

Law Amendments Committee  
Meeting of October 16, 2017

Bill No. 16 – Adult Capacity and  
Decision-making Act

Submission by  
H. Archibald Kaiser  
Schulich School of Law and  
Department of Psychiatry  
Dalhousie University  
Email: [archie.kaiser@dal.ca](mailto:archie.kaiser@dal.ca)  
Phone: 902.494.1003

---

**Apology for Being Unable to Attend The Law Amendments Committee Meeting of October 16, 2017**

I am sorry that I am unable to attend.

I have had a commitment for an out-of-province engagement for several months, which could not be rescheduled on such short notice. For that matter, the time available for the preparation of input to the Committee is extremely brief for such complex legislation.

These are my submissions in lieu of being able to present at the Committee.

**Setting the Stage for Bill No. 16:**

**The Lived Reality of Persons with Disabilities in Canada**

- “the history of disabled persons in Canada is largely one of **exclusion and marginalization**...excluded from the labour force, denied access to opportunities for social interaction and advancement, subject to invidious **stereotyping and relegated to institutions**” (Eldridge, SCC)
- “One in seven Canadians aged 15 years or older reported a disability” in 2012 (Stats. Can., “A profile of persons with disabilities...2012”)
- **There is no competition among persons who have different disabilities.** A broad definition of disability demands the recognition that **people often experience concurrent disabilities.**
  - “three out of four adults with disabilities reported more than one type of disability” (Statistics Canada, “A profile of persons with disabilities...2012”)
- “**chronic poverty is an everyday reality for people**” with disabilities (CMHA, March 26, 2015)
  - Persons with disabilities “remain more likely to be living in poverty across the working years” (CCD, Dec. 2, 2014)
- Poverty is associated with **lesser or non-participation in the labour force and inadequate benefits** in terms of income, housing, education and employment supports.

**Intellectual Disabilities: Definitions**

- Defined as **life-long conditions** that present before the age of 18 years that are characterized by **limitations in intellectual functioning and adaptive behavior** (Bielska et al., “Using National Surveys ...”, PHAC)
- “term used to refer to the **challenges** that some people face in **learning and often communication** ...”
  - “usually present” from birth or early age” (CACL, “Definitions and Terminology”)

---

### Intellectual Disabilities: Definitions

- “a significantly **reduced ability to understand** new or complex information and to **learn and apply** new skills (impaired intelligence). This results in a **reduced ability to cope** independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.” (WHO, Europe)

### Intellectual Disabilities: Incidence

- “no solid statistics, only rough estimates, on the global prevalence”
  - “Canadian estimate varies from 0.7% to 2.5%” (L’Arche, “Intellectual Disability by the Numbers”)
- “About 2% of the Canadian population have an intellectual disability.”
  - about 900000 people, with 30,000 living in institutions (in 2001) (CACL, Definitions and Terminology)
- “affect up to 3% of the population” (Bielska)

### Dual Diagnosis: Persons with Intellectual Disabilities and Mental Health Conditions

- 38% of adults with **intellectual disabilities** known to developmental service agencies “have either a **psychiatric condition and/or a behaviour problem**”; “**much higher than that observed in the Canadian population**” (Philip Burge et al)
- “population of people with intellectual disabilities who have co-morbid psychiatric or behavioural conditions ranges from 14%-64%” depending on population and criteria (Bielska)
- “individuals with developmental disabilities are **three to four times more likely to develop emotional, behavioural and psychiatric difficulties ...**” (CMHA, Ont.)
- Both persons with intellectual disabilities and those with mental health problems experience a higher prevalence of **physical health problems, stigma and discrimination, social exclusion and impoverishment, and lower life expectancy**
  - **Stigma and discrimination** make people’s difficulties worse, impeding recovery, heightening “**social isolation, poor housing, unemployment and poverty.**” (Mental Health Foundation, 2017)

### Recognizing Prejudice

**Stigma:** “a negative stereotype”; “discrimination is the behaviour” (CMHA, Ontario)

- “Stigma is principally a **psychological and social phenomenon ...**
  - A **social process** that aims to **exclude, reject, shame and devalue** groups of people on the basis of a particular characteristic” (Livingston, “Mental and Illness-Related Structural Stigma”, MHCC)

### Sanism (or Ableism or Disablism)

- a *form of prejudice*, like racism or homophobia
- “based predominantly upon stereotype, myth, superstition, and deindividualization” (Perlin, 1999)
- “**may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society**” (LCO, “Advancing Equality...”, 2012, 3)

### Emerging Perspectives on Disability: the New Dominance of the Social or Disability Model

- Canada is **moving from** seeing disability exclusively using a **medical model**, wherein disability has been seen as a health problem, where the **individual needs to be fixed or cured, viewed as a tragedy, to be pitied.**
- **Disability** is no longer being viewed as an individual pathology, but rather the **result of the interaction between people who have impairments and an environment that is filled with physical, attitudinal, communication and social barriers:**
- There has been a **global move towards the social or disability model**, represented by the *Convention on the Rights of Persons with Disabilities (CRPD)*: Canada has embraced this “important shift toward a human dignity approach to admissibility and away from a charity and medical model approach.” (Government of Canada, on the ratification of the *Convention*, March 11, 2010)
- This paradigm shift demands that persons with disability are **no longer viewed as “‘objects’ of charity, medical treatment and social protection; rather as ‘subjects’ with rights** who are capable of claiming those rights in making decisions for their lives based on their free and informed consent as well as being active members of society” (UN Enable)

MEDICAL MODEL	SOCIAL MODEL
<ol style="list-style-type: none"><li>1. Disability is a deficiency or abnormality.</li><li>2. Being disabled is negative.</li><li>3. Disability resides in the individual.</li><li>4. The remedy for disability-related problems is cure or normalization of the individual</li><li>5. The agent of remedy is the professional.</li></ol>	<ol style="list-style-type: none"><li>1. Disability is a difference.</li><li>2. Being disabled, in itself, is neutral.</li><li>3. Disability derives from interaction between the individual and society</li><li>4. The remedy for disability related problems are a change in the interaction between the individual and society.</li><li>5. The agent of remedy can be the individual, an advocate, or anyone who affects the arrangements between the individual and society. (Carol Gill, Institute of Disability Research)</li></ol>



---

### The Significance of the *Convention on the Rights of Persons with Disabilities (CRPD)*

- The CRPD reflects a **new world consensus** on the nature of disability and how people with disabilities should be treated in society, adopting the disability or social model
- The CRPD **links protections of individual rights and broader entitlements to positive rights**, such as the right to: live in the community; health; work; an adequate standard of living; participation in political, public and cultural rights.

### Why is the *CRPD* significant?

- No prior treaty specifically dealt with the rights of people with disabilities
- 160 signatories to and 164 ratifications of the *Convention* (as of May 2016)
- 92 signatories to and 89 ratifications of the *Optional Protocol*
  - **Canada signed the *Convention* on March 3, 2007 and ratified it on March 11, 2010; Canada has not yet signed the Protocol although it now appears ready to do so**

### General Principles (Article 3)

#### **The Moral Compass of the Convention**

- a) Respect for **inherent dignity, individual autonomy** including the freedom to make one's own choices, and **independence** of persons
- b) **Non-discrimination**
- c) Full and effective **participation** and inclusion in society
- d) **Respect for difference and acceptance** of persons with disabilities as part of human diversity and humanity
- e) **Equality of opportunity**
- f) **Accessibility**
- g) **Equality between men and women**
- h) Respect for the **evolving capacities of children** with disabilities and respect for the right of children with disabilities to preserve their identities

### General Principles:

#### **3(b) Non-discrimination**

- **Fundamental principle of international human rights law**
- **Includes direct and indirect discrimination**
- **reasonable accommodation** must be made for persons with disabilities
- **reasonable accommodation**: 'necessary and appropriate modification and **adjustments not imposing a disproportionate or undue burden**, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms' (Article 2)
  - Concept also **applies more broadly to "economic, social and cultural rights"**, wherein "each State Party undertakes to take measures to the maximum of its available resources" (Article 4(2))

---

**General Principles:**

**3(c) Participation and Inclusion**

- Participation is important to correctly identify specific needs, and to empower the individual
- **Full and effective participation and inclusion in society is recognized in the Convention as:**
  - A **general principle** (article 3(c))
  - A **general obligation** (article 4), including the obligation of States parties to “closely consult with and actively involve persons with disabilities” in the implementation of the *Convention* (Art. 4(3))
  - A **right** (e.g. articles 29, the right to participation in political and public life and 30, the right to participation in cultural life, recreation, leisure and sport)

**A Note on the Consultation Obligations Regarding Bill No. 16**

- Article 4(3) of the *CRPD* requires close consultation and active involvement of persons with disabilities and their representative organizations
- The Department of Justice representatives have always been respectful, patient and receptive to input from persons who attended the consultations in which I participated
- The consultation process started out at too slow a pace, compared to its last two months, from about August 1 to September 30, 2017
  - This period was too intense and pressured.
- The Department of Justice representatives seemed to be labouring under constraints that did not permit either the possibility of applying for a further extension from the Supreme Court of Nova Scotia or the thorough infusion of supportive decision-making in the Bill.
- The Government of Nova Scotia should conduct a “consultation audit” to see what lessons must be learned from the processes used regarding the *Accessibility Act* and *Bill No. 16*.

**General Principles:**

**3(f) Accessibility**

- **Important as a means to empowerment and inclusion**
- Both a **general principle and a stand-alone article** (article 9)
- Access must be ensured to:
  - **Justice** (article 13)
  - **Living independently** and being included in the community (article 19)
  - Information and **communication services** (article 21)
  - **Education** (article 24)
  - **Health** (article 25)
  - **Habilitation** and rehabilitation (article 26)
  - **Work and employment** (article 27) - human resource policies and practices
  - **Adequate standard of living** and social protection (article 28)

- **Participation** in political and social life (article 29)
- Participation in **cultural life, recreation, leisure and sport** (article 30)

### Is the CRPD Law?

- *The Precise Legal Effects of the Convention Are Uncertain*, but:
  - “could *strengthen and support legal arguments* advanced for clients with disabilities” (ARCH, *Providing Legal Services to People with Disabilities*, 2008, 10)
  - Provides a **strong normative base** for the need to transform Canadian mental health and disability law, policy and services
  - Must be adverted to by legislators, courts, officials in the administration of justice as a source of law and policy in considering issues affecting people with disabilities
  - **Tension between:**
    - **dualist assumptions:** distinct domestic and international legal systems requiring transformation by Canadian law
    - **monist aspirations** towards convergence: duty to ensure domestic law is shaped by and conforms with international law

### If the C.R.P.D. Is An Unimplemented Treaty, How Does It Affect Domestic Law?

- Becomes part of Canadian law at least when implemented by statute
  - although in any case **its values may inform “statutory interpretation and judicial review”** (*Baker*, S.C.C., 1999, para. 69)
- Some cases suggest there is a **presumption of conformity that requires legislation to be interpreted, where possible, in a manner consistent** with international law (*Shreiber* 2002 (50); *Canadian Foundation for Children* 2004 (31); *Mugesera* 2005 (82); *Merck Frosst* 2012 (117); *Thibodeau* 2014 (113))

### Hape 2007

- “well-established principle of statutory interpretation that **legislation will be presumed to conform to international law...**
- courts will **strive to avoid** constructions of domestic law pursuant to which the state would be in **violation** of its international obligations, **unless the wording of the statute clearly compels the result.**” (*Hape*, 2007 (53))
- legislatures are “**presumed to act in compliance** with Canada’s obligations” and “**to comply with the values and principles** of customary and conventional international law” (*ibid.*)

---

### **If the C.R.P.D. Is An Unimplemented Treaty, How Does It Affect Domestic Law?**

- International law is **one of many available sources of interpretative assistance**
  - The cases appear to be **leaning in the direction of the presumption of conformity of legislation with international human rights law and international human rights law having to be brought to bear as an interpretative guide**
    - **Assuming the legislation does not directly contravene the treaty**
      - ❖ **An oddity**, given the more generous and inclusive SCC stance on treaties and the *Charter* and the *Vienna Convention on the Law of Treaties*
      - ❖ **Canada would be in a very awkward position** were a court (or legislature) to determine that **domestic law openly flouts international human rights law**

### **Unimplemented Treaties and the Charter**

- Some cases suggest the *Charter* “**should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents** which Canada has ratified.” (*Slaight Communications*, SCC, 1989, approving *Ref. Re Public Service*, SCR, at 1056):
  - “Canada’s international human rights obligations should **inform not only the interpretation of the content of the rights** guaranteed by the *Charter* but **also the interpretation of what can constitute pressing and substantial s. 1 objectives...**” (*Slaight*, 1056-7)
- See also:
  - **Divito 2013 (22):**
    - “Canada’s international **obligations** and relevant **principles** of international law are also **instructive** in defining the (*Charter* s. 6(1)) right...”
  - **Kazemi 2014 (150):**
    - “...*Charter* will often be understood to provide **protection at least as great as that afforded by similar provisions in international human rights documents...**”
    - “principally...**an interpretative tool...**delineating the breadth and scope of *Charter* rights.”
    - “International Conventions may also assist in **establishing ...recognition of new principles of fundamental justice.**”
      - ❖ **But** not all commitments in international agreements amount to principles of fundamental justice.”
        - “very diverse”; “ever changing”
        - Cannot equate all international human rights “protections or commitments” with principles of fundamental justice
        - Cannot permit destruction of “Canada’s dualist system of reception of international law” and cast aside “parliamentary supremacy and democracy”
- Some cases might seem to ignore the **presumption** that *Charter* protections start with the minimum level provided by international human rights law:

- possibly reducing international law to being merely informative, of a comparable status to other aids, rather than imposing positive interpretative obligations
- Given the breadth and generosity of the rights guaranteed by the *CRPD*, it would seem that the *Convention ought to bolster the Charter's prohibition of discrimination on the basis of mental or physical disability*
- **And the *Convention* may also infuse the interpretation of other *Charter* sections, such as ss. 7, 10(a) and (b), 12 and 24(1)**

### The Duty to Scrutinize Legislation

- Some basic and overriding principles of international law must be kept in mind
  - The Vienna Convention on the Law of Treaties:
    - A State must “**refrain from acts which could defeat the object and purpose of a treaty**” (Art. 18(a))
    - “Every treaty in force is binding upon the parties to it and must be **performed in good faith**”. (Art. 26)
    - “**A treaty shall be interpreted in good faith...**” (Art. 31(11)) (See *Thibodeau* 2014 (35))
- A **failure to scrutinize** conventional mental health and disability legislation using the lens of the *CRPD* would **arguably not be in good faith**.
- **See also Canada's adoptive obligations under Art. 4 of the *CRPD***
  - “adopt all appropriate...measures for the implementation” (1)(a)
  - “modify or abolish existing laws...that constitute discrimination” (1)(b)

### The Optional Protocol to the *CRPD*

- Canada appears finally to be ready to ratify the Optional Protocol.
- This enables “individuals or groups of individuals...who claim to be victims of a violation “to send communications to the Committee on the Rights of Persons with Disabilities.” (Article 1)
- Obviously, many of the legal and social problems which people with disabilities experience could be the subject of such communications.
- Nova Scotia should be mindful of the heightened scrutiny to which it and the rest of the country will be subject after the ratification of the Optional Protocol.

### United Nations, Committee on the Rights of Persons with Disabilities, 2017: A Critique of Canada's *CRPD* Performance

- “Concluding observations on the initial report of Canada,” April 12, 2017
- 7: “The Committee is **concerned** about [Canada's] upheld reservation to Article 12..., **preserving substitute decision-making practices.**”
  - 8: “**recommends that [Canada] withdraw its declaration and reservations**”
- 9: “The Committee notes with **concern**:

---

(a) “That the provisions of the Convention are **yet to be appropriately incorporated** in legislation and policies...”

**UN Committee Concerns (continued)**

- **9: (b) The uneven application of the Convention and the Committee’s jurisprudence by the judiciary and law enforcement officials...”**
- 10: The Committee recommends...
  - (d) Raise awareness and develop **capacity building programmes among the judiciary and law enforcement officials about the Convention as a legally enforceable human rights instrument, the human rights model of disability, its principles and the jurisprudence of the Committee...”**



---

### **Comments on Bill 16**

The Preamble and purpose (s. 2) sections have some positive elements, but they should be strengthened.

A **preamble** recites “the circumstances and considerations that gave rise to the need for the legislation or the ‘mischief’ the legislation is designed to cure” and is “an important source of legislative values and assumptions.” (*Sullivan on the Construction of Statutes, Sixth Edition*, 2014).

An explicit **statement of purpose** by the Legislature is authoritative, setting out what “the legislation is meant to implement or the objectives that is meant to achieve,” establishing “a general framework within which administrative and legislative powers are conferred to achieve particular goals or to give effect to particular policies.” (Sullivan)

The addition of specific references to the *CRPD* and the *Charter* would clarify the intentions of the Legislature and would provide concrete evidence that this Act was meant to promote and protect fundamental human and constitutional rights.

I have drafted a possible version of a Preamble and a purpose section which was already incorporated in part in this Bill, but which should be considered for further adoption. This is attached.

---

## **Two Major Deficiencies: Depriving Adults of the Protections under International Human Rights Law**

Article 12 of the *CRPD*, "Equal recognition before the law" requires Canada and Nova Scotia to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

Article 13 of the *CRPD*, "Access to justice," requires that States Parties "shall ensure effective access to justice for persons with disabilities on an equal basis with others."

The proposed Act appears to be unmindful of the obligation to provide supports for adults who may be subject to the law that is required by the *CRPD*.

Moreover, in order to ensure effective access to justice, the legislation says nothing about providing advice to a prospective subject with regard to his or her rights and the provision of true advocacy services for persons subject to the legislation.

## **Specific Sections Bill 16**

### **Definitions, s. 3**

#### **(b) assessor**

The Government is well aware of the complexities of specifying categories of persons entitled to do assessments and the many issues that may surround these procedures. Extensive regulation making authority is established in section 60 (1)(e) of the draft legislation. These will obviously have to track the spirit and letter of the legislation very closely. Parts of these anticipated regulations should be moved to the statute because they are so important. In my opinion, regardless of membership in any profession, no one should be permitted to become an

---

assessor unless he or she undertakes a standard training program, enrolment in which should be encouraged by offering an honorarium.

**(c) capacity**

Curiously, this section mentions “with or without support,” whereas most of the rest of the legislation does not seem to contemplate the regularized provision of supports for persons who are subject to the law.

**(s) support**

This definition of support is obviously very limiting: “as may be reasonably and practically available.” Although it offers a few examples, this mention of support is otherwise isolated and lacking any other consistent context. Moreover, there is no mention of any duty by the state to provide any supports.

**s. 4: “interpreted and administered in accordance with the following principles”**

This section could more useful, were it placed in the context of Preamble and Purpose sections, as noted above.

The list is underinclusive. A comprehensive review of the *CRPD* and *Charter* case law suggests some worthwhile extensions. For example, article 3 of the *CRPD* suggests the need for references to: “Non-discrimination” and “Respect for difference” and “Equality of opportunity” and gender equality. Similarly, the *Act* should make reference to the need to provide freedom

---

from inhuman or degrading practices (Article 15) and from “Exploitation, violence and abuse” (Article 16).

### **Sections 5–8: “Application for Representation Order.”**

This is one of many places where it would be appropriate to include a further reference to the least restrictive and least intrusive principle. For example, section 5(2) should refer to the necessity of other measures having been contemplated and/or tried, before making the application.

In the same section, the list of preconditions refers to the requirement of “a capacity assessment report,” when this may not have been able to be obtained in the circumstances. The situations when this lack of a report might be tolerable should be noted in the *Act*, not merely the regulations.

Section 7(1) uses the balance of probabilities standard. Commensurate with the importance of such applications, the standard of proof should be elevated to clear and convincing, or something else more than the mere civil standard. At least there is a reference in section 7(1)(c) to “less intrusive and less restrictive measures,” but there is no specific requirement that the court consider the ameliorative effects of the provision of supports on the adult’s decision making capacity either there or in section 7(2).

Section 8 refers to circumstances involving “immediate danger,” and treads in part upon the situations contemplated in the *Adult Protection Act*, which is, unfortunately, not being addressed simultaneously. One wonders whether the new statute might be chosen over the *Adult Protection Act* in some cases. Neither statute provides sufficient procedural protections.

### **Sections 9-20: Capacity Assessment**

Section 10(2) would provide the Court with the authority to “direct an adult...to undergo the capacity assessment.” Given the broad protections of the principle against self-incrimination and the general right to silence. I am not sure of the Court’s authority to make such an order.

Section 18(c) is a positive provision as it requires the assessor to identify “what forms of assistance would help...without the need for representative.” If this section were supplemented by a **statutory obligation to provide supports**, it would have a far greater impact.

### **Sections 21–26: “Appointment of Representative”**

Although section 21(4)(b)(i) does refer to considering “The views and wishes of the adult,” it does not clarify that these views and wishes should be considered preminent. Moreover, this is one of many areas of the legislation where, if the individual does not have an advocate, his or her wishes may not be put adequately before the court. Indeed, without proper rights advice and advocacy services, the adult may not be making an informed and voluntary choice in expressing his or her apparent views and wishes.

Section 23(b), contemplating two or more representatives and the effect of the inability of one to act, automatically assigns “the remaining representatives” the authority to act. This would not seem to be suitable in some circumstances where there had been, for example, a previous division of authority between well-being and financial issues.

---

**Sections 27–49: “Authority and Duty of Representative”**

Section 27(2) says that “The Court *may* grant...only such authority” whereas this section should be mandatory rather than permissive, thereby insuring the restrictiveness of the grant of authority by the court.

Section 27 would be strengthened, in terms of protecting the adult’s dignity and autonomy, if a full list of required factors for the court to consider was included. Section 27(2)(d), with its reference to “the least restrictive and intrusive” criterion is appropriate. On the other hand, a legislative demand to address, for example the freedoms referred to in articles 14 to 24 of the *CRPD* would be helpful: Liberty and security of the person; freedom from inhuman treatment; freedom from exploitation, violence and abuse; integrity of the person; liberty of movement; living independently and in the community; personal mobility; freedom of expression; respect for privacy; respect for home and the family.

Particularly in the absence of a requirement of advocacy services for the adult, the ability of the Court, under section 27(4)(g) to permit the representative to determine “whether to “commence...any proceeding” is alarming, because it might effectively strip the adult of his or her entitlement to independent legal advice and representation, which would be essential if the adult wanted to challenge any order made in respect of him or her.

In sections 27(2)(d) and 27(3), there are other references to assistance and support which is laudable, but which is weakened by the lack of a thoroughgoing *requirement* under the *Act* to ensure that support or assistance is available at every juncture.

Without a court order, section 34 restricts the representative from making certain decisions. Additional explicit prohibitions should be included here. Examples might include



---

prolonged seclusion, segregation and physical or chemical restraints. Even with a court order, such activities concerning the adult should be extremely restricted or impermissible. Obviously, the limited availability of a court apparently being able to order an “aversive stimulus” (s. 34(1)(d)) should fall under this same type of list.

Section 39(1) would be invigorated were it to require the maximization of the “adult’s well-being and interests in financial matters,” rather than their mere protection and promotion.

Section 40 provides for circumstances where the representative can, while making a decision within his or her authority, diverge from the instructions the adult gave when he or she had capacity and the adult’s wishes and beliefs. An additional protection of the adult’s dignity and autonomy would include the need to return to Court in any instance where there is a major departure, substantially affecting the adult’s rights and interests.

It could be argued that the notion of a bond should be extended beyond what is covered under section 46, to extend to possible civil liability for abuse or betrayal of the representative’s obligations to the adult’s needs and freedoms in the non-financial sphere.

#### **Sections 50–54: Reporting by Representative**

Section 50 requires the maintenance of accounts “in accordance with the regulations.” A parallel obligation should be created in all instances for well-being, including, personal and health care issues, as is noted in section 51(c), albeit there on a discretionary basis.

---

## Sections 58–67: Proceedings in Relation to Representation Order

Section 58(2) provides for an adult being able to “apply to the Court for review of the order.” This is one of many areas within the act where the lack of mandatory independent advocacy services for the adult puts him or her in a very vulnerable position.

Section 66 discusses the entitlement of the adult “to retain and instruct counsel” and “to be heard by the Court in the matter most appropriate to the adult’s circumstances,” which again **fails to impose a state duty to provide counsel** for such an adult in all circumstances.

Sections 62 and 63 authorize applications for review and appeals by interested persons. It is most concerning that there is a lack of an overall oversight for the class of persons subject to the *Act*, by an independent body. As it stands, scrutiny is through the courts in individual cases only.

The *Protection of Persons in Care Act* provides for the opportunity for citizens or a mandatory obligation for service providers to report abuse. It would be reassuring for the whole category of persons subject to orders under the new legislation if there were regular scrutiny by an independent standards compliance authority, the ability to make a complaint by anyone and the duty to do so by service providers.

## General

The immunity granted under section 68 is arguably too extensive.

The offence provision under section 70 should be expanded to contemplate liability for other contraventions. For example, offences could be created surrounding the wilful or negligent failure to abide by the terms of in order with respect of the well-being or financial affairs of an adult.

---

The regulation making authority under section 71 is too broad. Some provisions should be reallocated to the substantive part of the legislation, thereby permitting greater legislative and public scrutiny. For example, this could include crucial issues with regard to: capacity assessment and assessors s. 71(1)(f); prescribing things that the representative for an adult is not permitted to do on behalf of the adult” (s.60(1)(k)); respecting the obligation of the representative to inform the adults and encourage his or her participation in decision-making (s. 60(1)(m)); reports of “abuse or misuse of representation orders” (s. 60(1)(z)); the “recognition of orders made under the former *Incompetent Persons Act*” (s. 60(1)(za).

**Transition and Consequential Amendments: The Unacceptability of Permitting the Survival of Orders under the Unconstitutional *Incompetent Persons Act***

It is very troubling that section 73 permits their survival of orders “under the former *Incompetent Persons Act*” as if they were made under the new legislation. This is completely illogical, given the unacceptable standards of the old *Act*. It leaves a significant number of vulnerable individuals being subject to all of the risks of unjustifiable intrusions or abuse permitted under the former legislation, with no mandatory scrutiny, which suggests an abandonment of responsibility. It would be reasonable, if the Committee is persuaded that all *Incompetent Persons Act* orders should be declared null and void, to provide some type of financial support in any required new application under the *Act*.

---

**APPENDIX: A Draft by H.A. Kaiser**

**An Act Respecting Representative Decision-making**

**Preamble**

**WHEREAS** under the United Nations *Convention on the Rights of Persons with Disabilities*, Nova Scotia recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

**AND WHEREAS**, Nova Scotia must take appropriate measures to provide access by persons with disabilities to the supports they may require in exercising their legal capacity;

**AND WHEREAS** Nova Scotia accepts that, absent such guarantees and supports, persons with disabilities are vulnerable to unwarranted infringements upon their inherent dignity, individual autonomy, independence and social inclusion;

**AND WHEREAS** Nova Scotia intends to facilitate the full and effective participation in society of persons with disabilities on an equal basis with others;

**AND WHEREAS** Nova Scotia is convinced that its obligations under the *Convention on the Rights of Persons with Disabilities* are meant to complement the rights and freedoms under the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*;

**THEREFORE, be it enacted by the Governor and Assembly as follows:**

1. This *Act* may be cited as the *Adult Capacity and Decision-making Act*.

2. The purpose of this *Act* is to:

- (a) Recognize that people may experience impairments of their decision-making capacity;
- (b) Provide a fair and respectful legal framework for protecting the safety and security of persons who have decision-making impairments and who thereby may be vulnerable;
- (c) Promote the dignity, autonomy, freedom of decision-making, independence and social inclusion of adults who may be subject to this legislation;
- (d) To provide the least restrictive and least intrusive supports and interventions when they are proven to be necessary, while offering the maximum level of support for the adult's well-being;
- (e) Ensure that any supports and interventions required for vulnerable adults are closely monitored to protect their rights and dignity, both as individuals and as members of a vulnerable group.