



Submission on the Development of NL's Decision-Making Framework – Phase 2

September 2025

In response to the Provincial Government's public call for feedback on the planned development of a Decision-Making Framework, Phase 2, the Office of the Seniors Advocate (OSA) is pleased to offer this submission, which is an addendum, following up on the OSA's submission during Phase 1 (November 2024).

Legal capacity is the ability to make personal life, health and financial decisions. It is a fundamental right which every adult is presumed to have, unless proven otherwise. Capacity to understand the decisions we make is very important. Currently, NL has multiple laws that address capacity and decision-making such as the **Advance Health Care Directives Act; Adult Protection Act, 2021; Mentally Disabled Persons' Estates Act; Enduring Powers of Attorney Act;** and the **Mental Health Care and Treatment Act**. Many of these laws exist to support decision-making for people who do not have legal capacity; sometimes through substitute decision-making whereby someone else makes decisions on the person's behalf. While laws and policies exist to support individuals who may lack capacity, the focus has shifted to empowering individuals to make their own decisions with appropriate support if needed. In 2024 the Department of Families and Affordability (formerly Department of Children, Seniors and Social Development) and the Department of Justice and Public Safety embarked on the task of modernizing decision-making legislation and policies.

During Phase 1, the OSA clearly expressed concerns that the timeframe of the consultative exercise was insufficient for the task being undertaken. Specifically, the OSA queried: *How will seniors be consulted on this topic? Will there be a continuing education component before finalizing the framework to ensure seniors have the opportunity for informed input?* The OSA is satisfied that government heard our concerns about the initial consultation process, given their roll-out of Phase 2 which included public, in-person consultative opportunities.

Section 16 (1) of the **Seniors' Advocate Act** outlines the powers and duties of the OSA which includes consulting with seniors, service providers and the public as well as informing the public and promoting awareness of systemic issues related to seniors. As it relates to the development of this Decision-Making Framework, the OSA worked to ensure that as many seniors as possible were afforded the opportunity for input during both phases of consultations. The OSA promoted government's consultative process and widely circulated the information and questionnaire. As well, the OSA brought together stakeholders and representatives from over ten senior-serving community organizations to facilitate their understanding of the importance of this legislation so that they in turn could educate the seniors they serve; the goal being to ensure seniors are fully able to voice informed opinions on this important issue.

The OSA's Phase 1 submission outlined the following points for government's consideration:

- A person's decision-making ability must be presumed until/unless proven otherwise;
- The presence of a dementia or cognitive impairment without further assessment is not a valid reason to exclude someone from decision-making about their own life;
- Undertaking a capacity-assessment, where a person's right to make decisions is being measured, is no small task and must be afforded the highest level of diligence;

- Who will be tasked with conducting capacity-assessments? What will be the requisite skills and training? How will this be monitored? How will the competencies of the assessors be measured?
- Personnel responsible for assessing decision-making capacity must:
 - be thoroughly trained in the specific condition(s) the person being assessed is living with;
 - possess geriatric expertise if the person being assessed is a senior; and,
 - be well-versed in current approaches and processes of capacity assessment techniques;
- How will the assessors and their work be monitored on an ongoing basis?
- In instances where a person conducts capacity assessments infrequently, there is potential risk that the person could become out of practice and their skillset less honed. What plans will be in place to mitigate for this risk?
- Once in place, what will be the relationship between this Framework and existing documentation regarding decisions including, Advance Health Care Directives and Enduring Power of Attorneys? Would the new decision-making framework supersede existing documentation regarding a person's decisions?
- After an assessment of a person's decision-making capacity finds the person is capable of naming who will support their decision-making or become their substitute decision-maker, the person must be apprised of the process and personnel must be well-satisfied that the individual understands the choices and consequences of naming that person; how will they ensure the person is safe?
- If a person is named to become a substitute decision-maker for another person, this action must be a decision of last-resort;
- Individuals considering taking on the responsibility of making decisions for/with another person must be apprised of accountabilities and guidelines to enable them to involve, listen to, and respect the views of the person, so as to best represent the desires of that person. Like the capacity assessment, this responsibility is extremely important;
- Will a provincial roster/register be in place to ensure individuals do not become decision-makers for a number of people and thereby heightening the potential risk of abuse? How will such a registry be monitored?
- It is important to include the person in all stages of a decision-making process, as much as they wish to be involved; active participation or kept informed of the process.
- A person's decision-making ability must not be considered to be all encompassing; that is, a person's ability to make decisions in one aspect of life, must not automatically mean that a person lacks capacity to make decisions in all aspects;
- Accountability measures must be implemented to ensure the person's best interests are tantamount and decisions must be free from undue influence. A definition of what is meant by best interests is needed; and,
- A person's decision-making capacity can change over time as a cognitive impairment degenerates or improves. A provision should be in place to reexamine and perhaps reassess a person's decision-making capacity as needed or as per a set schedule.
- How will seniors be consulted on this topic? Will there be a continuing education component before finalizing the framework to ensure seniors have the opportunity for informed input?

Each of the above issues remain critically important points. Through discussions with government officials, the OSA is encouraged that a number of these issues appear to be considered and incorporated during government's preliminary work. However, the OSA continues to keep these concerns at the forefront to ensure they are reflected in the final product.

Phase 2 of the consultative process presented four "Decision-Making Arrangements" approaches for consideration:

Decision-Making Arrangement A: Some adults who have capacity may self-identify a need for support with decision-making and choose a supporter to help them without going through a court process e.g., some adults may have communication barriers but are able to make decisions on their own.

In this approach there would be no assessments of any kind and therefore no need for a court process.

Decision-Making Arrangement B: Some adults may not have capacity for certain decisions and need support but are able to make decisions together with a loved one or trusted friend. These adults could enter a supported decision-making arrangement through a court process.

In this approach the person and their chosen supporter would demonstrate to the court that they can make decisions together through support decision-making.

Decision-Making Arrangement C: Some adults may lack capacity for certain decisions and may be able to enter into a supported decision-making arrangement, as determined through a capacity assessment. They may have trusted persons in their lives who are willing to act as their substitute decision-maker and make decisions for them. These adults could have a substitute decision-maker appointed through a court process.

In this approach eligible persons could include adults who cannot make their decisions through a supported decision-making process and have a person who is willing and suitable to become their substitute decision-maker.

Decision-Making Arrangement D: Some adults may lack capacity for certain decisions and may not be able to enter into a supported decision-making arrangement and have no willing or suitable person in their lives to act as their substitute decision-maker. These adults could have a state decision-maker appointed to address specific decisions.

This approach may be considered as a last resort option where other less intrusive options are assessed as not appropriate.

For Consideration:

- What if a person has full capacity to make their own decisions but struggles to communicate and has nobody in their life that they can select to support them?
- What if a person can communicate well but has difficulty processing information as, for example, in instances where a person lives with Attention Deficit Hyperactivity Disorder (ADHD) or Autism Spectrum Disorder?

- What if the person chosen as the supporter does not ultimately act with the person’s best interests in mind? How will assessments of the supporter and the person mitigate for this? What will be the recourse?
- What options are available for an adult who has capacity but wants support with decision-making (Arrangement A) but cannot identify a support who can help them?
- While everyone with capacity to make decisions has the right to make bad decisions, what protections would be in place in instances of coercion or duress? Can assessments of the supporter and the person mitigate for this? Is a definition of “best interests” needed?
- If a person does not wish to communicate through another person, can they refuse to do so? Is it a violation of their human rights for an entity to insist that a person has another person communicate for them?
- Decision-Making Arrangements B, C and D refer to a person lacking capacity; in these instances, the person would be assenting rather than consenting. Some thought should be given to the use of the terms consent and assent. Although often used interchangeably, they are very different. In its basic definition, consent is the explicit permission a person gives, via a decision, for something to happen/not happen or to do/not do something. It is most often used in legal and ethical contexts. Consent is given if a person has the legal capacity to understand and that person’s decisions may be expressed through a supported decision-maker. Assent, on the other hand, is general agreement to a decision by a person who may lack full legal capacity. It is defined as consisting of all the verbal and nonverbal communication that could be part of a decision. Assent is how a person’s autonomy is respected by involving them appropriately in decisions about their own life. Further, for a person to legally consent to a decision, they must first be informed. Informed consent should include everything the person might expect from the decision, pros and cons, other options, etc.
- Is it necessary that a supported decision-making arrangement be a court process? Are there successful models that could utilize professionals to support these arrangements and protect individuals’ rights without requiring court processes?
- When this Framework is finalized, how will decision-making rights be communicated to the public? Are there education opportunities?
- Discussions on the new Framework reference the possibility of the creation of a capacity assessment board. Specifically, what would be the role of this Board? Who would be the members and how would they be selected? Would this Board also be a monitoring body for ethical behaviour, practices, etc. of assessors and, perhaps, decision-makers?

The OSA is concerned that seniors are often not given opportunity to provide informed consent. For example, too often seniors are placed in care without having all information and options explained to them and against their wishes. Sometimes their “capacity” is presumed to be lacking. The concept of rights advisors is a positive approach to ensuring - regardless of presumed and/or assessed capacity - seniors are provided with all the details of the decisions being made and have opportunity to provide their perspective on the matter.

Further, the OSA has heard concerns expressed regarding how capacity is assessed and the ability for this to be appealed/challenged. Improvements to this process is supported and a multidisciplinary independent approach is prudent.

Having decisions respected is a human right afforded every adult, and adults living with cognitive challenges are no exception. And when we consider how the number of people living with a dementia or other cognitive issues will grow in the coming years, this Decision-Making Framework is vital. The OSA supports the development of legislation to protect seniors' rights to make decisions throughout the life continuum, as they are able, as long as the rights of the senior are protected.

The Office of the Seniors' Advocate thanks the Provincial Government for advancing this very important issue and looks forward to further opportunities for dialogue as this work proceeds.



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