

**Brief to the Attorney General of Ontario  
regarding the Law Commission of Ontario report  
*Capacity and Legal Representation for the Federal RDSP***

**Introduction**

Since the introduction of the Registered Disability Support Plan (RDSP) in 2008, many people have faced barriers to opening a plan as they have been unable to meet the legislated requirement of “contractual competency”. While some financial institutions showed a degree of flexibility in interpreting this requirement, there were still many people told that they would need to have a substitute decision maker appointed in order to meet the competency threshold. Many were unwilling to surrender their decision making to a guardian and were therefor blocked from accessing this important financial instrument.

To facilitate greater access to the RDSP for those who could not meet the threshold of contractual competency, the federal government introduced a temporary measure allowing a parent or spouse of an individual to act on the person’s behalf in opening a plan. This measure did improve access for many, but was time limited; provincial governments were told that the measure would end in 2016 by which time they were expected to have worked out a mechanism that would address the problem at a provincial level.

Community Living Ontario met with the Attorney General and asked for action to develop a mechanism before the 2016 deadline. We were pleased with the announcement that the Law Commission of Ontario had been asked to undertake an expedited process to study this matter and make recommendations. Now that the Law Commission’s report has been presented to the Attorney General, Community Living Ontario wishes to share its thoughts on the recommendations that came forward.

Community Living Ontario has long advocated for changes to the *Substitute Decisions Act* that would ensure that all people have the right to enjoy legal capacity on an equal basis and be supported to exercise that legal capacity. This is a provision that is now embedded in international law through Article 12 of the *UN Convention on the Rights of Persons with Disabilities*. In other jurisdictions, including some in Canada, progress has been made to advance these rights. The Ontario *Substitute Decisions Act* (s. 22(3) and s. 55(2)) include provisions that guard against unnecessary findings of incapacity and appointments of guardians, either for property or personal care. These provisions, however, have been seldom invoked and have been largely ineffective in providing a safeguard against guardianship orders.

Community Living Ontario has called for the establishment of a new legislative framework that would provide true alternatives to guardianship through supported decision making. We were delighted when the Law Commission undertook a broad study of the existing legal frameworks here in Ontario and we have been working closely with the Commission to explore this complex matter. We are hopeful that the work currently underway will help describe a reform process that will update our current legislative framework and bring it in line with the provisions of the UN Convention.

### **Our position on the Law Commission Report on accessing the RDSP**

While that broader study by the Law Commission of capacity law is still underway, we appreciate the superb work that the Commission has done in considering the question of capacity and legal representation for the RDSP. The approach outlined in the final report does not constitute a fully recognized supported decision making framework. It does, nevertheless, outline procedures that would allow many who may currently be deemed not to be contractually competent to open and manage an RDSP while maintaining a greater degree of control over their decision making and avoid the blunt instrument of guardianship.

We will first outline our reasons for supporting most of what has been proposed by the Law Commission. We will then outline the recommendations which we oppose.

#### **Law Commission Recommendation 1**

The primary recommendation proposed by the Law Commission is that people who are deemed to not be contractually competent be provided an opportunity to appoint an RDSP legal representative to assist them in opening and managing an RDSP. This approach respects the right of a person to seek out a trusted individual to assist them with their decision making and is consistent with the kind of reform that Community Living Ontario is seeking overall.

#### **Law Commission Recommendations 2 & 3**

The next set of recommendations relate to the mechanism for appointing an RDSP legal representative. The Law Commission has recommended two possible approaches for the government's consideration. We recommend against adoption of the approach suggested in recommendation 2 of using the existing Ontario provisions for granting or revoking powers of attorney. We know from experience that many people who have an intellectual disability have a problem meeting the threshold for granting or revoking powers of attorney. We encourage the government to implement the alternate provision outlined in recommendation 3 of adopting the provisions described in the British Columbia *Representation Agreement Act*. These provisions consist of factors including the communication of a desire to have a representative, the expression of approval, and, the existence of a relationship with the representative that is characterized by trust. The approach used within the BC representation agreement mechanism

represents a threshold that can be met by far more people while ensuring reasonable safeguards.

### **Law Commission Recommendations 4, 5, 9 & 10**

Community Living Ontario supports most of the recommendations outlined in recommendation 4 pertaining to the features of the personal appointment process with the exception of 4(d) which we will discuss below. Likewise, we support recommendations 5, 9 and 10 which deal with third party exemption from liability (5), public legal education (9) and conflict of laws provision (10).

### **Law Commission Recommendation 4(d)**

Community Living Ontario does not support recommendation 4(d). This provision requires the RDSP legal representative to formulate an opinion with respect to the adult's legal capacity to manage a payment out of the RDSP, prior to requesting that payments be made to the adult. The RDSP legal representative is expected to provide the financial institution a signed statement indicating the person has the capacity to manage the payment out. Otherwise, the representative shall not request the payment out, or consider options available under the Substitute Decisions Act.

A key objective of this law reform exercise was to find a way forward for those who wished to access an RDSP but were unwilling to surrender their decision making rights to a guardian in order to do so. While most of the Law Commission recommendations facilitate this outcome, recommendation 4(d) gives unreasonable powers to the RDSP legal representative that could result in the application of a guardian. Since an RDSP legal representative would typically be appointed to open the plan in cases where the individual is deemed to not have the contractually competency to act independently, it is difficult to understand under what circumstances the legal representative could reasonably assess that the individual had the competency to independently manage a payment out. It is therefore logical to predict that the assessment would usually, if not always, be that contractual competency did not exist. Therefore if the legal representative chooses to proceed with a payment out, the provisions of the *Substitute Decisions Act* will be considered, placing the individual at considerable risk of having a guardian appointed against his or her will. This is an unreasonable way to proceed. It requires the RDSP legal representative to make an assessment of the person's capacity which he or she is not likely qualified to make and it poses a high risk of the individual falling under guardianship.

It was our understanding that the Law Commission study of RDSP was going to consider mechanisms for opening and managing an RDSP, leaving the question of making payments out of the RDSP to be addressed once the broader Law Commission study of capacity has been completed and more robust mechanisms for decision making support can be put in place. We

recommend that the government not implement recommendation 4(d) and address the question of RDSP withdrawals at a later time, especially given that the same issues apply to disbursements of funds from various other financial instruments to individuals who may be deemed to lack capacity.

### **Law Commission Recommendation 6 - 8**

Recommendations 6 through 8 deal with the role that community organizations might play in acting as an RDSP legal representative. In our discussions with the Law Commission as it studied the RDSP, we understood that consideration was being given to recommending that organizations in the developmental services sector be allowed to act as RDSP legal representatives. It was argued that provisions contained in the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act 2008* afford appropriate legislative and regulatory safeguards to allow agencies funded through that legislation to appropriately play this role. If enacted, this recommendation would allow local agencies of Community Living to act as RDSP legal representatives. Our advice to the Law Commission was that we did not see this as an appropriate role for our local agencies. It creates unreasonable liability for the agency and has the potential to change the relationship that agencies have with the people for whom they provide support given the inherent conflict of interest. Despite our advice, we understood that the Law Commission was to include the recommendation to allow developmental service agencies to act as an RDSP legal representative. We were disappointed to see in the final report that not only was that recommendation included, but that it had been expanded to include a recommendation for the government to implement a process to designate other types of community agencies to play this role.

We strongly recommend against the implementation of recommendations 6 through 9.

### **In conclusion**

We thank the Attorney General for the opportunity to present our views on the recommendations of the Law Commission regarding *Capacity and Legal Representation for the Federal RDSP*. We applaud the Ontario Law Commission for its impressive work on this complicated issue and thank it for working so quickly to get its recommendations before the government. With the exception of the few items which we have outlined in this paper, we believe that the Commission has identified the most appropriate path forward. While the recommendations that have been made will not ensure access to every person who wishes to open an RDSP without a guardian, it will open the door for many who would otherwise be excluded. We ask that the government act quickly to implement the recommendations of the report other than those we have indicated given that the 2016 deadline is quickly approaching. We offer any assistance that we might give to make this happen.