

# **The Right to Legal Capacity and Supported Decision Making for All**

Final Brief to

The Law Commission of Ontario in Response to:  
Legal Capacity, Decision-Making and Guardianship,  
Interim Report, October 2015

Submitted By:

**THE COALITION ON ALTERNATIVES TO GUARDIANSHIP**

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March 14, 2016

## Introduction

The purpose of this Final Brief is to make recommendations for how the Law Commission of Ontario (LCO) might re-consider the recommendations made in its Interim Report<sup>1</sup>, in a manner which will address the concerns about the legal foundations of the LCO's recommendations, as raised in the expert opinions of Dulcie McCallum, LL.B and Professor Arlene Kanter. These opinions are appended to the Coalition's Preliminary Brief to the LCO.<sup>2</sup> It is the Coalition's submission that at this critical juncture in the LCO's project, it must ensure that its recommendations and approach have a solid foundation in law, both international and domestic. This Brief makes recommendations for how Ontario's current decision-making laws might be reformed in accordance with international legal obligations. In doing so, this Brief also comments upon some of the concerns expressed by the LCO in its Interim Report regarding potential barriers to implementing reforms which recognize an equal right to legal capacity and supported decision-making. We ask the LCO to consider this Final Brief along with the Coalition's October, 2014 Brief<sup>3</sup> and its March 7, 2016 Preliminary Brief.

### **Response to Draft Recommendation 3: The current Ontario approach to legal capacity, based on a functional and cognitive approach, be retained**

While Draft Recommendation 3 states that the functional and cognitive approach is to be retained, the Coalition was pleased to see that the LCO recommended that it be enhanced by recognition of the role that must be played by supports and accommodations. That is, that “.. legal capacity exists where the test for capacity can be met by the individual with the provision of appropriate supports and accommodations short of undue hardship.”<sup>4</sup> This is a positive direction towards recognition of people's right to exercise legal capacity. However, this alone does not address the fundamental concern with Recommendation 3. The approach currently employed in Ontario creates a binary situation wherein a person either is or is not capable, and this binary approach would not change

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<sup>1</sup> Law Commission of Ontario, Legal Capacity, Decision-Making and Guardianship, Interim Report, October, 2015, [LCO Interim Report]

<sup>2</sup> Coalition on Alternatives to Guardianship, Preliminary Brief, submitted to the Law Commission of Ontario on March 7, 2016. [Coalition Preliminary Brief].

<sup>3</sup> Coalition on Alternatives to Guardianship, Brief submitted to the Law Commission of Ontario in response to 'Legal Capacity, Decision-Making and Guardianship: Summary of Issues for Consultation', October, 2014 [Coalition October 2014 Brief]

<sup>4</sup> LCO Interim Report at p.71.

even with the nuanced test recommended by the LCO, which recognizes supports and accommodations.

However, Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) makes clear that persons with disabilities shall enjoy legal capacity on an equal basis with others.<sup>5</sup> Declaring a person incapable because of a lack of cognitive ability makes a discriminatory distinction on the basis of cognitive disability. As expressed by Professor Arlene Kanter, in her expert opinion, "...[t]he cognitive and functional approach to legal capacity adopted by the Law Commission is not consistent with Article 12."<sup>6</sup> Further, she states that Recommendation 3 "...runs counter to the very essence of the prohibition of discrimination found in Article 2 of the CRPD. Indeed as the CRPD Committee's General Comment recognizes, an individual's status as a person with a disability or the existence of an impairment may not be the basis for denial of legal capacity under Article 12."<sup>7</sup>

Dulcie McCallum, in her expert opinion, agrees with Professor Kanter's analysis, and also recognizes the imperative in the Ontario context, as follows:

The requisite legal correction can only be achieved by eliminating reliance on a statutory medical-model cognitive/functional test that creates a threshold to remove legal capacity and replacing it with decision-making legislation that enables everyone to exercise their right to legal capacity with or without reliance on supports, according to choice. There can be little doubt that achieving this in a manner that makes the law uniform, understandable, consistent, constitutional and in compliance with international law will be a major challenge. But given the constitutionally protected right to equality without discrimination on the basis of mental disability in s.15 of the *Charter* and the obligations set out in Articles 5, 9 and 12 of the CRPD, it is not only necessary, it is, in my opinion, the law.<sup>8</sup>

It is thus clear that Ontario is obligated to reform its decision-making laws so as to discontinue its use of the functional and cognitive approach as the exclusive threshold for recognizing legal capacity. While this is admittedly not an easy task, as the LCO has documented in its Interim Report, it is one that must be undertaken and that is achievable.

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<sup>5</sup> Convention on the Rights of Persons with Disabilities, [CRPD], Article 12(2).

<sup>6</sup> Professor Arlene Kanter, Expert Opinion, Appendix 'B' to Coalition Preliminary Brief at p. 11. [Kanter Expert Opinion]

<sup>7</sup> Kanter Expert Opinion, at p. 11.

<sup>8</sup> Dulcie McCallum, Expert Opinion, Appendix 'A' to Coalition Preliminary Brief at p. 47. [McCallum Expert Opinion]

To effectuate a right to legal capacity, people must have a range of options to exercise their legal capacity, as opposed to an ‘all or nothing’ approach. Dulcie McCallum’s opinion urges the LCO to look at legal capacity in new ways and argues that “...the development of legislation with respect to decision-making that respects the right to legal capacity for everyone, regardless of disability, will require taking into account how people with disabilities can be included, supported and accommodated.”<sup>9</sup>

Options for the exercise of legal capacity must allow people who have significant support needs to control their lives in different ways based on their unique circumstances. As such, the Coalition recommends that the test of legal capacity be replaced by a recognition that, in addition to exercising legal capacity based on cognitive ability, exercise of legal capacity may be based on a ‘will and preference’ approach, briefly described below.

Our Preliminary Brief sets out our recommendation for a legal framework which recognizes a range of ways to exercise legal capacity,<sup>10</sup> and draws from the Coalition’s October, 2014 Brief to the LCO for this purpose. In light of Canada’s obligations under the CRPD, and the now authoritative interpretation of what Article 12 requires, we urge the LCO to re-consider its retention of the cognitive and functional approach and replace it with one that incorporates recognition that decisions can be made based on best interpretation of will and preference. This would be consistent with international law and doing so would not run counter to Canada’s Declaration and Reservation. It would simply provide for alternatives to decision-making, along with powers of attorney, and guardianship, the latter being reserved for very rare situations when a person cannot exercise legal capacity through their own understanding and appreciation or via supporters who interpret their will and preferences. This might occur when an individual cannot understand and appreciate on their own, even with supports and accommodations, and there is no one who knows the person and is able to interpret their will and preferences

In accordance with the Coalition’s proposal for reforms to Ontario’s decision-making legislation, Ontario’s legislation should provide for an individual to appoint, or have appointed for them, decision-

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<sup>9</sup> McCallum Expert Opinion at p. 46.

<sup>10</sup> Coalition Preliminary Brief at pages 8-9 and Appendix ‘D’.

making supporters.<sup>11</sup> We acknowledge the LCO's Draft Recommendation 19, providing for individuals to enter into support authorizations, which provides a limited scope for individuals to appoint decision-making supporters. In addition to the appointment of decision-making supporters, the formulation of which is commented upon below, the Coalition recommends provisions which allow supporters to apply to be recognized as decision-making supporters for a person who does not meet the thresholds for exercising legal capacity independently (the functional and cognitive test, with revisions as proposed by the LCO), or for appointing a power of attorney or decision-making supporter. The process would have similarities to guardianship appointments, though the procedures would necessarily differ in some critical aspects to reflect the nature of the supported decision-making relationship and function. As proposed in our framework, and described summarily below, there would be additional safeguards to those currently imposed on guardianship arrangements.

Article 12 and the General Comment on Article 12 recognize that where a person's will and preferences can be reasonably interpreted by others as a basis for directing legal relationships, there is a State Party obligation to recognize this as a legitimate way of exercising the capacity to act.<sup>12</sup> The Coalition's proposals are a practical way of putting that obligation into effect. We respectfully request they be given due consideration.

## **Response to Draft Recommendation 19 relating to Support Authorizations**

### **Scope of Supported Decision-Making: Safeguards and Addressing Potential Abuse**

While the LCO has recommended legal recognition of 'support authorizations', it has recommended that their scope be restricted to reduce the risk of abuse and provide clarity.<sup>13</sup> It is the Coalition's submission that the LCO's approach, even though it allows for a vehicle of supported decision-making, does not do so to the full extent necessary in the context of international legal obligations. It is the Coalition's submission that a much broader recognition in law of supported decision-making arrangements can be achieved, while at the same time legislating safeguards to address concerns of

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<sup>11</sup> Coalition October 2014 Brief at p. 22 – 23.

<sup>12</sup> Committee on the Rights of Persons with Disabilities, Eleventh Session, General Comment No. 1 (2014), Article 12: Equal Recognition before the law, online:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en).

<sup>13</sup> LCO Interim Report at p. 159.

abuse. A detailed discussion of safeguards is set out in the Coalition's October, 2014 Brief. However, here we highlight some critical safeguards in response to the LCO's expressed concerns.

- Supported decision-making vehicles would require additional safeguards for decisions that fundamentally affect the adult's personal integrity or human dignity, such as sterilization that is not medically necessary. For these types of decisions to be effected, an application would have to be made before a Tribunal for review and authorization of the decision.
- Decision-making supporters would be prohibited from supporting an individual in a decision that is likely to place the adult in grave and imminent risk of a situation of serious adverse effects.
- Additional safeguards would exist where less than three supporters are appointed, all supporters are family members, and/or decisions are non-routine in nature (i.e. major property or health care decisions).
  - 3<sup>rd</sup> party attestation by affidavit of demonstrated relationship of trust, personal knowledge of the person, and commitment and ability of supporter to abide by legislated duties.
  - Affidavit of decision-making supporter(s) that he/she has abided by legislated duties.

The LCO's form of 'support authorization' limits decisions covered by these authorizations to day-to-day, basic routine decisions related to personal care and property. The Coalition understands that this type of limitation can act as a safeguard. However, the Coalition does not support such a limitation as it limits the usefulness of these vehicles and leaves those with certain disabilities back in the realm of guardianship for non-day-to-day decisions. Accordingly, the Coalition recommends instead that a much broader range of decisions be covered and with enhanced safeguards, as set out above and further detailed in its October, 2014 Brief.

The Coalition agrees with the LCO's recommendations relating to clarity of duties of supporters, mandatory role of monitors and mechanisms for oversight, compliance and dispute resolution.

Despite the above, the Coalition notes that its collective research regarding supported decision-making vehicles in other Canadian jurisdictions has not uncovered any particular concerns of abuse

specific to supported decision-making as compared to substitute decision-making. This does not mean to say that additional safeguards are not warranted, rather that the inclusion of additional safeguards, and a well-designed system, should be sufficient comfort to proceed with fulsome legislative recognition of supported decision-making vehicles.

### **Relevance of Supported Decision-Making for People with Disabilities**

In the Interim Report the LCO notes that "...the concept of supported decision-making has deep roots in the community living movement and in the experiences of individuals with intellectual disabilities and their families..."<sup>14</sup> Despite this, the Coalition wishes to dispel any myths that supported decision-making, as a vehicle for exercising legal capacity, is of relevance and importance only to the community living movement. Dulcie McCallum was a member of Canada's official delegation to the United Nations Ad Hoc Committee mandated to develop the CRPD and was intimately involved in the CRPD deliberations.<sup>15</sup> In her expert opinion she details the unprecedented role that civil society played at the CRPD negotiations.<sup>16</sup> Civil society was organized at the United Nations as the International Disability Caucus, a network of global, regional and national organizations of people with disabilities and allied non-governmental organizations. Her description of the evolution of the text of Article 12 makes clear that the movement for equal recognition of legal capacity was cross-disability. The issue of legal capacity and supported decision-making was based broadly in the disability community and not limited to the community living movement. Thus, while it is true that equal recognition of legal capacity and supported decision-making is a priority to the community living movement, its significance is by no means limited to this sector. Recognition in Ontario's laws of an equal right to legal capacity will meet the needs, and be welcomed, and indeed celebrated, by many people with disabilities.

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<sup>14</sup> LCO Interim Report at p. 135.

<sup>15</sup> McCallum Expert Opinion at p. 1.

<sup>16</sup> McCallum Expert Opinion at pages 16 – 19.

## Summary and Conclusion

In summary, the Coalition urges the LCO to take seriously the expert opinions of Dulcie McCallum and Professor Arlene Kanter, and re-draft its recommendations so they are consistent with both domestic and international law obligations. More specifically, we make the following recommendations in both the Preliminary Brief and this Final Brief:

1. Ontario's decision-making laws should be reformed so as to discontinue its use of the functional and cognitive approach as the exclusive threshold for recognizing legal capacity.
2. To effectuate a right to legal capacity Ontario's decision-making laws must recognize a range of ways to exercise legal capacity, which allow people in different circumstances and with significant support needs to control their lives in different ways
3. Ontario's decision-making laws should provide for supported decision-making in two ways:
  - a. Individual appointments of supporters
  - b. Application by supporters to be legally recognized as decision-making supporters
4. Sufficient safeguards can be created to protect against abuse and risk with supported decision-making vehicles.
5. Recognition of supported decision-making in law incorporates a recognition that decisions can be made based on best interpretation of will and preference.
6. The LCO should make recommendations for immediate law reform consistent with the CRPD as the rights provided for under Article 12 are not subject to progressive realization.