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

NOVA SCOTIA

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Acknowledgements

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Thank you also to the members of the External Advisory Panel for the passion, perspectives and knowledge they willingly shared, always with the goal of improving the lives of Nova Scotians impacted by this legislation. It was a pleasure and honour to discuss the complex issues that arose through this review with each of you:

Prof. Sheila Wildeman	Schulich School of Law, Dalhousie University
Patricia Neves	Inclusion Nova Scotia
Jeannie Whidden	People First
Cyndi Carruthers	People First
Jeanne Desveaux, QC	The Law Practice of Jeanne Desveaux Inc.
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Charlene Moore, QC	Nova Scotia Legal Aid
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Contents

1. 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.

2. Background

2.1. The *Incompetent Persons Act*

The *Incompetent Persons Act* was Nova Scotia's guardianship law until 2017. The Act allowed the court to appoint a guardian for a person who, because of an "infirmity of mind" was "incapable ... Of managing the person's own affairs." The affidavits of two physicians confirming the "infirmity" and the person's inability to manage their affairs would trigger the court's authority to appoint a guardian.

A guardian appointed under the *Incompetent Persons Act* was granted authority to manage the estate (finances, property, etc.) And person (health care, personal care, living arrangements, etc,) of the adult. A guardianship order granted decision-making authority over all aspects of the incapable person's life.

The Act set out a number of duties on the guardian – all concerned with the proper management of finances and property. The guardian was obliged to return to court for a license to sell the person's real property.

The *Incompetent Persons Act* was subject to significant criticism. In 1995 the Law Reform Commission of Nova Scotia identified the likelihood that the Act could be found unconstitutional, because of a significant lack of procedural protections. Notably, the Act did not require service on the adult who was subject to the proceedings, if the adult was 'under restraint'. The *Civil Procedure Rules* at the time provided that service was not necessary on the adult for any later step in the process (e.g., a motion to sell property, or to replace the guardian) if the adult was found to be incapable and their condition had not improved.

More generally, the Law Reform Commission noted that while procedural protections might be available in theory, a vulnerable adult under a guardianship order was likely to have difficulty accessing them. In fact, because decisions such as hiring a lawyer were left entirely in the hands of the guardian, the adult practically lost all ability to do so.

The Commission also noted the 'all-or-nothing' authority of the appointed guardian, in contrast to more modern guardianship legislation in other jurisdictions which adopted a 'least restrictive' approach.

In 2016, in the case of *Webb v Webb*, the Supreme Court of Nova Scotia declared that the operative sections of the *Incompetent Persons Act* were unconstitutional. The government of Nova Scotia conceded the unconstitutionality. The court found that the Act infringed the rights to liberty and security of the person, and was not consistent with the principles of fundamental justice.

In particular, the court noted that a person might be capable in some areas but incapable in others, yet the Act granted authority over all aspects of the person's life, once they were found to be incapable of managing their affairs. The Act did not permit the court to "tailor" the order to the decision-making areas where the person actually was incapable. That was the principal cause of its unconstitutionality.

The court gave the government one year to replace the *Incompetent Persons Act* with a more modern guardianship law that was consistent with the *Charter*.

2.2. The *Adult Capacity and Decision-making Act*

The *Adult Capacity and Decision-making Act* was developed through the second half of 2016 and most of 2017. In the spring of 2017 the government was granted an extension of six months, because of the provincial election which interrupted the spring legislative session.

The ACDMA was drafted to respond to the court's finding of unconstitutionality in *Webb* – in particular the need for the court to be able to tailor an order to the decision-making areas where the adult was found to be incapable. The drafters were aware of modern guardianship legislation in other jurisdictions – in Canada and around the world – and adopted many provisions that went beyond what was strictly necessary to meet the concerns raised in *Webb*. In particular, the ACDMA adopted supportive principles to ensure respect for the adult's continuing autonomy:

> Instead of being called a guardian, the person is called a representative, to recognize the continuing agency of the adult, and avoid the objectifying connotations of being under the guardian's protection.
>
> The representative is required to follow the prior expressed instructions, or the current wishes of the adult, unless they are unreasonable.

Even if the representative is not able to ascertain the adult's prior instructions or current wishes, the representative is required to make decisions consistent with the values and beliefs of the adult, rather than simply making a decision which in the representative's opinion would be in the adult's best interests.

The representative is required to keep the adult informed, to explain decisions and options to the adult, and involve the adult in decision-making.

The representative must take reasonable steps to encourage the adult to become capable of making decisions for themselves.

The Act defines capacity as the ability to understand and appreciate a decision, "with or without support", meaning that a person has the opportunity to demonstrate decision-making capacity in a given area with supports of various kinds, if the person needs them.

At the same time, the drafters were aware of growing concerns about personal and financial abuse of vulnerable adults by substitute decision-makers, such as under a power of attorney or guardianship order. The ACDMA includes provisions to ensure a level of oversight and protection in the event issues do arise. It allows a court to require a review of the order, and a review is mandatory in certain circumstances. The Act requires that representation orders be filed with the Public Trustee's office, and the Public Trustee was given authority to investigate and act on complaints about misuse of an order.

The bill to enact the Act was introduced and passed during the fall sitting of the House of Assembly in October 2017. It came into force on December 28, 2017.

2.3. Implementation of the ACDMA

The Department of Justice (DOJ) rolled out a public and legal education campaign in early 2018 that included in-person information sessions, and the creation and distribution of information materials online and in hard copy. Information was made available through the 211 service and on social media.

In-person public information sessions and lawyer information sessions on the ACDMA were held around the province. Public information sessions were held in Halifax, Dartmouth, Truro, Sydney, Yarmouth, and Wolfville. Lawyer information sessions were held in Sydney, Yarmouth, Halifax and Wolfville. Brochures on the new legislation were distributed to all attendees. The

sessions covered the purpose of the ACDMA, new requirements, capacity assessments and who can do them, differences between the old and new legislation, information for guardians appointed under the *Incompetent Persons Act*, the rights of adults under an application or order for representation (including the fact that legal representation is available), how to make a complaint, and where to go for more information. The Department used these sessions and social media to raise public awareness about the importance of advance care planning and estate planning. Approximately 185 people attended the public information sessions. Approximately 33 lawyers attended in-person and 26 were registered to participate remotely.

Information sessions were also provided to the Seniors Advisory Council, the Association of Adult Residential and Regional Rehabilitation Centres of Nova Scotia, and to lawyers at several Canadian Bar Association (CBA) events. A joint session of the CBA's Elder Law and Wills, Estates and Trusts Law sections was held in June 2018 in Halifax.

Public education materials geared towards adults who may be the subject of an application under the ACDMA, as well as people seeking to apply to become a representative for an adult, were made available on the Public Trustee office's webpage in December 2017. These materials included web content, a video presentation on the ACDMA, an animated video "If you need representation", faqs, a brochure, Guides and Forms. The Department of Justice also worked with the Legal Information Society of Nova Scotia on that organization's public information materials, which included a Guide to Adult Capacity and Decision-making, and information on the ACDMA included in their "It's In Your Hands" publication for seniors in early 2018.

Information on the new legislation was shared with relevant staff in the Departments of Health and Wellness and Community Services.

The Public Trustee's office developed training for Occupational Therapists, Registered Nurses and Social Workers seeking to become a certified capacity assessor under the ACDMA. Training was delivered to accepted applicants and a roster of certified capacity assessors was established in June 2019. The Public Trustee's office posted contact information for these available assessors on its webpages and communicated the existence of the roster among the legal community and other stakeholders in 2019 and 2020.

3. Review

3.1. Background

Section 71 of the *Adult Capacity and Decision-making Act* required the Minister of Justice to undertake a review of the Act's effectiveness in meeting its purposes within three years of the Act coming into force, and to file a report on the review with the legislature within one year thereafter. The review was also required to consider supported decision-making.

In September 2020, the Department of Justice convened an inter-departmental working group, to plan for the review process that would occur throughout 2021. 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 and lawyers from the Attorney-General's office.

The working group engaged with the former Office of Citizen Centred Approaches, a division of the Executive Council Office, to discuss and explore how relational principles of practice could help inform the review process. The principles are:

- Relationship focused – focusing not on individuals, but on relationships and connectedness
- Comprehensive and Holistic – mapping connections and understanding contexts and people involved
- Inclusive and Participatory – structure processed where inclusion makes a difference to those impacted
- Forward-focused – thinking about a plan for the future
- Culturally Aware – having a basic understanding of culture, experience, and background and how everyone approaches situations differently based on their culture, background and experience,

The working group used these principles to guide the review process; in particular, the design of the consultation and in consideration of the recommendations for improvements to the legislative framework and next steps.

The working group designed a consultation plan and consultation materials, and procured a vendor, Horizons Community Development Associates Inc., to host an on-line public survey and facilitate focus groups with affected stakeholder groups, during the spring of 2021.

The working group also examined and determined what changes to process and operations could be made immediately for improvements. Some examples of these were improving the communication between the Courts and Public Trustee to ensure all orders were sent to the Public Trustee's office. There was exploration of improvements to the Public Trustee's website to ensure information was more easily accessible, but this was not possible within the timeframe of the review and is an ongoing area of focus for the office. Finally, the working group set out to provide additional communication to the legal community and to community-based service providers about the ACDMA and the availability of trained allied health capacity assessors.

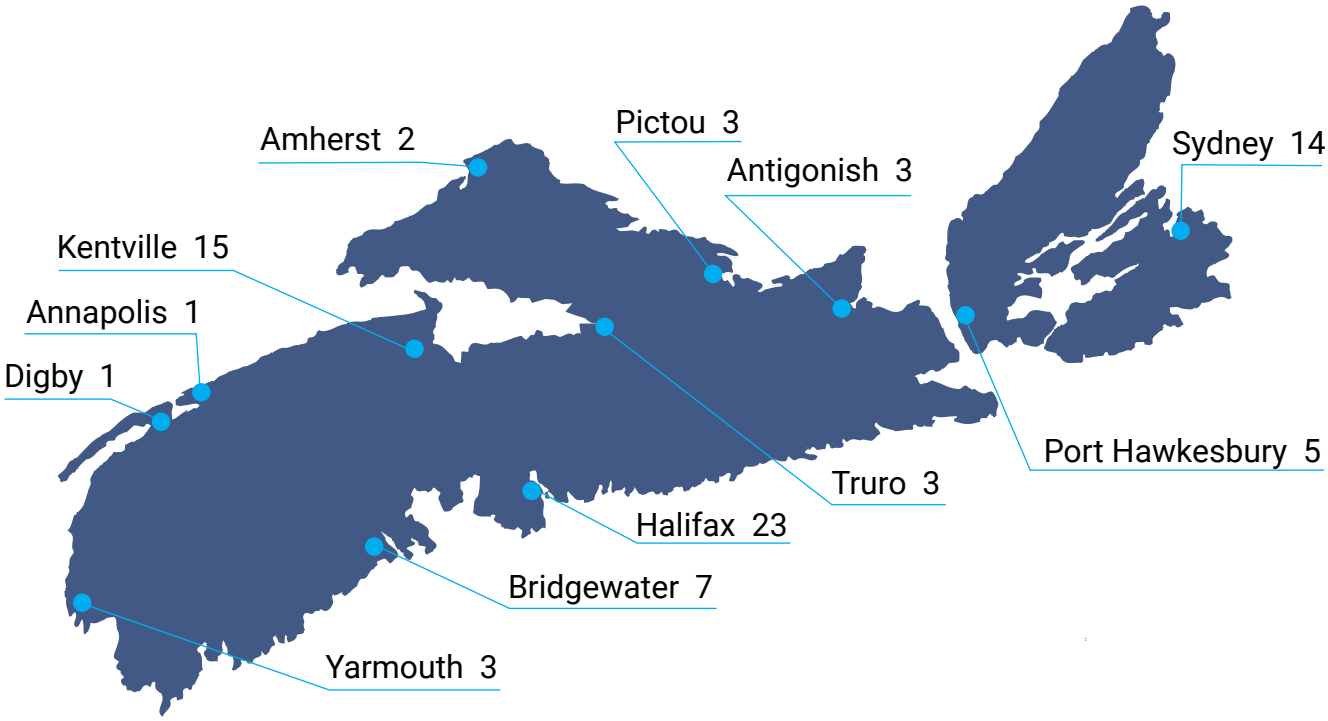
The working group enlisted staff at the Department of Justice to collect statistical information from court files under the ACDMA across the province. The key findings of that review are presented in the next section.

The working group also convened a panel of external advisors. The panelists' names and affiliations are listed in the acknowledgements section of this report. The advisory panel held a series of meetings through the late summer and fall of 2021, chiefly to advise the working group on the implications of the results of the public consultation, and to consider potential recommendations to government to improve the Act's effectiveness.

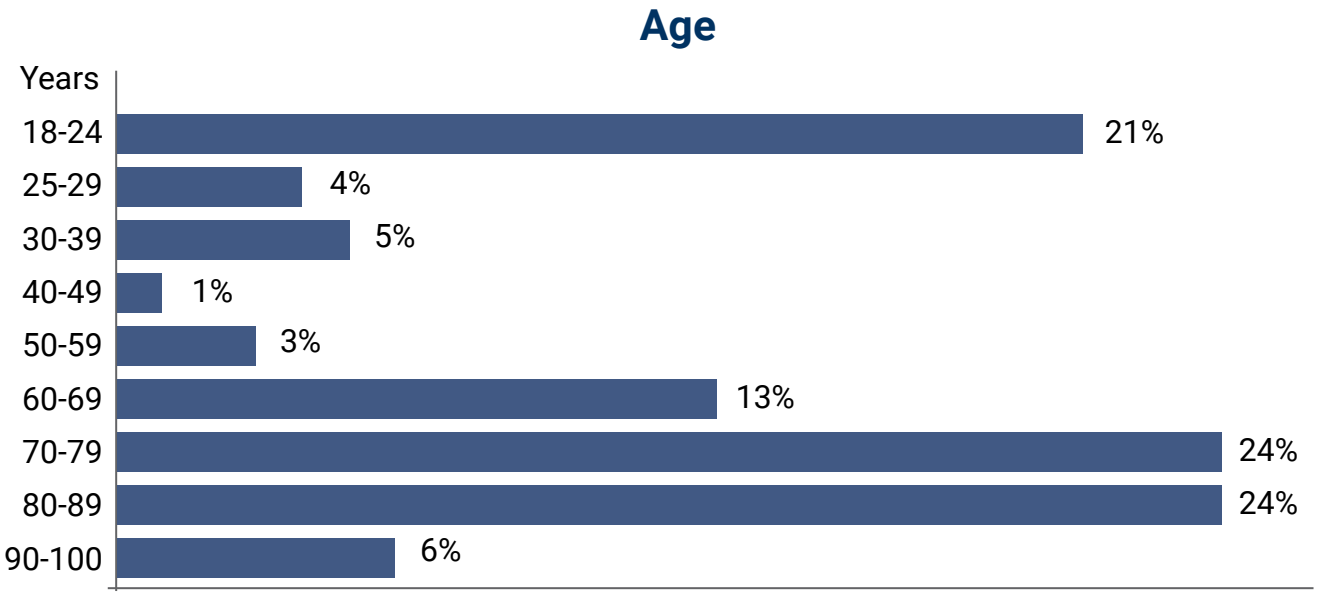
3.2. Data survey

The working group examined all of the court files that staff at the Supreme Court of Nova Scotia identified as being filed under the *Adult Capacity and Decision-making Act* up to 15 March 2021, with the exception of 3 files that were unavailable.

There were 83 ACDMA court files in total. Twenty-three were in Halifax, fifteen were in Kentville, fourteen were in Sydney and seven were in Bridgewater. The other courthouses had five or fewer ACDMA files:

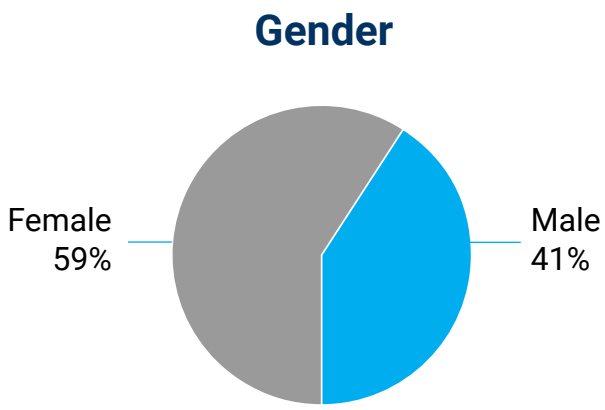


Over two thirds of applications concerned adults who were over the age of 60:

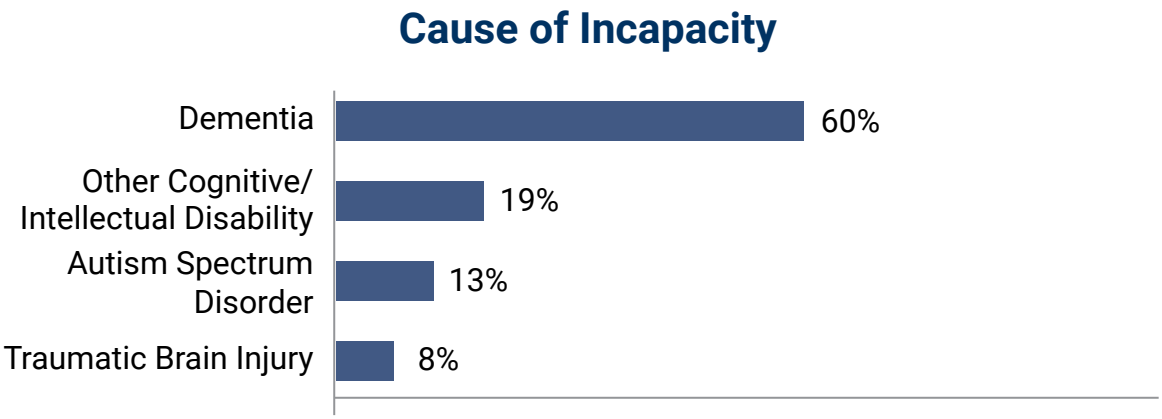


- Average age – 61
- Half of the adults aged 74 or older

Women made up a slight majority of adults who were the subject of applications:

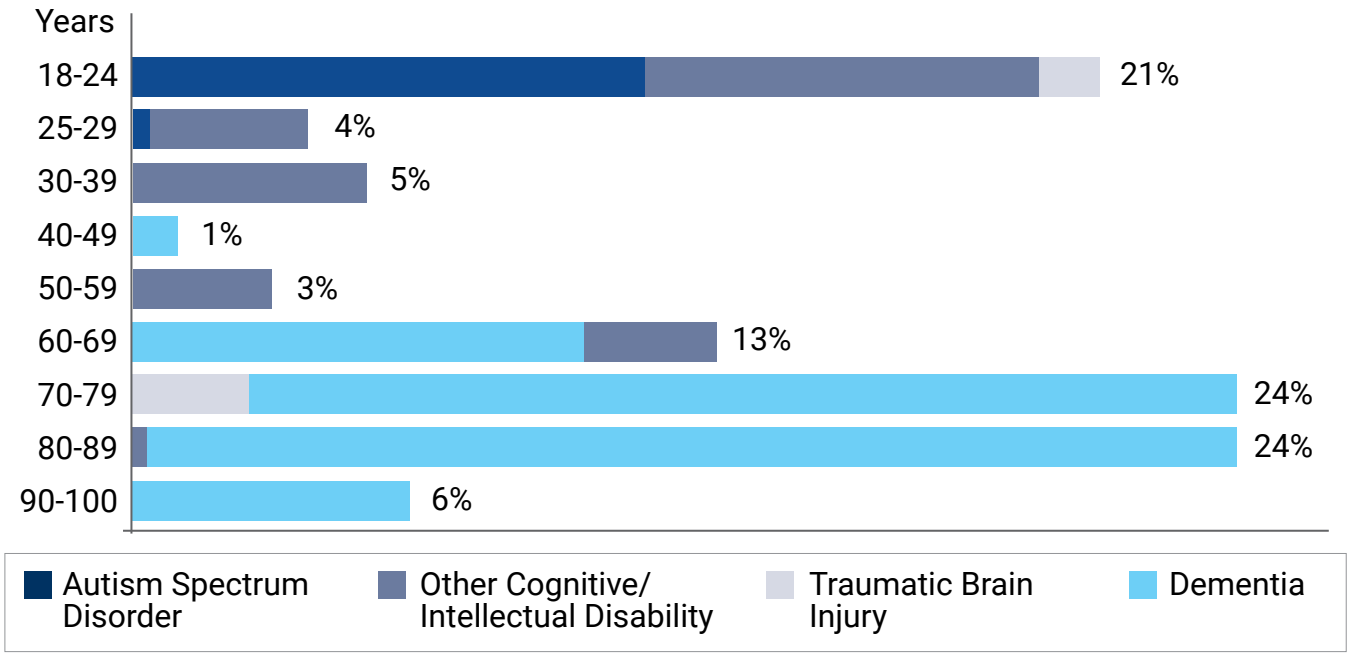


Dementia was indicated as the cause of incapacity in 60% of the files, with other cognitive or intellectual disabilities and autism spectrum disorder indicated as the cause in 32% of files, and traumatic brain injury accounting for 8%:



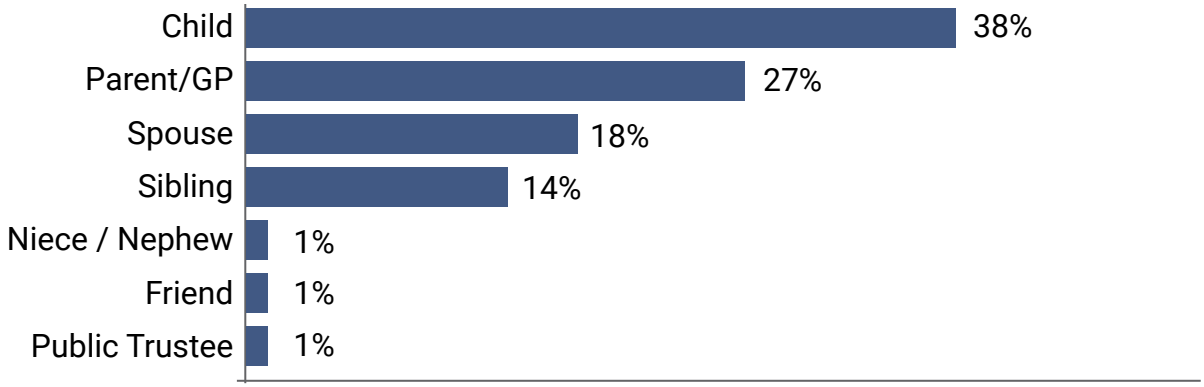
- 95% have no potential to regain capacity
- 4% unknown potential to regain capacity (Traumatic Brain Injury)
- 1% some potential to regain capacity (Schizophrenia)

Cause of incapacity by age

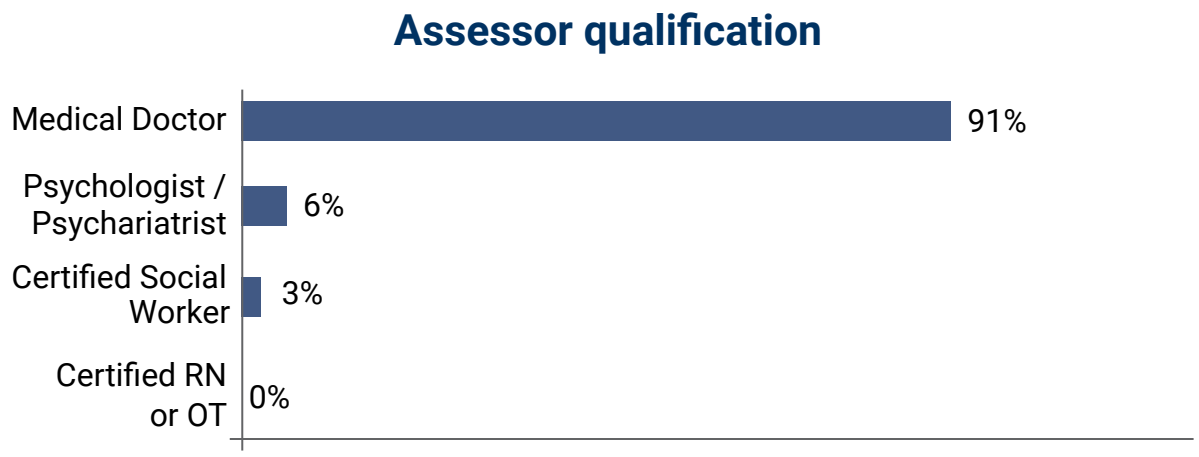


Most commonly, the children of the adult were the proposed representatives, followed by the adult's parents:

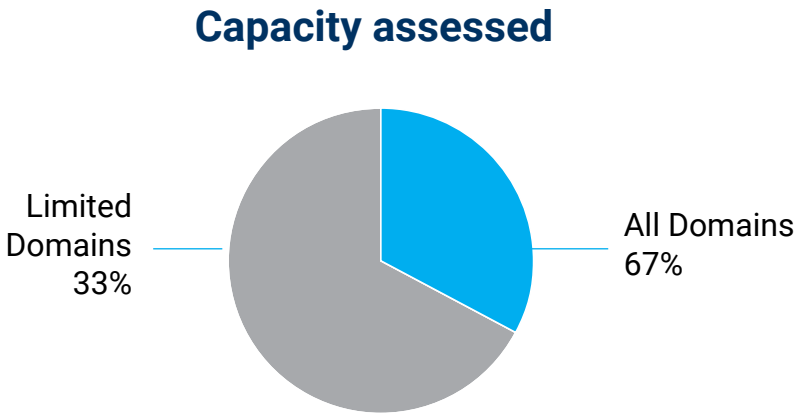
Relationship to adult

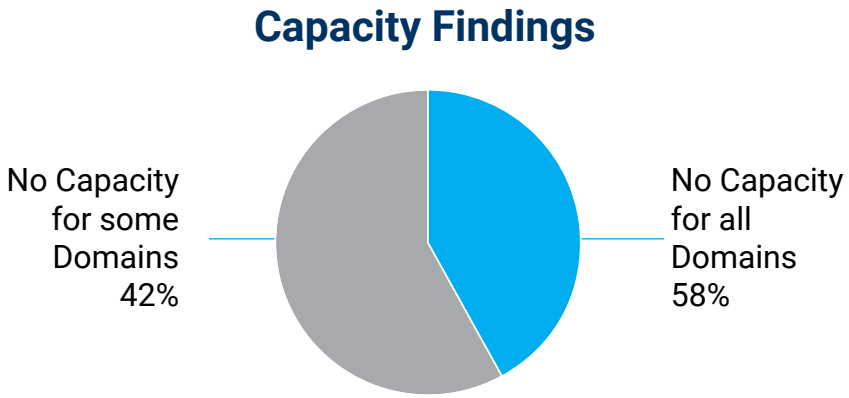


Despite the fact that the ACDMA enlarged the types of professions who could perform capacity assessments, by far most capacity assessments were still done by physicians:

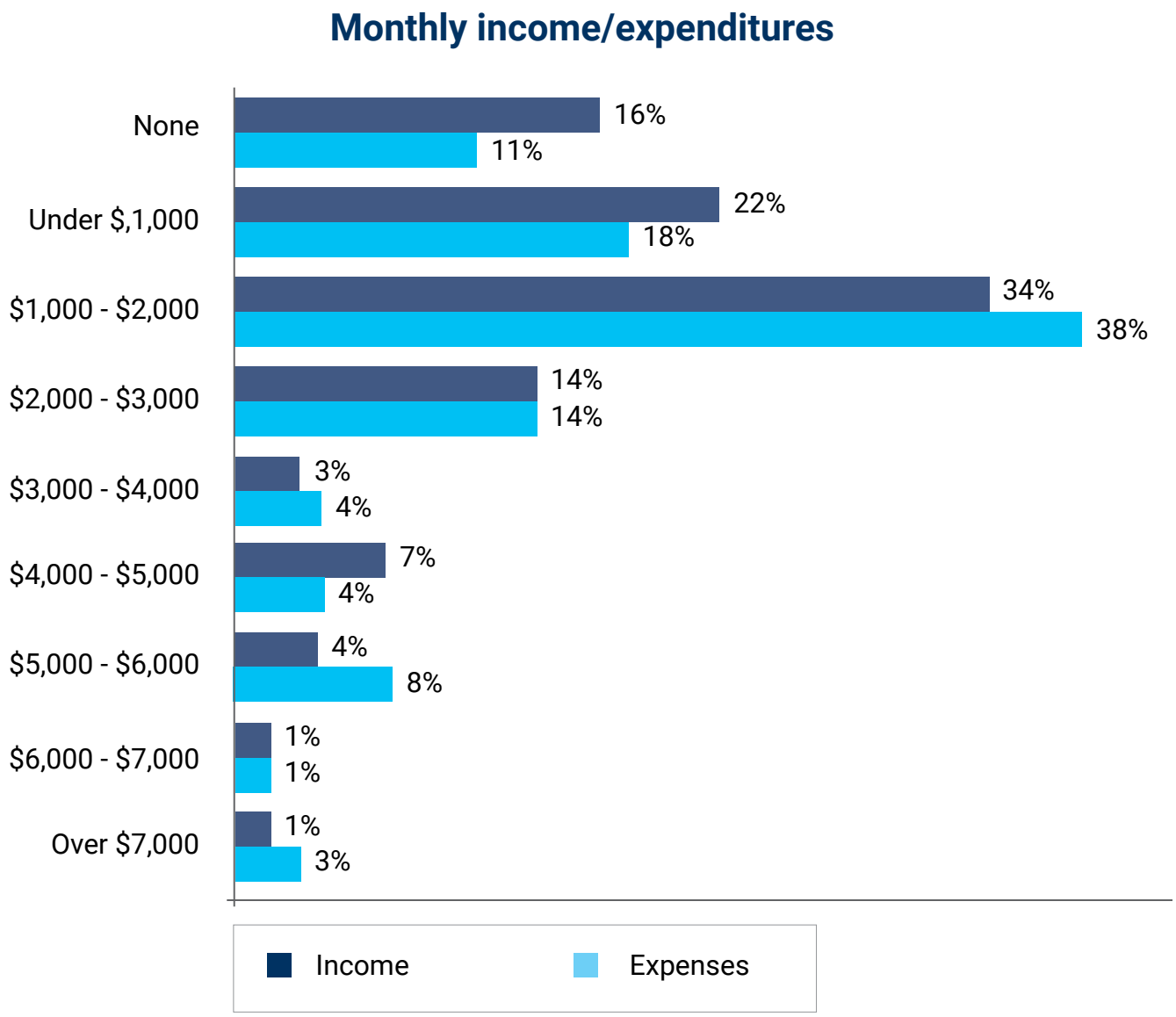


The ACDMA requires that a capacity assessor only assess those decision-making areas where an assessment is necessary. In the majority of files, assessors assessed all domains, but there was a substantial proportion where a limited assessment was done:

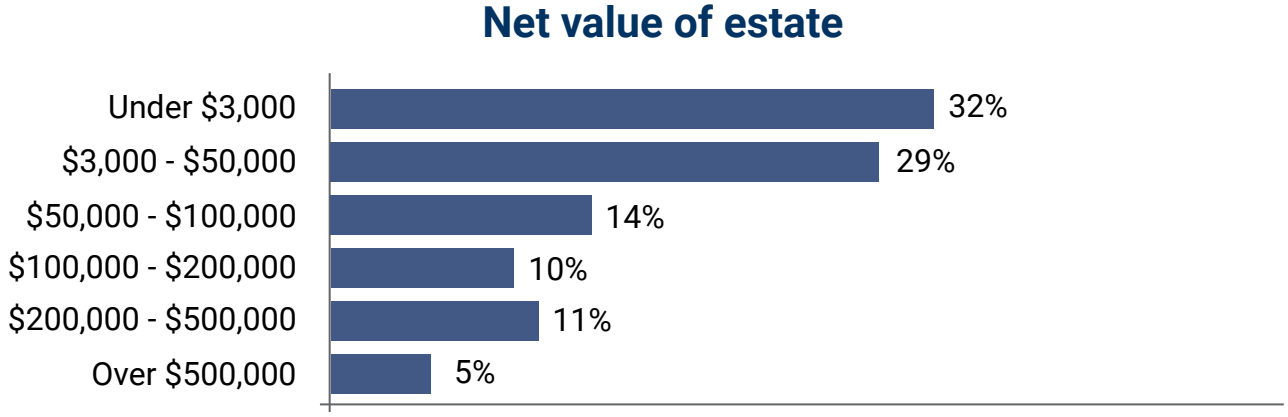




ACDMA files largely concerned adults with low- to lower-middle monthly income and assets:



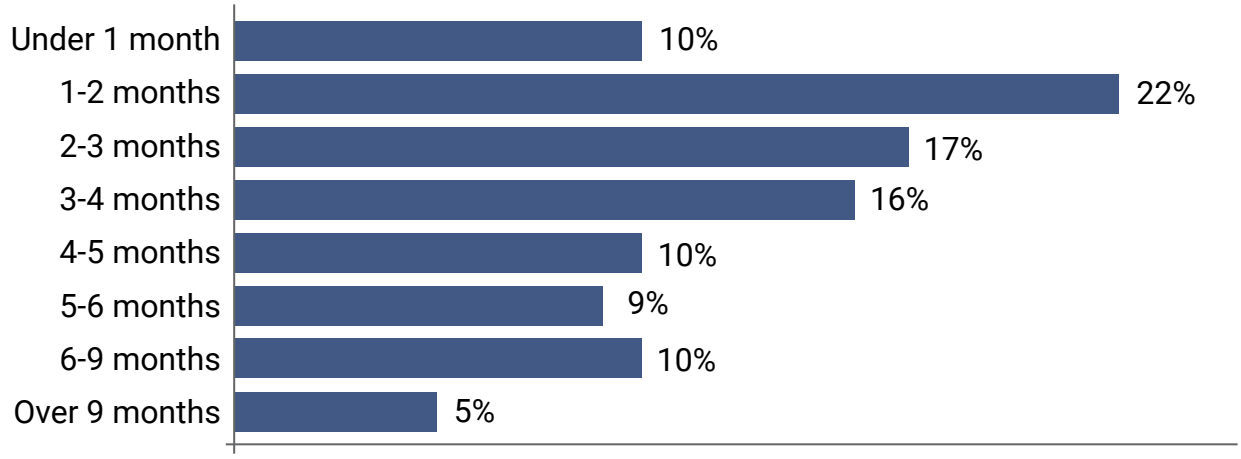
- Average Monthly Income – $1,725
- Average Monthly Expenses – $2,000



- Average Value of Estate – $137,000
- Half less than $28,000
- 18% of representatives requested compensation

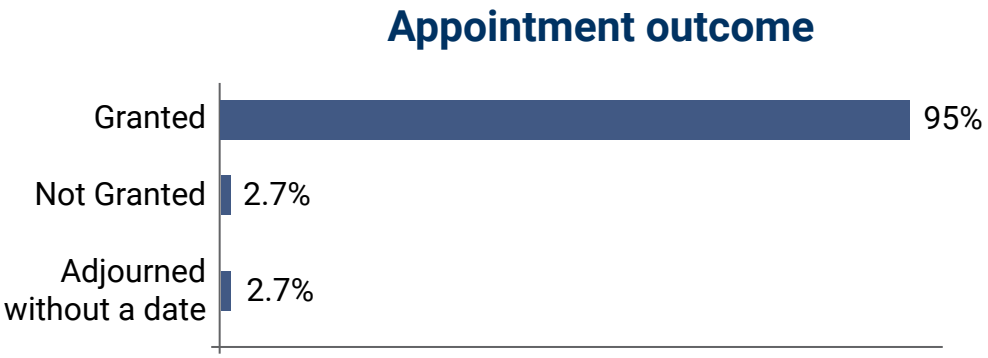
Most applications were filed with the court within four months of the capacity assessment, and most orders were issued by the court within 2 months of filing:

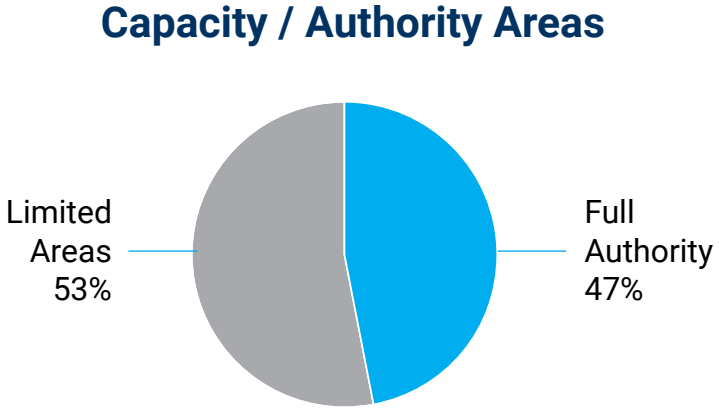
Time between capacity assessment and application filing date:



- Average number of days: 110

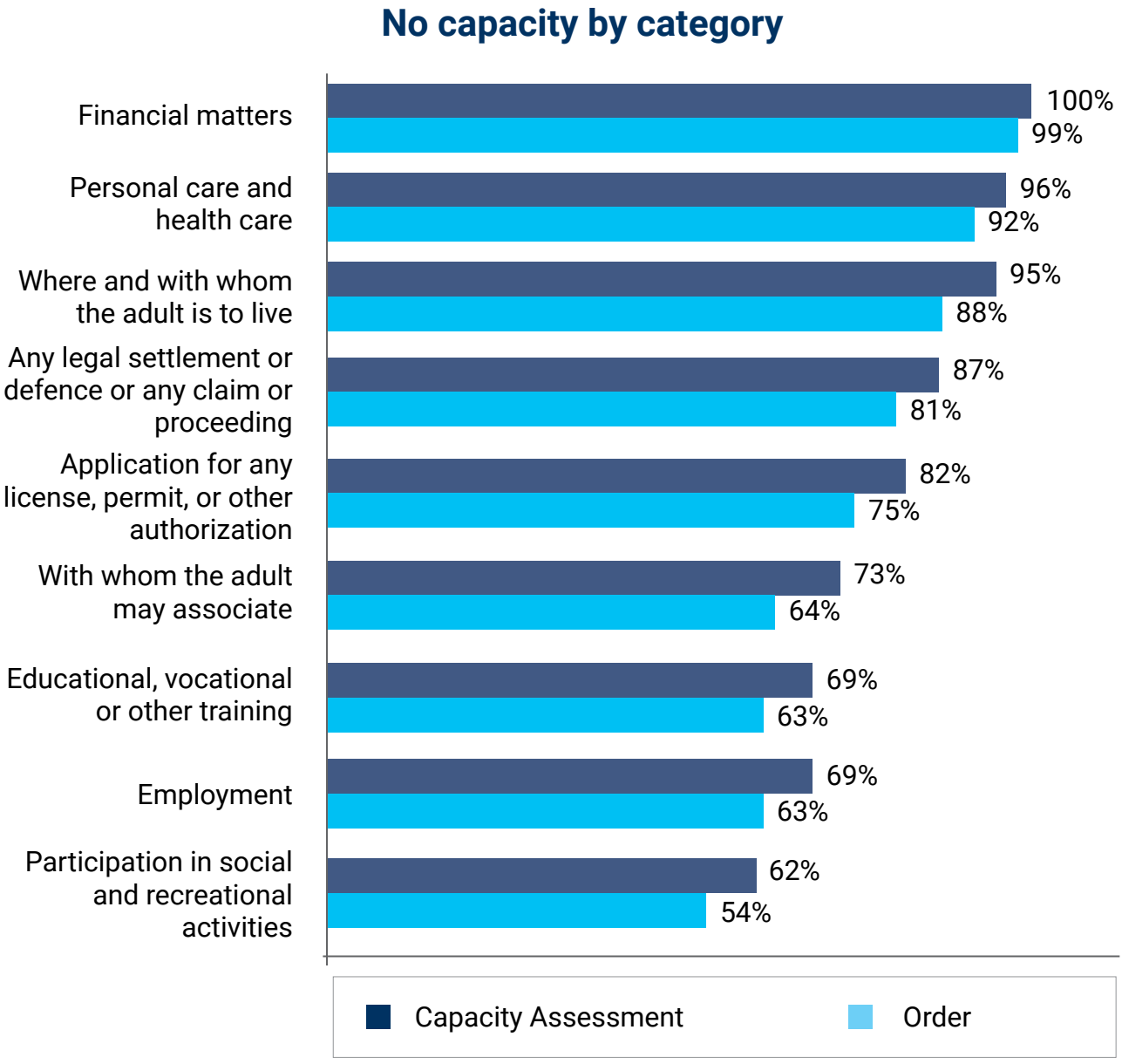
The court granted an order in 95% of applications, and in roughly half of cases where an order was granted the order granted authority to make decisions in all areas:





- Bond waived in 39% of appointments

In most applications, capacity was assessed for financial decisions, personal and health care decisions, and decisions about where the adult is to live:



Nova Scotia Legal Aid provides legal services to adults who are the subject of an ACDMA application. Legal Aid received 91 applications for service from the Act's enactment to 31 March 2021.

Regulations under the Act provide the Public Trustee's office with authority to investigate complaints about the misuse of a representation order. The Public Trustee has received three such complaints since the Act's enactment. After investigation, the Public Trustee determined that none raised a valid concern about an ACDMA order.

The Public Trustee's office provides financial assistance for capacity assessments, to those who demonstrate financial need. The Public Trustee has provided assistance for eight assessments.

The Public Trustee serves as a general resource for inquiries about the ACDMA processes. The Public Trustee received 228 inquiries up to 29 October 2021.

The Public Trustee receives a copy of each order in an ACDMA matter. The Public Trustee received 101 orders between 1 January 2018 and 29 October 2021.

3.3. Public consultation

To inform the review process, and with the restorative principles of practice as a guide, government needed to hear from those who have experience with the legislation, and/or with informal supported decision-making arrangements, including adults with intellectual disabilities, seniors, families, and ACDMA representatives. Government also needed to hear from organizations serving adults with disabilities and representing their interests, organizations serving seniors and representing their interests, the legal community, health professionals, care coordinators, residential facilities, academics, certified capacity assessors, and others. This allowed the working group to understand, comprehensively and holistically, how effective the legislation has been and where there is a need for improvement.

Ensuring adults with cognitive impairment were aware of the consultation and able to meaningfully participate was a priority in planning the consultation process (Restorative Principle of practice: Inclusive and Participatory). Advice on how to appropriately plan an accessible consultation process was sought from the Accessibility Directorate and key external stakeholders including:

- Autism Nova Scotia
- Centre on Aging, Mount St. Vincent University
- Brain Injury Association
- Inclusion Nova Scotia
- People First Nova Scotia
- Dr. Erica Baker, Psychologist, Trainer of capacity assessors under ACDMA

The Department of Justice hired Horizons Community Development Associates Inc. ("Horizons") to assist with final consultation process design, hosting/facilitation, collection of feedback, analysis of feedback, and reporting of results.

Public consultations were held from June 1-18, 2021. The public consultation was promoted to potential participants through invitation by the Public Trustee, Department of Justice leadership, as well as by the Departments of Community Services, Health and Wellness, and Seniors and Long-term Care. A news release, Twitter, and paid advertisements were also used to raise awareness about the consultation. Stakeholder organizations were asked to share information about the consultation with others in their networks and a poster they could share for that purpose was included with invitations to participate. The poster was designed with both an accessibility lens and a diversity lens.

A mixture of data collection methods was used to engage with the public and other stakeholder groups: surveys, focus groups and written submissions. Surveys were available in English and French via a weblink or in hard copy. Alternatively, they could be completed by phone through a toll-free telephone line. A total of 190 surveys were completed. Three written submissions were also received.

To ensure that the working group heard from those most affected by the legislation, focus groups were arranged for particular groups – adults with disabilities, seniors, representatives or family members of persons with cognitive disabilities, healthcare providers, lawyers and legal scholars, organizations serving those who might be subject to an order. Due to the pandemic, focus groups were facilitated via an online platform.

Eighteen focus groups were conducted with a total of 130 participants.

While careful planning was done to ensure opportunities for meaningful consultation with adults with disabilities, two immediate concerns about the consultation process arose. The first related to the government's extending of invitations to participate – for some adults and families, receiving individualized communication from the government was distressing. Horizons received phone calls from some concerned Nova Scotians who did not understand why they were being contacted and were not aware of the legislation.

The second concern was that the consultation process was not long enough. We heard the timeframe did not recognize the energy, time and other demands on families and adults with disabilities or dementia.

These concerns highlighted for the working group the need to raise awareness about the legislation, as well as the need for future engagement planning to better account for the needs of this community and acknowledge the level of fear and confusion that contact from government can trigger within this community.

To ensure the review was culturally aware, the working group made efforts to meaningfully engage with African Nova Scotian and Indigenous Nova Scotian communities. Despite these efforts, very few of the survey respondents self-identified as a member of these communities. In the pre-engagement phase of the consultation, advice was sought from leadership across government with expertise in this area about how to best engage with these communities (including DOJ's leadership on diversity and inclusion, African Nova Scotian

Affairs, Accessibility Directorate, l'nu Affairs, and others). It is clear from these conversations that a longer time frame would be required to address this or related subjects with these communities in future given the particular need for relationship building and coordination. A list of the key stakeholder organizations for African Nova Scotian and Indigenous Nova Scotian communities was developed in collaboration with the offices of l'nu Affairs and African Nova Scotian Affairs, the Accessibility Directorate and others. As with other key stakeholder groups, key organizations representing these communities were made aware of the consultation and how to participate, including the dates of focus groups for interested families and adults, and asked to share the information and poster widely.

Conversations around how to meaningfully engage with these communities and other marginalized communities in future are ongoing and guided, in part, by the Department of Community Services' Diversity, Inclusion and Community Relations Division. Specific advice on how to plan future engagement processes arising from the ACDMA Review within these communities is being documented for government leaders and decision-makers.

4. Preserving & enhancing autonomy

4.1. Support for the Act's principles and values

The *Adult Capacity and Decision-making Act* is intended to ensure the dignity, autonomy, independence, social inclusion and freedom of decision-making of adults who are subject to the Act, to the greatest extent possible. The Act is framed so that an adult's liberty is infringed only when necessary, and only by the least restrictive and intrusive means possible. The Act acknowledges the importance of personal and social relationships in enabling an adult to make decisions to the maximum extent possible, even when representation is required. In this way the Act acknowledges what we heard in the consultations; that relationships between an adult requiring representation and the representatives are critical and central to maintaining the adult's independence and decision-making as much as possible.

As outlined above, and in consideration of the court's decision in Webb, the Act is intended to provide significant protections against unnecessary or excessive limitations on adults' decision-making autonomy. Most significantly, capacity assessments must be domain-specific, and the court's order appointing a representative must be limited to only those decision-making domains where an adult is shown to lack capacity, and where decisions must be made. There are a series of significant duties on appointed representatives, to ensure that adults' continuing autonomy is respected despite any incapacity. The court must approve a plan for the representation, and the plan must indicate, among other things, how the representative intends to uphold those duties.

These added protections and requirements require that applications for a representation order will generally be more complicated and time consuming than an application for guardianship under the former *Incompetent Persons Act*.

In this review we heard that there is broad and deep support for the values and principles underlying the ACDMA. Participants and stakeholders from virtually all perspectives applauded the move away from an all-or-nothing concept of capacity, and the Act's emphasis on supporting an adult's continuing autonomy through a relational understanding of capacity. Consultation participants supported the definition of capacity, which recognizes that a person may exercise legal capacity if they can understand and appreciate the nature and consequences of certain decisions *with support*. There was also support for the duties on a representative when making decisions for an adult, which generally favour the adult's own decisions, wishes and values over the representative's view of what is in the adult's best interest.

We heard that in these and other ways the Act heralds a positive culture shift in Nova Scotia capacity law. Notwithstanding the significant practical challenges that the Act has presented in its implementation, this near universal support for the Act's animating principles and values is one of our most significant findings.

4.2. Putting principle into practice

Despite the Act's commitment to a more modern, supportive concept of substitute decision-making, it is clear that more is needed to realize its potential. In particular, it is not clear that those responsible for the Act's administration and those who are subject to it – lawyers, judges, representatives and represented adults – understand its requirements and their implications. A statutory provision requiring consultation with an adult or respect for the adult's current wishes will accomplish little, if the representative is unaware of those requirements or lacks the skills to fully uphold them. A right to apply for a review of an order is of little use to a vulnerable adult who lacks access to advocacy resources and supports to make an application to court.

We heard that there is little in the way of training or education for those most responsible for the Act's success in delivering on its promise – lawyers, judges, physicians and representatives. There is very little opportunity for monitoring or advocacy to ensure that adults who are subject to a representation order, or proceedings leading to one, are able to realize the significant protections that are part of the Act's design.

In this report we consider a number of opportunities for better education, information, and support to ensure that the Act's intended culture shift is realized.

4.3. Other capacity legislation

Nova Scotia has a variety of laws that apply to legal and mental capacity. Many of these laws allow for a person to be found incapable of making a decision or looking after their own interests because of cognitive disabilities or mental illness. In that case, another person is authorized to make decisions for them. These laws include the *Adult Protection Act*, the Hospitals Act, the *Involuntary Psychiatric Treatment Act*, the *Powers of Attorney Act,* the *Personal Directives Act*, the *Personal Health Information Act*, and court rules providing for the appointment of a litigation guardian.

The ACDMA was a step forward in recognizing more modern, supportive concepts of capacity and substitute decision-making. But the Act has a very limited application. There were only 83 applications in its first three and a half years. It is meant to be legislation of last resort, applicable only where a person has not made an enduring power of attorney or a personal directive, there is no substitute decision-maker available under the *Personal Directives Act* or *Hospitals Act,* and a significant decision needs to be made.

For these reasons, the significant steps forward in the ACDMA will have a relatively limited impact in the general legal treatment of adults who experience cognitive difficulties in making decisions. Other capacity-related legislation affects a far larger number of people. A number of respondents therefore urged that the government consider a broader project of reform, to modernize all of Nova Scotia's consent and capacity laws. Such a project would consider the above-referenced laws and others, with an eye towards further entrenching commitments to support the continuing autonomy of adults with cognitive disabilities, to promote their dignity as equal members of the community.

As well, a broader project of reform would provide the opportunity to harmonize the suite of Nova Scotia laws affecting decision-making capacity. As we discuss below, there is significant confusion about the applicability of different capacity laws in different circumstances, the different rules and tests that apply under each, and the interaction between different laws when more than one may apply.

A general review of Nova Scotia capacity laws has been previously recommended, including by the Law Reform Commission of Nova Scotia in its 2015 report on enduring powers of attorney, by the Nova Scotia Joint Community-Government Advisory Committee on Transforming the Services to Persons with Disabilities (SPD) Program in its 2013 report to the Minister of Community Services, and in the 2013 Report of the Independent Panel to Review the *Involuntary Psychiatric Treatment Act*.

A review of capacity laws may also consider better ways to monitor substitute decision-making arrangements. Under the ACDMA, a capacity assessor is required to indicate in the capacity assessment report whether an adult is likely to regain capacity. If the adult is found to be likely to regain capacity, the representation order must require the representative to return to court for a review of the order within a certain period of time. This is a highly formal, intrusive and likely costly option to ensure that a representation order is monitored. In fact, we have not found any representation order which required the representative to return to court for a review.

It was suggested to us that there should be a more informal, regular monitoring function, to ensure that orders are working as intended, and that adults have the opportunity to connect with advocacy services (e.g., Legal Aid) if not. We agree with this suggestion but would not necessarily limit it to ACDMA orders. In our view, the broader review of capacity laws should consider the development of a monitor function for persons whose legal capacity is displaced by an order or instrument.

Finally, a review of capacity laws could consider the safeguards that should be in place for substitute decision-makers when considering aversive stimulus treatments. These are treatments, procedures or therapies to condition a person to avoid certain behaviours (e.g., substance abuse) because it is associated with a negative experience.

The ACDMA permits the representative to consent to aversive stimulus treatment on the adult's behalf, if the court allows it. The ACDMA is the only legislation in Nova Scotia that expressly requires a court order for such consent.

We heard that some aversive stimulus therapies are perceived by persons with disabilities as a threat of violence. We understand that such therapies as are available now are not violent, but we were urged to recommend removing the court's ability to sanction such treatment, or else better define the circumstances in which it would be allowed. We recommend that a broader review of capacity laws should consider when, if ever, aversive stimulus treatments ought to be allowed.

Recommendation:

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.

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.

5. Education and awareness

5.1. Lack of awareness & information

We heard that many people do not know about the ACDMA or how it can help them. Among professional groups and especially persons with disabilities and their families there is a general lack of awareness that the Act exists, or how it works. As a result, families do not explore the option to seek a representation order until a crisis arises and a legal decision needs to be made for someone who lacks capacity.

We heard that the information that is available – from the Public Trustee and the Legal Information Society of Nova Scotia, for example - was hard to find and difficult to access.

We heard as well that there is widespread confusion about when the ACDMA is applicable, as opposed to other legislation that allows for substitute decision-making – e.g., the *Personal Directives Act* or the *Powers of Attorney Act*. This confusion extends across the most direct stakeholders – persons who may experience cognitive difficulties making decisions and their families – but also the professional groups who support them – health care providers, lawyers, teachers and school administrators, and service delivery agencies, among others. The Public Trustee's office, which is responsible for investigating complaints about ACDMA orders, regularly gets complaints that in fact concern powers of attorney or personal directives.

This creates obvious challenges as persons with cognitive disabilities and their families attempt to navigate a complex legal system. It also creates practical confusion where capacity may be at issue, since there are different definitions of capacity under different pieces of legislation, different forms for reporting a capacity assessment, and different conditions for when a substitute decision-maker may be appointed or authorized to act.

This confusion is part of the reason we recommend a general review and harmonization of Nova Scotia's consent and capacity laws. But it also indicates the need, in the more immediate term, for better information and education. We address that need below.

5.2. Complexity, cost and time

Among the strongest recurring themes in the consultation feedback was the complaint that the procedures under the Act are too complex, costly and time-consuming. There are numerous steps, starting with the identification of the ACDMA as the proper avenue for a given situation.

From there, the applicant must find a professional willing to do a capacity assessment. The assessment process itself can be complicated, requiring certain pre-conditions and steps before the assessment can take place, and the completion of a lengthy report afterwards. With a capacity assessment report in hand, the applicant must prepare a detailed representation plan and at least one affidavit setting out the background information leading to the application. The applicant must prepare a draft order for the court to issue. The applicant must obtain a vulnerable sector check for the proposed representative(s) that is dated no more than two months prior to filing the application. The applicant must then serve all of the documents on the adult and other parties and notify a number of other people by mail. Finally, the applicant must appear in court to present the application and answer any questions the judge may have. If the judge requires changes, those must be prepared and re-submitted.

It is no wonder that only one person we heard from made an application without the assistance of a lawyer. For others, finding and paying for a lawyer adds a further layer of complexity and significant cost.

The Act's complexity is further compounded for those who have low literacy levels, or who do not speak English as a first language. And the cost of a lawyer puts a representation order out of reach of many households with lower incomes.

As we discuss further below, the time commitment in particular can be a huge barrier, since it means that the Act is not well-suited to dealing with emergencies – e.g., a quick decision on selling a home to free up assets, following an unexpected onset of cognitive difficulty. But a representation order is truly meant to be a last resort, meaning that by that point there may be practically no other option for families in such circumstances.

As a consequence, we heard that many families are finding any way they can to avoid making an ACDMA application if possible.

To the extent this encourages people to explore informal supported decision-making arrangements as an alternative, this is not necessarily a bad thing. A representation order is an intrusive intervention in an adult's life, after all. But it is also possible, as we heard, that people are more likely to find workarounds that take the form of substitute decision-making, without the legal authority of a representation order. This means that people may be making decisions for adults with cognitive disabilities without the safeguards and duties that the Act was designed to ensure.

In summary, we heard immense frustration about the overall complexity and cost of applying for a representation order, and the time required to undertake it. This is so despite the general support for the Act's purposes and animating principles, from which much of the complexity necessarily arises. Indeed, we heard few concrete suggestions about how the application process itself – the documents and steps required in obtaining an order - could be made meaningfully simpler. We heard that there are too many forms, for example, but no one suggested that any of the forms currently in use could be done away with or significantly abridged.

5.3. Support for capacity law proceedings

In our view the best way to respond to the acknowledged complexity of the ACDMA processes, without weakening the Act's protections, is to provide better support for all involved in the process. This means providing education and training, navigation services, counselling and dispute resolution, and access to monitoring and advocacy services.

We do not propose any particular organizational model to make the necessary education and other support services available. In some cases, those services may be offered by a hub-type organization – e.g., education about the ACDMA and navigation through the ACDMA application process. In other cases, the services may already be in place elsewhere, or may be better delivered by another organization – e.g., planning for incapacity generally, or family group conferencing.

In what follows, we outline some of the more important services and supports as we see them, but we think the eventual design, the suite of services, and the delivery models for them should be decided after robust engagement with the groups that it is meant to serve. Better access to services can be an important step towards a more supportive, rights-based approach to cognitive disabilities generally in society. But it will only fulfill that objective if the service model is designed, from the ground up, with the people it is meant to serve involved at the centre of the undertaking. Care must be taken in designing the engagement process to enable meaningful participation by adults with disabilities and seniors from all communities within Nova Scotia, including Indigenous communities, African-Nova Scotian communities and newcomers to the province.

Recommendation:

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.

5.3.1. Education & training

There is a significant need for education and training about the ACDMA. This includes education and training:

- for adults who may be subject to an application or a representation order, particularly about their rights during a capacity assessment and while the order is in effect, and also where to find advocacy supports to realize those rights;
- for prospective applicants, about how to make an application, including what to consider in advance, how to find a capacity assessor or a lawyer, best practices for writing a representation plan, affidavit and draft order, and sample forms;
- for judges and lawyers, about how the Act is intended to promote an adult's continuing autonomy and the options available when designing an effective, individualized representation order;
- for service providers, educators and staff within government who provide or facilitate services to persons with cognitive disabilities and their families;
- for representatives, about how to fulfill the duties that the ACDMA requires of them, including how to support an adult in making their own decisions to the greatest extent possible.

Education and training services should encompass all of Nova Scotia's relevant capacity laws. Confusion about the ACDMA arises in part from the fact that there are a range of laws that at various times may apply to a person who experiences cognitive difficulties

making decisions. Therefore education materials and resources should explain those laws and the various options available, including the ACDMA, and the educational and training offerings should be developed with a system-wide ambit.

Providing education opportunities about capacity laws generally will also help in many cases to avoid the need for an ACDMA application in the first place. As this review has shown, over two thirds of ACDMA applications concern older persons (over the age of 60) experiencing cognitive difficulties later in life. Many of these people would have had capacity to make an enduring power of attorney and personal directive at some point earlier in their lives, which would likely have eliminated the need for a representation order.

We heard a number of ideas about how education and training should be made available. As noted, government may directly support the development and delivery of some, working with external advisors, academics and other subject-matter experts. In other cases, the materials or training opportunities may already be available or would be better developed by someone else. Professional bodies in particular will need to develop materials for their own constituencies.

Education materials should be available in print and on-line, depending on their target audience. Education materials should be developed in language and formats suitable to each audience. Online materials should be interactive, generating options depending on variables inputted by the user.

The education and training opportunities should be made available proactively, through contacts to the various target groups. Opportunities should be available province-wide, with attention in particular to rural areas that may be underserved by existing services. Special efforts should be made to reach African Nova Scotian, Indigenous and newcomer communities.

Recommendation:

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.

5.3.2. Navigation

Education materials and training opportunities are important, but we heard that families benefit from one-on-one assistance with the task of assembling a court application and seeing the process through. Similarly, adults facing an ACDMA application, or who are under a representation order, are likely to need personal assistance in understanding the process and potentially locating advocacy supports, to ensure that their rights are respected and their voices are heard in any proceeding.

With sufficient training and experience in the various steps of the application a support person could deliver valuable assistance to a family or applicant undertaking the process on their own – whether an ACDMA order is needed, how to answer various questions in the forms, where to find the necessary information to complete a representation plan, how to find a capacity assessor, how to prepare for the hearing, etc. Where the adult is able to make a power of attorney or personal directive, navigators would be in a position to connect people with related information and resources for advance planning.

Navigators should also be able to connect families with counselling and dispute resolution services. As we've seen, most ACDMA applications are family matters. The applicant and prospective representative(s) are typically family relations of the adult. Disputes about whether the adult needs representation, whether the proposed representative(s) are suitable, or whether the proposed representation plan will adequately respect the adult's wishes and look after their interests, are likely to involve intense interpersonal relationships with significant family history.

A family considering the options available to deal with cognitive difficulties experienced by a loved one may benefit from counselling services in various formats. Depending on the circumstances, that could take the form of family conferencing or other restorative practices. Navigators should be in a position to identify opportunities for such support in the community, and be able to quickly refer families to them.

Navigators should also be able to connect adults to independent legal counsel. Since the ACDMA came into force, Nova Scotia Legal Aid has offered free advice and representation to adults who are subject to an application. Independent legal counsel is important to ensure that vulnerable adults know their rights and can have their voice heard in ACDMA proceedings. But Legal Aid has no way to reach out on its own to an

adult who is facing a capacity assessment, or who has been served with a notice of application under the Act. And the adult may lack the knowledge or capability to contact Legal Aid on their own.

Navigators are more likely to come into contact with adults and families who are at the early stages of considering an application under the ACDMA. They are therefore in a good position to connect the adult with independent legal counsel, including Legal Aid. No one can force an adult to consult a lawyer, but navigators can offer to make the connection and arrange a meeting, or at least advise Legal Aid that an adult will be subject to an assessment or proceeding under the Act. In our view that should be one of their functions.

Recommendation:

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.

5.4. Guardianship orders

There is a particular need for education and potentially training of representatives who were appointed by a guardianship order under the former *Incompetent Persons Act*, and adults who are subject to those orders.

Guardianship orders were continued under the ACDMA, and guardians are now subject to the ACDMA, including all of the duties of a representative – e.g., to adhere to the adult's prior and current wishes unless it would be unreasonable to do so, to keep the adult informed as

to decisions and to involve the adult in decision-making to the extent reasonably possible. Further, like all representatives, guardians are not permitted to make decisions in areas where the guardian has reason to believe the adult has capacity, and in that case a guardian is obliged to return to court to have the order reviewed. As well, an adult subject to a guardianship order, or another interested party, may apply to court for a review of the order at any time.

It was an option, when the ACDMA was enacted, to require all guardians to return to court for a review, to ensure that the all-encompassing authority granted by the order was tailored to the adult's actual capacity. That would have caused significant financial costs for those families, however, regardless of whether the order was overbroad or not. The legislature instead chose to require a review only where the guardian has reason to believe that the original order was overbroad, or where the adult or a third party sought a review.

In our review we found only two applications to have a guardianship order reviewed under the ACDMA. Many guardianship orders have doubtless expired upon the death of the adult. For those that remain in effect, the low number of applications for review under the ACDMA may indicate that in many cases the existing order is appropriate – that the adult in question lacks capacity in all areas, and the order has not presented any other issue requiring the court's review.

We cannot be certain that that is the case for all orders, however. It is likely that there are adults in Nova Scotia who are subject to a guardianship order which removes their decision-making rights completely, but who are nonetheless capable of making decisions about at least some areas of their lives.

We therefore recommend that the Public Trustee's office identify persons who remain subject to guardianship orders made under the *Incompetent Persons Act*. The Public Trustee should be responsible to contact the adult and the guardian to ensure they are aware of the new legislation and new duties and rights under it, and that they are comfortable with the understanding of how adults can be supported in decision-making.

This project requires investigation, starting with the court files of each proceeding under the *Incompetent Persons Act*, and working forward through property records, obituaries and other data sources to locate the affected individuals. Approaching the families is liable to be sensitive, but necessary work, and the investigator may discover circumstances that require a review by the court or more immediate intervention. The Public Trustee is responsible for investigating complaints under the ACDMA. For these reasons the Public Trustee's office is well suited to this task.

The Public Trustee's office will require additional resources to complete the work, which we anticipate could take up to a year. But it is important to close the chapter on the *Incompetent Persons Act*, which was found to infringe fundamental rights and liberties. Without a project to contact guardians and adults subject to guardianship orders, we cannot say that it is not still doing so.

Recommendation:

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.

6. Application process

The *Adult Capacity and Decision-making Act* was meant to be a fundamental break with outdated ways of thinking about cognitive disability. It did away with the all-or-nothing conception of capacity. It rejected the idea that a person who was found incapable of making decisions had no further interest in or right to self-determination. As we have discussed, these values and principles have gained wide support.

The ACDMA also made a number of practical improvements over the processes for guardianship under the *Incompetent Persons Act*. It more clearly sets out the process for review of an order, and the court's authority to make changes if necessary. It expressly allows the court to appoint more than one representative, and to appoint an alternate representative in case the first representative is unable to continue in the role. These practical changes were generally welcomed.

Yet, as we have discussed, the necessary reforms in the ACDMA around capacity and continuing autonomy, and the need to protect against abuse of authority, required a more complex set of procedures and documents.

The time to assemble necessary documents, file them and give notice of the court hearing means the Act does not serve the interests of those who need to make decisions on a loved one's behalf in a crisis – yet this is often when a representation order is needed. The Act includes an emergency fast-track option, but it requires that the applicant return to court later with the proper paperwork, and so increases the overall cost of getting an order.

6.1. Cost

As we have touched on, the cost of a proceeding under the Act with legal representation is prohibitive for many families. We heard that an application can cost thousands of dollars in legal fees alone – up to $25,000 in one extraordinary case. Nova Scotia Legal Aid provides legal services for applicants meeting a certain income threshold, but the threshold still leaves many lower income families without assistance.

We heard as well that legal costs increase when the lawyer is unfamiliar with the process. In that case the client is effectively paying the lawyer to become familiar with the law.

The costs of an application are typically recoverable from the adult's estate, but that is only in cases where the estate has sufficient assets to cover them. As we have seen, in approximately half of the cases under the ACDMA the adult's estate is valued at less than $28,000.

All of this has led to evident frustration, and in some cases caused families to avoid the Act entirely where possible, seeking informal alternatives that may be less protective of adults' continuing autonomy and interests.

6.2. Going to court

In addition to the practical difficulties discussed in the last section, and the problem of significant legal costs, we also heard more general concerns about ACDMA applications being heard in court.

Parents seeking orders in relation to their children entering adulthood wondered why a court proceeding was necessary in the first place. The formal structure of the proceeding tends to depict a loving care-giver who has always looked after the best interests of their child as a third party, seeking judicial authorization to impose their views over their child's own wishes and desires.

We also heard justifiable concern that a judge presiding over a crowded Chambers docket will not have the opportunity to get to know the adult or the adult's supporters in order to consider the evidence - the capacity assessment and the representation plan in particular – with appropriate sensitivity.

The nature of judicial proceedings is necessarily formal, and to some extent presumes an adversarial contest. Most judicial proceedings arise from a legal dispute of some kind, after all. Yet in most cases under the ACDMA, the applicant is a caregiver, trying to do the right thing by their loved one. Indeed, most applications are uncontested. In some cases that may have to do with the lack of independent legal advice afforded to the adult, but that is unlikely to be the case for the majority of families. ACDMA applications are by and large concerned not with resolving a legal dispute but with ensuring that an adult's well-being and interests – including the right to self-determination - are protected.

Further, the ACDMA requires that any actual dispute arising under an order, which the parties are unable to resolve, be returned to court in the form of an application for a review. Practically speaking, that depends on the adult or their supporters having the wherewithal to contact and retain a lawyer to bring the review application before the court. For many that avenue will be out of reach.

In that context, it was suggested to us that ACDMA proceedings should generally not be heard in court, but rather before a specialized decision-making body. We agree.

6.3. Alternatives to court

We recommend that the government explore options for a decision-making body other than a court, to decide matters involving capacity under Nova Scotia laws. That would include applications for a representation order under the ACDMA, and for review of an order, but the body's mandate could be broader, encompassing matters under other legislation that could be usefully delegated to a body with expertise in mental capacity and legal rights. There are various models to consider, including tribunals in Manitoba, Ontario and Australia.

The primary advantages of a non-court model, as we see them, are expertise, individualized attention, flexibility, cost, and the opportunity for informal proceedings where the occasion permits. These are interlocking values. Where an application is uncontested, and the decision-making body is satisfied that the adult's interests are properly being represented in the proceeding, then it may be possible to provide a less formal environment that does not require the applicant to have a lawyer. The members' background in capacity issues will enable them to examine a capacity assessment and other evidence with a depth of expertise and knowledge. The relative informality of an administrative proceeding may allow them greater leeway to assist in the improvement of a representation plan and the individualization of the resulting order to the adult's particular capacities and needs.

As for matters where there may be some dispute or contest, we see the potential for the decision-making body to engage the parties in constructive dialogue more readily than a court can – or else to refer them to an external provider to give an opportunity for a more positive resolution. And, for those matters which genuinely cannot be settled consensually, the body would retain the authority to convene a formal hearing and issue a final determination.

Dealing with capacity matters outside court would meaningfully respond to the access to justice issues that we see at the heart of many of the complaints about the ACDMA – the complexity and cost of making an application when the matter is relatively straightforward on one hand, and the lack of real opportunity for adults with cognitive disabilities to challenge the conditions imposed on them by a representation order on the other. Issues under the ACDMA of either sort are very likely to arise in times of crisis. A flexible, responsive decision-making body can meet at least some of that need better than a court can.

An alternative decision-making model would also ensure that adults facing ACDMA proceedings have had the opportunity to receive legal advice and representation, through Nova Scotia Legal Aid or otherwise. This would be a mandatory check prior to any hearing.

We do not recommend any particular model for the decision-making body in terms of its membership, panel make-up, rules and procedures, or otherwise. Likewise, we do not recommend which laws, in addition to the ACDMA, ought to be delegated to it. Those aspects all need to be developed through an engagement process with affected stakeholders, including adults with cognitive disabilities, their families, advocacy organizations, relevant professional bodies, and those with practical administrative law expertise. Care should be taken to ensure that the decision-making body's mandate does not encroach on the jurisdiction of the superior courts, protected by section 96 of the *Constitution Act,* 1867.

Recommendation:

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.

6.4. Litigation guardians

As we discuss above, an adult facing a capacity assessment or other ACDMA proceeding may lack access to independent legal counsel. Nova Scotia Legal Aid offers free legal services to adults who are subject to an application, but Legal Aid has no way to independently contact adults in such circumstances – the adult or someone on their behalf must get in touch with Legal Aid. We have suggested a couple of ways to improve the opportunities for adults to receive legal assistance, including through the navigator service and the decision-making body.

But there remains a concern that an adult experiencing cognitive difficulties making decisions may also be incapable of instructing counsel. In that case it may be necessary for a litigation guardian to be appointed for the adult, as is common in *Adult Protection Act* proceedings. We agree that a litigation guardian should be available to instruct counsel, where the adult requires independent representation in an ACDMA proceeding but is incapable of giving instructions. The litigation guardian would ensure that the adult's interests are represented, independent of the evidence brought by the applicant. The litigation guardian would be in a position to challenge the evidence, including the capacity assessment or the representation plan.

As a substitute decision maker, 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. The decision-making body would be responsible to ensure that litigation guardians appearing before them are aware of their duties in this regard.

In adult protection matters, the litigation guardian is typically appointed from a roster of individuals independent of the adult's family, who are paid by the government to act in that capacity. It may be necessary to have similar services available in ACDMA matters as well, where the adult's family members are likely to have their own interest in the outcome of the proceeding.

Recommendation:

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.

6.5. Bond

The ADCMA requires a representative to file a bond in the amount of 1.25 times the value of the adult's personal property (e.g., money, investments, moveable property) for which the representative is responsible. The bond is effectively insurance against mismanagement or misfeasance by the representative, to protect the adult's property. A bond may be given by a person with sufficient assets, or more commonly will be purchased from a bonding company, like an insurance policy.

A bond is only required where the representative is given responsibility for managing the adult's property or finances. The court may waive the bond requirement if the adult's estate is less than $3,000, and the court is satisfied that there are other safeguards in place.

We heard concerns that the bond requirement is onerous and does not sufficiently take into account the relationship of trust that may exist between family members – particularly where the applicant is the adult's parent and the adult's personal property arises largely from contributions by the applicant – e.g., contributions to an RDSP. Others thought that a bond should not be required where the representative is the sole heir of the adult. Some respondents and participants urged that the court should have greater discretion to waive the bond, taking account of the circumstances of the appointment including the relationship between the adult and the proposed representative.

On the other hand, the bond is a significant protection against financial abuse of vulnerable adults. As we have learned, the majority of ACDMA applications concern adults experiencing dementia later in life. By that point many will have accumulated significant assets. The bond requirement should not be waived lightly. We disagree strongly with the notion, for example, that a representative who is the sole heir of the adult should not be required to give a bond. The assets belong to the adult while the adult is living, and the adult may require their use for home care services or long term care, or indeed to fulfill a wish or desire that the representative is bound to follow unless it is unreasonable.

We agree, however, that the court should have a broader discretion to waive the bond requirement. The threshold of $3,000 is arbitrary and does not take into account the relative assets of the representative. We recommend that the court should be permitted to waive the bond requirement in whole or in part, provided the court is satisfied that sufficient alternative safeguards are in place, and taking account of relevant factors, including the extent to which the adult's personal property has been accumulated through transfers without consideration by the proposed representative(s). The court would still have to take care in such a case, however, as the court may be appointing an alternative representative who did not contribute.

Recommendation:

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.

6.6. Currency of the vulnerable sector check

The ACDMA requires a vulnerable sector check for the proposed representative(s) and any alternate representative. Regulations under the Act require that the vulnerable sector check must be current up to no more than two months prior to the date of the application.

We have heard that there is confusion about whether 'date of the application' means the filing of the application, or the date when the matter is heard in court. The latter interpretation creates problems because if the hearing date is delayed for any length of time, a new check may be required. In our view an applicant should not be required to obtain a new check simply because the court hearing date has shifted. The regulations should specify that the vulnerable sector check must be dated no more than two months before the application is filed with the court.

Recommendation:

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.

6.7. Other process issues

We learned of other issues concerning processes under the ACDMA. It was brought to our attention that the time limit for the applicant to serve notice of an application upon the other parties (e.g., the adult), which the ACDMA leaves to the Civil Procedure Rules, is in some cases shorter than the time limit for the applicant to mail a copy of the notice of application to the extended list of interested persons at subsection 5(5). We agree the times should be

harmonized, and should follow the Civil Procedure Rules. In some cases that will leave less time for a person who receives a notice of application in the mail to file a notice of contest, but in that case the person is entitled to request an extension of time from the court, and we have little doubt the court would allow it if the objection appeared to have merit.

Recommendation:

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).

The Act requires that supporting documents – e.g., the capacity assessment report, the representation plan, the vulnerable sector checks – be filed with the application, but it does not speak to how the documents are to be proved as evidence before the court. *Civil Procedure Rule* 71.13(1) provides that they must be proved by affidavit and filed as part of the affidavit. The Act should include a provision to that effect.

Recommendation:

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.

It was recommended to us that the regulations under the Act include standard forms for such documents as the Notice of Application, a Notice of Application for Review, the applicant's affidavit, a draft representation order, and a personal bond.

The forms that currently exist under the Act – e.g., the capacity assessment report, the representation plan, representative's accounts - are not prescribed in regulations. Their essential contents are set out in the Act and regulations, but the forms themselves are prescribed by the Minister. This allows greater flexibility to change the forms when necessary, provided that the basic requirements of the Act and the regulations are adhered to.

For the same reason, we do not recommend prescribing a set of forms for other ACDMA documents in the regulations. However, having sample forms available would be very useful, particularly to self-represented persons but also to lawyers and judges when crafting affidavits and orders. The lack of a standard form order in particular has led to a lack of consistency in the orders that we have seen, and in some cases an unfortunate lack of attention to modern concepts and the requirements of the Act.

We recommend that there should be a set of set of non-binding sample forms available through the Public Trustee's office. The forms would include options and prompts to ensure that the Act's basic requirements and duties, and opportunities for individualization, are brought to the attention of users.

Recommendation:

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.

The Public Trustee must receive a copy of any representation order granted under the Act. The Public Trustee maintains a registry of orders and may follow up on any outstanding obligations in the order – e.g., to deliver accounts or return to court for a review of the order by a certain date.

This is a late stage in the proceeding for the Public Trustee to become involved, however. By the time the order is issued, the capacity assessment will have been completed and the court will have heard all of the evidence in order to craft the order. The Public Trustee has no practical ability to become involved in an application unless the Public Trustee hears about it through other channels – e.g., concerns brought by family members or others on behalf of the adult. This leaves adults vulnerable to being subject to ACDMA proceedings with no one involved to represent their interests, scrutinize the evidence, and ensure the integrity of the proceeding.

We recommend that the Public Trustee to be made a party to all ACDMA applications. The Public Trustee would see all evidence and argument, and would be able to participate in the proceeding if anything raised concerns.

Making the Public Trustee a party would also improve the registry of orders that the Public Trustee is mandated to maintain. As we heard during the review, despite the requirement in the Act the court does not always deliver ACDMA orders to the Public Trustee's office. As a party, the Public Trustee would automatically receive any order. Further, with access to the other documents in the file, the Public Trustee could develop the registry into a more useful source of statistical information, including information about the age and gender of the adult, the cause of incapacity, and other data elements such as those we have included in this report.

Finally, as a party the Public Trustee would be able to ensure that every adult facing an ACDMA proceeding has been provided with access to independent legal counsel.

Recommendation:

The Act should be amended to require that the Public Trustee be added as a party to ACDMA proceedings.

7. Capacity assessments

The main implication of the Webb decision was that a representative could only be given authority to make decisions in those decision-making areas, or 'domains', where an adult was shown to lack capacity. As a consequence, capacity assessments for purposes of a representation order under the ACDMA necessarily became more complex than under the *Incompetent Persons Act*. Under that Act the only question was whether, because of an "infirmity of mind", an adult was "incapable ... Of managing the person's own affairs", in which case the court would appoint a guardian to make all decisions regarding the adult's person and estate.

At the same time, developments in the law of mental capacity internationally and in other Canadian jurisdictions provided a set of best practices for capacity assessments, that were incorporated into the ACDMA and the regulations. These were intended to ensure that capacity assessments were carried out only when necessary, and with due regard for the adult's rights, dignity and privacy, and also that the adult was given the best possible opportunity to demonstrate their capacity during the assessment. Significantly, the Act's definition of capacity indicated that a person could demonstrate capacity if they were able to understand the nature of a decision and appreciate the reasonably foreseeable consequences of the decision, with support. The Act provided a non-exhaustive list of the kinds of support that could be used to help an adult demonstrate capacity.

The ACDMA also removed the requirement under the Civil Procedure Rules for an assessment by two physicians. Instead, an assessment by one professional would be sufficient, given the intended rigour of the capacity assessment form. And the list of professionals who could conduct a capacity assessment was widened: any physician or psychologist could do the assessment, and certain other professionals (nurses, social workers, and occupational therapists) could do so provided they received training through the Public Trustee's office. The Public Trustee has trained a number of professionals, who are now capable of performing a capacity assessment and filing an assessment report for purposes of an application.

In our consultations we heard general support for all of these changes.

7.1. Lack of access

Despite the widening of the professional groups who may perform an assessment, and the certification of a number of trained assessors, we heard that it can be difficult to find an assessor. We heard that many physicians and psychologists will not perform assessments, and there was a lack of awareness of the roster of trained assessors.

For their part, trained assessors have told us that they are an under-utilized resource, and could be doing many more assessments than they have been asked to do.

We also heard that it can be expensive to obtain a capacity assessment. While many physicians are apparently willing to provide an ACDMA capacity assessment report without charge to the applicant, a trained capacity assessor will generally charge a fee. The Province provides a subsidy for those demonstrating financial need, but the income threshold is low.

We recommend a concerted effort to raise awareness about the roster of trained assessors. This should happen in the short term. In the longer term navigators should be able to connect adults, families, lawyers, physicians, government departments and service providers with the trained assessors.

Recommendation:

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.

7.2. Capacity assessment form

We heard that there have been some difficulties with the prescribed capacity assessment form, called "Form 1". Some of these are technical, having to do with browser compatibility. Others are substantive, going to the wording of some questions and the overall flow of the document, which can be confusing.

We also heard that practitioners were in some cases confused about which form to use, since other consent and capacity legislation also uses a "Form 1".

We also heard more fundamental concerns about the form's lack of attention to certain elements in the Act. For example, the form prompts the assessor to ensure that the person has some support during the assessment, but does not describe all of the forms of support that are listed in the Act. The form requires the assessor to confirm that the adult was given the best opportunity to demonstrate capacity, but could say more, by way of written prompts and checkboxes, to ensure that certain impediments (e.g., sedation, lack of sleep, lack of nutrition/hydration, lack of medication, etc) are not hindering the adult's capacity at the time of the assessment.

We recommend that 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. To reduce confusion with other forms, it should not be called Form 1.

Recommendation:

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.

To reduce confusion with other capacity-related forms under other legislation, the capacity assessment report form should not be called "Form 1".

7.3. Expertise, quality, thoroughness

The Public Trustee has delivered training in capacity assessment to a number of qualified professionals. But the ACDMA does not require a physician or psychologist to have training in capacity assessments for purposes of the Act. This was due to concerns about access to assessors when the Act was introduced, and was based on physicians' and psychologists' general experience with decision-making capacity and consent.

In our consultations we heard concerns about the capacity assessments performed by some physicians. Participants complained about perfunctory "bedside" assessments, too simplistic to properly account for the complex psychological needs and abilities of the adult.

Participants and respondents acknowledged the difficulty of coming to a conclusion about a person's capacity, when capacity can change with time of day, medication, or shifting states of delirium, among other factors. But there was a general concern that some physicians in particular were not delivering on the careful and complex assessments that the Act requires, which are supposed to take account of such factors.

These concerns were borne out in our review of the court files. Some reports appeared to be hastily completed, lacking in explanation or background information that the form is designed to draw out. The form is evidence in a court proceeding which involves significant rights, yet some were practically illegible.

A number of respondents suggested that capacity assessment training should be mandatory. This would help to ensure that the Act's principles and values are effective for all adults, at the crucial point of the capacity assessment. But a requirement for training, in order to perform a capacity assessment under the ACDMA, would likely further limit access to assessors. Many physicians are doubtless doing a good job with the assessments, and we are not persuaded that many physicians would take the training if offered.

Instead, experts in capacity assessment, and the College of Physicians and Surgeons of Nova Scotia, should be engaged to explore ways to raise physicians' levels of practice in this area. Physicians should be encouraged to examine their own ability to undertake the multi-dimensional assessment required by the Act before accepting the engagement. Training should be offered, through the Public Trustee's office and other avenues. A written guide to conducting a capacity assessment, as provided for in the regulations under the Act, should be available and widely distributed to physicians, psychologists and other health professionals.

As well, the training for lawyers and judges described earlier should include an examination of examples of properly completed capacity assessments, so that they may recognize an assessment which is not adequate.

Recommendation:

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.

7.4. Support during assessment

The ACDMA provides that capacity means the ability to understand information relevant to a decision, and to appreciate the reasonably foreseeable consequences of a decision. The ACDMA clarifies that a person may demonstrate capacity "with or without support". In other words, a person may be supported through the capacity assessment, or at any time when capacity becomes relevant under the Act, in order to fully demonstrate their capacity.

The Act lists a number of supports that may be employed or used for this purpose (e.g., peer support, communication and interpretive assistance, individual planning, coordination and referral for services and administrative assistance) to the extent those are reasonably and practically available. But the Act does not require that they be provided to an adult during an assessment or otherwise.

One respondent recommended that the Act should be amended, to expressly assign a duty to the government to provide or fund such supports.

We do not recommend that approach, as the supports that may be provided to an adult will depend on what can be reasonably and practically made available at any given time or place. Many supports are currently provided, for example to clients of DCS' special needs program under the disability support program. But there should be continuing efforts to explore ways to provide greater support to adults, in order to fully demonstrate their capacity when it is called into question.

Recommendation:

Ways to provide greater supports to adults during capacity assessments and more generally should be explored.

7.5. Capacity assessors' responsibilities

A capacity assessor is responsible to determine if an assessment in any given decision-making area is necessary. If not, then the capacity assessor must not proceed with the assessment. The point is to ensure that an adult is not subject to an intrusive assessment of mental capacity in a given area, unless decisions will need to be made by or for the adult in that area. Capacity assessments should be limited in scope to only what is necessary at the time of the assessment.

The Act does not provide any guidance for a capacity assessor to determine when an assessment may be necessary. There is, therefore, a wide scope for discretion, and the potential for different treatment by different assessors.

In our view the standard of 'necessary' is the right one, being a relatively high bar in comparison to other formulations. But it is clear that better guidance is needed. The Public Trustee's office has developed a screening tool to address just this issue. Building on that work, the guide to conducting capacity assessments recommended in the previous section should include a section on screening in advance of an assessment, including how to apply the necessity standard.

Recommendation:

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.

Under the Act section 16, a capacity assessor has significant rights to obtain personal information about the adult, to inform the assessment. This includes personal health information, information about the adult's family relationships and behaviour, interactions with government agencies and more. The assessor may also obtain financial information about the adult, by order of a court. The assessor may only obtain information that is relevant to the assessment, and must protect it from disclosure or unauthorized access.

We heard concerns that the Act's provisions regarding access to personal information, other than financial information, are too lax. However reasonable, the request for information constitutes an invasion of privacy, and the mere fact of the request will necessarily reveal to outside parties that the adult is the subject of a capacity assessment.

In our view the protections against unnecessary invasions of an adult's privacy in the Act are adequate. The assessor may need access to background information to conduct a thorough and effective assessment, as the Act requires. The assessor is not permitted to seek information that is not relevant to the assessment.

We acknowledge, however, that there are best practices for deciding when to seek personal information, and how to do so sensitively. We suggest that this be covered in the assessment guide and training.

Recommendation:

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.

Capacity assessors are in a unique position with regard to the adult and the prospective representative. The capacity assessor will typically have been contacted by the prospective applicant, and through them been brought into contact with the adult for purposes of the assessment. This gives the assessor a unique vantage point from which to observe the interactions and behaviours of both persons, and potentially others in the adult's family or circle of support. The assessor may be able to draw useful conclusions or inferences about the dynamic between them, and potentially flag any concerns in this regard – e.g., a self-interested motive on the part of the prospective representative.

The capacity assessment form does not provide a direct means for the assessor to recount such observations for the benefit of the court or other third parties. The form allows the assessor to comment on forms of support that would be recommended for the adult to be able to manage the adult's needs without a representation order, and to describe whether the adult indicated any preference as to who should, or should not, be appointed as representative. But these are indirect ways to get at a more direct issue: that through their interaction with the parties the assessor may see something that causes concern, and that should be brought to the attention of others, particularly the judge deciding the application. In our view the form should expressly provide an opportunity for the assessor to set out such concerns.

As well, capacity assessors should be free to disclose concerns to the Public Trustee's office. The capacity assessment form may not ultimately be filed in the court proceeding, if, for example, the applicant does not wish the assessor's concerns to come to light. Enabling disclosure directly to the Public Trustee's office may require legislative changes to address privacy obligations, particularly under the *Personal Health Information Act*.

Recommendation:

The capacity assessment report form should provide space for the assessor to describe any general observations or concerns about the proposed appointment.

Through legislation or otherwise, assessors should be enabled to disclose concerns to the Public Trustee's office.

A capacity assessor must advise the adult of the purpose and effect of the assessment, and some of the adult's rights. The points to be covered are set out in section 9 of the regulations, and there is a prompt in the capacity assessment form to confirm that the assessor has advised the adult accordingly.

Section 9 does not include the right to legal counsel, but it is beyond question that an adult may have legal counsel present during an assessment. It was suggested that the capacity assessment form should include a prompt to that effect. We agree that the capacity assessor should advise the adult of that right, and would add that as a mandatory item to be conveyed pursuant to section 9 of the regulations. Assessors should be prepared to give contact information for Nova Scotia Legal Aid if the adult indicates a wish to have legal counsel present.

Recommendation:

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.

7.6. Capacity assessments generally

Many of the issues we have identified in relation to capacity assessments are not limited to those under the ACDMA. Capacity assessments happen under a variety of legislation with different purposes. Some of the problems are limited by access – e.g., under the *Involuntary Psychiatric Treatment Act*, only a psychiatrist can complete a declaration of involuntary admission, and the conditions for an assessment are narrowly defined. But in other cases

the same problems, such as the quality and consistency of assessments, the assessor's rights to information, and when it is appropriate to conduct an assessment, will arise. As well, assessments happen under different legislation, with different definitions and standards of capacity, different tools and report forms, and different thresholds and pre-conditions. As we have observed, this leads to confusion.

We suggest that this is one area that will benefit from a comprehensive review of Nova Scotia's consent and capacity laws, to harmonize the conduct of assessments as far as possible, and to endure that they are in accordance with modern principles of capacity. We repeat our recommendation for a general review of Nova Scotia capacity laws.

7.7. Engagement

Many of the recommendations in this and the preceding chapters will require meaningful engagement with a diverse group of stakeholders, as we have noted. Meaningful and accessible engagement with stakeholders and inclusive participation of those most impacted should be undertaken in relation to all of the foregoing recommended activities as appropriate.

Recommendation:

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.

8. Supported decision-making

Section 71 of the *Adult Capacity and Decision-making Act* requires the review of the Act's effectiveness to also consider supported decision-making.

Supported decision-making can be described as an arrangement or set of arrangements designed to support a person in exercising their decision-making capacity. In simple terms the point is to ensure that a person who may have difficulty making decisions on their own has the support and assistance they need to make decisions for themselves.

Supported decision-making can take many forms, from the informal – a person accompanying an adult to the bank to help explain information – to more formal arrangements; e.g., a legislatively-enabled support agreement granting the 'supporter' rights to receive information and communicate decisions on behalf of the adult. In this section we are primarily concerned with formal supported decision-making.

Understood in this way, supported decision-making is an alternative to substitute decision-making. In a substitute decision-making regime, a person is appointed or selected to make decisions on behalf of someone who is deemed incapable of making decisions on their own. The ACDMA is an example of a substitute decision-making regime. Elements of supported decision-making inform parts of the Act – notably the representative's duties to involve the adult in decision-making, and to favour the adult's prior instructions and current wishes unless they are unreasonable – but it remains a statute chiefly aimed at appointing a person to make decisions for the adult, in areas where the adult has been determined to be incapable.

During the law reform process that led to the enactment of the ACDMA, there were calls from various groups and individuals to also enact legislation to enable formal supported decision-making arrangements. These echoed earlier recommendations to recognize supported decision-making, for example by the Nova Scotia Joint Community-Government Advisory Committee on Transforming the Services to Persons with Disabilities (SPD) Program in its 2013 report to the Minister of Community Services. The legislature did not create supported decision-making legislation when the ACDMA was enacted, but it did ensure, through section 71 of the ACDMA, that supported decision-making would receive further consideration during the statutory review.

8.1. Views on supported decision-making

Amongst those who commented, most were in favour of the concept.

Particularly from persons with disabilities and their supporters, we heard that supported decision-making is most valuable because it enables persons with disabilities to remain in charge of their own lives. Adults with disabilities want to make their own decisions about their finances, health, where to live, what to eat, and where to work. They do not wish to lose the right to make decisions as the result of a diagnosis or disability.

Supported decision-making is seen as a way to ensure that disability is not a cause for the loss of legal capacity, meaning the right to have one's own decisions given legal effect. To that extent it is consistent with Canada's accepted obligations under the Convention on the Rights of Persons with Disabilities, article 12 of which guarantees the equal right to legal capacity, and the right to access supports in exercising legal capacity.

Supported decision-making is understood as a form of accommodation of disability – a legal structure to support persons with cognitive disabilities to enjoy substantive equality. In that way it is consistent with human rights principles found in the Charter and human rights laws.

Practically speaking, supported decision-making can offer a less restrictive, less intrusive alternative to the substitute decision-making regime under the ACDMA and other Nova Scotia laws. Depending on how it is set up, supported decision-making legislation may enable an adult to appoint a supporter to assist in making and communicating decisions, and in some cases that may be sufficient to meet the person's needs without recourse to a representation order. Even if a representation order is eventually required for some types of decisions, the adult may at the same time be able to make other decisions with the help of a supporter, minimizing the potential infringement of liberty and equality resulting from the order under the ACDMA.

On the other hand, we heard some skepticism about the concept of formal supported decision-making. In particular, some ACDMA representatives expressed concern about the possibility of abuse, if an adult with cognitive disabilities was able to choose anyone at all to be the adult's supporter. The position of supporter comes with potentially significant influence over the adult.

Because the adult chooses the supporter, the appointment is not subject to the review by a neutral third party like a judge. And because the decisions remain in the name of the adult, unlike with a power of attorney for example, it may be more difficult to investigate and hold a supporter accountable for any misuse of their influence.

Despite these concerns we are persuaded that Nova Scotia should move forward in considering the recognition of formal supported decision-making. There are clear reasons to permit supported decision-making arrangements to be formalized, as a less restrictive and intrusive alternative to substitute decision-making for some adults with disabilities. That is in keeping with the CRPD, the *Charter* and human rights principles, and the stated purposes of the ACDMA itself.

We see a number of practical advantages of formal supported decision-making legislation in meeting the concerns mentioned above. Most of all, the legislation may build in accountability and oversight safeguards, allowing for greater transparency and safety than leaving support relationships informal and unrecognized. As well, it can bring certainty to third parties dealing with an adult who relies on a supporter or network of support, regularizing and clarifying the third party's dealings with the adult and their supporters. Finally, legislation can provide clear guidance to a supporter about their legal duties and obligations, rather than leaving the supporter to feel their way through their role and responsibilities in an informal arrangement.

8.2. Models of formal supported decision-making

We do not recommend any particular model of formal supported decision-making in this report. There a number of models in legislation in other jurisdictions, and further innovations in the writings of academics, law reform agencies, and advocates for persons with disabilities.

The existing models differ on a number of dimensions:

- appointment of the supporter by a third party (e.g., a court or tribunal) or by the adult themselves in an agreement
- the threshold of mental capacity needed to enter into a support arrangement
- other pre-conditions (e.g., a pre-existing relationship of trust between the adult and the supporter)
- the scope of the supporter's authority, including the types of decisions that the supporter can help with, and limits such as monetary thresholds

- whether reporting to or monitoring by a third party is required
- whether agreements must be registered to be effective
- whether the supporter is also permitted to make decisions on the adult's behalf, and the circumstances in which the supporter is permitted to shift into that role
- if the supporter is permitted to make decisions for the adult, whether the supporter should follow the adult's prior capable instructions or current wishes, and the threshold for the supporter to disregard either (for example, if they are 'unreasonable')
- how to complain about abuse or misuse of the supporter's influence or other problems, and who may set aside an agreement or order

In Canada, there are three basic models for formal supported decision-making arrangements:

Supported decision-making agreements:

A supported decision-making agreement allows a person to appoint one or more supporters to help them make and/or communicate decisions. The supporter has legal status to help the person, but the decision-making authority stays with the person.

Legislation in Alberta and Yukon provides for these types of agreements. Prince Edward Island has enacted legislation to allow for them, but it has not been proclaimed in force. Manitoba does not provide for supported decision-making explicitly, but its legislation recognizes the validity of decisions made by a person with the help of an informal support network.

Alberta and Yukon require the adult to meet the traditional 'understand and appreciate' test for capacity when entering into supported decision-making agreements. This limits access to such agreements since a person must at least meet the functional test for capacity to make one. But the ability to understand and appreciate a supported decision-making agreement is different than understanding and appreciating a complicated financial decision, for example. So making an agreement can assist a person in setting up a relationship of support, to elevate their own decision-making capacity to handle more complicated decisions.

Representation agreements:

Representation agreements allow a person to appoint a representative to help them make decisions, and also to make decisions on the person's behalf.

Legislation in Yukon and British Columbia allows for these types of agreements. British Columbia's *Representation Agreement Act* does not require a person to meet the traditional test for capacity to enter into a representation agreement. Rather, the test for a 'limited' representation agreement is whether the person:

- Can communicate a desire to have a representative make, help make or stop making decisions
- Can demonstrate choices and preferences and express feelings of approval or disapproval of others
- Is aware that making a representation agreement means the representative may make decisions or choices that affect them
- Has a relationship of trust with the representative

This approach to capacity excludes fewer people from formally appointing a decision-making supporter. But it is subject to criticism that a person may appoint a representative without appreciating the consequences of putting someone in that position, potentially exposing the person to undue influence or abuse of authority.

Representation agreements allow flexibility in the representative's role, in that the representative can shift from supporting the adult's own decision-making to making decisions on their behalf where necessary. But this raises the risk that the representative may make decisions without being accountable for them, because it may not be clear in which role the representative was acting in respect of any given decision.

Under a 'limited' representation agreement made pursuant to the relaxed capacity standard outlined above, a supporter can be appointed to assist with, or make, decisions about personal and health care, other than very serious medical procedures, and routine financial matters – e.g., paying bills, depositing income, basic purchases, and investments.

Where financial matters are included, the representation agreement must name a monitor – a third party who is authorized and required to ensure that the representative is living up the representative's legal duties under the Act.

Representatives must follow the adult's current wishes if it is reasonable to do so.

Co-decision-making arrangements:

A co-decision-making arrangement is made by court order. The order permits and requires the adult and the co-decision-maker to make decisions jointly.

Legislation in Saskatchewan and Alberta provides for these types of arrangements.

Co-decision-making arrangements are more restrictive than supported decision-making because both parties, the adult and the co-decision-maker, must agree on the decision. In that sense they risk devolving into *de facto* substitute decision-making arrangements, since the co-decision-maker effectively has a veto. On the other hand, they may be less prone to abuse than other forms, because the co-decision-maker is appointed by the court.

Other models:

Other jurisdictions outside Canada have recognized supportive decision-making arrangements along the lines of the models described above, or hybrids. The Australian state of Victoria, for example, permits a tribunal to appoint a supporter, provided the adult and the supporter agree. The supporter must support the adult to make their own decision, but if the adult cannot, the supporter may make the decision, provided that the supporter must follow the adult's will and preferences as far as is practicable. The orders are reviewed yearly by the tribunal.

8.3. Moving forward

Considering whether to develop legislation to enable formal supported decision-making arrangements will require significant research and consultation. The options available in other jurisdictions will need to be examined in detail, and efforts made to determine their relative success in enabling persons with cognitive disabilities to exercise legal capacity without fear of abuse. Are the available arrangements being used? Have they been successful in relieving the need for substitute decision-making approaches? Are there records of complaints or court proceedings indicating problems? What reforms have been proposed?

With this background knowledge a plan for engagement with affected stakeholders and the public can be developed. We recommend a consultative approach from the start. That is, the persons most affected by the prospect of formal supported decision-making legislation should be involved from the ground up in developing an engagement plan.

We consider that a detailed discussion paper, identifying the results of the background research and setting out options for reform, and potentially even including some preliminary proposals, would be a key part of the engagement exercise. The contents of the paper should be presented in different formats and levels of detail for different audiences.

But beyond written engagement tools, the emphasis should be on bringing people with relevant lived experience together with those who may have professional or academic expertise, to explore the options and work through differences, with the aim of coming to a model of formal supported decision-making that can claim broad and deep support, particularly among the communities who stand to benefit the most from it. Particular effort should be made to ensure the perspective of African Nova Scotian and Indigenous communities, and newcomers, are represented.

These types of multi-stakeholder encounters are not easy to convene or facilitate, but the success of a potential legislative project to recognize supported decision-making will depend on its responsiveness to potentially differing requirements and perspectives. If adopted, supported decision-making legislation will be stronger for having come out of a collaborative, person-centred process like the one we are envisioning.

Recommendation:

Nova Scotia should engage with a diverse group of stakeholders to examine options for recognizing formal supported decision-making arrangements in legislation.

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

NOVA SCOTIA