



Report on the  
Review of the  
**Adult Capacity and  
Decision-making Act**

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# Summary

This is the report of the working group on the statutory review of the *Nova Scotia Adult Capacity and Decision-making Act* (ACDMA). The working group undertook the review on behalf of the Minister of Justice, pursuant to section 71 of the Act. The working group comprised representatives from the Departments of Justice, Health and Wellness, Community Services and Seniors and Long Term Care, as well as the Public Trustee's office..

The ACDMA came into force in December of 2017. It provides for the appointment, by a court, of a representative to make decisions for someone who is found to be incapable of making decisions for themselves.

The ACDMA replaced the *Incompetent Persons Act*, which was declared unconstitutional by the Nova Scotia Supreme Court in July of 2016. The ACDMA replaced the 'all-or-nothing' concept of decision-making capacity in the *Incompetent Persons Act* with a more modern, decision-specific model, recognizing that a person may be incapable of making decisions in some areas but not in others. The ACDMA included a number of supportive principles to ensure that an adult who is the subject of a representation order is nevertheless supported in exercising their continuing autonomy. A number of protective measures were adopted, including giving the Public Trustee's office the ability to investigate complaints.

The working group designed a consultation plan, including a public survey and focus groups with affected stakeholders. 190 surveys were completed. Eighteen focus groups were held with a total of 130 participants.

The working group worked with the Department of Justice to examine all ACDMA court files, for the purpose of gathering aggregate statistical data. The file review found that the majority applications concerned older adults with dementia-related illness, though a sizeable number concerned young people entering adulthood. A majority of the adults who were the subject of an application were female. Most applications were brought by the children, parents or spouse of the adult.

The Act requires the court to grant an order only in areas where the adult is shown to be incapable, and where decisions need to be made for the adult. The court granted full authority over all decision-making areas in approximately one half of all files.

Through the consultation, the working group heard that there is general support for the principles and underlying values of the Act. In particular, respondents appreciated the Act's decision-specific concept of capacity, the recognition that an adult may be capable of making decisions with support, and the requirements to support an adult's continuing autonomy notwithstanding the adult's legal incapacity.

There was concern, however, that the Act's commitments to supportive principles and least intrusive interventions were not having their intended effect in all cases, because of a lack of effective implementation. In particular, appointed representatives have few resources to educate them about their obligations under the Act. There also appears to be a need to train lawyers, judges and physicians about the Act's underlying values and commitments.

The working group also heard that the Act's positive changes will have limited effect, because other legislation which relates to legal capacity, and which affects many more people, still relies on older concepts.

There was significant concern about the complexity and cost of ACDMA applications, and the time it takes to get an order. The working group heard that most people required the assistance of a lawyer, at a substantial cost. The requirement for a bond requires further expense and effort.

Some respondents wondered whether it was necessary to have the applications heard in a formal court setting, for what are typically uncontested applications to be appointed to assist a loved one. As well, there was concern that judges generally lack expertise in mental capacity issues.

Many people were unsure about how the Act relates to other capacity legislation, such as the *Personal Directives Act*.

There was a general concern that in many cases the adult's interests will not be independently represented in the proceeding – in most cases the applicant is the only party to lead evidence. Some respondents pointed out that while the adult is entitled to independent legal counsel, practically speaking in many cases it will be difficult for vulnerable adults with capacity issues to access a lawyer.

The working group heard significant concerns about capacity assessments. Some people reported difficulty in finding an assessor. The Public Trustee has trained a roster of capacity assessors but many are unaware of the roster, and the trained assessors report being under-utilized.

There were also concerns about the quality of some capacity assessments, given the significant interests at stake. As well, there is a need to ensure that supports are available for adults undergoing a capacity assessment, in order to demonstrate their capacity to the fullest extent possible.

During the consultations, participants and survey respondents were asked about supported decision-making. This is an alternative to substitute decision-making, such as under an ACDMA representation order. Supported decision-making arrangements allow an adult to receive help in making and communicating decisions. Some jurisdictions have adopted formal supported-decision-making legislation, to recognize the supporter's role and to ensure there are effective safeguards against abuse.

Respondents were generally in favour of supported decision-making, while expressing concern about the possibility of abuse. There was not support for any particular model, but there was a general desire to see formal supported decision-making legislation in Nova Scotia, to provide a less intrusive option for some adults who would otherwise require a representation order.

## 1.1. List of Recommendations

The working group makes the following recommendations:

1. Nova Scotia's capacity laws should be reviewed to ensure that they reflect modern concepts of capacity and a commitment to greater support for persons with cognitive disabilities, to enable their equal right to decision-making autonomy as members of the community to the greatest extent possible.
2. The review should include consideration of a monitoring system, which would regularly check in with adults and their substitute decision-makers under various capacity-related legislation. The review should include consideration of aversive stimulus treatments.
3. The government should examine options to provide greater access to education, training, and other support services regarding Nova Scotia's capacity laws. In developing these options, consideration should be given to ease of access, such as having a single point of contact accessible through multiple channels. This work should include engagement with diverse stakeholders and inclusive participation of those most impacted.
4. A broad range of education and training opportunities should be developed for various groups affected by capacity laws in general – especially adults who may be subject to an ACDMA application or order, prospective ACDMA applicants and appointed representatives, but also professionals and agencies who work with them.
5. Navigation services should be established to support adults facing ACDMA proceedings, and applicants who need assistance with preparing an application. Navigation services should be able to refer families to counselling and dispute resolution services. They should also offer to connect adults with independent legal counsel, including services offered by Nova Scotia Legal Aid, and where the adult wishes, arrange a consultation.
6. The Public Trustee's office should identify and make contact with adults who remain subject to orders granted under the former *Incompetent Persons Act*, in order to educate the guardian and, as appropriate, the adult, as to the significant rights and duties that apply to them under the ACDMA. This should include identifying circumstances that require a review of the order by the court, and making an application for such review where necessary.

7. Options should be explored for a specialized decision-making body outside the traditional court system to decide consent and capacity matters under Nova Scotia laws. This would include a review of models in other jurisdictions.
8. A litigation guardian should be appointed for an adult who is incapable of instructing counsel in an ACDMA proceeding. The litigation guardian should be mindful of the duties to support and represent the adult's continuing autonomy, rather than making decisions on the basis of the litigation guardian's view of the adult's best interests. Options to ensure that there are non-interested persons available to act as litigation guardians should be explored.
9. The court should be permitted to waive the bond requirement for a representative with authority over financial matters, without reference to a monetary threshold, provided the court is satisfied that alternative safeguards are or will be in place, and having regard to a defined list of factors, including the extent to which the adult's personal property was accumulated through transfers without consideration by the proposed representative.
10. The regulations under the Act should be amended to specify that a vulnerable sector check in respect of a proposed representative or alternate representative must be dated no more than two months before the application is filed with the court.
11. The time limit to mail a copy of the notice of application to the extended list of interested persons in subsection 5(5) of the Act should be the same as the time limit to serve notice of the application upon the other parties as provided by subsection 5(4).
12. The Act should provide that documents required to be filed as part of an application – e.g., the representation plan, the capacity assessment, vulnerable sector checks - must be proved by affidavit and filed as part of the affidavit.
13. A set of non-binding sample forms for ACDMA documents that are not prescribed by the Minister should be developed. The forms would be published by the Public Trustee's office.
14. The Act should be amended to require that the Public Trustee be added as a party to ACDMA proceedings.

15. A concerted effort should be undertaken, through multiple channels, to raise awareness of the roster of trained capacity assessors maintained by the Public Trustee's office.
16. The capacity assessment report form should be reviewed, to clarify and streamline its presentation, to bring it into alignment with the Act, and generally to ensure that adults are given the support they need to best demonstrate their capacity.
17. To reduce confusion with other capacity-related forms under other legislation, the capacity assessment report form should not be called "Form 1".
18. Ways to improve the performance of capacity assessments by physicians should be explored with relevant stakeholders. Education and training should be offered, including the development of a guide to conducting a capacity assessment.
19. Ways to provide greater supports to adults during capacity assessments and more generally should be explored.
20. The guide to conducting capacity assessments should include a section on screening, in advance of an assessment, including guidelines on how to apply the necessity standard in subsection 12(2) of the Act. That topic should be covered in assessment training as well.
21. The guide to conducting capacity assessments should include a section on when and how to seek personal information about the adult from external sources. That topic should be covered in assessment training as well.

22. The capacity assessment report form should provide space for the assessor to describe any general observations or concerns about the proposed appointment.
23. Through legislation or otherwise, assessors should be enabled to disclose concerns to the Public Trustee's office.
24. Section 9 of the regulations should be amended to add the right to legal counsel as part of the assessor's initial advice to the adult. The capacity assessment form should be amended accordingly.
25. Meaningful and accessible engagement with diverse stakeholders and inclusive participation of those most impacted should be undertaken in relation to all of the foregoing recommended activities as appropriate.
26. Nova Scotia should engage with a diverse group of stakeholders to examine options for recognizing formal supported decision-making arrangements in legislation.





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