TORONTO

Stakeholder Consultation Results

Reforms to Ontario's Legal Capacity, Decision-Making and Guardianship Laws:

Implications for Toronto's Vulnerable Residents and the Service Providers Who Support Them

May 16, 2016

Section 1: Background:

This report summarizes the results of the May 10, 2016 stakeholder consultation at Toronto City Hall, entitled, *Reforms to Ontario's Legal Capacity, Decision-Making and Guardianship Laws – an Information and Consultation Session for Toronto Service Providers and Stakeholders.*

The objective of the consultation session was to provide feedback to the Law Commission of Ontario, which is examining and recommending reforms to Ontario's legal capacity, decision-making and guardianship laws, and in particular the *Substitute Decisions Act* and the *Health Care Consent Act*. An interim report was completed in October 2015. A final report is being prepared for Summer 2016.

Over 65 individuals, representing over 15 service and advocacy organizations, discussed the LCO's proposed reforms, with a focus on providing implementation advice and exploring the implications of the reforms for Toronto's vulnerable residents and the service providers who support them.

During the consultation session, LCO Senior Lawyer and Project Head, Lauren Bates, presented a summary of the project, with a focus on proposed reforms to the laws. Participants worked in small groups to discuss the various issues and generate feedback for the LCO to consider.

This consultation session was organized by the System Reform Table on Vulnerability in Toronto, which is part of the City of Toronto's *SPIDER* initiative ("Specialized Program for Interdivisional Enhanced Responses to Vulnerability"). The *SPIDER* initiative aims to reduce acutely elevated health and safety risks affecting vulnerable Torontonians, their homes or property, and their neighbours. SPIDER includes an interdisciplinary collaboration table for front-line staff and a system reform table, representing City of Toronto, Toronto Public Health, Toronto Central LHIN, United Way Toronto and York Region, Toronto Community Housing, Cota, and Toronto Police Services.

Representatives of the Toronto Seniors' Forum also contributed actively to the consultation. The mandate of the Toronto Seniors' Forum is to "give a voice to seniors not often heard" and to ensure that the City meets its commitment to provide services equitably to all senior residents.

For more information on the Law Commission of Ontario project, visit:

www.lco-cdo.org/en/capacity-guardianship-interim-report

For more information about the City of Toronto SPIDER initiative, visit:

www.toronto.ca/311/knowledgebase/01/101002792801.html.

Section 2: General Participant Feedback

2.1. The proposed reforms and the concepts and values underpinning them are welcome.

The proposed reforms strike a good balance between protection from harm/support for community and protection of individual rights and autonomy. The direction of the proposed reforms should improve outcomes for individuals and the surrounding community, and should close gaps in service provision, safety, and knowledge. For example, standardizing the rights and education of PoA will empower emergency service providers to do their jobs and for families to understand their scope of responsibility.

2.2. The "devil" will be in the "details" of implementation, and thoughtful work at the implementation phase will be essential for ensuring that the good work in this report results in good outcomes in practice.

Three implementation topics were highlighted as particularly important:

- **Quality Assurance**: Mechanisms will be needed to ensure appropriate and consistent oversight of substitute decision-making practices (by authorized individuals, community agencies, private firms, and government agencies including OPGT). These should include:
  - Eligibility criteria for assigning decision-making authority;
  - Standards of care and responsibilities of decision-makers/Attorneys should be clearly defined;
  - Mechanisms for systematically averting/detecting/addressing abuse and conflict of interest;
  - Clarity around enforcement procedures if problems are detected;
  - Review of regulatory college policies on support for decision-making; and
  - Training and maintaining competency related to decision-making supports and oversight are needed.

- **Liability Protection**: Managing liability for community organizations will be needed.

- **Funding**: Adequate funding to accommodate new staff roles and responsibilities and infrastructure will be needed.

2.3. The proposed reforms in the LCO Report fit together and are interdependent.

All of the reforms should be adopted and implemented together, to create a more coherent system. If the reforms are phased in at different times, this could produce even more fragmented and complex situation.

2.4. Early successes could be achieved by immediately providing better education and information about the law.

Education and creating a "one stop shop" for authoritative information will go a long way, right away, to correcting misunderstanding and potential for abuse. In particular, the rights and duties associated with PoA are very important to explain to potential Attorneys and to those others surrounding the individual.

2.5. Communication about this LCO project and the proposed reforms to the legislation process should be extended to a broader community.

Many participants at this session were unaware of the Law Commission's work on this important issue.

The remainder of this report summarizes feedback that was generated when participants broke into small groups to discuss proposed reforms related to:

- Approaches to Legal Capacity;
- Assessments of Capacity:
- Misuse/Abuse of Power of Attorney;
- Dispute Resolution;
- Expanding Choice of Substitute Decision-Making; and
- Improve Information and Education.

Section 3: Feedback on Proposed Reforms to Legal Capacity

This discussion focused on the proposal that individuals create "support authorizations" to appoint trusted persons to assist them with decision-making. Participants explored the potential risks and benefits of this strategy to support legal capacity.

3.1. The Support Authorization concept is a welcome innovation, if the risks are managed.

It could be very valuable in protecting autonomy for many people. It could save money for the health care system. It brings a social disability lens to the work and the legislation. It is not a solution for everyone, but it could be a very important enhancement to the current situation. In some respects this is how Power of Attorney is being used, but this would formalize the approach, and in some instances reduce the need to assign PoA.

3.2. Managing risks to the client and the person/organization providing support.

These need to be managed, by formalizing a robust monitoring system and by establishing limited liability for the person providing support. Criteria should be created and applied to determine who can and cannot be a support person (people with really great intentions could be terrible support people for decisions and vice versa). A very clear definition of support will be needed, as part of this formalization process.

Section 4: Feedback on Proposed Reforms to Capacity Assessment

In this discussion participants identified practical strategies for removing barriers to high quality capacity assessments and for increasing equity of access.

4.1. The key message from this discussion is that language proficiencies, literacy, ability to focus, etc. should be considered as barriers to *capacity assessment,* not as indicators of *incapacity.*

4.2. How to Remove Barriers and Increase Access to Quality Assessments:

- Assessment services should be covered by OHIP/other government funding to remove financial barriers. This should be an essential service that everyone can access;

- Provide appropriate translation services and literacy supports to remove language barriers. Consider the risks and benefits of a family member providing translation versus a professional translator;

- Assessor should be required to talk to the person being assessed, in the appropriate language and in a culturally appropriate manner;

- Establish assessment standards and regulation to increase consistency and quality of assessments;

- Establish guidelines re: appropriate frequency of assessment testing. Capacity can fluctuate for the senior population; one test may not tell the true story. When assessments are overturned inappropriately, the individual may be left very vulnerable;

- Conduct all relevant assessments at the same time (for property; health);

- Take account of the environment and conditions of the assessment. People are at their best when they are fed, had sleep, positive environment, positive relationship with the assessor. They are more vulnerable when hungry, tired, stressed. For example, hospital assessments may be less accurate because they don't reflect the realities of a person's real life. People may present differently in hospital than they do in community. Hospital-style assessments should be conducted in the person's own living space;

- Create equitable funding to ensure equitable quality of assessments in hospitals versus community;

- Create standards for consistent explanations of the purpose of the assessment;

- Assign a trained independent third party (ies) to attend the assessment to ensure quality. Assessments should not be conducted alone, considering the profound responsibility involved. (Jury vs judge). This could be a barrier for smaller agencies with limited staff;

- Assign an independent third party to provide advice about appealing an assessment. The same person should not conduct the assessment and provide advice about appeals;

- Ensure that basic information in the assessment tool and documentation is up to date (e.g. phone numbers for PGT); and

- Establish a regulatory body to monitor the seven designated groups that can conduct assessments. For example, College of Social Workers has guidelines regarding training for assessment.

Section 5: Feedback on Proposed Reforms to Address Misuse/Abuse of Power of Attorney (PoA)

This discussion focused on proposed reforms to improve the quality of power of attorney practices; particularly the proposal to formalize a "monitoring" function that would oversee power of attorney activities.

5.1. Improving Accountability and Quality

- Create eligibility criteria for PoA, similar to an executor of a will;

- Introduce official forms for authorization of PoA that are identifiable and recognizable. A summary of eligibility criteria and rights and responsibilities of PoA should be printed directly on the official form, with the signature page. This material should complement the introduction of standardized education and information materials;

- Create a POA registration database for Ontario/Canada, and the opportunity to verify records. Sometimes someone identifies themselves as PoA but it is not verifiable. Create mechanisms to protect against forged PoA;

- Create a test to detect if authorization of PoA was voluntary or coerced; and

- Create some clarity of relationship between service providers, clients, and those authorized as PoA. Sometimes the service providers talk directly to the PoA and do not acknowledge the client at all.

5.2 Implementing a "Monitoring" Function over PoA

- A transparent description of the proposed monitoring role and responsibilities would be required;

- Monitoring of PoA decisions might best be a responsibility for subject matter experts (i.e. a health care professional to monitor health decisions; a financial professional to monitor financial decisions);

- Case conferencing and circle of care/coordinated care plans could be effective models for shared monitoring across service providers. Monitoring of PoA could be embedded into circle of care approach. Note: if multiple agencies are involved with a client, accountability for monitoring should be clarified and understood by all parties (who is ultimately responsible);

- There are community models for designing a duty of care for PoA monitoring, such as CCAC's process for identifying and responding to vulnerability; the in-hospital model quickly escalates to the Consent and Capacity Review Board; and

- To a certain extent, service providers are already performing this role, especially with mental health clients.

5.3 Power of Attorney Issues for Persons with Developmental Disabilities and their Family Caregivers

There are some unique PoA considerations for persons with developmental disabilities and their family caregivers. Participants made the following observations and recommendations:

- Assessment of capacity and assessment of developmental disabilities should be better coordinated. Ideal if these tests could be performed by the same assessor;

- Financial barriers to capacity assessment are resulting in parents unable to provide guardianship for their children. Many persons with developmental disabilitiess do not have access to guardianship;

- Ageing parents of a person with a disability creates vulnerability for both parties. Accommodations to address acute vulnerabilities are needed;

Section 6: Feedback on Proposed Reforms Related to Dispute Resolution.

This discussion focused on the need for alternative resolution options. Two priority issues emerged: a need for a collaborative, interdisciplinary and timely alternative to the Capacity and Consent Board, and the need for increased access to legal advice for clients, families, and service providers.

6.1. Create Collaborative, Interdisciplinary, and Timely Alternatives to the Capacity and Consent Board.

- Mediation and dispute resolution supports are badly needed. Currently the Capacity and Consent Board (CCB) is not experienced as a collaborative process. There is the perception that "if you get to the CCB you have done something wrong". If the CCB is considered intimidating, then social support services may be disinclined to bring cases forward. This creates a dangerous situation;

- A tribunal with jurisdiction over both the Substitute Decisions Act and the Health Care Consent Act would be valuable because the issues are invariably complex and interdisciplinary. Some service providers commented that medical evidence and practical experience were not validated or respected at CCB hearings. A clear picture of the situation does not emerge in the court, because social/health perspectives are not included;

- Currently there is little recourse if those authorized as PoA do not show up at the hearings. This should be resolved; and

- Expedited, authoritative resolution of disputes is needed, particularly to respond to emergency and crisis situations and end of life situations. When people hesitate due to lack of knowledge or understanding, vulnerability and risk of harms are heightened.

6.2 Provide More Access to Legal Advice

- This issue is strongly linked to the "education and information" issue;

- Legal Advice is needed for families and service providers: Health professionals are not comfortable providing legal advice to families, although they are often asked. Often service providers are just learning as they go, by calling PGT. Specialized legal supports are needed;

- The actual assessors do not have a legal background – so the process is not balanced. Everyone has a lawyer except for the social worker who is dealing with the people;

- Currently there is no formal process for CCAC nurses to access legal support;

- A risk assessment department may provide support to employees but this is not the same as legal advice about how to proceed; and

- The Occupational Therapy College may provide legal support.

Section 7: Feedback on Proposed Reforms Realted to Expanding Choice for Substitute Decision-Making

This discussion focused on how to implement a substitute decision-maker role for community agencies. There was general agreement that the types of expansion suggested in the report (including involving community agencies and for profit businesses) would be feasible if implementation details were carefully addressed. The three key recommendations were:

(1) To create accountability tools and frameworks to ensure quality;
(2) To take steps to ensure equity of access to expanded substitute decision-making services; and
(3) To build on existing expertise and models that work. The potential tension between strict accountability frameworks and the need for flexible delivery models would need to be addressed.

7.1 Create Accountability Frameworks and Tools to Ensure Quality

- Very clear parameters and definitions of the role will be needed to be defined authoritatively (e.g. standards, guidelines, expectations, liability limitations, oversight procedures, processes for responding to misconduct, for timely and expedient resolution when issues arise);

- Agencies (for profit and non-profit) should be required to apply to take on the role, meet certain standards, and be audited regularly, to ensure quality and accountability. The role should be regulated. As a model, explore licensing and standards for professional fiduciaries. If this role is not tied into a professional, licensed practice, the risks are heightened; and

- If it is a business, regulatory fees should be in place.

7.2 Ensure Equity of Access to this Service

- Geographical locations of agencies will need to be considered to ensure equity of service across the city, across the province;

- Interagency partnerships will be valuable for capacity building and for promoting equity of access to services (for example, partnerships where lead agencies consult and run/support satellite offices). A partnership approach can also build capacity for arms-length oversight, which promotes quality assurance;

- Financial resourcing from government will be required to support expanded staffing and training needs;

- Different populations are served by different agencies with different skills/knowledge. Flexibility in services and service delivery will be appropriate to respond to different needs: e.g. outreach (home visits), mobile offices; satellite sites, etc.;

- Agencies could tailor their SDM services to particular populations (e.g. cultural, religious, and linguistic groups, dementia, developmental delays, youth, LGBT); and

- There is a huge opportunity here to develop a framework for bring services and supports to the community locally.

Case Example: CRA now requires that people bring their documents in person to community tax clinics to get their taxes done. This didn't used to be the case. In response, this year Woodgreen Community Services introduced mobile/outreach tax services to meet clients in their community/buildings.

7.3 Build on Existing Expertise and Models that Work

- Some agencies already have expertise or infrastructure related to this role, or do "bits and pieces". For example, case managers already help with day-to-day decision-making, including budgeting, checking in and following up. This experience should be drawn upon to develop and define a standard of care/scope of responsibility. Starting from "scratch" is not necessary;

- Agencies that have successful program models can be resources to support interagency training/mentoring. Program models that work can be replicated/built on;

- All this development and training work will require funding. The work that agencies already do should be acknowledged and funded; and

- Consider revamping the OPGT infrastructure and mandate so that it works in partnership with community agencies. The work the OPGT does itself needs to be assessed and improved upon.

7.4 Provide Stable Funding

- The government needs to back the commitment to change with additional, stable funding to support longevity and sustainability of programming; and

- There needs to be oversight, a consistent framework and clear direction about how to do this.

7.5 Consider Alternate Models: Microboards and Voluntary Trusteeship Programs

- Micro-boards are an innovative way to avoid the expense of guardianship and excessive agency control; and

- Current voluntary trusteeship programs are far and few between. They offer more autonomy and try to create dialogue about decisions. There is nothing between voluntary trusteeships and the OPGT. This is a huge gap.

Case Example: The cost to incorporate as a microboard is $2500, so one group in Scarborough have banded together to share the cost of the incorporation among multiple families for a housing situation.

Section 8: Feedback on Proposed Reforms Related to Education and Information

This discussion generated three key recommendations:

(1) To provide standardized, authoritative, and relevant information and education;
(2) To introduce standardized, official forms and documentation for PoA authorizations; and
(3) To ensure equitable access to information and education by using diverse delivery channels for different audiences and different settings.

8.1. Provide Standardized, Authoritative, Relevant Information and Education

- First simplify the laws, then disseminate the information: The current laws and systems are too complicated. That is one reason why people don't understand. A standard 2 page synopsis of the legislation is needed;

- Everyone should receive the same information about rights and responsibilities and rules. Standardize the information;

- A "certified" standardized training curriculum is needed, so that a person can receive "certified" training in this domain. Employers should pay for staff to attend the training;

- The Province should fund an information clearinghouse and perhaps run it; and

- Institutions and community agencies should be required to have an assigned staff member/department that is the "go-to" expert on capacity/guardianship issues and can be consulted by staff and clients (e.g. a lawyer or a social worker who has received training in the area and is well-versed in the legal framework).

Case Example: It would be very helpful to have a tool to help identify when your friend/neighbour/family member is becoming less capable, and advice about what to do next when those indications are present. For example, what can be put in place to help a person whose capacity may be diminishing?

8.2. Reinforce the Use of Standardized Information by Introducing Standard, Official Forms and Documentation

- Introduce official forms for PoA that are recognizable;

- A summary of rights and responsibilities of PoA should be printed on the form, with a signature page; and

- Introduce official Do-Not-Resuscitate forms. Currently, institutions may create their own forms.

8.3. Provide Equitable Access to the Information and Education

- Deliver information through diverse channels and settings, to diverse audiences;

- Many different people need information and education about capacity, decision-making, and guardianship affected individuals, family, service providers, friends, neighbours, general public, elected officials, police, government;

- Provide different ways of accessing information: web, paper copies distributed by agencies and by the hospitals. Local information sessions and community discussions should be offered regularly. Settlement communities will benefit from this information because it is new to them;

- Use Plain Language;

- Education and Information should be translated into multiple languages;

- Under AODA, education and information should be made accessible for people facing literacy barriers;

- Information about PoA issues should be included in high school curriculum, as part of health or family studies. It is essential information that everyone should be taught;

- A 24 hour information line would be valuable;

- Information, education and supports for Substitute Decision-Makers should be provided in hospital settings, through independent/neutral sources (not hospital staff). Substitute Decision Makers should not feel coerced/bullied to make decisions without having all the information they need. Substitute Decision Makers should know their rights and responsibilities;

- An online education package for PoA, including a guide or modules would be valuable; and

- Service providers should not also have to go to law school to understand capacity issues. This kind of education could be embedded in the training of social workers, nurses, etc.

PARTICIPATING ORGANIZATIONS (SELECTED)

Canadian Mental Health Association Toronto
Cota
City of Toronto
Good Neighbours Club
Government of Ontario
Reconnect Community Health Services
Sunnybrook Hospital
Toronto Central Community Care Access Centre
Toronto Community Housing
Toronto Public Health
Toronto Transit Commission
University Health Network
Woodgreen Community Services

Prepared by:

Social Policy Analysis and Research Unit
Social Development Finance and Administration Division
City of Toronto

Contact:

Kelly Murphy, Policy Development Officer
416-338-8368
kmurphy@toronto.ca