

REFORMING THE LAW OF LEGAL CAPACITY AND DECISION-MAKING

The Law Commission of Ontario Project

September 23, 2014
Alzheimer Knowledge Exchange
Knowledge Dissemination Event



The Law Commission of Ontario and Capacity Law



- **Law Commission of Ontario**
 - Law reform agency
 - Created September 2007
 - Created by agreement among LFO, MAG, LSUC, Osgoode Hall Law School, Deans of Ontario's law schools
- **Mission:**
 - Recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility;
 - Stimulate critical legal debate;
 - Study areas underserved by other research.
- **Relevant Projects**
 - The Law as it Affects Older Adults (completed)
 - Legal Capacity, Decision-making and Guardianship (ongoing)

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The LCO's Project on Legal Capacity, Decision-making and Guardianship: SETTING THE STAGE

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The Capacity, Decision-making and Guardianship Project

- **Reviewing** the provisions of the *Health Care Consent Act* and *Substitute Decisions Act*
- **Regarding** legal capacity, decision-making and guardianship
- **Developing** recommendations for changes to law, policy and practice



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Ontario's Law of Legal Capacity, Decision-making and Guardianship



- Three related statutes, in addition to common law:
 - *Substitute Decisions Act*
 - *Health Care Consent Act*
 - *Mental Health Act*
- These statutes regulate:
 - Capacity to manage property, personal care, and consent to treatment and admission to care facilities
 - Tests for and assessment of legal capacity
 - Statutory and court-appointed guardianship
 - Creation of powers of attorney and advance care planning
 - Duties of substitute decision-makers
 - Dispute resolution

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Why is This Area of the Law Important?



Capacity and guardianship law affects:

- significant portions of the population
- individuals who are vulnerable or at risk
- basic rights and freedoms
- multiple areas of service and life experience



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Development of the Project



- Preliminary Consultations
 - Approximately 70 interviews
 - Lawyers, academics, community and advocacy organizations, ethicists, government, decision-makers, health care providers, service providers
- Development of Project Advisory Group
 - Lawyers, health professionals, academics, government, service providers, advocates and community organizations
 - Advises the LCO on issues, project methods, and the content of reports
- Extensive Research
 - Historical, international, comparative and interdisciplinary research
 - Internal research and Commissioned Papers
- *Discussion Paper and Summary of Issues*
 - Released late June 2014
 - Basis for broad public consultations

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Where is Reform Needed? AN OVERVIEW OF KEY ISSUES

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Key Themes



- **The limits of the law:** The law is rooted in and attempts to address complex medical, familial and social dynamics
- **Striking the right balance:** Law reform in this area must balance many competing needs, goals and challenges. There is no perfect solution.
- **Addressing the implementation gap:** Many positive aspects of the current law are not being put into practice.
- **Considering the appropriate role for family:** What is it appropriate for us to expect from families? From government or service providers?
- **Complexity, fragmentation and cumbersomeness:** how can the system be streamlined and better coordinated, while still addressing a broad range of needs?
- **Identifying reforms that are practical and implementable:** taking into account Ontario's history, culture and current context

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Issue 1: Assessing Legal Capacity



- **Current law:** There are multiple means of assessing capacity, depending on the type of decision and the context
- **Concerns:**
 - Multiple processes are confusing to navigate both for individuals and for service providers
 - Particular processes for assessing capacity may lack sufficient checks and balances for protecting rights
 - Current protections may not be implemented in accordance with the law; training and oversight may be insufficient
- **Options:**
 - Coordination or streamlining of assessment processes
 - Enhanced training or oversight processes for those who assess
 - Navigational or advocacy supports for individuals and families

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Issue 2: Options for Those Needing Assistance with Decision-making



- **Current law:** Where a person lacks “legal capacity”, a substitute is appointed to make necessary decisions
- **Concerns:**
 - Substitute decision-making may unnecessarily limit the autonomy and participation of some individuals
 - “Black and white” approach makes it hard to deal with individual needs for assistance with decisions
- **Options:**
 - Supported decision-making approaches
 - More limited or temporary forms of guardianship

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Issue 3: Who Can Provide Assistance for Decision-making ?



- **Current law:** Most substitute decision-makers are family members or close friends, with the PGT acting mainly as a last resort decision-maker.
- **Concerns:**
 - Changing demographics and social trends result in growing numbers of individuals without family or close friends to act for them.
- **Options:**
 - Regulated for-profit “professional guardians” on a consumer choice approach
 - Creating a greater role for community organizations to either act in a decision-making role or to recruit and oversee individuals
 - Volunteer guardian programs

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Issue 4: Monitoring and Accountability for SDMs



- **Current law:** While the law sets out clear duties for substitutes, practically speaking, there is little oversight of or supports for substitutes
- **Concerns:**
 - Persons under substitute decision-making may be vulnerable to abuse
 - SDMs may not understand their responsibilities
- **Options:**
 - Training and education programs or mechanisms
 - Reformed appointment processes (e.g. for POAs)
 - Increased monitoring or reporting requirements
 - New or expanded complaints or investigation mechanisms

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Issue 5: Resolving Disputes



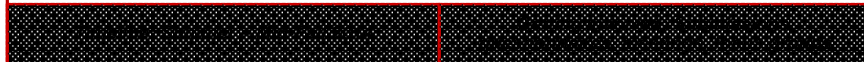
- **Current law:** Issues under the HCCA are mainly dealt with through the CCB; most issues under the SDA are under the jurisdiction of the Court.
- **Concerns:**
 - Accessibility, particularly for court-based processes
 - Power imbalances for individuals seeking to assert their rights
 - Difficulty in addressing entrenched family conflict
- **Options:**
 - Increasing use of alternative dispute resolution approaches
 - Providing greater navigational and advocacy assistance
 - Simplifying processes
 - Moving some Court functions to a tribunal based system

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Getting Involved in the Law Reform Process: MAKING EFFECTIVE CHANGE

Getting Involved

STAGE 3: Public Consultation



STAGE 4: Interim Report & Recommendations



STAGE 5: Final Report & Recommendations



Contributing to the Process 2014 Public Consultations



- Mechanisms:
 - Submissions
 - Consultation Questionnaires
 - Focus groups
 - Roundtable
- Reaching out to:
 - Individuals and families
 - Professionals and institutional stakeholders
 - Government, judiciary
 - Experts and academics

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Questions? Comments?



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