
REFORMING THE LAW OF LEGAL CAPACITY AND DECISION-MAKING

The Law Commission of Ontario Project

November 7, 2014

Elder Abuse Ontario GTA Conference

Villa Colombo



■ 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

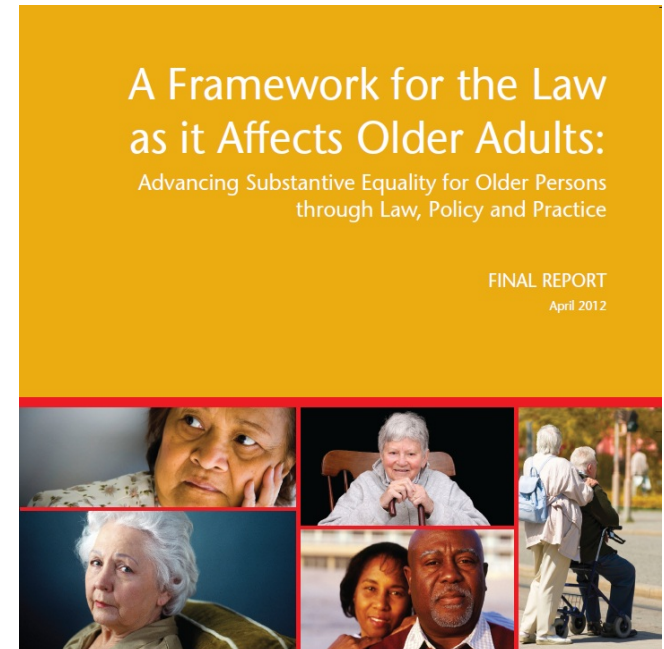
■ Mission:

- Recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility;
- Stimulate critical legal debate;
- Study areas underserved by other research.

Background: The LCO's Framework Projects



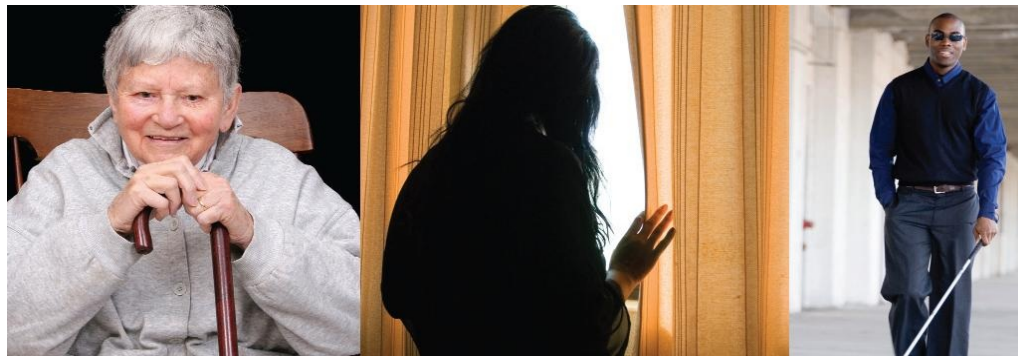
- Evaluative frameworks for law reform
 - Founded on principles and lived experiences
 - Based on broad consultation
 - Completed in 2012
- *Framework for the Law as it Affects Persons with Disabilities*
 - *Framework for the Law as it Affects Older Adults*



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



Project Scope

- Legislation under review:
 - *Health Care Consent Act*
 - *Substitute Decisions Act*
 - *Mental Health Act, Part III*
- Considered only as context:
 - Broader aspects of the *Mental Health Act*
 - PHIPA
 - Common law of capacity and consent
- Recommendations:
 - Amendments to legislation
 - Improvements to policy and practice to support implementation
 - To both government and non-government actors

Areas of Focus

1. **Assessment of capacity**
 - Including tests and assessment mechanisms
2. **Protecting and Promoting Autonomy**
 - Supporting people to make the choices that they can
3. **Appointment processes**
 - Including public and personal appointments
4. **Who may assist with decision-making?**
 - Can we broaden the options?
5. **Monitoring, accountability and prevention of abuse and misuse of SDM powers**
 - Including both abuse and misuse by SDMs and third parties
6. **Dispute resolution and rights enforcement**
 - Including processes under both the HCCA and SDA

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

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

Establishing the Project Advisory Group



- **Role of the Project Advisory Group**
 - Advisory only
 - Provides expert advice on issues and methodology
 - Assists with outreach and consultation
 - Reviews and comments on project documents
- **Composition of the Advisory Group**
 - Wide range of stakeholders and perspectives
 - Includes lawyers, health professionals, academics, government, service providers, advocates and community organizations
 - Includes representation from the CCB

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
- Identifies some potential recommendations
- Accompanied by briefer *Summary of Consultation Issues*

STAGE 3: Public Consultation

JULY – NOVEMBER 2014

- ❑ Public involvement central to the law reform process
- ❑ Consultation assists us to
 - Understand the issues more deeply
 - Identify priorities and approaches for reform
 - Test viability of potential recommendations
- ❑ Approach to consultation is broad and holistic



Public Consultation Methodology



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

FINAL STAGES: Interim and Final Reports

MID 2015: RELEASE OF INTERIM REPORT

- Based on consultations and ongoing research
- Will be reviewed by Advisory Group and approved by LCO's Board of Governors
- Will contain draft analysis and recommendations
- Will be circulated widely for comment

EARLY 2016: RELEASE OF FINAL REPORT

- Responding to comments received on the Interim Report
- Reviewed by Advisory Group and approved by LCO's Board of Governors
- Will contain final recommendations

ISSUE 1: Assessing Legal Capacity

■ Concerns:

- ❑ Multiple processes for assessing capacity are confusing to navigate both for individuals and for service providers
- ❑ Interactions between capacity assessment processes may not be smooth
- ❑ 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

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

■ Options:

- ❑ More limited or temporary forms of substitute decision-making
- ❑ Stronger procedural protections and supports
- ❑ Additional education, support or oversight for substitute decision-makers
- ❑ New decision-making approaches

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

■ Concerns:

- Changing demographics and social trends result in growing numbers of individuals without family or close friends to act for them.
- PGT as decision-maker of last resort may not be the best option for all needs.

■ 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

ISSUE 4: Monitoring and Accountability for SDMs

■ Concerns:

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

■ 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

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

■ 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

ISSUE 6: 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

■ Options:

- ❑ Stronger oversight and remedies to respond to failures to comply
- ❑ Proactive education and training programs for professionals, service providers, SDMs
- ❑ Creation of a central clearinghouse for information and tools and resources
- ❑ Clear statutory responsibilities for education and training

Questions? Comments?



For more information or to get involved:

Website: www.lco-cdo.org

E-mail: LawCommission@lco-cdo.org

Tel: (416) 650-8406

Fax: (416) 650-8418

Executive Director: Patricia Hughes

Head of Project: Lauren Bates