The Right to Legal Capacity and Supported Decision Making for All

A Brief to

The Law Commission of Ontario in Response to:

"Legal Capacity, Decision-Making and Guardianship: Summary of Issues for Consultation"

Submitted By

THE COALITION ON ALTERNATIVES TO GUARDIANSHIP

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October 2014

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Plain Language Summary

Over twenty years ago, People First of Ontario, Community Living Ontario, People First of Canada, and the Canadian Association for Community Living formed a Coalition to create Alternatives to Guardianship in Ontario.

We did so because guardianship and substitute decision making take away people's right to control decisions about their lives.

When the *Substitute Decisions Act* was being adopted, the Government of Ontario heard our call. They did include a 'prohibition' or a 'ban' on court-appointed guardians where an 'alternative' (other way to assist) could be put into place.

There are three main problems with what has happened since:

- The prohibition (ban) only affected for court-appointed guardianship – not statutory guardianship or all the places in the *Health Care Consent Act* where substitute decision makers can be appointed.
- The Government did not take steps needed so that people's support networks and other assistance would be legally recognized. This is what protects us all from substitute decision making. The Government made a commitment to do so, but it did not happen.
- Substitute decision making is still far too much a reality in our lives.

Steps have been taken since in international law and Canadian law that make alternatives a recognized human right:

- The UN Convention on the Rights of Persons with Disabilities (CRPD) was approved (ratified) by the Government of Canada, with the Government of Ontario's support, in 2010.
- The CRPD recognizes
    - A right to decide without discrimination on the basis of disability
    - The duty of governments to make sure people have the supports they need to control decisions in their lives
    - The duty on doctors, banks, and others who enter legal agreements with people to accommodate them in the decision making process.
- The *Gray v. Ontario* legal case on deinstitutionalization in Ontario recognized supported decision making as an 'alternative' under the *Substitute Decisions Act.*
- The Ontario Human Rights Commission has recognized that there is a duty to accommodate people with disabilities in health care and other decision making processes.
- The Select Committee on Developmental Services in Ontario, which has released its final report recognized the problem. The Committee has recommended that a system of supported decision making be implemented in Ontario.

We recommend five main reforms:

A. Rename the Substitute Decisions Act, to include supported decision making, and include principles that recognize the right to legal capacity for all.
B. Recognize the right to legal capacity without discrimination
C. Establish 'Statutory Supported Decision Making'
D. Put into law a process for supported decision making
E. Establish needed safeguards.

We lay out twenty-six specific recommendations to put these reforms into law, policy and practice.

In summary, these recommendations are that the Government of Ontario should reform provincial laws and policies to make sure that:

1. All people have a right to legal capacity – or the right to decide – regardless of their intellectual, mental or cognitive disability.

2. For those who may not be able to make decisions on their own, they should have a right to a support person to assist them:

   a. People should be able to appoint their own support person

   b. Where they are not able to appoint by themselves, people in a relationship of personal trust and commitment to the person should be able to apply to be recognized as their supporters.

3. Decision-making supporters of a person must be legally required to act only according to the wishes of the person, and to assist them in making their decisions.

4. Community support systems are in place across Ontario to:

   a. assist people who need support to develop supported decision-making networks;

   b. provide advocacy services as might be needed for persons to exercise their right to decide;

   c. provide information tools and resources about supported decision making – for individuals, families, support networks, doctors, banks, and lawyers, and the public;

   d. provide public awareness programs about the right to legal capacity and supported decision making for all.

Summary of Recommendations

This Brief outlines five directions for reform and twenty-six recommendations to ensure that the legal regime in Ontario respects, promotes and protects the right to legal capacity to act without discrimination on the basis of disability. Essential to realizing this basic human right will be establishing legal recognition, provision, supports and safeguards for supported decision making.

A. Rename the SDA and Legislate both Purpose and Principles to Guide its Interpretation and Implementation

1. Rename the Act to 'Legal Capacity and Supported Decision Making Act' to reflect an overall purpose to promote the right to legal capacity, to provide safeguards where it cannot be exercised independently, and to ensure access to supported decision making.

2. Establish a purpose and guiding principles for the Act to guide interpretation of the right to legal capacity, and supports as may be needed for this purpose.

B. Recognize a Range of Ways to Exercise Legal Capacity, Without Discrimination on the Basis of Disability

3. Replace the legislated definition of capacity with a definition of what it means to exercise legal capacity consistent with international law and recognize the "will and preferences" approach to grounding legal capacity, in addition to the 'cognitive' approach.

4. Provide legislated recognition for a range of ways to exercise legal capacity:

   (a) Legally independently, to the extent a person is able meet the cognitive tests necessary to translate their will and preferences into legally valid decisions
   (b) Through powers of attorney, as provided for in the SDA
   (c) Through a statutory supported decision-making arrangement – effectively providing for a person to appoint decision-making supporters, or to have them appointed upon application.

5. Recognize that to act legally independently may require supports and accommodations for that purpose.

6. Clarify that the presumption in law is not that all individuals have 'capacity', but rather that they have the capacity to act legally independently, with supports and accommodations as may be required.

7. Recognize supports that may be required for people to exercise legal capacity, through the range of ways recognized in the law.

8. Extend the prohibition of substitute decision making and requirement to recognize an alternative course of action that does not require a finding of incapacity to all areas where incapacity to act legally independently may be alleged under the SDA, Health Care Consent Act and the Mental Health Act.

9. Amend the Alternative Course of Action provision to recognize supports, and establish that the ACA is not just a provision, but a process.

10. Recognize that the provincial government has a role to assist individuals to develop alternative courses of action, as required under Article 12.3 of the UN CRPD.

C. Establish 'Statutory Supported Decision Making'

11. Provide for statutory appointment of decision-making supporters on the basis of a demonstrated personal relationship of trust, personal knowledge and commitment.

12. Legislate duties for decision-making supporters.

13. Establish statutory test of 'best interpretation of will and preferences' rather than 'best interests' as the test for decision-making supporters in situations where there are disputes about how best to interpret a person's will and preferences as the basis for assisting in executing his/her legal agency into specific decisions and agreements.

14. Recognize the duty of other parties to provide accommodation in the decision making process.

15. Provide for protection of liability of third parties for entering agreements with individuals under statutory supported decision making, to the extent they abide by the principles of supported decision making, and respect and accommodate the duties of decision-making supporters.

D. Legislate Needed Mechanisms for Implementation of Alternative Course of Action Assessment and Supported Decision Making

16. Expand the role and mandate of the Public Guardian and Trustee as a fixed point of responsibility in government with responsibility for statutory supported decision making.

17. Require 'alternative course of action' assessment at all points where incapacity for legal independence may be triggered in the SDA, HCCA and MHA.

18. Establish a system of 'ACA Assessors'.

19. Provide for designating community agencies to provide assistance in developing supported decision making arrangements and providing associated supports, independent advocacy and public promotion.

E. Establish Needed Safeguards

20. Establish an Office of the Provincial Advocate for the Right to Legal Capacity.

21. Provide a legislated role for monitors of supported decision making arrangements.

22. Provide for appeal rights – expand the mandate of the Consent and Capacity Board to adjudicate matters related to alternative courses of action and supported decision-making arrangements.

23. Provide for complaints, investigations and interventions related to abuse/neglect, while protecting the right to legal capacity and support. .

24. Provide for safeguards with respect to decisions which could fundamentally affect personal integrity or human dignity for adults with a supported decision-making arrangement.

25. Expand duties of substitute decision makers to include exploration of alternatives to guardianship.

26. Provide for Registration of Supported Decision-Making Agreements.

Introduction

In adopting the 'alternative course of action' provisions of the *Substitute Decisions Act* in 1992, the Ontario Legislative Assembly made a promise to the people of Ontario that real alternatives to guardianship would be available. 'Alternatives' were understood at the time to be the supports needed to assist people to maintain their right to control their personal and property decisions. The provision was designed to address the concerns of our Coalition that people with more significant intellectual, cognitive and psychosocial disabilities would too easily fall under guardianship. The Ontario Attorney General at the time also committed to creating the means by which alternatives could be established and recognized. Those promises were not fulfilled. The alternative course of action provisions have rarely served their intended purpose.

We have waited over twenty years for an opportunity to make sure that real alternatives, in the form of supported decision making, become law and available in Ontario. We believe the Law Commission's initiative on 'Legal Capacity, Decision-Making and Guardianship' provides the first real forum for this purpose since the *Substitute Decisions Act* came into effect. We urge the Law Commission to make strong and bold recommendations for the Government of Ontario on how to ensure practical alternatives to guardianship, that provide for supported decision making, are finally established in Ontario. This Brief is intended to assist in the achievement of that objective.

The 'Coalition on Alternatives to Guardianship' was created in the fall of 1992 by People First of Ontario, the Ontario Association for Community Living (now Community Living Ontario), People First of Canada, and the Canadian Association for Community Living. All four organizations have recently decided to formally re-launch our Coalition in order to ensure that any proposed reforms to the *Substitute Decisions Act* in Ontario provide for real alternatives to guardianship in the form of legally-recognized supported decision making.

With the aging of the population and the growing proportion of people with intellectual, developmental, cognitive and psychosocial disabilities, it is now more urgent than ever before to ensure a system for enabling supports for decision making, rather than growing recourse to substitute decision making, is provided to the citizens of Ontario. That the balance is not yet right in Ontario is clearly acknowledged in the 2014 Final Report of the 'Select Committee on Developmental Services' of the Ontario Legislature. The Select Committee has again recognized the need to ensure people with disabilities are "empowered" and supported to make their own decisions, rather than to have them made *for* them.[1] The Committee fully expects the Law Commission of Ontario to

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[1] Ontario, Legislative Assembly, Select Committee on Development Services, FINAL REPORT INCLUSION AND OPPORTUNITY: A NEW PATH FOR DEVELOPMENTAL SERVICES IN ONTARIO (Toronto: Queen's Park, July 2014), online: http://www.ontla.on.ca/committee-proceedings/committee-reports/files_pdf/SCDSFinalReportEnglish.pdf.

recommend a system of supported decision making, and itself recommends that such a system be established.

The Select Committee's recommendation and our position is now supported in international law with the ratification by Canada in 2010 of the UN 'Convention on the Rights of Persons with Disabilities' (CRPD). The UN treaty body overseeing implementation of Convention issued its first 'General Comment' in April 2014, with a focus on the right to legal capacity, calling for guardianship systems to be replaced by systems of support for decision making, based not on mental capacity, but on recognition and respect for a person's "will and preferences." Canada's report to the UN on its implementation of the CRPD, prepared in collaboration with provincial/territorial governments including the Government of Ontario, acknowledges that "Anyone who requires support in exercising their legal capacity should have access to the support required to do so, subject to appropriate regulation and safeguards."[2]

This Brief outlines our position on the direction the reforms in Ontario should take, and we make specific recommendations for comprehensive reform within the context of the current legal framework in Ontario. The Coalition believes its recommendations would be suitable to apply to all Ontarians. However, they were designed with the history of the SDA coupled with the Coalition's interests at the forefront, and our particular concern for people who have labelled with an intellectual disability.

We very much appreciate the invitation of the Law Commission of Ontario to provide this input.

Background

For over twenty years we have urged governments in Ontario and across Canada to come up with alternatives to guardianship because of our deep and profound belief that guardianship schemes represent a violation of the right to autonomy and self-determination on the basis of mental disability, a prohibited ground of discrimination in the *Canadian Charter of Rights and Freedoms.* Moreover, we believe that placing people under guardianship undermines the basis of their equal respect and dignity, cherished values in Canadian society. It does this by vesting their legal agency and person in another authority.

The Coalition originally formed in 1992 as the Ontario Standing Committee on the Administration of Justice was holding hearings and reviewing the *Substitute Decisions Act*, and preparing to send it back to the Ontario Legislature for third and final reading. Despite numerous appearances and briefs to the Government of Ontario by the Ontario

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[2] Canada, Convention on the Rights of Persons with Disabilities: First Report (2014) online: http://publications.gc.ca/collections/collection_2014/pc-ch/CH37-4-19-2013-eng.pdf.

Association for Community Living, it was clear by the fall of 1992 that the concerns of people with intellectual disabilities and their families were not being heard, that no real alternatives existed in the proposed Bill. With great courage, People First of Ontario and People First of Canada issued a press release on September 21, 1992 calling on the Government to introduce amendments to recognize the supports that people require to make their own decisions. The organizations threatened that their members would camp out on the grounds of the Ontario legislature until they got the assurances "from this government that it will not put forward such an archaic piece of legislation that in effect strips the rights of those deemed incapable of speaking for themselves." The press release quoted Denis Laroche, President of People First of Canada:

> We must make sure that people have support in making decisions from "partners" they know and trust. These partners then would interpret their needs and desires to others. Decision making must occur within trusting relationships and it is essential that proposed legislation reflect the fact that we all make decisions with the help of others.

Within a few hours, People First was contacted by the Attorney General's office committing itself to coming up with a solution. However, while the Ontario Association for Community Living had made calls for supported decision making and outlined its key elements,[3] and the Canadian Association for Community Living had established a Task Force on 'Alternatives to Guardianship' in 1991 and released a major report outlining a legislative framework to put supported decision making into practice,[4] the Attorney General's Office felt that further work would be needed to detail a scheme, beyond what could be done before the Standing Committee completed its work. As a result, it was agreed to introduce into the legislation a new provision establishing a 'prohibition' on guardianship where an 'alternative course of action' was available that would address the need for decisions to be made, and would also avoid a finding of incapacity, a major concern of the Coalition. The alternative course of action (ACA) provision was approved by the Standing Committee in the final hours before it approved the legislative package and it was sent to the Legislature, where it was adopted in December 1992. That provision is now in the legislation with respect to court-appointed guardianship applications with respect to the person and to property.

The Coalition was then funded by the Ministry of Citizenship to develop a proposed set of procedures by which a supported decision making system, as an alternative course of action, could be implemented in Ontario, following the Attorney General's commitment to establish a process to consider how to implement such a system. On

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[3] See, for example, Audrey Cole, "Brief of the Ontario Association for Community Living to the Ontario Guardianship and Advocacy Review Committee" (Toronto: Ontario Association for Community Living, May 1989); and, Ontario Association for Community Living, "Brief to the Standing Committee on the Administration of Justice," (Toronto: Ontario Association for Community Living, January 1992).

[4] Canadian Association for Community Living, REPORT OF THE C.A.C.L. TASK FORCE ON ALTERNATIVES TO GUARDIANSHIP (Toronto: Author, August 1992).

behalf of the Coalition, two legal experts in the field, Orville Endicott and Ken Pike, prepared an extensive set of proposals for implementation in a report titled "From Paternalism to Partnership: Developing Legal Approaches that Reinforce Rather than Disregard the Capacity of Persons With Mental Disabilities to Make Choices."[5] However, the promised process with the Government to consider how procedures would be implemented never materialized.

Drawing on the original work by the members of the Coalition, we take this opportunity to outline key recommendations in response to the Law Commission of Ontario's request for submissions. In addition to earlier briefs and reports that our Coalition members prepared twenty-plus years ago, we are substantially guided in our current recommendations by two extensive pieces of research which draw upon developments in the intervening years, including Canada's ratification of the UN CRPD:

- *Draft Statutory Framework for the Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada* (prepared by the CACL Working Group on Legal Capacity and Supported Decision Making, 2014)
- *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* (by Michael Bach and Lana Kerzner, 2014)

The Coalition's Guiding Principles

In developing our recommendations for reform, we are guided by the Statement of Principles adopted by our Coalition:

Summary Statement

All human beings, by nature, have a will and can make decisions. People who have an intellectual disability may express these decisions in non-traditional ways. Any legal system which deprives individuals of their right to be supported in their decision-making, and which appoints substitute decision-makers (guardians) based on tests of competency, makes people vulnerable and deprives them not only of the right to self-determination but also of other rights.

Principles

1. All individuals, by nature, have a will and can make choices and decisions about their lives.

2. All individuals have the right to make decisions (self-determination).

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[5] Orville Endicott and Kenneth Pike, "From Paternalism to Partnership: Developing Legal Approaches That Reinforce Rather Than Disregard The Capacity Of Persons With Mental Disabilities To Make Choices" Unpublished Paper (Toronto: Ontario Association for Community Living, 1995).

3. Individuals may want help from other persons of their choosing with whom they have trusting relationships, including family members or friends, to make decisions or have them interpreted, and to communicate them to others. This is called supported decision making.

4. Individuals who have an intellectual disability may communicate choices, wishes, likes and dislikes in non-traditional ways which can include actions rather than language. Friends, family members, or others who are trusted by the individual, can help to interpret these decisions.

5. The law must recognize this natural interdependence of people and give status and validation to supported decisions that are made within such trusted, supportive relationships.

6. All adults have the right to make decisions with support or to name a substitute (e.g. by power of attorney) to make decisions for them.

7. Laws that do not recognize supported decision making or that protect other interests at the expense of the individual's right to self-determination discriminate against persons who have an intellectual disability and make them more vulnerable.

8. Individuals should never be assessed to determine competency; decisions should be reviewable if there is concern that the will of the individual is not being respected or that the individual is being exploited.

9. Any legal system which sets up a test of competency to be used to appoint a substitute decision-maker puts the individual at risk of also losing other rights such as the right to marry, the right to vote or the right to enter into contracts.

10. A decision that could not have been made by the individual without support, e.g. consent for non-therapeutic sterilization, experimentation or other non-therapeutic procedures that could offend human dignity, should not be made within supported decision making relationships.

What Do We Mean by an 'Alternative to Guardianship'

At the outset of making specific recommendations, it is essential to be clear on what we mean by an 'alternative course of action'. Courts in Ontario and other jurisdictions in Canada have recognized supports and supported decision-making as an alternative course. Powers of attorney, too, are frequently cited as an alternative course. This is consistent with legislative provisions elsewhere in Canada which directly characterize both supports and planning documents as alternative courses of action. However, courts appear to be willing to accept, as an alternative course, any practical arrangement that will meet the needs of the individual and at the same time avoid guardianship.

Recognizing supports as an 'alternative course of action' is not about engaging in an exercise of creating a finite list of types of supports. A crucial component of supported decision-making is the recognition that each person exercises his/her legal capacity differently. Each person is an individual with unique needs and preferences. Each person, too, accesses different kinds and combinations of supports, in his/her own unique and personal ways. Supports to be recognized as an 'alternative course of action' may include:

- individual planning, service coordination and referral;
- independent advocacy;
- communication and interpretive assistance;
- any form of supported decision making arrangement, whether specifically recognized in legislation or not;
- peer support;
- relationship-building assistance;
- administrative assistance;
- any other support or accommodation considered necessary to assist the adult in exercising control over his or her decisions, or to provide the adult with the conditions needed to develop or regain decision-making capabilities and to exercise his or her right to legal capacity;

We recommend that supported decision-making planning documents be legislatively recognized, as they are in British Columbia, Alberta and Yukon, but with modifications as detailed below. We also recommend the creation of what we call statutory supported decision-making. Each of these would be considered an 'alternative course of action'.

We want to make clear at the outset that we do not consider any form of guardianship or imposed substitute decision-making as an 'alternative course of action'. We reject the notion that limited trusteeships, such as exists in the context of the Ontario Disability Support Program and the Canada Pension Plan, be considered an 'alternative course of action' for the purposes of the SDA.

Submission to the Law Commission on Supported Decision Making and the RDSP: Consent, Consensus and Conscientious Representation

Earlier this year, the Canadian Association for Community Living, Community Living Ontario and Pooran Law made a submission to the Law Commission of Ontario regarding its consultation on the RDSP. That submission outlined key concepts for a framework for supported decision to enable anyone eligible to open an RDSP to do so, regardless of mental disability, and without the costly and demeaning process of being found contractually incapable.[6] The submission also outlined how to ensure protection for third party financial institutions of using an alternative course approach as recommended. Three ways supported decision making could operate to assist a person with a mental disability to open an RDSP were outlined:

- Through decision-making assistance of supporters to assist a person in making the decision and arriving at a valid *consent* to the transaction;
- Where decision-making ability to act independently is further impaired, it was recommended that the supporter would take on a more active role, helping the person and the third party communicate and interpret, thus facilitating a 'meeting of minds' and a *consensus* on proceeding with the transaction;
- For the small minority of persons with mental disabilities unable to participate in a decision-making process where their participation is meaningful, supported decision making would provide for *conscientious representation* of the person' will, needs and interests as expressed by someone with whom the person has a relationship of trust. As stated in the brief: "Conscientious representation implies a deep moral and ethical commitment to the essential personhood of the one being represented."

The directions for reform and specific recommendations presented below build on these recommendations, and outline system elements to give them effect. In the terms of the framework presented below; the person who 'consents' to the transaction would be supported to act 'legally independently.' In this case, supported decision making may be more or less formalized (as provided through procedures recommended in the submission regarding the RDSP and as outlined below), as required to assure third parties of the validity of that consent. Individuals exercising legal capacity through decision-making supporters which facilitate either consensus or conscientious representation would require appointment through the statutory supported decision-making provisions as outlined below.

Directions for Reform and Recommendations

[6] See "Comments of the Canadian Association for Community Living, Community Living Ontario and PooranLaw Professional Corporation on the Discussion Paper of the Law Commission of Ontario on the "Capacity of Adults with Mental Disabilities and the Federal RDSP" " (Toronto: Community Living Toronto, March 7, 2014).

Our Coalition recommends the following directions for law reform, and specific recommendations, in response to the questions for consultation identified by the Law Commission of Ontario. These are drafted with the benefit of extensive research undertaken since our original proposals were developed, and with the guidance of subsequent developments in international law:

We have designed the recommendations in this Brief to merge as easily as possible with the current provisions and framework for decision-making found in the SDA, HCCA and MHA. The Report does not recommend an overhaul of any of these Acts nor any change to their structure.

A. Rename the SDA and Legislate both Purpose and Principles to Guide its Interpretation and Implementation

1. ***Rename the Act to 'Legal Capacity and Supported Decision Making Act' to reflect an overall purpose to promote the right to legal capacity, to provide safeguards where it cannot be exercised independently, and to ensure access to supported decision making.***
2. ***Establish a purpose and guiding principles for the Act to guide interpretation of the right to legal capacity, and supports as may be needed for this purpose.***

Discussion:

We recommend that the *Substitute Decisions Act* be renamed to give fuller expression to its original intention, and to the developments since its adoption that reflect the commitment to respecting, promoting and protecting the right to legal capacity and to supports needed for that purpose. Recognizing 'supported decision making' in the title would serve to provide clear commitment to and promotion of this statutory protection to the right to legal capacity, a status and approach which has been recognized in common law jurisprudence in Ontario in the *Gray v. Ontario* ruling of the Ontario Divisional Court and highlighted below.[7]

It is important to note that, unlike the HCCA, the SDA contains no preamble stating purpose or principles, which would serve to guide interpretation and implementation. The HCCA does include such principles and references enhancement of autonomy and ensuring a significant role of supportive family members.[8] Another example, directly relevant to legal capacity, is the Yukon's *Adult Protection and Decision-Making Act* which contains the following guiding principle:

[7] *Gray v. Ontario*, [*2006*] *OJ. No. 266* (Div. Ct.).
[8] HCCA at s 1(e)

> The Supreme Court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provisions of support and assistance, have been tried or carefully considered.[9]

In this regard, we support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

That a preamble, purpose and/or principles provision be added to an amended and renamed SDA, which would also apply also to alternative course of action provisions recommended below for the HCCA and MHA. These should be broadly written and include provisions affirming the following:

- Respect and enhancement of autonomy
- Recognition of an adult's right to access supports and accommodations to exercise their legal capacity, in ways that maximize their autonomy
- Recognition of the duty to accommodate in the decision-making process
- The court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as, but not limited to, support and assistance, have been tried or carefully considered
- The Public Guardian and Trustee should not become statutory guardian of property unless alternatives, such as, but not limited to, support and assistance, have been tried or carefully considered
- All adults should receive the most effective, but least restrictive and intrusive, form of advocacy, support and assistance to avoid guardianship, and prior to any assessment of capacity is conducted.

This is not a complete set of preamble/purposes/principles that we believe should be included in the legislative framework. The ones recommended here relate specifically to enhancing considerations of alternative courses of action to findings of incapacity and appointment of guardians.

We fully endorse and recommend inclusion of the fuller set of purpose and principles as provided in the CACL *Draft Statutory Framework for the Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada.*

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[9] *Adult Protection and Decision-Making Act*, which is Schedule A to *Decision-Making, Support and Protection to Adults Act*, s.2(d)

B. Recognize a Range of Ways to Exercise Legal Capacity, Without Discrimination on the Basis of Disability

3. ***Replace the legislated definition of capacity with a definition of what it means to exercise legal capacity consistent with international law and recognize the "will and preferences" approach to grounding legal capacity, in addition to the 'cognitive' approach.***
4. ***Provide legislated recognition for a range of ways to exercise legal capacity including:***

    (d) Legally independently, to the extent a person is able meet the cognitive tests necessary to translate their will and preferences into legally valid decisions
    (e) Through powers of attorney, as provided for in the SDA
    (f) Through a statutory supported decision-making arrangement – effectively providing for a person to appoint decision-making supporters, or to have them appointed upon application.

Discussion:

The SDA is currently based on a cognitive approach to capacity, and as such effectively recognizes only one way to exercise legal agency – that of 'legal independence' – the making of decisions by oneself. Thus, the presumption is, as it should be, that all individuals can act legally independently, until otherwise determined. This cognitive approach has been acknowledged in the Ontario Guidelines for Conducting Capacity Assessments as the basis of the SDA. The gatekeeper function these guidelines play, while respectful that some individuals may require supports and accommodations for capacity, recognize this exclusively within a model of legal independence as the only way to exercise legal capacity.

However, the UN CRPD now recognizes that legal capacity to act, which the UN treaty body on the CRPD identifies as 'legal agency', should be based on a person's "will and preferences." As noted in the report, *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario*:

To date, the Committee on the Rights of Persons with Disabilities has issued two General Comments and Concluding Observations on state party reports submitted from nineteen countries.[10] All of those Concluding Observations make reference to the obligation of states parties to establish provision for supported decision making in law, and in sixteen of these reports specific recommendations are made for establishing provision for legal capacity on the basis of a person's "will and preference." The ruling issued on Denmark's state party report is illustrative of this language:

[10] This information is current as of October 10, 2014. General Comments and Concluding Observations of the Committee can found online: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

> The Committee recommends that the State party review the Legal Incapacity and Guardianship Act and introduce into legislation supported decision-making which respects the person's rights, will and preferences, in full conformity with article 12 of the Convention, including the individual's right to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry and to work.[11]

The Committee has distinguished 'mental capacity' and 'legal capacity' in its first General Comment on the CRPD issued in April 2014:

> Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors…[12]

In summary, we recommend that amendments to the SDA would provide for an adult to exercise his/her legal capacity through:

- ***Legal independence with supports and accommodations as needed*** – defined by the 'understand and appreciate' decision-making ability test currently provided in the SDA, adapted to recognize that persons may require decision-making supports and accommodations to meet what remains essentially a mental capacity test;
- ***A Power of Attorney for Property*** – with the decision-making ability test for making this appointment, as provided for in the current legislation;
- ***A Power of Attorney for Personal Care*** – with the reduced threshold decision-making ability test for making this appointment as provided for in the current legislation;
- ***A Supported Decision-Making Arrangement by Appointment in a Planning Document*** – where an adult appoints a decision-making supporter or supporters to assist him/her in some or all areas of property and personal care decisions; and with a decision-making ability test for this appointment similar to the test of appointing a power of attorney for personal care; and/or,
- ***A Supported Decision-Making Arrangement by Application*** – where a person may not be able to appoint decision-making supporters, but has the decision-

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[11] United Nations Committee on the Rights of Persons with Disabilities, "Concluding observations on the initial report of Denmark" (2014), online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fDNK%2fCO%2f1&Lang=en.

[12] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 12, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

making ability to act with intention, and in a manner which can be sufficiently interpreted by a person or persons in his/her life who apply to play the role of decision-making supporter(s), and who meet the criteria as specified in the legislation.

In effect, all these ways of exercising legal capacity could engage and would be protected by 'alternative courses of action' to findings of incapacity and to guardianship. They are not mutually exclusive, and across the lifespan most people will use different ways, or a combination of ways, depending on their needs at any particular phase of their lives.

5. ***Recognize that to act legally independently may require supports and accommodations for that purpose.***
6. ***Clarify that the presumption in law is not that all individuals have 'capacity', but rather that they have the capacity to act legally independently, with supports and accommodations as may be required.***

Discussion:
We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report in the following discussion.

In order to protect against supported decision-making arrangements becoming the expectation for persons with intellectual, cognitive or psychosocial disabilities and to maximize their opportunity and right to act legally independently, we recommend that the law be amended to clarify the presumption of capacity, as capacity to act legally independently. We suggest that this is, in fact, the understanding in both statutory and common law, with the emphasis on decision-making capacity as the 'ability to make decisions for oneself'. The definition of capacity for this purpose should also be defined in a manner to maximize opportunity for persons to meet that test by ensuring, consistent with jurisprudence in capacity-related law, that people have access to the supports and accommodations they may require to meet the test of legal independence.

Within our recommended scheme, the presumption in law would no longer be that persons have 'capacity'; but rather that they have the decision-making ability to act legally independently. This would mean that the person has decision-making abilities defined by existing standards of mental capacity to 'understand and appreciate' the nature and consequences of the decision, and may require some supports and accommodations to enhance that ability for the purposes of acting legally independently. The scheme would be designed and implemented to maintain the ACA prohibitions on findings of incapacity and guardianship where one of these alternatives

could be established, or maintained with the addition of accommodations and/or supports. As discussed below, it would be complemented with a government obligation to ensure at least some proactive steps are taken to explore and establish such alternatives where at all feasible.

If such supports and accommodations are not incorporated into the statutory tests, there is greater risk both of findings of incapacity, as well as a search for alternatives courses of action which may result in more restrictive options than recognizing a person's legal independence. That is, we must be concerned that we are not imposing statutory supported decision-making arrangements on a person for lack of more informal supports and accommodations. Such assistance could enable persons to meet the 'understand and appreciate' test, and maintain their legal independence to make their own decisions.

Given these potential risks and harms, we recommend that statutory tests of legal independence explicitly incorporate recognition that a person may require supports and accommodations to meet the relevant test of capacity.

For this purpose, we recommend drawing upon and adapting the definition of capacity as provided in the Northwest Territories *Guardianship and Trusteeship Act*, which uses the 'understand and appreciate' test as in the Ontario SDA, but defines capacity in a manner that incorporates assistance:

> a) the ability, by himself or herself or with assistance, to understand information that is relevant to making a decision…; and
> b) the ability, by himself or herself or with assistance, to appreciate the reasonably foreseeable consequences of a decision…[13]
> [Emphasis added]

Given the discussion above, and drawing on the test in the Northwest Territories statute, the statutory test of capacity in both the SDA and HCCA could be re-formulated to be a test of legal independence and be stated as follows:

a) The ability, by himself or herself or with assistance and accommodations, to understand information that is relevant to making a decision…;

and

b) the ability, by himself or herself or with assistance and accommodations, to appreciate the reasonably foreseeable consequences of a decision.

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[13] *Guardianship and Trusteeship Act*, S.N.W.T., 1994, c.29, s.12(1). S. 31 of the *Guardianship and Trusteeship Act* contains similar wording, and contains the additional clause, "with assistance".

7. *Recognize supports that may be required for people to exercise legal capacity, through the range of ways recognized in the law.*

The UN treaty body General Comment on Article 12 expands the grounds of legal capacity beyond mental capacity to recognition of a person's will and preferences, and attaches the provision of support to respecting the rights, "will and preferences" of persons:

> Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making… Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others. [14]

The legislation should define what is meant by supports and accommodation for the purpose of the definition of legal capacity. At a minimum, the following should be explicitly recognized:

- independent advocacy
- communication and interpretive assistance
- informal support of family, friends or peers
- support and assistance from third parties, who may be parties to the transaction (such as health care providers or financial institutions) or independent parties
- any other good or service as may be prescribed by the regulations, including government-funded and delivered services.

[14] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 12, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement (last accessed: 16 October 2014).

8. ***Extend the prohibition of substitute decision making and requirement to recognize an alternative course of action that does not require a finding of incapacity, to all areas where incapacity to act legally independently may be alleged under the SDA, Health Care Consent Act and the Mental Health Act.***

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

The same definition of capacity/incapacity is legislatively established across the provisions of the SDA, MHA and HCCA. However, the legislative scheme does not equally afford alleged incapable people the option of arguing that alternatives to substitute decision making exist in each of the instances where the scheme anticipates a possible allegation. That is, when a person's right to decide is removed by a process of statutory guardianship or the HCCA hierarchy, the focus of the inquiry is exclusively on incapacity, as opposed to alternatives. As described by Judith Wahl, in relation to court-ordered guardianship, the judge makes the decision as to whether to order guardianship and the capacity assessments are only part of the evidence that the judge considers. However, assessments under the HCCA or those that trigger statutory guardianship "… can have an almost immediate impact."[15] Thus, an inequity and injustice occurs in that there is no rational basis upon which to justify the availability of an alternative course option in the context of court proceedings, but not in any other context in which substitutes are imposed."

9. ***Amend the Alternative Course of Action provision to recognize supports, and establish that the ACA is not just a provision, but a process.***

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

The wisdom of conceiving of the alternative course of action more as a process, in contrast to a single provision, is not new. The drafters of British Columbia's versions of the *Adult Guardianship Act*, both the 1993 version and the 2007 version, incorporated an alternative course of action process, in the context of both court appointed and statutory guardianship.

[15] Judith Wahl, "Capacity and Capacity Assessment in Ontario" at p 21.

The full set of recommendations in this brief speak to shifting the alternative course of action into a process. To do so in policy and practice, would require a restatement of the provision in the law. Taking guidance from alternative course of action provisions in other Canadian jurisdictions, as provided in *Fulfilling the Promise: Ensuring Alternatives to Guardianship*, we support that report's recommendation that the SDA's alternative course of action provision, in relation to both court appointment of a guardian for property and personal care, be re-drafted along the following lines:

> The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,
>
> a) does not require the court to find the person to be incapable of acting legally independently to manage property/personal care; and
> b) is less restrictive and less intrusive of the person's decision-making rights than the appointment of a guardian.
>
> For the purpose of this provision, 'alternative course of action' is defined as follows:
>
> 'alternative course of action' means alternative ways for an adult to make decisions that may involve the adult:
>
> a) accessing assistance in making decisions with respect to matters relating to his or her person or property, including less intrusive forms of support or assistance in decision-making
> b) making decisions through a legally-recognized supported decision-making arrangement
> c) making decisions through a power of attorney.

10. Recognize that the provincial government has a role to assist individuals to develop alternative courses of action, as required under Article 12.3 of the UN CRPD.

Discussion:

Article 12.3 of the CRPD states that:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

As outlined below, the legislation should provide clear direction and obligation for the government to take such steps, and we recommend they do so by financing and designating community agencies for this purpose. There is no question that harm arises from loss of capacity to act legally independently, harm well recognized in the jurisprudence and in the consultations and reports leading up to the adoption of the

SDA, and now more clearly under international law. It is essential, therefore, that more proactive provisions to fulfill this positive duty are established.

C. Establish 'Statutory Supported Decision Making'

11. Provide for statutory appointment of decision-making supporters on the basis of a demonstrated personal relationship of trust, personal knowledge and commitment.

Discussion:

A main way to give more effect to the ACA provisions across all areas where incapacity to act legally independently may be triggered is to provide for statutory recognition and provision for making supported decision making arrangements. The role of decision-making supporters in relation to their principal, is as agents to assist the person in translating their will and preference into person-centred plans and decisions needed to give effect to those plans, and to execute any necessary agreements for this purpose, including those related to property, health care and other personal decisions. A range of supports may be required to enable valid consent, consensus or conscientious representation: interpretive support, person-centred planning, decision-making assistance, communicative supports to translate a person's will and preferences for third party agreements, administrative supports in the execution of plans and agreements, and personal relationship- building supports to sustain decision-making support capacity for the individual.

As the SDA adapted the law of agency to recognize enduring powers of attorney, effectively it should now be amended again to provide for persons, on specified conditions of being able to express their will and preferences in a manner that at least one other person can understand, to have decision-making supporters appointed and legally recognized. The qualification for this role is that the supporting person(s) is in a demonstrated relationship of trust, personal knowledge and commitment to the person who requires decision-making support. The statutory framework would provide for the individual to appoint, or to have appointed for them, decision making supporters to give effect to their will and preferences through processes of consent, consensus building, or conscientious representation.

The outlines of this approach to supported decision making have been legally recognized in Ontario in *Gray v. Ontario*.[16] In that ruling, the Ontario Divisional Court validated the supported decision-making process put in place for those individuals moving from Rideau Regional Centre to the community. The court explicitly justified the

[16] *Gray v. Ontario*, [*2006*] *OJ. No. 266* (Div. Ct.).

supported decision-making arrangements as "consistent with the words and the intention of section 55(2) [the ACA provision for personal care] of the Act."[17]

Recommended procedures for the statutory appointment process are outlined in the attached *Draft Statutory Framework for the Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada* and in *Fulfilling the Promise: Alternatives to Guardianship in Ontario.*

12. Legislate duties for decision-making supporters.

Discussion:
We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

The duties of guardians and attorneys as set out in the SDA serve the purpose of safeguarding the substitute decision-making relationship. That is, the fact that guardians and attorneys have legislated duties with which to comply requires that they meet standards which attempt to minimize the chance that they will abuse their power, act inappropriately or fail to act within the ambit of the legal relationship created. The SDA also contains consequences for not acting within the legislated duties. It is the need to avoid these legal consequences that, in part, ensures compliance, and acts as a safeguard against wrongdoing by the attorney or guardian.

Given the important role that such legislated duties have the potential to play in safeguarding decision-making relationships, it is equally important that comparable duties be created to govern actions of those acting as supporters in supported decision-making arrangements. Similar and analogous safeguards should be legislatively imposed on supporters as a method of ensuring that they act in accordance with their powers and do not, knowingly or unwittingly, act in a manner that would be abusive or take advantage of the person who they are supporting. Most of the duties of guardians and attorneys as enumerated in the SDA are equally relevant to 'statutory supported decision makers'. We recommend that they be maintained and apply to statutory supported decision making, and include, in particular:

- act diligently, honestly, in good faith and in accordance with all laws and legislation and the principles of the SDA
- be guided by the individual's will and preferences as well as his/her values and beliefs
- invest in and maintain a personal relationship of trust and connection with the adult

[17] [2006] O.J. No. 266 at para 47.

- act in a manner which respects the adult's dignity of risk, without placing him or her in grave and imminent risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects

13. Establish statutory test of 'best interpretation of will and preferences' rather than 'best interests' as the test for decision-making supporters in situations where there are disputes about how best to interpret a person's will and preferences as the basis for assisting in executing his/her legal agency into specific decisions and agreements.

Discussion:

There will be situations where there is 'interpretive indeterminacy' about how to interpret a person's will and preferences for the purpose of guiding decision making and executing agreements. Where a person, his/her decision-making supporters, and/or third parties involved in a potential transaction or legal relationship are not able to arrive consensus about an adequate interpretation of will and preference, first recourse should be to designated community agencies to assist (provisions for which are outlined below). Where substantial interpretive conflict persists, adjudication maybe required to arrive at the best interpretation. As recommended below, this could be addressed through an expanded mandate for the Consent and Capacity Review Board.

In its General Comment on Article 12 released in April 2014,

The UN Committee on the Rights of Persons with disabilities recognizes this principle of 'best interpretation of will and preferences' as an alternative to the 'best interests' principle consistent with a will and preference grounding of the right legal capacity to act.[18]

14. Recognize the duty of other parties to provide accommodation in the decision making process.

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

[18] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 18bis, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

The right to reasonable accommodation is not the same as the right to support to exercise legal capacity. These are separate, but complementary, concepts.[19] The duty to accommodate focuses more on the roles and responsibilities of private third parties and the State, while legal recognition of supporters focuses more on the adult. In international law there is an important feature, too, which distinguishes the right to support and the duty to accommodate. The duty to accommodate is limited by a reasonableness standard, whereas the provision of access to support is not necessarily limited by this standard.[20]"

The recent Ontario Human Rights Commission "Policy on Preventing Discrimination based on Mental Health Disabilities and Addictions"[21] has made the clear connection, in law and policy, between what the duty to accommodate means, and its implications for decision-making. Law and policy reform in this area must occur with Ontario's *Human Rights Code* at the forefront as it has primacy over the SDA, HCCA and MHA. The OHRC Policy makes clear that "…decisions that take place under these pieces of legislation must have regard for the Code and human rights principles,"[22] including the duty of reasonable accommodation. Indeed, the Code has primacy over all other provincial laws in Ontario.[23]

While the prohibition against discrimination and its associated duty to accommodate, are not new in Ontario's legal framework, their applicability to legal capacity is reinforced in the CRPD. Article 5 of the CRPD, 'Equality and non-discrimination', contains two provisions that are particularly relevant to legal capacity, as follows:

> States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

'Reasonable accommodation' is defined in Article 2 of the CRPD as follows: "… necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

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[19] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 34, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

[20] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 12, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

[21] June 18, 2014, online: http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions.

[22] OHRC mental health Policy at p 67.

[23] Ontario's *Human Rights Code*, s.47(2), states that the Code has primacy over other legislation unless the legislation specifically provides that it is to apply despite the Code.

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

The Committee on the Rights of Persons with Disabilities, in its General Comment on Article 12, applies the right to non-discrimination, including the associated right to reasonable accommodation, to the exercise of legal capacity.[24] The General Comment makes clear the role of States Parties in relation to the duty to accommodate in its statement that "States parties are required to make any necessary modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or undue burden."

15. Provide for protection of liability of third parties for entering agreements with individuals under statutory supported decision making, to the extent they abide by the principles of supported decision making, and respect and accommodate the duties of decision-making supporters.

Discussion:

Prior to entering into a relationship that is either legally binding or has legal implications, third parties would be entitled to be provided with an original or notarial copy of a decision-making agreement upon which the adult is relying. As well, third parties would be entitled to rely upon the exercise of a supported decision making arrangement entered into under the proposed legislation as evidence of a valid decision.

D. Legislate Needed Mechanisms for Implementation of Alternative Course of Action Assessment and Supported Decision Making

16. Expand the role and mandate of the Public Guardian and Trustee as a fixed point of responsibility in government with responsibility for statutory supported decision making

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

Legislation must define a fixed point of responsibility within government responsible for assisting people to develop the various forms of supported decision-making arrangements. Ideally, this would be a separate 'Legal Capacity and Support Office' reporting directly to the Legislature.

However, in Ontario's context, and in view of Ontario's current institutional structures that address capacity issues, wholesale institutional re-design would not likely be

[24] United Nations Committee on the Rights of Persons with Disabilities, "General comment No 1 (2014) Article 12: Equal recognition before the law," at paragraph 34, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

feasible. Thus, if the PGT were given the clear mandate to promote alternative courses of action, the PGT could take on this function with a relatively minimal increase in costs.

The expanded role would be to promote and protect the newly created and/or recognized roles and responsibilities in relation to supported decision-making and accommodations. In any event, it would be mandated to promote and protect the right to legal capacity and to assist individuals as well as others involved in decision-making processes – like financial institutions, health care providers, etc. – to meet their obligations to support and accommodate adults in decision-making processes.

The expanded responsibilities of the PGT would include the following:

- Accept, process and decide applications for statutory supported decision-making. This responsibility would mirror the PGT's existing responsibility in relation to applications for statutory guardianship.
- Facilitate the creation of statutory supported decision-making arrangements by engaging 'alternative course of action' (ACA) assessors and Designated Community Agencies – both of which are discussed below.
- Engage ACA assessors as an enhancement to its already existing mandate in relation to investigating situations of serious adverse effects.
- Assist all relevant parties, including individuals, supporters and third parties, to address concerns regarding duties of supporters and duties to accommodate imposed on third parties. This may involve a role for mediation, which is already provided for in the SDA.[25]

17. Require 'alternative course of action' assessment at all points where incapacity for legal independence may be triggered in the SDA, HCCA and MHA

18. Establish a system of 'ACA Assessors'

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario*, and quote and paraphrase that report as follows:

Changing circumstances and loss of certain functional capacity temporarily or permanently are not reasons to automatically trigger a capacity assessment or to deny legal capacity. Rather, they are circumstances which should trigger an assessment of what supports are needed to maintain and exercise legal capacity in the new circumstances. Given the legislative language in the SDA of 'alternative courses of action', we recommend an Alternative Course of Action Assessment ('ACA Assessment'). ACA Assessment would serve as a distinct function, role and

[25] SDA, s. 86.

methodology from the assessments of capacity which currently take place pursuant to the SDA, HCCA and MHA.

As discussed above, current capacity assessment guidelines are focused almost exclusively on testing for mental capacity as individual cognitive capacities, and are not designed to explore alternative courses of action to a finding of incapacity, as provided for under the SDA. While the "Guidelines for Conducting Assessments of Capacity" and capacity assessor training encourage an exploration of least restrictive alternatives, capacity assessors might only be able to provide general information regarding less restrictive alternatives. Assessors may not be aware of all of the available alternatives in a specific community and they are not in a position, nor do they have the legal mandate, to determine which, if any, might be feasible in a given situation.

Fully exploring alternative courses of action to findings of incapacity to act legally independently, and to appointment of substitute decision-makers and guardians, consistent with the more explicit provision of alternative courses of action envisioned in these recommendations, will require a more rigorous and intensive assessment process than is provided for in the current legal regime.

Trigger Points for an Alternative Course of Action assessment and process would include:

- Determinations of capacity/legal independence
- Applications for court-appointed guardianship – ACA assessment would need to accompany applications for court-appointed guardianship to provide evidence in relation to the requirement which prohibits the appointment of guardians where alternative courses exist
- Applications for statutory guardianship – ACA assessment would be engaged by the PGT as part of the process
- Applications for statutory supported decision-making – ACA assessment would be engaged by the PGT as part of the process
- Assist individuals to establish supports for the purpose of creating a supported decision-making planning document
- Investigation conducted by the PGT of serious adverse effects pursuant to the SDA would include an ACA assessment
- Health care decisions governed by the HCCA would involve ACA assessments if needed to address concerns regarding capacity/legal independence and to assist individuals to access supports before the HCCA hierarchy is engaged

Assessing alternative courses of action could entail determining:

- Whether there are reasonable grounds that a person is not legally independent to make a particular decision;
- the extent to which supports and accommodations are being provided, or could be provided, for meeting the test of legal independence;

- what supports already exist in an individual's life for the purpose of facilitating a more formal and legally based supported decision-making arrangement
- what community-based alternatives might be available to develop supports around an individual

This Report recommends the creation of a role for individuals who are designated to conduct ACA Assessments. Given the limitations with the current capacity assessment process, this report recommends a clearly formulated set of guidelines for Alternative Course of Action Assessors ("ACA Assessors"). These would be based on the statutory clarification of alternative courses as proposed above, and a designated ACA assessor role. ACA assessment would have its own set of guidelines and certification procedures, and would provide a broader range of individuals who may or may not be members of regulated health professionals.[26]

Key requirements for ACA assessors would be:

- Demonstrated experience working with at least one or two of the special populations who are most likely to have legal capacity restricted, including those special populations already identified in the Capacity Assessment Guidelines.
- Other minimum educational and experiential qualifications as may be determined
- Knowledge of community resources and options
- Understanding of the range of supports and accommodations required by some individuals to demonstrate capacity, and ways these can be arranged.

In order to put such a system in place:

- The mandate of the existing Capacity Assessment Office could be expanded to include the following functions in relation to ACA assessors, which it already undertakes in relation to capacity assessors:[27]

    - Train ACA assessors
    - Provide ongoing education and consultation to ACA assessors
    - Maintain a roster of ACA assessors
    - Answer inquiries about ACA assessment

- Guidelines, training materials and certification requirements for ACA assessors would be created
- ACA assessment certification could be made available to social workers and other professional staff in health and long-term care facilities to ensure easy and efficient access to assessors and to ACA determination for the range of decisions that may need to be made in those settings.

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[26] That is, members of one of the colleges governed by the RHPA.
[27] Ministry of the Attorney General, "The Capacity Assessment Office: Questions and Answers", http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp.

- ACA assessors could also be available at designated community agencies

19. Provide for designating community agencies to provide assistance in developing supported decision making arrangements and providing associated supports, independent advocacy and public promotion.

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

The legislative framework should provide that Community Agencies be designated by the Minister with statutory responsibility for provision of supports and services to help facilitate and enable people to have broad access to alternative courses of action that meet their individual needs, lifestyles and are sensitive to the communities in which they live and the beliefs and values they hold. Without access to supports and accommodations for decision making, those individuals for whom the alternative course of action provisions should be designed most to benefit will not be able to take advantage of its provision. They will be at substantial risk of having their equality rights to exercise and enjoy legal capacity on an equal basis with others denied. It is essential, therefore, that positive measures be in place to enable access to supports and accommodations needed for alternative courses of action to be given as full effect as possible.

That said, ensuring equal access is not obtained by providing the same service to each individual who may require supports and accommodations. Some individuals may have the needed informal supports already in place in their lives, along with long-standing relationships of personal knowledge with the third parties with whom they enter legal relationships. Together, these may result in access to all the supports and accommodations that person needs to exercise his or her legal capacity. For other individuals, who lack such supportive relationships in their lives, more proactive interventions may be required, starting with an alternative course of action assessment. Depending on the community, the range of supports and alternatives will vary, given the different resources available.

A largely community-based approach is required for ensuring proactive measures for alternative courses of action are in place. This 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. 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.

In this regard, functions of the Community Agencies could include the following:

- Provision of assistance to individuals to arrange supports and accommodations for decision-making
- Provision of assistance to individuals for creation of statutory supported decision-making arrangements
- Provision of independent advocacy
- Provision of ACA assessors
- Provision of specific decision-making supports, for example, communication assistance and interpreters
- Provisions of assistance to third parties in providing accommodations in the decision-making process
- Public education and promotion regarding supported decision-making options and access to related government and community resources

E. Establish Needed Safeguards

20. Establish an Office of the Provincial Advocate for the Right to Legal Capacity

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

Issues of the exercise of legal capacity are only becoming more challenging with the aging of the population, increasing recognition of the rights of persons with disabilities, greater clarity about the duty to accommodate in decision-making processes, and recognition that capacity to understand and appreciate is a fluid and changing faculty.

In order to ensure the maximum opportunity for individuals to exercise their right to legal capacity, and to have recourse to and relief of alternative courses of action less restrictive than appointment of guardians and substitute decision makers, we recommend the establishment of an 'Office of the Provincial Advocate for the Right to Legal Capacity.' Modeled on the existing Ontario Office of the Provincial Advocate for Children and Youth,' and building on the experience in other jurisdictions in Canada of Provincial Advocates for children, seniors, and health advocates, the office would provide both individual and systemic advocacy related to the matters covered in a reformed legal regime along the lines outlined in these recommendations.

Various provisions for rights advice, alternative courses of action, and obligations of various government agencies in respect of legal capacity are currently recognized in the statutory regime, and would be enhanced in envisioned reforms. However, given the complex nature of support and accommodation to exercise legal capacity in a growing number of situations, and given outstanding concerns about the exercise of legal capacity, as most recently expressed in the hearings and the 2014 *Final Report* of the Select Committee on Developmental Services, an advocacy function is critically

needed. This was recognized in the original scheme of the legislation introduced in the 1990s, but the function was later largely removed with the repeal of *The Advocacy Act* in 1996.

Provisions for independent advocacy could be made available for individuals as part of the alternative course of action supports delivered by community agencies, as proposed above. The broader need for advocacy services could be met by establishing a separately mandated Office of the Provincial Advocate, through enabling legislation as with the case of the Office of the Provincial Advocate for Children and Youth. Promoting alternative courses of action could be well served by the creation of such an office, given that an advocacy function has long been recognized as an essential check and balance against inappropriate recourse to restriction of legal capacity for populations already marginalized and vulnerable.

21. Provide a legislated role for monitors of supported decision making arrangements

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

Given that some people are at higher risk of neglect and abuse because of the nature of their disability, isolation, or other factors, some provision should be in place to enable 'monitors' of supported decision-making arrangements to be appointed. The purpose of the role of a monitor is to ensure that the supporters are complying with their duties. The role of monitor could be modelled after that in British Columbia's *Representation Agreement Act.* People, 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 and known to the individual and/or decision-making supporters. Additionally, a roster of paid monitors could be developed for appointment by the OPGT.

An appointment should be made only on request by an adult, supporter, the OPGT or the court where there are reasonable grounds to indicate that this safeguard is required to ensure the decision-making process with and around the adult maintains integrity. A monitor would be independent and act to ensure supporters are fulfilling their statutory obligations. Specific powers and duties to guide actions of monitors should be set out in the legislation, as they are in the *Representation Agreement Act*. These should include respect for the support relationship and abiding by the values, wishes and beliefs that the individual holds. A monitor's role would be to make reasonable efforts to determine whether decision-making supporters are complying with their legislated duties. Similar to the manner in which the role of monitor is fashioned in British Columbia's *Representation Agreement Act*, if the monitor believes that the supporter is not

complying with his/her duties, and the matter cannot be resolved, the monitor should be required to inform the OPGT.

22. Provide for appeal rights – expand the mandate of the Consent and Capacity Board to adjudicate matters related to alternative courses of action and supported decision-making arrangements

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase that report as follows:

The creation of vehicles for giving statutory recognition to supported decision-making will undoubtedly give rise to a number of disputes. An appeals tribunal must be given the mandate to hear appeals on these matters. Ontario's Consent and Capacity Board could have its mandate expanded to address these issues, although this would have resource implications that would need to be considered.

We recommend that Ontario's Consent and Capacity Board be given powers to adjudicate the following types of disputes and appeals:

- decisions of the OPGT regarding establishment of 'statutory supported decision-making', appointment of monitors and its response to situations of serious adverse effects
- disputes in relation to denials of accommodations and supports for exercising legal capacity
- disagreements between supporters about what a person's will and preferences are, or how they apply in the making of a particular decision
- determinations about whether a person meets the test of capacity, that is, is able to act legally independently
- whether supporters are meeting their duties as required by legislation and dictated by the parameters of the supported decision-making arrangement
- disputes regarding ACA assessment determinations

We recommend that the Consent and Capacity Board be required to conduct its processes and hearings in accordance with the following:

- its decisions and actions be guided by the principle of establishing the most autonomy-enhancing, community-based support arrangement possible
- appeals processes and hearings must be fully accessible to those who are most likely to appear before it, including people with intellectual disabilities, cognitive disabilities and psycho-social disabilities
- Consent and Capacity Board adjudicators who are assigned to cases that address alternative course of action matters must have specialized knowledge and expertise in issues of legal capacity and decision-making supports and the decision-making issues of those who are most likely to appear before it,

including people with intellectual disabilities, cognitive disabilities and psycho-social disabilities

- Time frames for holding hearings and rendering decisions must be fast and sensitive to the nature of the issue in question given that many decisions are time-sensitive so a determination in relation to supports, accommodations and the method by which decisions will be made must be made expeditiously.

23. Provide for complaints, investigations and interventions related to abuse/neglect, while protecting the right to legal capacity and support

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase those reports as follows:

Various concerns have been raised in the literature on supported decision making about how best to safeguard the adult from abuse and neglect, what are termed 'serious adverse effects' in the context of the legal regime in Ontario. Appointment of guardians and substitute decision makers is no sure safeguard in and of itself to such occurrence. That said, consideration would need to be given to how safeguards would operate in a regime which gave much clearer recognition of the scope of alternative courses of action including statutory supported decision-making arrangements.

Provision of support to promote and protect the right to legal capacity must be distinct from and independent of procedures for investigating abuse and neglect, but act in concert with those investigations. There must be infrastructure to ensure the adult's right to legal capacity is enhanced to the greatest extent possible in any investigation of abuse and neglect. There must be a balance achieved between the government's duty to intervene and protect, with the obligation to enhance the supports required to assist a person in regaining their self-determination and maximizing the exercise of legal capacity through provision of supports and accommodations.

24. Provide for safeguards with respect to decisions which could fundamentally affect personal integrity or human dignity for adults with a supported decision-making arrangement.

Discussion:

People with statutory supported decision making arrangements are likely to be vulnerable persons by some definition. We recommend the following restrictions and procedures as proposed in the *Draft Statutory Framework for the Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada*:

(1) Where an adult is not able to act legally independently, and has a supported decision making arrangement in place, and decisions which may

fundamentally affect the adult's personal integrity or human dignity are being considered, including:

(a) sterilization that is not medically necessary to protect the adult's health;
(b) removal of tissue from the adult's living body:
    i. for implantation in the body of another living person pursuant to the (relevant Human Tissue and Organ Donation) Act; or
    ii. for medical education or research purposes;
(c) participation by the adult in research or experimental activities, if the participation offers little or no potential benefit to the adult;
(d) despite any objection of the adult, to restrain, move or manage the adult and authorize another person to do these things, if necessary to provide personal care or health care to the adult;
(e) decisions which are likely to place the adult in grave and imminent risk of a situation of serious adverse effects; or
(f) any other matter prescribed in the regulations;

(2) decision-making supporters for the adult must apply to the CCB (under its revised mandate as recommended above) for review and authorization of the decision prior to its execution;

(3) In approving any such applications, the CCB must be satisfied that:
(a) the adult is expressing his or her will and preferences specific to that decision and has demonstrated at least some appreciation and understanding, by him or herself, of the nature and consequences of the decision;
(b) where there appears conflict between the adult's contemporaneously expressed preferences, and a decision-making supporter's assessment of the adult's previously expressed longer-term will, that:
    i. the adult's expressed preferences cohere with a reasonable understanding of the adult's longer-term will, and reasonably correspond to the current context; and
    ii. the decision-making supporters have provided reasonable evidence that the adult's previously expressed longer-term will would require not abiding by the adult's contemporaneously expressed preferences.
(c) in the case of an application for the purposes of subsection 1(d), the decision would be for the sole the benefit of the adult.

(4) Where the CCB makes an order pursuant to subsection (3) that conflicts with the adult's contemporaneously expressed preferences, such an order shall not be deemed to be a decision of the adult.

25. Expand duties of substitute decision makers to include exploration of alternatives to guardianship

Discussion:

Our Coalition imagines a society where guardianship no longer exists. However, consistent with the recommendations we made above, should there be an adherence to guardianship in law in any form, it is essential that the duties of substitute decision makers be expanded to invest in development of alternative courses of action. To that extent, we support the support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase those reports as follows:

It may not be possible at a certain point in time because of lack of resources, or the stage in development of a person's decisional abilities, or because of the fluid nature of capacity to establish a supported decision-making arrangement for a particular individual. Because of its changing and fluctuating nature, therefore, obligations should be established for guardians while undertaking their substitute decision-making role, to continually explore whether alternative courses of action are possible and encourage the individual, consistent with his/her will and preferences, to create support relationships for decision-making. This is one way to ensure that even when a substitute decision maker is appointed, the appointment will be for as short a time as possible with the goal of facilitating the creation of supports and it will not necessarily remain the least restrictive alternative over time.

The statutory obligations in this regard should include appropriate reviews by the OPGT, and provision for referral to community agencies to assist in this process.

For those who may require a substitute decision-maker the aim must always be to assist the person to communicate and develop relationships with others who can support the person. This recommendation is consistent with substitute decision-making, whether court-appointed, statutory, or by virtue of the HCCA hierarchy, being used only as a last resort.

As the guardian discerns the adult's will and preferences, and assists in developing relationships for the adult with others who are committed to developing a trusting relationship with the adult over the longer-term, the guardian is guided by a clearer understanding of the adult's will and preferences. As the situation evolves, the adult may choose to transition to making decisions with supports, or develop the ability to make decisions legally independently.

26. Provide for Registration of Supported Decision-Making Agreements

Discussion:

We support the recommendations of *Fulfilling the Promise: Ensuring Alternatives to Guardianship in Ontario* and quote and paraphrase those reports as follows:

We recommend that consideration be given to establishing a registry of supported decision-making arrangements, for third parties to access, as provided with consent by individuals and their decision-making supporters. A determination would need to be made if this should be a voluntary registry for person who appoint their decision-making supporters, or if, given the reliance by third parties on such agreements in order to ensure validity of decisions, whether such a registry should be mandatory. Where persons apply through the OPGT to be appointed as decision-making supporters, such a registry should likely be mandatory as a safeguard for the adult, the decision-making supporters and third parties relying on the agreement for validity of legal relationships entered into.

Conclusion

A historic step was taken in 1992 when the Ontario Legislature adopted the prohibition on guardianship where needed decisions could be made by an 'alternative course of action' that did not require a finding of incapacity and that was a less restrictive alternative than guardianship. As people labelled with an intellectual disability, their families, advocates and representative organizations, we felt our voices were heard. We believed our vision for a truly inclusive society, where rights, liberty and self-determination would not be denied for lack of supports, was finally becoming more widely shared and understood. We were hopeful that in the subsequent months and years the promise for an inclusive framework of rights and support would be fulfilled, even though those who crafted the 'alternative course of action' provision could not imagine at the outset of this journey all the pieces that would need to be put into place. We trusted the intention and commitment of the Government of Ontario to act, in concert with us, to craft the regulations, policies and practices that would make our now shared vision of inclusive communities and society a reality for all Ontarians.

It is a profound understatement to say that we are disappointed by the failure of the Government to deliver after all these years. We trust that the stories shared at the Select Committee on Developmental Services will make clear what the denial of control over decisions in our lives means in daily life, and how the harm that lays in the wake of this denial diminishes us all.

We have not kept silent in the intervening years. As organizations we have worked to demonstrate what living good and supported lives in the community looks like. We undertook the development of research and drafted statutory models for the right to legal capacity and supported decision making. We worked with our partners and other governments internationally in the development of the UN Convention on the Rights of Persons with Disabilities, and were proud to see the right to legal capacity and supports in decision making fully recognized in international law. More solid ground for our beliefs, values and proposals is now being created as the CRPD is clearly interpreted to make expression of 'will and preferences' a ground of the right to legal capacity. That it should be so, has been an unwavering commitment since we first launched our Coalition. We have worked with our partners in other parts of Canada to see legislation respecting the right to legal capacity and supported decision making now adopted in British Columbia, the Yukon, Manitoba, Alberta and Saskatchewan. We think that some limitations exist in these laws, which is why we have provided such a comprehensive set of recommendations in this brief.

The Law Commission of Ontario now has an historic opportunity to fill out what the alternative course of action should mean, in a manner that is inclusive of all Ontarians, and fully respects international law. We look to you for your leadership, and your partnership. We offer the recommendations in this Brief to assist in this important step in reforming laws in Ontario to more fully and equally realize the right to legal capacity and self-determination for all.