished the inheritance.[641] In some cases, the SDM may respond to attempts by a financial institution to block inappropriate transactions by simply transferring the account to another institution that may not be aware of the situation and may agree to the transaction.[642]

Financial institutions have responded to concerns about financial abuse of persons who may lack legal capacity in a variety of ways – for example, by developing training materials for front-line staff to help identify potential abuse and to escalate it to senior staff or outside authorities appropriately; engaging in public education activities to alert the public to risks and

responsibilities;[643] developing lists of red flags and common scenarios; and improving internal escalation processes in this area.

Service providers, particularly social service providers, may find this area complex and difficult, not only in terms of the law but also the ethical and practical issues raised. During the LCO's preliminary consultations, several service providers expressed a desire for greater supports and resources to be available to them when grappling with these issues.

5. General Mechanisms for Addressing Abuse

It must be kept in mind that there are multiple mechanisms outside Ontario's capacity, decision-making and guardianship legislation that are intended to prevent, identify and address abuse of adults. Most of these are not specific to persons who have been determined to lack legal capacity, but are equally applicable to this group. The mechanisms available under the SDA for addressing abuse must be understood in this broader context.

It should also be understood that the mechanisms for addressing abuse cannot be cleanly separated: they may overlap or intersect. For example, an investigation by the PGT into allegations of "serious adverse effects", as described later in this Chapter, may lead to a referral to the criminal justice system: the reverse may also happen. Those who contact the PGT with concerns related to the treatment of a person believed to be legally incapable may not understand the nature of the PGT's mandate and may believe themselves to be triggering a process similar to a police investigation; those making a complaint to the Ministry of Healths ACTION line may not understand the scope or limitations of that avenue.

Criminal Code

Perhaps the most significant avenue for addressing abuse is the criminal justice system. The provisions of the *Criminal Code* cover most of the issues of concern. Relevant provisions include those addressing theft, assault, sexual assault, false imprisonment, failure to provide the necessities of life to a dependent, fraud, misappropriation of funds by a person in a position of trust and theft by power of attorney.[644] The sentencing provisions of the *Criminal Code* provide that evidence that the offence was motivated by bias, hate or prejudice based on age or disability shall be deemed an aggravating factor, as well as abuse of a position of trust or authority in relation to the victim.[645]

However, many have noted that the criminal justice system, while important in addressing abuse, has significant limitations, and cannot provide a comprehensive response to the issue.[646] For example, the relationship dynamics underlying some forms of elder abuse, together with the effects of shame and fear of retaliation, may make the victims of such abuse reluctant to disclose it or to see family members face criminal penalties.[647] Delays in the administration of

justice can mean that victims of abuse may be dead or legally incapable by the time the case goes to trial.[648]

Persons with disabilities may face a number of barriers in accessing the criminal justice system, despite a number of initiatives in recent years intended to improve access.[649] Despite the increased risk of victimization, the 2006 Statistics Canada Victims Services Survey reported that only 24 per cent of victim services agencies in Canada were able to provide services to persons with disabilities.[650] As DAWN Canada pointed out to the LCO,

> It is important to note that women with disabilities (physical, mental, sensory, chronic illness) experience a much higher rate of abuse of all types, than their nondisabled counterparts and more abuse than men who have disabilities. This is important to keep in mind, as it is often very difficult for women with disabilities to even leave the abusive situation in which they find themselves, let alone take legal action against their abusers. Often, women's shelters and transition houses are not accessible to women with disabilities. Therefore, it would appear that it would be even more difficult for women with disabilities to access any legal help, especially if they could not find a safe haven first.[651]

As well, public institutions may not be sufficiently equipped to respect and protect the safety of the persons with disabilities they serve. For example, persons with disabilities are less satisfied with the police response to their complaints than others, and have a less favourable view of the criminal justice system.[652]

Ontario's Elder Abuse Strategy

Ontario has a comprehensive, non-legislative strategy to combat elder abuse, developed by the Ontario Seniors Secretariat, and implemented in partnership with the Ministry of the Attorney General, the Ontario Victim Services Secretariat, and Elder Abuse Ontario. The strategy focuses on three key priorities:

- coordination of community services
- training for front-line staff
- public education to raise awareness.

Elements of the Strategy include a province-wide, toll-free victim support line and a network of Elder Abuse Regional Consultants. The Consultants are intended to help promote and support efforts to prevent and address abuse, and act as key resources to community service and justice system stakeholders. [653]

Provisions Specific to Particular Areas of Law

In many instances, laws or programs that are targeted to individuals who may be at particular risk of abuse contain mechanisms for preventing, identifying and addressing abuse. The list below is not intended to be exhaustive, but to provide some examples.

The *Long Term Care Homes Act*, *2007* and its regulations contain multiple provisions related to abuse. Considering that a very significant proportion of those residing in long-term care homes are older adults who are living with disabilities that may affect cognition, such as dementia or stroke, these protections are a very important part of the legislative landscape related to abuse. The Act institutes mandatory reporting by the long-term care home to the Ministry if there are reasonable grounds to suspect that any of the following incidents may have occurred:

1. Improper or incompetent treatment or care of a resident that resulted in harm or a risk of harm to the resident.
2. Abuse of a resident by anyone or neglect of a resident by the licensee or staff that resulted in harm or a risk of harm to the resident.
3. Unlawful conduct that resulted in harm or a risk of harm to a resident.
4. Misuse or misappropriation of a resident's money.
5. Misuse or misappropriation of funding provided to a licensee under the Act or the *Local Health System Integration Act, 2006*.[654]

It is an offence to fail to report any such incidents.[655] Residents of the long-term care home may make a report regarding abuse, but are not required to do so. Social workers, doctors and other regulated health professionals who report abuse are protected against complaints regarding violations of confidentiality or privilege, so long as the report was not malicious or without reasonable grounds.[656] The Act includes provisions for inspections following upon a report, as well as whistle-blower protections.[657]

The above provisions of the *Long Term Care Homes Act* are the only mandatory reporting provisions for abuse of adults in Ontario, unlike other jurisdictions which have mandatory reporting requirements that are broader and more extensive. However, various statutes include mechanisms that may be used to identify or address abuse. Regulated health professionals and certain types of facilities must report sexual abuse of a patient by a member of a regulated health profession.[658] As well, under the *Social Inclusion Act,* the Quality Assurance Measures regulation sets out a variety of requirements with which agencies must comply. Many of these are positive measures, aimed at the promotion of social inclusion, individual choice and rights, measures which would tend toward the prevention of abuse. There are also specific requirements for agencies to develop and regularly review policies and procedures for

- documenting and reporting alleged, suspected or witnesses incidents of abuse of persons with developmental disabilities;
- supporting the person who has been abused, or is suspected or alleged to have been abused; and
- dealing with staff or volunteers who have or are alleged to have abused persons with developmental disabilities.

Where abuse at an agency may amount to a criminal offence, the agency must immediately report the alleged, suspected or witnessed behaviour to the police.[659] Agencies are required to provide mandatory education and training to staff, volunteers, board members and service recipients about issues related to abuse and on the agency's policies.

Sector Specific Requirements or Initiatives

Particular sectors or service industries that have frequent contact with individuals who may be at some risk of abuse may have developed internal or industry-wide protocols, policies or mechanisms for addressing abuse. For example, in the financial services sector, many banks have developed internal training programs to assist staff in detecting and responding to potential abuse. This might include training that helps staff identify inappropriate use of powers of attorney and outline potential steps for addressing it, such as blocking further transfers, cancelling client cards, placing cautions on the account or in the last resort informing a family member, the police or the office of the Public Guardian.

- **QUESTION FOR CONSIDERATION: Are there ways in which laws, policies or practices for addressing abuse through legal capacity, decision-making and guardianship laws could be better coordinated with general provisions for addressing abuse of those who tend to fall within this area of the law?**

C. The Current Legal Context

1. Appointing a Substitute Decision-maker

The process for personal and public appointments of SDMs was thoroughly detailed in Part Three, Chapter III. Appointment processes are important to issues of abuse and misuse, as they offer an opportunity to screen out potential abusers, as well as to provide information and education both to SDMs and the persons they assist.

Those who have legal capacity to do so may personally appoint an SDM, either for property or personal care decisions, through a power of attorney (POA). Personal appointments such as POAs rely on the individual to screen potential SDMs to ensure that they are capable of undertaking the duties, and are willing and suitable to do so. As is described in Part Three, Chapter III, Ontario's legislation regarding POAs aims to make these tools widely accessible, and

so there are relatively few practical or procedural barriers to their creation, as compared with other jurisdictions. The resultant risk is that those creating POAs may not fully understand the potential implications of doing so, and may put themselves at risk of abuse, neglect or exploitation by their attorneys. In practice, individuals may choose an attorney for reasons that have very little to do with who would exercise that role the best, and more to do with family dynamics. As well, as private appointments, these powerful documents are amenable to very little scrutiny, so that abuse or misuse may be difficult to detect. Part Three, Chapter III explored a number of potential amendments to the requirements for creation of POAs that might have an impact on risks related to abuse and misuse.

Public appointments (guardians) are available to those who do not have the legal capacity to appoint their own SDM. While those falling under guardianship are to be consulted about their preferences for an SDM, the ultimate decision is made by the court (in a court-appointed guardianship) or the PGT (for replacement applications under a statutory guardianship). The screening of potential guardians is therefore carried out by a public body.

In either case, most SDMs will be family members of close friends: under POAs because these are the people that grantors are likely to choose, and under guardianships because these are the people most likely to be willing to be appointed and for whom there is in some circumstances a statutory preference. These are the individuals who know the affected persons best, and who might be expected to best understand their values and hopes, to have their well-being at heart, and to have the requisite dedication and commitment to carry out the sometimes extensive responsibilities associated with this role. As was noted above, these are also the persons with whom the individual who lacks or who is preparing for the possibility of lacking legal capacity is likely to have complex ongoing ties of interdependence.

2. Roles and Responsibilities of Substitute Decision-makers

Although the means of creating and monitoring personal and public appointments differ, the roles and responsibilities of guardians and of persons acting under a POA are largely similar. There are some differences, however, between the roles of SDMs for property and those for personal care.

SDMs for Property

An SDM for property is a fiduciary, and must carry out his or her duties diligently, with honesty and integrity, and in good faith, for the benefit of the individual.[660] In considering the benefit of the individual, the SDM for property must take into account personal comfort or well-being, where that may be affected.[661] An SDM for property may be compensated.[662] If the SDM is not compensated, he or she must exercise the degree of care, diligence and prudence as she or her would for her or his own affairs; if compensation is received, then the standard is that of a person in the business of managing the property of others.[663] If the SDM breaches his or her

duties, he or she is liable for damages, unless the court decides to reduce the damages because the SDM acted honestly, reasonably and diligently.[664]

In managing the property, the SDM shall make those expenditures that are reasonably necessary

- for the individual's support, education and care;
- for the support, education and care of the individual's dependants; and
- that are necessary to satisfy the individual's legal obligations.

Where the property is limited, these expenditures are in a hierarchical order; for instance, expenditures may only be made for the support, education and care of dependants where sufficient remains for the support, education and care of the individual. In making expenditures, the value of the property, the accustomed standard of living of the individual and her or his dependants, and the nature of other legal obligations must be taken into account. The SDM may make charitable donations, or gifts or loans to friends or relatives of the individual, but only under limited circumstances.[665]

The SDM must keep account of all transactions involving the property, according to the detailed requirements in the Regulation.[666] The SDM for property has a number of important procedural duties, such as:

- explaining his or her powers and duties to the individual;
- encouraging the participation of the individual in decisions related to property;
- fostering regular personal contact between the individual and her or his supportive family members and friends; and
- consulting from time to time with supportive family members and friends who are in regular personal contact with the individual, as well as those from whom the individual receives personal care.[667]

A statutory guardian for property must, if the person requests it, assist in arranging an assessment by a Capacity Assessor of the person's capacity, as often as every six months.[668]

SDMs for Personal Care

The SDA provides guidance for making substitute decisions with respect to personal care. On decisions that do not fall under the HCCA, the SDM must respect the prior capable wishes of the individual as follows:

- If, while capable, the individual expressed wishes or instructions relevant to a decision, the SDM shall make the decision in accordance with those wishes or instructions;

- The SDM must exert reasonable diligence to ascertain whether such wishes or instructions were expressed;
- The SDM must respect later wishes or instructions over earlier ones;

If no prior wishes or instructions were expressed, the SDM is to be guided by the best interests of the individual, taking into consideration the individual's

- values and beliefs held while capable, and that the SDM believes the individual would still act on if capable; and
- current wishes, if they can be ascertained;

The SDM must also weigh whether the decision is likely to improve quality of life, prevent its deterioration, or reduce the extent or rate of any deterioration; and whether the benefits of the decision will outweigh the risk of harm from an alternative decision.[669] In general, the SDM must choose the least intrusive and restrictive course of action available and appropriate in the circumstances. Confinement, monitoring devices or means of restraint must not be used unless they are essential to prevent serious bodily harm to the individual or to others, or they allow the individual greater freedom or enjoyment.[670]

The procedural duties for an SDM for personal care are very similar to those for a property SDM, and include the following:

- explaining his or her powers and duties to the individual;[671]
- encouraging the individual to participate, to the best of his or her abilities, in decisions that are being made;[672]
- fostering regular personal contact between the individual and supportive family members and friends;[673]
- fostering as far as possible the independence of the individual;[674] and
- consulting from time to time with supportive family and friends who are in regular contact with the individual, as well as those providing personal care.[675]

The SDM must keep records of decisions made, in accordance with the regulations.[676] An attorney for personal care must, if the person requests it, assist in arranging an assessment by a Capacity Assessor of the person's capacity, as often as every six months.[677]

3. Existing Mechanisms for Addressing Abuse and Misuse

Ontario's legislation already contains a considerable number of measures that may contribute to preventing, identifying and addressing abuse through substitute decision-making powers. Some mechanisms apply to all SDMs. Others are specific to POAs or to guardians, reflecting the different nature of the appointment processes.

Mechanisms for all SDMS

Record-keeping requirements: As was detailed above, all SDMs are required to keep accounts of their activities on behalf of the person they are appointed to assist.

Procedural duties: The SDA includes a number of requirements that increase transparency and accountability for SDMs, including duties to explain their role to the person, foster supportive contact with family and friends, and to consult from time to time with family and friends in the discharge of their responsibilities;

Standard of care: SDMs for property are held to a fiduciary standard, while SDMs for personal care are required to act diligently and in good faith.

Clear requirements for decision-making: The clear requirements as to the principles and considerations to be taken into account in the discharge of the SDMs role make it easier to determine whether the SDM is acting to benefit the person rather than his or herself.

Investigative powers of the PGT: Sections 27 and 62 of the SDA provide the PGT with the duty and the powers to investigate "any allegation that a person is incapable" with respect to either property or personal care and that "serious adverse effects are occurring or may occur as a result". If the results of the investigation reveal reasonable grounds to believe that a person is incapable and that serious adverse effects, as defined in the legislation, are or may be occurring, the PGT shall apply to the court for a temporary guardianship, which shall not exceed 90 days and which must set out the powers of the PGT and any conditions imposed on the guardianship. The SDA gives the PGT significant discretion in determining the steps necessary for an investigation, as well as powers of entry and access to records for the purposes of carrying out these investigations.[678]

Mechanisms for POAs

Execution requirements: As is detailed more thoroughly in Chapter VII, the SDA includes a number of requirements for the creation of a POA that are intended to ensure that those creating POAs understand the implications, and are not coerced into creating these documents. These include the requirements for independent witnesses to the creation of the power of attorney, and for a statement of intent in creating a continuing POA for property, among others.

Passing of accounts and other powers of the Court: The Superior Court of Justice may give directions on any question arising in connection with the exercise of a POA, upon application from the attorney, dependant, attorney or guardian for the other domain, the PGT, or any other

person with leave of the court.[679] The court may give such directions as it believes are for the benefit of the individual and her or his dependants, and as are consistent with the SDA.

As well, an application may be made to the court to have part or all of the property accounts of the attorney passed. Such an application may be made by the attorney, the grantor, the attorney or guardian for personal care, a dependant of the grantor, the PGT, the Children's Lawyer, a judgment creditor, or any other person to whom the court grants leave. The court has a wide range of powers upon the passing of accounts, including directing the PGT to bring an application to become the guardian, suspension of the power of attorney or appointment of the PGT as guardian pending investigation, ordering a capacity assessment of the grantor of the POA, or termination of the POA.[680]

Mechanisms for Guardians

Role of the PGT in Screening Applications: As is described in Part Three, Chapter III, the PGT is responsible for reviewing applications to replace it as statutory guardian. As well, for all applications for court-appointed guardianships, the PGT is a statutory respondent.[681] The PGT reviews these applications, and will send a letter addressing the issues raised by the application to counsel for the applicant as well as to the Registrar for the Superior Court of Justice. In most cases, issues are clarified and resolved prior to hearing, but in rare cases, the PGT may appear at the hearing to submit responding evidence or make submissions or both.[682]

Passing of Accounts: As with attorneys acting under a POA, guardians are required to keep accounts, and a guardian, attorney, the individual, a dependent, the PGT, the Children's Lawyer, a judgment creditor, or any other person with the leave of the court, may apply to have financial accounts passed. As well, the PGT has a general power to request a copy of the records kept by a guardian of either property or personal care under the SDA.[683]

Registration: The PGT is mandated to keep an updated register of guardians, both of property and of the person. This register includes the name and address of both the individual and of the guardian(s) for that person. For each guardian, the register includes information on how the guardian acquired her or his authority; any restrictions on that authority; the date that the authority took effect, changed or terminated; and for guardians of the person whether the authority is full or partial and if partial the areas where the guardian has authority.[684]

Management Plans: As is discussed in Part Three, Chapter III, applicants for property or personal care guardianship must prepare management or guardianship plans. These plans may be amended with the approval of the PGT, or if necessary through a return to court.

D. Concerns and Options for Reform

1. Critiques of Existing Mechanisms

During the preliminary consultations, many stakeholders raised concerns that these mechanisms for addressing abuse through and misuse of substitute decision-making powers are insufficiently effective. While it was generally felt that the substantive duties and requirements placed on SDMs were appropriate, there was a widespread perception that these may not be effectively implemented. [685] Concern focussed on three main areas:

1. **Lack of understanding of the law:** both guardians and those acting under POAs frequently are unaware of their roles and responsibilities under the SDA, and consequently may fail to respect the limits of their authority or to meaningfully carry out their procedural duties. As well, as was discussed in Part Three, Chapter III, those granting POAs often do not understand the full implications of the extensive powers they are granting and the risk for abuse: this may result in the selection of an inappropriate attorney or attorneys or the failure to include sufficient effective safeguards in the document.
2. **Lack of effective monitoring mechanisms:** the mechanisms available for monitoring the activities of guardians and attorneys are limited, and those mechanisms that exist are largely "passive" rather than proactive; for example, while the duty to maintain accounts is important, those acting under a POA may never be required to share those accounts with anyone. As a result, it may be difficult to detect abuse when it is occurring. ARCH Disability Law Centre comments that

   > The mechanisms available … [are] all passive in the sense that they each require the 'incapable' person to initiate an action that may lead to monitoring or scrutiny of the guardian's actions. With limited access to rights advice and legal counsel, many 'incapable' people are prevented or limited from triggering these mechanisms.[686]

   Notably, under the HCCA, while a health practitioner has the power to apply to the CCB to raise concerns that an SDM for treatment, admission to long-term care or personal assistance services is failing to make decisions in accordance with the law,[687] there is no means for the individual who rights are directly affected to make such an application and attempt to enforce their rights.

3. **Lack of effective redress mechanisms:** where abuse or misuse is detected, concerns have been voiced that the means for addressing it may be inadequate, slow, inaccessible or offer insufficient redresss. Given the importance of the rights at stake when a person is placed under substitute decision-making, meaningful and accessible mechanisms for holding the SDM to account are essential. For example, a slow response may be meaningless: as many pointed out with respect to financial abuse, "once the money is

gone, it is gone", and the individual is left with the resultant long-term financial difficulties and limited options.

2. Potential Alternative or Additional Mechanisms for Preventing, Identifying and Addressing Abuse

Concerns regarding abuse and misuse of appointments are not restricted to Ontario. The section below highlights a number of provisions that have either been enacted or considered and recommended in laws relating to substitute decision-making appointments in other jurisdictions that may contribute to the prevention, identification and addressing of abuse through appointments.

As noted above, issues related to dispute resolution were identified as a significant shortfall in addressing abuse. Options for reform related to dispute resolution are dealt with in Part Four, Chapter II, and related issues regarding advocacy and supports to access to the law are addressed in Chapter III of that Part. Lack of understanding among those represented by an SDM as well as by those acting as such, of the responsibilities and roles of those SDMs, together with some options for increasing meaningful access to information, is dealt with in Part Three, Chapter III.D.2 for POAs and in Part Four, Chapter III for guardianships, as well as being discussed in a more holistic manner in Chapter IV of that Part.

It should be noted that many jurisdictions treat appointments related to property differently from those related to personal care issues, recognizing that concerns related to abuse are significantly different when it comes to issues related to property. This distinction should be kept in mind when considering the various options outlined below.

Potential law reform measures in this section have been divided into four categories: those related to increasing understanding of the roles and responsibilities of SDMs; those that create mechanisms for monitoring use of these powers and identifying abuse; those that create or strengthen complaints and investigation mechanisms; and those that aim to limit or prevent loss of funds through improper use of appointments. These four areas should be thought of in relation to each other: for example, monitoring and oversight mechanisms must be carefully coordinated with complaints and investigations mechanisms; or extensive education programs may reduce the need for intensive oversight and supervision.

<u>Increasing understanding of roles and responsibilities of SDMs</u>

Information and education for SDMs: While the appointment of a guardian is clearly a more rigorous process than the appointment of a power of attorney, it is nevertheless the case that guardians may not have a clear understanding of their duties and powers. As noted in Part

Three, Chapter II, the role of an SDM is very challenging, but in Ontario those who take it up are provided with few formal supports to help them perform it well.

The Australian state of Victoria currently provides optional training sessions for newly appointed guardians and administrators. The Victorian Law Reform Commission, in its review of guardianship law in that state, supported reforms to allow the Victorian Civil and Administrative Tribunal (VCAT) to order individuals to complete training as a condition of appointment as a guardian or administrator, commenting that, "[t]he Commission sees great value in enhanced training for all substitute decision makers, the vast majority of whom are well-meaning people who have accepted appointment to a very difficult and unfamiliar role".[688]

ARCH Disability Law Centre, in their paper on protecting the rights of persons with disabilities who are under guardianship, supports mandatory information and education programs for guardians, and suggests that training should cover legal obligations under the SDA; the scope and limits of an SDM's decision-making authority; the rights of the person under guardianship, as well as educating SDMs on how to carry out their responsibilities in a manner that respects the dignity, autonomy, participation and social inclusion and overall equality rights of the individual.[689]

Signed undertakings by SDMs: The Victorian Law Reform Commission further recommended that guardians and administrators be required, at the time of their appointment, to sign an undertaking to comply with their responsibilities. While the Commission did not recommend particular sanctions for failure to comply with such an undertaking, "the document would be available for use in any subsequent proceedings concerning failure of a substitute decision maker to comply with a particular duty",[690] as well as ensuring that guardians are aware of the seriousness of the obligation that they are undertaking and the nature of their statutory duties.

- **QUESTION FOR CONSIDERATION: Are there specific information, education or training initiatives that could be integrated into law, policy or practice to ensure that individuals and their substitute decision-makers better understand their rights, roles and responsibilities, and if so, how might these be implemented?**

<u>Oversight and Supervision</u>

As was detailed above, Ontario provides some mechanisms for monitoring or supervising SDMs, the most notable being the requirement for guardians to create management plans, and the duty for SDMs to maintain accounts combined with the provisions for passing of accounts. However, most of Ontario's mechanisms for addressing misuse or abuse of the power of an SDM require the person under representation to take active steps to invoke oversight. ARCH Disability Law Centre observes that,

> The mechanisms available ... [are] all passive in the sense that they each require the 'incapable' person to initiate an action that may lead to monitoring or scrutiny of the guardian's actions. With limited access to rights advice and legal counsel, many incapable people are prevented or limited from triggering these mechanisms.[691]

Some jurisdictions give public bodies much more robust powers and responsibilities for oversight of SDMs. Some examples are provided below.

Reporting requirements: Some jurisdictions require proactive regular reports from guardians, particularly those with financial responsibilities. In Victoria, for example, administrators must submit financial statements to the VCAT on an annual basis and otherwise as directed.[692] This requirement does not apply to persons acting under a power of attorney or to guardians for personal care-type issues (guardians). The Victorian Law Reform Commission rejected suggestions that these requirements be expanded to these groups, commenting that the cost of perusing reports was likely better spent on providing improved training and support for guardians.[693]

"Visitor" programs: Some jurisdictions include in their legal capacity, decision-making and guardianship legislation active supervisory powers over guardians and in some cases attorneys. For example, the *Mental Capacity Act, 2005* (MCA) of England and Wales not only requires the Public Guardian to maintain a registry of persons acting under powers of attorney and of deputies for property or personal welfare, but also to supervise deputies, and to receive regular reports from deputies and attorneys.

As well, the MCA creates a role for "Court of Protection Visitors". These visitors, some of whom are designated "special visitors" with expertise in capacity-related disabilities, may be ordered by the Court of Protection to visit deputies, attorneys or the individuals for whom these persons are acting and to prepare reports for the Public Guardian on issues as directed.[694] The MCA's *Code of Practice* describes their role as follows:

> The role of a Court of Protection Visitor is to provide independent advice to the court and the Public Guardian. They advise on how anyone given power under the Act should be, and is, carrying out their duties and responsibilities. There are two types of visitor: General Visitors and Special Visitors. Special visitors are registered medical practitioners with relevant expertise. The court or Public Guardian can send whichever type of visitor is most appropriate to visit and interview a person who may lack capacity. Visitors can also interview attorneys or deputies and inspect any relevant healthcare or social care records. Attorneys and deputies must co-operate with the visitors and provide them with all relevant information. If attorneys or deputies do not co-operate, the court can cancel their appointment, where it thinks that they have not acted in the person's best interests.[695]

In addition to investigating abuse, visitors can assess the general wellbeing of the individual and provide advice and support to attorneys and deputies.

The draft Irish bill takes a very similar approach, with comprehensive registry systems, reporting requirements, a supervisory role for the Public Guardian, and the creation of specialized and general "visitors": a distinctive feature is that these functions extend also to "assisted" and co-decision-making arrangements.[696]

The "Community Visitors" system in the Australian state of Queensland is focussed on persons in congregate settings, such as long-term care homes and mental health facilities. This system has both oversight and complaints functions. As part of their oversight functions, they regularly visit mental health facilities and other sites (other than private homes) where individuals with diminished capacity reside or receive services[697] to review and provide reports on matters including:

- the adequacy of services for the assessment, treatment and support at the site;
- the appropriateness and standard of services for the accommodation, health and wellbeing of consumers at the site;
- the extent to which consumers at the site receive services in the way least restrictive of their rights;
- the adequacy of information given to consumers at the site about their rights; and
- the accessibility and effectiveness of procedures for complaints about services for consumers at the site.[698]

The complaints functions of the Community Visitors program are described below, in the section on complaints mechanisms.

Monitoring and Advocacy Office: ARCH Disability Law Centre has recommended that consideration be given to establishing an independent, competent, impartial body whose role would be to monitor and oversee decision-makers, address situations in which decision-makers are abusing or misusing their powers, and deal with complaints from persons determined to be legally incapable. The Office would receive and review reports from SDMs, and where concerns arose, could investigate and if necessary require the SDM to take steps to achieve compliance. This central office would also be responsible for provision of rights advice, and for receiving and informally addressing complaints.[699]

Supervision by the Public Guardian: In Queensland, the Community Visitor program is supplemented by a range of supervisory powers provided to the Queensland Adult Guardian with respect to attorneys, guardians and administrators. These include powers to give advice to an attorney, guardian or administrator; by written notice, make an attorney, guardian or

administrator subject to the Adult Guardian's supervision for a reasonable period if the Adult Guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney, guardian or administrator has contravened the Act or his or her duties, but has not done so wilfully; and to require an attorney appointed in relation to financial matters, or an administrator, to present a plan of management for approval.[700]

Such programs of active supervision are not without their detractors. For example, the Victorian Law Reform Commission rejected suggestions regarding mechanisms for random audit and investigation of substitute decision-makers, commenting that,

> The Commission does not believe that random investigation and auditing of substitute decision makers would be a useful or cost-effective means of encouraging people to fulfil this challenging role effectively. The trust and confidence necessary for an appointment to operate successfully could be undermined if substitute decision makers feel under suspicion of exercising their powers inappropriately. The Commission believes that it is better to encourage good appointments of substitute decision makers and to provide these people with high quality training and support about the role.[701]

- **QUESTION FOR CONSIDERATION: Are there mechanisms that could be added to law, policy or practice to improve monitoring and oversight of substitutes, such as enhanced duties to report or account, "visitor" programs for persons under substitute decision-making, or other types of supervisory powers? If so, which mechanisms would be most desirable and how might these be practically implemented?**

<u>Powers to receive and investigate complaints</u>

As noted above, the Ontario PGT has an obligation to investigate allegations that a person is incapable and serious adverse effects are occurring or may be occurring as a result. Where the investigation demonstrates reasonable grounds to believe that serious adverse effects are occurring, and that the appointment of a temporary guardian is necessary, the PGT must apply to the court to be named the temporary guardian.

The PGT has very extensive powers to investigate allegations that fall within the scope of its mandate. For example, the PGT is entitled, as part of the investigation, to gain access to "any record relating to the person who is alleged to be incapable that the Public Guardian and Trustee reasonably believes to be relevant to the investigation", including the person's personal health records, pension fund information, and bank account and other financial records, information that most of us would consider highly private. The PGT can enter a facility or controlled-access residence for the purposes of the investigation without a warrant, and if right of entry is blocked, can obtain a warrant and the assistance of the police in executing it.[702]

However, it is important to note that the scope of the PGT's mandate is limited to those situations where "serious adverse effects" are or may be occurring. The standard for what is a "serious adverse effect" is high: for personal care issues, it includes "serious illness or injury, or deprivation of liberty or personal security",[703] and for property management includes "loss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependents".[704] That is, the PGT's investigation mandate does not extend to the more frequent, but less grave violations of statutory rights by SDMs.

Further, the PGT's role in this respect potentially involves significant state intervention in the lives of individuals. The PGT investigations process is "specifically designed to address situations where harm to an incapable person can *only* be prevented by a prompt application to court for an order appointing the Public Guardian and Trustee as the person's temporary guardian" [emphasis added]. In *Ziskos v Miksche*, the court commented,

> [T]he PGT is not mandated to offer free investigative services to private individuals to provide them with support in a dispute with other individuals regarding the management of the affairs of an incapable person. The PGT must expend her investigation resources in the interests of incapable individuals who find themselves at risk and without any other avenue for assistance.[705]

In other cases, the PGT has discretion as to how to proceed, as consistent with its overall mandate and statutory framework. The PGT may, for example, decide not to intervene, may intervene informally, refer the matter to social services or the police or a voluntary capacity assessment, or may apply to court for directions.[706] In 2013 – 2014, the PGT received 10, 574 calls to its investigation screening room (this may include multiple calls referring to a single person). From these, 239 investigations were opened. Callers are also commonly referred to other resources, including to private lawyers, the Capacity Assessment Office, the CCAC, health practitioners, law enforcement or other government offices.

Of the 214 investigations completed in 2013 – 2014:

- 78 were referred to other sources, including families, community agencies or the police;
- 63 were concluded with a determination that an application to the court was not warranted due to insufficient evidence of mental incapacity or of serious harm;
- 61 resulted in a property guardianship for the PGT through an examination for capacity under the MHA or a capacity assessment under the SDA, or resumption of statutory guardianship under section 19 of the SDA;
- 8 cases resulted in applications to court for either permanent or temporary guardianship for property or personal care; and
- 3 cases closed due to the death of the alleged incapable person during the investigation; and
- 1 case was found to be a spurious allegation without legal foundation.[707]

During the preliminary consultations, stakeholders spoke favourable of the PGT's investigative powers, but raised concerns regarding the PGT's "last resort" mandate in this area. For example, in a research paper on access to justice for persons living in congregate settings, the Advocacy Centre for the Elderly commented that,

> It has been ACE's experience, however, that the Public and Guardian and Trustee has interpreted its duties very narrowly, saying it is a "service of last resort," and does not use its authority to intervene and investigate often enough. Friends, family members and health practitioners concerned about the welfare of an older person often call ACE in frustration after being told by the Public Guardian and Trustee that an investigation will not be completed.[708]

This issue is closely linked with that of dispute resolution mechanisms, which is examined in more depth in the following Chapter. While there are mechanisms for raising concerns about the adherence of an SDM to statutory responsibilities, these are mainly through applications to Court, a path that is frequently seen as inaccessible due to its costs and formalities, and also relies on the initiative of the individual affected. This often leaves persons living under substitute decision-making with few realistic options for raising concerns about the activities (or failure to act) of their SDMs. In their paper on protecting the rights of persons with disabilities who are subject to guardianship, ARCH Disability Law Centre reviewed a series of case studies of persons who experience abuse or misuse of SDM powers under the current law, and concludes that

> What emerges are significant gaps and weaknesses in the existing monitoring and accountability mechanisms for guardians in Ontario. In many cases, the SDA does technically contain mechanisms for monitoring and redress, but these mechanisms are practically ineffective because they are not accessible to many 'incapable' persons.[709]

Complaint systems: Several jurisdictions include some form of complaint mechanism for individuals who are represented by an SDM. Under the MCA of England and Wales, the Public Guardian is empowered to receive "representations" (including complaints) about the way in which deputies or persons acting under a power of attorney are exercising their powers.[710] The Public Guardian has investigatory powers, although it may investigate jointly with other bodies such as social services, National Health Services bodies, police or other bodies. It may also refer complaints to appropriate agencies, although it retains responsibility for ensuring that the Court of Protection has the information it requires to take any necessary actions with respect to attorneys or deputies.[711]

The Queensland Community Visitors system which was referenced above provides Visitors with a responsibility to inquire into and seek to resolve complaints, and where complaints cannot be resolved, to refer them promptly to the appropriate body for investigation or resolution or

both.[712] They have broad powers to "do all things necessary or convenient to be done to perform the community visitor's functions", including entering visitable sites without notice, requiring the production of information or documents, and meeting with consumers alone.[713] In addition, the Adult Guardian for Queensland (similar in function to Ontario's PGT) has the power to investigate any complaint or allegation that an adult with impaired capacity is being, or has been, neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements.[714] As part of this mandate, the Adult Guardian has the power to compel the production of detailed accounts from attorneys or administrators, and a right to "all information necessary to investigate a complaint or allegation or to carry out an audit".[715] After an investigation or audit is completed, the Adult Guardian must create a report and provide it to the person at whose request it was carried out, as well as to every attorney, administrator or guardian for the person, and any interested party.[716]

As was noted above, ARCH Disability Law Centre has recommended the creation of a Monitoring and Advocacy Office with a number of functions, among them the receipt and resolution of complaints from individuals about the activities of their SDMs. This organization would have a mandate to informally resolve complaints where possible, as well as to investigate. Where a complaint could not be resolved in this fashion, the individual would receive advice about formal dispute resolution options.[717]

- **QUESTION FOR CONSIDERATION: Are there new mechanisms for complaints or enhancements to the Public Guardian and Trustee's investigatory powers that would be effective and appropriate for addressing concerns regarding abuse or misuse of the powers of substitute decision-makers? If so, what mechanisms would be most desirable, and how might they be practically implemented?**

<u>Limiting or Preventing Loss of Funds through Abuse</u>

A common concern with mechanisms for addressing financial abuse through personal appointments is that, by the time the abuse is identified and the mechanisms for addressing it are activated, the money has often been spent, and no really meaningful redress is possible. While the offender may be prevented from further wrongdoing and may, if criminal proceedings are undertaken, be sanctioned, this may be small comfort to those individuals whose assets have been misappropriated, and who must live in diminished and perhaps quite difficult financial circumstances thereafter. There are some mechanisms either in place in other jurisdictions or recommended that aim to address this issue, at least partially. As with other responses to abuse, one must balance reductions in accessibility of these legal instruments with the potential for reduction in abuse.

Limits on Conflict Transactions and Gifts: Persons in a fiduciary relationship, such as persons exercising a POA or acting as a guardian, have a duty to avoid placing themselves in a position of conflict of interest.[718] As the scope of any fiduciary obligation will depend on the precise nature and scope of the relationship, some jurisdictions have taken the further step of codifying and clarifying the obligations of persons acting as SDMs with respect to conflicts of interest.

The state of Queensland in Australia has incorporated into its legislation specific limitations on conflict transactions for persons acting under a power of attorney. Its *Powers of Attorney Act 1998* imposes a duty on attorneys acting in financial matters to avoid conflict transactions, unless the person granting the power of attorney has authorized that transaction, conflict transactions of that type, or conflict transactions in general. The definition of a conflict transaction makes it clear that a conflict will not exist merely because by the transaction the attorney deals with a property jointly held between the attorney and the person on whose behalf he or she is acting, acquires a joint interest in the property or obtains a loan or gives a guarantee or indemnity in relation to these types of joint interests.[719] Queensland's Civil and Administrative Tribunal dealing with these matters is given authority to authorize certain conflict transactions,[720] as is the Supreme Court.[721]

In its 2008 Report, the Western Canada Law Reform Agencies noted that a "no personal benefit" duty for persons exercising a power of attorney may be unrealistic:

> For instance, the duty may be impossible to meet where household expenses are shared because the donor and attorney are spouses, or because the attorney lives with the donor as the donor's caregiver. Indeed, it may be at times unavoidable for the attorney to derive some personal benefit as a side effect to maintaining a beneficial lifestyle for the donor.[722]

The WCLRA further expressed concerns that attempting to define the duty to avoid conflict was likely to prove extremely difficult, and would likely involve elaborate and complex legislative provisions.

However, in its thorough 2010 review of Queensland's guardianship law, the Queensland Law Reform Commission highlighted that breaches of a duty to avoid conflict transactions may also be a symptom of unacceptable attitudes, such as that older persons' 'money is a family matter". In the case of older persons, children may view assets not as something that belongs to the older person and should be used for their benefit, but as a form of inheritance or shared asset. There may even be a presumption that the older person "would not mind" if the assets are used to the benefit of others, even if that means that the older person suffers a detriment.[723]

In its Report, the Queensland Law Reform Commission exhaustively reviewed the provisions related to conflict transactions. It recommended the retention and strengthening of such provisions, stating,

> Given that serious consequences may flow from failing to comply with the conflict transaction provisions, it is essential that the provisions are expressed as clearly as possible and deal appropriately with the types of conflict situations which commonly arise, particularly in family situations, so that being appointed as an attorney or an administrator does not become an unattractive proposition.[724]

The Victorian Law Reform Commission in its 2012 report on Guardianship recommended the adoption of similar measures. It noted that community responses had highlighted concerns that there was insufficient understanding of the circumstances where a conflict of interest might arise between the grantor of the power of attorney and the person exercising it.[725] It recommended that the law prohibit conflict transactions by enduring financial administrators, with clear and limited exceptions, such as where the transaction received prior authorization by a principal who had legal capacity to provide such authorization or where the transaction is authorized by the VCAT. It proposed a definition of conflict transactions as including those in which "there may be conflict, or which results in conflict, between: (a) the duty of a financial administrator or an enduring financial administrator towards the principal, and (b) either — the interests of the appointee, or a relation, business associate or close friend of the appointee, or (ii) another duty of the appointee". [726]

It should be noted that the SDA already provides a clear set of positive obligations as to how attorneys for property should allocate the assets of the grantor, and provides guidance on issues related to gifts and loans. Continued issues around improper allocation of assets by attorneys may reflect, not an issue with the substantive legislative provisions, but either with knowledge of the law, or with the provisions in place for supervision and enforcement. It is not clear whether express provisions related to specific types of transactions, including a requirement to obtain express approval prior to undertaking them, would add significantly to what is already in place.

Authority to Freeze Accounts: In Saskatchewan, where a financial institution has reasonable grounds to believe that a vulnerable adult is being subjected to financial abuse, it may suspend the withdrawal or payment of funds from a person's account for up to five business days. Immediately upon doing so, the financial institution must alert the Public Guardian and Trustee, which has the authority to require a financial institution to suspend the withdrawal or payment of funds from the person's account for up to thirty days. The Public Guardian and Trustee is

provided with the authority to investigate the allegations upon which the suspension of withdrawals or payments is made.[727]

Provision of bonds/security: Ontario law requires guardians, in some instances, to post security. These requirements could be extended to persons acting under a POA or other personal appointment related to property as both a deterrent to abuse, and a source of recourse in the case of abuse. However, it would be likely to have an inhibiting effect on access to POA; for this reason, ALRI declined to include such a recommendation in its review of proposals to address misuse of enduring POAs.[728]

- **QUESTION FOR CONSIDERATION: Are there mechanisms that could be put into place to reduce loss or damage to individuals through abuse of substitute decision-making powers, such as limits on conflict transactions, provision of authority to freeze accounts where abuse is suspected, or expanded requirements to post bonds or security? If so, which mechanisms would be most desirable, and how might they be practically implemented?**

E. Questions for Consideration

1. **Are there ways in which laws, policies or practices for addressing abuse through legal capacity, decision-making and guardianship laws could be better coordinated with general provisions for addressing abuse of those who tend to fall within this area of the law?**
2. **Are there specific information, education or training initiatives that could be integrated into law, policy or practice to ensure that individuals and their substitute decision-makers better understand their rights, roles and responsibilities, and if so, how might these be implemented?**
3. **Are there mechanisms that could be added to law, policy or practice to improve monitoring and oversight of substitutes, such as enhanced duties to report or account, "visitor" programs for persons under substitute decision-making, or other types of supervisory powers? If so, which mechanisms would be most desirable and how might these be practically implemented?**
4. **Are there new mechanisms for complaints or enhancements to the PGT's existing investigatory powers that would be effective and appropriate for addressing concerns regarding abuse or misuse of the powers of substitute decision-makers? If so, which mechanisms would be most desirable and how might these be practically implemented?**
5. **Are there mechanisms that could be put in place to reduce loss or damage to individuals through abuse of substitute powers, such as limits on conflict transactions, provision of authority to financial institutions to freeze accounts where abuse is suspected, or expanded requirements to post bonds or security? If so, which mechanisms would be most desirable, and how might they be practically implemented?**
6. **Are there other reforms to law, policy or practice that should be considered to prevent, identify and address abuse or misuse of the powers of substitute decision-makers?**

II. DISPUTE RESOLUTION AND RIGHTS ENFORCEMENT

A. Introduction

1. The Importance of Effective Dispute Resolution and Rights Enforcement Mechanisms

Dispute resolution and rights enforcement are closely connected to almost all of the other issues raised throughout this *Paper*. Without effective mechanisms to enforce the rights and responsibilities set out in the statutes and to resolve disputes between those falling within the scope of the law, the law amounts to little more than a statement of aspirations.

As has been noted throughout the *Paper*, many stakeholders (though certainly not all) find themselves in agreement with the essential approach of the current legislative regime, with its domain and time-specific understanding of capacity; its focus on safeguarding capable individuals from paternalistic interference; its requirement for substitute decision-makers to support the autonomy and inclusion of the persons for whom they act; and its careful provision of procedural rights. Their concern is that in practice, the legislation does not deliver on its promise. Some significant portion of the responsibility for that shortfall is attributed to gaps and shortcomings in the mechanisms for rights enforcement and dispute resolution. For those who advocate a more significant re-shaping of the fundamental premises of Ontario's statutory framework, improved and accessible dispute resolution and rights enforcement mechanisms are identified as an important component in a new system.

> Effective mechanisms for rights enforcement in particular are important, not only to ensure that individuals have meaningful access to the rights and protections accorded to them by the statute, but also for identifying and redressing systemic problems with the law itself or its implementation. Where rights enforcement and dispute resolution systems have no ability to identify and address systemic issues, problems with legislative drafting or approaches may never become sufficiently visible to spur change, major institutional actors may be able to disregard the requirements of the law with relative impunity, and the costs of ensuring compliance with the legislative scheme will fall on the shoulders of individuals who are relatively under-resourced.

Specific issues related to rights enforcement and dispute resolution are one aspect of the larger concern in this area regarding access to the law, which is the subject of this Part of the *Paper*. This Chapter will focus on the characteristics of decision-making forums, while the previous Chapter addresses options for preventing and identifying abuse by substitute decision-making powers (with a particular focus on administrative mechanisms); the following Chapter

addresses supports needed to access the law, such as assistance with navigating through complex systems; and the final Chapter in this Part deals with provision of information and education.

2. Dispute Resolution and Rights Enforcement in the Context of Legal Capacity, Decision-making and Guardianship

In considering what might make for effective dispute resolution and rights enforcement for legal capacity, decision-making and guardianship laws, it is necessary to consider the particular context of these laws and the characteristics of those they affect.

Characteristics of this Area of the Law

In designing systems for dispute resolution and rights enforcement for this area of the law, the most important aspect to keep in mind is its effect on the fundamental rights of those who fall under it, and its far-reaching effects on the well-being of these citizens. All of the principles identified in the LCO's *Frameworks* are profoundly implicated in these laws. Decisions as to whether a person has legal capacity, whether or not to appoint a guardian or to terminate a guardianship, who should act in the role of a substitute decision-maker, and whether that substitute decision-maker is adequately fulfilling her or his duties (for example, upon the passing of accounts) have life-altering implications.

It has been suggested that many aspects of this area of the law sit uneasily with the traditional adversarial model of dispute resolution. The Victorian Law Reform Commission, commenting on the processes of the administrative tribunal [VCAT] that addresses issues related to capacity, decision-making and guardianship in that jurisdiction, comments that these issues differ from most other issues dealt with by tribunals in that there is no dispute between litigants to resolve. Rather,

> VCAT is being asked to act as the representative of the state in deciding whether a person is unable to make their own decisions because of a disability and whether another person should be appointed to make those decisions for them. This task is not well served by employing traditional – or even more modern - `dispute resolution` processes. The Commission believes that this task would be better served by acknowledging the unique nature of Guardianship List matters and by designing special processes for use in these cases that are as informal and accessible as possible.[729]

As has been emphasized throughout this *Paper*, this area of the law must be understood in the broader context of the laws and supports available to older persons and persons with disabilities, including the interaction with mental health laws, income support programs, privacy and access to information laws, and the laws and structures related to health care, long-term care and social services. These are all areas of considerable legal and structural complexity, and in many cases under significant resource pressures.

Laws and systems related to legal capacity, decision-making and guardianship are complicated, perhaps unavoidably so, dealing as they do with concepts that are abstract but have profound practical implications; difficult trade-offs between accessibility, efficiency and procedural protections; and complex health and social service systems. This complexity makes the law difficult to navigate, creating additional difficulties in designing meaningful mechanisms for dispute resolution and rights enforcement.

Concerns about rights enforcement and dispute resolution in this area are exacerbated by perceived shortcomings elsewhere in the statutes. For example, in the absence of active monitoring or oversight mechanisms for persons acting under a power of attorney (POA) or as guardians, the provisions for passing of accounts or a request for directions from the Court take on an extra significance. For those who would advocate for reduced use of guardianships, inadequacies in procedural protections and reassessment mechanisms for capacity assessments raise additional concerns about the ability of the current system to respect fundamental autonomy rights. Pervasive concerns regarding lack of awareness and understanding of the law apply here as well: individuals and substitute decision-makers (SDMs) are frequently unaware not only of their rights and responsibilities under the law but of the avenues for raising and addressing issues. Dispute resolution and rights enforcement are best understood as one aspect of the inter-connected statutory framework.

As well, any discussion about access to capacity and guardianship law must be situated in the broader context of access to the law in Ontario in general. There have been, in recent years, many expressions of concern and calls for reform to Ontario's civil justice and legal aid systems, as well as a number of initiatives aimed to ameliorate some of these concerns.

For example, one important aspect of access to the law is access to legal advice and representation, whether through lawyers or paralegals. The special provisions for representation under legal capacity and guardianship laws are discussed in the following Chapter, and include provision of Legal Aid funded counsel for certain applications to the CCB and "section 3" counsel for persons whose capacity is in issue under the SDA. In general, however, the high cost of legal services has frequently been identified as a significant barrier for middle and low income individuals,[730] and the cost of legal services was repeatedly raised as a concern during the LCO's public consultations for the *Framework* projects. Some very low-income individuals may have access to legal services through Legal Aid Ontario; however, income criteria are restrictive, as are the range of issues addressed. In 2006, Ontario became the first jurisdiction in North America to license paralegals, who can represent individuals and provide legal services related to tribunal hearings, Small Claims Court, traffic matters and minor criminal matters.[731] The Law Society of Upper Canada administers a Lawyer Referral Service that provides individuals with a no-charge 30 minute consultation with a lawyer or paralegal.[732] Pro

Bono Law Ontario facilitates *pro bono* legal services to low-income individuals for civil (non-family) legal issues not covered by legal aid.[733] As well, *JusticeNet* is a not-for-profit service helping people in need of legal expertise, whose income is too high to access legal aid and too low to afford standard legal fees.[734] Despite these various initiatives to improve access to free or low-cost legal services, the cost of legal services remains a serious problem.

Common Types of Disputes

This section provides a very brief overview of the types of disputes and rights enforcement issues that commonly arise in this area of the law. Specific issues have been dealt with in the appropriate chapters, particularly those addressing capacity assessment mechanisms, the use of powers of attorneys and guardianships, and the appointment of SDMs. This section does not attempt to replicate that material, but simply to highlight aspects particular to concerns about dispute resolution and rights enforcement.

Challenging Findings Regarding to Capacity: A determination of a lack of legal capacity will have a transformative effective on an individual's life. A finding of incapacity under the *Substitute Decisions Act* (SDA) can result in long-term removal of decision-making authority from the individual, whether through the activation of a POA or through the appointment of a guardian. While findings of incapacity under the *Health Care Consent Act* (HCCA) are for specific decisions only and do not result in the long-term appointment of an SDM, decisions about admission to long-term care or treatment can have long-term and profound impacts on an individual's life. Given the central importance we place on individual autonomy, self-determination and the ability to participate in society, a determination that an individual lacks legal capacity, with all that it entails, is one that should not lightly be made.

Recognizing this, both the *Enquiry on Mental Competency* (*"Weisstub Report*")[735] and the *Report of the Advisory Committee on Substitute Decision Making for Mentally Incompetent Persons*[736] ("*Fram Report*") emphasized the importance of adequate procedural protections surrounding capacity assessments, to ensure that SDMs are only appointed for those who truly need them. The *Weisstub Report* recommended, alongside a number of important procedural protections, that a Review Board (rather than the courts) provide expert review of assessments through a hearing process,[737] and that individuals should have access to rights advice or a patient advocate or both.[738] The *Fram Report* emphasized the importance of safeguards to protect the rights of individuals who might not, without assistance, have the ability to oppose proceedings that remove fundamental rights.[739]

Identifying the Appropriate Substitute Decision-maker: In some cases, following an assessment of incapacity there is confusion or dispute regarding the identification of the appropriate SDM. There may be dispute, for example, about the validity of a POA or in some cases competing

POAs, or confusion as to the application of the HCCA's hierarchical list of SDMs. Family members may disagree as to who should be appointed as guardian. Such disputes may entail allegations of exploitation, abuse or neglect.

In some cases, these disputes arise out of or turn into protracted and bitter divisions between family members. Trusts and estates lawyers have sometimes analogized these to family law disputes, as family members may be competing for "custody" of an aging parent or sibling, with lifelong grievances and family dysfunctions arising to the surface. These situations may deteriorate into extended litigation, financed in part from the income and assets of the person they are nominally intended to benefit. Members of the Bar have pointed out that the legislation was not designed for these types of disputes:

> When the *Substitute Decisions Act* and the *Health Care Consent Act, 1996*, were passed into law, they did not anticipate the degree to which these laws would be applied in the context of "high conflict" families. A significant number of court applications now involve substitute decision making for incapable adults and pit family members against each other. The legislation was never intended to address conflicts of this degree and type, and the current processes do not lend themselves to timely or appropriate resolutions.[740]

For example, in the long-running case of *Abrams v Abrams,* an aggressive family battle over a mother's POA that spanned several years of litigation and included numerous orders from the court, DM Brown J commented that,

> Based upon my review of the history of this proceeding and after reading the endorsements previously made by my colleagues, I have concluded that the applicant seems more interested in engaging in a war of attrition by motion than in moving to a final adjudication of the merits. At the same time, the record clearly shows that [the respondents'] conduct has contributed significantly to the delay in scheduling this matter for trial.[741]
>
> …
>
> [E]ach, in his or her own way, has bickered and delayed, leading me to believe that [the mother]'s best interests have been shoved to the back seat whilst other problems amongst these battling family members have been brought to the fore.[742]
>
> …
>
> Proceedings under the *SDA* are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only one focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the Legislature in the *SDA*, should not and will not tolerate family factions trying to twist *SDA* proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues.[743]

The Toronto Star recently highlighted a bitter and protracted battle for guardianship of a middle-aged man with an intellectual disability between his sister and his long-term caregiver, involving tens of thousands of dollars in legal fees, allegations of kidnapping and criminal activity, a disputed POA for personal care, and a payout under the Huronia class action lawsuit. The dispute was ultimately settled on the eve of a hearing into the sister's guardianship application, with the agreement including a provision requiring mediation, to be paid for by both parties, prior to the commencement of any future action, and one of the parties commenting that the judge "would not be happy to see either woman back in his court".[744]

Challenging the Decisions of Substitute Decision-makers: The HCCA and the SDA set out principles and standards for decision-making by substitutes. These principles may not necessarily lead to a single possible outcome. As well, there may be concerns as to whether the legislative principles have actually been complied with. The person under guardianship or power of attorney may wish to challenge a decision by an SDM, as may third parties such as non-SDM family members, or service providers. For example, health care professionals may challenge whether a family member acting as an SDM has made a legally appropriate decision with respect to consent to treatment. Further, where there are multiple SDMs (commonly, where multiple family members have been appointed as attorneys under a POA), there may be a dispute between the SDMs as to the appropriate course of action in a particular circumstance.

Failure to Comply with Legislative Requirements: As has been discussed throughout this *Paper*, a key concern with the current legal framework in this area is the "implementation gap", in which the law on paper does not meaningfully translate into law on the ground. There are many reasons for this gap, including ignorance or misunderstanding of the law, practical challenges and resource limitations. One important element is inadequate rights enforcement mechanisms. Where individuals find it too difficult to raise concerns or seek remedies with respect to inappropriate or abusive actions on the part of SDMs, service providers or implementing institutions, this raises not only individual issues but systemic ones.

Concerns About Abuse or Neglect of Persons Lacking Capacity: Concerns about abuse or neglect of persons who may lack legal capacity and the avenues available for addressing these were addressed at some length in the previous Chapter. These issues may manifest in a number of ways, for example, through disputes about the appropriate SDM, challenges to a particular decision of an SDM, or allegations of failure to comply with legislative requirements. In any case, such concerns raise some of the most complex and grave issues in this area of the law.

Characteristics of Those Affected by This Area of the Law

Concerns regarding rights enforcement and dispute resolution under the SDA should be understood in light of the circumstances that disproportionately affect persons with disabilities

and older adults attempting to access the law, as identified in the *Framework* projects. These include factors such as the following:[745]

Lower average levels of education and literacy: For historical reasons, older persons and particularly older women, currently have relatively lower levels of literacy and education than younger persons. Persons with disabilities continue to experience barriers to education, and therefore also tend to have lower levels of education and literacy than persons without disabilities.

Fixed or low-income: For different reasons, older adults and persons with disabilities tend to be excluded from or marginalized in the labour force. Some older persons, particularly unattached older women, live in very low-income, but even those who are more financially secure frequently live on fixed incomes which limit their ability to afford legal services. Income levels for persons with disabilities, whether employed or not, are markedly lower than for those without disabilities.

Health and activity limitations: Older persons and persons with disabilities tend to disproportionately experience health and activity limitations that may affect their physical or psychological ability to pursue complaints and seek redress. While progress is being made, accessibility barriers remain and may impede the ability of older persons and persons with disabilities to access justice system services.

Congregate living environments: Those who reside in congregate settings, such as long-term care homes and psychiatric facilities face special barriers in accessing information and resources, and will particularly face challenges in pursuing complaints related to their living environments or the professionals who provide them with services.

Power imbalances: persons with disabilities and older adults may find themselves dependent on the continued supports either of institutional service providers or informal carers. These power imbalances may make it very difficult for them to raise concerns about abuse, exploitation or neglect.

As well, persons with disabilities that affect their memory or understanding of information will face particular challenges in accessing the law. These types of disabilities may make it harder to individuals to find about their rights and the available mechanisms for enforcing them, and to navigate complex systems, particularly without effective supports. As well, persons with these types of disabilities may be considered to be unreliable witnesses and therefore have difficulty in having their concerns taken seriously. For example, concerns about financial abuse by a family member may be dismissed as simply being the result of confusion or misunderstanding on the part of the complainant.

And of course where older age or disability intersect with other aspects of diversity, such as gender, sexual orientation, language, culture or others, there may be additional barriers to accessing the law. Persons from minority language communities, for example, may have difficulty finding information about their rights or options, or in communicating their concerns.

These characteristics have significant implications for how older persons and persons with disabilities access the law. They may face barriers in accessing information about their rights, independently navigating complex systems, pursuing options that have significant costs attached, or seeking redress against persons on whom they depend for vital supports. Systems that do not address such barriers may be practically inaccessible for these groups.

3. Goals for Effective Dispute Resolution and Rights Enforcement

ARCH Disability Law Centre has suggested that effective dispute resolution systems in the area of legal capacity and decision-making must satisfy certain requirements, including:

- Respecting the principle of accessibility, including the provision of supports to assist persons with capacity issues to access and use dispute resolution mechanisms;
- Respecting the principle of inherent dignity and worth, which requires meaningful mechanisms for raising concerns about abuse or mistreatment;
- Being effective, in that they are timely, navigable, and provided at no-cost to persons who live in low-income; and
- Being performed by an independent, impartial body with knowledge of the law and of the context of legal capacity and decision-making.[746]

The *Frameworks* recommend that, in order to ensure that complaint and enforcement mechanisms respect the principles, those designing them consider whether

- The law includes access to a complaint and enforcement mechanism that clearly and meaningfully identifies, addresses and remedies both individual and systemic violations of the law, including for those individuals who are particularly disadvantaged or at heightened risk;
- The complaint and enforcement mechanisms are designed in a way that addresses power imbalances and prevents potential retaliation against those who raise issues;
- The complaint and enforcement mechanisms are accessible, including respecting the *Human Rights Code* and *Accessibility for Ontarians with Disabilities Act*, providing appropriate accommodations, addressing barriers related to low-income, and recognizing intersectional identities;
- The complaint and enforcement mechanisms are navigable, whether through their simplicity and transparency or through provision of navigational assistance;

- Those affected are provided with meaningful and accessible information about their rights and how to enforce them; and
- Supports are available to empower individuals to understand their rights and advocate for themselves.[747]

Considering the particular contexts of this area of the law, dispute resolution and rights enforcement mechanisms must be adapted to the gravity of the issues, as well as to the nature of the relationships in which many of the issues occur.

> ➢ **QUESTION FOR CONSIDERATION: What goals should be the priorities in considering reforms to Ontario's dispute resolution and rights enforcement mechanisms for this area of the law?**

4. Avenues of Recourse Outside of the SDA and HCCA

In addition to the avenues of redress specifically identified under the SDA and HCCA, there are some general venues through which persons falling under legal capacity, decision-making and guardianship laws may seek assistance or remedies. The most important of these are the complaints procedures for the regulated professional colleges, as this is the mandated method of oversight and recourse related to formal capacity assessments. As well, individuals may have resort to ombuds-type services and internal institutional complaints procedures. It is not within the scope of this project to recommend changes to the internal processes of the regulatory colleges or of service provider institutions in general; however, it is important to understand the strengths and limitations of these pathways as part of the context for dispute resolution and rights enforcement in this area.

Internal Institutional Policies and Procedures

Many institutions have created internal mechanisms for addressing concerns or complaints. Part Four, Chapter I described how both the *Social Inclusion Act* and the *Long-term Care Homes Act* mandate and set standards for internal processes for addressing abuse. As is detailed at some length in the LCO's *Final Report* on the *Framework for the Law as it Affects Older Adults*, agencies providing home care and other service under *Home Care and Community Services Act* are required to establish processes for receiving and reviewing complaints regarding eligibility, level and quality of services.[748] Most hospitals have internal complaint procedures, and many have created Patient Advocacy Offices whose functions are to assist patients or residents.

These procedures can offer low-cost, non-adversarial and accessible means of raising and resolving issues. However, they are generally not independent processes, so that the individual who is raising issues may have concerns about bias or reprisal. Depending on the level of formality of the institutional procedure, there may also be concerns about transparency and accountability.

Sectoral Complaints Mechanisms

Some sectors have complaint mechanisms that can be used to address concerns related to decisions regarding legal capacity and decision-making. For example, the Ombudsman for Banking Services and Investments (OBSI) provides an independent service for resolving disputes related to participating banking services and investments, which is free of charge to consumers. Positioned as an alternative to the legal system, OBSI will receive complaints where internal dispute resolution mechanisms have not proved successful. OBSI will accept complaints within 180 days of the final response to an internal process, or after the firm has had at least 90 days to respond through its internal processes. The service is confidential, and the approach informal. OBSI cannot issue binding orders, but its recommendations for resolving disputes are generally respected. Where either party decides not to accept a recommendation, the complainant may still have recourse to legal action.[749] In this role, OBSI addresses disputes related to capacity, substitute decision-making and abuse – for example, situations where a bank blocks a transaction by an SDM due to concerns about abuse, and a dispute develops.

Complaints to the Colleges

As is described in Part Two, Chapter II, those who formally assess legal capacity, whether through examinations under the *Mental Health Act*, assessments under the SDA, or evaluations under the HCCA, must be members of specified professions, and therefore fall under the regulatory control of their professional colleges. Complaints about failure to comply with ethical or statutory requirements for capacity assessment may be made to the assessor's professional college. The *Regulated Health Professions Act* and the accompanying *Health Professions Procedural Code* set time frames for addressing complaints, as well as substantive and procedural rights for complainants. In practice, this appears to be a rare occurrence.

The Advocacy Centre for the Elderly (ACE) has commented with respect to complaints against regulated health professionals that

> It is ACE's experience that the complaints process is lengthy and, if legal counsel is retained, expensive. Some of our clients opt not to make a complaint because it will take too long to address a problem that needs to be addressed immediately.[750]

ACE further raised concerns that Colleges may fail to promote compliance with or enforcement of the existing laws, citing a case in which a College upheld a physician practice of making treatment decisions and having nursing staff inform families of the treatment only after the fact, which ACE argued was blatant disregard for the requirements for consent under the HCCA.[751]

B. The Consent and Capacity Board

1. Introduction to the CCB

The Consent and Capacity Board (CCB) is established under the HCCA as an independent, expert administrative tribunal,[752] with jurisdiction over issues raised by the HCCA, PHIPA, the MHA and determinations of capacity under the SDA. It describes its mission as providing "fair, timely, effective and respectful hearings that balance legal and medical considerations while protecting individual rights and ensuring the safety of the community",[753] a mandate which emphasizes the multidimensional nature of its role, and the careful balance it must strike between competing principles and policy goals.

In particular, the CCB may hear the following applications:

- To review a finding of incapacity, whether by a health professional with respect to treatment,[754] an evaluator with respect to admission to care facilities or consent to personal assistance services provided in a long-term care home,[755] or by a Capacity Assessor with respect to property;[756]
- To appoint a decision-making representative with respect to decisions to be made under the HCCA;[757]
- For permission for an SDM to depart from the prior capable wishes of a person who lacks capacity;[758]
- To determine whether an SDM is acting in compliance with the requirements of the HCCA as to how decisions are to be made;[759]
- For directions when the appropriate application of the HCCA with respect to a required decision is not clear; and[760]
- For review of certain specified decisions that have significant impacts on the rights of the person, such as admission to a treatment facility and admission to a secure unit in a care facility.[761]

In practice, the vast majority of the applications that the CCB addresses are reviews of determinations that a person is incapable with respect to treatment, or findings that an individual should be admitted or remain admitted at a psychiatric facility on an involuntary basis.[762]

The disputes before the CCB are somewhat unusual in that both parties to an application are likely to agree on the ultimate goal, "to see the patient out of hospital and moving forward in his or her life".[763] Physicians are not advocates for intervention, *per* se, but rather aim to restore or improve the patient's, so that their aims are not cleanly opposed to those of patient counsel who are aiming to protect the autonomy and liberty interests of their clients. However, it certainly may be true that the physician and the patient may have quite different

understandings of how to achieve a good outcome, and may prefer a very different balance between safety and autonomy.

Members of the CCB may hear applications alone or in panels of three or five. The legislation gives priority to expeditious resolutions: hearings must commence within seven days of an application and decisions rendered within one day of the conclusion of the hearing. Decisions of the CCB may be appealed to the Superior Court of Justice on questions of both fact and law.[764]

The effectiveness of the CCB is supported by the requirements for rights advice under the MHA, and the widespread provision by Legal Aid Ontario (LAO) of counsel without cost for individuals who appear before the CCB.

The CCB is unique among Canadian jurisdictions, and is a model for dispute resolution that appears to have strong support among stakeholders. In *Cuthbertson v Rasouli*, the Supreme Court of Canada remarked on the strengths of the CCB as a venue for the resolution of disputes related to treatment and consent, commenting on its "strong track record", its expertise in balancing the objectives of the HCCA, and its ability to "bring consistency and certainty to the application of the statute".[765] During the LCO's preliminary consultations, the LCO stakeholders emphasized the value of the independent, expert, flexible, relatively non-adversarial and expeditious dispute resolution provided by the CCB.

2. Concerns and Critiques

Concerns related to the CCB amount to a desire for adjustments, rather than whole-sale reform. Not surprisingly considering its mandate and the often very different experiences and perspectives of the usual parties to an application, the patient and the physician concerns related to the operation of the CCB vary significantly.

Respondent Concerns

Undermining the long-term well-being of patients: In most applications, the respondent will be a physician whose determinations are challenged by a patient. From the perspective of some respondents, the CCB's strong orientation towards procedural rights detracts from the central goal of caring for and protecting people who cannot do so for themselves. In this view, an excessive preoccupation with rights and process during the hearing process may avert immediate minor infringements of rights but may ultimately lead to more serious and sustained rights infringements down the road.[766] That is, necessary interventions may not take place, with negative long-term consequences for the patient. Psychiatrist Richard O'Reilly argues that, for example, in a situation where an applicant is discharged following a CCB decision to rescind his involuntary status (and therefore his compulsory admission to a psychiatric facility) based on a procedural defect, the applicant regains his liberty at that time but the risk to his liberty remains: if the applicant harms someone as a function of his illness, a subsequent criminal

conviction or a Not Criminally Responsible (NCR) finding will infringe that liberty interest all the same.[767]

Resource implications for over-burdened systems: Respondents also raise concerns that the CCB's procedural focus drains resources from an already overburdened system, leading to significant costs in terms of both financial and human resources".[768] Although respondents are more likely to be self-represented at a hearing, when they do obtain counsel that cost comes at the expense of limited clinical care dollars.[769] As well, time spent by healthcare professionals on CCB processes is time taken away from patient-focussed activities.

Anti-therapeutic effects: There are also criticisms that CCB hearings lead to "anti-therapeutic results". As noted above, it is argued that time required for CCB processes may affect the time available for clinical activities, as well as delaying needed treatment.[770] Further, hearing processes may in themselves create strain for the parties.[771] It should be noted, however, that the anti-therapeutic effects of legal proceedings are disputed: in fact, some argue that access to due process for patients can actually support therapeutic outcomes by increasing the accountability for the treatment team,[772] increasing compliance on the part of patients with the ultimate decision,[773] and assisting applicants in understanding what is happening to them and why.[774]

Appeals and "warehousing": A widely raised concern that exemplifies many of the above themes, relates to processes for appeals from CCB decisions. While Legal Aid counsel are commonly provided for applications to the CCB, they are much less commonly provided for appeals to the Superior Court of Justice. Following a negative decision for an applicant to the CCB, counsel may assist the applicant to file a notice of appeal; however, without counsel to move the appeal forward, the matter may linger. This is a particular concern for treatment decisions for persons who are involuntarily admitted to a psychiatric facility. While the matter is pending, which may in some cases be a period of some months, the individual is neither at liberty nor being treated: the psychiatric facility is simply "holding" the person pending resolution, an unsatisfactory situation from all perspectives.

- **QUESTION FOR CONSIDERATION: Are there practical reforms to law, policy or practice that would promote more timely resolution of appeals from decisions of the Consent and Capacity Board?**

<u>Applicant Concerns</u>

Insufficient attention to procedural protections: Contrary to the arguments made from the respondent perspective, applicants and their advocates often perceive the CCB as being *insufficiently* attentive to due process and fundamental rights. Lora Patton has raised concerns about routine disregard for procedural requirements and a lack of remedies for violations.[775] A

stakeholder survey by current CCB Chair Justice Ormston's found that counsel for applicants felt that CCB members often failed to understand the enabling legislation or the role that counsel plays in advancing and protecting the rights of applicants.[776]

Bias in favour of medical expertise: Connected to the above is a concern that in practice, the CCB is excessively deferential to medical expertise, so that the rights underlying the statute are in practice insufficiently realized. Professor Aaron Dhir raises concerns that adjudicators, clinicians and even patient's counsel may fall into the trap of conflating the presence of mental disability with lack of capacity, so that the tribunal hearing in regards to capacity may become a "mere ceremonial act, devoid of real meaning", and urges patient counsel to develop expertise in pharmacology and psychiatric diagnostics so as to be able to challenge these assumptions and educate tribunal members.[777]

Disempowering processes: Applicants may find the CCB process disempowering, with its implicit acceptance of a medicalized approach that positions the issues as problems to be both defined and resolved by "expert[s]", an approach that strips applicants of the ability to define their own experience.[778] A related concern is the lack of a role for consumers as members of the CCB.[779] The results of a study into the experience of ethno-racial consumers showed that applicants felt that the Board was inaccessible, and failed to recognize their distinct (cultural) experiences.[780] Justice Ormston's report also noted the view that Board members "were insensitive to the patients' needs."[781]

3. Options for Reform

Suggestions for reforming the CCB's processes often focus on means of improving their responsiveness to the particular context of these decisions. This reflects the comment of the Victorian Law Reform Commission, reproduced earlier in this Chapter, that the nature of these issues are distinctive, that they are not necessarily well suited to traditional adversarial approaches, and that decision-making bodies should have latitude to adopt flexible and innovative approaches to dispute resolution. Two such potential approaches are considered below.

Increased access to mediation: In recent years, many administrative tribunals have incorporated pre-hearing mediation into their processes in an effort to manage caseloads and promote responsive resolutions. Mediation may, of course, take on many different forms.

Greater use of mediation by the CCB could recognize both greater self-determination by applicants, and the on-going nature of the relationships between the parties in most applications. However, mediation processes may raise concerns because the patient is inherently in a vulnerable position: there is a clear imbalance of power between the parties, especially since the physician is in a position of authority over the patient. As a result, there is a

risk that mediation may tilt the process towards excessive intervention. Much of the usefulness of mediation in this context would depend on high levels of specialized knowledge and skill among the mediators. Further, as the issue is one of fundamental rights, it may clearly be argued that it is not amenable to mediation: rights are not negotiable. It is notable that the Canadian Centre for Elder Law (CCEL) reports that in its consultation with experts and stakeholders it found a universal rejection on the question of mediating capacity.[782]

Further, one of the hallmarks of the CCB's process is its focus on timely, efficient resolution of disputes, an important attribute in a context where decisions may be urgent and fundamental liberties at stake. The current statutory time limitations inherently constrain opportunities for pre-hearing mediation.

- **QUESTION FOR CONSIDERATION: Are there effective and practical means of further incorporating alternative dispute resolution mechanisms into the processes of the Consent and Capacity Board that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?**

Active adjudication: Active adjudication has been characterized as a "mid-point between adversarial and inquisitorial models of legal process, and one focused on the policy context rather than the judicial model of the neutral arbiter or inquest model of the judge-led inquiry".[783] It generally involves a more hands-on and flexible approach by the adjudicator, as opposed to the traditional adversarial model. The reformed Ontario Human Rights Tribunal provides a notable example of the use of active adjudication in a rights-based context.[784] The greater control over proceedings awarded to the adjudicator through this approach may assist in focussing the issues, evening the playing field between unequally matched adversaries, and encouraging a truth-seeking process rather than a choice between warring positions.[785] There are concerns that active adjudication, if poorly implemented, may undermine the principles of natural justice or lead to concerns of bias; for successful use of active adjudication, it is necessary to have decision-makers who are skilled, expert and able to discern where such an approach is appropriate.

- **QUESTION FOR CONSIDERATION: Are there effective and practical means of amending the hearing processes of the Consent and Capacity Board, such as for example incorporating active adjudication, that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?**

C. The Superior Court of Justice

1. Jurisdiction of the Court

Ontario's Superior Court of Justice has jurisdiction over a number of issues related to legal capacity, decision-making and guardianship.

As noted above, the Court hears appeals of decisions made by the CCB. Part Three, Chapter III of this *Paper* detailed the role of the Court in the appointment, variation and termination of guardianships, including directly through the court-appointed guardianship process (either through hearing or the summary disposition process), and by hearing applications related to a refusal by the PGT to issue a replacement certificate for a statutory guardianship. As was noted above, decisions about who should or should not act as guardian to a person determined to legal capacity may be the venue for high-conflict family disputes.

The Court also has an important role in providing oversight of the activities of SDMs and resolving questions of interpretation. Notably, the Court may hear applications for the passing of all or part of the accounts of either a guardian or attorney for property. The Court also has broad powers to "give directions on *any question* arising in connection with the guardianship or power of attorney" [italics added] for either property or personal care.[786]

Significantly, the Court has broad remedial powers when addressing applications for directions or for the passing of accounts. Upon an application for directions, the Court may "give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this Act".[787] Upon the passing of accounts of an attorney, the Court may direct the PGT to apply for guardianship or temporarily appoint the PGT pending the determination of the application, suspend the POA pending the determination of the application, order a capacity assessment for the grantor, or order the termination of the POA. Similarly, with an application to pass the accounts of a guardian, the Court may suspend the guardianship pending the disposition of the application, temporarily appoint the PGT or another person to act as guardian pending the disposition of the application, adjust the compensation taken by the guardian, or terminate the guardianship.[788]

2. Concerns and Critiques

During the LCO's preliminary interviews, a number of concerns were raised regarding current dispute resolution mechanisms under the SDA.

Warring families: As described earlier in this Chapter, in some cases, proceedings related to powers of attorney or guardianship become venues for (or have their sources in) bitter personal disputes that have less to do with the application of the law or the well-being of the individual who is supposedly at the centre, than with longstanding family divisions. These types of cases raise difficulties similar to those at the heart of some family law disputes. A court room may not be the best place to address tangled family dynamics. Exacerbating the problem is that such litigation may be funded, not by the feuding parties, but from the assets of the "incapable" individual, and may have the end result of undermining or ending relationships that are of significant importance to that individual.

Adversarialism: Related to the above point, where individuals who are or alleged to be legally incapable wish to raise concerns related to the need for guardianship or misuse of funds, for example, the adversarial nature of the process may make that an unappealing option, because they may be proceeding against family members or other persons with whom they have a personal relationship, or on whom they have some dependency for care or support.

> There are clear barriers to pursuing litigation to resolve conflicts with a statutory guardian, such as the cost and complexity associated with the legal process. When the guardian is also a family member there are further concerns such as the impact litigation may have on family relationships. This is especially worrisome when the 'incapable' person may depend upon the support of the family member guardian…. [L]itigation or termination of the guardianship may be an extreme and inappropriate measure to deal with problems that may be resolved through mechanisms that may allow the guardianship to remain intact.[789]

Cost: The cost of legal advice and representation for an application to court can be beyond the reach of many families. As one consultee remarked unhappily, "Every door leads to a lawyer's office". Practically speaking, redress is unavailable because it is beyond the individual's resources. This practical inaccessibility of redress was a dominating theme in discussions of abuse and misuse of powers of attorney and guardianship. As ARCH Disability Law Centre has observed, this issue is exacerbated because the SDM has easier access to the funds of the individual than does the individual him or herself. ARCH provided an example from its own experiences serving such clients.

> [T]he SDA permits guardians to use the 'incapable' person's funds to pay for legal counsel to challenge the 'incapable' person's attempts to assert his/her autonomy. This is exactly what happened in Hazel's case: her guardian used Hazel's money to pay his own legal counsel, while at the same time refusing her access to her own funds, which she needed in order to defend herself. The guardian's access to Hazel's funds was automatic, while her ability to recoup costs if he 'overspent' would be based on her being able to convince a court to issue a costs award against the guardian. This latter process would impose further costs upon Hazel. Even if she was successful in obtaining an order from the court, there is no guarantee that her guardian would have had the resources to honour the order.[790]

Complexity: The processes for seeking redress under the SDA are legally complex and are intimidating for individuals, particularly since there are no formal mechanisms available to provide information or supports. There are no parallels under the SDA to the provisions for rights advice or rights information under the HCCA. While guardians and persons acting under a power of attorney are responsible for providing information about their roles and responsibilities to the individual, there is no mechanism for ensuring that they do so, and where the concerns are related to the conduct of the SDM, that substitute is hardly likely to be a reliable source of information. ARCH Disability Law Centre sums up its review of Ontario's mechanisms for right enforcement for persons with disabilities under guardianship as follows:

> In many cases, the SDA does technically contain mechanisms for monitoring and redress, but these mechanisms are practically ineffective because they are not accessible to many 'incapable' persons. For example, the SDA provides for several court-based processes to enable guardians to seek directions or allow 'incapable' persons to challenge the appointment or continued role of a guardian. Such processes are inaccessible due to the costs required to initiate litigation and retain counsel, the fact that they are time consuming, legally complex, and rely on the initiative of the 'incapable' person. No support is available to assist 'incapable' persons to access legal processes.[791]

It was pointed out to the LCO that many of these problems can be traced to the repeal of the *Advocacy Act* and the complementary provisions of the SDA, which would have provided individuals with rights advice at a number of key points, including appointments of statutory guardians, applications for court-appointed guardianships, court orders for assessments of capacity, and appointments of the PGT as a temporary guardian following an "serious adverse effects" investigation. The provision of advocacy services at these points would have ensured informational and navigational supports at those points where significant rights were at issue. Issues related to advocacy and similar supports are dealt with more thoroughly in the following Chapter, but must be kept in mind as part of the context of law reform in this area.

3. Options for Reform

Based on the above, it appears that reform to the dispute resolution processes under the SDA needs to focus on increasing accessibility, broadly understood, as well as the ability to effectively address the nature of the family dynamics at play in this area of the law and to bring a holistic approach to the issues at stake. A review of other jurisdictions indicates two main approaches to such reform: adding services and supports to existing court-based processes, or moving some or all issues to an administrative tribunal system. Within either approach, there are multiple design options. The following Chapter explores advocacy and other types of supports for persons attempting to access the law, while Chapter IV of this Part explores issues related to access to information: any recommendations for reform to dispute resolution and rights enforcement processes must be considered in the light of those materials.

<u>Creating Additional Supports or Services for Court Processes</u>

Ontario has created a number of specialized courts that are able to provide expert, targeted and holistic services, to better address their particular context. The Unified Family Courts and the Mental Health Court are two well-regarded examples of such an approach to justice. The Mental Health Court was formed in 1998, in response to the strains placed on the Ontario Court of Justice by the increasing numbers of mentally disordered accused at Toronto's Old City Hall location. Toronto's Mental Health Court provides diversion services, accommodates the needs of mentally ill accused, expeditiously deals with issues of "fitness to stand trial" and attempts to "slow down the 'revolving door'". It provides expert and holistic services: the Crown Attorneys are dedicated, permanent staff, there are nine Mental Health Workers attached to the Court, a

psychiatrist from the Centre for Addiction and Mental Health attends daily to perform "stand down assessments", and court clerks have specialized knowledge of the system.[792]

The United Kingdom's Court of Protection (CoP) provides an example of such a specialized court in the context of legal capacity decision-making law. It is a court that has a specific mandate to address this area of the law, and that has a broader range of tools at its disposal for addressing the issues. The CoP has broad jurisdiction, which includes

- making determinations of capacity;
- making declarations, decisions or orders on financial or welfare matters affecting persons who have been found to lack capacity;
- appointing and removing deputies to make ongoing decisions for persons who have been found to lack capacity;
- determining the validity of powers of attorney;
- considering objections to the registration of a power of attorney.[793]

The volume of applications dealt with by the COP is very large. In 2010, the COP received over 18,000 applications related to property and financial affairs, the vast majority of which were related to applications to appoint a deputy.[794]

The processes and powers of the CoP are specialized in a number of respects:

- **Tailored rules of procedure:** The COP has the power to make its own Rules dealing with the manner and form of proceedings, notice, evidence, the enforcement of orders, and other matters.[795]
- **Codes of practice:** for the guidance of those who act in connection with the MCA, comprehensive, plain language and authoritative "Codes of Practice" must be developed and revised as required.[796]
- **Assistance to applicants:** The application process is fairly complex, with a series of deadlines and notice requirements. For example, the "application pack" for an application related to financial and property matters that does not require permission from the CoP to proceed, includes ten different documents, including both forms and directions. CoP staff will provide general information about the CoP's processes, as well as basic guidance in relation to the application and forms.
- **The Visitor system:** The CoP has the power to request a report from a "Visitor". These visitors, some of whom are designated "special visitors" with expertise in capacity-related disabilities, may be ordered by the CoP to visit deputies, attorneys or the individuals for whom these persons are acting and to prepare reports for the COP or the Public Guardian on issues as directed.[797]

- **Requests for reports:** The COP may also request a report from the Public Guardian, a local authority, or a National Health Service body. The report may be made in writing or orally, as directed.[798]
- **Appointment of public counsel:** The COP may appoint a "suitable person" or the Official Solicitor (with consent) to act in the name of, represent or act on behalf of the individual to whom proceedings relate.[799]

It should be noted that the legal capacity and decision-making system in which the CoP functions differs in many significant respects from Ontario's, including the presence of a comprehensive public registry system for both deputies and attorneys, the institution of "Mental Capacity Advocates" for particularly vulnerable individuals (as is described in Part Four, Chapter III of this *Paper*) and a Public Guardian with broad responsibilities to monitor SDMs, including through registries, receipt of reports, Visitor programs and a complaint mechanism. The broad jurisdiction and heavy caseload of the CoP makes it possible for it to operate as a specialized court, and to develop expertise and specialized services accordingly.

ARCH Disability Law Centre, in its review of Ontario's current system for protecting the rights of persons with disabilities who are subject to guardianship, pursues this approach to reform, recommending that current dispute resolution systems under the SDA be supplemented by

- a comprehensive mandatory system of independent rights advice for those falling under guardianship law, potentially by a "Visitor" system as is described in Part Four, Chapter II;
- provision of advocacy supports to persons wishing to challenge a finding of incapacity under the SDA;
- measures to limit the imposition of guardianship and require its regular review, such as periodic capacity assessments and time-limited decision-making arrangements;
- mandatory education and training programs for guardians;
- regular mandatory reporting requirements for guardians; and
- the establishment of a Monitoring and Advocacy Office that would, among other functions, receive complaints and informally resolve them where possible.[800]

Specific recommendations by ARCH are reviewed in more detail at the relevant points in this *Paper.*

- **QUESTION FOR CONSIDERATION: Are there additional powers for the court or specialized supports or services for persons attempting to access their rights or resolve disputes under the *Substitute Decisions Act* that would improve the accessibility or effectiveness of current dispute resolution processes in this area? If so, what reforms would be most appropriate and how could they best be implemented?**

Tribunal Systems

In its *Report* prior to the reforms that lead to the *Mental Capacity Act 2005* (MCA), the Law Commission of England and Wales considered the creation of an administrative tribunal to deal with rights enforcement and dispute resolution in this area of the law, but ultimately recommended a specialized court because of the seriousness and complexity of the issues that would form the majority of the workload for the responsible judicial forum.

Some Canadian commentators have, however, suggested that legal capacity and guardianship issues currently falling under the jurisdiction of the Superior Court of Justice might be effectively addressed through an administrative tribunal, pointing to the success of the CCB within its mandate. For example, in its commissioned research paper on supported decision-making, the Canadian Centre for Elder Law commented that,

> Administrative tribunals were considered more accessible, less intimidating, and more expert in their deliberations around issues such as decision-making, least intrusive approaches and community linkages. *The Ontario Consent and Capacity Board seems well-placed to oversee supported decision-making challenges, with an appeal to Superior Court*. [italics in the original][801]

Similarly, Michael Bach and Lana Kerzner, in their work on supported decision-making, have recommended dispute resolution and rights enforcement through an administrative tribunal with exclusive focus on decision-making.[802]

During the 1980s, as part of a wave of guardianship reform, a number of Australian states innovated the use of administrative tribunals to address matters related to legal capacity, decision-making and guardianship. The tribunal model is now firmly entrenched in those jurisdictions. A comprehensive review of the use of tribunals in this context, conducted by Carney and Tait, found that they had been notably successful along a number of benchmarks. Using a mix of cross-jurisdictional file reviews, case studies, observations of hearings, and in-depth interviews, the authors concluded that:

- Courts appeared to be more likely than tribunals to defer to professional advice and were less likely to use hearings to test out evidence or seek out new information, and perhaps consequently to appoint SDMs with extensive powers;[803]
- Tribunals appeared to be more likely focus on institutional practices and to act in a proactive and systemic way, as well as to attempt to divert cases; [804] and
- Tribunals appeared to be more likely to attempt to include the person for whom an application was made as a participant in the process. [805]

Carney and Tait concluded that,

> Tribunals tend to pay more attention to social context and functioning, and are less likely to appoint proxies. This may have something to do with the tribunal form or the more inquisitorial style of hearing. But it also reflects a different narrative, a different vision of what the jurisdiction is about. They need social information to identify socio-legal crises. They may be reluctant to appoint substitutes, but they are more interventionist than courts in addressing systemic issues. The tribunals also pay more attention to incorporating the person for whom the application was made into an alliance.[806]

As one example of such a tribunal, the Australian state of Victoria has created a "Super-Tribunal", the Victorian Civil and Administrative Tribunal (VCAT). Its jurisdiction is broad, including matters related to legal capacity and guardianship as well as human rights, consumer matters, residential and retail tenancies, freedom of information issues, and many other matters. Its purpose is to be "an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service".[807]

VCAT members include the President, who is a judge of Victoria's Supreme Court; Vice-Presidents, who must be judges of the County Court, Deputy Presidents (who are full-time appointments); Senior Members and ordinary members (who may be full-time, part-time or sessional appointments. All must have been admitted to legal practice.[808] VCAT has three divisions or "lists": civil, administrative, and human rights, the latter being the locus of capacity and guardianship decisions. VCAT has locations across the state, and in guardianship issues, may conduct hearings at hospital bedsides or in homes to avoid the need to transport ill or frail individuals to hearing centres.

VCAT is a very busy Tribunal, dealing with over 90,000 applications in 2012-2013. The Guardianship List is one of the busiest, with almost 11,000 applications commenced during that time.[809] VCAT hears applications to appoint or to reassess guardians for personal care or administrators for financial matters; to revoke, vary or suspend a power of attorney for property; to revoke or suspend powers of attorney for medical treatment; or to consent to special procedures such as termination of a pregnancy. Because the legislation mandates regular reassessments of the appointments of guardians and administrators, these make up a considerable portion of VCAT's work in this area (approximately two-thirds).[810]

The Victorian Law Commission explains that,

> Because VCAT is a tribunal rather [than] a court, its members do not have the same tenure as judges and magistrates, and its procedures are designed to be less formal than those followed in courts. For example, VCAT is not bound by the rules of evidence. The VCAT Act directs that hearings must be conducted with 'as little formality and technicality' and 'as much speed' as the law and a proper consideration of the matter allows. However, VCAT is bound by the rules of natural justice. This

> means that the parties must be given a fair hearing and have their case determined by an impartial decision maker.[811]

The Commission further notes that VCAT employs an "inquisitorial" model.[812] Interestingly, currently none of the parties in Guardianship List matters, including the proposed represented person, has a right to legal representation during the hearing; rather the consent of VCAT or the agreement of all the parties is required before a professional advocate can represent a person at a hearing.[813] This restriction should be understood in light of the activities of Victoria's "Public Advocate", which provides no-cost individual and systemic advocacy related to capacity and guardianship issues, as is described in the following Chapter. The Victorian Law Reform Commission has recommended that the legislation be amended to provide all parties with a right to legal representation or to representation by another professional advocate with leave of VCAT.

Matters are dealt with expeditiously: the legislation requires VCAT to list guardianship and administration matters for hearing within 30 days of receipt of the application, and the median resolution time for applications in 2012-2013 was 4 weeks. VCAT includes mediation and compulsory conferences as part of its processes. In its *Annual Report*, VCAT states that it refers

> matters to mediation or compulsory conference at an early stage, achieving significant success in terms of party satisfaction and reduced hearing times. Although presiding Members must make final orders, in appropriate cases ADR offers families the best opportunity to resolve their issues amicably. In a significant number of cases, following ADR, parties have withdrawn their applications without VCAT needing to make orders appointing administrators or guardians, or orders about enduring powers of attorney.[814]

VCAT hearing centres provide a range of services to applicants, including a duty lawyer to answer questions and provide assistance to unrepresented applicants, and a volunteer Court Network service that provides information and referrals.

VCAT also has some functions that go beyond dispute resolution. It receives annual accounts from private administrators, and provides public education sessions around the state for newly appointed guardians and administrators.[815] The role and operation of Victoria's Public Advocate is described in Part Five: it suffices to say here that the operation of VCAT is best understood in the context of the existence of a separate, independent body performing both individual and systemic advocacy for individuals affected by guardianship laws. In particular, when VCAT receives an application, it may refer the matter to a Public Advocate Duty Officer, who may contact the applicant or proposed represented person to explain the process or make enquiries, may prepare a report on the views of the proposed represented person, or may conduct a formal investigation.[816] The Victorian Law Reform Commission noted the importance of a

thorough pre-hearing process in these cases, and recommended an expanded role for VCAT in this area, so that it can effectively undertake

- a thorough examination of the application to ensure that it is supported by material the tribunal needs to decide the matter;
- an analysis of the application to determine whether it should proceed directly to hearing or be referred to an alternative process; and
- liaison with the parties, particularly the applicant and the proposed represented person, to ensure that they are properly prepared for the hearing or for any alternative processes that are recommended.[817]

Some aspects of VCAT, such as the limited role currently allotted to legal counsel, would make an uneasy fit within the Ontario context; however, VCAT provides an example of a flexible, specialized administrative tribunal that places an emphasis on accessibility and efficiency. This approach is supported through the strong advocacy and systemic functions played by the Public Advocate.

- **QUESTION FOR CONSIDERATION: For dispute resolution and rights enforcement under the *Substitute Decisions Act*, are there lessons to be learned from tribunal systems in other jurisdictions?**

D. Questions for Consideration

1. **What goals should be the priorities in considering reforms to Ontario's dispute resolution and rights enforcement mechanisms for this area of the law?**
2. **Are there practical reforms to law, policy or practice that would promote more timely resolution of appeals from decisions of the Consent and Capacity Board?**
3. **Are there practical and effective means of further incorporating alternative dispute resolution mechanisms into the processes of the Consent and Capacity Board that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?**
4. **Are there practical and effective means of amending the hearing processes of the Consent and Capacity Board, such as for example incorporating active adjudication, that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?**
5. **Are there additional powers for the court or specialized supports or services for persons attempting to access their rights or resolve disputes under the *Substitute Decisions Act* that would improve the accessibility or effectiveness of current dispute resolution processes in this area? If so, what reforms would be most appropriate and how could they best be implemented?**
6. **For dispute resolution and rights enforcement under the *Substitute Decisions Act*, are there lessons to be learned from tribunal systems in other jurisdictions?**

III. SUPPORTS TO ACCESSING THE LAW: NAVIGATION, PROBLEM-SOLVING AND VOICE

A. Introduction

As the LCO highlighted in the *Frameworks*, persons with disabilities and older persons, as well as those who represent, work with or advocate for these individuals, have frequently noted the challenges that they face in receiving services and securing their rights, even when dealing with legislation or services that are intended to benefit them. These challenges have a variety of sources, including

- negative or stereotypical attitudes on the part of service providers or embedded in service systems;
- the inherent difficulties in navigating large and complex bureaucracies, especially for individuals who are in any way vulnerable or marginalized;
- power imbalances between those who provide services and those who receive them, again especially for vulnerable individuals;
- challenges arising from the intersection of other types of diversities, such as language, culture, racialization, gender, or many others with their older age or disability; and
- the inevitably occurring imperatives within large institutions, including resource constraints and conflicting institutional goals.

All of these barriers and challenges must be understood in the broader context that older adults and persons with disabilities may experience, in which they are more likely to be live in low-income and to experience social isolation and lack of opportunities for participation, and in which they may experience persistent silencing or stigmatization.

Consistent with this broader picture, during the LCO's preliminary consultations, participants raised a number of linked concerns about the operation of Ontario's capacity, decision-making and guardianship laws: the vulnerability of individuals falling within the system to violations of their statutory rights, sometimes with profound consequences; the challenges for individuals of navigating effectively through a very complex system; and the perceived shortfalls in dispute resolution mechanisms, enforcement and remedies. They pointed to a number of underlying causes for these problems, including lack of meaningful access to information for those falling under the laws, significant power imbalances between large institutional service providers and individuals who are often marginalized or disempowered, and a lack of effective accountability mechanisms for institutions involved in implementing the law. These concerns have been highlighted throughout this *Paper*.

As has been emphasized throughout this *Paper*, concerns about access to the law are all the more pressing in this area because of the profound effect of legal capacity, decision-making and guardianship laws on many aspects of the lives of those they touch.

As a result, one of the key priorities for reform identified during the LCO`s preliminary consultations was the provision of supports to enable individuals to more effectively access their rights under the law. Particular emphasis was placed on developing systems, policies or practices that would ensure that:

- individuals whose rights were potentially affected by these laws had meaningful access to information about the law, its potential impact on them, and their options for pursuing their rights;
- both individuals directly affected and those who provide them with supports receive assistance in navigating the often complex systems for capacity assessment, entering or exiting guardianship, or challenging the activities decisions or activities of SDMs;
- individuals with disabilities that affect their abilities to identify or articulate their needs and wishes receive supports and accommodations to assist them in this respect; and
- where individuals must deal with lengthy, procedurally demanding or multi-layered legal structures in order to resolve disputes or enforce their rights, that they receive the assistance necessary to ensure that they can meaningfully advocate for their rights.

These issues are the focus of this Chapter.

This Chapter focuses on formal supports. It is important to acknowledge the very extensive and vital informal supports that are provided by family and friends. As the *O'Sullivan Review* emphasized,

> There can be many benefits to this type of [informal] advocacy relationship. As the advocates in this case are likely to know the vulnerable adult very well, including his or her personal history, special needs and circumstances, they are particularly able to understand the vulnerable adult's needs and desires. Further, the relationship between these individuals is likely to be ongoing, which lends stability to the advocacy relationship. In addition, it is difficult to replace the bonds of love and trust that normally exist in family relationships and friendships which foster well intentioned and zealous advocacy.[818]

However, the challenges that have been identified with access to the law in this area highlight the inherent limitations of placing so much responsibility for supports and advocacy on family and friends. It has been pointed out that there may be tensions between the role of informal advocate and the non-advocacy roles that friends and family members play, including informal

caregiving.[819] Further, as was discussed in Part Three, Chapter II, the responsibilities that are already placed on family and friends are enormous, and very challenging in the context of limited existing resources. Many family and friends who have struggled to advocate for and support their loved ones would benefit enormously from assistance in carrying out this role.

Issues related to supports are clearly closely connected to those addressed in the chapters on capacity assessment, appointment processes, dispute resolution, and information and education. Certainly the simpler and more transparent are the systems for rights enforcement, appointments and assessments, the more likely that those affected will be able to access them without extensive supports. More comprehensive systems for proactive monitoring and oversight of SDMs or regular reassessment of capacity will reduce the need for individuals to independently navigate dispute resolution and rights enforcement systems. One must view the system as a whole. Ontario's current system is one of very considerable complexity: it has many procedural safeguards and mechanisms for challenging decisions, but has few proactive or supervisory mechanisms, and levels of support and advocacy available to individuals vary considerably across the system.

- **QUESTION FOR CONSIDERATION: What types of supports are most important for assisting persons falling within this area of the law to understand and assert their rights? Should the focus of supports be on provision of accessible, timely and appropriate information; assistance in navigating complex systems; supporting affected individuals to articulate their values and wishes; support to advocate for their rights; or some other needs?**

B. A Little History: Advocacy, Law Reform and the Current Legislative Scheme

As has been noted elsewhere in this *Paper*, the need for supports to ensure effective access to the law was identified during the development of the current legislative framework, and was initially addressed through the *Advocacy Act* and accompanying provisions in the *Substitute Decisions Act* (SDA) and the predecessor statute to the *Health Care Consent Act* (HCCA). A review of this legislative history illuminates both the current challenges with the legislation, and the difficulties in designing and implementing effective supports in this area.

1. The Fram Report *and the* O'Sullivan Review

In late 1986, the Attorney General of Ontario announced a *Review of Advocacy for Vulnerable Adults*, responding to concerns regarding "an unmet need for non-legal advocacy for vulnerable adults living in institutional care settings and the community". Advocacy has been variously defined, but at its most basic, it is a mechanism for ensuring respect for rights; promoting participation, empowerment and accountability; and facilitating creative and practical problem-solving in laws or systems that address vulnerable and marginalized groups, including persons with disabilities and older adults. As such, it is connected with broader notions of access to

justice, and a consideration of the elements of advocacy can make an important contribution to reform of laws, policies and practices affecting these groups.

Father Sean O'Sullivan was asked to report back, within six months, on the best method or methods for delivering advocacy services, including considering ways in which advocacy might be co-ordinated with existing case management and other service delivery systems, as well as existing community legal and volunteer advocates.[820]

Interestingly, the issue of advocacy had initially been referred to the Fram Committee, which was considering reforms to substitute decision-making laws, highlighting the importance of the connection between this area of the law, and advocacy. When that Committee had difficulty reaching consensus over a number of months and it appeared that progress on the original mandate was being delayed, the independent review was struck. Nevertheless, the Fram Committee did important preliminary work in identifying principles and objectives for advocacy, as well as identifying key points where advocacy was required. The Fram Committee identified the role of advocates as explaining the significance of the legal step that was being taken and the legal options available to the individual, and where appropriate putting the individual in touch with legal resources. The Committee recommended the provision of advocates to affected individuals at a number of points in the processes surrounding capacity assessment and substitute decision-making, as follows:

1) court appointment of guardians or conservators;
2) termination of conservatorship or guardianship;
3) order for assessment and enforcement;
4) prior to an assessment of capacity for statutory conservatorship or powers of attorney for personal care;
5) refusal of substitute decisions about treatment; and
6) annual visit to all persons under guardianship or a POA for personal care.[821]

The Fram Committee recommended that, given the importance of advocacy to the effective implementation of the SDA, the SDA not come into force until the *Advocacy Act* had been implemented.

The *O'Sullivan Review* focussed on social rather than legal advocacy, and on formal rather than informal advocates. It identified four basic principles for advocacy:[822]

1) **It must be client directed:** the actions of the advocate must be guided by the instructions of the client and the advocate must serve the client on a voluntary and consensual basis. The advocate should not substitute a "best interests" approach for the instructions of the client.

2) **It should be independent:** in order to avoid any potential or perceived conflicts of interest, advocates should be administratively and financially independent of the human service delivery systems that they must advocate within.
3) **It should be accessible:** clients must be able to access advocacy both from within institutions and from the community, and advocates must be able to freely communicate with clients without interference from others. Accessibility also includes protections for client confidentiality, and the ability of advocates to access (with client consent) necessary records and individuals**.**
4) **It should be neither adversarial nor passive:** the concept of advocacy has sometimes been resisted as embodying an overly adversarial approach, and as a threat to traditional interpersonal and professional relationships. Appropriate advocacy should not have the effect of polarizing relationships, but nor should it be overly passive and compliant, avoiding sensitive, difficult or unpopular issues. It should be seen as a way to achieve co-operation, with more adversarial approaches available as a last resort.

The *Review* identified a number of goals for an advocacy system for Ontario. Such a system should provide safeguards against unnecessary guardianship; be independent; encourage self-advocacy (self-determination) where possible; enhance the role of family and friends; educate, delabel and destigmatize; be flexible; be responsive; promote cooperation with Providers and Ministries; be accessible; be reformative (seek improvements in programs); have clout; and be accountable.[823]

The *Review* considered a number of models of advocacy systems, including a publicly funded, independent "Advocacy Ombudsman"; a volunteer-based citizen advocacy program; development of mechanisms to educate, coordinate and empower those already acting as advocates; and an Advocacy Commission, which would develop standards and procedures, as well as regional offices which would be directed by community-based boards and staffed by advocacy coordinators. The *Review* ultimately recommended the adoption of this latter "Advocacy Commission" approach.

2. The Advocacy Act, 1992 *and the Advocacy Provisions of the* Substitute Decisions Act *and* Consent to Treatment Act

As is described in Part One of this *Paper*, in 1992 the legislature of Ontario passed a package of legislation that made sweeping changes to the law relating to legal capacity, decision-making and guardianship. This legislation was the culmination of a lengthy and intensive law reform process that included the *O'Sullivan Review*, the *Fram Report* and the *Weisstub Enquiry* on mental competence. The issue of advocacy was central to the three central statutes, the *Advocacy Act*, the SDA and the *Consent to Treatment Act.*

<u>The *Advocacy Act*</u>

While the *Advocacy Act* was closely linked to the reform of capacity and guardianship laws, it had a much broader purpose, and was intended to have an impact on the lives of many individuals who did not fall within the ambit of legal capacity and guardianship law. The purposes of the *Advocacy Act* were as follows:

> (a) to contribute to the empowerment of vulnerable persons and to promote respect for their rights, freedoms, autonomy and dignity;
> (b) to provide advocacy services,
> (i) to help individual vulnerable persons express and act on their wishes, ascertain and exercise their rights, speak on their own behalf, engage in mutual aid and form organizations to advance their interests,
> (ii) to help individual vulnerable persons who are incapable of instructing an advocate, if there are reasonable grounds to believe that there is a risk of serious harm to the health or safety of those persons, and
> (iii) to help vulnerable persons to bring about systemic changes at the governmental, legal, social, economic and institutional levels;
> (c) to ensure that community development strategies are applied in the provision of advocacy services;
> (d) to take into account the religion, culture and traditions of vulnerable persons;
> (e) to ensure that aboriginal communities are enabled to provide their own advocacy services whenever possible;
> (f) to acknowledge, encourage and enhance individual, family and community support for the security and well-being of vulnerable persons.[824]

The *Act* applied to "vulnerable persons" age 16 and older, who were defined as persons who, "because of a moderate to severe mental or physical disability, illness or infirmity, whether temporary or permanent and whether actual or perceived (a) is unable to express or act on his or her wishes or to ascertain or exercise his or her rights, or (b) has difficulty in expressing or acting on his or her wishes or in ascertaining his or her rights".[825] It also applied for the purposes of the provision of rights advice and other advocacy services under the *Mental Health Act,* the SDA and the *Consent to Treatment Act.*[826]

The *Act* created an Advocacy Commission. The functions of the Advocacy Commission were expansive and included promoting respect for vulnerable persons and their rights; providing both individual and systemic advocacy services, providing rights advice and other advocacy services required under capacity and guardianship laws, providing training for advocates, ensuring that community development strategies were applied to the provision of advocacy services, encouraging and enhancing individual, family and community support for the security and well-being of vulnerable persons, establishing minimum qualifications and standards for advocates, conducting programs of public information and education, and others.[827]

Advocates were not substitute decision-makers, and did not have authority to make decisions in place of or on behalf of a vulnerable person.[828] Advocates were prohibited from doing anything that was inconsistent with the instructions or wishes that the person expressed while capable of instructing the advocate. A person was considered capable of instructing the advocate if the person was able to indicate a desire for advocacy services and the purpose for which he or she desired to receive the services, and was able to express in some manner his or her instructions or wishes. However, the advocate could also act where the vulnerable person was incapable of providing instruction, if there was a risk of serious harm to the health or safety of the vulnerable person; prior to such action, the advocate was required to take all reasonable steps necessary to determine whether the individual was really incapable of instructing the advocate.[829]

Where a vulnerable person was incapable or agreed, an advocate could take instructions from a substitute decision-maker, including a guardian or person acting under power of attorney.[830]

Advocates were provided with rights of entry and access to records, and were bound by duties of confidentiality, with specific requirements for disclosure in limited circumstances.

Substitute Decisions Act and *Consent to Treatment Act*

The recommendations of the Fram Committee with respect to advocacy and substitute decision-making were briefly described above. The legislation as passed in 1992 closely hewed to these recommendations. Under the SDA and *Consent to Treatment Act*, advocates were given a role at key transition points in the lives of persons affected by the law, where important rights were at stake. At these points, advocates were generally made responsible for

- notifying the individual of the decision or determination that had been made with respect to her or him;
- explaining the significance of the decision or determination in a way that took into account the special needs of that person;
- explaining the rights that the individual had in that circumstance, such as a right to appeal the decision or determination;
- in some cases, the advocate was required to ascertain the wishes of the individual (e.g., whether he or she wished to challenge the decision or determination) and to convey those wishes to the appropriate body (e.g., the PGT).

Action on these decisions or determinations could not be taken until the advocate had carried out these duties, or had made efforts to do so and had been prevented.

The advocacy envisioned was therefore of a relatively restricted (though important) type: the advocate was not to speak on behalf of the individual, to undertake negotiations or make representations. The core focus of the advocate's role was to ensure that the individual was aware of his or her situation, understood her or his rights, and had the information necessary to

exercise those rights. In this way, the role of the advocate under these statutes was very similar to that of current-day rights advisers.

The situations in which advocates (referred to as "rights advisers" in the context of the *Consent to Treatment Act*, although they were to be authorized advocates under the *Advocacy Act*) were required to act included the following:

- the appointment of a statutory guardian of property following an examination under the *Mental Health Act*;
- the appointment of the PGT as a temporary guardian following an investigation into serious adverse effects;
- applications for validation or registration of powers of attorney for personal care;
- applications for court-appointed guardianships;
- court orders for assessment of capacity, including orders for apprehension of the individual to enforce assessments;
- findings of incapacity with respect to treatment made within a psychiatric facility;
- findings of incapacity with respect to "controlled acts" in a non-psychiatric facility;
- applications to the CCB for directions regarding the prior expressed wishes of an individual; and
- applications to the CCB for permission to depart from the prior expressed wishes of an individual;

3. The Repeal of the Advocacy Act *and Amendments to Capacity and Guardianship Laws*

The *Advocacy Act* was repealed in 1996, immediately following upon an election that resulted in a change of government, and prior to any extensive implementation. (Despite passage of the legislation in 1992, it was only proclaimed in spring 1995, a few months prior to the election.) The repeal of the *Advocacy Act* was accompanied by amendments to the SDA and the *Consent to Treatment Act* (which was ultimately replaced by the HCCA). All references to "advocates" were removed from the SDA, and the role of rights advisers under the *Consent to Treatment Act* replaced by much more limited provision for "rights information" in a restricted set of circumstances.

It has been argued that the decisive defeat of this initiative was the result of an attempt to do "too much, too late". The *Act* was the target of a wide range of criticism that focussed, not only on its costliness, but also its perceived intrusion on families and private rights and what was believed to be a potential for undermining existing professional and community groups that worked in the area. It has been commented that the legislation was premised on an understanding that the interests of vulnerable adults were not necessarily identical with those of their families and service providers and that they therefore needed an independent voice;

however, the government "did not recognize (at the outset, at least) that its actions were, in effect, setting up families, professionals, housing providers – indeed, all the 'others' in the life of a vulnerable person – as potential adversaries".[831] As a result, while there was widespread support for the concept of advocacy, there was difficulty in garnering wide stakeholder support for this particular legislation, and the process for implementation was delayed to such a late point that there was little chance of developing public support through implementation.

- **QUESTION FOR CONSIDERATION: What can be learned from the history of the *Advocacy Act* to guide reforms to the provision of supports for persons falling within this area of the law?**

C. Existing Supports for Accessing Ontario's Capacity, Decision-making and Guardianship Laws

This section details the formal, professional mechanisms for supporting access to the law by those directly affected that are currently found within or surrounding Ontario's legal capacity, decision-making and guardianship laws. It should be noted that this is not a comprehensive description of all the means of support currently accessed by persons directly affected by these laws. As noted above, family and friends often act as informal advocates. Individuals may receive supports through volunteer or other efforts by consumer or advocacy organizations. Some individuals are able to access private legal service providers to act for them. These are all important sources of support for individuals navigating Ontario's laws related to legal capacity, decision-making and guardianship, and will remain so under any foreseeable circumstances. Rather, this section addresses formal support mechanisms that are specifically targeted to this area of the law.

1. Rights Advisers and the Psychiatric Patient Advocate Office

Rights Advisers

The *Mental Health Act* creates a class of designated rights advisers, who provide rights advice to individuals in a number of specific circumstances. These rights advisers are found in psychiatric facilities designated under the MHA, and are also designated with respect to the issuance or renewal of community treatment orders outside of psychiatric facilities.[832] The vast majority of rights advisers in Ontario are provided by the Psychiatric Patient Advocate Office (PPAO), which supplies rights advisers to all ten specialty or tertiary care psychiatric facilities and 71 of 74 community or general hospitals with psychiatric units (Schedule 1 hospitals).[833] As well, rights advice is provided to those individuals (and their SDMs if any) who are being considered for the issuance or renewal of a CTO. In addition, the PPAO trains all other rights advisers.[834] In 2011, the PPAO reported providing rights advice to 350 patients in tertiary care facilities who had been certified as incapable of managing property and 322 whose incapacity to manage property

had been continued, together making up 9.1 per cent of rights advice visits to tertiary care facilities.[835] They provided rights advice to 646 patients in community hospital psychiatric facilities who had been certified as incapable of managing property and 353 whose incapacity had been continued, making up 4.2 per cent of these visits.[836]
The PPAO writes:

> Rights Advice ensures that mental health patients who have had their legal status changed as an involuntary or incapable patient are afforded the same protection under the *Canadian Charter of Rights and Freedoms* as any other citizen, including the right to life, liberty and security of the person; the right not to be arbitrarily detained or imprisoned; and the right upon detention to be informed of the reasons for detention, to retain legal counsel without delay, and to challenge the reasons for their detention.[837]

The situations under which rights advice is required include when a person is found incapable with respect to the management of property under Part III of the MHA.[838] As described in more detail in Part Three, Chapter II, when a physician issues either a certificate of incapacity or a certificate of continuance under the MHA, she or he must promptly notify both the patient and a rights adviser. The rights adviser must then meet with the patient, unless the patient refuses to do so, and explain the significance of the certificate and the right to have the issue of incapacity to manage property reviewed by the Consent and Capacity Board (CCB). If the patient so requests, the rights adviser must assist the patient in making an application to the CCB and in obtaining legal services. The duty to provide an explanation is met so long as the rights adviser "explains [the] matter to the best of his or her ability and in a manner that addresses the person's special needs, even if the person does not understand the explanation".[839]

The role of rights advisers therefore does not include representing or negotiating for the individual. This is at least in part because those accessing rights advice will in most cases have access to legal advocacy either through Legal Aid Ontario funding or the private bar: it is part of the role of the rights adviser to connect individuals to legal services if they so desire.

Rights advisers must not be themselves service providers: they may not be persons involved directly in the clinical care of the person receiving the advice, or a person providing treatment or care and supervision under the community treatment order (CTO).[840] Rights advisers must

- be knowledgeable about the rights to apply to the CCB under the MHA, the HCCA and the *Personal Health Information Protection Act*;
- be knowledgeable about the CCB's workings, its application procedures and how to contact it;
- be knowledgeable about how to obtain legal services;

- have the necessary communication skills to effectively perform the functions of a rights adviser; and
- have successfully completed an approved training course for rights advisers and have received certification for such.[841]

While at the outset, there were concerns that the rights adviser system would be overly adversarial or would interfere with the ability of health care professionals to carry out their responsibilities, rights advisers are now a well-established and well-regarded element of Ontario's capacity and guardianship system.

Critiques of rights advice generally focus two issues. The first is the limited role that rights advisers have, restricted as it is to certain decisions under the MHA. Rights information requirements under the SDA and HCCA are frequently criticized as insufficiently effective. Under the HCCA, instead of rights advice upon a finding of lack of legal apacity, rights information is provided by the professional assessing capacity. ACE has commented that,

> Rights information does not require any specific paperwork to be completed. Unfortunately, many health care practitioners fail to satisfy the minimal requirement of providing rights information to individuals meaning they are unaware of their statutory rights and the procedures necessary to exercise these rights.
>
> ****
>
> There are also problems with the policies respecting rights information of the various health colleges .... By requiring health practitioners to follow the policies of their Colleges, they could be subject to discipline proceedings if they failed to provide rights information. However, the policies of the Colleges did not necessarily ensure that the patient would have the information for the purpose of due process. As well, it is questioned whether the Colleges enforce this requirement for rights information and discipline practitioners who fail to comply.[842]

As well, under the SDA it is the guardian or attorney acting under a POA whose task it is to explain roles and responsibilities of the SDM to the person under substitute decision-making: not only does this potentially raise problems of conflicts of interest, but since many if not most attorneys and guardians only imperfectly understand the law, it is not likely to be an effective means of providing information.[843] It has been suggested that at least some of the situations where "rights information" is currently provided would benefit from the provision of something that is similar to rights advice.

ARCH Disability Law Centre supports an expansion of rights advice services to all those who are determined to be incapable, potentially through a "Visitor" system in which professionals or trained volunteers visit all persons deemed to lack legal capacity, to provide rights advice and answer any questions the individual may have about the decision-making arrangement.[844] ARCH observes that

> Providing rights advice to 'incapable' persons is one practical way in which to promote individual autonomy and independence, and full and effective participation. The first principle requires that people with disabilities have access to information needed to understand and enforce their rights. The provision of rights advice will contribute to ensuring that 'incapable' persons are aware that they can participate in decisions that affect them or challenge the actions of their decision-makers. Knowledge of their rights and mechanisms to assert those rights would provide some degree of empowerment to 'incapable' persons. The provision of rights advice to every person who is subject to some form of decision-making is a basic step towards protecting and promoting the rights of 'incapable' persons.[845]

Other criticisms related to implementation issues, most importantly challenges in ensuring that the role of rights advisers is fully respected so that they are able to effectively carry out their mandate. It has been suggested that more effective mechanisms are needed to ensure that health professionals understand, respect and support the statutory requirements for rights advice.

The Psychiatric Patient Advocate Office

As described above, the PPAO plays a vital role in providing sustained, independent and consistent individual advocacy through its rights advice function. Importantly, this individually focussed function is combined with a systemic role. The mandate of the PPAO sets out the following functions:

- To advance the legal and civil rights of patients by means of both individual case work and systemic advocacy;
- To inform the patient, family, hospital staff, and the community about patients' legal and civil rights;
- To assist, facilitate (self-advocacy), and help resolve the complaints made by psychiatric patients by providing an avenue for resolution through negotiation according to the patient's instructions;
- To investigate alleged incidents and to assess institutional and systemic responses to these instances;
- To refer patients, when necessary, to outside community advocacy resources such as community organizations, lawyers or physicians who may offer a second opinion.

The PPAO provides plain language materials related to patient rights and conducts public education activities. It has been involved in a wide range of law reform initiatives related to its mandate, as well as media involvement to raise public awareness about patient rights' issues, and sharing its expertise with other institutions in a number of jurisdictions. The PPAO has had some significant impact through its systemic advocacy, including campaigns to increase the Personal Needs Allowance, ensure access to voting rights, develop patient councils in provincial

psychiatric hospitals and address police disclosure of non-criminal, mental health related contacts as part of police records checks.[846]

2. Section 3 Counsel

Under the SDA (and therefore, for the purposes of capacity to manage property or to make decisions about personal care), where the legal capacity of an individual is in issue in a proceeding under the SDA and that person does not have legal representation, the court may arrange for legal representation to be provided, and the person will be deemed to have capacity to retain and instruct counsel for that purpose.

In some of these cases, the person may be eligible for legal aid, and a certificate may be issued. If not, the person is responsible for their own legal fees. Either the person or his or her guardian of property orpower of attorney for property may seek review of the legal fees charged by counsel appointed under this section.

``Section 3 counsel`` play a vital role in ensuring that the rights of persons alleged to be lacking legal capacity are recognized and advanced. However, lawyers acting as section 3 counsel have pointed out to the LCO that in a not inconsiderable number of cases, the person currently acting as guardian or exercising a POA for the person at issue is opposed in interest to that person, and that these SDMs have considerable opportunity and incentive to attempt to thwart effective representation by section 3 counsel. If they have physical custody of the individual, they may attempt to block or limit access by the counsel, or may attempt to monitor or eavesdrop on conversations between the lawyer and client. They may use their control over the finances of the individual to unreasonably block or delay payment of legal fees. These difficulties may undermine the ability of section 3 counsel to perform their roles effectively, and may dissuade lawyers from taking on section 3 clients. It has been suggested that reforms are required to reduce the opportunities for SDMs to improperly thwart the intent of the section 3 provisions.

3. Legal Aid

The *Legal Aid Services Act, 1998* requires Legal Aid Ontario (LAO) to provide services in the area of mental health law.[847] In particular, LAO provides legal aid certificates to clients in the civil mental health system who are exercising rights to review by the CCB under the MHA and HCCA. The qualifications for a legal aid certificate for a CCB hearing are relaxed compared to those for other issues. In the fiscal year 2010-11, LAO expended $2.8 million on certificates for CCB applications, which included the issuance of 2,836 certificates and 2,566 hearings conducted. To place this number in context, in that year, there were a total of 5,216 applications filed with the CCB.

Section 81 of the HCCA states that where an individual who is party to a proceeding before the CCB may be incapable and does not have counsel, the CCB may direct LAO to arrange for legal

representation. It should be noted that this does not require LAO to issue a certificate for that legal representation if the individual is not otherwise eligible, and the individual will be responsible for the resultant legal fees.

LAO maintains a Panel Standard that governs lawyers who represent clients before the CCB. This requires lawyers who are admitted to the CCB Panel to

- undertake mandatory training on advocacy before the CCB,
- observe at least one CCB hearing prior to representing an LAO client before the CCB;
- maintain a minimum level of experience (generally three retainers every two years);
- comply with the "LAO Expectations for CCB Panel Members", which includes requirements related to client contact, accommodation of client needs, appropriate preparation for hearings, and responsiveness, among others.

About 100 lawyers actively provide legal aid services in mental health law (including hearings before the Ontario Review Board as well as CCB hearings).

LAO does not generally fund appeals from the CCB to the Superior Court. As noted in the previous Chapter, the lack of access to representation for individuals appealing from CCB decisions and the resultant delays in final settlements of pressing issues was a point of significant concern for a number of stakeholders during the LCO's preliminary consultations.

Legal Aid Ontario is currently developing a comprehensive Mental Health Strategy, a number of aspects of which may have a significant impact on individuals who fall under legal capacity, decision-making and guardianship law The goal of the Strategy is to expand and improve on current LAO services while dedicating new programs and resources to clients with mental health and addictions issues. LAO has released a Consultation Paper on the Strategy, and expects to formally release the Strategy for comment later in 2014.[848]

4. Specialty Legal Clinics

Specialty legal clinics provide both systemic and individual advocacy around a range of issues facing marginalized groups of Ontario. Two of these clinics, ARCH Disability Law Centre (ARCH) and the Advocacy Centre for the Elderly (ACE), have devoted considerable portions of their resources to issues related to legal capacity, decision-making and guardianship. It should be noted, however, that both clinics have limited resources and small staff complements, and cannot provide direct legal representation to all those who might need it and be unable to afford it.

In operation since 1984, ACE provides legal services to low-income seniors across Ontario. These services include individual and group client advice and representation, public legal education, community development and law reform activities. Because laws related to legal

capacity, decision-making and guardianship have a disproportionate impact on older Ontarians, this has been an area of core focus for ACE. ACE provides advice and information on issues related to capacity, health care consent and advance care planning, and engages in strategic litigation, recently including a joint intervention with ARCH in the case of *Cuthbertson v Rasouli,* a decision of the Supreme Court of Canada related to consent to withdrawal of treatment.[849] ACE has engaged in considerable public education on issues related to capacity and substitute decision-making, as well as the development of an extensive range of publications on the topic, including webinars, plain language materials and a tool for health professionals produced in collaboration with the National Initiative for the Care of the Elderly (NICE). ACE is also active in law reform efforts in the area, including the preparation of submissions.

ARCH provides a similar range of services to persons with disabilities, and has considerable experience in working with individuals who have capacity issues or are erroneously assumed to have capacity issues due to their disability or their medication. ARCH has identified legal capacity as a priority area of work. ARCH has completed policy papers on issues related to capacity, such as addressing capacity of parties before administrative tribunals, has provided workshops on capacity law for individuals with disabilities and for workers who support people with intellectual disabilities. On an individual basis, ARCH provides advice to people with disabilities who are subject to guardianship or other forms of substitute decision-making, assist clients in negotiations with the PGT or other substitute decision-makers, helps clients to obtain and prepare for capacity assessments, and assist clients in terminating guardianships. ARCH has been involved in a number of significant cases related to capacity and consent law, recently including *Zheng* v *Zheng*, an important case on orders for capacity assessment in the context of applications for termination of guardianship.[850]

5. Some General Comments

As the above demonstrates, Ontario's legal capacity, decision-making and guardianship system is not without advocacy and support mechanisms. There are a number of individuals and organizations that aim to provide both formal and informal supports in order to empower individuals and protect rights, and these are rightly viewed as vital elements of Ontario's legal capacity, decision-making and guardianship laws.

However, it is also true to say that the current system does not differ substantially from that described and found inadequate at the time of the *Fram Committee Report* and the *O'Sullivan Review*. Many individuals who are vulnerable due to disability, isolation, power imbalances or other factors are navigating a complex legal and service delivery system without access to formal supports in doing so. The services and supports that exist are fragmented and limited in scope.

As was referenced earlier in this Chapter, two of the major concerns identified during the preliminary consultations were the difficulties individuals face in navigating systems and the challenges that service providers face in assisting them in doing so, together with concerns that the system lacks effective mechanisms for ensuring that the rights set out in the legislation are respected. These concerns may be considered as directly linked to the lack of access to independent, knowledgeable information, advice and navigational assistance targeted to those who are directly affected by the law and their supporters.

The *Advocacy Act* and the accompanying measures in the SDA and *Consent to Treatment Act* were unsuccessful due to perceptions of costliness, concerns about excessive adversarialism, and the hope that informal supporters such as family and friends could successfully perform this role. While the *Advocacy Act* may or may not have proved a viable mechanism for meeting the need identified, its repeal did not obviate the need for some mechanisms to fill this role, however they might be labelled.

A review of other jurisdictions and of other areas of Ontario law addressing vulnerable populations reveals that a number of systems include mechanisms, variously constituted, aimed at filling this role. The following sections identify some potential models. This is not a comprehensive review, but is simply intended to outline some existing options. While it is unlikely that any of these models could be simply transferred intact into Ontario's legal capacity and guardianship system to effectively fill the need, they may assist in identifying the elements of some options that could be considered in designing an Ontario-appropriate mechanism.

- **QUESTION FOR CONSIDERATION: Are there ways to strengthen existing supports for accessing rights under legal capacity, decision-making and guardianship laws, including rights advice, section 3 counsel and legal aid services for persons falling within this area of the law? Are there ways in which these supports could be expanded to reach a broader range of needs?**

D. Models for Provision of Supports to Accessing the Law

Supports for accessing the law may be provided in a number of different ways. The following are examples of supports provided through specialized independent public institutions, through services embedded within institutions that come into contact with those who may need assistance, and through funding of community agencies. These examples are not set out as specific proposals for reforms to Ontario laws and systems, but rather are intended to provide starting points for consideration of potential approaches to supports in the Ontario context.

1. Specialized Public Advocacy Institutions

Provisions of supports through an independent, publicly funded advocacy organization is intended to create a specialized, centralized and expert organization, able to develop a deep understanding of the issues and the population served, and to connect individual and systemic

issues. Two examples are provided below. The Australian state of Victoria has, as part of its legal capacity, decision-making and guardianship system, a specialized "Public Advocate" which provides a range of services and supports, including individual supports for accessing rights under the law. In Ontario, the Provincial Advocate for Children and Youth provides a central point for advocacy for a population that experiences significant restrictions on voice and access to the law.

The State of Victoria: Public Advocate Office

Australia's "Public Advocate" institutions provide a model of holistic, independent, institutional public advocacy in the context of capacity and guardianship law. Several Australian states, including Queensland, Victoria and South Australia, have "Public Advocates" or bodies performing a similar function.

Since the mid-1980s, Victoria has had an independent statutory official called the "Public Advocate", which has a broad responsibility for promoting and safeguarding the rights and interests of persons with disabilities. The Public Advocate has a dual role as both a guardian of last resort and an "official watchdog" for the rights of persons with disabilities in general. The roles of the Public Advocate are

> (a) to promote, facilitate and encourage the provision, development and co-ordination of services and facilities provided by government, community and voluntary organizations for persons with a disability with a view to promoting the development of the ability and capacity of persons with a disability to act independently; minimizing the restrictions on the rights of persons with a disability; ensuring the maximum utilization by persons with a disability of those services and facilities; and encouraging the involvement of voluntary organizations and relatives, guardians and friends in the provision and management of those services and facilities;
> (b) to support the establishment of organizations involved with persons with a disability, relatives, guardians and friends for the purpose of instituting citizen advocacy programs and other advocacy programs; undertaking community education projects; and promoting family and community responsibility for guardianship;
> (c) to arrange, co-ordinate and promote informed public awareness and understanding by the dissemination of information with respect to the provisions of the *Guardianship and Administration Act* and any other legislation dealing with or affecting persons with a disability;
> (d) to investigate, report and make recommendations to the Minister on any aspect of the operation of the Act referred to the Public Advocate by the Minister.[851]

The functions of the Public Advocate with respect to individual supports include seeking assistance for a person with a disability from any department, institution, "welfare organization" or service provider; making representations on behalf of or acting for a person with a disability; and giving advice to any person about the Act.[852]

The Victorian Law Reform Commission states that:

> The Public Advocate engages in both individual and systemic advocacy. These terms tend to be used in different ways throughout the community. Advocacy can, however, be understood in broad terms as 'essentially the very ordinary process of standing up for the rights of people who are being treated unfairly'. The Public Advocate describes its advocacy work as a 'last resort' service that 'focuses on the best interests of the person with a disability who is at risk of abuse, exploitation or neglect'.[853]

Individual advocacy may involve phone calls, writing letters, arranging meetings, or help with making formal complaints, mediation or legal cases. Systemic advocacy flows from the Public Advocate's policy work, and includes research, submissions and reports.

In the fiscal year 2012-2013, the Public Advocate provided advocacy services to 394 individuals,[854] in addition to systemic activities such as submissions to draft laws, policies, regulations and guidelines. Advocacy cases may be referred from the Victorian Civil and Administrative Tribunal (VCAT) (described in the previous Chapter), may be the result of direct requests to the Office, or may be taken up of the Public Advocate's own initiative. The Public Advocate also notes the "intent[ion] of the office to maintain an advocacy focus for all individuals with a disability".[855] Individual advocacy services may address both short and long-term or complex issues. The Public Advocate has recently initiated a Secure Extended Care Unit advocacy project, which identifies individuals who have been residents in these units for extended periods of time in order to speak with them and their care providers and clarify the issues leading to extended residence in these units. In some cases this may lead to changes in residence status.[856]

In the Victorian Law Reform Commission's consultations on reforms to guardianship law, the advocacy functions of the Public Advocate received strong support, although there were suggestions that it would be beneficial to clarify and strengthen the legislative provisions relating to this role. Concerns were expressed that because of the dual role of the Public Advocate as both advocate and guardian of last resort, the advocacy functions were neglected in favour of the Public Advocate's guardianship responsibilities.

The Public Advocate suggested that its advocacy functions (particularly individual advocacy) should be based on a set of principles, in particular that advocacy must

- be provided in a way that promotes the personal and social wellbeing of the person;
- give effect, wherever possible, to the wishes of the person;
- be carried out, wherever possible, in consultation with the person;
- be provided in a manner that is least restrictive of the person's freedom of decision and action as is possible in the circumstances;

- assist the person to live in safety and security and free from abuse, exploitation and neglect; and
- allow the person to participate in a contribute to the community to the maximum extent possible in the circumstances.[857]

The Victorian Law Reform Commission has recommended amendments to clarify the Public Advocate's advocacy role, including its ability to engage in both individual and systemic advocacy and an ability to intervene in court or tribunal proceedings as part of this role, and that the advocacy role should be guided by a set of principles in harmony with those for guardianship legislation as whole.[858]

The Public Advocate system, while broader in reach than persons found to lack legal capacity, is closely tied to the capacity and guardianship system. It is responsive in approach (there are no requirements to involve advocates) and for the most part, *ad hoc*. The scale of its advocacy activities is relatively small, but these activities are integrated with its activities as a guardian, investigator, and overall centre point for issues of persons with disabilities. It is able to undertake both individual and systemic advocacy, and in some cases the two are linked, as in the Extended Secure Care Unit initiative mentioned above.

Ontario: Provincial Advocate for Children and Youth

Ontario's Provincial Advocate for Children and Youth provides an Ontario example of a formal advocacy program operating out of a specialized institutional structure. The Provincial Advocate has a lengthy history dating back to the creation of a "Child Advocate" in 1978. The office was situated within the Ministry of Community and Social Services, and reported to the Deputy Minister and focussed on providing individual advocacy for "hard to serve" or "incorrigible" children. The position was given a legislative foundation in the 1982 *Child and Family Services Act* as the Office of Child and Family Service Advocacy, and over time, gradually began to take on systemic as well as individual advocacy.[859]

In 2007, the *Provincial Advocate for Children and Youth Act* was passed in the Ontario Legislature with all-party support. The Advocate is appointed by the Lieutenant Governor in Council for a period of five years,[860] on the recommendation of an all-party committee, and reports directly to the Legislature, rather than to any Ministry. The Advocate is required to table an annual report to the Legislature. The Advocate provides advocacy for children under the *Child and Family Services Act*, to children in provincial or demonstration schools, and to children and youth with respect to issues arising in (or transportation to and from) court holding cells.[861] The Advocate has adopted as its Mission Statement: "The Office of the Provincial Advocate for Children and Youth serves youth in state care and the margins of state care through individual,

systemic and policy advocacy. The Office strives, at every level of its operation to be an exemplar of youth participation."[862]

The Advocate is provided with broad powers to carry out its function. It can receive complaints; represent the views and preferences of individuals to service providers and agencies; provide informal dispute resolution between individuals and service providers; conduct reviews (either in response to complaints or of its own initiative); make reports, provide advice and make recommendations; provide information on how to access approved services; and engage in systemic reviews; among other activities. It may not represent individuals before a court or tribunal.[863]

The Advocate has described its work as positioned across three areas: individual advocacy, systemic advocacy and community development.[864] In 2011-2012, the Advocate received close to 3500 calls for assistance, and undertook a wide range of activities, including assisting First Nations children and youth to prepare an alternative report to the United Nations Committee on the Rights of the Child regarding inequities in education funding; the creation of *My REAL Life Book* which provides an account of the child welfare system from the perspective of children and youth in that system; the *Our Voice, Our Turn* report and roadshow on children transitioning out of care, the development of a submission to the Social Assistance Review Committee, the creation of an Inquest Database to inform advocacy around the deaths of children who fall within the Advocate's mandate, regular group home reviews, and many others.

Service providers and agencies are required to inform children in care of the existence and role of the Advocate. They must also provide information about how to contact the Advocate, and where a child or youth wishes to do so, must afford means to do so privately and without delay.[865] The legislation also provides for access to information and protection of confidentiality.[866]

Reflecting a broad and principled approach to the mandate, the *Act* specifies that in its interpretation and application, regard must be had to the principles of the United Nations *Convention on the Rights of the Child*, and to the desirability of the Advocate being "an exemplar for meaningful participation of children and youth through all aspects of its advocacy services".[867]

2. Embedded Institutional Supports

As a contrast to the provision of responsive supports through a specialized institution, supports and advocacy may also be embedded within broader institutional structures, with a mandate to provide proactive universal supports at identified points where rights are at stake. This is the model under which Ontario's Rights Advisers currently operate. As was noted in the discussion

of Rights Advisers, this program has strong stakeholder support, and it has been suggested that it, or a similar program, be expanded to other areas or populations. Two examples are set out below of support and advocacy programs in this area of the law that operate in different or broader contexts than the Rights Adviser program. The Independent Mental Capacity Advocates (IMCA) of the United Kingdom operate through that jurisdiction's National Health Service to provide advocacy in the treatment and long-term care context to individuals who lack legal capacity and are without supporting family and friends. Review Officers in Alberta provide services and supports to persons in the process of court appointments related to legal capacity and decision-making.

United Kingdom: Independent Mental Capacity Advocates

The *Mental Capacity Act 2005* includes a framework of legal rights to advocacy in specified circumstances. It creates an Independent Mental Capacity Advocacy (IMCA) service, which is responsible for helping "particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions".[868] An IMCA *must* be involved with a person who lacks legal capacity and has no one to support them, whenever a serious medical treatment is proposed, or long-term residential accommodation is under contemplation.[869] IMCAs *may* be involved in case reviews and adult protection cases.[870] The local authorities or National Health Service (as relevant) ("the responsible party") are responsible for arranging for an IMCA intervention where required or appropriate.

The IMCA's role is to support and represent the individual. To facilitate this role, they have a legal right to access the necessary healthcare or social care reports as well as to meet with the individual in private. Any information or reports that the IMCA provides must be taken into account in determining the decision at issue. The duties of the IMCA are defined in the *Code of Practice* as to

- be independent of the person making the decision;
- provide support for the person who lacks capacity;
- represent the person without capacity in discussions to work out whether the proposed decision is in the person's "best interests" as defined by the Act;
- provide information to help work out what is in the person's best interests; and
- raise questions or challenge decisions which appear not to be in the best interests of the person.[871]

The *Code of Practice* under the *Mental Capacity Act 2005* emphasizes the duty of the IMCA to ascertain the wishes, values and preferences of the individual:

> The IMCA needs to try and find out what the person's wishes and feelings might be, and what their underlying beliefs and values might also be. The IMCA should try to communicate both verbally and non-verbally with the person who may lack capacity, as appropriate. For example, this might mean using pictures or photographs. But there will be cases where the person cannot communicate at all (for example, if they are unconscious). The IMCA may also talk to other professionals or paid carers directly involved in providing present or past care or treatment. The IMCA might also need to examine health and social care records and any written statements of preferences the person may have made while they still had capacity to do so.[872]

IMCAs are required to have specific experience, have completed IMCA training, have integrity and a good character, and be able to act independently.[873] The "responsible bodies" should put into place dispute resolution procedures, as well as procedures, training and awareness programmes to ensure that staff know when they need to instruct an IMCA and have the relevant information for doing so; keep relevant records related to the activities of the IMCA's activities; record how the service provider has taken into account the IMCA's report and information as part of the process of working out the person's best interests; give access to relevant records as requested and share relevant information; let all relevant persons know that an IMCA has been instructed; and inform the IMCA about the ultimate decision and the reasons for it. [874]

Like Rights Advisers, the activities of IMCAs are

- legislatively mandated, with a responsibility placed on the part of relevant institutions to facilitate their work:
- focused on specific decisions or turning points where individuals are particularly vulnerable: and
- focused mainly on individual advocacy.

The role of IMCAs differs from that of Rights Advisers in some important ways. Support is targeted to a broader range of situations, including those that, in Ontario, are addressed by rights information rather than rights advice. However, supports are targeted only to those who are most vulnerable – that is, those who have no informal supports available.

Secondly, IMCAs are tasked not only with providing information and facilitating a challenge to a decision, but more broadly with representing the person.

This role of the IMCAs must be understood in the context of the legal capacity and guardianship regime of England and Wales, which differs sharply from Ontario's in several key respects. First, the law explicitly recognizes the role that supporters may play in assisting individuals to make a decision: one of the key principles of the MCA is that people must be

supported as much as possible to make a decision prior to reaching a conclusion that they lack the capacity to make the decision. Support may include provision of information in alternative formats, ensuring appropriate contexts and times for discussions, or allowing relatives or friends to provide help or support. In this context, the IMCA might be considered as playing the role of a supporter for a person who lacks informal supports.

Secondly, where a person is found to lack capacity, and does not have a lasting power of attorney or a court-appointed deputy, the health care or social care worker will make the decision in the best interests of the person involved. As a result, the role of the IMCA becomes a vital counterbalance to the power of professionals who will decide on their clients' behalf. The IMCA is a last protection for the rights of the person found to be legally incapable: their role in representing the individual and challenging decisions is a fundamental procedural safeguard.

Alberta: Review Officers

As part of its system for applications for co-decision-making, guardianship and trusteeship orders, Alberta's new *Adult Guardianship and Trusteeship Act* creates a position of Review Officer within the Public Guardian and Trustee. When the Court receives an application for the appointment of a co-decision-maker, guardian (for personal matters) or trustee (for financial matters) other than the Public Guardian and Trustee, a Review Officer must provide a written report to the Court that sets out

- the views and wishes of the person who is the subject of the application;
- the suitability of each proposed co-decision-maker, guardian or trustee, as well as of any proposed alternatives;[875]
- in the case of 'desk applications', the compliance of the Review Officer with a number of procedural duties;[876] and
- any other comments that the Review Officer considers relevant to the application.[877]

The Court is required to consider these reports when reaching its decision,[878] unless the application is an urgent one.[879]

Applicants for a co-decision-making, guardianship or trusteeship order must submit a comprehensive package of documentation in the required formats to the Review Officer. These include personal references, consent to a criminal records check, and for guardianships or trusteeships, a detailed plan.[880]

The Review Officer has a duty to

- meet in person with the individual who is the subject of the application;

- explain the nature and the purpose of the application, and that the individual has a right to request a hearing and to attend and make representations at such a hearing; and
- ascertain the views and wishes of the person regarding the application.[881]

The role of the Review Officer is in some ways analogous to that of a Rights Adviser, in that the Officer is focussed on individual issues; has a proactive role (that is, every person who is subject to a particular type of decision has mandated access); and is focussed on provision of information and communication of views rather than representation or negotiation.

Rights Advisers enter the process where a determination has already been made that changes the status of the individual. Review Officers play their part at the beginning of the process, prior to any determination being made. This has a number of important ramifications for their role in the overall legal capacity, decision-making and guardianship system. As well, there are important differences in the way the support role is envisioned, including the following;

- The requirement to ascertain and report the views and wishes of the affected individual gives the Review Officer an important role in promoting the voice of the individual.
- The Review Officer also has an evaluative function in assessing options that is quite different from that of a Rights Adviser.
- As part of the PGT, the Review Officer function is not structurally independent.
- The Review Officer function does not have the systemic element that the Psychiatric Patient Advocate Office provides in Ontario's system.

3. Agency-Provided Supports

Supports may also be provided in a decentralized fashion, through funding of community agencies that have connections to the affected communities. This allows supports to be provided as part of a more holistic approach to the needs of the affected individual, through organizations that may already have strong profiles and relationships with affected communities and individuals. Ontario`s Adult Protective Services Worker program provides an example of such a support service.

Ontario: Adult Protective Services Workers

The Adult Protective Service Worker (APSW) program has operated in Ontario since 1974. It currently operates under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (SIPDDA), under the aegis of the Ministry of Community and Social Services (MCSS). Under SIPDDA, MCSS funds appropriate sponsoring agencies (usually generic service providers) to provide adult protective service worker programs to eligible individuals, without a fee.

The APSW program aims to support adults with a developmental disability who are living on their own (with some exceptions) to live as "independently, safely and securely as possible in

the community". APSWs work directly with eligible individuals on a voluntary basis, with the individuals as active participants in all steps of the relationship.

APSWs provide the following services:

1) Advocacy on the behalf of the individuals they serve, to assist with accessing and maintaining generic community supports, apply for government-funded services and otherwise assist with living safely and securely in the community;
2) Support to individuals in identifying their own strengths and needs, and providing referrals and information;
3) Coordination and case management of community resources, service plans, liaison with other service providers;
4) Supports in other areas, such as problem-solving, life-skills development, general education and awareness building.

The MCSS 2012 *Policy Guidelines for the Adult Protective Service Worker Program* state that:

> In the role of advocate, the APSW works with community-based services and agencies to:
> - Ensure, within the scope of the APSW's mandate and authority, that the rights of the adult who has an developmental disability are acknowledged and respected, and
> - Inform the adult who has a developmental disability of their rights.
>
> Before acting as an advocate, the APSW determines the level at which the individual who has a developmental disability understands a potentially harmful or complex situation and can speak on their own behalf.[882]

APSWs do not make decisions on behalf of individuals, or act as guardians or under power of attorney. The *Policy Guidelines* emphasize "While the APSW can assist people in making healthy and safe decisions, ultimately the final decision belongs to the adult who has a developmental disability and who is capable of making those decisions".[883] In extraordinary circumstances, the APSW may *temporarily* act as a trustee for ODSP income supports, while other service alternatives are put into place.[884]

- **QUESTION FOR CONSIDERATION: What can be learned from supports to accessing the law in other jurisdictions or in other Ontario programs?**
- **QUESTION FOR CONSIDERATION: Should supports be provided proactively, or upon the request of the individual? Does this differ at various points in the system?**
- **QUESTION FOR CONSIDERATION: Who should deliver supports to accessing the law in this area? For example, should supports be provided through community agencies, a specialized public institution, or embedded institution-specific supports?**

E. Questions for Consideration

1. **What types of supports are most important for assisting persons falling within this area of the law to understand and assert their rights? Should the focus of supports be on provision of accessible, timely and appropriate information; assistance in navigating complex systems; supporting affected individuals to articulate their values and wishes; support to advocate for their rights; or some other needs?**
2. **What can be learned from the history of the *Advocacy Act* to guide reforms to the provision of supports for persons falling within this area of the law?**
3. **Are there ways to strengthen existing supports for accessing rights under legal capacity, decision-making and guardianship laws, including rights advice, section 3 counsel and legal aid services for persons falling within this area of the law? Are there ways in which these supports could be expanded to reach a broader range of needs?**
4. **What can be learned from supports to accessing the law in other jurisdictions or in other Ontario programs?**
5. **Should supports be provided proactively, or upon the request of the individual? Does this differ at various points in the system?**
6. **Who should deliver supports to accessing the law in this area? For example, should supports be provided through community agencies, a specialized public institution, or embedded institution-specific supports?**

IV. ACCESS TO INFORMATION AND EDUCATION

A. Introduction

One of the dominant issues throughout this *Paper* is the effect of the pervasive lack of knowledge and understanding of this area of the law on its meaningful and effective implementation. This affects every aspect of the law, and every group that comes into contact with it. This Chapter gathers together material from throughout the *Paper* to provide a focussed examination of this problem.

There are four groups who must understand the law in order for it to be implemented as envisioned:

1. Those who are directly affected (those who may or have been determined to lack legal capacity, or who are attempting to create authorizations, such as powers of attorney, to address future decision-making arrangements);
2. Those who act for others who have been determined to lack legal capacity: as described in Part Three, Chapter II, these are mostly family and friends, but may include others;
3. Those who provide information, advice and support to those who interact with Ontario's legal capacity and guardianship system, such as advocates, community agencies and social service providers;
4. Those professionals who are responsible for implementing the law, such as professionals who assess capacity, obtain consent, or are responsible for ensuring compliance with the law.

Each of these groups has different information needs, and will face different opportunities and barriers in accessing information and education.

As noted throughout this *Paper*, the range of those affected or potentially affected by this area of the law is very wide. For example, any person may decide that it is advisable to create planning documents such as powers of attorney, as part planning for contingencies. Thus, in addition to education and information targeted to particular groups, a broader public education strategy may be essential. Certainly there were extensive public education efforts at the time that the current laws came into effect.

It should be noted that provision of information 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. Reforms related to access to information should be considered in conjunction with other potential reforms, such as improved dispute resolution, simplified or more flexible processes or additional mechanisms for monitoring and oversight.

- **QUESTION FOR CONSIDERATION: How could information, education and training related to legal capacity, decision-making and guardianship be better coordinated and made more accessible to the general public and all those seeking it?**

B. Persons Directly Affected by the Law

1. Older Adults and Persons with Disabilities, and Access to Information

The importance of – and barriers to – access to information about the law was a recurrent theme in both *Framework* projects. As the *Framework for the Law as it Affects Persons with Disabilities* comments, where there is a lack of access to information about rights and recourse under the law, "the autonomy of persons with disabilities may be undermined, as they are unable to make informed choices about laws, policies and programs that may affect them".[885]

During the consultations for the *Framework for the Law as it Affects Older Adults,* many older adults expressed that they felt poorly informed about their rights and legal options: in focus groups, many participants had difficulty identifying where they might go to find information about rights and responsibilities. This was particular true for some groups, such as newcomer older adults.

A range of barriers to accessing information were identified for both older adults and persons with disabilities. These include a lack of disability-accessible information and heavy reliance on online forms of information, particularly since older adults and persons with disabilities are more likely, for different reasons, to have limited access to technology. As well, those who live in low-income may have more challenges in locating accurate and comprehensive information that relates to them, and both persons with disabilities and older adults are more likely to live in low-income. Further, needs for information often arise at a point when individuals are in crisis, and at such times, these individuals will have additional difficulties in navigating complex systems and multi-layered bureaucracies.[886]

2. Provision of Information to Affected Individuals under the Law

General Comments

To ensure that those directly affected by this area of the law are able to effectively access their rights, they need to receive information about:

- the relevant provisions of the law;
- the potential impact of the law on their particular circumstances;
- the options available for challenging a decision or proceeding; and
- the resources available to assist them in doing so.

For this information to be meaningful, it must be

- **accessible** in the broadest sense of the term, taking into account disability-related accommodation needs, the diversity among those affected by the law (including cultural and linguistic diversity), the circumstances of those living in congregate settings and remote or rural areas, and the barriers faced by those living in low-income;
- **timely**, so that individuals receive the information at the key transition points when they are able to make use of it;
- **appropriate** in terms of the kind of information that is provided; and
- **trustworthy**, in that it is free of bias or conflict of interest.

The means by which individuals are able to access information will differ depending on the particular point in the legal capacity, decision-making and guardianship system at which they find themselves. That is, the best mechanisms for providing information to individuals who are considering creating a POA will differ from those for persons who are subject to a guardianship application, or for persons who are concerned that their guardians are not respecting the limits of their authority. Key points at which individuals may require information about rights and recourse include

- assessment of capacity;
- appointment or termination of an appointment of a substitute decision-maker (SDM), whether through a personal appointment, a public appointment or an automatic appointment (e.g., the HCCA's hierarchical list);
- when an SDM makes key decisions affecting significant rights;
- when there are concerns relating to misuse or abuse of powers under the legislation.

Current Information Requirements

As is described in more detail elsewhere in this *Paper,* the *Substitute Decisions Act* (SDA), Part III of the *Mental Health Act* (MHA) and the *Health Care Consent Act* (HCCA) include some requirements for information to be provided to affected individuals at key transition points.

Assessing Capacity: Part Three, Chapter II of this *Paper* outlined the statutory requirements for provision of information to individuals undergoing an assessment of capacity. Because an assessment of capacity can in a number of circumstances have very significant automatic effects on the individual's status and choices, information about the legal effect of the assessment, the rights of the individual and the options available is crucial.

- *Mental Health Act* (MHA) examinations of capacity to manage property: those undergoing these examinations have a right to notice of the issuance of a certificate of incapacity, and to timely provision of rights advice by a specialized Rights Adviser. The Rights Adviser will provide information to the patient about the significance of the certificate and the right of appeal.

- HCCA assessments of capacity to consent to treatment: a finding of lack of capacity must be communicated to the individual. Outside of psychiatric facilities, the form and content of the notice depends on the guidelines of the regulating professional college.
- HCCA evaluations of capacity to consent to admission to long-term care or to personal assistance services: the HCCA does not require provision of information to the affected individual; however, the mandated form for evaluators includes an information sheet that must be provided to the individual and a box to tick to indicate that the individual has been informed about the finding and the right to appeal.
- SDA assessments by designated Capacity Assessors: the individual must be provided with information about the purpose, significance and potential effect of the assessment, as well as written notice of the findings of the assessment. Where a statutory guardianship results, the PGT must inform the individual that it has become the guardian and that there is a right to apply for review of the finding.

The level of access to information at this stage, and the independence and oversight of the accuracy and thoroughness of that information, therefore varies considerably.

Roles and responsibilities of SDMs: the SDA requires all SDMs, whether appointed through a power of attorney (POA) or a guardianship, to explain their powers and duties to the affected individual. There is no formal mechanism for ensuring that this step is carried out. Further, while the PGT can of course be expected to thoroughly understand the "powers and duties" of an SDM, as is discussed below in many cases, the family and friends who are acting as SDMs are not conversant with their statutory responsibilities: they will neither be aware of their duty to explain them, or in a position to accurately describe them. And of course, there will be some minority of SDMs who are abusive, neglectful or exploitive. In these situations, which are precisely the ones where the individual will most require understanding of legal rights and recourse, the SDM is very unlikely to detail them.

As well as the formal requirements under the statutes, community agencies, service providers and advocacy organizations may provide information at various points, either through public education activities or in response to requests for assistance.

There is, for example, a plethora of material available on the nature and effect of powers of attorney (POAs), for those that search it out. Notably, the Ministry of the Attorney General's POA "kit" contains considerable practical information about the requirements for, and benefits and risks of POAs. Community Legal Education Ontario provides online resources about POAs, as does the Advocacy Centre for the Elderly (ACE), the Ontario Seniors Secretariat, and the National Initiative for the Care of the Elderly. Similar information is available about health care consent, guardianship and other issues related to this area of the law.

3. Improving Access to Information for Those Directly Affected

Throughout this *Paper,* options have been identified for improving access to information about the law at various key points. These include

- more stringent requirements for the creation of a power of attorney, including use of mandatory forms or a requirement to seek legal advice (Part Three, Chapter III);
- expanded use of "rights advice" services, particularly in situations where currently requirements are for rights information (Part Four, Chapter III);
- expanded supports for navigating the law, including various types of advocates or support workers (Part Four, Chapter III).

- **QUESTION FOR CONSIDERATION: What are the priorities for reforms to law, policy or practice to ensure that individuals who encounter the capacity, decision-making and guardianship system have meaningful access to the information that they need to preserve their autonomy to the greatest extent possible and to understand and enforce their rights?**

C. Those Acting as Substitute Decision-makers

Part Three, Chapter II of this *Paper* examined the very high level of responsibility entailed in acting as an SDM, and the challenges faced by those individuals, mostly family and friends, who take on this demanding role. As that Chapter noted, there is a great need for supports and resources to enable these family members and friends to carry out these roles as intended by the statutes. Information and education may not deter negatively motivated individuals from abusing their roles as SDMs. However, the vast majority of SDMs, including those who are currently failing to abide by statutory requirements, are not intentionally misusing their powers. Rather, they do not understand the nature of their responsibilities, or do not have the skills or supports to carry out those responsibilities adequately. Better information and education for SDMs can assist individuals in meeting their responsibilities as well as contributing to holding them accountable when they fail to do so: it is difficult to hold individuals to account for failure to carry out duties of which they were not aware.

Despite the importance of informed SDMs, the currently statutory regime provides little in the way of formal requirements to inform or support them. For example, persons appointed under a POA need not even be informed that they have been appointed, and there are no mechanisms for ensuring that attorneys understand their role. While the process for becoming a guardian is more rigorous than that for a personal appointment, there are no requirements or formal supports to assist them with gaining the information and developing the skills that are necessary. While a variety of organizations and institutions have voluntarily developed

information resources for SDMs, these are fragmented and most frequently require the SDM to seek them out.

Part Four, Chapter I, dealing with abuse and misuse of SDM powers, described the voluntary training sessions provided to guardians and administrators in the Australian state of Victoria, as well as the recommendation of that state's Law Reform Commission that the Tribunal that deals with legal capacity and guardianship matters be empowered to order training as a condition of appointment. ARCH Disability Law Centre, in their paper on protecting the rights of persons under guardianship, recommended the institution of mandatory training programs, which would include

- information about legal obligations under the SDA;
- information about the scope and limitations of the powers of a guardian's decision-making authority;
- education on how to carry out SDM responsibilities in a way that respects the rights of the individual.

As noted in Part Three, Chapter II, SDMs would also benefit from information connecting them with resources that are available to assist them with the practical, ethical and emotional challenges associated with their responsibilities.

The Victorian Law Reform Commission further recommended that guardians and administrators, at the time of their appointment, be required to sign an undertaking to comply with their responsibilities, as a means of ensuring that they are aware of the seriousness of the obligation they are undertaking and the nature of their statutory duties.

- **QUESTION FOR CONSIDERATION: What are the priorities for reforms to law, policy or practice to ensure that persons appointed as substitute decision-makers adequately understand their roles and responsibilities, and have the skills necessary to effectively perform their often challenging roles?**

D. Those Providing Services to Persons Directly Affected

Beyond those organizations or professionals who are directly responsible for implementing the law, which are discussed below, there are a wide variety of service providers, community agencies and advocacy organizations that regularly interact with groups of individuals who are directly affected with the law, such as family caregivers; persons with developmental, intellectual, cognitive or psycho-social disabilities; or older persons. These organizations may find themselves attempting to provide informational or navigational assistance to individuals who interact with this area of the law, or confronted with concerns about abuse.

These organizations may be large or small; may be public, private or non-profit; and may be found across a wide range of sectors. While they will have a better ability to locate resources than most private individuals, in most cases, they will not have easy access to expertise in the area. To some degree, access to information and advice exists on an informal basis: many of the experts that the LCO spoke to during the preliminary consultations described themselves as regularly providing assistance and advice to colleagues and others in understanding and interpreting law and appropriate practice in this area. Such advice relies, however, on informal networks of contacts and on the goodwill and dedication of those providing such advice beyond the scope of their regular duties.

During the LCO's preliminary consultations, we heard from a number of organizations, particularly smaller social services providers, about the challenges they face in addressing these needs; they urged the LCO to identify ways to improve access to expertise and advice on complex issues related to this area of the law for these organizations. Such assistance might take the form, as one person suggested, of a telephone advice line. In the Australian state of Victoria, the Office of the Public Advocate includes as part of its role the provision of information to professionals who come into contact with the legal capacity, decision-making and guardianship system, such as healthcare professionals and financial services providers.

- **QUESTION FOR CONSIDERATION: What are the priorities for reforms to law, policy or practice to ensure that service providers adequately understand their roles and responsibilities under the law, have a meaningful understanding of the circumstances and experiences of the individuals affected by these laws, and have the skills necessary to effectively interpret and apply the law?**

E. Those Implementing the Legislation

The effective implementation of Ontario's legal capacity, decision-making and guardianship regime depends on the knowledge, skills and efforts of a wide range of organizations and professionals. Some, such as those professionals who assess capacity under the SDA, MHA or HCCA, are directly assigned important statutory responsibilities. Others are responsible for setting policies or developing practices through which the legislation is implemented, such as health or long-term care institutions. Some, such as the relevant professional colleges, are responsible for receiving complaints related to certain duties under the law.

It is important to emphasize that service providers are, by and large, well-intentioned in their efforts to serve their clients, and that they may be operating in contexts of considerable constraint and difficulty. There may be no simple solutions to the ethical, practical or resource challenges that these institutions or professionals may face in providing services to what may at times be their most vulnerable clients. However, this very vulnerability and the centrality of the

rights at issue makes it essential to ensure that service providers have the information, skills and resources to effectively fulfil their responsibilities.

The problem of the "implementation gap" was identified as a very significant issue during the preliminary consultation. One substantial element of this gap arises from insufficient or incorrect application of the law by these professionals and organizations, a problem which has roots in misunderstandings or lack of awareness of the law. Service providers may find the law related to legal capacity and decision-making complex and confusing, or may lack sufficient training or supports to properly apply it.

1. Needs for Education and Information

Both *Frameworks* emphasize the importance of education and training for those charged with implementing law in ensuring that processes under the law respect the principles. Education and training should be ongoing, and should address the substance of the law (including the application of the *Human Rights Code*, the *Charter* and the *Accessibility for Ontarians with Disabilities Act*), and anti-ageist and anti-ableist education, including common stereotypes and negative attitudes, systemic barriers, and access and accommodation issues.

Attitudinal Barriers

As was extensively discussed in the *Framework* projects, both older adults and persons with disabilities have historically been subjected to paternalistic attitudes and limiting assumptions about their capabilities, including their ability to make decisions for themselves. Well-intentioned service providers may restrict the rights of persons with disabilities and older adults with the purpose of protecting them from harm or discomfort, and this may overlap with assumptions about the capacity of older persons or persons with certain disabilities. Bach and Kerzner have commented that,

> Service provision in the disability and older adult sectors is often based on charity and protection models, and an assumption that because people need supports and care, other should make decisions on their behalf. Often service providers also require that they are provided decision-making authority on behalf of those they are supporting so they can more efficiently manage the range of individual decisions related to care, medications, activities, etc.[887]

The Advocacy Centre for the Elderly (ACE) has similarly noted that,

> A simple example of ageism is the automatic assumption that older people are incapable of making a decision due to their age. Although there is a presumption in the *Health Care Consent Act* that a person is capable, the onus is often on the older person to prove their capacity. Another common example of ageism is the attitude that seniors must be 'protected' by restricting their activities because it is in their 'best interests'.[888]

For example, some long-term care homes have policies preventing **all** residents, whether legally capable or incapable, of leaving the home without an escort; in other cases, the long-term care home may improperly defer to family members to prevent capable persons from leaving or may prevent capable residents from leaving because they are concerned that they are likely to fall, drink alcohol or otherwise come to harm.[889]

These kinds of attitudes may significantly affect how service providers implement the law. Those adopting a paternalistic or "best interests" approach to older persons and persons with disability may, whether consciously or unconsciously, fail to respect the central tenets of the legislation, such as the presumption of capacity, the understanding of capacity as decision-specific, and the importance of procedural rights in protecting individual autonomy.

As has been noted elsewhere throughout this *Paper*, because of the diversity of Ontario's population, it is particularly important that those implementing the law in this area, including those who assess capacity (across multiple systems), understand how multiple forms of diversity may intersect with disability or older age, how they may impact on access to services and supports, and how they may affect the expression of decision-making abilities.

Lack of knowledge or understanding of the law

During the preliminary consultations, the LCO heard widespread concerns about gaps in the knowledge or understanding of those who are responsible for implementing the law. For example, the LCO has heard from many individuals that service providers are commonly confused as to what constitutes a proper authorization of an SDM, or the scope of powers afforded by guardianship or a POA. SDMs are often misunderstood as having plenary powers over individuals: service providers may inappropriately allow a person holding a power of attorney for property to make decisions regarding personal care, for example.

In some settings, misunderstandings of the law may be extensive and systemic. A research paper commission by the LCO from ACE and Dykeman, Dewhirst O'Brien LLP (DDO) ("the ACE/DDO Paper") highlights extensive confusion among health care service providers about the status of various "advance care planning" documents (referred to by some as "advance directives"), such as "Do Not Resuscitate" (DNR) orders, "levels of care" forms, and other health care documentation of patient wishes. Providers frequently misunderstand such documents as themselves providing valid consent to treatment and as "speaking" directly to health care practitioners, rather than as statements of capable wishes that may guide the SDM should the patient become legally incapable. That is, these documents may be treated as authorizations when they do not have such a status in Ontario law. These misunderstandings may be crystallized in forms, policies and procedures which guide the work of health care practitioners on a day-to-day basis.[890]

Similarly, in research on access to justice in congregate settings, ACE found, "The failure of health practitioners to obtain informed consent for medical treatment was rampant in both retirement and long-term care homes".[891] Furthermore, lack of knowledge combined with pervasive "paternalistic and infantilising attitudes" on the part of staff[892] may lead to systemic violations of the rights of residents of long-term care homes.

Access to information about the law or support in its application may be challenging for professionals for a variety of reasons. Some examples are listed below.

- **Insufficient institutional supports:** In some cases, the professionals who are responsible for implementing or overseeing the implementation of the law have limited access to information and advice due to institutional constraints. For example, in some long-term care homes, there may be only one registered nurse for the facility: he or she is dealing with quite complex requirements under the *Long Term Care Homes Act* (LTCHA) and the HCCA, and may not have colleagues to provide mentoring or to ask for advice.
- **Irregular exposure to the area:** Some professionals may work in the area only rarely, and so may not develop adequate expertise to fully appreciate the ramifications of their work. For example, during the LCO's work on the *Framework for the Law as It Affects Older Adults*, the LCO repeatedly heard concerns about lawyers inappropriately assuming legal incapacity on the part of older adults and improperly consulting with the older adult's family or friends rather than their actual client, or of lawyers providing incorrect advice about this area of the law.[893] Similar issues have been raised with respect to legal services related to mental health issues outside of large urban areas: because the cases are few, lawyers may not have the opportunity to develop an in-depth understanding of this area of the law.
- **Law at the front-lines:** As well, in some institutions, it is front-line workers who will be directly encountering issues related to legal capacity and decision-making, and who will be assigned the responsibility for identifying potential issues and applying correct procedures. It is also at the front-lines where pressures related to limited resources, competing needs and the tension between standardization and responsiveness to individual needs will be most acute. High turnover may exacerbate difficulties related to attitudinal barriers and lack of understanding of the law: service providers may find it difficult to keep staff training up-to-date and there is less opportunity for staff to develop skill and confidence in dealing with these issues.

2. Current Sources of Information, Education and Training

Those responsible for implementing the statutory framework may have access to information, education and training from a variety of sources. These are briefly described below.

Educational institutions

Many of the service providers or professionals charged with implementing or supporting the implementation of the law must meet certain educational requirements prior to entering their professionals. This is true for social workers, health professionals and lawyers, for example. Educational institutions may provide information related to this area of the law, either as mandatory or voluntary course material. Lawyers, for example, may encounter information about issues related to legal capacity, decision-making and guardianship through a variety of coursework, including courses on mental health law, elder law, health law, disability law, or trusts and estates law. Information about this area is not required of law school graduates, however, and many lawyers will not encounter this area until later in their careers or at all.

Professional Regulatory Bodies

Professional regulatory colleges play an important role in providing information and education to their members across a wide range of subject areas. Professional regulatory bodies, such as the regulated health colleges, may require practitioners to demonstrate specific knowledge or skills in order to become accredited, may develop policies or guidelines that are binding on their members and may be the subject of complaints where there is non-compliance, and may provide ongoing education and training opportunities.

For example, health practitioners are required to comply with the policies of their own regulatory health colleges, which in a number of cases have issued policies, codes of practice, or guidelines relevant to legal capacity, decision-making and guardianship. The College of Nurses of Ontario, for example, has issued a *Practice Guideline* on consent,[894] while the College of Physicians and Surgeons has a policy statement on consent to medical treatment[895] and the College of Occupational Therapists of Ontario has issued a guide to the legislation for its members.[896]

The regulated health colleges may also provide education and training opportunities for health practitioners, as part of their mandate to "develop, establish and maintain standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members".[897]

Employing Institutions

For professionals working in large institutions, such as hospitals, long-term care homes, Community Care Access Centres, or large social service agencies, their implementation of the law will be significantly shaped by their employer. Institutions may develop internal policies dictating how the law is to be interpreted and applied, create internal training programs or resources, or provide access to information and advice through internal legal or ethics departments.

For example, health practitioners working in larger institutions often have issues related to legal capacity and decision-making structured through the use of institutional forms and procedures. These are intended to standardize process, simplify complex issues into manageable formats, and ensure compliance with law and policy. Unfortunately, in some cases these forms and procedures may themselves fail to comply with the law. A review of a sample of materials from hospitals and long-term care homes by ACE and DDO revealed that many of these documents incorporated significant misunderstandings of the law: for example, several documents incorrectly suggested that SDMs could engage in advance care planning on behalf of individuals lacking legal capacity, and several institutions were using materials from other jurisdictions without adaptations to ensure compliance with Ontario law. This is of particular concern because focus groups with health practitioners indicated that "health care organizations' forms drive practice".[898]

The ACE/DDO Paper provides extensive illustrations of this issue in the context of the provision of healthcare. The Paper reviews a number of advance care planning and consent forms and systems, as well as several institutional policies and practices, and concludes that these documents not uncommonly contain errors with respect to the law. For example, the paper notes that "[ACE has] frequently come across long-term care home documents that provide that a resident must consent to *any* treatment proposed by a health practitioner at the long-term care home ... Consents to treatment given pursuant to such blanket agreements are plainly unlawful and ineffective."[emphasis added][899] As another example, seven of the thirteen sets of institutional policies and forms reviewed as part of this research project incorrectly either stated or appeared to assume that substitute decision-makers could express wishes, values and beliefs on behalf of incapable patients.[900] The ACE/DDO Paper states that,

> What these examples of policies and forms show is that health care organizations appear to have different understandings of how the requirement to obtain informed consent to treatment relates to advance care planning, advance directives and other level of care forms. In many of the advance care planning forms that we reviewed, it is very difficult to determine if the form was meant to record patient wishes, new wishes created by the SDM, informed consent to treatment, or some combination.... While imperfect and generic forms would not be a concern if health practitioners consistently and correctly understood and applied the law, as we set out below in our discussion of our health care practitioner focus groups, the use of these forms appears to cause confusion.[901]

Government Mandated Training and Education

The current statutory regime requires those carrying out the various forms of formal capacity assessments to be members of specified professions, and thereby to have completed the requisite education and met accreditation standards. Beyond that, specific training is not mandated, with the notable exception of Capacity Assessors who are designated under the SDA, who must have completed the requisite training and requirements to maintain qualification.

This includes a qualifying course approved by the Attorney General that includes instruction in the SDA, best practices for completing forms and reports under the Act, standards for the performance of capacity assessments, and procedures for determining if a person needs decisions made on their behalf. They must be evaluated on their mastery of the training.[902] An approved capacity assessor must also complete continuing education courses every two years.[903] In addition to the continuing education course, an approved capacity assessor must provide the PGT with copies of two recent assessments (with personal information removed) every two years[904] and must perform a minimum of five assessments in every two-year period in order to maintain their approved status.[905]

Professional Associations

Professional associations may also provide materials or continuing education opportunities. For example, the Canadian Medical Association's *Code of Ethics* includes provisions related to respecting the right to accept or reject treatment, ascertaining wishes and provision of information to patients. The Ontario Bar Association's Trusts and Estates Section regularly provides Continuing Professional Development related to powers of attorney, as does the Health Law Section with respect to capacity and consent.

Other

A wide variety of organizations and professionals also provide information, resources and training aimed at supporting effective and appropriate implementation of this area of the law, including

Government bodies: The Consent and Capacity Board (CCB) and the Public Guardian and Trustee (PGT) both provide informational materials and conduct presentations aimed at the professionals and institutions with which they interact.

Advocacy and consumer organizations: Organizations that work with and advocate for persons directly affected may develop education and training for professionals, as part of initiatives aimed at closing the implementation gap and promoting the rights of the individuals that they serve. For example, ARCH Disability Law Centre, ACE and Elder Abuse Ontario regularly engage in public education for professionals and institutional stakeholders.

Academics and experts: academics and experts may use their skills to develop tools for "knowledge translation", aiming to turn complex issues of law and professional practice into practical tools or resources. For example, the National Initiative for the Care of the Elderly (NICE) has as its goals to help close the gap between evidence-based research and actual practice; improve the training of existing practitioners, geriatric educational curricula, and interest new students in specializing in geriatric care; and effect positive policy changes for the care of older adults. To this end, interdisciplinary teams review evidenced-based literature to

develop and disseminate user-friendly, interdisciplinary, team-based tools, such as "Understanding the Legal Dimensions of Financial Literacy: Power of Attorney" and the "Tool on Capacity and Consent".

General Comments

All told, considerable effort has been invested into assisting professionals and institutions to understand the law in this area and their obligations under it. Despite these efforts, it is generally believed that much more is needed. As the executive director of one organization that puts significant resources into education and training in this area commented, the need in this area appears to be almost inexhaustible: the law is complex, the issues are difficult and personnel regularly change over.

As well, there is no central repository of information on this area of the law. For those looking for information or resources, there is no one obvious place to look. While many organizations identify information gaps based on their own experiences and attempt to fill them, there is no central mechanism for identifying needs on an ongoing basis.

Further, while many organizations provide information and education, no organization has a clear and specific mandate to do so. For example, while the regulatory health colleges are required under section 3 of the *Regulated Health Professions Act* to "develop, establish and maintain standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members", there are no specific requirements to do so with respect to consent and capacity. While the PGT provides public information and education as resources permit, it is not specifically tasked by the legislation with doing so.

Finally, as the ACE/DDO Paper highlights, where resources exist, they may sometimes be misleading or inaccurate. ACE and DDO reviewed a number of resources available to health practitioners in understanding and applying the law related to legal capacity, consent and advance care planning, including policies and publications produced by regulatory colleges, and advance care planning forms and systems prepared by a variety of organizations, such as Cancer Care Ontario, the Resident Assessment Instrument (RAI) and others. While these documents had valuable components, they frequently contained misleading or incorrect information, such as assuming that a doctor could take direction from a planning document as opposed to a person or interpret a patient's wishes, suggesting that wishes must be written, or suggesting that health practitioners in long-term care homes are required to obtain written advance directives from patients. Some difficulties arise because materials are prepared on a national level, and so do not adequately deal with Ontario law. It is important, therefore, that where

resources are developed, they be legally accurate for the Ontario context: otherwise, they may actually further exacerbate the implementation gap, rather than reducing it.

- **QUESTION FOR CONSIDERATION: What reforms to law, policy or practice could help to ensure that professionals carrying out core responsibilities under the SDA, MHA and HCCA have the skills and expertise required to perform their roles, and that this skill and expertise is kept current?**

F. Questions for Consideration

1. **What are the priorities for reforms to law, policy or practice to ensure that individuals who encounter the capacity, decision-making and guardianship system have meaningful access to the information that they need to preserve their autonomy to the greatest extent possible and to understand and enforce their rights?**
2. **What are the priorities for reforms to law, policy or practice to ensure that persons appointed as substitute decision-makers adequately understand their roles and responsibilities, and have the skills necessary to effectively perform their often challenging roles?**
3. **What are the priorities for reforms to law, policy or practice to ensure that service providers adequately understand their roles and responsibilities under the law, have a meaningful understanding of the circumstances and experiences of the individuals affected by these laws, and have the skills necessary to effectively interpret and apply the law?**
4. **What reforms to law, policy or practice could help to ensure that professionals carrying out core responsibilities under the SDA, MHA and HCCA have the skills and expertise required to perform their roles, and that this skill and expertise is kept current?**
5. **How could information, education and training related to legal capacity, decision-making and guardianship be better coordinated and made more accessible to the general public and all those seeking it?**

PART FIVE

ADVANCING EFFECTIVE LAW REFORM

Chapter I briefly explores three elements relevant to effective implementation of law reform in this area: creating accountability and transparency mechanisms within law, policy or practice in the area so that the law's effect can be effectively monitored, ensuring that there are adequate mechanisms for coordinating systems; and providing means for ongoing identification and review of the effect of the law. Chapter II provides information about how to get involved in the LCO's public consultations for this project.

I. ENSURING AN EFFECTIVE SYSTEM: COORDINATION, SYSTEM MONITORING AND TRANSPARENCY

A. Introduction

Thhis *Paper* has identified many concerns with specific aspects of Ontario's laws related to legal capacity, decision-making and guardianship: how individuals are assessed for legal capacity to make decisions, have substitute decision-makers (SDMs) or supporters appointed, understand their legal rights and responsibilities, and raise and address concerns, among other issues. One underlying theme running through many of these issues is the decentralized nature of Ontario's system, with multiple institutions and processes reflecting a diversity of needs, and a focus on individual action to access the system and its supports. An recurring concern throughout this initial phase of the project has been the challenge in coordinating all of the many institutions and aspects of this area of the law, and ensuring that they are working well together towards the achievement of the ultimate purposes of the law. This concern may be understood as the result of three significant and interrelated gaps in the current regime: mechanisms for transparency and accountability for the effective operation of the system; systems or institutions for coordinating the various system functions; and means for identifying flaws or implementation issues in the system as whole. Each of these are briefly examined below.

B. Transparency and Accountability for System Functioning

A recurrent challenge in attempting to evaluate how well Ontario's laws in this area are working and to identify and assess potential law reform options is the pervasive lack of data with respect to the functioning of the current regime. For example, while several organizations have made considerable efforts over the years to improve understanding of the laws among the public, SDMs, service providers and professionals, the lack of any central coordinating role makes it difficult to identify who has been doing this work or how effective it has been.. There is therefore no straightforward means of determining what are the most pressing needs for information and education, what resources are available to address these needs or what might be the most effective strategies or tools for doing so. In many cases, it is simply not possible to gather any meaningful data at all about the operation of key aspects of the system: concerns related to the abuse and misuse of powers of attorney (POA) are an obvious example, where there are no means of determining how many POAs are in effect, let alone how common abuse is. Similar issues arise in almost every area, from assessing capacity to dispute resolution. While the Public Guardian and Trustee (PGT) and the Consent and Capacity Board (CCB) do collect statistics for case management purposes and report publicly on an annual basis, the information available through this means touches on only a few aspects of the system.

Without such data, it is difficult to meaningfully assess whether the reforms of the 1990s have met their goals; or whether any shortfalls in doing so are the result of problems with the fundamental assumptions and strategies underlying the laws or with their implementation. Just as it is important to have monitoring and oversight mechanisms to ensure that the law is functioning as intended on an individual basis, it is important to have such mechanisms with respect to the effectiveness of the laws as a whole. The *Framework for the Law as It Affects Persons with Disabilities* states,

> In general, laws benefit from the inclusion of mechanisms to ensure accountability, transparency and effectivenss. Often there is a lack of monitoring and oversight mechanisms for laws disproportionately or exclusively affecting persons with disabilities; as a result, it is difficult or impossible to determine whether these systems are operating effectively or the degree to which persons with disabilities are subject to abuses or violations of their rights. Monitoring of the law and regular evaluation of its effects provides a strong foundation for meaningful law reform, and mechanisms for monitoring and evaluation should be built into the law from the outset.

The *Frameworks* include a number of questions related to monitoring of the law that are relevant here.

1. What mechanisms does the law include to allow those affected, including persons with disabilities, to provide feedback on the effectiveness of the law and on any unanticipated negative consequences for persons with disabilities?
2. How does the law require meaningful information about its impact and effectiveness to be systematically gathered and documented?
3. How does the law require that information about its operation and effectiveness be made publicly available?
4. How does the law ensure that those charged with implementing and overseeing the law regularly report on their activities and the effectiveness with which the law, program or policy is administered?
5. Where the law provides significant discretion to those charged with its implementation, what additional reporting and monitoring mechanisms does it include to ensure that this discretion is exercised consistently, fairly, transparently and in a principled manner?

- **QUESTION FOR CONSIDERATION: Are there reforms to law, policy or practice which would increase transparency and accountability for the legal capacity, decision-making and guardianship system as a whole?**

- **QUESTION FOR CONSIDERATION: What steps can be taken to support ongoing monitoring and evaluation of any reforms to the law in this area, and to ensure that changes to law, policy and practice have the effect intended?**

C. Coordination of the Legal Capacity, Decision-making and Guardianship System

Many jurisdictions include as part of their legal capacity, decision-making and guardianship regime institutions or mechanisms that are intended to coordinate or oversee certain functions that are considered essential to the effective functioning of the system as a whole. Commonly, these include education, monitoring and oversight, and last resort functions.

For example, in Ireland's proposed new statutory framework (which is briefly described elsewhere in this *Paper*), the Office of the Public Guardian would fill a strong centralizing role in the system, with an extremely comprehensive range of functions, including:

- supervising decision-making assistants, co-decision-makers, decision-making representatives and attorneys for relevant persons,
- establishing and maintaining a register of decision-making assistance agreements, co-decision-making orders, decision-making orders and decision-making representative orders, and enduring powers of attorney,
- appointing special visitors and general visitors, who visit decision-making assistants, representatives, co-decision-makers and attorneys or the persons that they are assisting, and to receive reports from these visitors,
- receiving security which has been directed by the court to be furnished by a decision-making representative for a relevant person in relation to the performance of his or her functions,
- if required to do so by the court, having the custody, control and management of some or all of the property of a relevant person,
- receiving and considering reports from co-decision-makers, decision-making representatives or attorneys for relevant persons, and
- receiving and considering representations, including complaints, in relation to the way in which a decision-making assistant, co-decision-maker, decision-making representative or attorney for a relevant person is performing his or her functions as decision-making assistant, co-decision-maker, decision-making representative or attorney, as the case may be, and to act on such complaints where they have substance
- nominating persons to act as decision-making representatives where the court is unable to find other persons who are willing or suitable to so act,
- establishing public education and information programs, including online to all those involved in the system, and
- providing advice and guidance to bodies in the State in relation to their dealings with relevant persons. [906]

As is dealt with in Part Four, Chapter III, in the Australian state of Victoria, the Office of the Public Advocate, which is separate from the Public Guardian, plays this coordinating role. The Public Advocate was created as part of the wide-ranging reforms to capacity and guardianship

laws in the 1980s, and is considered, along with the role of the VCAT, as one of the most successful innovations of that reform. The recent review of Victoria's legal capacity and guardianship regime by that state's Law Reform Commission affirmed widespread and strong support for the role of the Public Advocate.[907] The Victorian Law Reform Commission recommended not only that the Public Advocate retain its current mandate, but that it be provided with additional responsibilities and funding. The Public Advocate has a dual role as both a guardian of last resort and an "official watchdog" for the rights of persons with disabilities in general. The roles of the Public Advocate are:

> (a) to promote, facilitate and encourage the provision, development and co-ordination of services and facilities provided by government, community and voluntary organizations for persons with a disability with a view to promoting the development of the ability and capacity of persons with a disability to act independently; minimizing the restrictions on the rights of persons with a disability; ensuring the maximum utilization by persons with a disability of those services and facilities; and encouraging the involvement of voluntary organizations and relatives, guardians and friends in the provision and management of those services and facilities;
> (b) to support the establishment of organizations involved with persons with a disability, relatives, guardians and friends for the purpose of instituting citizen advocacy programs and other advocacy programs; undertaking community education projects; and promoting family and community responsibility for guardianship;
> (c) to arrange, co-ordinate and promote informed public awareness and understanding by the dissemination of information with respect to the provisions of the *Guardianship and Administration Act* and any other legislation dealing with or affecting persons with a disability;
> (d) to investigate, report and make recommendations to the Minister on any aspect of the operation of the Act referred to the Public Advocate by the Minister.[908]

As was described in Part Four, Chapter I, in its paper, *Decisions, Decisions: Promoting and Protecting the Rights of Persons with Disabilities Who are Subject to Guardianship*, ARCH Disability Law Centre identified as a core shortcoming in the current system the lack of active (as opposed to responsive) mechanisms for ensuring that the rights of persons under guardianship are respected and that guardians comply with this legislative responsibilities, and recommended the creation of a "Monitoring and Advocacy Office", separate from the PGT. This Office would be an "independent, competent, impartial body whose role would be to monitor and oversee decision-makers, address situations in which decision-makers are abusing or misusing their powers, and deal with complaints from 'incapable' persons".[909]

To the extent that this central coordinating role exists in Ontario, it is undertaken by the Public Guardian and Trustee (PGT) and the Capacity Assessment Office (CAO). The vital roles of the PGT have been described in the relevant sections of this *Paper,* and include acting as a decision-maker of last resort and as statutory guardian for property, appointing replacement guardians for property, conducting "serious adverse effects" investigations and applying to the court for

temporary guardianships as appropriate, reviewing applications for court appointments of guardians, and make submissions or appearances as appropriate, reviewing accounts of guardians for property when they are submitted to the Court for approval, maintain the registry of guardians, arranging for section 3 counsel for those who are subject to proceedings under the SDA and require counsel; and create informational material and provide public education (although this last is not statutorily mandated).

The CAO trains eligible health professionals to be Capacity Assessors under the SDA, and provides ongoing education for designated Capacity Assessors, maintains a roster of qualified Capacity Assessors, oversees the work of Capacity Assessors, provides information about Capacity Assessment to the public; and operates a Financial Assistance Plan for those individuals who cannot afford the cost of a Capacity Assessment.

The roles of the PGT and CAO are central to the operation of Ontario's system; however, they are also clearly relatively modest in extent compared to those of similar institutions in some other jurisdictions. As noted above, Ontario's approach to this area of the law has been relatively decentralized, with a focus on the responsibilities of affected individuals, families and professionals in ensuring that the system operates effectively and as envisioned.

This issue of "system coordination" is closely connected to the issue of transparency and accountability briefly outlined above. Without some coordinating institution or mechanism, it is more difficult to design means of ensuring that information about outcomes is publicly available. To return to the example of powers of attorney, because there is no body responsible for providing any monitoring or oversight of these powers, no information is gathered regarding how many POAs are executed or in effect, who they affect or appoint, what powers they assign or how often concerns about their use arise.

- **QUESTION FOR CONSIDERATION: Are there reforms to law, policy or practice, including institutional roles or responsibilities, which would improve the coordination and effectiveness of the system as a whole?**

D. Identifying System Issues

The two issues identified above, the relative lack both of central coordinating institutions or mechanisms and of means for gathering and disseminating data about the operation of the system contribute to the challenge of evaluating the current system, whether on an ongoing basis to correct problems of implementation, or as part of a more thorough-going review.

It is worth considering whether reforms could incorporate into law, policy or practice means or requirements to regularly review their impact and effectiveness. For example, both the *Accessibility for Ontarians with Disabilities Act* and *Human Rights Code Amendment Act*

contained provisions requiring the review of the reforms they enacted after a certain period of time. Section 57 of the *Human Rights Code Amendment Act* required a review of the implementation and effectiveness of the changes resulting from the enactment of that statute, three years after the effective date. This review was required to include public consultations, and a report to the responsible Minister.[910] This review was completed in 2012.[911] The *Accessibility for Ontarians with Disabilities Act* contains more comprehensive review requirements. A first review was required within four years of the coming into force of the AODA, with further reviews to take place every three years. The Minister must appoint a person to undertake a "comprehensive review of the effectiveness of th[e] Act and the regulations", including public consultation. The person appointed must submit a report on that review that may include recommendations for improving the effectiveness of the Act and regulations.[912]

- **QUESTION FOR CONSIDERATION: Are there reforms to law, policy or practice which would improve the ability to identify and address problems with the system as a whole?**

E. Questions for Consideration

1. **Are there reforms to law, policy or practice which would increase transparency and accountability for the legal capacity, decision-making and guardianship system as a whole?**
2. **Are there reforms to law, policy or practice, including institutional roles or responsibilities, which would improve the coordination and effectiveness of the system as a whole?**
3. **Are there reforms to law, policy or practice which would improve the ability to identify and address problems with the system as a whole?**
4. **What steps can be taken to support ongoing monitoring and evaluation of any reforms to the law in this area, and to ensure that changes to law, policy and practice have the effect intended?**

II. PARTICIPATING IN THE LAW REFORM PROCESS: THE LCO'S PUBLIC CONSULTATIONS

The law of legal capacity, decision-making and guardianship directly affects a large and growing number of Ontarians. Most Ontarians will at some point encounter this area of the law, whether in a professional role or through their own illness or disability, that of a loved one. The impact of these laws on the rights and basic quality of life of those directly affected, and on the lives of their families and friends, is profound. For law reform to be effective, it is important to hear from those affected, to understand both how the law currently works in practice and how it can be improved to be more meaningful, accessible, just and effective.

This comprehensive *Discussion Paper* is accompanied by a simplified *Summary of Consultation Issues*, which briefly outlines the key issues identified by the LCO through its research and preliminary consultations and lists the consultation questions.

The LCO will be conducting public consultations on the issues raised in this document from **June 25, 2014** until **Friday, October 17, 2014.** There are a number of ways in which you can participate in this consultation.

You can mail, fax or e-mail your comments to:

Law Commission of Ontario
Public Consultation: 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

You may also use the LCO website comments form at www.lco-cdo.org. Submissions must be received by **October 17, 2014**.

The LCO has developed two consultation questionnaires: one for persons directly affected by laws related to legal capacity, decision-making and guardianship, and one for families, friends, supporters and substitute decision-makers. These are available online at www.lco-cdo.org, or you may request other formats by telephone or email. You may respond to the questionnaires by mail, online, or by telephone. To respond to by telephone, please call us at:

Toronto : (416) 650-8406
Toll-free : 1 (866) 950-8406
TTY : (416) 650-8082

LCO staff would also be pleased to meet to discuss the issues raised in this discussion paper, by telephone or in person. If you wish to set up a consultation meeting with the LCO, you may contact us to discuss possible arrangements. Meetings can take place in person, by conference call or via other interactive technologies. If you have questions regarding this consultation, please call (416) 650-8406 or e-mail us at lawcommission@lco-cdo.org.

Based on the results of our consultation phase and the LCO's ongoing research, the LCO will prepare an *Interim Report* containing draft analysis and recommendations, which is anticipated to be released in Spring 2015.

APPENDIX A: THE LCO'S FRAMEWORK PRINCIPLES

Appended below are excerpts from the LCO's *Framework for the Law as It Affects Persons with Disabilities* and *Framework for the Law as It Affects Older Adults.* The originals can be consulted in the final reports for those projects.

Excerpt from *A Framework for the Law as It Affects Persons with Disabilities*

Principles for the Law as It Affects Persons with Disabilities

In order to counteract negative stereotypes and assumptions about persons with disabilities, reaffirm the status of persons with disabilities as equal members of society and bearers of both rights and responsibilities, and encourage government to take positive steps to secure the wellbeing of persons with disabilities, this *Framework* centres on a set of principles for the law as it affects persons with disabilities.

Each of the six principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. The concept of equality is central to both the *Charter* and the *Code*. The Supreme Court has recognized that governments, in providing services, must respect the equality rights of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality.

There is no hierarchy among the principles, and the principles must be understood in relationship with each other. Although identified separately, the principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting the Dignity and Worth of Persons with Disabilities:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every person with a disability. All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
2. **Responding to Diversity in Human Abilities and Other Characteristics:** This principle requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.

3. **Fostering Autonomy and Independence:** This principle requires the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
4. **Promoting Social Inclusion and Participation:** This principle refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.
5. **Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
6. **Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.

- *For more information on the principles, see the* Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.C

Implementing the Principles

As principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all of the principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors to be taken into account in the application of the principles.

Taking the Circumstances of Persons with Disabilities into Account: While it is generally recognized that persons with disabilities make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from their non-disabled peers, laws and policies do not always systematically and appropriately take these into account. As a result, laws and policies may have unintended negative effects on persons with disabilities, may work at cross-purposes with each other, or may fail to achieve their intended goals. In some cases, stereotypes or negative assumptions about persons with disabilities may shape the degree to which or the way in which persons with disabilities are taken into account. In this way, the law may be ableist in its impact. As part of respecting and implementing the principles, the circumstances of persons with disabilities must be taken into account in the development and implementation of all laws, policies and programs that may affect them. This includes the recognition that persons with disabilities are themselves a highly

diverse group, with widely varying perspectives, circumstances and experiences. The LCO's *Final Report*, which is a companion to this *Framework*, along with the resources linked to throughout the *Framework*, may provide assistance in understanding the circumstances of persons with disabilities.

Life Course Analysis: Following from the above, in applying the principles, it is important to consider the full life course of persons with disabilities. The life experiences of each of us will profoundly shape the resources and perspectives we bring to each stage of life. Barriers or opportunities experienced at one stage of life will have consequences that will reverberate throughout the course of life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of individuals. That is, the impact of laws must be understood in the context of every stage of the life of persons with disabilities, from birth to death, and how these stages relate to each other.

Treating Law as Person-Centred Approaches: Law is often developed, implemented and analyzed as a set of separate and largely independent systems. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of fragmented systems – and requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. This requires law to respond to individuals as whole persons with unique needs and identities, and to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of persons with disabilities, in many cases an inclusive design approach that incorporates from the outset the needs of persons with disabilities as well as others into the overall design of a law of general application will be the most effective approach. Persons with and without disabilities will benefit from a focus on dignity, autonomy, inclusion, safety and diversity in the design of laws. Many of the measures required to fulfill the principles and to make the law more fair, accessible and just for persons with disabilities will also make the law more fair, accessible and just for others. Designing laws, policies and programs of general application to include persons with disabilities from the outset can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of persons with disabilities and aim to promote positive principles, their implementation may fall far short of their goals. This is a common phenomenon. There are two aspects to this "implementation gap": implementation strategies for the law, and mechanisms for ensuring that persons with disabilities are adequately able to access and enforce their rights. In developing and analyzing laws, as much attention must be paid to the implementation of laws as to their substance.

Progressive Realization: The fulfillment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of the experiences of persons with disabilities evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles should be undertaken, such that the changes to law and policy respect and advance the principles, principles are realized to the greatest extent possible at the current time, there is a focus on continuous advancement while regression is avoided, and concrete steps for future improvements are continually identified and planned.

Respect, Protect, Fulfill: In the realm of international human rights law, the concept of "respect, protect, fulfill" is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must take immediate steps to prevent violations of these rights by third parties and provide access to legal remedies for when violations do occur.
3. The obligation to fulfill – States parties must take appropriate legislative, administrative, budgetary, judicial, promotional and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects persons with disabilities, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- *For more information, see the* Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.D

Excerpt from *A Framework for the Law as It Affects Older Adults*

Principles for the Law as It Affects Older Adults

In order to counteract negative stereotypes and assumptions about older adults, reaffirm the status of older adults as equal members of society and bearers of both rights and responsibilities, and encourage government to take positive steps to secure the wellbeing of older adults, this *Framework* centres on a set of principles to be considered for the law as it affects older adults.

Each of the six principles contributes to an overarching goal of promoting substantive equality for older adults. The concept of equality is central to both the *Charter of Rights and Freedoms* and the Ontario Human Rights Code, The Supreme Court has recognized that governments may have a positive duty to promote the equality of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality. Substantive equality is about more than simple non-discrimination, and includes values of dignity and worth, the opportunity to participate, and the necessity of taking needs into account. It aims towards a society whose structures and organizations include marginalized groups and do not leave them outside mainstream society

There is no hierarchy among the principles, and although they are identified separately, the principles must be understood in relationship with each other. The principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

1. **Respecting Dignity and Worth:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every older adult. All members of the human family are full persons, unique and irreplaceable. The principle therefore includes the right to be valued, respected and considered; to have both one's contributions and one's needs recognized; and to be treated as an individual. It includes a right to be treated equally and without discrimination.
2. **Fostering Autonomy and Independence:** This principle recognizes the right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the right of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.
3. **Promoting Participation and Inclusion:** This principle recognizes the right to be actively engaged in and integrated in one's community, and to have a meaningful role in affairs. Inclusion and participation is enabled when laws, policies and practices are designed in a way that promotes the ability of older persons to be actively involved in their communities

and removes physical, social, attitudinal and systemic barriers to that involvement, especially for those who have experienced marginalization and exclusion. An important aspect of participation is the right of older adults to be meaningfully consulted on issues that affect them, whether at the individual or the group level.

4. **Recognizing the Importance of Security:** This principle recognizes the right to be free from physical, psychological, sexual or financial abuse or exploitation, and the right to access basic supports such as health, legal and social services.
5. **Responding to Diversity and Individuality:** This principle recognizes that older adults are individuals, with needs and circumstances that may be affected by a wide range of factors such as gender, racialization, Aboriginal identity, immigration or citizenship status, disability or health status, sexual orientation, creed, geographic location, place of residence, or other aspects of their identities, the effects of which may accumulate over the life course. Older adults are not a homogenous group and the law must take into account and accommodate the impact of this diversity.
6. **Understanding Membership in the Broader Community:** This principle recognizes the reciprocal rights and obligations among all members of society and across generations past, present and future, and that the law should reflect mutual understanding and obligation and work towards a society that is inclusive for all ages.
   - *For more information on the LCO's Principles for the Law as It Affects Older Adults, see the* Final Report, *Chapter III.B*.

Implementing the Principles

As the principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors be taken into account in the application of the principles.

Taking the Circumstances of Older Adults into Account: While it is generally recognized that older adults make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from those of younger members of society, laws do not always systematically and appropriately take these needs and circumstances into account. As a result, laws may have unintended negative effects on older adults. In some cases, stereotypes or negative assumptions about older persons may shape the degree to which or the way in which older adults are taken into account. As a result, the law may be ageist in its impact. As part of respecting and implementing the principles, the circumstances of older persons must be taken into account in the development, implementation and review of all laws, policies and practices that may affect them.

While aging is often popularly viewed as an inevitable biological process, it is important to remember that the experience of aging is actually a multidimensional process, shaped by social attitudes about growing older and about older persons, the social structures and institutions (including laws and policies) that surround older adults, and by the lives that older adults have lived prior to entering "old age". Any description of aging and older adults is therefore necessarily complex, as is the case for all life stages.

Life Course Analysis: In applying the principles, it is important to consider older adults as in a phase of "the life course". Older adults have complex needs and circumstances that are based on a lifetime of experiences and relationships that helped to shape who they are and the choices available to them. Barriers or opportunities experienced at earlier stages of life will have had consequences that reverberate throughout life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of that individual. That is, the impact of laws on older persons must be understood in the context of every stage of their lives, and how these stages relate to each other.

Gender Based Analysis: It is particularly important to consider the experience of aging and older age through a gender lens. Demographic patterns globally indicate a longer life for women, and give rise to gender-specific issues. For example, because of longer life expectancies and because women tend to marry older men, women are more likely than men to be widowed and living alone, which has a number of implications for income, caregiving and living arrangements. Older women also face particular negative stereotypes and dismissive treatment related to their age and gender.

Treating Law as Person-Centred: Law is often developed, implemented and analyzed as a set of separate and largely independent areas, such as family, criminal and real estate law. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of complex and fragmented systems. This approach requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. It requires law to respond to individuals as persons with diverse needs and identities, and therefore to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of older adults, in most cases an approach that is responsive to individuals at various stages of the life course and incorporates older adults into the overall design of the law will be most effective. Younger as well as older adults will benefit from a focus on dignity, autonomy, inclusion, security, diversity and membership in the broader community in the design of laws. Many, if not most of the measures

required to fulfil the principles and to make the law more fair, accessible and just for older adults will also make the law more fair, accessible and just for others. An inclusive design approach to laws, policies and practices can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of older adults and aim to promote positive principles, their implementation may fall far short of their goals. This phenomenon, sometimes referred to as the problem of "good law, bad practice", is not uncommon in the law as it affects older adults. The *Report of the United Nations Expert Group Meeting on the Rights of Older Persons* specifically urges governments to "close the gap between law and implementation of the law". There are two aspects to this issue: implementation strategies for the law, and mechanisms for ensuring that older adults are adequately able to access and enforce their rights.

Progressive Realization: The fulfilment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of older persons and the aging process evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles may be undertaken, and should ensure that there is a focus on continuous advancement, principles are realized to the greatest extent possible at the current time while regression is avoided, and concrete steps for future improvement are continually identified and planned.

Applying the Concept of "Respect, Protect, Fulfil": In the realm of international human rights law, the concept of "respect, protect, fulfil" is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must prevent violations of these rights by third parties.
3. The obligation to fulfil– States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects older adults, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

APPENDICES

- *For information on implementation of the principles see the* Final Report, *Chapter III.B.5 - 7, and on the circumstances of older adults see Chapter II.*

APPENDIX B: CONSULTATION QUESTIONS

1. Within the identified scope of this Project, are there additional issues or themes that should be considered?

2. What constraints and opportunities should the LCO be aware of to ensure that law reform proposals in this area will be practical and implementable?

3. What should be the primary purpose or purposes of this area of the law?

4. What do the principles and commitments found in the CRPD, *Charter*, *Human Rights Code* and AODA tell us about the key elements of reforms to Ontario's legal capacity, decision-making and guardianship laws? How might they affect the interpretation and application of these laws?

5. Are there specific reforms to the *Substitute Decisions Act* or *Health Care Consent Act* that would support better coordination with other laws, such as the *Mental Health Act,* privacy laws, income or social support laws or others?

6. How does the experience of this area of the law differ depending on gender, sexual orientation, gender identity, racialization, immigration status, Aboriginal identity, family or marital status, place of residence, geographic location, language, various forms of disability, or other forms of diversity? What reforms to the law in this area are needed to ensure that it takes into account the characteristics of affected older persons and persons with disabilities?

7. What do the *Framework* principles tell us about designing effective reform for this area of the law?

8. What are the most important implications of the *Framework* principles for the approaches to and standards for legal capacity in Ontario law?

9. Are there specific ways in which the current "ability to understand and appreciate" test for legal capacity should be clarified in order to improve its implementation? Or are there other means through which practical guidance on its application could be provide? Are there specific ways in which the legislative test should be amended to better reflect the social and contextual aspects of legal capacity?

10. Should a test for legal capacity based on "will and intention" of the individual be adopted for some or all aspects of Ontario's decision-making and guardianship laws? If so, in what circumstances would such a test be appropriate, and how would this standard for capacity be assessed?

11. How does the experience of capacity assessment differ depending on gender, sexual orientation, racialization, language, culture, socio-economic status, Aboriginal status, geographic location, various forms of disabiLity or other forms of diversity?

12. For each of Ontario's mechanisms for assessing capacity, does it strike the appropriate balance between formality, procedural protections, accessibility and efficiency?

13. Who should carry out the various types of capacity assessments required? What type of training and education should they receive? How should this training be delivered?

14. Is there sufficient monitoring and oversight of the various types of capacity assessments in Ontario? If not, what are specific suggestions for how the various capacity assessment mechanisms could be improved in this respect?

15. Are standards for the assessment of capacity under the various mechanisms sufficiently clear, consistent and stringent? If not, what are specific suggestions for how they might be improved?

16. Would Ontario benefit from greater harmonization, coordination or simplification of its various capacity assessment mechanisms? If so, what are specific suggestions for how this might be achieved?

17. Do Ontario's capacity assessment mechanisms deal adequately with fluctuating levels of capacity? If not, what are specific suggestions for how they might be improved in this respect?

18. Are there barriers to accessing Ontario's capacity assessment mechanisms? If so, what are specific suggestions for how they can be made more accessible?

19. What are the advantages and risks of formalizing supported decision-making in Ontario law?

20. If formal supported decision-making is incorporated into Ontario law:
    a) To whom should it apply?
    b) What should be the test for capacity to be part of such an arrangement or to end it?
    c) Should this type of decision-making be available for all types of decisions or only for some?
    d) Should these arrangements be a presumed default arrangement, as opposed to substitute decision-making arrangements? If so, in what circumstances?
    e) Should appointments and terminations of these arrangements be personal (like a power of attorney) or public (like the appointment of a guardian)? What should the appointment and termination processes require?

f) Who should be able to act as a supporter?
g) What should be the responsibilities of supporters?
h) What type of monitoring and oversight mechanisms should operate for these decision-making arrangements?
i) What other mechanisms should be incorporated to guard against abuse through these decision-making arrangements?
j) What should be the obligations of third parties with respect to these arrangements? What legal protections should be in place for third parties when transacting with persons who are in such arrangements?

21. What are the advantages and risks of formalizing co-decision-making in Ontario law?

22. If co-decision-making is incorporated into Ontario law:
    a) To whom should it apply?
    b) What should be the test for capacity to be part of such an arrangement or to end it?
    c) Should this type of decision-making be available for all types of decisions or only for some?
    d) Should these arrangements be a presumed default arrangement, as opposed to substitute decision-making arrangements? If so, in what circumstances?
    e) Should appointments and terminations of these arrangements be personal (like a power of attorney) or public (like the appointment of a guardian)? What should the appointment and termination processes require?
    f) Who should be able to act as a co-decision-maker?
    g) What should be the responsibilities of supporters?
    h) What type of monitoring and oversight mechanisms should operate for these decision-making arrangements?
    i) What other mechanisms should be incorporated to guard against abuse through these decision-making arrangements?
    j) What should be the obligations of third parties with respect to these arrangements? What legal protections should be in place for third parties when transacting with persons who are in such arrangements?

23. Should Ontario expand the role that specialized professionals may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:
    a) For what types of decisions should these professionals be authorized to act?
    b) What types of training, licensing or educational requirements should be required of these professionals?
    c) What types of oversight and monitoring should be put in place for these professionals? Who should carry out this oversight and monitoring?
    d) What should be the responsibilities and liability of these professionals?
    e) What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?

24. Should Ontario expand the role that volunteers or other community members may play in acting for persons who have been determined to lack legal capacity for a particular type of decision? If so:
    a) For what types of decisions and in what types of circumstances should these individuals be authorized to act?
    b) Who should be responsible for recruiting, selecting and overseeing these individuals?
    c) What types of training or supports should be provided to these individuals?
    d) What types of oversight and monitoring should be put in place? Who should carry out this oversight and monitoring?
    e) What should be the responsibilities and liability of these individuals?
    f) What additional measures should be put in place to prevent, identify and address neglect, misuse or abuse by these professionals?

25. What role might community organizations play for individuals who have been determined to lack legal capacity for a particular type of decision? If community agencies were to act as substitute decision-makers, what lessons could be learned from the experiences with informal trusteeships, or with the use of community agencies in this role in other jurisdictions?

26. What role might personal support networks play in a reformed Ontario capacity, decision-making and guardianship system? How might this role be formalized in law?

27. Where family or friends are acting for a person who has been determined to lack capacity to make a particular decision, are there supports that would enable them to more effectively fulfil this role?

28. Are reforms required to strengthen oversight and monitoring of the role of the Public Guardian and Trustee as substitute decision-maker? If so, what specific reforms would be most appropriate and effective?

29. Are there concerns regarding the appointments process for substitute decision-makers under the *Health Care Consent Act* that should be addressed in reforming this area of the law?

30. What practical reforms to law, policy or practice would most effectively provide grantors of powers of attorney for property with more effective means of appropriately triggering the operation of these documents?

31. Are there reforms that should be made to the requirements or options for the creation of a power of attorney to improve the understanding or grantors or attorneys or both of the risks, benefits and responsibilities associated with these powerful documents? If so, what would be the most practical and effective reforms?

32. Would a registry system for powers of attorney improve the ability to verify and validate these documents, or to prevent and identify abuse? What would be the benefits and disadvantages of a registry system?

33. If a registry system for powers of attorney should be created,
    a) Should it be voluntary or mandatory?
    b) What information should be maintained in the registry?
    c) Who should have access to the information in the registry and under what circumstances?
    d) Who should operate the registry?
    e) What would be required to ensure its compliance with privacy legislation?

34. Are there mandatory requirements or options that should be added to the creation or provisions of powers of attorney, such as duties to account, monitors or notices of attorneys acting, to improve monitoring and accountability for attorneys? If so, what would be the most practical and effective reforms?

35. Should Ontario consider reforms to create or strengthen options for more limited forms of guardianship, such as partial guardianships or appointments for specific decisions only? If so, what would be the most practical and effective reforms?

36. Should Ontario consider reforms to guardianship procedures to ensure regular review of the need for a guardian, such as requirements for time-limited guardianships or mandated regular guardianship reviews? If so, what would be the most practical and effective reforms?

37. Are there reforms to law, policy or practice that would result in a better balancing of accessibility and responsiveness of guardianship procedures with the necessity for adequate procedural protections for such a weighty decision? If so, what would be the most practical and effective reforms?

38. Are there reforms to law, policy or practice that could more effectively ensure that guardians are appointed for individuals only as a last resort, where no less restrictive alternatives are available? If so, what would be the most practical and effective reforms?

39. Are there ways in which laws, policies or practices for addressing abuse through legal capacity, decision-making and guardianship laws could be better coordinated with general provisions for addressing abuse of those who tend to fall within this area of the law?

40. Are there specific information, education or training initiatives that could be integrated into law, policy or practice to ensure that individuals and their substitute decision-makers better understand their rights, roles and responsibilities, and if so, how might these be implemented?

41. Are there mechanisms that could be added to law, policy or practice to improve monitoring and oversight of substitutes, such as enhanced duties to report or account, "visitor" programs for persons under substitute decision-making, or other types of supervisory powers? If so, which mechanisms would be most desirable and how might these be practically implemented?

42. Are there new mechanisms for complaints or enhancements to the PGT's existing investigatory powers that would be effective and appropriate for addressing concerns regarding abuse or misuse of the powers of substitute decision-makers? If so, which mechanisms would be most desirable and how might these be practically implemented?

43. Are there mechanisms that could be put in place to reduce loss or damage to individuals through abuse of substitute powers, such as limits on conflict transactions, provision of authority to financial institutions to freeze accounts where abuse is suspected, or expanded requirements to post bonds or security? If so, which mechanisms would be most desirable, and how might they be practically implemented?

44. Are there other reforms to law, policy or practice that should be considered to prevent, identify and address abuse or misuse of the powers of substitute decision-makers?

45. What goals should be the priorities in considering reforms to Ontario's dispute resolution and rights enforcement mechanisms for this area of the law?

46. Are there practical reforms to law, policy or practice that would promote more timely resolution of appeals from decisions of the Consent and Capacity Board?

47. Are there practical and effective means of further incorporating alternative dispute resolution mechanisms into the processes of the Consent and Capacity Board that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?

48. Are there practical and effective means of amending the hearing processes of the Consent and Capacity Board, such as for example incorporating active adjudication, that would both promote responsive resolutions and respect the particular nature of the rights and disputes at issue?

49. Are there additional powers for the court or specialized supports or services for persons attempting to access their rights or resolve disputes under the *Substitute Decisions Act* that would improve the accessibility or effectiveness of current dispute resolution processes in this area? If so, what reforms would be most appropriate and how could they best be implemented?

50. For dispute resolution and rights enforcement under the *Substitute Decisions Act*, are there lessons to be learned from tribunal systems in other jurisdictions?

51. What types of supports are most important for assisting persons falling within this area of the law to understand and assert their rights? Should the focus of supports be on provision of accessible, timely and appropriate information; assistance in navigating complex systems; supporting affected individuals to articulate their values and wishes; support to advocate for their rights; or some other needs?

52. What can be learned from the history of the *Advocacy Act* to guide reforms to the provision of supports for persons falling within this area of the law?

53. Are there ways to strengthen existing supports for accessing rights under legal capacity, decision-making and guardianship laws, including rights advice, section 3 counsel and legal aid services for persons falling within this area of the law? Are there ways in which these supports could be expanded to reach a broader range of needs?

54. What can be learned from supports to accessing the law in other jurisdictions or in other Ontario programs?

55. Should supports be provided proactively, or upon the request of the individual? Does this differ at various points in the system?

56. Who should deliver supports to accessing the law in this area? For example, should supports be provided through community agencies, a specialized public institution, or embedded institution-specific supports?

57. What are the priorities for reforms to law, policy or practice to ensure that individuals who encounter the capacity, decision-making and guardianship system have meaningful access to the information that they need to preserve their autonomy to the greatest extent possible and to understand and enforce their rights?

58. What are the priorities for reforms to law, policy or practice to ensure that persons appointed as substitute decision-makers adequately understand their roles and responsibilities, and have the skills necessary to effectively perform their often challenging roles?

59. What are the priorities for reforms to law, policy or practice to ensure that service providers adequately understand their roles and responsibilities under the law, have a meaningful understanding of the circumstances and experiences of the individuals affected by these laws, and have the skills necessary to effectively interpret and apply the law?
60. What reforms to law, policy or practice could help to ensure that professionals carrying out core responsibilities under the SDA, MHA and HCCA have the skills and expertise required to perform their roles, and that this skill and expertise is kept current?

61. How could information, education and training related to legal capacity, decision-making and guardianship be better coordinated and made more accessible to the general public and all those seeking it?

62. Are there reforms to law, policy or practice which would increase transparency and accountability for the legal capacity, decision-making and guardianship system as a whole?

63. Are there reforms to law, policy or practice, including institutional roles or responsibilities, which would improve the coordination and effectiveness of the system as a whole?

64. Are there reforms to law, policy or practice which would improve the ability to identify and address problems with the system as a whole?

65. What steps can be taken to support ongoing monitoring and evaluation of any reforms to the law in this area, and to ensure that changes to law, policy and practice have the effect intended?

ENDNOTES

[1] Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012). Online: http://www.lco-cdo.org/en/older-adults-final-report [LCO, *Framework for the Law as It Affects Older Adults*].
[2] Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012). Online: http://www.lco-cdo.org/en/disabilities-final-report [LCO, *Framework for the Law as It Affects Persons with Disabilities*].
[3] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [SDA].
[4] *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Schedule A [HCCA].
[5] *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A [PHIPA].
[6] *Mental Health Act*, R.S.O. 1990, c. M.7 [MHA].
[7] The concept of progressive realization emphasizes that the fulfilment of the principles is an ongoing process, as circumstances, understandings and resources develop, Efforts to improve the law should be undertaken, such that changes to law and policy respect and advance the principles, principles are realized to the greatest extent possible at the current time, and there is a focus on continuous advancement. The *Frameworks* further elaborate on the concept of progressive realization: LCO, *Framework for the Law as It Affects Older Adults*, note 1, 7; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, 96.
[8] Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Brisbane: June 1996), 1. Online: http://www.qlrc.qld.gov.au/reports/r49v1Ch1_6.pdf.
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[10] Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (Toronto: 1987), vii [Fram Report].
[11] Fram Report, note 10, 39-47.
[12] Weisstub, *Enquiry*, note 9, 55.
[13] Weisstub, *Enquiry*, note 9, 19.
[14] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 2nd Sess, No 81 (16 December 1986), 4255-56 (Hon Ian Scott) [Hansard]. See also Review of Advocacy for Vulnerable Adults, Terms of Reference, January 1987 in Sean O'Sullivan, *You've Got a Friend: A Review of Advocacy in Ontario* (Toronto: Ontario Ministry of the Attorney General, 1987), 162.
[15] *You've Got a Friend*, note 14, 121-22.
[16] Canadian Centre for Elder Law Studies, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario* (Vancouver: British Columbia Law Institute, 2006), 43. Online: http://www.bcli.org/bclrg/publications.
[17] *Advocacy Act, 1992*, S.O. 1992, c. 26.
[18] Ernie S. Lightman & Uri Aviram, "Too Much, Too Late: the Advocacy Act in Ontario" (2000) 22:1 Law & Pol'y 25, 40.
[19] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, GA Res 61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010) [CRPD].
[20] CRPD, note 19, Art. 4.
[21] Lana Kerzner, "Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective" (Paper prepared for the *In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st Century* symposium at the University of British Columbia, April 2011), 19.
[22] Kerzner, note 21, 21.
[23] United Nations Treaty Collection, "Status of Treaties: Convention on the Rights of Persons with Disabilities." Online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

[24] *Godbout* v. *Longueuil (City),* [1997] 3 S.C.R. 844, para. 66. See also *R.B.* v. *Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315.
[25] *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46, paras 58-60.
[26] *Fleming* v. *Reid* (1990), 73 O.R. (2d) 169 (Dist. Ct.), rev'd (1991), 4 O.R. (3d) 74, 82 D.L.R. (4th) 298 (C.A.), para. 60.
[27] In *R.* v. *Kapp,* the Supreme Court of Canada stated that "Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies [section] 15 as a whole": [2008] 2 S.C.R. 483, 2008 SCC 41, para. 16.
[28] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 47(2).
[29] *Human Rights Code*, note 28, Preamble.
[30] For explication of the nature, content and limits of duty to accommodate, see Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 2000). Online: http://www.ohrc.on.ca.
[31] For example, the Commissioner for Human Rights for the Council of Europe has recommended the creation of an explicit legal obligation for government and key institutions (such as health care and financial service providers) to "provide reasonable accommodation to persons with disabilities who wish to access their services. Reasonable accommodation includes the provision of information in plain language and the acceptance of a support person communicating the will of the individual concerned": Commissioner for Human Rights, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities* (Strasbourg: 2012), 5. Mona Paré has also made this argument: Mona Paré, "Of Minors and the Mentally Ill: Re-Positioning Perspectives on Consent to Health Care" (2011) 29:1 Windsor Y.B. Access Just. 107, 121.
[32] Ontario Human Rights Commission, *Minds That Matter*: *Report on the consultation on human rights, mental health and addictions* (Toronto: 2012), 92. Online: http://www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%2C%20mental%20health%20and%20addictions.pdf.
[33] *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].
[34] HCCA, note 4, s. 1.
[35] Note 4, ss. 10, 25.
[36] Note 4, ss. 10-11, 15.
[37] Note 4, s. 20.
[38] Note 4, s. 21.
[39] Note 4, Parts III, IV.
[40] Note 4, ss. 40, 57.
[41] Note 4, s. 70.
[42] Note 4, s. 75.
[43] SDA, note 3, s. 7.
[44] Note 3, ss. 46, 49.
[45] Note 3, ss. 7(7.1), 8, 46(8), 47.
[46] SDA, note 3; O Reg 460/05.
[47] SDA, note 3, ss. 16-17.
[48] Note 3, ss. 22, 55.
[49] Note 3, ss. 32, 38, 66-67.
[50] MHA, note 6, s. 54. There is an exception where the patient is already under guardianship or a power of attorney for property under the SDA.
[51] MHA, note 6, ss. 59-60.
[52] Note 6, s. 20, especially s. 20(1.1).
[53] HCCA, note 4, s. 4; SDA, note 3, s. 2.
[54] SDA, note 3, s. 3; HCCA, note 4, s. 81.
[55] British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (Vancouver: September 2013).
[56] PHIPA, note 5, s. 4.

[57] *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 [PIPEDA].
[58] Long-Term Care Task Force on Resident Care and Safety, *Report: Long-Term Care Task Force on Resident Care and Safety* (May 2012), 16. Online: http://longtermcaretaskforce.ca/images/uploads/LTCFTReportEnglish.pdf.
[59] *Long-Term Care Homes Act, 2007*, S.O. 2007, c.8.
[60] *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008,* S.O. 2008, c. 14 [SIPDDA].
[61] SIPDDA, note 60, s. 3.
[62] SIPDDA, note 60, s. 4.
[63] SIPDDA, note 60, s. 11.
[64] Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Analytical Report* (Ottawa: Minister of Industry, 2007), 34 [PALS 2006 Analytical Report].
[65] Note 64, 30.
[66] Kerri Joffe (ARCH Disability Law Centre), *Enforcing the Rights of People with Disabilities in Ontario's Developmental Services System* (Toronto: Law Commission of Ontario, June 2010), 13.
[67] National Advisory Council on Aging, "Seniors on the Margins: Aging with a Developmental Disability," (Ottawa: Minister of Public Works and Government Services Canada, 2004), 8. Online: http://publications.gc.ca/collections/Collection/H88-5-2-2004E.pdf.
[68] Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Tables* (Ottawa: Minister of Industry, 2008), 12, 19. Online: http://www.statcan.gc.ca/pub/89-628-x/89-628-x2008011-eng.pdf [PALS 2006 Tables].
[69] Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Labour Force Experience of People with Disabilities in Canada* (Ottawa: Minister of Industry: 2008), 13. Online: http://www.statcan.gc.ca/pub/89-628-x/89-628-x2008007-eng.pdf.
[70] National Advisory Council on Aging, note 67, 11.
[71] Note 67, 9.
[72] Edward F. Ansello & Peggy O'Neill, "Abuse, Neglect, and Exploitation: Considerations in Aging with Lifelong Disabilities," (2010) 22 Journal of Elder Abuse and Neglect, 105, 110.
[73] According to Statistics Canada, in 2003, 37 per cent of individuals aged 65 and older considered themselves to be in very good or excellent health, as compared to 63 per cent of those aged 25 to 54: Martin Turcotte & Grant Schellenberg, *A Portrait of Seniors in Canada* (Ottawa: Minister of Industry, 2007), 43-51. Online: http://www.statcan.gc.ca/pub/89-519-x/89-519-x2006001-eng.pdf [Turcotte & Schellenberg].
[74] Alzheimer Society of Canada, *Rising Tide: The Impact of Dementia on Canadian Society* (Toronto: 2010), 18. Online: http://www.healthyenvironmentforkids.ca/sites/healthyenvironmentforkids.ca/files/Rising%20Tide_Full%20Report_Eng_FINAL_Secured%20version.pdf.
[75] Note 74, 17.
[76] LCO, *Framework for the Law as It Affects Older Adults*, note 1, 73.
[77] Note 1, 77-78.
[78] The rate of low-income among older adults is relatively low. However, unattached older woman are a group that is at particular risk of low-income, as historic gender roles resulted in many women who were dependent on their spouses for income security, such that widowhood or divorce might result in a slide into low income: See Chantal Collin & Hilary Jensen, *A Statistical Profile of Poverty in Canada* (Ottawa: Library of Parliament, September 2009), Chart 6. Online: http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.htm; Turcotte & Schellenberg, note 73, 95. Also see André Bernard & Chris Li, *Death of a Spouse: The Impact on Income for Senior Men and Women* (Ottawa: Minister of Industry, July 2006); Chris Li, *Widowhood: Consequences on Income for Senior Women* (Ottawa: Statistics Canada, July 2004).
[79] Research on the incidence of elder abuse in Canada is sparse. A 1992 study found that approximately 4 per cent of the Canadian senior population reported experiencing one or more forms of abuse, with financial abuse being the most prevalent form: Elizabeth Podnieks, "National Survey on Abuse of the Elderly in Canada" (1993) Journal of

Elder Abuse and Neglect 4:1-2, 58. The 1999 General Social Survey found a prevalence rate of elder abuse of 7 per cent, emotional abuse was the most common, followed by financial abuse at 1 per cent. An overview of the research may be found in Christine A. Walsh & Yongjie Yon "Developing an Empirical Profile for Elder Abuse Research in Canada" (2012) 24:2 Journal of Elder Abuse and Neglect, 104, 108.

[80] See Turcotte & Schellenberg, note 73, 138.

[81] According to a recent survey, almost 80 per cent of Canadians surveyed believed that aging at home offers a better quality of life, citing greater comfort, independence and the opportunity to be closer to family. The older the survey respondents, the more strongly they expressed their preference to remain at home as they age. Acrobat Research, *National Survey on Aging in Place* (Living Assistance Services: December 2009). Online: http://www.laservices.ca.

[82] See Turcotte & Schellenberg, note 73, 138.

[83] For a thorough examination of the barriers that older adults living in congregate settings may experience in accessing the law, see Advocacy Centre for the Elderly*, Research Paper for the Law Commission of Ontario: Congregate Living and the Law as It Affects Older Adults* (Law Commission of Ontario: August 2009).

[84] For a review of some of these issues see Susan Stobert & Kelly Cranswick, *Looking after Seniors: Who Does What for Whom?* (Ottawa: Statistics Canada, 2004), 2; Judith A. Frederick & Janet E. Fast, *Eldercare in Canada: Who Does How Much?* (Ottawa: Statistics Canada, 1999) 26; Kelly Cranswick & Derrick Thomas, *Elder Care and the Complexities of Social Networks* (Ottawa: Statistics Canada, 2005) 10.

[85] Mireille Vézina & Martin Turcotte, *Caring for a Parent Who Lives Far Away: the Consequences* (Ottawa: Statistics Canada, 2010), 3-13.

[86] LCO, *Framework for the Law as It Affects Older Adults*, note 1, 41-42.

[87] Ontario Human Rights Commission, *Minds That Matter*, note 32, 23.

[88] According to Statistics Canada, in 2006, the median income of a person age 15 or older with an "emotional" disability (which includes emotional, psychiatric and psychological conditions) was $14,544 as compared to $27,496 for persons without a disability: PALS 2006 Tables, note 68*,* 8, 19.

[89] The recent consultation report of the Ontario Human Rights Commission, *Minds That Matter*, note 32 provides an overview of the barriers faced by persons with mental health disabilities in a wide range of areas.

[90] Canadian Institute for Health Information, *Ontario Trauma Registry 2012 Report: Hospitalizations for Major Injury in Ontario, 2010-2011 Data* (October 2012), 1.6—TBI by GCS. Online: https://secure.cihi.ca/estore/productFamily.htm?pf=PFC1926&lang=en&media=0.

[91] Canadian Institute for Health Information, *The Burden of Neurological Diseases, Disorders and Injuries in Canada* (2007), 59. Online: https://secure.cihi.ca/estore/productFamily.htm?pf=PFC830&lang=en&media=0.

[92] Ontario Brain Injury Association, *The OBIA Impact Report 2012: A statistical Snapshot of Acquired Brain Injury and its Effects on Survivors and Caregivers* (2012), 26-27, 32-33. Online: http://www.obia.ca/ImpactReport/ImpactReportOnline-Dec2012.pdf.

[93] A recent study found that 57% of caregivers choose to provide care. 40% report that there is no one else to do it: Linda Duxbury, Christopher Higgins & Bonnie Schroeder, *Balancing Paid Work and Caregiving Responsibilities: A Closer Look at Family Caregivers in Canada* (January 2009), 9. Online: http://www.cprn.org/doc.cfm?doc=1997&l=en.

[94] In one study, 73 per cent of caregivers of persons with dementia (interviewed for this report) reported finding a positive aspect of caregiving, and 6.9 per cent found more than one positive aspect of caregiving. Commonly reported positive aspects of caregiving included the following: companionship (22.5 per cent), fulfilment/rewarding experience (21.8 per cent), enjoyment (12.8 per cent), love for recipient (5.5 per cent): Carole A. Cohen, Angela Colantonio & Lee Vernich, "Positive Aspects of Caregiving: Rounding out the caregiver experience" (2002) 17:2 Int J Geriatr Psychiatry, 184, 186.

[95] World Health Organization and Alzheimer's Disease International, "Dementia: A Public Health Priority" (2012), 73. Online: http://www.alz.co.uk/WHO-dementia-report**.**

[96] See, for example, The Change Foundation, "Because this *is* the Rainy Day: A Discussion Paper on Home Care and Informal Caregiving for Seniors with Chronic Heart Conditions" (February 2011), 3.

[97] Bonnie Laschewicz et al, *Understanding and Addressing Voices of Adults with Disabilities within Their Family Caregiving Contexts: Implications for Capacity, Decision-Making and Guardianship* (Toronto: Law Commission of Ontario, January 2014). See, for example, the description of facilitative family interactions at 20–22.
[98] Note 97, 22.
[99] Note 97, 7.
[100] Note 97, 23-26. Note that the names used in the case studies are not those of the actual individuals.
[101] SDA, note 3, s. 32(1.2).
[102] Note 3, s. 32(5).
[103] The number of individuals age 65 and older increased by 14 per cent between 2006 and 2011. In 2011, there were nearly 5 million Canadians age 65 and older, making up almost 15 per cent of the population: Statistics Canada, *The Canadian Population in 2011: Age and Sex* (Ottawa: Minister of Industry, 2012), 3. The most rapidly growing age group was that between 60 and 64, indicating that population aging will accelerate in Canada in the coming years. Growth rates are also very significant for those age 85 and older: p. 5.
[104] In 2008, approximately 1.5 per cent of Canada's population was living with dementia. It is estimated that this will increase to approximately 2.8 per cent of the population by 2038. The incidence of dementia increases with age: in 2008, 7 per cent of those over age 60 had been diagnosed with some form of dementia, with the incidence rising to 49 per cent of those age 90 and older. See Alzheimer Society of Canada, note 74, 17-18.
[105] Statistics Canada indicated that in 2006 approximately 15.5 per cent of Ontario's population reported an activity limitation. The disability rate is increasing across all age groups: PALS 2006 Analytical Report, note 64, 16.
[106] This shift is discussed at some length in Law Commission of Ontario, *Preliminary Consultation Paper: Approaches to Defining Disability* (Toronto: June 2009).
[107] For example, the reports of both the Queensland Law Reform Commission and of the Victorian Law Reform Commission have articulated a set of principles and purposes that should underlie reform of the capacity and guardianship laws of their respective states, see: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws: Report Volume 1* (Brisbane: 2010), Ch 4 [Queensland Law Reform Commission, volume 1]; and Victorian Law Reform Commission, *Guardianship: Final Report* (Melbourne, Australia: 2012), ch 6, 88 and following [VLRC].
[108] For example, the law reform commissions for the Australian states of Victoria and of Queensland have recently completed comprehensive reviews of their respective capacity and guardianship regimes. Ireland has recently proposed new capacity and guardianship legislation, which if passed will represent significant change from its previous laws. In Canada, Alberta has recently significantly revised its law in this area, as has the Yukon. Law reform agencies in British Columbia, Alberta and Nova Scotia have recently reviewed aspects the law, with a particular focus on powers of attorney.
[109] See, for example, Rannveig Traustadóttir, "Disability Studies, the Social Model and Legal Developments" in Oddný Mjöll Arnardóttir & Gerard Quinn, eds., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff Publishers, 2009) 3; Commissioner for Human Rights, note 31, 2; Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Toronto: Law Commission of Ontario, October 2010) [Bach & Kerzner, *A New Paradigm*]; Kerzner, note 21; Penelope Weller, "Developing Law and Ethics: The Convention on the Rights of Persons with Disabilities" (2010) 35:1 Alt. L. J. 8; Penelope Weller, "The Convention on the Rights of Persons with Disabilities and the social model of health: new perspectives" (2011) Special Ed. J. Mental Health L. 74; and many others.
[110] The Ontario Bar Association has noted that "When the *Substitute Decisions Act* and the *Health Care Consent Act, 1996*, were passed into law, they did not anticipate the degree to which these laws would be applied in the context of 'high conflict' families. A significant number of court applications now involve substitute decision making for incapable adults and pit family members against each other. The legislation was never intended to address conflicts of this degree and type, and the current processes do not lend themselves to timely or appropriate resolutions": Ontario Bar Association, *OBA Submission on the Law Commission of Ontario's The Law as it Affects Older Adults — Consultation Paper: Shaping the Project* (July 2008), 18 [OBA Submission].

[111] See Ontario Ministry of the Attorney General, *Powers of Attorney* (Toronto: Queen's Printer for Ontario, 2012). Online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf [MAG, *Powers of Attorney*]. The Ontario Bar Association has stated that "the Substitute Decisions Act … is intended to protect the vulnerable. However, it makes the appointment of substitute decision makers and creation of powers of attorney an unsupervised process, while making the scrutiny of appointments and the abusive acts of the substitute decision makers, inaccessible, complex, slow, and expensive. As a result powers of attorney are vulnerable to misuse and abuse, and justice delayed in the curtailing of abuse of these powers, is almost certainly justice denied." OBA Submission, note 110, 16.

[112] Capacity Assessment Office, Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (Toronto: 2005), II.1 [MAG, *Guidelines*].

[113] Weisstub, *Enquiry*, note 9, 27; Tina Minkowitz, "Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities," in Bernadette McSherry & Penelope Weller, eds., *Rethinking Rights-Based Mental Health Laws* (Oxford: Hart Publishing, 2010), 159-60.

[114] Weisstub, *Enquiry*, note 9, 27.

[115] Lawrence A. Frolik, "Commentary: Statutory Definitions of Incapacity: The Need for a Medical Basis" in Marshall B. Kapp et al, eds, *Older Adults' Decision-Making and the Law* (New York: Springer Publishing Company, Inc., 1996) 41.

[116] Margaret Isabel Hall, "Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability" (2012) 58:1 McGill L. J. 61, 65.

[117] Charles P. Sabatino & Erica Wood, "The Conceptualization of Capacity of Older Persons in Western Law" in Israel Doron & Ann Snoden, eds., *Beyond Elder Law: New Directions in Law and Aging* (Heidelberg: Springer, 2012) 36.

[118] D'Arcy Hiltz & Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario, 2013 Edition,* (Lexis Nexis: Markham, Ontario, 2012), 1 [Hiltz & Szigeti].

[119] For a discussion of this distinction see International Disability Alliance, *Legal Opinion on Article 12 of the CRPD* (June 2008). Online: http://www.internationaldisabilityalliance.org/.

[120] Office of the High Commissioner for Human Rights, *Legal Capacity: Background Paper* (New York and Geneva, 2005), 13.

[121] Thus, the provision in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) requiring States parties to "accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity": CEDAW, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 3 September 1981), Art 15.

[122] See, for example, Bach & Kerzner, *A New Paradigm*, note 109, 15-18.

[123] Weisstub, *Enquiry*, note 9, 31.

[124] See, for example, the extended discussion by the Queensland Law Reform Commission, volume 1, note 107, 264-69. A very helpful outline of the evolution of these approaches can be found in Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 *Colum. Hum. Rts. L. Rev.* 93-169.

[125] Although this of course raises the question of how "lunacy" and "idiocy" were defined and assessed. Weisstub provides a helpful outline of the development of the terms and of this area of the law in general in *Enquiry*, note 9, Appendix III.

[126] For example, the United Kingdom's *Mental Capacity Act* includes a requirement that impairment of decision-making ability be shown to be *because of* an impairment or disturbance in the functioning of the mind or brain: *Mental Capacity Act 2005* (UK), c. 9, s. 2(1).

[127] Queensland Law Reform Commission, volume 1, note 107, 265.

[128] Weisstub, *Enquiry*, note 9.

[129] An overview of the Recommendations can be found at Weisstub, *Enquiry*, note 9, 5-21. Not all of the recommendations are summarized here: recommendations relevant to assessment protocols and procedural protections are summarized at the relevant points in this Paper.

[130] HCCA, note 4, s. 4; SDA, note 3, s. 2.

[131] *Starson* v. *Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32 [*Starson*], para. 80.

[132] Weisstub, *Enquiry*, note 9, 421-22.
[133] SDA, note 3, s. 16.
[134] Note 3, s. 8.
[135] Note 3, s. 47.
[136] Note 3, s. 45.
[137] HCCA, note 4, s. 4(1).
[138] For a general discussion of some of the practical difficulties attendant on putting the legal theory of capacity into practice, see M. B. Kapp, "Decisional Capacity in Theory and Practice: Legal Process versus 'Bumbling Through'" (2002) 6:4 Aging & Mental Health 413-17.
[139] *Starson*, note 131, para. 80.
[140] Brian F. Hoffman, *The Law of Consent to Treatment in Ontario,* 2d ed (Toronto: Butterworths, 1997), 21.
[141] Weisstub, *Enquiry*, note 9, 422.
[142] *Starson*, note 131, para. 80.
[143] Note 131, para.15.
[144] Monique W. Dull, "Starson v Swayze, 2003 – 2008: Appreciating the Judicial Consequences" (2009) 17 Health LJ 51, 61; Jessica W. Berg et al, *Informed Consent: Legal Theory and Clinical Practice*, 2nd ed. (New York: Oxford University Press, 2001), 102.
[145] Berg et al, note 144, 102.
[146] Loren H. Roth, Alan Meisel & Charles W. Lidz, "Tests of Competency to Consent to Treatment" (1977) 134:3 Am J Psychiatry 279, 281.
[147] Dull, note 144, 61.
[148] *Starson*, note 131, para. 78.
[149] Dull, note 144.
[150] See International Disability Alliance, "IDA Letter on Functional Capacity," Correspondence from the International Disability Alliance to Professor Ronald McCallum, UN Committee on the Rights of Persons with Disabilities (July 2010). Online: http://www.chrusp.org/home/resources.
[151] Bach and Kerzner, for example, state that "The CRPD breaks the link between mental capacity and legal capacity, by prohibiting discrimination on the basis of disability in the enjoyment and exercise of legal capacity. On their face, mental capacity statutory provisions which articulate cognitive tests for having one's legal capacity recognized and protected appear to be in violation of the CRPD." Bach & Kerzner, *A New Paradigm*, note 109, 67.
[152] Note 109, 55-58.
[153] See, for example, *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, s. 4(1) [AGTA].
[154] *Mental Capacity Act 2005*, note 126, ss. 3(1)(a)–(c).
[155] MAG, *Guidelines*, note 112.
[156] Note 112, II.3.
[157] Bach & Kerzner, *A New Paradigm*, note 109, 65-66.
[158] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 8(2). Note that Newfoundland and Labrador have, in legislative amendments related to access to Registered Disability Savings Program accounts, adopted a very similar test: Bill 3, *An Act to Amend the Enduring Powers of Attorney Act*, 1st Sess, 47th Leg., Newfoundland, 2012, s.15(2) (assented to June 27, 2012), S.N.L. 2012, c. 4.
[159] VLRC, note 107*,* ch 7, 120.
[160] *Personal Directives Act*, R.S.A. 2000, c. P-6, ss. 7(1), 9(2) [PDA].
[161] Office of the Public Guardian, *Guide to Capacity Assessment under the Personal Directives Act* (Edmonton: 2008), 3. Online: http://humanservices.alberta.ca/documents/opg-personal-directives-publication-opg1642.pdf [Office of the Public Guardian, *Guide to Capacity*].
[162] PDA, note 160; Alta Reg 26/98, Schedule 2.
[163] PDA, note 160, s. 9(2).
[164] Weisstub, *Enquiry*, note 9, 35-36. He notes, however, that some submissions recommended the use of boards that combined legal, social and medical expertise.

[165] For example, the SDA, note 3, does not require an assessment by a designated capacity assessor to determine whether an individual has capacity to complete a power of attorney. Nor is such an assessment required to determine capacity to make a will, or to instruct counsel. However, LCO interviews with several capacity assessors indicated that these and other non-legislatively required assessments make up a considerable portion (and for some the majority) of the assessments that they carry out. Similarly, psychiatrics and geriatric psychiatrists indicated in interviews with the LCO that they are often requested by other medical colleagues to assess the ability of patients to consent to treatment, although the HCCA, note 4, s. 10 specifies that the "health practitioner who proposes a treatment" shall only administer that treatment if "he or she is of the opinion" that either the individual is capable with respect to the treatment and has given consent, or that the individual is incapable and a substitute decision maker has given consent.

[166] Mona Paré, note 31, 114.

[167] Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (London: TSO, 2007), 53. Online: http://www3.imperial.ac.uk/pls/portallive/docs/1/51771696.PDF [COP].

[168] Note 167, 69-70.

[169] Note 167, 189.

[170] AGTA, note 153; Alta Reg 219/2009, Part I.

[171] Alexandra Carling-Rowland & Judith Wahl, "The Evaluation of Capacity to Make Admission Decisions: Is it a Fair Process for Individuals with Communication Barriers?" (2010) 10:3 *Medical Law International* 180.

[172] Note 171, 181.

[173] *Flynn et al* v. *Flynn*, (18 December 2007) 03-66/07 (Ont SCJ), cited in *Abrams* v. *Abrams* (2008), 173 A.C.W.S. (3d) 410, 173 A.C.W.S. (3d) 606, para. 50 (Ont SCJ) [*Abrams*].

[174] *Abrams*, note 173, para. 50.

[175] Weisstub, *Enquiry*, note 9, 39.

[176] Note 9, 70.

[177] VLRC, note 107*,* 113.

[178] AGTA, note 153; Alta Reg 219/2009, s. 3(1)(a).

[179] AGTA, note 153; Alta Reg 219/2009, s. 4(2)(a).

[180] AGTA, note 153; Alta Reg 219/2009, s. 3. This applies to *all* capacity assessments.

[181] Weisstub, *Enquiry*, note 9, 35.

[182] See, for example, Alberta, Legislative Assembly, *Hansard*, 27th Parl, 1st Sess, No 40a (28 October 2008) at 1590 (Laurie Blakeman).

[183] AGTA, note 153, s. 27; PDA, note 160, s. 10.1. See Office of the Public Guardian, *Guide to Capacity*, note 161, 12-17.

[184] PDA, note 160, s. 21(1).

[185] *Guardianship and Administration Act 1986* (Vic), ss. 61(1), 63(1).

[186] VLRC, note 107, 243.

[187] MHA, note 6, ss. 54-60.

[188] The person must *have* a guardian under the SDA, but with respect to the power of attorney, the physician must believe "on reasonable grounds" that such a document exists: note 6, s. 54(6).

[189] Note 6, s. 54(2).

[190] Cancellation of a certificate is issued using form 23, which only requires the patient's name and identifying information and the physician's signature: Ontario Ministry of Health, *Form 23, Mental Health Act – Notice of Cancellation of Certificate of Incapacity to Manage One's Property under Section 56 of the Act* (Toronto: Queen's Printer for Ontario, 2013). Online: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6442-41~1/$File/6442-41E.pdf.

[191] MHA, note 6, s. 57(2).

[192] MHA, note 6, s. 54(3). The finding of incapacity may be found invalid if this requirement is not met: Hiltz & Szigeti, note 118, 316 citing *A.P. (Re)*, 2004 CanLII 34872 (ON CCB).

[193] Ontario Ministry of Health, *Form 21, Mental Health Act – Certificate of Incapacity to Manage One's Property under Subsection 54(4) of the Act* (Toronto: Queen's Printer for Ontario, 2013). Online: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6440-41~1/$File/6440-41E.pdf.
[194] Ontario Ministry of Health, *Form 22, Mental Health Act – Financial Statement Section 55 of the Act* (Toronto: Queen's Printer for Ontario, 2013). Online: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6441-41~1/$File/6441-41E.pdf.
[195] Ontario Ministry of Health, *Form 24, Mental Health Act – Notice of Continuance of Certificate of Incapacity to Manage One's Property under Subsection 57(2) of the Act* (Toronto: Queen's Printer for Ontario, 2013). Online: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/014-6443-41~1/$File/6443-41E.pdf.
[196] MHA, note 6, s. 54(4).
[197] SDA, note 3, s. 15.
[198] Consent and Capacity Board, *Review of Capacity to Manage Property (Form 18)*, 2. Online: www.ccboard.on.ca/english/publications/documents/form18.pdf.
[199] SDA, note 3, s. 6: *"*A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."
[200] *Khan* v. *St Thomas Psychiatric Hospital* (1992), 7 O.R. (3d) 303, 87 D.L.R. (4th) 289 (CA) adapted the test for financial competence set out in the *Weisstub Report* for the purposes of interpreting provisions regarding a certificate of incompetence to manage an estate. *Roy* v. *Furst* (1999), 87 A.C.W.S. (3d) 1225, [1999] OJ no 1490 (SCJ) adopted the test from the *Weisstub Report* as set out in *Khan. J.T. (Re)*, 2008 CanLII 5623 (ON CCB) considered the test in detail, and outlined a six point test, based on the decision of the Psychiatric Review Board *In the Matter of SH and the North Bay Psychiatric Hospital* (a copy of this decision is on file with the LCO). This six-point test has been widely adopted.
[201] This in indicated by the use of binding language ("a physician shall examine" as opposed to "the physician may examine"): MHA, note 6, s. 54(1).
[202] Note 6, s. 59(1).
[203] Note 6, s. 59(2).
[204] Psychiatric Patient Advocate Office, *Annual Report 2011: Rights Protection in a Time of Change* (Toronto: 2011), 6. Online: www.sse.gov.on.ca/mohltc/ppao/en/Documents/PPAO%20Annual%20Report%202011.pdf [PPAO, *Annual Report*].
[205] R.R.O. 1990, Reg. 741, s 14.2(1).
[206] Psychiatric Patients Advocate Office, "Mental Health Rights Advice". Online: http://www.sse.gov.on.ca/mohltc/ppao/en/Pages/AboutthePPAO/OurServices_B.aspx?openMenu=smenu_OurServices [PPAO, *Rights Advice*].
[207] MHA, note 6, s. 60(1).
[208] MHA, note 6, s. 60(2). However, an examination prior to discharge 'resets the clock'—a patient who is re-examined prior to discharge has the right to apply for a review of the continuance even if they have made an application to the Board in the prior six months: see *S.L.G. (Re)*, 2005 CanLII 56686 (ON CCB).
[209] MHA, note 6, s. 60(3).
[210] Henry Olders, "Comprehensive Assessments of Competence: A Psychiatrist's Perspective" (2011) 5:2 McGill JL & Health 283, 284.
[211] *V. (Re)*, 2009 CanLII 13471 (ON CCB).
[212] Jude Bursten, "Mental Health Law in the Community: A rights Protection Framework That Falls Apart?" in Psychiatric Patient Advocate Office, *Mental Health and Patients' Rights in Ontario: Yesterday, Today and Tomorrow* (Toronto: Queen's Printer for Ontario, 2003) 69. Online: https://ozone.scholarsportal.info/bitstream/1873/13331/1/283377.pdf. During preliminary consultations, some stakeholders raised similar concerns about potential improper use of MHA examinations as a compulsory alternative to SDA assessments. Some commented that this was generally well-intentioned. For example, the costs

associated with SDA assessments make them impractical in some circumstances. However, the LCO did not locate any documented instances of this kind of practice.

[213] Note 212, 69.

[214] Note 212, 69.

[215] HCCA, note 4, s. 10.

[216] Note 4, s. 4(3).

[217] S.O. 1992, c. 31. Repealed by HCCA, note 4, s. 2(2).

[218] HCCA, note 4, s. 15(1).

[219] Note 4, s. 15(2).

[220] Note 4, s. 2(1).

[221] *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. The Regulated professions are listed in Schedule 1 of the Act. They are: audiology and speech-language therapy, chiropody, chiropractic, dental hygiene, dental technology, dentistry, denturism, dietetics, massage therapy, medical laboratory technology, medical radiation technology, medicine, midwifery, nursing, occupational therapy, opticianry, optometry, pharmacy, physiotherapy, psychology, and respiratory therapy.

[222] HCCA, note 4, s. 21.

[223] O Reg 865/93, s. 1.

[224] See for example, College of Physicians and Surgeons of Ontario, "Determining Capacity to Consent: Guiding Physicians through Capacity and Consent to Treatment" (CPSO, 2007) Dialogue 32, online: http://www.cpso.on.ca/uploadedFiles/policies/policies/policyitems/Consent.pdf; College of Physicians and Surgeons of Ontario, "Consent to Medical Treatment, Policy 4-05" (January/February 2006). Online: http:// http://www.cpso.on.ca/policies/policies/default.aspx?ID=1544 [CSPO, *Consent to Treatment*]; College of Nurses of Ontario, *Practice Guideline: Consent* (2009), online: www.cno.org/Global/docs/policy/41020_consent.pdf [College of Nurses of Ontario, *Consent*]; College of Dieticians of Ontario, "Guidelines: Health Care Consent Act (HCCA)." Online: http://www.cdo.on.ca/en/pdf/publications/guidelines/hcca.pdf; College of Dieticians of Ontario, "The Jurisprudence Handbook for Dietitians in Ontario" (Fall 2012). Online: www.cdo.on.ca/en/pdf/Publications/.../Jurisprudence%20Handbook.pdf; College of Occupational Therapists of Ontario, *Guide to the Health Care Consent and Substitute Decisions Legislation for Occupational Therapists* (1996), online: www.coto.org/pdf/hcca_guide.pdf. Online: http://www.coto.org/pdf/hcca_guide.pdf [College of Occupational Therapists of Ontario, *Consent*]; College of Respiratory Therapists of Ontario, "Responsibilities Under Consent Legislation" (December 2011). Online: http://www.crto.on.ca/pdf/PPG/UnderConsent.pdf; College of Physiotherapists of Ontario, "Health Care Consent Act: Briefing Note" (2005, updated 2007). Online: http://www.collegept.org/Assets/registrants'guideenglish/briefing%20notes/BNhealthCareConsentAct.pdf; College of Chiropractors of Ontario, "Standard of Practice: Consent" (Amended November 2004). Online: http://ccholive.v51.com/site_documents/S-013%20Consent.pdf.

[225] Ontario Ministry of Health and Long-Term Care, *Community Care Access Centres: Client Services Policy Manual* (Toronto: 2006, updated 2007), ch 4. Online: http://www.health.gov.on.ca/english/providers/pub/manuals/ccac/ccac_mn.html.

[226] Dr. E. Etchells, *Aid to Capacity Evaluation (ACE)* (Joint Centre for Bioethics, University of Toronto, nd). Online: http://www.jointcentreforbioethics.ca/tools/documents/ace.pdf.

[227] Katharine Byrick & Barbara Walker-Renshaw, *A Practical Guide to Mental Health and the Law in Ontario* (Toronto: Ontario Hospital Association, 2012). Online: www.blg.com/en/Expertise/Documents/MentalHealthLaw_1033.pdf.

[228] National Initiative for the Care of the Elderly, *Tool on Capacity & Consent: Ontario Edition* (Toronto: Advocacy Centre for the Elderly, 2003). Online: http://www.nicenet.ca/files/NICE_Capacity_and_Consent_tool.pdf.

[229] MHA, note 6, ss. 38, 59.
[230] HCCA, note 4, s. 32.
[231] HCCA, note 4, ss. 32(1)-(2), (5)-(6); Consent and Capacity Board, *CCB Rules of Practice*, rule 32.
[232] Hiltz & Szigeti, note 118, 182.
[233] Judith Wahl, "25 Common Misconceptions about the *Substitute Decisions Act* and *Health Care Consent Act*" (Advocacy Centre for the Elderly, updated November 2008), 17-24. Online: http://www.advocacycentreelderly.org/appimages/file/25%20Common%20Misconceptions.pdf.
[234] Note 233, 19-20.
[235] Note 233, 17-24.
[236] Hiltz & Szigeti, note 118, 178. For an example of this dynamic, see *A.F. (Re),* 2005 CanLII 3201 (ON CCB).
[237] Daniel J. Dochylo & Michel Silberfeld, "Capacity, Consent and Health Care Decision-Making" in Ann Soden, ed., *Advising the Older Client* (Markham: Lexis Nexis, 2005), 133, 162.
[238] Advocacy Centre for the Elderly, note 83, 25.
[239] HCCA, note 4, s. 2(1).
[240] Hiltz & Szigeti, note 118, 194.
[241] *Heuberger* v. *Stenn*, [2002] O.J. No 1285, [2002] O.T.C. 216 (SCJ).
[242] HCCA, note 4, s. 2.
[243] O Reg 264/00.
[244] Judith Wahl, "Capacity and Capacity Assessment in Ontario" (prepared for the CBA Elder Law Programme, Ottawa, Ontario, March 24-25, 2006), 13. Online: http://www.practicepro.ca/practice/PDF/Backup_Capacity.pdf [Wahl, *Capacity*].
[245] Jeffrey Cole & Noreen Dawe, *Assessing Capacity for Admission to Long-Term Care Homes: A Training Manual for Evaluators* (Community Care Access Centre, 2010, revised 2011), iii. Online: www.ccac-ont.ca/Upload/central/General/ConsentandCapacityTrainingManual.pdf. It is not clear to which study they are referring, unfortunately.
[246] Carling-Rowland & Wahl, note 171, 171.
[247] Note 171, 182.
[248] The origins of this form are not documented and recollections differ as to its original development. However, it appears to have been in use from the very beginning of the current regime, and has been widely treated as an "official" document.
[249] *H. (Re)*, 2005 CanLII 57737 (ON CCB) states, "Merely asking those five questions and getting (or not getting) answers is not a fair test of a person's capacity." See, for example, *Starson*, note 131, paras 77, 81 (evaluators must displace the presumption of capacity on a balance of probabilities and demonstrate that an individual lacks the *ability* to appreciate the foreseeable consequences of the decision); *Saunders* v. *Bridgepoint Hospital*, 2005 CanLII 47735 (ON SC) [*Saunders*], para. 121 (procedural fairness requires that evaluators inform individuals about the capacity assessment process on an ongoing basis).
[250] Wahl, *Capacity*, note 244, 18.
[251] Cole & Dawe, note 245, iii.
[252] Note 245.
[253] The Dementia Network of Ottawa, "A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease". Online: http://www.community-networks.ca/uploads/L%20consentlawOttAlzheimers.pdf.
[254] Alexandra Carling-Rowland, "Communication Aid to Capacity Evaluation – CACE: A Communicatively Accessible Capacity Evaluation to Make Admissions Decisions" (2012).
[255] *Health Care Consent Act – Evaluation of Capacity for Admission to a Long-Term Care Home* (Ministry of Health and Long-Term Care).
[256] In *Koch (Re)*, Quinn J imported some of the procedural safeguards from the *SDA* into the admissions context, specifically, the right to be informed of the significance of a finding of incapacity, the right to have counsel or a trusted friend present during the evaluation, the right to refuse the evaluation, and the right to be informed of

these rights prior to the evaluation: *Koch (Re)* (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712 (Gen Div) [*Koch (Re)*]. However, some consider these comments to be *obiter* and the Board has not always considered itself bound by them: Hiltz & Szigeti, note 118, citing *I.L.A. (Re)*, 2004 CanLII 29716 (ON CCB).

[257] *Saunders*, note 249, para. 118.

[258] HCCA, note 4, ss. 50(1)-(2).

[259] Hiltz & Szigeti, note 118, 193, citing *In the matter of MD*, TO-10-0096, TO-10-5182, TO-10-5163.

[260] See Wahl, *Capacity*, note 244, 19-21. Also see *A.B. (Re)*, 2004 CanLII 29602 (ON CCB) and *S.S.; File TO-05-4570 (Re)*, [2005] O.C.C.B.D. No .19 for illustrations of troubling shortfalls in the capacity evaluation process.

[261] Carling-Rowland & Wahl, note 171, 172, 178, 180.

[262] Advocacy Centre for the Elderly, note 83, 26.

[263] SDA, note 3, s. 16(1).

[264] Note 3, s. 79.

[265] Note 3, s. 1(1).

[266] O Reg 460/05, ss. 2(1)(a), 2(2).

[267] SDA, note 3, s. 17(1).

[268] Note 3, s. 24(5).

[269] Note 3, s. 55(1).

[270] O Reg 460/05, ss. 2(1)(b), 4.

[271] O Reg 460/05, ss. 2(1)(c), 5(1).

[272] O Reg 460/05, ss. 2(1)(c), 5(2).

[273] O Reg 460/05, ss. 2(1)(d), 6.

[274] MAG, *Guidelines*, note 112.

[275] O Reg 460/05, ss. 3(1)-(2).

[276] O Reg 460/05, s. 3(3).

[277] SDA, note 3, ss. 78(1)-(3).

[278] Note 3, ss. 78(1)-(3).

[279] Note 3, s. 78(2).

[280] Note 3, ss. 78(5), 16(4).

[281] Note 3, ss. 16(5)-(6).

[282] SDA, note 3, s. 20.2. Note that persons who are found incapable of managing property and who then fall under a continuing power of attorney do not have this avenue open to them. Nor are there rights of review for a finding of incapacity for personal care. See the discussion in Hiltz & Szigeti, note 118, 32, 43-44.

[283] Sarita Verma & Michel Silberfeld, "Approaches to Capacity and Competency: The Canadian View" (1997) 20:1 Int JL & Psychiatry 35, 42.

[284] Olders, note 210, 285.

[285] Michel Silberfeld et al, "Capacity Assessments for Requests to Restore Legal Competence" (1995) 10:3 International Journal of Geriatric Psychiatry 191, 196.

[286] See, for example, *Koch (Re)*, note 256, where a husband requested evaluation of his wife's capacity following the production of a draft separation agreement by his wife's lawyer. *Urbisci* v. *Urbisci*, 2010 ONSC 6130, 67 E.T.R. (3d) 43, also involved a request for assessment in the midst of separation proceedings, when Mrs. Urbisci decided that her husband and daughter were more concerned about her money then her well-being and decided to revoke an existing power of attorney in favour of her husband. *Deschamps* v. *Deschamps* (1997), 52 O.T.C. 154, 75 A.C.W.S. (3d) 1130 (Gen Div) [*Deschamps*], involved a son seeking to be appointed guardian of property for his father as part of an extensive effort to prevent him from re-marrying.

[287] Verma & Silberfeld, note 283, 41.

[288] SDA, note 3, s. 2(1).

[289] Note 3, s. 2(2).

[290] Note 3, s. 2(3).

[291] An individual can make a POA for personal care that contains a provision waiving the grantor's right to apply to the CCB for review of decisions under the HCCA or authorizing the attorney to use reasonable force to determine whether the grantor is incapable, to take the grantor to any place for care or treatment or to admit them. In order for any of these provisions to be valid, the grantor must be assessed as capable of managing personal care within 30 days of signing the POA and must also make a statement in the prescribed form indicating that she understands the effect of the provisions and that she understand that the POA can only be revoked if she is assessed as capable of managing personal care within 30 days of the revocation. This is the only circumstance in which an individual is statutorily required to be assessed to make a POA. SDA, note 3, s. 50.
[292] Carole A. Cohen & Kenneth I. Shulman, "Capacity Assessments and the Role of the Clinical Expert: The Ontario Experience" (1998) 19:1 Health L Can 19, 21; James E. Spar & Andrew S. Garb, "Assessing Competency to Make a Will" (1992) 149:2 The American Journal of Psychiatry 169, 174.
[293] See *R.V. (Re)*, 2003 CanLII 25699 (ON CCB).
[294] *Knox* v. *Burton*, 2004 CanLII 35099 (ON SC).
[295] Wahl, *Capacity*, note 244, 19-20.
[296] Spar & Garb, note 292, 172-73.
[297] Olders, note 210, 285.
[298] See, for example, Weisstub, *Enquiry*, note 9, 73-74, 81.
[299] VLRC, note 107, ch 7, 120.
[300] *Mental Capacity Act 2005*, note 126.
[301] Kerri Joffe & Edgar-Andre Montigny (ARCH Disability Law Centre), *Decisions, Decisions: Promoting and Protecting the Rights of Persons with Disabilities Who are Subject to Guardianship* (Toronto: Law Commission of Ontario, January 2014), 97 [Joffe & Montigny].
[302] Advocacy Centre for the Elderly, note 83, 25-26.
[303] LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, 48.
[304] Advocacy Centre for the Elderly, note 83, 24.
[305] Hiltz & Szigeti, note 118, 182.
[306] LCO, *Framework for the Law as It Affects Older Adults*, note 1, 166-67.
[307] These issues are discussed in more depth in LCO, *Framework for the Law as It Affects Older Adults*, note 1, 32, 61-66, 159; and LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, 34-37, 54-58.
[308] Minkowitz, note 113.
[309] See for instance: Michael Bach, *The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions from Law Reform* (Toronto: Institute for Research on Inclusion and Society, 2009), 5-6.
[310] United Nations Treaty Collection, note 23.
[311] Note 23.
[312] Note 23.
[313] Jennifer L. Wright, "Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA" (2010) 33 International Journal of Law and Psychiatry 350, 354.
[314] Leslie Salzman, "Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?" (2011) 4 St. Louis U. J. Health L. & Pol'y 279, 291.
[315] CRPD, note 19, Preamble.
[316] Terry Carney, "Clarifying, Operationalising, and Evaluating Supported Decision Making Models" (2014) 1:1 Research and Practice in Intellectual and Developmental Disabilities (Forthcoming) [Carney, *Models*]. For example, an evaluation of a two-year Pilot Project by the South Australian Office of the Public Advocate that involved 26 "decision-ready" individuals (not under guardianship) with intellectual disabilities or an acquired brain injury found generally positive reviews by consumers, supporters and service providers. It also pointed to some operational challenges. Staff overseeing the program found that fairly intensive case management was required to support the development of the process Some staff recommended that "vulnerability indicators" be used to pre-screen

participants to determine appropriateness of inclusion in the program: Margaret Wallace, *Evaluation of the Supported Decision Making Project* (South Australia Office of the Public Advocate, November 2012).

[317] See, for example, Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, "Supported Decision-Making: A Viable Alternative to Guardianship?" (2013) 117:4 Penn St. L. Rev., 1111-57; Anthony Mason, "Foreword" (2013) 36:1 UNSWLJ, 170-74; Carney, *Models*, note 316.

[318] Kohn, Blumenthal & Campbell, note 317, 1114. Similar concerns are noted in Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010), 4. Online: http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf.

[319] Krista James & Laura Watts (Canadian Centre for Elder Law), *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Toronto: Law Commission of Ontario, March 2014), 78.

[320] See, for example, United Nations, Office of the United Nations High Commissioner for Human Rights & Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* - Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities (Geneva: United Nations, 2007), 90: "Even when an individual with a disability requires total support, the support person(s) should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual." See also Minkowitz, note 113, 157-58: "Even in quite extreme situations such as the conditions known as persistent vegetative state and coma, or loss of consciousness, the principles of support can be applied so as to give full respect to any present communications by the person (which can sometimes be discerned by close associates though missed by others), and if such communications are indeterminate, following the person's previously expressed wishes, abiding values and experience with similar situations."

[321] Bach & Kerzner, *A New Paradigm*, note 109, 86-89.

[322] Gerald Quinn, "Personhood & Legal Capacity, Perspectives on the Paradigm Shift of Article 12 *CRPD*" (HPOD Conference, Harvard Law School, 20 February 2010). Quinn notes that "what's worse: stretching a fiction (100% support) to the point that it is visibly at odds with reality – a factor that is only likely to be seized on by States acting out of abundant caution and enter declarations or reservations ring-fencing substitute decision-making – or, admitting the obvious and then using our talents to lock in the exception and transform how decisions are 'made for' people?"

[323] Office of the Public Advocate, *Supported Decision-Making, Background and Discussion Paper* (Melbourne, Australia: November 2009), 24 [Office of the Public Advocate, *Supported Decision-Making*].

[324] *Mental Capacity Act 2005*, note 126, s. 1(3).

[325] *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, ss. 2(3), 29.

[326] *Adult Protection and Decision-Making Act*, S.Y. 2003, c. 21, Schedule A.

[327] Note 326, s. 4.

[328] VLRC, note 107, 128, s. 8.17.

[329] In the Yukon, a third party can make an application to set aside an agreement reached with an adult who did not consult with his or her supporter. For Lecturer Shih-Ning Then this provision creates an uneasy compromise: "Here, a clear tension exists between protecting the adult and allowing that adult to make 'bad' decisions. This is particularly so because decision-making capacity is explicitly preserved by these agreements." Shih-Ning Then, "Evolution and Innovation in Guardianship Laws: Assisted Decision-Making" (2013) 35:1 Sydney L. Rev. 133, 150.

[330] Government of Alberta, "Supported Decision-Making: Adult Guardianship and Trusteeship Act", 2. Online: http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5609.pdf.

[331] Yukon Health and Social Services, "Adult Protection and Decision-Making Act – Supported Decision-Making Agreements". Online: http://www.hss.gov.yk.ca/supported_agreements.php.

[332] AGTA, note 153, s. 4(1); *Adult Protection and Decision-Making Act,* note 326, s. 6.

[333] AGTA, note 153, s. 3; *Adult Protection and Decision-Making Act,* note 326, ss. 1, 9.

[334] AGTA, note 153, s. 4(2); *Adult Protection and Decision Making Act*, note 326, s. 5(1).

[335] AGTA, note 153, s. 4(2); *Adult Protection and Decision Making Act*, note 326, s. 5(1).

[336] AGTA, note 153, s. 4(2); *Adult Protection and Decision Making Act*, note 326, s. 5(1).

[337] *Adult Protection and Decision Making Act*, note 326, s. 5(1)

[338] Note 326, s. 5(1).
[339] Note 326, s. 5(1).
[340] Note 326, ss. 5(2), 11.
[341] AGTA, note 153, s. 6(2).
[342] AGTA, note 153, s. 10(1); *Adult Protection and Decision Making Act*, note 326, s. 13(2).
[343] *Adult Protection and Decision Making Act*, note 326, s. 13(2).
[344] *Adult Protection and Decision Making Act*, note 326, s. 12.
[345] Michelle Browning, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision-Making* (Winston Churchill Memorial Trust of Australia, 2010), 22, 27; Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.
[346] Browning, note 345, 23.
[347] VLRC, note 107, 128.
[348] Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services; Browning, note 345, 28-29; VLRC, note 107, 129.
[349] United Nations, note 320, 90.
[350] A.J. McClean, *Review of Representation Agreements and Enduring Powers of Attorney* Undertaken for the Attorney General of the Province of British Columbia (Victoria: Attorney General, 2002). See also: Glen, note 124, 147-48; VLRC, note 107, 130, para. 8.31, distinguishing BC's approach from supported decision making.
[351] YOIC 2005/78, s. 5. Investing funds is limited to investing funds that are protected by the Canada Deposit Insurance Corporation.
[352] The *Adult Protection and Decision-Making Act* states that they can be used "to enable an adult to agree to allow two or more trusted friends or relatives to make a *limited range of daily living decisions* ... for and on behalf of the adult" where he or she "does not need guardianship" and "is capable of managing most of all of their affairs under some circumstances but has difficulty doing so under other circumstances." *Adult Protection and Decision-Making Act,* note 326, ss. 14-15.
[353] Yukon Health and Social Services, *Representation Agreements: Do I Need One?*, 2. Online: *www.hss.gov.yk.ca/pdf/rep_agreement_booklet.pdf*.
[354] Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services; *Adult Protection and Decision-Making Act,* note 326, ss. 6, 15.
[355] *Enduring Power of Attorney Act,* R.S.Y. 2002 c. 73, s. 3.
[356] Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.
[357] The CEP awarded former students on average $19,412 per person across Canada. Aboriginal Affairs and Northern Development Canada, "Statistics on the Implementation of the Indian Residential Schools Settlement Agreement". Online: http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192.
[358] Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.
[359] McClean, note 350, 4.
[360] Office of the Ombudsperson, Province of British Columbia, *No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults* (Public Report No. 49 to the Legislative Assembly of British Columbia, February 2013).
[361] *Representation Agreement Act*, note 158, s. 9(g). This version of the *Representation Agreement Act* was amended in 2007. As of September 1, 2011, this provision is no longer available. Robert M. Gordon, *The 2008 Annotated British Columbia Representation Agreement Act, Adult Guardianship Act and Related Statutes* (Thomson Carswell Ltd.: Toronto, 2008), 1; Nidus Personal Planning Resource Centre and Registry, "Representation Agreement Act Amendments" (March 2012). Online: http://www.nidus.ca/PDFs/Nidus_01Sept2011_Amendments_and_RA.pdf.
[362] *Representation Agreement Act*, note 158, s. 7.
[363] Note 158, s. 7.
[364] Consultation with Nidus Personal Planning Resource Centre and Registry. See also the voluntary form produced by the British Columbia Attorney General that allows an adult to choose one scope of power or both, as well as to

customize which types of decisions for which the representative has authority to act. British Columbia Attorney General, "Representation Agreement (Section 7) Form". Online: http://www.ag.gov.bc.ca/incapacity-planning/pdf/Representation_Agreement_S7.pdf.

[365] *Representation Agreement Act*, note 158, ss. 9.1, 15.

[366] Note 158, s. 8(2).

[367] *Representation Agreement Act*, note 158, s. 8(2); Mona Paré, note 31, 122-23.

[368] Nidus Personal Planning Resource Centre and Registry, note 318. There are few other sources with empirical evidence about representation agreements. Wendy Harrison conducted a detailed study of RAs that provides a wealth of information on non-standard agreements for personal care and advance health care directives. See Wendy Harrison, *Representation Agreements in British Columbia: Who is Using them and Why?* (Project submitted in partial fulfillment of the requirements for the degree of Master of Gerontology, Simon Fraser University, Fall 2008). See also: Kohn, Blumenthal & Campbell, note 317.

[369] See Community Living British Columbia, "Guide to Individualized Funding - Supporting Choice and Innovation" (May 2009), 7. Online: http://www.communitylivingbc.ca/individuals-families/support-for-adults/individualized-funding/.

[370] See, for instance, Mary B. Hamilton, "Incapacity Planning: The New Law Planning for Personal Care Decisions" Prepared for the Continuing Legal Education Society of British Columbia (June 2011), 3.1.6; Law Society of British Columbia, "The Representation Agreement Act." Online: http://www.lawsociety.bc.ca/page.cfm?cid=1209&t=The-Representation-Agreement-Act; Browning, note 345, 31.

[371] Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability* (Brussels: 2007), 5-6. Online: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=gladnetcollect; Stanley S. Herr, "Self-Determination, Autonomy, and Alternatives for Guardianship" in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford: Oxford University Press, 2003), 433.

[372] Herr, note 371, 433; Inclusion Europe, note 371, 6.

[373] Herr, note 371, 433.

[374] Inclusion Europe, note 371, 6.

[375] Note 371, 6.

[376] Herr, note 371, 434.

[377] Note 371, 434.

[378] Inclusion Europe, note 371, 6.

[379] Note 371, 6.

[380] Herr, note 371, 433.

[381] Note 371, 433.

[382] Note 371, 434.

[383] Herr, note 371, 434; Inclusion Europe, note 371, 6.

[384] Bach & Kerzner, *A New Paradigm*, note 109.

[385] Michael Bach & Lana Kerzner, *Fulfilling the Promise, Ensuring Alternatives to Guardianship* [Bach & Kerzner, *Fulfilling the Promise*]. This description is based on an unpublished version of this Paper, received in March 2014. A revised version of this Paper will be available from the IRIS Institute for Research and Development on Inclusion and Society in the early summer of 2014.

[386] This is a summary of the requirements, which are set out in full elsewhere in this *Paper* and which are found in the SDA, note 3, s. 66.

[387] Advocacy Centre for the Elderly, *Comments on the Discussion Paper: Capacity of Adults with Mental Disabilities and the Federal RDSP* (February 28, 2014), 9.

[388] Joffe & Montigny, note 301, 66.

[389] James & Watts, note 319, 77.

[390] Terry Carney, "Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law" in Israel Doron & Ann M. Soden, eds., *Beyond Elder Law: New Directions in Law and Aging* (Berlin: Springer, 2012) ch 1, 10 [Carney, *Guardianship*].
[391] Office of the Public Advocate, *Supported Decision-Making*, note 323, 24.
[392] Joffe & Montigny, note 301, 92.
[393] This issue is explored throughout the paper prepared by James & Watts, note 319. See in particular the discussion at pages 49, 59-60, 77.
[394] Terry Carney has commented that, "People already have but very fuzzy understanding of adult guardianship or health powers, so some level of misuse and misunderstanding is surely inevitable under a more sophisticated system": Carney, *Guardianship*, note 390, 11.
[395] See, for example, James & Watts, note 319, 8.
[396] Carney, *Guardianship*, note 390, 12.
[397] Then, note 329, 151.
[398] VLRC, note 107, 152.
[399] Then, note 329, 151.
[400] AGTA, note 153, s. 13; Alberta Human Services, "Co-Decision Making Brochure". Online: http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5610.pdf; *The Adult Guardianship and Co-decision-making Act,* S.S. 2000, c. A-5.3, ss. 13, 39.
[401] *The Adult Guardianship and Co-decision-making Act,* note 400, s. 40.
[402] AGTA, note 153, s. 13(4).
[403] VLRC, note 107, 156.
[404] Note 107*,* ch. 9, 151-69.
[405] Note 107*,* 1159, ss 9.53-54.
[406] *The Adult Guardianship and Co-decision-making Act,* note 400, s. 42. In Alberta, "A co-decision-maker shall not refuse to sign a document...if a reasonable person could have made the decision and the decision is not likely to result in harm to the assisted adult": AGTA, note 153, s. 18(5).
[407] *The Adult Guardianship and Co-decision-making Act,* note 400, s. 41. In Alberta, the Court may specify whether a contract is voidable if it is not in writing and signed by both parties: AGTA, note 153, s. 17(5).
[408] VLRC, note 107, 155-56.
[409] Note 107, 156.
[410] Note 107, 157.
[411] Note 107, 158.
[412] Terry Carney & Fleur Beaupert, "Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing *CRPD* Supported Decision-Making" (2013) 36:1 UNSW Law Journal 175, 184.
[413] Consultation with the Public Trustee for Alberta.
[414] SDA, note 3, ss. 32(1), 38.
[415] Note 3, ss. 66(1), 67.
[416] SDA, note 3, ss.37, 66(3)-(4); HCCA, note 4, ss. 21, 42, 59.
[417] SDA, note 3, ss. 32, 66.
[418] Note 3, ss. 32, 66.
[419] Note 3, ss. 33, 38.
[420] Bach & Kerzner, *A New Paradigm*, note 109, 80.
[421] SDA, note 3, ss. 5, 44.
[422] Note 3, ss. 12(1)(a), 53(1)(a).
[423] Note 3, ss. 7(3), 46(2).
[424] Note 3, s. 46(3).
[425] Note 3, s. 17(1).
[426] Note 3, s. 17(4)-(5).
[427] Note 3, ss. 22, 55.

[428] The exception to this being for summary disposition applications, which are uncontested.
[429] SDA, note 3, ss. 24, 57.
[430] HCCA, note 4, ss. 20(1), 41, 58.
[431] Note 4, s. 20(2).
[432] Note 4, s. 20(5).
[433] Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.
[434] Office of the Public Guardian and Trustee, *The Role of the Office of the Public Guardian and Trustee* (Queen's Printer for Ontario, 2006, reprinted 2013), 3 [OPGT, The Role].
[435] Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.
[436] Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*.
[437] Office of the Public Guardian and Trustee, *When the Office of the Public Guardian and Trustee Becomes Your Guardian of Property* (Queen's Printer for Ontario: 2006, reprinted 2013), 3-4.
[438] Ernest J. Weinrib, "The Fiduciary Obligation" (1975) 25:1 UTLJ 1, 4.
[439] Support & Trustee Advisory Services, "What We Do". Online: http://mystas.ca/what.
[440] Note 439.
[441] Support & Trustee Advisory Services "Trustee and Advisory Services Brochure". Online: http://mystas.ca/sites/default/files/user_files/pdf/STAS_brochure.pdf.
[442] Cal Bus & Prof Code § 6530 (2014) [CPFA]. (Chapter 6 of the Business & Professions Code is known as the Professional Fiduciaries Act, pursuant to § 6500).
[443] CPFA § 6538(a).
[444] CPFA § 6538(b).
[445] Professional Fiduciaries Bureau, "Pre-Licensing Education Information". Online: Professional Fiduciaries Bureau http://www.fiduciary.ca.gov/forms_pubs/prelicreq.shtml.
[446] CPFA § 6510.
[447] CPFA §§ 6518, 6520.
[448] CPFA § 6536.
[449] CPFA §§ 6580, 6582.5.
[450] CPFA § 6580.
[451] Professional Fiduciary Association of California. Online: http://www.pfac-pro.org.
[452] CPFA § 6580(c).
[453] CPFA § 6560.
[454] CPFA § 6561.
[455] Office of the Public Advocate, *Annual Report 2012 – 2013* (Victorian Government Printer: 2013), 12 [OPA, *Annual Report*].
[456] Office of the Public Advocate, *Community Guardianship Manual*, 7.
[457] Note 456, 10, 16.
[458] Note 456, 18.
[459] Note 456, 19
[460] Note 456, 37.
[461] Note 456, 21-22.
[462] Note 456, 23-24.
[463] *Assisted Decision-Making (Capacity) Bill 2013* (July 13, 2012), ss. 23(3), 61 [Bill 2013].
[464] Herr, note 371, 441; see also, Kees Blankman, "Guardianship Models in the Netherlands and Western Europe" (1997) 20:1 International Journal of Law and Psychiatry 47 at 54; Inclusion Europe, note 371, 8.
[465] Herr, note 371, 443; Inclusion Europe, note 371, 8.
[466] Inclusion Europe, note 371, 8. See also, Herr, note 371, 443.

[467] Herr, note 371, 443- 44.
[468] Note 371, 443-44.
[469] Herr, note 371, 443; Inclusion Europe, note 371, 9.
[470] Inclusion Europe, note 371, 8.
[471] Note 371, 8.
[472] Bach & Kerzner, *Fulfilling the Promise*, note 385, 154.
[473] Herr, note 371, 434.
[474] Herr, note 371, 434; Inclusion Europe, note 371, 6.
[475] Herr, note 371, 434.
[476] Note 371, 440.
[477] *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 8 [Saskatchewan *Powers of Attorney Act*].
[478] Law Reform Commission of Saskatchewan, *Consultation Paper on Enduring Powers of Attorney*, (Saskatoon: January 2001), 28. Online: Law Reform Commission of Saskatchewan http://www.lawreformcommission.sk.ca/Papers.htm.
[479] *The Adult Guardianship and Co-decision-making Act,* note 400, s. 30.
[480] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Schedule B, s. 12(1).
[481] Note 480, s. 12(2).
[482] Social Security Advisory Board, "Disability Programs in the 21st Century: The Representative Payee Program" (2010) 2:1 Social Security Advisory Board Issue Brief Series, 5.
[483] Bach & Kerzner, *Fulfilling the Promise*, note 385, 37.
[484] Vela Canada, "Microboards". Online: http://www.velacanada.org/vela-microboards.
[485] David and Faye Wetherow, "Microboards and Microboard Association Design, Development and Implementation" (Revised August 2004). Online: http://www.communityworks.info/articles/microboard.htm.
[486] Vela Canada, note 484.
[487] Office of the Public Advocate, *Supported Decision-Making*, note 323, 24.
[488] Joffe & Montigny, note 301, 105.
[489] Healthcare practitioners may, for example, be unaware of or confuse the rankings in the hierarchy, may not understand that where there are two persons who are equally ranked in the hierarchy they are not entitled to select between them, may be confused as to the steps to take when there is doubt about the legal capacity of the top-ranked person in the hierarchy, may be confused as to the extent of the efforts that must be taken to ensure that the top-ranked hierarchical person is willing and available, may misunderstand the scope or effect of a power of attorney and so on. For a discussion of these issues see Judith Wahl, Mary Jane Dykeman & Brendan Gray, *Health Care Consent and Advance Care Planning in Ontario* (Toronto: Law Commission of Ontario, January 2014), 244 and following.
[490] A brief history of Ontario's legislative regime is provided in Chapter II of this Paper.
[491] See, for example, SDA, note 3, ss. 7(3), 46(2).
[492] Note 3.
[493] Note 3, s. 7(2).
[494] Note 3, s. 4.
[495] Note 3, s. 8(1).
[496] Note 3, s. 9(1).
[497] Note 3, s. 8(2).
[498] Note 3, s. 5.
[499] Note 3, s. 7(4).
[500] Note 3, s. 7(5).
[501] Note 3, s. 7(3).
[502] Note 3, s. 11.
[503] Note 3, s. 12.
[504] Note 3, s. 7(7.1).

[505] MAG, *Powers of Attorney*, note 111.
[506] SDA, note 3, s. 7(1).
[507] Note 3, s. 10.
[508] Note 3, s. 9(3).
[509] Note 3, s. 45.
[510] Note 3, ss. 46(6)-(7).
[511] Note 3, s. 50.
[512] Note 3, s. 43.
[513] Note 3, s. 47.
[514] Note 3, ss. 46(8)-(9).
[515] Note 3, s. 48.
[516] Hiltz & Szigeti, note 118, 39.
[517] SDA, note 3, ss. 45, 49.
[518] Note 3, s. 49.
[519] Note 3, s. 44.
[520] Note 3, s. 46(2)
[521] Note 3, s. 46(3).
[522] Note 3, s. 46(4)
[523] Note 3, s. 46(5).
[524] Note 3, s. 52.
[525] Note 3, s. 53.
[526] Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards against Abuse, Final Report No. 88* (Edmonton, Alberta: February 2003), 6-7.
[527] For a fuller discussion of this issue, see Jan Goddard, "Powers of Attorney – Safekeeping & Other Practical Considerations", *The Six-Minute Estates Lawyer 2013.*
[528] *Enduring Power of Attorney Act*, note 355, ss. 3(1)(b), 4.
[529] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform, Final Report* (2008) [WCLRA], 20, 25; Law Reform Commission of Nova Scotia, *Final Report, Enduring Powers of Attorney in Nova Scotia,* (Halifax: 1999), 18.
[530] Saskatchewan *Powers of Attorney Act*, note 477, s. 12(1).
[531] Alberta Law Reform Institute, note 526, 7-9.
[532] Submission by Caxton Legal Centre Inc., quoted in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws: Report Volume 3* (Brisbane: September 2010), 164 [Queensland Law Reform Commission, volume 3].
[533] http://greyflagcampaign.com/poa-qa.html.
[534] Ontario Law Reform Commission, *Report on Powers of Attorney* (Toronto: Department of Justice, 1972), 26.
[535] *The Powers of Attorney Act*, C.C.S.M., c. P97, s. 12.
[536] *Powers of Attorney Act*, S.Nu. 2005, c. 9, s. 14(1) [Nunavut *Powers of Attorney Act*].
[537] *Powers of Attorney Act*, S.N.W.T. 2001, c. 15, s. 15 [N.W.T. *Powers of Attorney Act*].
[538] Nidus Personal Planning Resource Centre and Registry. Online: http://www.nidus.ca/?page_id=238.
[539] *Mental Capacity Act 2005*, note 126, s. 9. For more information on the Register, see Office of the Public Guardian, https://www.gov.uk/government/publications/register-a-lasting-power-of-attorney (Updated 1 October 2013).
[540] VLRC, note 107, ch 16.
[541] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 16 (15 April 2010) at 1530 (David Zimmer). Online: http://hansardindex.ontla.on.ca/hansardeissue/39-2/l016.htm.
[542] Note 541 (Khalil Ramal).
[543] Alberta Law Reform Institute, note 526, 21.
[544] *The Powers of Attorney Act*, note 535, s. 22.

[545] Saskatchewan *Powers of Attorney Act*, note 477, s. 17.
[546] N.W.T. *Powers of Attorney Act*, note 537, s. 23; Nunavut *Powers of Attorney Act*, note 536, s. 25(1).
[547] Alberta Law Reform Institute, note 526, 10-16.
[548] Note 526, 21-22.
[549] WCLRA, note 529, 55-64.
[550] New Zealand Law Commission, *Misuse of Enduring Powers of Attorney, Report No. 17* (Wellington, New Zealand: April 2001), 15.
[551] Queensland Law Reform Commission, volume 3, note 532, 191.
[552] *Representation Agreement Act*, note 158, ss. 12(1), (4).
[553] Note 158, ss. 12(6), (8).
[554] Note 158, s. 20(1).
[555] Note 158, ss. 20(2)-(3).
[556] Note 158, s. 20(4).
[557] Note 158, s. 20(5).
[558] VLRC, note 107, 203.
[559] Queensland Law Reform Commission, volume 3, note 532, 218-19.
[560] HCCA, note 4, ss. 33, 51, 66.
[561] Fram Report, note 10, 104.
[562] SDA, note 3, s. 18(1)-(2).
[563] Note 3, ss. 24, 57.
[564] Note 3, s. 59.
[565] Note 3, s. 70.
[566] Note 3, s. 69.
[567] Summary disposition applications require the filing of two pieces of evidence containing an opinion that the adult is incapable. At least one of these must contain an opinion that it is necessary for decisions to be made on the adult's behalf and at least one must be undertaken by a capacity assessor. See SDA, note 3, ss. 72, 77-78.
[568] Note 3, s. 69.
[569] "Role of the Office of the Public Guardian and Trustee", Paper prepared for the Law Society of Upper Canada Program, Advocacy for the Senior Client (September 24, 2003); OPGT, The Role.
[570] SDA, note 3, ss. 72-77.
[571] Consultation with Brendon Pooran.
[572] Consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
[573] Law Society of Upper Canada, "How to Have a Guardian of Property Appointed through Court Application", online: http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/How-to-Have-a-Guardian-of-Property-Appointed-through-Court-Application/ (last accessed: September 25, 2013).
[574] Consultation with Brendon Pooran.
[575] SDA, note 3, s. 77(3).
[576] Note 3, ss. 25(1), 58(1).
[577] Note 3, ss. 24, 57.
[578] See for example, *Covello v. Sturino* [2007] O.J. No 2306 158; *Deschamps*, note 286.
[579] *Koch (Re)*, note 256.
[580] A "Ulysses contract" allows a person creating a power of attorney for personal care to waive rights to challenge a finding of incapacity or to permit the use of force to facilitate treatment. Not surprisingly, the requirements for the creation of a "Ulysses contract" are stringent: see SDA, note 3, s. 50; HCCA, note 4, s. 32(2).
[581] Ontario, Legislative Assembly, Committee Transcripts: Standing Committee on Administration of Justice, "Bill 74, *Advocacy Act, 1992,* and Companion Legislation" (October 5, 1992).
[582] Bach & Kerzner, *Fulfilling the Promise*, note 385, 17-18.
[583] SDA, note 3, ss. 27, 62.
[584] Note 3, ss. 27, 62.

[585] Note 3, s. 20.
[586] Note 3, s. 20.
[587] Note 3, s. 20.1.
[588] Note 3, s. 20.
[589] Note 3, s. 20.3.
[590] Note 3, ss. 28-29, 63-64.
[591] Bach & Kerzner, *A New Paradigm*, note 109, 8.
[592] Kohn, Blumenthal & Campbell, note 317, 1117-18.
[593] Doug Surtees, "How Goes the Battle? An Exploration of Guardianship Reform" (2012) 50:1 Alta. L. R. 115-27.
[594] Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act*
[595] Bach & Kerzner, *Fulfilling the Promise*, note 385, 90.
[596] Joffe & Montigny, note 301, 61.
[597] Note 301, 61.
[598] AGTA, note 153, s. 54(5).
[599] VLRC, note 107, 192.
[600] Note 107, 264.
[601] Bill 2013, note 463, s. 27.
[602] *Guardianship and Administration Act 1986* (Vic) ss. 61(1), 63(1).
[603] VLRC, note 107, 243.
[604] AGTA, note 153, ss. 33(8), 54(7).
[605] Joffe & Montigny, note 301, 98.
[606] Note 301, 98-99.
[607] Queensland Law Reform Commission, volume 3, note 532, 97, 108.
[608] Note 532, 109-10.
[609] Consultation with Doug Surtees.
[610] Alberta Human Services, "Trusteeship Order" (Edmonton, Alberta: Created April 4 2013). Online: http://humanservices.alberta.ca/guardianship-trusteeship/agta-trusteeship-order.html.
[611] Consultation with the Public Trustee for Alberta.
[612] SDA, note 3, ss. 22(3), 55(2).
[613] AGTA, note 153. Section 46(5) for trusteeships. Section 26(5) makes parallel provision for guardians.
[614] Alta Reg. 219/2009, s. 4(2).
[615] Note 614, s. 4(5).
[616] Bach & Kerzner, *Fulfilling the Promise*, note 385, 88.
[617] Note 385, 151-53.
[618] Cameron Crawford, *When Bad Things Happen: Violence, Abuse, Neglect and Other Mistreatments against Manitoban Women with Intellectual Disabilities* (Winnipeg: Community Living - Manitoba, 2007), 45.
[619] BC Adult Abuse/Neglect Prevention Collaborative, *Vulnerable Adults and Capability Issues in BC, Provincial Strategy Document* (January 2009), 24. Online: http://www.bcli.org/sites/default/files/Vanguard_(16May09).pdf [Vanguard Project].
[620] Note 619, 23.
[621] National Initiative for the Care of the Elderly, *Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada* (Toronto: 2012). Online: file:///C:/Users/Maria/Downloads/mcdonald_defining-measuring%20elder%20abuse_synthesis_final.pdf
[622] Vanguard Project, note 619, 23.
[623] Joffe & Montigny, note 301, 48.
[624] Podnieks, note 79.

[625] Charmaine Spencer, *Diminishing Returns: An Examination of Financial Abuse of Older Adults in British Columbia* (Gerontology Research Centre, Simon Fraser University: 1998), 26.
[626] John B. Bond et al, "The Financial Abuse of Mentally Incompetent Older Adults: A Canadian Study" (1999) 11:4 Journal of Elder Abuse and Neglect 23, 33.
[627] Note 626, 27, 32.
[628] Statistics Canada, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* by Samuel Perreault (Ottawa, Canadian Centre for Justice Statistics: 2009), 8-9. Online: http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=85F0033MIE2009021 [Perreault].
[629] Crawford, note 618, 59.
[630] Note 618, 58.
[631] See LCO, *Framework for the Law as It Affects Older Adults*, note 1, ch VI and LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, ch V.
[632] Joffe & Montigny, note 301, 57.
[633] Alzheimer's Society (U.K.), Short changed: Protecting people with dementia from financial abuse (December 2011) 46.
[634] Note 633, 20, 46.
[635] PIPEDA, note 57.
[636] Note 57, s. 3.
[637] Note 57, Schedule 1, Principle 4.3.
[638] Note 57, s. 7(3)(d)(i).
[639] SDA, note 3, s. 83(1)(f).
[640] Bill C-12, *An Act to amend the Personal Information Protection and Electronic Documents Act* (Ministry of Industry, September 29, 2011).
[641] Interview with Doug Melville, OBSI, December 21, 2013.
[642] Linda Routledge, "Protecting Bank Clients from Financial Abuse" Forum on the Financial Abuse of Seniors, March 26, 2013, 11. Online: http://www.ifa-fiv.org/wp-content/uploads/2013/03/Routledge-Protecting-Bank-Clients-from-Financial-Abuse-March-26-2013.pdf.
[643] For example, the Canadian Bankers Association has launched a financial literacy program aimed at seniors, with a particular focus on financial abuse: see http://www.cba.ca/en/media-room/65-news-releases/688-canadian-bankers-association-to-launch-financial-literacy-program-for-seniors.
[644] See, for example, *Criminal Code*, R.S.C., 1985, c. C-46, ss. 215, 264, 323, 328-332, 334, 336, 346, 366, 380, 423.
[645] Note 644, s. 718.2.
[646] Margaret Hall, *Developing an Anti-Ageist Approach Within Law*, (Law Commission of Ontario: July 2009), 37. Online: http://wwww.ontla.on.ca/library/repository/mon/24009/304765.pdf.
[647] Selina Lai, *Final Report: Community Mobilization Empowering Seniors Against Victimization to the National Crime Prevention Centre of Canada Public Safety Canada* (United Seniors of Ontario: March 2008), 11. Also see Donald Poirier & Norma Poirier, *Why is it so difficult to combat elder abuse, and in particular, financial exploitation of the elderly?* (Law Commission of Canada: July 1999), section 5.3.3. Online: http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/research_project/99_elder_2-en.asp#p14.
[648] For example, in *R.* v. *Khelawon*, the manager of a retirement home was accused of assaulting five residents; however, by the time the matter reached trial, four of the victims had died and the remaining victim was no longer competent to testify. The Supreme Court of Canada ruled that the videotaped statements made by the victims after the assaults were inadmissible as being unreliable, and as a result, the accused was acquitted. Ontario's "Justice on Target" initiative aims to reduce delays in the justice system, and has seen some improvements in the timeliness and efficiency. Initiatives include streamlined disclosure process, providing earlier access to information to support timely decision-making, increased availability of plea courts, on-site legal aid, and many others. Information on the Justice on Target initiative can be found at http://www.attorneygeneral.jus.gov.on.ca/english/jot/.

[649] For example, the Ministry of the Attorney General has developed a Vulnerable Victims and Family Fund to provide financial and court-based supports for victims of crime and families of homicide victims, and this includes coverage for disability-related supports, such as sign-language interpretation or real-time captioning, to enable equal participation in the criminal justice system.
[650] Perreault, note 628, 11.
[651] DAWN – RAFH Canada, *Response to the Law as it Affects Older Adults Consultation Paper* (Toronto: Law Commission of Ontario: 7 July 2008), 1.
[652] Perreault, note 628, 10.
[653] For more information on Ontario's Strategy to Combat Elder Abuse, see the website of the Ontario Seniors' Secretariat at http://www.seniors.gov.on.ca/en/elderabuse/strategy.php and that of the Ontario Network for the Prevention of Elder Abuse at http://www.onpea.org/english/elderabuse/helpforseniors.html.
[654] *Long Term Care Home Act 2007,* S.O. 2007, c. 8, s. 24(1).
[655] Note 655, s. 24(5).
[656] Note 655, ss. 24 (3)-(4).
[657] Note 655, ss. 25-26.
[658] *Health Professions Procedural Code,* Schedule 2, *Regulated Health Professions Act*, *1991,* note 221, ss. 85.1 and following.
[659] SIPDDA, note 60; O Reg 299/10, s. 8.
[660] SDA, note 3, ss. 32(1), 38.
[661] Note 3, ss. 32(1.1), 38.
[662] Note 3, s. 40.
[663] Note 3, ss. 32(7)-(8), 38.
[664] Note 3, ss. 33, 38.
[665] Note 3, ss. 37, 38.
[666] SDA, note 3, ss. 32(6), 38; O Reg 100/96, *Accounts and Records of Attorneys and Guardians*.
[667] SDA, note 3, ss. 32(2)-(5).
[668] Note 3, s. 20.1.
[669] Note 3, ss. 66(2)-(3).
[670] Note 3, ss. 66(9)-(10).
[671] Note 3, s. 66(2).
[672] Note 3, s. 66(5).
[673] Note 3, s. 66(6).
[674] Note 3, s. 66(8).
[675] Note 3, s. 66(7).
[676] SDA, note 3, s. 66(4.1); O Reg 100/96, *Accounts and Records of Attorneys and Guardians*.
[677] SDA, note 3, s. 51.
[678] Note 3, ss. 82-83.
[679] Note 3, ss. 39, 68.
[680] Note 3, s. 42.
[681] Note 3, s. 69.
[682] OPGT, The Role.
[683] O Reg 100/96, *Accounts and Records of Attorneys and Guardians*, ss. 5(2), (4).
[684] O Reg 99/96, *Register*.
[685] For a thorough discussion of concerns related to abuse by guardians and of options for reform, see Joffe & Montigny, note 301.
[686] Joffe & Montigny, note 301, 63.
[687] HCCA, note 4, ss. 37, 54, 69.
[688] VLRC, note 107, 413.
[689] Joffe & Montigny, note 301, 100-101.

[690] VLRC, note 107, 414.
[691] Joffe & Montigny, note 301, 63.
[692] VLRC, note 107, 414.
[693] Note 107, 423.
[694] *Mental Capacity Act 2005*, note 126, ss. 49, 58, 61.
[695] COP, note 167, 248.
[696] Bill 2013, note 463, ss. 56, 59.
[697] *Guardianship and Administration Act 2000* (QLD), ss. 222-24.
[698] Note 697, s. 224.
[699] Joffe & Montigny, note 301, 103-104.
[700] *Guardianship and Administration Act 2000* (QLD), s. 179.
[701] VLRC, note 107, 424.
[702] SDA, note 3, s. 83.
[703] Note 3, s. 62(1).
[704] Note 3, s. 27(1).
[705] *Ziskos* v. *Miksche*, [2007] O.J. No. 4276 (S.C.J.), para. 238.
[706] Philippa Geddie, "Guardianship Investigations by the Public Guardian and Trustee: What They Are and What They Aren't" (Ontario Bar Association: January 2013), 1.
[707] Figures provided by the Office of the Public Guardian and Trustee, based on the Register of Guardians maintained by the Public Guardian and Trustee as required by Regulation 99/96 under the *Substitute Decisions Act.*
[708] Advocacy Centre for the Elderly, note 83, 26.
[709] Joffe & Montigny, note 301, 67.
[710] *Mental Capacity Act 2005*, note 126, s. 58(1).
[711] COP, note 167, 250-51.
[712] *Guardianship and Administration Act 2000* (QLD) s. 224(3).
[713] Note 700, s. 227.
[714] Note 700, s. 180.
[715] Note 700, s. 183(1).
[716] Note 700, s. 193.
[717] Joffe & Montigny, note 301, 104-105.
[718] In *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, paras. 146-47, La Forest J noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". In *Manitoba Métis Federation Inc.* v. *Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, para. 47, the SCC reaffirmed that "…a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person."
[719] *Powers of Attorney Act 1998* (Qld), s. 73.
[720] *Guardianship and Administration Act 2000* (Qld), s. 152.
[721] *Powers of Attorney Act 1998* (Qld), s. 118.
[722] Alberta Law Reform Institute, note 526, 37-38.
[723] Queensland Law Reform Commission, volume 3, note 532, 240-41.
[724] Note 532, 245.
[725] VLRC, note 107, 187.
[726] Note 107, xlviii.
[727] *The Public Guardian and Trustee Act*, S.S. 1983, c P-36.3, ss. 40.5–40.9.
[728] Alberta Law Reform Institute, note 526, 23.
[729] VLRC, note 107, 485.

[730] This issue was considered at some length, for example, in *Listening to Ontarians, Report of the Ontario Civil Legal Needs Project* (The Ontario Civil Legal Needs Project Steering Committee, May 2010). Online: http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf.
[731] *Bill 14, Access to Justice Act, 2006,* S.O. 2006, c. 21.
[732] For a description of this service, see the Law Society of Upper Canada website at: http://www.lsuc.on.ca/faq.aspx?id=2147486372.
[733] For a description of the organization and the services provided, visit the Pro Bono Law Ontario website at: http://www.pblo.org.
[734] See the JusticeNet website at: http://www.justicenet.ca/directory/search/.
[735] Weisstub, *Enquiry*, note 9.
[736] Fram Report, note 10.
[737] Weisstub, *Enquiry*, note 9, 244.
[738] Note 9, 240.
[739] Fram Report, note 10, 74.
[740] OBA Submission, note 110, 18.
[741] *Abrams* v. *Abrams*, [2010] O.J. No. 787, 2010 ONSC 1254, para. 28.
[742] Note 741, para. 34.
[743] Note 741, para. 35.
[744] Dale Brazao, "Sister battles caregiver for care of intellectually challenged brother" (Toronto Star: November 20, 2012); Dale Brazao, "Guardianship battle for intellectually challenged man settled" (Toronto Star: October 17, 2013).
[745] LCO, *Framework for the Law as It Affects Older Adults*, note 1, ch II C; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, ch II C.
[746] Joffe & Montigny, note 301, 108.
[747] Adapted from Step 6 of both *Frameworks*.
[748] LCO, *Framework for the Law as It Affects Older Adults*, note 1, ch VI provides a detailed description and analysis of the provisions of the HCCSA, including the complaint and enforcement requirements, in light of the *Framework.*
[749] See the Ombudsman for Banking Services and Investments website at: www.obsi.ca.
[750] Advocacy Centre for the Elderly, note 83, 24.
[751] Note 83, 24.
[752] HCCA, note 4, s. 70.
[753] Consent and Capacity Board, "Mandate & Mission Statement" (February 28, 2012). Online: CCB <http://www.ccboard.on.ca>.
[754] HCCA, note 4, s. 32.
[755] Note 4, ss. 50, 65.
[756] SDA, note 3, s. 20.1.
[757] HCCA, note 4, ss. 33, 51, 66.
[758] Note 4, ss. 35, 53, 68.
[759] Note 4, ss. 37, 54, 69.
[760] Note 4, ss. 35, 52, 67.
[761] Note 4, ss. 34, 53.1, 54.2. Note that the provisions with respect to secure units are not yet in force.
[762] For the fiscal year 2011-2012, over 80 per cent of all applications fell into these categories: Consent and Capacity Board*, Annual Report 2011 – 2012,* 5.
[763] Nyranne Martin "The Ethical and Practical Advocate: Considerations for Hospital Counsel in the Mental Health Context" (Canadian Bar Association National Health Law Summit, Montreal: May 2011) 5.
[764] HCCA, note 4, s. 80.
[765] *Cuthbertson* v. *Rasouli*, [2013] 3 S.C.R. 341, 2013 SCC 53 [*Cuthbertson*], paras 97-103.
[766] See, for example, Richard O'Reilly, "Is An Adversarial System Suitable For Committal And Capacity Reviews?" in Psychiatric Patient Advocate Office, *Mental Health and Patients' Rights in Ontario: Yesterday, Today and*

Tomorrow" (Toronto: Queen's Printer for Ontario, 2003), 43; Gray J.E., O'Reilly R.L. & Clements G.W. "Protecting the Rights of People with Mental Illness: Can we Achieve Both Good Legal Process and Good Clinical Outcomes?" (2002) 23:2 Health Law in Canada 25 at 30-31.

[767] O'Reilly, note 766, 43-44.

[768] Gray, O'Reilly & Clements, note 766, 30-31. See also Lois Hutchinson, "Finding The Balance: Mental Health Treatment And Patients' Rights From A Psychiatrist's Perspective" in Psychiatric Patient Advocate Office, *Mental Health and Patients' Rights in Ontario: Yesterday, Today and Tomorrow*" (Toronto: Queen's Printer for Ontario, 2003), 41.

[769] See Gray, O'Reilly & Clements, note 766, 30.

[770] See Hutchinson, note 768, 41.

[771] See, for example, John J. Ensminger & Thomas D. Liguori, "The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential" (1978) 6 J. Psychiatry & L. 5, 6.

[772] Note 771, 17, 20.

[773] Bruce J Winick, "Therapeutic Jurisprudence and the Civil Commitment Hearing" (1999) 10 J. Contemp. Legal Issues 37 at 44.

[774] Note 773, 46-47.

[775] Lorra Patton, *"'These Regulations Aren't Just Here to Annoy You:' The Myth of Statutory Safeguards, Patient Rights and Charter Values in Ontario's Mental Health System"* (2008) 25 Windsor Rev Legal & Soc Issues 9.

[776] Justice Edward F. Ormston, "The Role and Function of the Consent and Capacity Board in the Mental Health System – Issues and Trends" in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen's Printer for Ontario, 2008), 224.

[777] Aaron A. Dhir, "Relationships of Force: Reflections on Law, Psychiatry and Human Rights" (2008) 25 Windsor Review of Legal and Social Issues 103, 110.

[778] Jennifer Chambers, "Empowerment and Recovery — Are they Connected?" in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen's Printer for Ontario, 2008), 107.

[779] Note 778, 107.

[780] See Ruby Dhand, "Access to Justice for Ethno-Racial Psychiatric Consumer/Survivors in Ontario" (2011) 29:1 Windsor Y.B. Access Just. 127, 139. It should be noted that Statistics Canada found that Ontario has the highest percentage of immigrants among seniors. See Turcotte & Schellenberg, note 73, 23.

[781] Ormston, note 776, 224.

[782] Canadian Centre for Elder Law, Elder and Guardianship Mediation Report, (Vancouver, B.C.: 2011) 32.

[783] Lorne Sossin, "Human Rights, Access to Justice & Innovation", January 25, 2013. Online: http://www.bcli.org/sites/default/files/EGM_Report_Jan_30_2012_0.pdf.

[784] For a review of the implementation of active adjudication by the OHRT, see Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Toronto: Queen's Printer for Ontario, 2012).

[785] See JA Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 ICLQ 281; Bruce P Archibald, "Progress in Models of Justice: From Adjudication/Arbitration through Mediation to Restorative Conferencing (and Back)" in Ronalda Murphy & Patrick A. Molinari, eds, *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canadian Institute for the Administration of Justice, 2009) 129; Michael King et al, Non-Adversarial Justice (Leichhardt: The Federation Press, 2009) 1.

[786] SDA, note 3, ss. 39, 68.

[787] Note 3, ss. 39(4), 68(4).

[788] Note 3, ss. 42(7)-(8).

[789] Joffe & Montigny, note 301, 58-59.

[790] Note 301, 62-63

[791] Note 301, 67.

[792] See Toronto Mental Health Court, "Overview of the Court" (2008). Online: www.mentalhealthcourt.ca; Justice Richard D. Schneider, "Mental Health Courts" in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen's Printer for Ontario, 2008), 186-88.
[793] Judiciary of England and Wales, *Court of Protection Report 2010*, 6.
[794] Note 793, 6.
[795] *Mental Capacity Act 2005*, note 126, s. 51.
[796] Note 126, s. 42.
[797] Note 126, s. 49.
[798] Note 126, s. 49.
[799] Note 126, s. 51(2).
[800] Joffe & Montigny, note 301.
[801] James & Watts, note 319, 81.
[802] Bach & Kerzner, *A New Paradigm*, note 109, 120-23; Bach & Kerzner, *Fulfilling the Promise*, note 385, 166.
[803] Terry Carney & David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Sydney: The Federation Press, 1997), 86.
[804] Note 803, 112.
[805] Note 803, 136.
[806] Note 803, 197.
[807] Victorian Civil & Administrative Tribunal, *VCAT Annual Report 2012 - 2013*, 2. Online: http://www.vcat.vic.gov.au/system/files/2012-13_complete_annual_report.pdf [VCAT, *Annual Report*].
[808] *Victorian Civil and Administrative Tribunal Act 1998*, Act No. 53/1998, ss. 8-14.
[809] Note 807, 5.
[810] Note 807, 42-43. Of the 10,942 applications to VCAT in 2012 – 2013, 7,288 (66.6 per cent) were reassessments.
[811] VLRC, note 107, 468.
[812] Note 107, 468.
[813] Note 107, 493.
[814] VCAT, *Annual Report*, note 807, 42.
[815] Note 807, 42-43.
[816] VLRC, note 107, 469.
[817] Note 107, 485-86.
[818] *You've Got a Friend*, note 14, 72.
[819] See, for example, Barry Gray & Robin Jackson, "Introduction: Advocacy and Learning Disability" in *Advocacy and Learning Disability,* Barry Gray & Robin Jackson, eds. (Philadelphia: Jessica Kingsley Publishers, 2002) 7, 9. Also see Enabling Living Independently Today and Everyday, *Advocacy Definition*, 4-5. Online: http://www.elitestaffordshire.co.uk/uploads/file/Advocacy%20Definition.pdf.
[820] Hansard, note 14, 4255-56. See also *You've Got a Friend*, note 14, 162.
[821] Fram Report, note 10, 75-80.
[822] *You've Got a Friend*, note 14, 43-47.
[823] Note 14, 121-22.
[824] *Advocacy Act, 1992*, note 17, s. 1; repealed HCCA, note 4, s. 1.
[825] *Advocacy Act, 1992*, note 17, ss. 2-3; repealed HCCA, note 4, s. 1.
[826] *Advocacy Act, 1992*, note 17, s. 3; repealed HCCA, note 4, s. 1.
[827] *Advocacy Act, 1992*, note 17, s. 7; repealed HCCA, note 4, s. 1.
[828] *Advocacy Act, 1992*, note 17, s. 19(1); repealed HCCA, note 4, s. 1.
[829] *Advocacy Act, 1992*, note 17, s. 17; repealed HCCA, note 4, s. 1.
[830] *Advocacy Act, 1992*, note 17, s. 19(2); repealed HCCA, note 4, s. 1.
[831] Lightman & Aviram, note 18, 33.
[832] MHA, note 6; R.R.O. 1990, Reg. 741, ss. 14-14.1.

[833] PPAO, *Rights Advice*, note 206.
[834] Linda Carey, "Rights Advice" in Psychiatric Patient Advocate Office, *Mental Health and Patients' Rights in Ontario: Yesterday, Today and Tomorrow*" (Toronto: Queen's Printer for Ontario, 2003), 9-11.
[835] PPAO, *Annual Report*, note 204, 9.
[836] Note 204, 10.
[837] Psychiatric Patient Advocate Office, "About the PPAO". Online: http://www.sse.gov.on.ca/mohltc/ppao/en/Pages/AboutthePPAO.aspx.
[838] MHA, note 6, s. 59.
[839] MHA, note 6; R.R.O. 1990, Reg. 741, s. 16(1).
[840] MHA, note 6, s. 1.
[841] MHA, note 6; R.R.O. 1990, Reg. 741, s. 14.2.
[842] Lisa Romano, Judith A. Wahl & Jane Meadus (Advocacy Centre for the Elderly), *Submission to the Law Commission of Ontario Concerning: The Law as it Affects Older Adults* (July 23, 2008), 14-15.
[843] Joffe & Montigny, note 301, 93-94.
[844] Note 301, 95.
[845] Note 301, 94.
[846] A brief review of systemic advocacy by the PPAO can be found in David Simpson, "Systemic Advocacy: A Catalyst for Change" in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen's Printer for Ontario, 2008), 43-45.
[847] *Legal Aid Services Act*, *1998,* S.O. 1998, c. 26, s. 13.
[848] Legal Aid Ontario, *Mental Health Strategy Consultation Paper* (November 2013).
[849] *Cuthbertson*, note 765.
[850] *Zheng* v. *Zheng*, [2012] O.J. No. 2957, 2012 ONSC 3045 (Div Ct).
[851] *Guardianship and Administration Act 1986* (Vic), s. 15.
[852] *Guardianship and Administration Act 1986* (Vic), s. 16.
[853] VLRC, note 107, 447.
[854] For context, the population of the state of Victoria in 2013 was 5.7 million, compared to Ontario's population of 13.5 million.
[855] OPA, *Annual Report*, note 455, 10.
[856] Note 455, 19.
[857] VLRC, note 107, 452.
[858] Note 107, 461.
[859] Agnes Samler, "An Independent Voice for Children and Youth: the Ontario Provincial Advocate" in Psychiatric Patient Advocate Office, *Honouring the Past, Shaping the Future: 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen's Printer for Ontario, 2008), 46-48.
[860] *Provincial Advocate for Children and Youth Act, 2007*, S.O. 2007, c. 9, ss. 3, 6.
[861] Note 860, s. 15.
[862] Office of the Provincial Advocate for Children and Youth, "About Us". Online: http://provincialadvocate.on.ca/main/en/about/aboutus.cfm.
[863] *Provincial Advocate for Children and Youth Act, 2007*, note 860, s. 16.
[864] Provincial Advocate for Children and Youth, 2011/2012 Annual Report to the Legislature, 9.
[865] *Provincial Advocate for Children and Youth Act, 2007*, note 860, s. 18.
[866] Note 860, ss. 19-20.
[867] Note 860, s. 2(3).
[868] COP, note 167, 178.
[869] *Mental Capacity Act 2005*, note 126, s. 39.
[870] *The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006* (UK), SI 2006 No. 2883.
[871] COP, note 167, 180.

[872] Note 167, 188.
[873] Note 167, 184.
[874] Note 167, 183-84.
[875] AGTA, note 153, s. 81.
[876] Alta Reg 219/2009, ss. 38, 45, 49, 51, 57.
[877] Alta Reg 219/2009, ss. 38, 46, 51, 58.
[878] AGTA, note 153, ss. 26(7), 46(7).
[879] Note 153, ss. 27, 48.
[880] Alta Reg 219/2009, s. 34.
[881] Alta Reg 219/2009, s. 36.
[882] Ministry of Community and Social Services, *Policy Guidelines for the Adult Protective Service Worker Program 2012* (Revised October 2012), 11.
[883] Note 882, 14.
[884] Note 882, 10, 14.
[885] LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, 54.
[886] LCO, *Framework for the Law as It Affects Older Adults*, note 1, 159; LCO, *Framework for the Law as It Affects Persons with Disabilities*, note 2, 54.
[887] Bach & Kerzner, *A New Paradigm*, note 109, 6.
[888] Advocacy Centre for the Elderly, note 83, 45.
[889] Romano, Wahl & Meadus, note 842, 24.
[890] Wahl, Dykeman & Gray, note 489, 243-44.
[891] Advocacy Centre for the Elderly, note 83, 43.
[892] Note 83, 40.
[893] See, for example, note 83, 19.
[894] College of Nurses of Ontario, *Consent*, note 224.
[895] CSPO, *Consent to Treatment*, note 224.
[896] College of Occupational Therapists of Ontario, *Consent*, note 224.
[897] *Regulated Health Professions Act, 1991*, note 221, Schedule 2, s. 3.
[898] Wahl, Dykeman & Gray, note 489, 250-53.
[899] Note 489, 237-38.
[900] Note 489, 228-29.
[901] Note 489, 235.
[902] O Reg 460/05, ss. 2(1)(b), 4.
[903] O Reg 460/05, ss. 2(1)(c), 5(1).
[904] O Reg 460/05, ss. 2(1)(c), 5(2).
[905] O Reg 460/05, ss. 2(1)(d), 6.
[906] Bill 2013, note 463, s. 56(2).
[907] VLRC, note 107, 444.
[908] *Guardianship and Administration Act 1986* (Vic), s. 15.
[909] Joffe & Montigny, note 301, 103.
[910] *An Act to amend the Human Rights Code*, S.O. 2006, c. 30, s. 57.
[911] Pinto, note 784.
[912] AODA, note 33, s. 41.