
REFORMING THE LAW OF LEGAL CAPACITY AND DECISION-MAKING

A Law Commission of Ontario Project

March 29, 2016
brainXchange Online Event



The Law Commission of Ontario



■ 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.

■ Core Values:

- Transparency, excellence, integrity, independence and impartiality, innovation, diversity and multidisciplinary, pragmatism, efficiency, and collaboration

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

What Does the Project Address?



- Legislation under review:
 - *Health Care Consent Act* (capacity to consent to treatment)
 - *Substitute Decisions Act* (powers of attorney, guardianship)
 - *Mental Health Act, Part III* (capacity to manage property)
- Considering:
 - Substance of the law
 - Policies and practices applied to implement the law
- Recommendations:
 - Amendments to legislation
 - Improvements to policy and practice to support implementation
 - To both government and non-government actors

Why is This Area of the Law Important?

This area of the law affects:

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

KEY POINT: This area of the law must balance competing needs, principles and objectives

What Are the Big Problems in This Area?



1. Laws are confusing, complex and difficult to navigate; they are often poorly implemented
2. Laws do not adequately address the range of individual needs: people may be over or under-protected
3. Widespread concerns about elder abuse through powers of attorney
4. When things go wrong, it is difficult to get help or a resolution

What are the Contexts for Recommendations?

- The limits of the law
- Striking the right balance
- Addressing the implementation gap.
- Considering the appropriate role for family
- Complexity, fragmentation & cumbersomeness
- Identifying reforms that are practical and implementable

STAGE 1: Project Scoping

EARLY 2013

- Preliminary research
 - Understand the legislative framework and history
 - Identify key areas of concern
 - Understand broader context: international developments, emerging trends, social and demographic pressures
- Preliminary consultations
 - Approximately 70 interviews
 - Lawyers, government, decision-makers, professional bodies, community and advocacy organizations, service providers, advocates, experts and researchers, ethicists
- Creation of Project Advisory Group

STAGE 2: Research and Development of *Discussion Paper*

MID 2013 – MID 2014

■ Extensive Research

- Including historical, international, comparative and interdisciplinary research
- Both internal and expert commissioned papers

■ Discussion Paper

- Released to the public in late June 2014
- Comprehensive review of the issues
- Identified some potential recommendations
- Accompanied by briefer *Summary of Consultation Issues*

STAGE 3: Public Consultation

Summer 2014 – Winter 2015



1. Written submissions
2. Consultation Questionnaires
 - ❑ For those receiving assistance with decision-making
 - ❑ For those providing assistance
3. Focus Groups
 - ❑ 30 groups in a variety of locations
 - ❑ With individuals, family members, professionals & organizations
4. Consultation Forum
 - ❑ Discussion with experts from many disciplines and perspectives
5. Individual interviews

FINAL STAGES: Interim and Final Reports

JANUARY 2016: RELEASE OF INTERIM REPORT

- Based on consultations and ongoing research
- Contained draft analysis and recommendations
- Circulated widely for comment
- Submission deadline March 4, 2016

EARLY 2017: RELEASE OF FINAL REPORT

- Responding to comments received on the Interim Report
- Will contain final recommendations
- Will be provided to government and shared broadly with stakeholders and the community

KEY ISSUES FOR REFORM

Looking for the Way Forward

ISSUE 1:

Pervasive Misapplication of the Law

■ Concerns:

- ❑ Pervasive misunderstanding of the law at all levels: among families, individuals affected, service providers and professionals
- ❑ Difficulty in identifying reliable resources, tools or information
- ❑ Lack of any systemic or coordinating approach to education and oversight

■ Draft Recommendations:

- ❑ Clear statutory responsibilities for education and training
- ❑ Creation of a central clearinghouse for information and tools and resources
- ❑ Duty for health practitioners to provide SDMs with information
- ❑ Strengthened education and training programs for professionals, service providers

ISSUE 2:

Better Protection for Autonomy

■ Concerns:

Individuals may find their ability to decide for themselves unnecessarily limited due to:

- ❑ inflexible appointment processes, shortcomings in assessments or lack of procedural protections
- ❑ inappropriate use of substitute decision-making powers by SDMs
- ❑ lack of flexibility in our approach to legal capacity

■ Draft Recommendations:

- ❑ More limited or temporary forms of substitute decision-making
- ❑ Stronger procedural protections and supports to divert from substitute decision-making
- ❑ Education, support & oversight for substitute decision-makers
- ❑ New approaches, e.g., supported decision-making

ISSUE 3:

Assessing Legal Capacity

■ Concerns:

- ❑ Confusing multiple processes for assessing capacity
- ❑ Complex interactions between capacity assessment processes
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

■ Draft Recommendations:

- ❑ Clear triggers for assessments under the MHA and SDA
- ❑ Barrier removal for Capacity Assessments
- ❑ Clear guidelines for assessments under the HCCA
- ❑ Strengthened rights information protections
- ❑ Strengthened training and oversight for health practitioners

ISSUE 4:

Monitoring and Accountability for Substitute Decision-makers

■ Concerns:

- Persons under substitute decision-making may be vulnerable to abuse
- Substitute decision-makers may not understand their responsibilities and may misuse their powers

■ Draft recommendations:

- Clarifying the requirements for substitute decision-making
- Requirement for POA to sign Statement of Commitment prior to acting
- Option to appoint a “monitor” with statutory powers and responsibilities
- Requirement to distribute a “Notice of Attorney Acting”

ISSUE 5:

Resolving Disputes and Protecting Rights

■ Concerns:

- Accessibility, particularly for court-based processes
- Power imbalances for individuals seeking to assert their rights
- Difficulty in addressing entrenched family conflict

■ Draft recommendations:

- Moving jurisdiction over guardianship and powers of attorney from the courts to a reformed Consent and Capacity Board
- Increasing use of alternative dispute resolution approaches
- Strengthening Legal Aid Ontario supports and “Section 3” counsel
- Creating more options for the PGT upon completion of an investigation

Questions? Comments? Suggestions?



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