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RECOMMENDATION I

In view of developments in connection with the CRPD Committee's guidance to Canada, and more generally the fundamental importance, (acknowledged in Nova Scotia's new *Accessibility Act),* of ensuring that persons with disabilities are involved in the law and policy reform processes affecting them, government should EITHER:

- Seek a further extension of the suspended declaration from the court, or

- Add a provision requiring a mandatory review of the Act within a specified period, while committing to a robust and inclusive consultation process.

In light of the Article 12 of the CRPD, government should include in any requirement for mandatory review **a commitment to consult on and introduce a supported decision-making regime.**

RECOMMENDATION II

In the period of consultation and review noted above, government should carefully reconsider the list of matters to be prohibited or strictly restricted under the Act's contemplated conferral of decision-making powers.

RECOMMENDATION III

Nova Scotia should more adequately consult on and consider the specific legal implications of the imperative that the law relating to legal capacity must accommodate disability, as required by the CRPD and by basic principles of Canadian human rights law.

In particular, government must consult on and institute a regime in which capacity assessment, orders, and practices are centred in the duty to provide decision-making supports.

RECOMMENDATION IV: adopt the Kaiser Preamble.

RECOMMENDATION V: CLARIFY WHO OWES THE DUTY TO SUPPORT AND WHEN

The state:
The Act should make clear that ***the state*** owes a duty to provide supports to access the right to make decisions, as part of its obligations under domestic and international human rights law. This duty may be triggered for instance by assessments of capacity under the Act.

Capacity assessors:

As the Bill stands, there is no duty placed on ***those assessing capacity*** to explore how the person may be supported to demonstrate capacity to make the sorts of decisions placed into question (see ss.9-19).[1] As the CACL/ NSACL press release notes, there is moreover no requirement to provide evidence to a court that reasonable accommodations and alternatives have been exhausted (to the point, say, of undue hardship) prior to appointment of a representative. **In order to ensure that the Act conforms to the human rights norm of accommodation of disability, it should clearly provide that *capacity assessors* must explore and exhaust mechanisms for supporting legal capacity prior to a conclusion of incapacity.**

The representative, too, must explore and exhaust supports. This duty is partially recognized in the Act as it stands – although the duty should be underwritten by the state's duty to facilitate provision of supports.

Service providers:
In addition, under human rights principles, ***third party service providers*** owe a duty to accommodate (and so to provide supports to equally access to the services in question) to the point of undue hardship.

RECOMMENDATION VI:
-Maintain the duty in s.40 to comply with (rather than merely take into account) the adult's current wishes.
-Revisit the standard for overriding current wishes.

RECOMMENDATION VII: Those given the authority to assess capacity should undergo standard training which reflects the human rights values and priorities of the new (amended) law.

RECOMMENDATION VIII: Institute a regime of mandatory reporting whereby representatives must update the Court and/or an agency responsible for monitoring orders and decisions under the Act.

RECOMMENDATION IX: **Institute a regime of advocacy supports, including state-funded counsel and more informal provision of advice. Create an office (possibly a division of the Public Trustee) responsible for independent investigation of complaints and proactive oversight and monitoring of representatives' compliance with the law. In addition, consider creating a tribunal responsible for hearing challenges under this and other NS laws relating to legal capacity and the duty to provide supports.**

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[1] S.18 states that "Where the assessor is of the opinion the person lacks capacity" in a specific area, the assessor should "indicate in the capacity assessment report what forms of support or assistance, if any, would help the person manage their needs without need for appointment of a representative." However, there is no clear duty to explore, provide, or exhaust provision of supports at the point of assessment. Nor is there a duty on government to ensure that supports are available.

RECOMMENDATION X: Create (as part of the independent hub suggested above) a Decision Support Service or Supported Decision Making Resource Centre, responsible for research including continuing inter-jurisdictional scans of best practices relating to supported decision-making, as well as public education and investigation of complaints.

RECOMMENDATION XI: Remove s.73's grandfather clause and insert a requirement that government conduct a review of all existing orders and ensure discharge or transition to the new regime.

RECOMMENDATION XII: Reform of a broader suite of Nova Scotia laws relating to consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with reform of laws and policies relating to disability supports, in order to better coordinate respect for the liberty and equality rights of persons with intellectual, psychosocial, or cognitive disabilities -- as contemplated in the Roadmap.[2]

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[2] *Choice Equality and Good Lives in Inclusive Communities, A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program* (Department of Community Services, August 29, 2013).

Wildeman – Law Amendments Committee Submission, Oct 16, 2017

A. Background – Why did Government Need to Replace the Incompetent Persons Act?

- The history of state-condoned human rights abuses of persons with disabilities in Nova Scotia – in particular, grave abuses of the rights of persons with intellectual or cognitive impairments – is a long and shameful one.

- The *Incompetent Persons Act,* antiquated legislation reaching back to the 19th century and beyond, was declared constitutionally invalid because of interference with the rights to **liberty and security of the person under s.7 of the Canadian Charter of Rights and Freedoms** (Webb v Webb, 2016 NSSC 180). The old standard of incapacity from infirmity of mind to manage one's own affairs was unconstitutionally broad and vague, and the all or nothing or plenary powers of a guardian were unconstitutionally broad.[1]

- Because the Attorney General conceded the Act's unconstitutionality, the judge did not enter into a comprehensive analysis. In particular, there was no examination in *Webb* of the Act's failure to respect the right to **equality, or more specifically to accommodation of disability**. Yet this is a human right that, along with respect for liberty or autonomy, must inform any attempt to draft a human rights respecting approach to disability.

- **This government is to be congratulated for admitting** the old law's unconstitutionality, which was recognized over the years by many including the law reform commission of the province in 1993, while successive governments did nothing.

- This government did **what it had to** – there was no constitutional basis for the law and it admitted this rather than fight for its illegal continuance.

- Now the question is, **has government responded in a manner that respects human rights?**

- A related question is: **What other laws or suites of laws must government reform in order to respect the human rights of persons with intellectual or psychosocial disabilities, or cognitive impairments such as dementia, in this province?**

B. Process Problems and Mandatory Review

1. Weak consultative process failed to meet democratic and human rights requirements

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[1] Formal invalidation was made on agreement of ss. 2(b) [definition of incompetent person], 3(3) [appointment of guardian], 3(4) [powers - full care and custody], 14 [process through which person petitions court to lift order], and 16 [apprehension of an 'incompetent person at large' on warrant of 2 JPs].

As my colleague Archie Kaiser points out in his submission, the UN *Convention on the Rights of Persons with Disabilities* (CRPD), ratified by Canada in 2010, requires that governments effect the **full and effective participation and inclusion of persons with disabilities in society** (article 3(c)). The CRPD further includes a **general obligation** to "closely consult with and actively involve persons with disabilities" in the implementation of the Convention (Art. 4(3)), and recognizes a **right** to participation in political and public life (art. 29)

Prof Kaiser notes that "the Department of Justice representatives have been respectful, patient and receptive to input from persons who attended the consultations" at which he was present; I echo that statement. However, intensive and responsive stakeholder consultations began too late, beginning in late summer, and were too time-pressured for stakeholders to adequately canvas the options and be heard.

I would add that too little was done **to locate persons directly affected by the Bill and to ensure their voices were heard**. Given that subjection to an overly intrusive and restrictive law may have prevented persons from understanding or asserting their rights as well as their ability to participate in consultations, this is not a process in which one can send out a general notice and expect those affected to show up. It would take more dedicated and sensitive efforts to reach out and enable the contributions of persons directly affected.

In sum: the consultation process leading up to these reforms amounted to too little consultation with those directly affected, too late.

2. Scan of the wider legal and political context– CRPD Committee Concluding Observations

Article 12 of the CRPD, titled "Equal Recognition Before the Law," requires States Parties to "take appropriate measures to provide access by ~~persons with disabilities to~~ the support they may require in exercising their legal capacity." Moreover, Article 13, "Access to Justice," requires that States Parties "ensure effective access to justice for persons with disabilities on an equal basis with others."

The CRPD Committee, in its April 2017 concluding observations on Canada's first report,[2] recommended that Canada "withdraw its declaration and reservation to article 12 of the Convention[3] [in which, inter alia, Canada reserves the right to continued use of substitute decision making regimes] **and that it carry out a federal-provincial**

[2] See CRPD/C/CAN/CO/1 (8 May 2017) (observations adopted by the Committee April 12, 2017)

[3] The reservation states that Canada "reserves the right to continue [the use of substitute decision making regimes] in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal"

territorial process, in consultation with persons with disabilities, "to bring into line with the Convention legislation that allows for the deprivation of legal capacity of persons with disabilities." The Committee has been very clear that it regards Canada's reservation as inconsistent with the object or purpose of the CRPD.

I understand that the federal government has already initiated a process in response to the CRPD Committee, and that an initial F-P-T is to be held before this year is through.

This, in addition to the problems with the consultation process, suggests that government should either postpone passage of the Bill and revisit it in light of broader consultation and the imminent FPT process, *OR should insert a mandatory review clause which, in addition to a commitment to inclusive consultation, will allow alignment of the law with international and domestic human rights norms*.

I add that Canada has indicated its commitment to ratifying the Optional Protocol to the CRPD. Nova Scotia should keep in mind that this will enable individuals or groups to take complaints to the CRPD Committee where they have exhausted legal options in Canada.

RECOMMENDATION I

In view of the above-noted developments in connection with the CRPD Committee's guidance to Canada, and more generally the fundamental importance, acknowledged in Nova Scotia's new *Accessibility Act,* of ensuring that persons with disabilities are involved in the law and policy reform processes affecting them, government should EITHER:

- Seek a further extension of the suspended declaration from the court, or

- Add a provision requiring a mandatory review of the Act within a specified period, while committing to a robust and inclusive consultation process.

As described below, and in light of the Article 12 of the CRPD, government should include in any requirement for mandatory review **a commitment to consult on and introduce a supported decision-making regime.**

C. Substance: A Few Steps Forward, But a Failure to do Justice to Persons with Disabilities in Nova Scotia

1. Least restriction on liberty

- Bill 16 has been lauded by the Minister of Justice for some important steps forward. In particular, the Bill expressly builds in the principle of **Least Restrictive Means of**

support and intervention. The test for legal capacity is now decision-specific and orders are to be restricted to the extent or nature of the incapacity.

- Moreover, it is important to note the shift in decision-making responsibilities, away from a best interests model toward one in which compliance with prior capable wishes, or where those are unavailable, current wishes, is required. However, respect for current wishes is notably circumscribed by the words 'where it is reasonable to do so" – arguably allowing a return to paternalistic restrictions.[4]

- Despite these key advances, the terms of the Bill do not fully manifest the principle of least restriction. For instance, the Bill fails to prohibit or clearly and in determinate fashion to limit interventions such as use of seclusion or restraints.[5]

The federal government is now looking at restricting the issue of seclusion in prisons, particularly where prisoners have mental health conditions. This Act, like the federal correctional act, includes a general principle of least restriction -- but that is arguably not enough to ensure that deprivation of liberty is fully protected against. Moreover as NSACL argues, the Act's contemplating court-endorsed use of aversive stimuli does not sit well with the idea of respect for liberty and autonomy. We would like to have heard from government on how such a provision respects human rights.

RECOMMENDATION II

In the period of consultation and review noted above, government should carefully reconsider the list of matters to be prohibited or strictly restricted under the Act's contemplated conferral of decision-making powers.

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2. Accommodation of disability / supports for decision-making

- The more comprehensive problem is that the model of incapacity adopted fails to fully or meaningfully build in the central and critical imperative of accommodation of disability through provision of decision-making supports.

- That is, the Bill fails to recognize or manifest recognition of the fact that **the flip side of the coin of respect for liberty, and of the principle of least restriction, is the duty to accommodate and so provide supports to enable equal access to the right to liberty and self-determination**. You can't have one without the other.

- I agree with my colleague Archie Kaiser who has argued that this Bill, while it makes tantalizing mention of supports, fails to fully endorse or lay a legal or practical

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[4] I discuss this point further on in my more specific review of terms of the Act, below.

[5] Again, I discuss this further below.

foundation for the concept. It fails to clearly recognize the duty of government, as well as more specifically capacity assessors, service providers, and representatives once appointed, to ensure provision of supports for decision-making. This should include access to state-funded counsel where capacity is challenged.[6]

- The concept of supports for decision making is part of **a necessary human rights regarding shift *from a model of suspension and displacement of legal authority to make decisions and determine one's life* to a model of *accommodation of disability*.**

- In order to accommodate persons in wheelchairs in order to ensure access to public spaces, we need ramps. To accommodate persons who are deaf in accessing health care, we need deaf interpretation services. The central message you will be hearing from those who have come out today to speak for a human rights informed model of supported decision making is similarly, that in order to access the same rights as others to make decisions about our lives and have those decisions respected in law, government, (and also service providers regulated under the Human Rights Act), needs to ensure accessible decision-making supports, responsive to different types of disabilities and to cultural and linguistic diversity.

- I point you to a recent article on the theoretical underpinnings of the concept as well as related empirical research: "Future Directions in Supported Decision-Making"[7] in a recent issue of the Disability Studies Quarterly.

- What kinds of supports are required? At a minimum, those proposed in the literature and assessed in a growing body of empirical studies include **communication supports**, availability of **assistants trained in enabling understanding of information in a way that speaks to a person's capabilities**, also simple things like giving more time **for understanding, and ensuring cultural or linguistic difference is taken into account in the decision-making process or any capacity assessment process**. Of key importance, as suggested by CACL, is "access to agents who can help arrange needed decision-

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[6] Ontario's *Substitute Decisions Act* states that

> **3.** (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
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> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
>
> (b) the person shall be deemed to have capacity to retain and instruct counsel.

Under s.7 of the Charter, state-funded counsel is required for indigent parents in child apprehension cases in view of the grave threat to liberty and security of the person – arguably it is similarly required in a guardianship proceeding in which one's right to make one's own decisions is threatened. See New Brunswick (Minister of Health and Community Services) *v.* G. (J.), [1999] 3 S.C.R. 46.

[7] Anna Arstein-Kerslake et al, "Future Directions in Supported Decision-Making" (2017)37:1 Disability Studies Quarterly http://dsq-sds.org/article/view/5070/4549

making assistance including independent advocacy and rights advice." Finally, state-funded counsel is a necessary complement to more substantive supports for decision making, to ensure that the duties under the Act to provide supports and to ensure least restrictions on liberty are complied with.

- Another critical mechanism, recognized in legislation in Canada and internationally, is the **supported decision making agreement,** which enables nomination of a decision-making supporter whose role it is to assist in ensuring legal capacity is maintained and exercised by the person concerned.[8]

RECOMMENDATION III

Nova Scotia should more adequately consult on and consider the specific legal implications of the imperative that the law relating to legal capacity must accommodate disability, as required by the CRPD and by basic principles of Canadian human rights law.

In particular, government must consult on and institute a regime in which capacity assessment, orders, and practices are centred in the duty to provide decision-making supports.

D. Specific examples of areas of the Bill requiring reform

In what follows I note specific elements of the Bill of particular concern, in line with the themes I have noted on i) insufficient protection against deprivation of liberty and ii) insufficient provision for state-provided supports for decision-making capacity.

1. Preamble

A preamble is intended to inform interpretation of legislation where the meaning is not otherwise clear. The current preamble makes mention of the least restrictive principle and the right to liberty and self-determination. But it unaccountably leaves out any mention of equality. This is surprising and concerning.

I endorse **Professor Kaiser's proposed preamble**, which incorporates explicit commitments to equality and accommodation of disability, and moreover to the suite of interconnected fundamental human rights stated in the CRPD.

RECOMMENDATION IV: adopt the Kaiser Preamble.

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[8] The laws in BC (Representation Agreement Act, RSBC 1995 c.405), Alberta (under the *Adult Guardianship and Trusteeship Act,* SA 2008, c A-4.2) and the Yukon (Decision-Making Support and Protection to Adults Act, SY 2003, c21) provide such regimes. The new Irish law, the *Assisted Decision Making (Capacity) Act 2015* does so as well.

2. Reference to, and then disappearance of, "support" in the Bill

Despite some promising gestures toward the concept of supports, capacity assessments, legal orders and representative decision-making under the Act are stuck in the old medical model of capacity as an internal feature of the individual rather than firmly reorienting capacity assessment to the central question of how persons with disabilities may be supported in exercising their capacities.

a. Section 3(c) **defines 'capacity'** as capacity "with or without support"; however, the rest of the bill does not contemplate regularized provision of supports to persons subject to the law.

b. Section 3(s) **defines "support"** in a way that at first is arguably overly limiting (to supports "reasonably and practicably available" – this overly discounts the requirement stated as "undue hardship" in human rights law). Otherwise the list is tantalizing, and includes "peer support, communication and interpretive assistance, individual planning, coordination and referral for services and administrative assistance". However, it problematically does NOT include independent advocacy (or assistance in obtaining such advocacy), nor a catch-all clause contemplating any other form of support or assistance necessary to assist the person in exercising control over their decisions, or in developing or regaining decision-making capabilities.

c. Moreover, it is not clear on whom the duty to provide supports lies.

RECOMMENDATION V: CLARIFY WHO OWES THE DUTY TO SUPPORT AND WHEN

The state:
The Act should make clear that ***the state*** owes a duty to provide supports to access the right to make decisions, as part of its obligations under domestic and international human rights law. This duty may be triggered for instance by assessments of capacity under the Act.

Capacity assessors:
As the Bill stands, there is no duty placed on ***those assessing capacity*** to explore how the person may be supported to demonstrate capacity to make the sorts of decisions placed into question (see ss.9-19).[9] As the CACL/ NSACL press release notes, there is moreover no requirement to provide evidence to a court that reasonable accommodations and

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[9] S.18 states that "Where the assessor is of the opinion the person lacks capacity" in a specific area, the assessor should "indicate in the capacity assessment report what forms of support or assistance, if any, would help the person manage their needs without need for appointment of a representative." However, there is no clear duty to explore, provide, or exhaust provision of supports at the point of assessment. Nor is there a duty on government to ensure that supports are available.

alternatives have been exhausted (to the point, say, of undue hardship) prior to appointment of a representative. **In order to ensure that the Act conforms to the human rights norm of accommodation of disability, it should clearly provide that *capacity assessors* must explore and exhaust mechanisms for supporting legal capacity prior to a conclusion of incapacity.**

The representative, too, must explore and exhaust supports. This duty is partially recognized in the Act as it stands – although the duty should be underwritten by the state's duty to facilitate provision of supports.

Service providers:
In addition, under human rights principles, ***third party service providers*** owe a duty to accommodate (and so to provide supports to equally access to the services in question) to the point of undue hardship.

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3. Responsibilities of the representative

- I agree with Prof. Kaiser regarding s.21(4)(b)(i): i.e., that the will and preference of the individual concerned should presumptively be determinative of whom the representative should be. Moreover, I agree that **mandated independent advocacy services** should be available to the affected adult at this point and indeed throughout the process (see below).

- On the responsibilities of representatives, I agree again with Prof. Kaiser that an important reform would be to stipulate **certain required considerations for the court, pertaining to the fundamental rights and freedoms of the individual**, before making an order. Moreover, as noted above, the Act should go further in expressly prohibiting certain interventions, and/or delimiting their scope.

-On the representative's responsibilities in relation to decision-making (in the areas of authority assigned), a few important advances in the law should be noted.

- First, rather than having authority to substitute a decision that the representative views as in the person's best interests, the Bill requires that the decision comply, in order of priority, with 1) prior capable wishes of relevance to the decision if any; 2) current wishes if compliance is reasonable (a caveat I'll come back to), 3) the person's values and beliefs; and if that does not decide it, 4) the person's well being (which builds in concern for maximizing social inclusion, autonomy and self-determination, as well as physical and mental health). (s.40)

This marks an important move toward putting the person – their will and preference -- at the centre of the decision-making process. In addition, the representative must explore options and inform the person of those options to ensure current wishes are informed. However, the caveat that those wishes must be respected only "where it is reasonable to do so" (s.40(1)(b)) potentially allows for or invites reinsertion of best-interests-based reasoning on paternalistic grounds. The language should better reflect the adult's right to decisions that pull against another's understanding of what is reasonable, and protect the

dignity of risk. CACL suggests that a threshold of permissible risks of harm be set at significant risk of serious harm. Professor Kaiser recommends inserting a need to return to the Court where there is a major departure from wishes, substantially affecting the adult's rights and interests (see Kaiser submission p.16).

RECOMMENDATION VI:
-Maintain the duty in s.40 to comply with (rather than merely take into account) the adult's current wishes.
-Revisit the standard for overriding current wishes.

4. Mandatory training / refreshing of competency

- There is no mandatory training or refreshing of assessment powers in the Bill. I agree with others who were consulted on the following recommendation:

RECOMMENDATION VII: Those given the authority to assess capacity should undergo standard training which reflects the human rights values and priorities of the new (amended) law.

5. Mandatory reporting

The Bill lacks provision for robust legal oversight of orders to ensure that the least restriction principle, the duty to explore and provide supports for decision-making, and other duties of decision-makers are being met.

Active monitoring of compliance with the law is essential given the vulnerability of those under such orders to abuses of the representative's authority.

Such oversight and accountability may be effected *partly* by introducing mandatory reporting requirements, (not currently contemplated, although representatives of the estate must keep accounts (s.50), and a court may order such reporting on a one-off basis (s.51(c)). It may otherwise be effected through **appointment of special investigators/monitors, perhaps accomplished by expanding the work of the Public Trustee's office, or otherwise by creating an independent hub or agency responsible for overseeing implementation of this and other laws relating to legal capacity and decision-making supports (see below).**

RECOMMENDATION VIII: Institute a regime of mandatory reporting whereby representatives must update the Court and/or an agency responsible for monitoring orders and decisions under the Act.

6. State-funded / arranged counsel and access to independent monitoring / review

While s.58(2) provides adults with an ability to apply to the Court for review of an order, and s.66 entitles the adult to retain and instruct counsel, there is no provision for state-funded counsel or other advocacy supports. While representatives have a duty to assist in

arranging reassessment of capacity, for instance (per s.42), adults must first obtain a court order to trigger this duty.

Adults whose legal capacity is called into question or who are under a representation order should have a right to independent advocacy / rights information services as well as state-funded counsel. This flows from legal precedent on the right to state funded counsel where liberty and/or security of the person is fundamentally threatened by state action.

Moreover, an independent agency vested with responsibility under the Act should be empowered to receive and investigate complaints. **That agency should make periodic efforts to reach out to persons represented as well as representatives and review recent reports (in accordance with mandatory periodic reporting, recommended above).**

In addition, in order to enable access to justice in this area involving the fundamental rights of persons highly vulnerable to others' power, government should consider creating a stand-alone tribunal equipped to hear challenges to orders and decisions under this and other Nova Scotia laws concerning legal capacity and the duty to provide supports.

RECOMMENDATION IX: Institute a regime of advocacy supports, including state-funded counsel and more informal provision of advice. Create an office (possibly a division of the Public Trustee) responsible for independent investigation of complaints and proactive oversight and monitoring of representatives' compliance with the law. In addition, consider creating a tribunal responsible for hearing challenges under this and other NS laws relating to legal capacity and the duty to provide supports.

7. Capacity-Building in Nova Scotia

Our province is not the only jurisdiction revisiting laws on legal capacity, and attempting to assess how we may incorporate the human rights principles that have come to dominate this area – in particular, the principle of accommodation of disability.

It is essential that government remain apprised of developments in this quickly-moving area of human rights law and practice. To that end, the Act should create (and government should properly resource) an **institutional hub for research and public education, in addition to (as suggested above) investigation of complaints under the new law.** The institution in question could be framed as a ***supported decision making resource centre***, providing information to the public (including persons not under formal orders) seeking to enable the exercise of legal capacity.

This proposal is consistent with government's commitment to ensuring accessibility and inclusion to meet the needs of persons with disabilities. If accessibility and equality is

denied at the point of the right to make choices, then we have failed to meet the most basic expectations of human rights in the context of disability.

The new Irish law, the *Assisted Decision Making (Capacity) Act 2015*, establishes a Decision Support Service with clear functions which include building public awareness regarding the exercise of capacity by persons who require assistance in the exercise of their capacity. This office also has power to investigate complaints about decision-making representatives.

RECOMMENDATION X: Create (as part of the independent hub suggested above) a Decision Support Service or Supported Decision Making Resource Centre, responsible for research including continuing inter-jurisdictional scans of best practices relating to supported decision-making, as well as public education and investigation of complaints.

8. Grandfathering of orders under the old Incompetent Persons Act

It is unacceptable that s.73 of the Bill purports to translate plenary guardianship orders under the old, unconstitutional Act into new, liberty-respecting orders. The recent Irish law (*Assisted Decision Making (Capacity) Act 2015*) requires review of all existing guardianships to either discharge the adults affected (as occurred in Landon Webb's case) or to assist in the transition to the new regime. This is a clear requirement in order to ensure constitutionality of the new law. Financial and other assistance is required to ensure that the old orders (and practices under those orders) are no longer unconstitutional.

RECOMMENDATION XI: Remove s.73's grandfather clause and insert a requirement that government conduct a review of all existing orders and ensure discharge or transition to the new regime.

9. Protecting against deprivation of legal capacity and deprivation of liberty (through attention to the role of supports) beyond this new law

It is essential to link the work begun with this new law to a wider process aimed at protecting and vindicating the basic human rights of persons with disabilities in Nova Scotia. In particular, it is necessary to revisit a suite of Nova Scotia laws on consent and capacity, in light of the ways that the liberty-respecting requirement of least restriction on liberty links up to a duty to provide supports to enable equal enjoyment of putatively universal legal entitlements.

As has been pointed out by the Community Homes Action Group,[10] Nova Scotia continues to experience a human rights crisis brought on by failure to create meaningful

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[10] See "Choice, Equality and Community Homes – NOW. A Report on The Adequacy of Residential Options for Persons with Developmental Disabilities and Autism Who Are Preparing to Move to the Community," Presented by Community Homes Action Group

alternatives to institutionalization or overstretched efforts to provide home-based care. The result is a profound restriction of the liberties and choices of persons with disabilities. Reform of laws based in consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with revisiting the laws and policies relating to disability supports, as contemplated in the Roadmap.[11]

Ultimately, deprivation of liberty (including decision-making capacity) and failure to provide supports (including decision-making supports) are two sides of the same, human rights denying, coin.

RECOMMENDATION XII: Reform of a broader suite of Nova Scotia laws relating to consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with reform of laws and policies relating to disability supports, in order to better coordinate respect for the liberty and equality rights of persons with intellectual, psychosocial, or cognitive disabilities -- as contemplated in the Roadmap.[12]

(CHAG) to the Ministry of Community Services Standing Committee, Nova Scotia, October 4, 2016.

[11] *Choice Equality and Good Lives in Inclusive Communities, A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program* (Department of Community Services, August 29, 2013).

[12] *Ibid.*