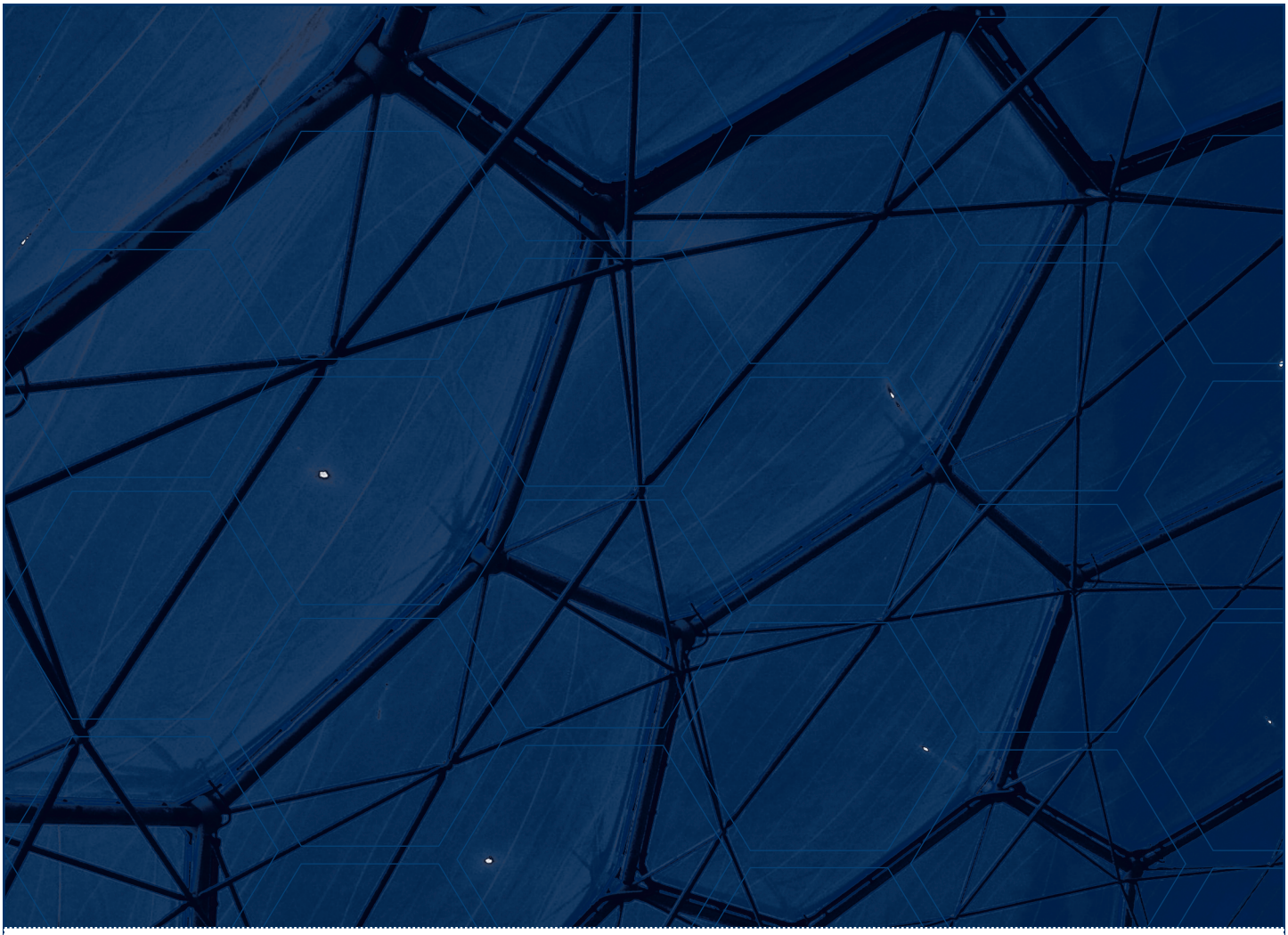

Vulnerable Adults and Capability Issues in BC

PROVINCIAL STRATEGY DOCUMENT

—January 2009

PREPARED BY THE BC ADULT ABUSE / NEGLECT PREVENTION COLLABORATIVE

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VULNERABLE ADULTS AND CAPABILITY ISSUES IN BC

Provincial Strategy Document

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SECTION
1.0

INTRODUCTION AND BACKGROUND

1.1 Dedication

ON BEHALF OF THE BC Adult Abuse / Neglect Prevention Collaborative, I would like to dedicate the Vanguard Project and this Provincial Abuse Response / Prevention Strategy to all adults in BC who are at risk of or who are experiencing abuse or neglect along the capability / incapability continuum. The courage it takes to remain in or to leave such situations is immense. This Project has been motivated by our sense of this from those we have met who are hurting, and our collective understanding, that given a certain set of circumstances, many beyond our control, any of us could be abused or neglected. This Project and Provincial Strategy represents the culmination of our heartfelt desire as a well-established, diverse, and collegial knowledge community to improve our legislation, policy, and response / prevention systems to best serve all adults in BC.

Alison Leaney, MSW, RSW
Chair – BC Adult Abuse / Neglect Prevention Collaborative
December 2008

1.2 A Brief History of the BC Adult Abuse / Neglect Prevention Collaborative

THE BC ADULT ABUSE / Neglect Prevention Collaborative ("the Collaborative"), formerly known as the Adult Abuse, Neglect and Self-Neglect Planning Group, was formed more than ten years ago by the Public Guardian and Trustee to provide advice on the implementation of Part 3 of the *Adult Guardianship Act*[1]*: Support and Assistance for Abused and Neglected Adults*.

Implementation issues this Group dealt with included:

1. reviewing and developing regulations;
2. designating agencies;
3. identifying necessary protocols between designated agencies and the police;
4. supporting the development of networks of support for individuals and groups working with vulnerable adults; and
5. identifying and reviewing necessary public information, education materials and strategies targeting various audiences.

Part 3 of the *Adult Guardianship Act* came into force almost in its entirety on February 28, 2000. After much discussion and with support from the Public Guardian and Trustee of BC, the Planning Group broadened its mandate to become the BC Adult Abuse/Neglect Prevention Collaborative.

[FOOTNOTE]

[1] R.S.B.C. 1996, c. 6.

In addition to providing input on implementation issues with regard to the legislation, regulations and related policy, the Collaborative's mandate includes:

1. encouraging community practices that, within the spirit and intent of the legislation, respond to, prevent, and reduce abuse, neglect, and self-neglect of adults; and

2. providing a forum for coordination and collaboration at the provincial level among groups committed to addressing adult abuse, neglect, and self-neglect.

The membership of the Collaborative includes representatives of the designated agencies, the Ministry of Public Safety and Solicitor General, the Public Guardian and Trustee of BC, provincial non-profits working in the abuse response / prevention field such as the BC Centre for Elder Advocacy and Support and the BC Association of Community Response Networks, researchers/academics, and other concerned community members. The Collaborative operates according to a shared leadership model where decisions are made by consensus; the Collaborative is owned by no one and directed by all. The group meets regularly and it was within this provincial forum that the need for the Vanguard Project was identified.

The collaborative operates according to a shared leadership model where decisions are made by consensus.

1.3 The Vanguard Project – Vulnerable Adults and Capability

IN BRITISH COLUMBIA ADULT CAPABILITY is one of the most pressing concerns of vulnerable adults and their advocates, and yet this area of law and policy remains a source of ongoing confusion. It is an area of practice that brings together diverse professionals working in law, health, and social services, with each discipline bringing a varied knowledge base and practice standards to the table. It is also an area impacted by many branches of law. Despite this complexity, to date few resources exist to clarify the responsibilities of the various provincial agencies in protecting the rights of vulnerable adults who may have diminished or diminishing capability. In spite of the multi-disciplinary nature of capability issues, few tools exist to support cross-disciplinary collaboration and strategy in this area.

The purpose of the Collaborative's work is to address this void. This *Provincial Strategy Document – Vulnerable Adults and Capability Issues in BC* (the "*Provincial Strategy Document*") brings together research on law and policy in relation to adult abuse / neglect prevention and mental capability. These materials clarify key language and summarize relevant laws, canvas internationally existing practice protocols and guidelines, assemble advocacy and protocol development resources, and make recommendations for change in British Columbia. The Provincial Strategy Document contains a shared knowledge base that will clarify the law, support practice, and assist agencies to develop their own protocols for responding to adult

capability issues. Its approach is comparative, with emphasis placed on the values and principles underlying the various legal frameworks, in order to achieve a richer understanding of the issues at stake.

It is a particularly exciting moment in the history of advocacy with and for vulnerable adults. At the time of writing the province has recently passed new adult guardianship legislation embodying a significant shift in thinking around adult protection, the culmination of twenty years of advocacy for law reform. The new legislation rejects the old absolutist framework according to which an individual is either completely mentally capable or incapable of all decisions (a binary approach), in favour of a continuum model permitting recognition of partial or area-specific incapability. It is a change that potentially restricts the loss of independence affected by a finding of incapability, and hopefully allows adult support and protection measures to promote the well-being of vulnerable adults in a much broader sense than previously possible. The *Provincial Strategy Document* is intended to create a shared, inter-disciplinary understanding of the meaning and implications of the capability continuum as it applies to the enforcement of different statutes.

The Provincial Strategy document is intended to create a shared inter-disciplinary understanding of the meanings and implication of the apability continuum as it applies to the enforecment of different statutes.

The Collaborative's work on capability / vulnerability has 3 phases. **PHASE 1** encompasses the creation of this *Provincial Strategy Document* and the materials in the attached CD. **PHASE 2** includes disseminating the information contained in the *Provincial Strategy Document* and accompanying materials to target audiences in law, health, and social work. This will also include modifying the material into education modules designed for different knowledge communities such as social work, health care, law, criminal justice, and housing. Teaching of these materials will place emphasis on the interplay between capability and migration / immigration, gender, poverty, Aboriginal peoples, disability, and ageism. To this end a thorough cross-disciplinary mapping will occur in relation to agencies involved in dealing with adults who may have been deemed incapable, or who are suspected of diminished capacity. Subsequently key stakeholders will be invited to the table as a first step towards developing internal protocols and best practices for each discipline.

PHASE 3 of the Vanguard Project includes the development of a province-wide, inter-disciplinary protocol in regard to dealing with vulnerable adults on the capability continuum.

The vision of the Vanguard Project is obviously ambitious. It will take many years and a great deal of inter-agency cooperation to fulfill its final goal. However, a coordinated response of this scope is necessary to care for our growing community of vulnerable adults.

THIS PROJECT HAS A NUMBER OF resources and materials. The accompanying CD includes the following:

1. Law Reform Report on Abuse and Neglect and Capacity Issues in Canada * (LRR)
2. Legal Matrix of Capacity Assessment Tools
3. Summaries of Assessment Tools Used in Other Jurisdictions
4. Vanguard Presentation Slides – Current and Future Laws Update
5. Tips for Good Practice for Lawyers: Capability and Vulnerability Issues
6. Housing and Capability Issues Background Paper
7. Immigration and Capability Issues Background Paper

This group of materials has been designed so that people can use as much or as little as they may need. Readers may wish to read all the documents on the CD along with this entire document. Alternatively, some users may wish to use this document as a starting point and refer to other materials periodically. In particular, aspects of this report are more broadly expanded upon in the LRR. To facilitate this, where a reader may wish to find out more information on a specific issue explored in more depth on the LRR CD, a "*" symbol will appear.

1.4 Project Format: A Note about Assessments

SCREENING, ASSESSING, AND INTERVENING in situations of suspected abuse, violence, neglect, and self-neglect is a complex and potentially dangerous activity. It requires the utmost care. It also requires an understanding of the individual's social and cultural context and level of risk. This, in turn, demands an appraisal of the interplay between the individuals involved, the context and situation they live within, and the medical, psychological, spiritual, physical and cognitive functioning of both the abused adult as well as that of the abuser.

The assessment of a person's capacity to make decisions is tailored to address the specific decision that needs to be made. This includes the legal criteria for capability to take that particular decision, and the standard that may or may not be set for assessment criteria in determining the capability to make that particular action. There is no global assessment of incapability for all decisions.

Many tools have been developed, standardized, and validated for assessing the ability to make medical, financial, and contractual decisions. There are tests and tools to measure memory, cognitive function, and executive functioning. Clinicians administer some of these measuring tests and tools, while others require a self-report. Some are based on observations by caregivers and support people. The presentation of the

person and the nature of the decision at issue guide the selection of the assessment tool chosen. There is a diversity of opinions on what the correct tool for the circumstance should be. When the complex interplay between capacity, functioning, and decision-making in an encumbered or vulnerable individual is juxtaposed on a backdrop of coercion, exploitation, control, complex family and intimate partner relationships, interdependency, financial and psychological dependency, cultural constraints, accessibility barriers, poverty, historical abuse and a lack of social resources or alternatives, the assessment process becomes that much more complicated and nuanced.

It is for this reason that this strategy document does not advocate the use of a particular assessment tool for determining capability. Circumstances and individuals are too varied, unique, and complex to be governed by a single test. Rather, there are some basic premises and elements that are required for all incapability assessments that meet standards of good practice. These steps are particularly relevant when there is a suspicion of abuse, neglect or self-neglect, and fundamental rights such as where and with whom one lives and associates may be at stake.

All incapability assessments share a common multi-step process. The assessor must evaluate the adult's ability to receive, assimilate, and integrate the relevant information, evaluate benefits and risks, understand the implications of the decision, and be able to carry out the decision and understand that the information given applies to the adult. In most situations a comprehensive assessment requires a multidisciplinary approach and will include an evaluation of cognitive function, executive function and overall health. All treatable medical causes of cognitive and executive dysfunction should be addressed prior to an incapability assessment. To support a person-centred assessment the assessor should try to develop and understand the person's values, beliefs, and cultural context. The assessment must be focused on the adult's ability to make a specific decision, and be able to act on and execute that decision. This does not imply a global finding of incapability.

This strategy document supplies a multifaceted set of resources to respond to the complex problem of capacity assessment. While the content may not make assessment easier, the Collaborative trusts that it will stimulate discussion, and enrich understanding of the overarching laws, values, and principles underlying adult protection legislation. It is hoped that this will create a potential to render the practice more coherent, principled, and consistent.

1.5 Organization and Methodology

THIS STUDY CONSIDERS MATERIAL and laws generated outside British Columbia. Although it may serve as a resource for capability assessment broadly, the intent is to enhance BC practice in particular. This project focuses on values and principles, linking them back to applicable laws, in order to be relevant to a practice that involves such a diverse community of professionals and clients. The document is organized in such a way that readers may choose whether to read the booklet in its entirety or review only those sections of immediate relevance. The sections build upon each other

but should also be independently and internally coherent. Aspects of this publication may be useful to anyone whose practice includes vulnerable adults. Policy-makers should find that the principled approach of this overview provides sufficient background for internal or local protocol development.

- **SECTION 1** provides a brief introduction and background to the project participants, the project format, and the organization and methodology of the *Provincial Strategy Document*.

- **SECTION 2** defines the key terms *vulnerability*, *capability*, *capacity* and *abuse*; and we refer to these terms throughout the publication. Work with vulnerable adults crosses multiple disciplines that subscribe to different language conventions. A shared understanding of the meaning of these key terms will support practice immensely, and readers should ensure that they review the meanings of these terms as defined within this document.

- **SECTION 3** explores the *principles* informing adult abuse and neglect legislation and the capability assessment of vulnerable adults. Its structure is comparative: the review of law covers most Canadian jurisdictions, and the review of policy is international. The comparative approach emphasizes the values and principles underlying law and policy, a key to both maintaining rigorous practice and creating internal protocols that support and reflect the governing law. All existing Canadian adult abuse and neglect legislation was reviewed. The methodology employed to map the differences between adult abuse and neglect laws in Canada is explained at length in **Appendix A** to this publication; it was largely a function of distilling the aspects of each legal system down to essential questions that addressed both the breadth and the philosophical intent of each system. The review of policies and protocols is by no means exhaustive – this is a large and growing body of work. The materials consulted are described in **Appendix B.**

- **SECTION 4** brings the focus back to BC by providing a brief legal history and reviewing the new legal framework that we hope will soon take effect. During this transitional period while practitioners are learning about the new guardianship system, individuals will continue to be subject to committeeships ordered under the older law (the *Patients Property Act*). An overview of the divergent approaches to adult protection embodied by the old and the new should enrich our knowledge of capability law.

- **SECTION 5** lists resources in BC for working with vulnerable adults and provides a visual overview of the different interventions possible in a context of diminishing capability.

- **SECTION 6** looks to the future. Our recommendations for reform build on the analyses contained in Sections 3 and 4. We offer suggestions on how to use the *Provincial Strategy Document* to enhance BC practice. The final subsection returns to the larger vision of the BC Adult Abuse / Neglect Prevention Collaborative: the creation of inter-agency or inter-disciplinary practice protocols. As we explain in Section 1 of this publication, the *Provincial Strategy Document* is but the first phase of the Vanguard Project.

SECTION
2.0

THE CONCEPTUAL FRAMEWORK

2.1 Defining Vulnerability

2.1.1 VULNERABILITY: A BRIEF LEGAL HISTORY

DURING THE LATE 1980s and early 1990s, the rhetoric of elder abuse and neglect moved away from a paternalistic age-based definition towards an age-neutral, disabilities model.* Age was no longer the primary indicator of incapability. Rather, adults of any age who faced societal challenges were labeled "vulnerable." Although this analytical shift was intended to be progressive, vulnerability has proven itself an inherently problematic concept.[2]

There are four main arguments against the term "vulnerable"*:

1. It is vague, imprecise, and overbroad: under the right conditions, any person may be vulnerable.
2. It masks paternalism, and is used to justify otherwise unwarranted intervention.
3. It defines a person based on assumptions associated with a perceived disability or medical diagnosis.
4. It renders factors external to the adult an intrinsic part of an adult's individual identity.[3]

The Scottish Law Commission attempted a definition of vulnerability in its 1997 *Report on Vulnerable Adults*.[4] The Commission first considered using the ordinary dictionary term for vulnerability, which it cited as meaning "capable of being wounded, liable to injury, or hurt feelings: open to successful attack: capable of being persuaded or tempted...".[5] Recognizing the excessive breadth of this definition, the Commission recommended replacing the dictionary definition[6] with the following:[7]

A vulnerable adult should be defined for the purposes of this report as an adult who is unable to safeguard his or her personal welfare, property or financial affairs, and is:

(a) in need of care and attention arising out of age or infirmity, or

(b) suffering from illness or mental disorder, or

(c) substantially handicapped by any disability.

The Manitoba Law Reform Commission was wary of inadvertently entrenching a

[FOOTNOTES]

[2] For more information about this evolution please see the accompanying CD materials, especially LRR.
[3] For more information on personhood, please see: Centre for Research on Personhood in Dementia, www.crpd.ubc.ca.
[4] Scottish Law Commission, *Report on Vulnerable Adults*, No. 158 (Edinburgh: Stationary Office, 1997).
[5] E.M Kirkpatrick, ed. *Chambers Twentieth Century Dictionary* 1983 ed. (Edinburgh: Chambers, 1983) as quoted in *ibid*. at 6.
[6] *Ibid*.
[7] *Ibid*. at 7.

paternalistic or protectionist element in adopting a definition of vulnerability. In analyzing the concept of vulnerability in its 1999 Report on *Adult Protection and Elder Abuse*, the Manitoba Law Reform Commission stated:

The problematic logic of equating a *vulnerable* adult with one who is legally incapable of managing his or her own affairs is apparent in the circularity of the statutory definitions discussed below.

The vulnerable adult is defined by circumstances, such as abuse, neglect, and exploitation that induce vulnerability and limit choice. These circumstances then become the justification for nonconsensual and paternalistic intervention, which may limit choice still further.

Despite statutory checks and balances, the powers granted to agencies to intervene into the life of an adult may seriously limit the adult's ability to exercise choice and autonomy.[8]

This thinking is also captured in a 2001 publication of the National Advisory Council on Aging:

> Adult protection laws also raise concerns about personal autonomy. They are intended for any "vulnerable" adult but those most affected are seniors. The right to make unwise decisions or take risks, for example, appears to be tolerated more readily in younger adults than in seniors.[9]

A general move away from use of the term "vulnerable" started in the late 1990s and continues today. Instead, jurisdictions with new comprehensive legislation such as BC and Yukon have moved to the simpler "adult who has been abused or neglected". It seems likely that the trend to this type of definition will continue, and the legal use of the term "vulnerable" will increasingly fade as statutes are amended and updated across Canada. The term is still very widely used in common parlance, however, and shows little indication of being removed from the everyday lexicon. As such, the Vanguard Project team has moved to reconceptualize the meaning of the terms, to bring it into the 21st century of thought regarding adult abuse and capability.

2.1.2 RE-CONCEPTUALIZING VULNERABILITY – THE VANGUARD APPROACH

The Vanguard Project retains and redefines the term "vulnerability". Why hold on to such a problematic term? The notion of vulnerability captures more than the adult who has been abused or neglected. It highlights a potential, promoting the possibility of prevention rather than simply reacting.

[FOOTNOTES]

[8] Manitoba Law Reform Commission, *Adult Protection and Elder Abuse*, No. 103 (Winnipeg: Manitoba Law Reform Commission, 1999) at 25 [Adult Protection].
[9] "Seniors and the Law" *Expressions: Bulletin of the [Canadian] National Advisory Council on Aging* 14:3 (Summer 2001) at 6.

For the purpose of thinking about capability in this study the term vulnerability remains useful for identifying older adults at a greater *risk* of abuse or neglect. For while responsiveness is important, capability legislation is intended to protect adults who are vulnerable to financial, physical, or emotional abuse and to respond as soon as reasonably possible to prevent a loss or injury before it occurs. A discussion of capability requires a language for referencing potential. A purely reactive legal system would have significantly less potential to protect adults whose capability to manage their own affairs is at issue.

The Vanguard Project adopts the following new understanding of the term vulnerability that avoids the problems noted in section 2.1.1.

1. **Vulnerability is relative** – a person is more or less vulnerable. The term does not describe an absolute state.
2. **Vulnerability is relational.** A person is always vulnerable to something.
3. **Vulnerability is not reducible to a disability issue.** A disability or a medical condition may or may not give rise to vulnerability depending on the circumstances. Conversely, other social circumstances may render a person vulnerable whether or not the person has a disability.
4. **Vulnerability is a social condition.** This social condition may arise out of diverse social factors such as isolation, a lack of education, poverty, absence of citizenship, a language barrier, a mental health diagnosis, an illness, a developmental disability, an addiction, homelessness or housing instability, a history of abuse, gender or sex, gender identity, and / or sexual orientation. These group memberships or characteristics are indicators of vulnerability.
5. **Vulnerability is not an inherent quality.** Vulnerability does not represent a flaw of an individual. Rather, it arises out of the relationship between a person's characteristics and /or circumstances and a potential abuser. The concept of vulnerability would be meaningless without the possibility of abuse and the presence of the individual or institution that might affect the abuse. In this sense vulnerability is a social construction.
6. **Vulnerability is not a static concept.** Social circumstances change and people do too.

2.2 Defining Capability

2.2.1 CAPABILITY AND DECISION-MAKING

Particular understandings of capability or capacity underlay modern guardianship and substitute decision-making legislation. In BC, the law of wills and trusts speaks of "legal capacity" whereas the guardianship framework references "legal incapability".

Essentially these expressions reflect the same notion: an inability to make appropriate decisions. For the purposes of this study, which focuses on guardianship legislation, we use the terms capability and incapability. Other jurisdictions reviewed in Section 3 of this study use the term "capacity" to denote the same issue addressed in the BC guardianship framework.

At its core, capability issues are about decision-making. Guardianship and substitute decision-making systems exist to assist persons unable to make their own decisions (i.e. – persons in a coma) or to protect individuals liable to injure themselves or undermine their assets through poor decision-making. They also purport to protect vulnerable adults from being taken advantage of by individuals or institutions that do not have the adult's best interests at heart.

Definitions of capability vary across jurisdiction and have evolved over the years. The key to many recently revised definitions is the notion that a capable adult must be able to understand information, evaluate data, and appreciate the consequences of decisions. In this sense capability is about a person's decision-making process, and it is neutral as to the outcome of that process. Vulnerable adults retain the right all free people possess to make unwise or risky decisions where they make these choices with capability. Linking back to the discussion of vulnerability in Section 2.1, the notion of risk relevant to our thinking about capability and vulnerability is whether the adult in question is at risk of abuse given her particular circumstances and the decisions she faces at the time of the assessment or guardianship application. Guardianship laws do not restrain adults who are not vulnerable and capable of taking risks.

Under a number of existing legal systems a determination of incapability requires the presence of a disabling condition or diagnosis. The trend in revised systems or regimes has been to dispense with this requirement. However, definitions of capability still vary with respect to whether a determination is global (also called plenary), or whether capability is domain or decision-specific. A finding of incapability may, for example, be limited only to financial matters or a particular subset of personal care decisions.

2.2.2 THE CAPABILITY-CAPACITY CONTINUUM

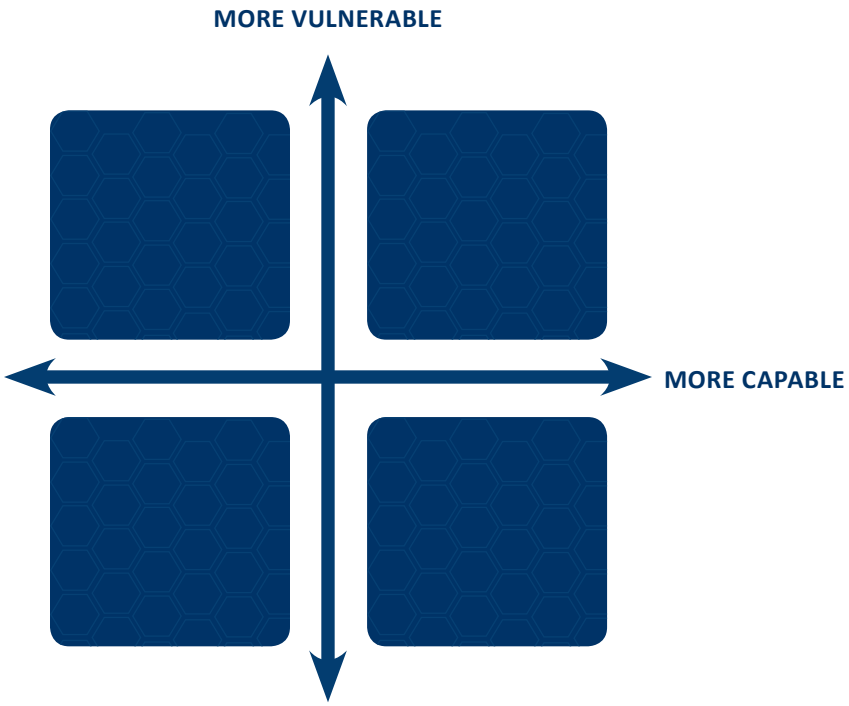
Many modern guardianship and substitute decision-making systems reject a binary all-or-nothing approach to capability in favour of the notion that there are shades of grey to capability: for the purpose of this study we call this approach the capability continuum. The premise underlying the notion of a continuum is the idea that incapability may be specific to circumstances and particular categories of decision-making. Capability may also improve, decrease, or fluctuate.

These more nuanced models that presuppose a continuum approach attempt to narrow, as much as possible, the intrusion upon an individual's autonomy where

capability is at issue. The notion of capability thus becomes attached to *decisions* rather than the individuals themselves. Ultimately the continuum underscores that each person is unique and that *individuals* may be capable of some tasks or *decisions* while being incapable of others.

The concept of vulnerability is useful to understanding how the notion of a continuum reflects in our thinking about capability. It may be employed to aid in illustrating the implications of viewing capability as a continuum, rather than a static or "fixed" concept.

The correlation between vulnerability and capability is not static. These states are not necessarily determinative of each other: a person may be quite incapable without being particularly vulnerable, or very capable but highly vulnerable.



However, the concepts do remain intrinsically linked. The presence of a high degree of vulnerability (as defined in this document) suggests a need for assistive, supportive, or protective intervention if an individual is also incapable. The absence of vulnerability can alleviate the need for intervention even if there is a suspicion of incapability. Moreover, attention to the particular social factors that could render an adult vulnerable helps give meaning to the otherwise abstract notion of capability. This approach to thinking about capability allows us to more adequately consider the social circumstances that affect vulnerability and capability.

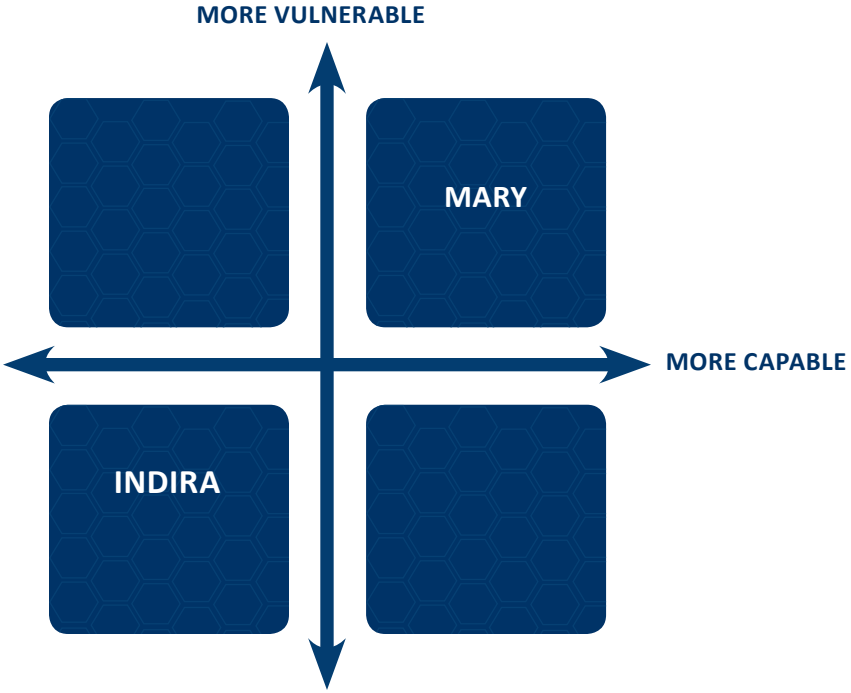
Consider, for example, Mary. She is 75 years old and lives in a rural community. Mary has

multiple sclerosis, but has no cognitive impairments. She has a history of being domestically abused, having been regularly assaulted by her long-time husband. Mary has low-esteem and no friends or close family to support her. When her husband died, Mary's son moved back in with her. He begins to physically and emotionally abuse her and begins "gas-lighting" her (the purposeful intent to make a person think they are 'crazy'), causing Mary to believe she is going insane. Mary's son takes advantage of her mental distress and forces her to sign a power of attorney, giving him control of all her finances. In this instance, although Mary is highly capable, she is nevertheless highly vulnerable due to her circumstances.

Consider, on the other hand, Indira. She is 80 years old and lives in an excellent residential care home in an urban setting. Indira suffers from late stage Alzheimer's but has no significant physical impairments. Despite her high level of dementia, Indira's family and friends maintain very close ties with her, visiting her often and trying to include her in their lives to the fullest degree. Her caregivers respect Indira's values, wishes, and beliefs in her care and lifestyle choices as much as she is able to express them. Where she is not able to do so, her caregivers use pre-existing pre-expressed values, wishes, and beliefs that Indira set out prior to the onset of dementia. Indira's comfortable assets are held in trust and cannot easily be accessed improperly by others. In this instance, while Indira has low capability because of her significant dementia, she has comparatively low vulnerability as her social conditions support her very well.

Below are two visual representations of the ideas expressed above. In Figure 1, Mary and Indira are placed on the matrix in a general way. Mary is noted in the north-east quadrant of the matrix, as being more vulnerable and more capable. Indira is noted in the south-west quadrant of the matrix, as being less vulnerable and less capable.

[FIGURE 1: Mary and Indira]



In Figure 2, Mary and Indira's conditions are more specifically "mapped" on the matrix.

[FIGURE 2: Matrix of Indicators]

This tool can be broadly used as a "snapshot" of their situations. It is a non-diagnostic tool that can be re-mapped periodically.

CAPABILITY AXIS

Capability and incapability are indicated along the east-west axis. The adult's general capability would be noted here using results from the broad and inclusive assessment, which was carried out according to the legal framework of assessment for the particular jurisdiction.

VULNERABILITY AXIS

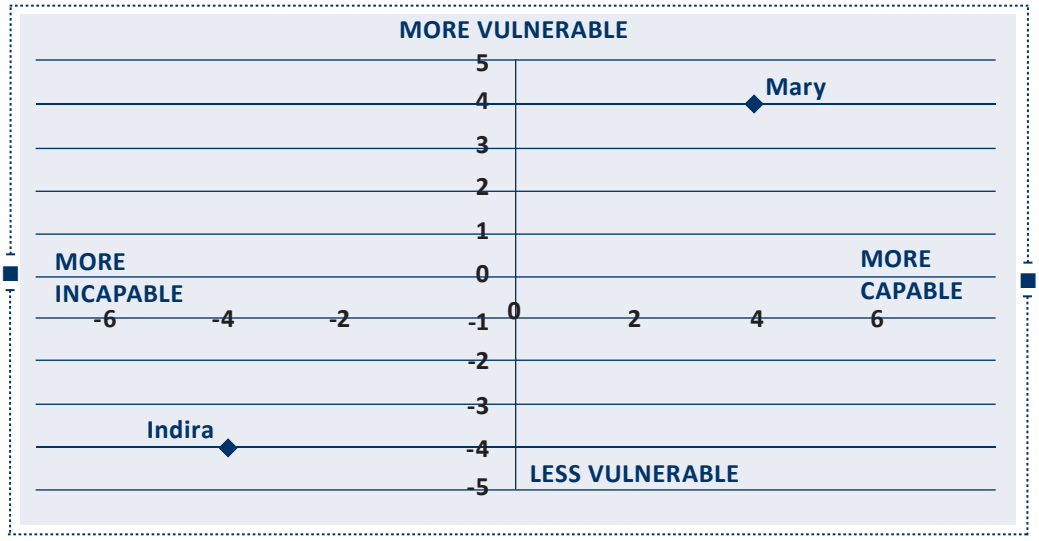
As noted in Section 2.1, vulnerability is construed as socially determined, rather than inherent to any adult. When considering the vulnerability axis on the matrix above, some of the factors to consider include:

- ☐ Current or historical abuse or neglect
- ☐ Isolation, including both physical and social
- ☐ Lack of supportive family, friends, and other social networks
- ☐ Lack of education
- ☐ Low income / poverty
- ☐ Absence or uncertainty of citizen ship
- ☐ Recent immigration
- ☐ Language barriers
- ☐ Mental health diagnosis
- ☐ Illness
- ☐ Developmental disability
- ☐ Physical challenges or frailty
- ☐ Addiction
- ☐ Homelessness or housing instability
- ☐ Gender /sex
- ☐ Gender identity
- ☐ Sexual orientation
- ☐ Culture of origin, including First Nations
- ☐ Transportation barriers

None of these indicia are themselves entirely determinative, nor are they reflective of any inherent personal challenge of the adult. Rather, they are a non-inclusive listing of many socially constructed challenges that adults may face. (i.e. – sexual orientation is not an inherent challenge; however, discrimination based on homophobia is a socially constructed vulnerability that some adults may be forced to contend with, and which might increase an adult's vulnerability in a certain set of circumstances).

This more detailed representation is provided as an illustrative and descriptive conceptualization as an aid to understanding general concepts, it is not a standardized diagnostic tool. This is only a broad framework, which when refined, may provide a helpful snapshot for persons working with adults experiencing a confluence of vulnerability and capability.

[FIGURE 2: Vanguard Risk Assessment Tool: Use of vulnerability and capability matrix to assess risks (Vanguard Assessment Tool – 'VAT')]



When assessing risk it is critical to identify the "risk of what". Risk should not be dealt with as a general or abstract concept. It is suggested that organizations, agencies, and professionals appropriately modify the indicator questions in accordance with their own mandate.

2.3 Abuse and Mistreatment of Adults

CONCEPTUALLY, CAPABILITY AND VULNERABILITY cannot be separated from the problem of abuse and mistreatment of adults. This is because guardianship and substitute decision-making frameworks exist to protect incapable adults vulnerable to abuse and mistreatment in different forms that may occur if these adults are not adequately supported. However, in an imperfect world where well-meaning people, agencies, and organizations make mistakes and abuse their power, the conceptual relationship becomes more complex.

Abuse means deliberate mistreatment of an adult that causes the adult:

- physical, mental, or emotional harm, or

- damage to or loss of assets

and includes intimidation, humiliation, physical assault, sexual assault, over-medication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors.

Abuse can take many forms. Some examples are:

- **physical abuse:** acts of violence or rough treatment, including slapping, shaking, punching, or rough handling
- **mental or emotional abuse** (also referred to as psychological abuse): severe and continuing intimidation, humiliation, isolation and exclusion from events, activities, and decision-making
- **sexual abuse:** any unwanted or exploitive sexual behaviour, including harassing, assaulting, or using adults for sexual purposes without their consent
- **financial abuse:** misusing an adult's money and property, including taking money, property or possessions by coercion; influencing the making of a will; cashing cheques without authorization; using bank accounts without authorization; or misusing a power of attorney or representation agreement
- **medication abuse:** withholding medication that the adult needs or giving too much or too little medication
- **violation of entitlements:** censoring mail, invading or denying privacy, denying access to visitors, restricting the movement of an adult, or withholding information to which the adult is entitled.
- **spiritual abuse:** including measures that prevent an adult from continuing to maintain her faith or continuing to support religious or faith-based institutions of her choice

Neglect means any failure to provide necessary care, assistance, guidance or attention to an adult that causes the adult, or is reasonably likely to cause within a short time:

- serious physical, mental or emotional harm, or
- substantial damage to or loss of assets.

Neglect includes self-neglect. Neglect may or may not be deliberate. It can be, for example, the intentional withholding of food and personal care. It can also be unintentionally caused by a lack of experience, information, knowledge or support.

Abuse and mistreatment may arise from various sources: friends, neighbours, family members including children and partners, paid caregivers and volunteers, strangers or "new best friends," health care providers and doctors, trustees and other financial

custodians, service providers, police – essentially anyone who may be in a position of intimacy with or power over the vulnerable adult. A person or an institution may perpetrate abuse. Typically it is violation of a relationship of trust and dependency that exists as a result of the adult's vulnerability but may arise from a stranger or predator, such as via telephone or internet scam, home renovation scams, etc.

Misuse of a power of attorney, advance care plan, or guardianship measure is an instance of abuse that may fall into any of the above categories. The corollary of trust and power is that it always creates a potential for abuse. Thus, ironically, the very instruments designed to protect a person from some forms of abuse also create an opportunity for mistreatment. Guardianship reduces independence, and thus may undermine an individual's ability to protect herself from some form of harm.

Similarly, residents of care facilities experience a heightened risk of physical or psychological abuse.[10] In complete contradiction to the current perception and intention of care facilities, these institutions may fail to provide a safe and healthy environment for their residents.

- **Consider for example the case of Li.** Li is a 45-year-old second generation Asian-Canadian man, living in Greater Vancouver. Li suffered a traumatic brain injury when he was 33, due to a motorcycle accident. Li has fluctuating capability with regard to his ability to make health care decisions, but consistently needs assistance with financial matters, including routine paying of bills, purchasing of goods, etc. As part of his personal injury settlement, an application was made by Li's older brother Yann for guardianship of Li's financial affairs. The settlement was not a structured settlement, as Yann was a businessman who wished to conservatively invest his brother's funds. As such, Yann has been Li's financial guardian for some time and has purview over the significant settlement funds. Yann, however, has recently suffered his own financial loss, and his business is in dire need of a cash infusion. Yann transfers money from Li's investments to support his business, justifying that Li would want to help his brother and support his duty to his family. While it is uncertain whether or not Li would have offered the money had he been capable, this is a clear breach of Li's legal fiduciary duty. Yann's business continues to suffer and Li's money is lost. Yann has breached his duty as guardian and Li has a right to the return of the funds. However, Yann is now bankrupt and there is little practical way to get the money back, even if someone was to discover this financial abuse and bring the matter to the attention of a new prospective guardian. Li remains incapable of understanding the financial loss, of which Yann ensures Li is not told.

Residents of care facilities experience a heightened risk of physical and pyschological abuse.

- **Consider also the situations of Jane and Krishna.** Both live in the same long-term residential care facility (nursing home) in a rural area. Neither have close social connections; Jane, at 86, has outlived most of her friends and family, and Krishna, 72, immigrated to Canada fifteen years ago, having been sponsored by his now

[FOOTNOTE]

[10] Adult Protection, *supra* note 8 at 12.

estranged family. Jane suffers from Parkinson's Disease and her body "seizes up". She is often unable to move her body for periods of time, and when she is able to move, she is very shaky. Jane is quite mentally capable, but she is lonely and wishes to be more socially connected with others. Krishna is a traditional Sikh man, and has a full beard and turban. He has some moderate dementia and has difficulty remembering his rudimentary English. When he is frustrated or scared, he sometimes lashes out physically. Increasingly he is reverting to his original dialect and understands less and less spoken English. There are no other Sikhs, or even South Asians, in this rural long-term care facility.

The long-term care facility is chronically understaffed, due to funding shortages and lack of adequately trained staff. It increasingly relies on personal care workers without much training. Jane is often left in her bed alone. When she has a seizure, it is rarely noticed, although she is herself very much aware of her isolation and neglect. Staff members do not have the time to engage Jane much one-on-one, or to take her to social activities. As she is so often entirely "frozen" or alternatively shaking, she is not viewed as a high priority to engage in social activities. Jane is often terrified of dying and having nobody notice. Her body, her bed, and her room have become effective prisons for her.

Krishna is increasingly left in a chair with a tray and a seatbelt, which effectively restrain him. Female personal care workers have tried to wash and cut his hair and beard. He has physically pushed them away each time, yelling at them in a language they do not understand. His food includes a diet that offends his religious beliefs, which he increasingly pushes to the floor. Staff members have started to feed him while he is restrained. He is confused and upset and has no one to speak with. He has no way to worship as he has done for his entire life, and is unable to communicate well with staff. Staff have labeled him a "problem patient" and try to avoid contact with him whenever possible.

Many people who receive support and assistance from others have both positive experiences and relationships. However, it is sometimes the very people or institutions that are established to support and assist vulnerable or incapable adults that the abusers. The higher the level of social vulnerability or incapability, the greater the dependence that adult has on someone else. The greater the dependence is, the greater the risk for abuse or mistreatment exists.

Guardianship provisions or other protective measures may, ironically, prove the greatest and most significant risk to that adult. In Canada, there is little in the way of guardianship or attorney supervision and much abuse is hidden and / or systemic. For these reasons, and the desire to preserve the highest degree of personhood, guardianship and protective measures should be approached with caution and restraint.

SECTION
3.0

VALUES AND PRINCIPLES

3.1 Intervention vs. Independence: A Comparative Analysis of Adult Abuse and Neglect Legislation in Canada

IN CANADA ADULT ABUSE, NEGLECT, and guardianship are addressed at the provincial and territorial level. Each province has created its own framework for responding to concerns regarding abuse, neglect, and capability. The differences in approach are founded on differing ideologies regarding the importance of intervening to protect the vulnerable adult versus the need to safeguard as much of the vulnerable adult's independence as is possible. This contrast illustrates the current essential tension underlying thinking around capability internationally. In this document, the term "regime" describes the global framework, put into place by provincial governments to deal with issues of adult abuse and neglect. This may include steps specifically *taken* or steps specifically *not taken*.

The information detailed below can be found in a more expanded form on the CD materials.

Canadian abuse and neglect legislation can be grouped into roughly four categories:*

1. Comprehensive Adult Protection Regimes (newer Comprehensives such as Yukon and BC and older Comprehensives such as PEI and New Brunswick)
2. Deliberately Limited Regimes (Ontario, Alberta, and Manitoba)
3. Protectionist Regimes (Nova Scotia)
4. 'Patchwork' Regimes[11] (NWT, Saskatchewan, and Quebec)

Below, the various regimes are mapped on a matrix classifying them according to the emphasis placed on intervention versus independence, and breadth versus a narrow scope. The following discussion is a description of the categories.

1. COMPREHENSIVE ADULT PROTECTION REGIMES

A comprehensive regime is contained in a discrete piece of specific legislation. The legislation either stands alone, or is embedded within a broader substitute decision-making or guardianship scheme that specifically addresses adult abuse and neglect. Legislation will describe a specific class or classes of adults who are protected from defined forms of abuse and neglect. This comprehensive approach includes some type of agency

[FOOTNOTES]

[11] The term 'patchwork' is used only to suggest that a number of different 'bits and pieces' of legislation are woven together, used or otherwise applied in relation to a particular situation. It is used as a constructive term, without negative connotation. .

intervention and investigation, often by means of a designated agency.[12]

Within Canada, there are two sub-groupings of jurisdictions with comprehensive regimes. These groupings can largely be explained by their timing. The newer regimes include BC and Yukon; the older regimes include PEI and NB.

As mapped in the following matrix, the newer regimes are typified by breadth of scope and a commitment to the independence of the adults that may be subject to the legislation. These regimes tend to be embedded in a modern substitute decision-making or guardianship regime, and they embody a least-restrictive approach. Their definitions of abuse and neglect reflect more current thinking in the field and also include strong rights-based language. These regimes are supported by closely-knit Public Guardian and Trustee legislation. Newer regimes include strong powers to investigate abuse, a broad scope of possible outcomes, and the requirement to consult with the adult to the greatest extent possible. A detailed analysis of the BC regime is found in section 4.1 of this study.[13]

The older comprehensive regimes generally have a narrower scope, and a less clearly stated commitment to an independence-based model. Powers to investigate may be less well developed, and the scope for outcomes may also be somewhat more limited.

Hallmarks of the most modern comprehensive abuse and neglect legislation include the following:

1. Legislation applies to all adults, regardless of location or care recipient status;
2. Legislation applies to all adults, regardless of vulnerability or mental capability;
3. Definition of abuse includes physical, emotional, psychological, financial, sexual, chemical, and spiritual abuse, as well as a general statement that other rights may also exist;
4. Definition of abuse does not require intention to cause abuse;
5. Legislation includes neglect, and also a self-neglect provision that respects a person's right to live at risk;
6. Legislation includes a statement of adult independence and the desire to have the abuse and neglect legislation used in the least restrictive fashion possible, recognizing adults' rights to live at risk and make individual choices;
7. Rejection of a reasonable person standard for decision-making (what would a hypothetical *reasonable person* want?) and endorsing an *individual referencing*

[FOOTNOTES]

[12] Adult Protection, *supra* note 8 at 6.
[13] This review is limited to abuse and neglect legislation and did not consider the intersection of mental health legislation. It was beyond the scope of this work to consider how mental health law interacts with abuse and neglect legislation, but it is important work that should be addressed in another project.

model (what would this person want?);

8. Protection for whistleblowers reporting abuse in good faith;
9. Protection from liability for those investigating abuse and all persons reporting abuse in good faith;
10. A provision making malicious or false claims an offence;
11. Designated agencies to receive reports of abuse;
12. Voluntary reporting;
13. Mandatory investigation by an agency upon receipt of a report of abuse or neglect;
14. Strong investigatory powers of that agency;
15. Ability to preserve assets of the adult during the investigation process;
16. Broad range of possible outcomes including involvement of community networks or other community resources – with removal of the adult and / or guardianship as the last possible resort;
17. Requirement that the adult, regardless of capability, be consulted with to the greatest extent possible and that their wishes must guide the process and outcomes. Capable adults may naturally refuse assistance.

2. DELIBERATELY LIMITED REGIMES

Ontario,[14] Alberta, and Manitoba[15] have abuse and neglect regimes deliberately limited in scope. These provinces possess no abuse or neglect specific legislation for those living outside of care centres, such as long-term care facility residents. The provinces have rejected a comprehensive approach on the basis that it would be too invasive in adults' lives, and that other existing legislation would suffice. [16] Theoretically, assault, theft, neglect,[17] fraud, and other forms of exploitation are covered in the *Criminal Code* or via family / domestic abuse legislation and civil remedies.

Discussion in these jurisdictions revealed a real apprehension that specific adult abuse and neglect legislation would increase the ageist ghettoization of crimes or abuses, particularly against older adults. Instead of being considered criminal acts, persons in authority might instead look to the abuse and neglect legislation and determine that these are "civil matters", and not pursue criminal charges. Much of this debate mirrors discourse regarding violence against women legislation in the 1980s.

[FOOTNOTES]

[14] Ontario's yet to be proclaimed *Long-Term Care Homes Act*, 2007, S.O. 2007, c. 8 has a new adult abuse and neglect component that will be the "cutting edge" of these regimes in a deliberately limited scope.
[15] Manitoba's legislation only covers abuse.
[16] In Alberta, there is also a trend of moving towards a medicalized model as opposed to a social rights model.
[17] *Criminal Code*, R.S.C. 1985, c. C-46, s. 215.

Hallmarks of the most modern deliberately limited adult abuse and neglect legislation include the following:

1. Legislation applies to all persons in care, which most notably includes long-term care (it may also include a hospital, nursing home, lodge, group home, respite care, health facility, or personal care home);
2. Mandatory reporting of abuse by all persons, including staff, professionals, and the general public. Reporting of abuse is not required by the victims of the abuse;
3. Definition of abuse includes physical, emotional, psychological, financial, sexual, chemical and spiritual abuse, inappropriate use of restraints, as well as a general statement that other rights may also exist;
4. Definition of abuse does not require intention to cause abuse but may include willful blindness ("knew, or ought to have known");
5. Legislation includes a statement of adult independence and the desire to have the abuse and neglect legislation used in the least restrictive possible fashion, recognizing adults' rights to live as they choose and to make individual choices;
6. Rejection of a *reasonable person* standard for decision-making (what would a reasonable person want?) and endorsement of an *individual referencing* model (what would this person want?) for capable adults;
7. Protection for whistleblowers reporting abuse in good faith and with reasonable cause;
8. Protection from liability for those investigating abuse and all persons who reported abuse in good faith and with reasonable cause;
9. A provision making malicious or false claims an offence;
10. A provision making it an offence to discourage someone from making a report of abuse or neglect;
11. Mandatory investigation upon receipt of a report of abuse or neglect, typically by a Director of the care facility, and then a report out to an external agency for review;
12. Strong investigatory powers of that agency;
13. Requirement that the adult, regardless of capability, be consulted to the greatest extent possible and that their wishes must guide the process and outcomes to the greatest extent possible;
14. Every care home or long-term care residence should have a written abuse and neglect policy which is approved by the appropriate Minister responsible (health);

15. Every care home or long-term care residence should have a written restraints policy that is approved by the appropriate Ministry responsible (health).

3. PROTECTIONIST REGIMES

Nova Scotia has the most protectionist regime in Canada and it is currently undergoing a review. Nova Scotia has a split system – the current Adult Protection Act[18] ("NS APA") of 1989 is limited in scope to persons living in the community. However, since 2004 there has been an intention to have the NS APA paired with the *Protection for Persons in Care Act*[19] — to broaden the scope of the legislation to include care facility recipients.

A protectionist regime requires mandatory reporting and is entrenched in the best interests of the adult model. Under the NS APA, it is an offence to fail to report information, including information that is confidential or privileged, indicating that an adult is in need of protection.[20] The law grants the state broad powers – if an adult is determined to be in need of protection, the state can obtain an order to enter the adult's home, remove the adult from their home, order assessments, and in some circumstances require assistance be given – but contains no provisions that expressly give the person being assessed the right to be heard, or have his or her wishes taken into consideration.

When the Act came into effect, the primary role was to assist adults living at home who were being abused by caregivers. The intention was that the Act would provide short-term remedies until long-term solutions were put in place. The NS APA reflects such short-term goals, for example, through the requirement that an order deeming an adult to be "in need of protection" be reviewed by a court every six months. The Ministry reports that most adults receiving services under adult protection are experiencing self-neglect, rather than abuse or neglect by others. Presumably these statistics will be reflected in upcoming recommendations.

The hallmarks of such a regime include:

2. Mandatory reporting generally (in this case – in the community);
3. Punishable offences and fines for failure to report abuse and neglect;
4. Few provisions placing limits on false claim provisions;
5. Use of a best interests test as opposed to an individual referencing test;
6. Little provision for input from the adult;
7. Mandatory investigation of reports of abuse;

[FOOTNOTES]

[18] R.S.N.S. 1989, c. 2.
[19] S.N.S. 2004, c. 33 (not in force).
[20] Adult Protection, *supra* note 9, at s. 16(1).

8. Ability to authorize medical exams of the adult, possibly against his will;

9. Ability to obtain a court order to overcome an impeded investigation;

10. Ability to remove an adult from her residence.

4. PATCHWORK REGIMES

Some jurisdictions have not implemented specific adult abuse and neglect legislation. Saskatchewan, the NWT, and Quebec cannot be said to have abuse and neglect legislation, however, in its absence other legislation is sometimes used.

In such cases domestic violence legislation typically becomes the automatic default. This is very limited, however, and does not capture the broader need for abuse and neglect legislation. In Saskatchewan, the *Victims of Domestic Violence Act*[21] includes "persons who reside or resided together in a family, spousal or intimate partner relationship or parents."[22] In the NWT the *Protection Against Family Violence Act*[23] includes a "spouse, former spouse, persons who resided or who are residing together in a family or intimate relationship, parents or grandparents."

Quebec's most direct legislation on abuse and neglect is found in the *Quebec Charter of Rights and Freedoms*,[25] which includes "aged or handicapped persons who may be exploited."[26]

Additionally, each jurisdiction has a *Public Guardian and Trustee Act* or equivalent (in Quebec there is the *Public Curator Act*[27]) and adult guardianship legislation and human rights legislation. In Saskatchewan, recent amendments to the *Public Guardian and Trustee Act*[28] now allow for the freezing of assets in cases of suspected financial abuse.

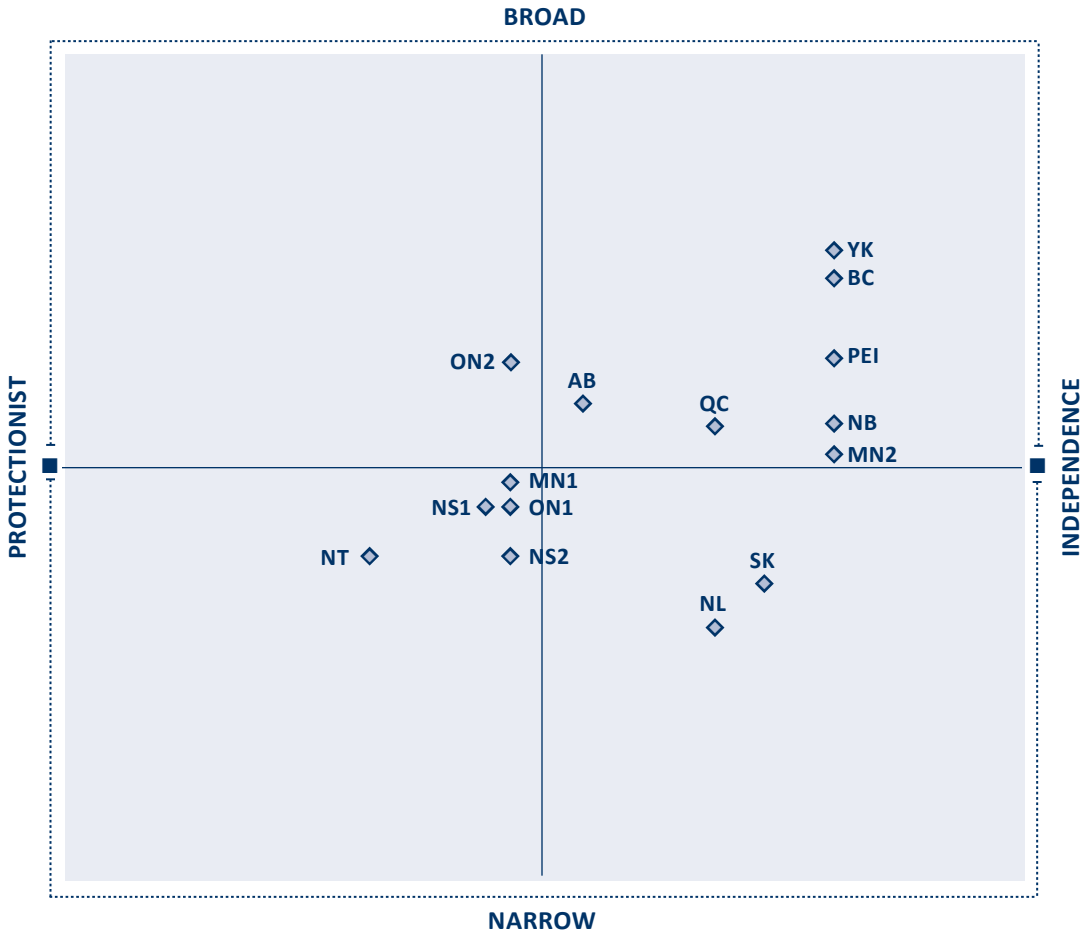
5. MAPPING ADULT ABUSE AND NEGLECT AND GUARDIANSHIP SCHEMES IN CANADA

The goal in mapping Canada's adult abuse and neglect statutory regimes is to provide a visual tool outlining the various groupings and trends in this field. It is not meant to be a scientific statistical representation, and is not held out as such. It is rather a useful way to parse the component policy choices that typically make up adult abuse and neglect legislation, in order to better consider the various options. It further allows an at-a-glance mapping of where each jurisdiction lies in relation both to the others, and also to the whole.

[FOOTNOTES]

[21] S.S. 1994, c. V-6.02.
[22] *Ibid.* at s. 2(a).
[23] S.N.W.T. 2003 C. 24.
[24] *Ibid.* at s. 2(1).]
[25] R.S.Q. c. C-12.
[26] *Ibid.* at s. 48.
[27] R.S.Q. c. 81
[28] S.S.1983, c. P-36.3; amended in 2001, c. 33, s. 19.

[Comparing Adult Protection Legislation]



BC: Adult Guardianship Act, R.S.B.C. 1996 c.6 Part 3
AB: Protection for Persons in Care Act, R.S.A. 2000. c.P-29
SK: Public Guardian and Trustee Act, S.S. 1983, c.P-36
MN1: Protection for Persons in Care, C.C.S.M., c.P144
MN2: Vulnerable Persons Living with a Mental Disability Act, C.C.S.M. c. V90
ON1: Nursing Home Act, R.S.O. 1990 C.N1
ON2: An Act Respecting Long-term Care Homes, (Bill 140), 2007 (not in force)
QC: Charte des Droites et Libertes de la Personne, L.R.Q. C-12
PE: Adult Protection Act, R.S.P.E.I. 1988, cC-13
NB: Family Services Act, R.S.N.B, 1980, CF-22
NS1: Adult Probation Act, R.S.N.S. 1989, c.2
NS2: Protection for Persons in Care Act. S.N.S. 2004, c.33 (not in force)
NL: Neglected Adults Welfare Act, R.S.N.L. 1990, c.N-3
YK: Decision Making, Support and Protection to Adults Act, S.Y. 2003 c. 21
NT: Protection Against Family Violence Act, S.N.W.T. 2003, c.24 & Guardianship and Trustee Act, 1994, S.N.W.T. c.29

3.1.1 THE VANGUARD APPROACH TO INTERVENTION

A consistent and challenging issue is how to balance the two values of protection and independence. As the above discussion illustrates, Canadian jurisdictions vary greatly in their approaches. Protection requires some compromise of independence for the sake of an adult's well-being; the challenge is to devise a framework that sacrifices as little independence as possible. This requires careful navigation of problems such as determining when to intervene, and tailoring the intervention to suit the particular risk posed. Excessive intervention risks creating as much compromise to the vulnerable adult's quality of life as no intervention at all.

The Vanguard approach to intervention reflects much of the modern Canadian literature in this field. Respect and understanding of the adult and their viewpoints, as much as possible, is a preliminary requirement. Responding to and operationalizing pre-expressed values, wishes, and beliefs is a priority. When intervention is required, it should be limited to the "least intrusive and most effective" means available to achieve the goal. Interventions should be appropriately limited in terms of both time and purview. If possible, persons with capability challenges should be given assistance with making discrete decisions (assisted or supported decision-making), rather than moved directly to a substituted decision-making system.

3.2 Principles for Guiding the Practice of Practitioners Working with Vulnerable Adults in BC

THE FOLLOWING GUIDING principles came into force in 2000 when the first phase of adult guardianship reform took place in BC.

GUIDING PRINCIPLES

2 This Act is to be administered and interpreted in accordance with the following principles:

(a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;

(b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

(c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

The Act entrenches the common law presumption of capability:

PRESUMPTION OF CAPABILITY

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

3.2.1 OTHER VALUES AND PRINCIPLES EMBEDDED IN THE *ADULT GUARDIANSHIP ACT*

A number of subsections of BC's new guardianship law are worth reprinting as they codify significant principles relevant to practice. Their emphasis on the importance of protecting and respecting the independence of vulnerable adults as much as possible marks an important shift from the *Patients Property Act*.[29]

The prior expressed wishes of an adult must be considered in the context of a guardianship application:

APPOINTMENT OF GUARDIAN

> 8 (1) (3) Subject to subsection (4), when appointing a guardian for an adult, the court must consider any wishes the adult, when capable, expressed orally or in writing respecting who should, or should not, act as guardian.

The new legislation also requires a personal guardian to consider pre-expressed wishes and gives meaning to this concept. The list of the property guardian's duties contains similar language.

DUTIES OF PERSONAL GUARDIAN

> 20 (1) In this section, *"pre-expressed wishes"* means instructions or wishes regarding personal care or health care that an adult most recently expressed while capable, including any instructions or wishes set out by the adult in a representation agreement or an advance directive that was terminated under section 12.
>
> (2) When making decisions on behalf of the adult, a personal guardian must comply with the adult's pre-expressed wishes, unless to do so would be inconsistent with an order of the court.
>
> (3) If there are no pre-expressed wishes relevant to the decision to be made, a personal guardian must act in the adult's best interests, taking into account:
>
> (a) with respect to the adult's personal care or health care,

[FOOTNOTES]

[29] R.S.B.C. 1996, c. 349 [PPA].

(i) the adult's known beliefs and values, and

(ii) any prescribed matters, and

(b) with respect to the adult's health care,

(i) whether the adult's condition or well-being is likely to be improved by the proposed care,

(ii) whether the adult's condition or well-being is likely to improve with out the proposed care,

(iii) whether the benefit the adult is expected to obtain from the proposed care is greater than the risk of harm, and

(iv) whether a less restrictive or less intrusive form of care would be as beneficial as the proposed care.

3.2.2 A BRIEF INTERNATIONAL SURVEY OF CAPABILITY RESPONSE PROTOCOLS AND GUIDELINES*

Diverse resources in the form of policies, protocols, guidelines and discussion papers exist to guide or question the practice of those who work with vulnerable adults and address problems of capability in the context of their practice.

This review of capability assessment resources was broad in scope but by no means exhaustive. It considered material produced in British Columbia and other Canadian jurisdictions, the United States, the United Kingdom, Australia, and Africa. A number of the handbooks we reviewed were intended to guide the practice of particular professionals, such as doctors, lawyers, or judges. Some documents interrogated or interpreted particular legal systems, and so are very specific to their region in their application. Others contain a broader discussion of capability and practical or ethical issues in relation to working with vulnerable adults with capability issues. Some were focused strictly on assessments and others addressed practice more broadly. Appendix B contains a complete list of the publications studied. This aspect of the Vanguard Project necessarily remains ongoing, as it is a vast and growing area of knowledge production. Many of these tools are easily referenced in the CD materials, including a chart on tools used and considered in the course of this project.

In spite of differences in target audience it was possible to identify cross-disciplinary themes in terms of values and principles underlying the best practice of practitioners working with vulnerable adults presenting with capability issues. This list is intended to serve multiple purposes: a resource for practitioners who work with vulnerable adults; a starting place for discussion regarding creation of an agency specific or interdisciplinary protocol; and a catalog of best practices.

PRINCIPLES FOR PRACTICE

1. All adults are presumed to be capable of making decisions.
2. Vulnerable adults are entitled to the basic human rights accorded to other adults in their jurisdiction.
3. Guardianship is a last resort measure: guardianship orders and capability assessments are unnecessary if there are alternate ways of adequately meeting the adult's needs. Opt for the most effective but least intrusive measures.
4. All adults have a right to be supported to make their own decisions where possible.
5. All decisions should reference the individual and his or her core values, expressed wishes, life choices, and decision-making style.
6. Adults have the right to self-determination and autonomy, including the right to make poor or risky decisions if they do so with capability. Risky or "imprudent" behaviour is not proof of incapability.
7. Best interests must guide assessment practice: incapability assessments and guardianship applications are undertaken only if they will serve the interests of the adult.
8. Capability is domain or task specific or situational: incapability assessments are concerned solely with a specific decision or with an area of decision-making.
9. Appropriate incapability assessment and guardianship applications never occur in a vacuum. They must reflect and consider the resources and support available to the individual.
10. Preservation of and respect for an adult's language, cultural membership and community attachments must guide practice and interventions.
11. Informed consent by the adult is the ideal. Adults have the right to be informed of actions undertaken to protect them.
12. An adult has a right to confidentiality subject to the limitations imposed by the law.

SECTION
4.0

THE LAW OF CAPABILITY IN BC

4.1 The Current State of Capability Law – A Time of Transition

BC IS CURRENTLY entering an interesting transitional period in terms of the law of capability. Over the last twenty years BC's capability law has been in a degree of limbo. While the *Patients Property Act* remains in effect, various reports were issued recommending reform and a number of bills, potentially affecting a major revision of BC's guardianship system, were proposed but never passed. Finally, in 2007, Bill 29, the third bill in twenty years intended to create a more nuanced adult guardianship framework, was granted Royal Assent - though the law has yet to be proclaimed. Thus BC possesses a new set of adult guardianship laws yet to be interpreted and applied by the courts.

Although Bill 29[30] repeals the *Patients Property Act*, at the time of publishing this older statute remains in effect. Current practice therefore requires a familiarity with both the old and the new systems.

There is another reason why it is worthwhile to have knowledge of both legal frameworks: in their divergent approaches to addressing adult protection the two systems represent two of the major streams of thinking discussed in section 3.1 of this study. The contrast emphasizes the paradigm shift wrought by the new Bill, and highlights the values underlying the two systems.

4.2 A Brief History of BC Capability Law: *The Patients Property Act*

IN BRITISH COLUMBIA, as in all common law jurisdictions,[31] adults are presumed to have capability and, as such, to be capable of making necessary decisions with respect to themselves and their property.

British Columbia's current guardianship laws are heavily rooted in 14th century English "lunacy" laws, according to which the King was granted control over the land and income of "idiots" (those who had never been and would never be capable) and "lunatics" (those who had once been capable and might regain capability).[32] The province's *Patients Property Act* – until recently the only legislation governing guardianship in BC - is a direct descendant of the *Imperial Lunacy Act*[33] of 1890, and predominately parallels its predecessor's archaic method of estates administration.

[FOOTNOTES]

[30] 3d Sess., 38th Parl., 2007 [Bill 29].
[31] Common law jurisdictions, distinguished from civil law jurisdictions, are legal systems in which great weight is accorded to court decisions, which along with codified laws, form the laws of the land. Some of the largest Common Law jurisdictions are Canada, excluding Quebec, the United Kingdom, Australia, New Zealand and South Africa.
[32] Louise Harmon, "Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment" (October 1990) 100:1 The Yale L.J. 1 at 16.
[33] 53 & 54 Vict., c. 5

The title of the BC law reflects the thrust of the legislation: the goal of the *Patients Property Act* is estate administration rather than the guardianship of the well-being of the "patient". As explained in the following section, the latter approach more accurately captures the approach of the new legislation.

Neither capability nor incapability is defined in the *Patients Property Act*. Under this Act, incapability is a legal determination made on the basis of medical evidence. An adult deemed legally incapable under the *Patients Property Act* is under a legal disability, similar to that of a minor by virtue of age, and is deemed incapable of making decisions with respect to their person, their property, or both.

In section 1 the Act defines a "patient" as:

a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health care facility or psychiatric unit as defined in the *Mental Health Act*, or

b) a person who is declared under this Act by a judge to be

   (i) incapable of managing his or her affairs,

   (ii) incapable of managing himself or herself, or

   (iii) incapable of managing himself or herself or his or her affairs.

If an adult is declared by the Court to be incapable under the Act the Court may appoint any person to become the committee (pronounced comm-i-ttee) or parent-like guardian of the adult's property (committee of the estate), their person (committee of the person), or both.[34] Under the *Patients Property Act* guardianship is global, and thus a committeeship results in a loss of all decision-making power.

4.3 An Overview of BC's New Capability Legislation

THE *ADULT GUARDIANSHIP AND PLANNING STATUTES AMENDMENT ACT*, 2007 – BILL 29

Bill 29, *The Adult Guardianship and Planning Statutes Amendment Act*, 2007 (not in force),[35] which amends the B.C. *Adult Guardianship Act* and repeals the *B.C. Patients Property Act*, received Royal Assent on November 22, 2007. The new legislation goes a long way toward creating a modern guardianship regime for BC. It redresses the

[FOOTNOTES]

[34] PPA, supra note 29, at s. 6(1).
[35] Bill 29, supra note 30.

paternalism of the *Patients Property Act* by repealing that statute and replacing it with more nuanced law. This new legislation refers to adults as *adults*, rather than as *patients*, and unlike the *Patients Property Act*, is concerned with support and decision making more broadly rather than simply protection of the adult's estate.

Bill 29 replaces the committeeship system with a framework of three distinct types of guardians: statutory guardians, personal guardians, and property guardians. The system provides for two parallel processes as statutory guardians are appointed through a different process than personal and property guardians.

This new legislation also emphasizes and promotes the use of personal planning tools to provide for the event of incapability. In particular, there are changes to the *Power of Attorney Act*, which include the creation of "springing powers of attorney" - documents that can remain dormant until the occurrence of a certain event. Also, these legislative changes emphasize that powers of attorney will be the preferred document for substitute financial decision planning rather than the use of a representation agreement.

Changes to the *Representation Agreement Act*[36] now emphasize that this type of personal planning document will be used chiefly for substitute personal and health care decision-making and to support "assisted" decision-making. These changes in Bill 29 significantly reduce their use as tools for substitute financial decision-making.[37]

4.3.1 THREE TYPES OF GUARDIANS IN BC

STATUTORY GUARDIANS

Under Bill 29, the Public Guardian and Trustee can become the statutory guardian of a person without any appearance in court. The Public Guardian and Trustee, working with recommendations from health care providers, may determine whether a statutory guardian needs to be assigned to assist with the management of an adult's financial affairs.

The process requires an assessment of incapability. If a health care provider has reason to believe that an adult may be incapable of managing their financial affairs, the health care provider may request that a qualified health care provider assess the adult's incapability under section 32(1). (A "qualified health care provider" is a medical practitioner or a member of a prescribed class of health care providers; the latter will be detailed within the regulations.)

Upon receipt of a report of an adult's incapability, a health authority designate may issue a certificate of incapability. The certificate of incapability must then be

[FOOTNOTES]

[36] R.S.B.C. 1996, C. 405
[37] Further in formation can be found at www.trustee.bc.ca, and www.nidus.ca.

forwarded to the Public Guardian and Trustee, who can either accept or reject the certificate. If the certificate is accepted, the Public Guardian and Trustee becomes the adult's statutory property guardian. As an adult's statutory property guardian, the Public Guardian and Trustee has all of the powers of a property guardian under the *Adult Guardianship Act*.

Where a property guardian already exists, a statutory property guardian will not be appointed.

PERSONAL AND PROPERTY GUARDIANS

The court may appoint a guardian when an adult is found to be incapable of making decisions related to their personal care, health care, or financial affairs. There is a very high standard of proof for establishing that an adult is incapable. Though not strictly defined in the new law, incapability is envisaged as being "rheostat" – with the amount of court intervention reluctantly dialed up, only when needed, and dialed down, as soon as possible. The goal of ensuring the most effective and least intrusive measures is canonized in the Bill 29 changes.

Where someone believes an adult is incapable of making these decisions, and that adult refuses to be assessed an application may be made to the court under section 4(1) for an order directing an adult to submit to an assessment of incapability. Anyone who believes an adult is in need of a personal guardian, property guardian, or both may make the application. Pursuant to section 8, a court may make an order appointing one or more guardians if the court is satisfied that:

- the adult needs to make decisions respecting the adult's personal care, health care, or financial affairs;
- the adult is incapable of making those decisions;
- the adult needs, and will benefit from, the assistance and protection of a guardian; and
- the needs of the adult would not be sufficiently met by alternative means of assistance.

A court may appoint more than one guardian. Each guardian may have completely different or overlapping areas of authority. In cases of situations in which guardians share authority, they must act unanimously unless otherwise ordered by a court.

A personal guardian is obliged to comply with instructions or wishes expressed in a representation agreement or advance care directive; they are not obligated to do so if such compliance is inconsistent with a court order.[38]

Where a personal guardian is appointed, any personal or health care provisions

[FOOTNOTE]

[38] *Ibid.* at s. 20(2).

in representation agreements or advance care directives made by the adult are terminated, unless otherwise ordered by the court.[39]

The Court must consider any wishes the adult expressed when capable in respect of the choice of guardian. In addition the Court may, upon application by the Public Guardian and Trustee, appoint a temporary property guardian if the Public Guardian and Trustee has reason to believe the adult is incapable and an order is needed urgently to protect the adult from financial damage or loss.

Once a guardian is appointed, the proposed legislation makes it clear that the guardian has only the powers granted in the Court order, or any enactment, and sets out the duties and liabilities of the guardian. The guardian is mandated to comply with the adult's pre-expressed capable wishes, unless to do so would be inconsistent with an order of the Court. If there are no pre-expressed capable wishes, the proposed legislation sets out precisely what factors must be taken into account when making a decision in the best interests of the adult. As a result, the concept of best interests is virtually a defined term, and is stripped of its paternalistic connotations. "Best interests" are reviewed in greater detail in section 3.2.2 of this study and the accompanying materials on the included CD.

4.3.2 PRIVACY AND DISCLOSURE OF PERSONAL INFORMATION

One of the many criticisms of the old BC adult protective regime was the lack of provisions regarding the protection and disclosure of the personal information of the vulnerable adult, including the results of the capability assessment. The new guardianship act contains some positive changes in this area.

Under section 62 of Bill 29 the groups entitled to access an adult's personal information are a designated agency, a qualified health provider, and the Public Guardian and Trustee. The disclosure is limited to the information necessary to allow them to perform their functions under the *Adult Guardianship Act*. The same bodies are permitted to further disclose this information for the purpose of exercising their duties under the Act. Any person in possession of information must disclose it to these parties under the law. As between these groups, all claims to confidentiality, except solicitor-client privilege, are overridden.

Language that appears to limit the assessor's power to share the outcome of the assessment is also a notable change. Section 62.1(3) states that the qualified health care provider who performs the capability assessment may disclose the information obtained under the Act for the purpose of providing a report to: the Public Guardian and Trustee; a health authority designate; a designated agency and a person who requests in writing a report to be used for a court application.

[FOOTNOTE]

[39] *Ibid*. at s. 12(1).

4.3.3 THE TRANSITION PERIOD FROM THE OLD TO THE NEW LAW

Bill 29 repeals the old law. At the time the law takes effect there will obviously be vulnerable adults with existing committees appointed under the *Patients Property Act*. Under new law, the committees automatically become guardians without having to go through the process set out in the new law.

Depending on the circumstances of the original appointment, the guardian will be either the Public Guardian and Trustee or the person who held the committeeship:

1. if the adult is a "patient" within the meaning of paragraph (a) of the definition – that is to say, the adult was certified under the *Mental Health Act* - the Public Guardian and Trustee is deemed to be the adult's statutory property guardian;

2. if an adult is a patient within the meaning of paragraph (b) of the definition and has a committee, the person who was the committee is deemed to have been appointed under the *Adult Guardianship Act* as personal guardian or property guardian or both, as applicable, with the same powers as the committee.

4.3.4 CONSENT TO HEALTH CARE AND INCAPABILITY

SUBSTITUTE DECISION-MAKERS

In BC, an adult is presumed to be capable of making a health care decision – either to accept or to refuse health care. However, where an adult is not able to do so, in most cases, another person will do this on their behalf. This is known as substitute decision-making. In BC, until Bill 29, a health care provider needed to acquire consent from either the capable adult, or in the case of an adult incapable of making this particular decision, that adult's correct legal substitute decision-maker. The legal substitute decision-maker then makes the decision on the incapable adult's previously expressed values, wishes and beliefs. If these are not known, only then will a decision be made in the adult's "best interests".

Bill 29 amends the *Health Care (Consent) and Care Facility (Admission) Act*. It does not change the rule that a capable adult, or if incapable their correct legal substitute decision-maker, must give or refuse consent to health care. It does, however, expand the group of authorities who are able to assist adults in making health care consent decisions. The following summarizes the list of individuals or authorities (in ranked order) that, under the amended Act, are authorized to give or refuse consent to health care on behalf of an incapable adult:

1. Personal Guardian appointed under the *Adult Guardianship Act*;

2. Representative appointed under the *Representation Agreement Act*;

3. Advance Directive created under the *HCCCFA Act*;
4. Temporary Substitute Decision Maker appointed under s.16 of the *HCCCFA Act*;
5. The Public Guardian and Trustee.

ADVANCE CARE DIRECTIVES

One of the most significant amendments to the *Health Care (Consent) and Care Facility (Admission) Act* is the introduction of the concept of an "advance directive" into the law in the new Part 2.1. An advance directive gives capable adults the ability to make binding documents on personal health care decisions, in advance of incapability, without the health care provider consulting with a proxy/substitute decision-maker. These instructions will be subsequently interpreted as the adult's wishes regarding consent or refusal to health care in the event that the adult is not capable of making such decisions. Unlike the previous system, a substitute decision-maker does not have somebody else interpret the previously expressed wishes; rather, the health care provider reads the advance directive without requiring a third party to interpret the instructions or wishes. This is a significant change in BC's health care consent substitute decision-making regime.

An advance directive is not absolutely binding. A health care provider does not have to follow the instructions in an advance directive if she feels that:

- ☐ the advance directive does not address the health care decision to be made;
- ☐ the instructions in the advance directive are not clear;
- ☐ while the adult was capable and since the advance directive was made, the adult's wishes, values or beliefs have changed and the advance directive does not reflect such changes; or
- ☐ since the advance directive was made there have been significant changes in medical knowledge, practice or technology that might substantially benefit the adult.

SECTION
5.0

RESPONDING TO CAPABILITY ISSUES IN BC

5.1 Access to Justice and the Vulnerable Adult

LEGAL RIGHTS ARE MEANINGLESS unless both a parallel legal framework and community resources exist to allow a person to enforce these rights. In the case of adults facing capability issues, this is especially important both because the threat of the loss of independence is so great, and because the adult (often an older adult or an adult with disabilities) may experience significant barriers to self-advocacy.

British Columbians may seek legal resources by talking to a private lawyer, accessing legal aid, through a clinic, by accessing other clinic based services, by getting online and print resources through public legal education, and getting information or advice by telephone or online.

A vulnerable adult may need to seek legal assistance in numerous circumstances. Some of these circumstances include the following:

- An adult whose capability is at issue may wish to refute an assessment of incapability, and argue that they are capable of making the necessary decision in question.
- An adult whose capability is at issue may wish to respond to an assessment of incapability or a guardianship plan.
- An adult whose capability has improved may no longer want to have a guardianship order.
- An adult may be a victim of crime, such as an assault or breach of trust or a witness to a crime.
- An adult may wish to restrict the access of an abuser or ensure access of a loved one, including a minor child.
- An adult may wish to seek legal advice on issues of advance personal and financial planning, wills and estate planning, marriage, divorce, property sale, guardianship of minor children, asset protection or liquidation, housing choices and costs etc.

Research suggests that people with capability issues and vulnerable adults are less equipped to adequately self-advocate in the legal system, but are often over-represented within that same system.* In essence their need is greater, but their resources and access are less. The reasons for this are not specifically clear, but include existing physical, financial, informational, cultural, and behavioral challenges.

The physical barriers may be diverse and difficult to overcome. Adults may be physically unable to attend court for a variety of reasons such as a difficulty in obtaining transportation to justice resources or institutions, or find difficulty in navigating a building that may be inaccessible for an individual with a physical disability. An adult may be dissuaded from being involved in legal proceedings due

a hearing impairment or a language barrier. The formal structures of court may be intimidating or confusing, leading to a lack of motivation to enforce rights. An isolated older adult may be reluctant to meet with strangers.

Many adults may also choose not to pursue their legal rights out of an inability to afford legal costs, including lawyers' fees and court filing fees. The radical reduction of civil legal aid services in British Columbia in past years has meant that generally only those individuals facing the potential "deprivation of their liberty" have any recourse to legal aid. This notion of deprivation of liberty has been severely limited in its interpretation, and is predominately triggered by only the most serious criminal offences. It is significant that although an adult who is found to be incapable will experience a loss of independence and liberty, as yet this kind of deprivation has not been captured by the BC legal aid qualifying definitions. As such, general legal aid is not available in BC for adults whose liberty is in jeopardy due to a legal challenge to their capability. A new clinic, run by the BC Centre for Elder Advocacy and Support has recently been established. This Elder Law Clinic can provide some advice and representation, but is very limited in its capacity. There is a broad and increasing need for substantive legal aid review to allow adults with capability issues to access justice in BC.

Many adults may also choose not to pursue their legal rights out of an inability to afford legal costs, including lawyers' fees and court filing fees.

The movement in BC toward delivering legal services through online programs may fail to serve the community of older adults who may have limited computer literacy, or those who have limited access due to isolation caused by illness and disability. Persons with capability challenges are unlikely to be able to wade through online resources and understand what information might apply to them. This requires both a high degree of abstract reasoning and executive function, as well as access to a computer and the requisite knowledge to use it. Overall, computer-based legal services do not well serve this community of clients.

Other adults may also be ineligible for assistance from community advocacy programs because they own property, hold property in trust, or have capability issues too complex to be handled by a community advocate who is not a lawyer. Many seniors, for example, are asset rich, but cash poor – they own or partially own their own home, but have very low income – and thus cannot either access free services or pay for a lawyer.

Issues involving persons with capability are rarely single, easily resolved, and discrete ones that can be addressed in a community advocacy program. They are often, by their nature, complex and multi-faceted, often tangled with a myriad of different legal, social, and emotional aspects to them. They may involve victim assistance matters like domestic violence. They can involve medical, psychiatric, and health issues. They can involve fiduciary obligations, trustee issues, and powers of attorney. They may involve family law, changing guardianship legislation, criminal law, or

mental health law. This complexity does not mean that people in this situation cannot be helped. Rather, in helping, one must be aware to dig deeper, ask more thorough questions and avoid leaping to conclusions, while being alive to changing social conditions that may be influencing the situation.

There often exists a notion that "family or friends" will see to the welfare of such adults. Evidence suggests, however, that it is this very group that is most likely to exploit these adults. Conversely, this group of adults may be entirely without close friends or family.

Another challenge can be for adults who may retain or have regained sufficient decision-making ability to be mentally capable of some regular life tasks and yet still lack cognitive abilities or the awareness required to self-advocate, access services, or be aware of legal rights. Such adults may appear at first to be able to self-advocate, but after some time is spent with that adult, it becomes clear that executive function or another impairment inhibits the adult from accessing justice on their own.

5.2 The Vulnerable Adult's Access to a Lawyer

ONE OF THE OTHER barriers to access to justice is that an adult dealing with capability issues may not be permitted to instruct a lawyer. The BC Law Society Professional Conduct Handbook, which guides the practice of BC lawyers, contains language that appears to prohibit a lawyer from taking instruction from an "incapable person".[40] Chapter 3 of the Handbook, under the heading "Client Capacity," provides some exceptions. It reads as follows:

> 2.1 If a client cannot adequately instruct counsel for any reason, the lawyer must maintain a normal client-lawyer relationship with the client, to the extent reason ably possible.
>
> 2.2 A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only if the lawyer:
>
> (a) reasonably believes that the client cannot adequately instruct counsel,
>
> (b) reasonably believes the appointment or other protective action is neces- sary to protect the client's interest, and
>
> (c) does not take any action contrary to any instructions given to the lawyer by the client when the client was capable of giving such instructions.
>
> 2.3 A lawyer who reasonably believes that a client cannot adequately instruct counsel may, pending appointment of a representative of the client, continue

[FOOTNOTE]

[40] Law Society of BC, "Client Capacity and Lawyer's Duty of Confidentiality" *Professional Conduct Handbook* (Vancouver: 2005) at Chapter 5 [Professional Conduct Handbook].

to act for the client to the extent that instructions are implied or as otherwise permitted by law.

And under the heading "Lack of Capacity," the Handbook states:

> 2.4 A lawyer who is prevented from entering into a client-lawyer relationship with a person because of the person's lack of capacity **[*note 4]** may provide reasonable and necessary minimal assistance to the person and disclose confidential information provided the lawyer:
>
> (a) is satisfied that the person cannot adequately instruct counsel generally or about possible protective action the lawyer might take,
>
> (b) makes it clear to anyone who may be misled by the lawyer's involvement that the lawyer does not represent the person,
>
> (c) discloses the minimum amount of information required, and
>
> (d) does not take action contrary to any direction given to the lawyer by the person. **[*Note 5]**

- **[*Note 4]** A lawyer may not form a client-lawyer relationship with a person who has never been the lawyer's client and who lacks the capacity to instruct the lawyer, except if the lawyer is appointed to act by a court or tribunal, by operation of statute or in a proceeding in which some aspect of the client's mental capacity is in issue. However, a lawyer may act for a person of marginal capacity who is capable of giving instructions on some matters but not others.)

- **[*Note 5]** For example, such assistance might consist of appearing at a scheduled court appearance to protect the person's interests or advising the Public Guardian and Trustee, family members or others of the person's need for assistance. Lawyers must act with great care in these situations since the disclosure of confidential information could open a lawyer to a claim and an accusation of acting unlawfully.

Although in BC lawyers are expected to assess the "capacity" of clients informally under these provisions, they have no training as "capacity assessors" and there remains confusion between mental capacity and legal capability. The above rules, based upon the lawyer's "reasonable beliefs" as to a potential client's capacity or "marginal" capacity, offer scant protection from the serious consequences of taking instruction from an incapable client. As Note 5 indicates, "lawyers must act with great care in these situations since the disclosure of confidential information could open a lawyer to a claim and an accusation of acting unlawfully." Many lawyers do not feel comfortable working with persons in the "grey zone" of capability, and will avoid such cases, further limiting the available group of lawyers able to assist persons with capability challenges.

Note 4 does not completely resolve the issue of whether a lawyer can take instruction from a client whose capability is at issue. For example, while the Court

has the discretion to appoint a lawyer to represent an adult facing a committeeship application under the Rules of Court, it is not mandatory that such an adult be represented or be served with notice, and there are no provisions respecting the appointment of counsel for the alleged patient under the PPA. These exceptions, which are already effectively buried in the footnotes of the Handbook, neither provide an adequate definition of "capacity" or "marginal capacity" for the prudent lawyer, nor do they assist the allegedly incapable adult in securing counsel.

An adult who wishes to commence a proceeding challenging a determination of incapability must first convince a lawyer to accept the risks of liability, professional sanctions and the potential for a personal costs award against them associated with such a challenge. If that hurdle is overcome, how does the adult pay for legal services, given the problem of access to justice addressed in the previous section?

5.3 The Vulnerable Adult's Access to the Criminal Justice System

THE SAFETY NEEDS of the adult must be initially determined, and if they are urgent must be addressed first. Unfortunately, capability may severely impact the availability of criminal justice response, despite its importance in supporting vulnerable adults. Many acts of abuse and neglect are clouded by justifications and ageist and/or ableist attitudes. Victimization is often classified with euphemisms such as "abuse and neglect" with can effectively decriminalize offences. It is necessary to send a clear message that many of these actions are in fact crimes and, like all crimes, are offenses against society as well as the victim.

Crimes against vulnerable people frequently escalate and lead to serious physical injury, death, or the irreversible loss of assets. Timely intervention can prevent some of this damage. Physical violence may be used to establish and maintain authority in an abusive relationship. Frequently, the person who is being assaulted is unable to leave or report the abuse due to fear or retaliation, cultural or religious values and conditions, love for the abuser, self-blame, or a lack of resources. Police action and criminal charges may be the only opportunity to safeguard a senior isolated by a violent abuser. Research has demonstrated that a strong criminal justice intervention has a positive impact on future violent behaviour.

Even when acknowledged or reported to authorities, much abuse and neglect of older people is not acted upon. The complex dynamics of abuse and neglect mean that its criminal nature has generally not been fully recognized or, when acknowledged, not acted upon as a criminal matter. Some criminal acts in which older people are commonly targeted, including home invasions and consumer fraud, are vigorously pursued. However, when the offence takes place in a caregiving setting or within a relationship, it may go undetected, unreported, and unchecked. Victims are often unable or unwilling to report to the police. In cases in which a report is made, it is frequently difficult to obtain enough evidence to prove an offence, and thus obtain a

conviction. Crown counsel may be reluctant to proceed with a criminal case if victims or witnesses appear to or have some degree of compromised capability or who may appear to be "vulnerable" witnesses. All of these broad factors play important roles in inhibiting these adults from accessing justice, and can be seen as "devaluing" adults on the capacity – vulnerability continuum within the criminal justice system.

CROSS-DISCIPLINE POLICIES

The *Violence Against Women in Relationships (VAWIR) Policy*[41] and *Designated Agencies and Police Working Together*[42] each include information to support the development of collaborative working relationships and inter-agency protocols.

CROWN COUNSEL POLICY

- **[CHARGE ASSESSMENT GUIDELINES (CHA 1)]** These guidelines are particularly relevant to the abuse and neglect of older persons because the Public Interest Factors in Favour of Prosecution include the fact that "the victim was a vulnerable person, including children, elders, spouses and common law partners", with a cross-reference to the Crown Counsel Policy on Elder Abuse. Public interest factors in favour of prosecution that may relate to vulnerable adults are (g) "the alleged offender was in a position of authority or trust" and (m) "there are grounds for believing that the offence is likely to be continued or repeated".

- **[ELDER ABUSE – OFFENCES AGAINST ELDERS (ELD 1)]** This policy begins with a reference to Crown counsel's Charge Assessment Guidelines' statement that it is generally in the public interest to proceed with a prosecution where the victim is a vulnerable person. The policy also instructs Crown to make reasonable efforts to advise the victim of victim assistance programs. It also states that when Crown counsel decides not to charge, the file should be returned to police with a reminder to inform the local designated agency if they have concerns about the safety or health of the adult, and that, if the adult appears to be incapable, the police may consult the Public Guardian and Trustee.

5.4 Interventions

Options to consider when an adult has difficulties making decisions about his or her health care, personal care, or financial affairs.

[FOOTNOTES]

[41] Applicable to police, Corrections personnel, and victim service workers when an assault occurs in a spousal relationship this policy does not address cases of assault that occur in other types of relationships, for example, mother/son or caregivers/people receiving care, even though these relationships may share many of the same dynamics..

[42] *Designated Agencies and Police Working Together, A Provincial Policy Framework. Related to the Adult Guardianship Act, Part 3, Support and Assistance for Abused and Neglected Adults*. This is a publication of the Public Guardian and Trustee of B.C., the policy outlines the working relationship between designated agencies and the police.

Options to Consider – What the Law Enables

TERM	MECHANISM	PROCESS	WHO BECOMES SUBSTITUTE DECISION MAKER?	POWERS GRANTED	MENTAL CAPABILITY OF THE ADULT
INFORAML SUPPORT & ASSISTANCE	N/A	N/A	N/A	Informal, or planned, solutions such as joint banking accounts, community or family supports.	N/A
TEMPORARY SUBSTITUTE DECISION-MAKER FOR HEALTH CARE / CARE FACILITY ADMISSION	Health care consent and care facility admission legislation.	If adult is incapable, and no guardian or representative, health care provider selects a temporary decision-maker for health care. Care facility manager selects temporary decision make for admission to facility.	Listed in the legislation. Adult spouse or nearest relative, friend, relative in law, Public Guardian and Trustee as last resort. Other eligibility requirements set out in the legislation.	Short term substitute decision making for health care and/or care facility admission. Authority does not extend to controversial, intrusive or irreversible forms of health care. Can give consent to use of restraint in a care facility subject to the Adult Care Regulation.	Incapable of making the health care or care facility admission decision
ENDURING POWER OF ATTORNEY	Adult grants an enduring power of attorney if mentally capable of doing so.	Capable adult and proposed attorney sign a document witnessed by two adults (or one lawyer or notary).	Any capable person (the "attorney") chosen by the adult: e.g., family, friends, or trust company. The Public Guardian and Trustee but only in exceptional circumstances.	Adult directs attorney to make decisions about financial or legal matters. Attorney may act when appointed, or later when the power is triggered by an event such as the onset of incapability. Powers can be either general or specific. Enduring clause allows attorney to act when donor becomes incapable.	Must be capable to grant an enduring power of attorney.

TERM	MECHANISM	PROCESS	WHO BECOMES SUBSTITUTE DECISION MAKER?	POWERS GRANTED	MENTAL CAPABILITY OF THE ADULT
REPRESENTATION AGREEMENT	Adult appoints representative who is named in an agreement.	Adult creates an agreement signed by the adult and the representative and witnessed by two adults (or one lawyer or notary).	Any capable person (the representative) chosen by the adult; e.g., family, friends, trust company (financial affairs only). The Public Guardian and Trustee but only in exceptional circumstances and only for finances.	Depends upon the type and scope of the agreement. Representative can be authorized to make decisions about the adult's health care or personal care when the adult is incapable. Some agreements may include a limited authority to manage the adult's financial affairs. Agreement may be triggered by an event such as the onset of incapability.	Must be capable to appoint a repre-sent-ative. Adults with diminished capacity may make some kinds of agreements with trusted relatives or friends.
ADVANCE DIRECTIVE	Adult gives or refuses consent to health care in ad-vance, in writing, in a document. May also specify other health care wishes in the document.	Adult creates and signs the directive which is witnessed by two adults (or one lawyer or notary).	No substitute decision-maker. An advance directive is an instructional directive that must be followed by health care providers unless there is doubt about its validity.	Health care providers must provide or withhold the health care described in the directive unless doubt about the validity of the directive. No obligation to give health care if this would be unethical.	Must be capable to make an ad-vance directive.
DESIGNATED AGENCY – LEGAL MANDATE TO INVESTIGATE	*Adult Guardian-ship Act*, Part 3	Designated agen-cies must look into reports of adult abuse and neglect they receive or become aware of.	N/A	DAs can offer available and appropriate support and assistance. For adults who cannot get assistance on their own, DA can also use new legal tools which include: 3 new ways of gaining access and restraining orders .	Presumed to be capable unless there is reason to believe adult is abused or neglect-ed and not able to get assistance on their own because of a restraint, physical disability, or condition that impacts decision-making ability.

TERM	MECHANISM	PROCESS	WHO BECOMES SUBSTITUTE DECISION MAKER?	POWERS GRANTED	MENTAL CAPABILITY OF THE ADULT
PENSION TRUSTEESHIP	Federal Income Security Programs (ISP) – standard form.	One physician signs form and applicant sends to ISP.	Any capable adult: family, friends, Public Guardian and Trustee.	Trustee can manage monies paid through OAS/GIS/CPP only. A trustee cannot manage any other income or assets.	Adult must be incapable before trusteeship is triggered.
STATUTORY PROPERTY GUARDIAN	Certificate of Incapability (*Adult Guardianship Act*, Part 2.1).	Certificate may be signed by a health authority designate following an assessment by a qualified health care provider.	Public Guardian and Trustee. Public Guardian and Trustee may later authorize another person (e.g., a family member or friend) to act as statutory property guardian.	Management of the incapable adult's financial affairs, including his or her legal affairs.	Certificate may be issued if the adult is incapable of managing financial affairs.
PGT INVESTIGATION OF ATTORNEYS, REPRESENTATIVES, COMMITTEES	*Public Guardian & Trustee Act*, s. 17, 18.	Referrals can be made to AIS at the PGT.	N/A	Authority to collect personal information. Can also apply for committeeship if appropriate.	N/A

TERM	MECHANISM	PROCESS	WHO BECOMES SUBSTITUTE DECISION MAKER?	POWERS GRANTED	MENTAL CAPABILITY OF THE ADULT
PGT POWERS	Asset Protection - Public Guardian and Trustee Act (s. 19).	Referrals can be made to AIS at the PGT.	N/A	PGT can freeze assets (e.g. bank accounts) until it is clearer what the adult's situation is, and can conduct an investigation if there is reason to believe the adult is mentally incapable and not able to make their own decisions.	Must have reason to believe – • Adult is an adult under Part3 – abused or neglected, unable to seek support & assistance, with a condition affecting decision-making • Adult's assets are at risk.
SUPPORT & ASSISTANCE COURT ORDER (PROVINCIAL COURT)	Adult Guardianship Act , Part 3	Designated agency asks PGT to arrange for an assessment of incapability according to Practise Guidelines. If adult assessed as incapable, DA can apply to court for order.	Provincial Court	Court can order that the adult be provided with any or all of the services outlined in the Support and Assistance Plan, e.g. admission to a care facility, restraining order. Order can be for up to 12 months, renewed for up to 12 months more.	Mentally incapable of not understanding the support and assistance offered, the reasons and the consequences.
PROPERTY GUARDIAN	Court Order (*Adult Guardianship Act*, Part 2).	Assessments by two qualified health care providers. Order is made by the Supreme Court of BC.	Any capable person: family, friends, trust company, Public Guardian and Trustee. Person nominated by the adult.	The property guardian has full responsibility for the adult's financial and legal affairs. Guardian is accountable to the Public Guardian and Trustee.	Order may be made if the adult is incapable of managing financial affairs.

TERM	MECHANISM	PROCESS	WHO BECOMES SUBSTITUTE DECISION MAKER?	POWERS GRANTED	MENTAL CAPABILITY OF THE ADULT
PERSONAL GUARDIAN	Court Order (*Adult Guardianship Act*, Part 2)	Assessments by two qualified health care providers. Order is made by the Supreme Court of BC.	Any capable adult. (family, friends), including a person nominated by the adult. Public Guardian and Trustee. It is recommend that the person be family or close friend of the adult.	The personal guardian has responsibility for decisions about the adult's health care and personal care. Guardian is accountable to the Public Guardian and Trustee Powers may be full or limited by the Court, depending upon the adult's needs.	Order may be made if the adult is incapable of making health care or personal care decisions.
INVOLUNTARY ADMISSION TO A PSYCHIATRIC FACILITY	Certificate under *Mental Health Act*	One medical certificate for the initial admission; two certificates for longer term involuntary treatment in a facility.	Director of a designated facility makes treatment and placement decisions per the psychiatric diagnosis.	Involuntary admission for psychiatric treatment. Time limited and subject to review by the Mental Health Review Board. Involuntary patients may be released to receive treatment in the community subject to recall.	Treatable psychiatric disorder, danger to self or others, and incapable of making decisions.

Compiled and amended by the staff and contacts of the Public Guardian and Trustee of BC

SECTION
6.0

WHERE DO WE GO FROM HERE?

AFTER RESEARCH AND SYNTHESIS on legislation, case law, legal and social science literature and current practice and policies, the Collaborative is in a position to make recommendations on key issues relating to adult capability, vulnerability, abuse and mistreatment in BC. Recommendations from this group represent consideration on issues of law, government, criminal justice, health, social services, social work, housing and diversity.

6.1 Recommendations Flowing from this Study

It is recommended that:

1. A variety of "knowledge communities" be created and supported to provide leadership, education, and training around issues of adult abuse, capability, and vulnerability.

Knowledge communities are nodes of expertise that bring together diverse experts, moderators, facilitators, and the general public. Knowledge communities facilitate interactions and learning between its members, and thus provide its members with additional perspective. Creating and supporting these relationships will enrich the level of discourse and lead to better creation and distribution of knowledge.

2. Best practice tools be developed to support the work of different knowledge communities working with vulnerable adults with capability issues.

At a minimum, legal professionals, health care workers, social workers, the criminal justice system and financial institutions need best practices to guide their work in this area. The guidelines should reflect the interdisciplinary nature of the practice, and in an accessible fashion bridge health and legal principles.

3. Financial institutions should create protocols and policies at both the head office and the branch office regarding persons with capability issues and/or vulnerable persons. Core professional competencies in dealing with documents which refer to vulnerable adults or adults with diminished capability should be established and routinely tested as part of a required professional knowledge base.

Financial institutions play a significant role in the lives of persons who experience capability challenges and/or vulnerability. At the moment, financial institutions have little in the way of professional core competencies to serve this group. As financial institutions often act in a fiduciary role to these adults, they bear the responsibility to ensure that staff is well-versed and prepared to deal with this client group and their associated financial / legal needs.

4. There is a need for the creation of a thorough cross-disciplinary mapping of agencies involved with dealing with adults who may have been assessed as incapable, or are suspected of diminished capacity.

This research will both support ongoing practice and highlight gaps in service. Currently there is very little insight as to which agencies have specific resources. At present, there appear to be significant gaps in resources, which prevent the legal framework from working correctly or adequately. It is impossible to work on service quality improvement, consistency of service or best practice without a thorough understanding of "who is doing what" in what agency.

5. Knowledge communities develop consistent visions and terminologies of key terms – a shared lexicon.

A barrier to interdisciplinary collaboration is the varied use and meaning of language including key terms such as "capability", "vulnerability", and "abuse" etc.

6. Core agencies and organizations such as government, designated agencies, police, health care professions, lawyers, social workers, justice workers, housing agencies and financial agencies develop modules on adult abuse and neglect, and establish core professional competencies in these work areas.

Adult abuse and neglect is a current and growing concern. To adequately respond to enquiries and to operationalize BC's new substitute decision-making and guardianship regime, key professions and government need to become very familiar with how to respond to adult abuse and neglect in their own fields.

7. Key Provincial ministries commit to advocating for funds to support BC's abuse response prevention scheme.

The Ministry of Health, Attorney General, Solicitor General, and the ministries responsible for seniors and persons with disabilities, with one ministry taking the lead, make a joint Treasury Board submission to better support Designated Agencies and Community Response Networks to fulfill their statutory and community-based responsibilities pursuant to the *Adult Guardianship Act* and other applicable legislation.

8. People working with adults who have capability challenges become culturally educated.

Many aspects of working with vulnerable adults require a respect for each individual's life experience and cultural values. It is important to use individual-referencing for assessing an individual's capability and the creation of any guardianship plan. Training must occur at all levels of service delivery to build and strengthen service

providers and government staff's cultural competence. People working with adults who have capability / capacity challenges must ensure that they do not stereotype or impose their own values and beliefs on the adult.

9. The BC *Adult Guardianship Act* regime be comprehensively evaluated, based on both quantitative and qualitative data to examine its effectiveness in terms of both process and outcomes.

The new *Adult Guardianship Act* is untested. Its implementation should be monitored via quantitative and qualitative analyses of the experience of vulnerable adults going through the system. This should include tracking individuals through case studies and also include broad evaluation of the regime.

10. A law reform project be undertaken to review statutes and court rules with a view to harmonizing use of terms which reference an adult's capacity.

A thorough examination needs to occur including determining consistency in terms of the meaning and consequences of diminished or diminishing capacity. A broader review of legislation is required than was possible within the limited scope of this project. While this study identified some inconsistencies, it is likely that others exist. Correcting this largely technical law reform problem will have significantly beneficial result for all British Columbians.

11. Research in criminal law and procedural aspects of adult incapability be undertaken.

This study focused on civil law measures, including adult abuse and guardianship legislation. To globally support vulnerable adults and adults with capability issues, a broader examination of criminal offences and the justice system is required. This investigation must examine and track outcomes of police responses to adult abuse complaints.

12. The criminal justice system workers develop their own internal procedures for dealing with this community.

Police, Crown, court and victim service workers should have internal procedures for dealing with vulnerable adults who may have capability issues. Consistent response throughout the province is desperately needed.

13. Access to legal counsel for adults with capability related issues must be consistently and affordably provided.

Vulnerable adults whose capability is at issue must be provided with access to legal counsel to advise them on their rights and the implications raised by a challenge to their capability. They must also be provided with legal representation at any subse-

quent hearing or proceeding that impinges on their rights to make their own decisions as it has significant impact on their personal liberty.

14. Relevant rules and legislation confirm that adults whose capability is at issue have the right to instruct counsel.

Vulnerable adults whose capability is at issue should have a right to instruct counsel when they choose. The *Adult Guardianship Act*, the Law Society's Professional Conduct Manual, and all other relevant legislation and court rules must be amended to clearly affirm the adult's legal rights. A lawyer's ability to take instructions from such clients should be assured and should not result in negative consequences to the lawyer acting in good faith and with professional competency.

15. Discriminatory language be eliminated.

Professional organizations, government policies, legislation, court rules, and official documents should be reviewed to eliminate language that is discriminatory. This should be completed with a particular focus on ageism and ableism.

16. Key stakeholders from a number of Provincial ministries be briefed on the work done to develop protocols and sit as active members of the BC Adult Abuse and Neglect Prevention Collaborative.

Representatives from several Provincial ministries should attend, participate and represent their ministries as members of the BC Adult Abuse and Neglect Prevention Collaborative. In particular, there should be representation from provincial ministries with purview over seniors, community living, health, housing, attorney general and the solicitor general. This will enable them to maintain up-to-date knowledge on the work done so far to develop protocols locally and provincially with regard to vulnerable adults along the capability continuum. This will also enable them to support direct implementation of protocol development and of this overall strategy.

17. Provincial ministries develop internal and inter-agency protocols for coordinated responses to adult abuse, vulnerability and capability.

In order to ensure communication and coordinated responses to incidents involving incapability and vulnerable adults, the protocols must be implemented at both the provincial and local service delivery levels.

6.2 How your Agency can use this Tool

The ***Provincial Strategy Document – Vulnerable Adults and Capability*** is a resource created to serve many purposes.

(A) PRACTICE RESOURCE

Many professionals encounter vulnerable adults with capability issues in the context of their work. Some people are involved in formal and non-formal capability assessments as part of their regular practice. In particular, lawyers, judges, doctors, health professionals, police officers and other justice system staff work with this community of adults, likely at times without an awareness that capability is such a significant theme in their own practice. This document is intended to support individual practice by acting as a resource upon which diverse professionals can draw. Further, by producing resources and materials available to professionals with different areas of expertise and educational backgrounds, this document operates as a shared knowledge base that supports greater consistency in agency responses to capability. It should also facilitate interagency collaboration when capability issues present themselves in individual cases.

Here are just a few examples of instances where capability issues may emerge. A lawyer may conduct informal capability assessments before accepting instructions from elder clients, for example, when drafting a will or creating a trust, by ascertaining if the client can understand and appreciate the nature and consequences of the instructions they are giving. A lawyer also might either represent a party involved in a guardianship application or receive a request for assistance from an adult whose capability is at issue. Similarly, a judge may preside over an application under the *Adult Guardianship Act* or a civil or criminal matter involving a vulnerable adult. A police officer may be present at a scene involving the domestic assault of an older adult spouse, or be contacted by a family regarding a concern that a parent is being exploited by her trustee. The same family members may contact a bank manager. Though day-to-day practice will often require further research or follow-up, the *Provincial Strategy Document* will serve as a basic backgrounder on this complex area of law and policy. It is also our sincere hope that the additional knowledge about vulnerable adults contained in this publication will support creative problem solving to more fully address the specific needs of vulnerable adults.

(B) PROTOCOL DEVELOPMENT

Many communities, agencies and government ministries are taxed with the responsibility of creating local and provincial protocols to detail their own procedures in response to capability and vulnerability issues. Protocols will facilitate greater effectiveness in terms of response and clarify the roles different organizations will play in responding to these issues. The *Provincial Strategy Document* is intended to support these activities by assembling and summarizing legal and ethical responsibilities and roles in this area and providing a broad picture of the capability

landscape beyond any one agency's particular scope of practice. The resources section in Section 5.1 contains a list of resources to support protocol development

(C) TEACHING AND KNOWLEDGE MOBILIZATION

The Provincial Strategy Document is a resource to support diverse teaching opportunities including personnel training, ongoing professional development and college training programs. It could also serve as a resource for knowledge mobilization in relation to vulnerable adults and capability. Organizations wishing to assume leadership in promoting the rights of adults with capability issues will now have a resource to draw upon.

6.3 Creating an Interdisciplinary Protocol – the Vanguard Vision

ADULT CAPABILITY AND VULNERABILITY is an inter-disciplinary area of practice encompassing, at minimum, law, health care and social work. The issues touch upon the practice of advocates and professionals working in housing, victim assistance, immigration, criminal law, guardianship and mental health. Responding to incidents involving capability and vulnerability concerns implicates bank managers, trustees, police officers, doctors, judges, hospital employees and care facility staff.

Not surprisingly, each community brings a different knowledge base and expertise to its practice, may subscribe to a different code of ethics, and plays a different role in responding to problems of adult capability. Terminology is used differently or the same words have different meanings, making it challenging to talk about these issues, let alone ensure a coordinated response.

Communication and coordination of services and responses at the provincial and local levels is key to best practices in adult capability and vulnerability. An interdisciplinary protocol is the ideal tool to reflect the cross-disciplinary nature of this work and bridge gaps in understanding. Although each of us may possess the best of intentions in terms of supporting and assisting vulnerable adults, in the absence of ongoing communication we may be inadvertently undermining each other's work, failing to take advantage of appropriate options or taking unnecessary steps.

An interdisciplinary protocol can serve multiple functions. It should:

- summarize the roles, their limits, and contact people or positions of the various responders and supporters (direct and indirect) and their areas of practice in addressing capability/vulnerability issues;
- reflect agreements about when, how and to whom referrals ought to occur such that they will happen when appropriate and will occur more smoothly;

- include agreed upon processes for problem solving and conflict resolution where agreement on the best approach cannot easily be reached;
- clarify confidentiality rules and other information sharing practices such that limitations on collaboration will be transparent, individual privacy further safeguarded and practitioners accorded greater respect when ethics prevent communication.

Ultimately, the improved relationships that emerge from an interdisciplinary protocol and the process leading to its creation will further the shared goal of enhancing individual practice and improving the delivery of services to adults with diminished or diminishing capability. In many communities in BC, local Community Response Networks have been instrumental in beginning the process of protocol development.

APPENDIX
A

SOURCES OF ADVICE OR ASSISTANCE

Protocol Development Resources

All of the following resources can be obtained or located by contacting the Adult Guardianship Community Developer at the Public Guardian and Trustee of BC at mail@trustee.bc.ca or 604-660-4444.

- **1. Public Guardian and Trustee of BC and the BC Association of Community Response Networks. A Guide for Developing Protocols: Community, Agency, and Interagency Protocols.**

  This guide summarizes BC's Community Response Network movement's learning related to the development of agency or internal protocols, how they fit in the context of a community protocol, and the types of situations in which interagency protocols are needed. Sample text of all three types of protocols needed at the local community level is included.

- **2. Public Guardian and Trustee of BC. Designated Agencies and Policy Working Together: a Provincial Policy Framework Related to Part 3 of the *Adult Guardianship Act* – Support and Assistance for Abused and Neglected Adults.**

  This framework was developed collaboratively by the Justice System Working Group (made up of police, designated agency staff, and other CRN members) and hosted by the Public Guardian and Trustee of BC. It provides a description of designated agencies' organization, role and mandate to the police, and a description of police agencies' organization, role and mandate to designated agency staff. It also outlines topics and issues an interagency protocol should address.

- **3. Public Guardian and Trustee of BC. Designated Agencies and Police Working Together Interagency Protocol Template.**

  This template draws from the Designated Agencies and Police Working Together Provincial Policy Framework. It lists the topics and issues an interagency protocol should address based on input from designated agency staff and police.

- **4. RCMP "E Division" Policy Directive. Operations Manual 100.3 *Adult Guardianship Act* and an Example of a Locally Developed Unit Supplement (Surrey Detachment**)

  The E Division Policy on Adult Guardianship describes Part 3 of the Adult Guardianship Act and the police roles and responsibilities within it, namely to keep the peace, to investigate alleged criminal offences, to identify key contacts to liaise with local designated agency key contacts, and to participate in local Community Response Networks. The locally developed Unit Supplement operationalizes the E Division Policy Directive at the local level by identifying local designated agencies and key contacts in the Surrey Detachments five districts.

- **5. British Columbia Inter-Ministry Committee on Elder Abuse and Continuing Care Division, Ministry of Health and Ministry Responsible for Seniors, Principles, Procedures and Protocols for Elder Abuse. Victoria, BC: Ministry of Health & Ministry Responsible for Seniors, Feb. 1992.**

  This protocol provides examples of agency or internal protocols that should be developed by various responders in relation to abuse of seniors.

Selected Resources – About the Incapability Assessment Process

- **Centre for Research on Personhood and Dementia, UBC**
  Tel: 604-822-6872
  Web: www.crpd.ubc.ca
  Email: crpd@interchange.ubc.ca

- **BC Psychogeriatric Association**
  Web: www.bcpga.bc.ca/index.html

- **Public Guardian and Trustee of BC - Services to Adults**
  Tel: 604-660-4444
  Web: www.trustee.bc.ca
  Email: mail@trustee.bc.ca

Selected Resources – About Abuse / Neglect Response and Prevention

RESPONSE

- **Designated Agencies** (Regional Health Authorities and Community Living BC) in BC by Community (and other local numbers)

  www.vchreact.ca and select the link for "Act on Abuse & Neglect" for responders in the following communities – Vancouver, Burnaby, Richmond, North Shore, Sea-to-Sky (Squamish, Whistler, Pemberton), Sunshine Coast – Powell River, Central Coast.

  www.trustee.bc.ca for responders in communities other than those in the Vancouver Coastal Health region noted above (and other community numbers). Select the link "Helping an Adult Get Support and Reporting Abuse and Neglect". Numbers to call are listed by the community where the adult lives.

- **BC Centre for Elder Advocacy and Support (BC CEAS)**
  Business Tel: 604.688.1927
  Toll free for legal information or for Clinic: 1.866.437.1940
  Web: www.bcceas.ca
  Email: infor@bcceas.ca

- **VictimLink**
  Tel: 1.800.563.0808
  Web: www.communityinfo.bc.ca/victims.htm
  Email: help@communityinfo.bc.ca

Selected Resources – Prevention

- **BC Adult Abuse/Neglect Prevention Collaborative**
  c/o Public Guardian and Trustee of BC – Adult Guardianship
  Community Development Coordinator
  Tel: 604.660.4444
  Web: www.trustee.bc.ca
  Email:mail@trustee.bc.ca

- **BC Association of Community Response Networks**
  Tel: 604.660.4482
  Web: www.bccrns.ca
  Email: crns@telus.net

SUPPORTS FOR SPECIFIC GROUPS

- **Alzheimer's Society of BC**
  Tel: 604.681.6530
  1.800.667.3742
  Web: www.alzheimerbc.org
  Email: info@alzheimerbc.org

- **BC Association for Community Living**
  Tel: 604.777.9100
  Web: www.bcacl.org
  Email: info@bcacl.org

- **BC Brain Injury Association**
  el: 604.465.1783
  1.877.858.1788
  Web: www.bcbraininjuryassociation.com
  Email: info@bcbraininjuryassociation.com

- **BC Coalition of People with Disabilities**
  Tel: 604.875.0188
  1.800.663.1278
  Web: www.bccpd.bc.ca
  Email: feedback@bccpd.bc.ca

- **BC Schizophrenia Society**
  Tel: 604.270.7841
  1.888.888.0029
  Web: www.bcss.org
  Email: bcss.prov@telus.net

- **Canadian Mental Health Association – BC Division**
  Tel: 604.688.3234
  1.800.555.8222
  Web: www.cmha.bc.ca
  Email: info@cmha.bc.ca

- **Indian Residential School Survivors Society**
  Tel: 604.925.4464
  Web: www.irsss.ca
  Email: reception@irsss.ca

- **Mood Disorders Association of BC**
  Tel: 604-873-0103
  Web: www.mdabc.net
  Email: info@mdabc.net

- **MOSAIC**
  Tel: 604.254.9626
  Web: www.mosaicbc.com
  Email: mosaic@mosaicbc.com

- **SUCCESS**
  Tel: 604-684-1628
  Web: www.successbc.ca

- **Vancouver and Lower Mainland Multicultural**
  Family Support Services Society
  Tel: 604.436.1025
  Web: www.vlmfss.ca
  Email: againsviolence@vlmfss.ca

Legal Representation Resources (BC)

- **Access Justice BC**[43]
  Tel: 604.878.7400
  1.877.762.6664
  Web: www.accessjustice.ca
  Email: appointments@accessjustice.ca

  [Note] Access Justice operates over 60 clinics across British Columbia and is associated with a number of clinics throughout Western Canada. In 2007, approximately 350 B.C. lawyers donated their time at the clinics, and they served 4,000 clients.

- **BC Centre for Elder Advocacy and Support**
  Business Tel: 604.688-1927
  Toll free for legal information or for clinic: 1.866.437.1940
  Web: www.bcceas.ca
  Email: info@bcceas.ca

  [Note] BC CEAS can provide two types of support and assistance. First, it can provide community development, education sessions, referral, and assistance on issues of older adult abuse and neglect. Second, BC CEAS operates a small free legal clinic for older adults, with the priority of serving older adults who cannot afford a lawyer and who are experiencing challenges to their personal health and safety or difficulty accessing justice. This clinic can provide legal information, summary advice, legal opinion, and in some limited cases full legal representation. Contact BC CEAS directly for more information.

- **Lawyer Referral Service (CBA BC Branch)**
  Tel: 604.687.3221
  1.800.663.1919
  Web: http://www.cba.org/bc/Public_Media/main/lawyer_referral.aspx
  Email: lawyerreferral@bccba.org

  [Note] The Lawyer Referral Service (LRS) is funded by the Law Foundation of BC and operated by the BC Branch of the Canadian Bar Association. The LRS program enables the public to access lawyers practising in the field of law required for the particular situation and provides the opportunity to have a consultation with a lawyer for up to 30 minutes for a fee of $25 plus taxes. Operators are available to take your call. Once the area of law is determined the operator will provide you with the name and

[FOOTNOTE]

[43] On the date of printing, significant cuts were announced to Legal Services Society and to other services such as the LawLINE. It is noted that demand for legal aid has gone up more than anticipated. As such, there will be fewer resources to cover a greater and increasing demand (www.cbc.ca/canada/british-columbia/2009/01/13/bc-legal-aid-funding-crunch.html). It is unclear what of these resources will be cut or retained. Please contact the organizations directly for updates on changes to their policies or resources.

telephone number of a lawyer in your geographical area. You contact the lawyer to set up an appointment to meet. You are entitled to up to a half hour consultation for $25 (plus taxes). This consultation is to determine whether or not you have a legal problem. If you know you have a legal problem and need to hire a lawyer, the Lawyer Referral Service can help you find a lawyer at their regular rate. Out-of-province and country requests can email lawyerreferral@bccba.org.

- **Legal Services Society of BC**
  Tel: 604-408-2172 (Lower Mainland)
  1-866-577-2525 (toll free, outside the Lower Mainland)
  Web: www.lss.bc.ca

  [Note] If you have a legal problem but can't afford a lawyer, the Legal Services Society (LSS) has a range of free services that may help you. LSS is the non-profit organization that provides legal aid to British Columbians. Legal aid services include:

  - ☐ Legal information through legal information outreach workers and LawLINE staff, as well as publications in many languages and the Family Law in BC website.
  - ☐ Legal advice from duty counsel lawyers at most courthouses. You can also get help from family advice lawyers at several family justice centres, and the lawyers and paralegals on LawLINE.
  - ☐ Legal representation from a lawyer is available for those who qualify and have serious family, child protection, or criminal law issues. It is also available for some immigration, mental health, and prison law matters.
  - ☐ You can apply in person at a legal aid office, or over the phone by calling the Call Centre listed above.

- **LawLINE**
  Tel: 604-408-2172 (Lower Mainland)
  1-866-577-2525 (toll free, outside the Lower Mainland)
  Web: http://www.lss.bc.ca/general/LawLINE.asp

  Note: LawLINE is a free phone service of the Legal Services Society (LSS) designed to help people who don't qualify for a legal aid lawyer to represent them. They provide brief information about print and website resources to help you resolve your legal problem, referrals to other services if LSS cannot help you obtain legal advice.

  Their advice services may include:

  - ☐ written opinions and advice
  - ☐ correspondence
  - ☐ help writing documents
  - ☐ contact with third parties

- **Pivot Legal Society**
  Tel: 604.255.9700
  Web: www.pivotlegal.org
  Email: info@pivotlegal.org

  Note: Pivot works on strategic legal advocacy, which means focusing on the causes of problems rather than symptoms. By selecting those cases with the potential to advance the legal rights and interests of the largest number of people, Pivot aims to maximize the impact of its resources on the law and on society.

- **Salvation Army Pro Bono Program**
  Tel: 604.694.6647
  Web: www.probono.ca

  [Note] The objective of the Salvation Army Pro Bono program is to bring together lawyers, and the poor in order to eliminate barriers to justice. The program exists to support, co-ordinate, and encourage the delivery of Pro Bono services in communities of The Salvation Army's BC South Division through the existing offices of The Salvation Army. The target group of the program is those persons who are ineligible for legal aid, and meet the required income guidelines.

STUDENT LEGAL CLINICS

- **Law Students Legal Advice Program (UBC Law School)**
  Tel: 604.822.5791
  Web: www.lslap.bc.ca

  [Note] The Law Students' Legal Advice Program (LSLAP) offers free legal advice and representation to persons who cannot afford it throughout the Greater Vancouver Regional District. The clinicians are law students at the University of British Columbia at all levels of study, and are assisted by accredited members of the bar who provide legal advice and guidance for each client. The purposes of the Greater Vancouver Law Students' Legal Advice Society are to co-ordinate the operation of the Law Students' Legal Advice Program clinics, to prepare the Law Students' Legal Advice Program Manual, and to provide LSLAP members with valuable practical experience to supplement their legal studies at UBC.

  LSLAP assists low-income earners with various legal issues, including:

  - ☐ Criminal
  - ☐ Family Law
  - ☐ Small Claims
  - ☐ Employment Standards
  - ☐ Residential Tenancy
  - ☐ WCB

- ☐ Consumer Protection
- ☐ Employment Insurance
- ☐ Social Assistance
- ☐ Auto Insurance (ICBC)
- ☐ Wills and Estates
- ☐ Incorporation of Non-Profit Societies and,
- ☐ Civil Liberties.

In addition, they can offer representation on a case-by-case basis in such hearings as:

- ☐ Small Claims Court
- ☐ Criminal Court
- ☐ Child and custody matters in Provincial Court
- ☐ Welfare Appeals
- ☐ Residential Tenancy Branch Arbitrations
- ☐ Academic Disciplinary Hearings

They can also draft certain types of legal documents, including:

- ☐ Demand Letters
- ☐ Wills
- ☐ Powers of Attorney
- ☐ Representation Agreements and Living Wills
- ☐ Notice of Claims and Replies

■ **The Law Centre (UVIC Law School)**
Tel: (Victoria) 250.385.1221
Web: www.thelawcentre.ca
Email: reception@thelawcentre.ca

[Note] The Law Centre provides advice, assistance and representation to clients who cannot afford a lawyer. Thousands of persons living in the Capital Regional District are served annually. The Law Centre also provides law students with clinical and legal education. Students are trained and supervised in the conduct of legal matters by lawyers who are members of the University of Victoria, Faculty of Law. The Law Centre also provides legal education programs to the public.

The Law Centre can:

- Provide advice and assistance in a variety of legal areas including: wills, residential school claims, housing, small claims, criminal and family matters;
- Provide legal advice about human rights issues such as discrimination, duty to accommodate and individual rights;
- Assist in the preparation of Human Rights complaints and represent clients in settlement discussions and at hearings before the BC Human Rights Tribunal;
- Provide legal advice about family law issues such as divorce, custody, access, sup port and restraining orders;
- Assist in the preparation of documents needed for Provincial Court and Supreme Court cases;
- Represent clients in Provincial Court with support and restraining order applications not covered by Legal Aid;
- Assist clients in restorative justice programs and diversion;
- Represent clients in Provincial Court with criminal matters not covered

APPENDIX
B

METHODOLOGY

Mapping Adult Abuse and Neglect and Guardianship Schemes in Canada

The graph maps legislative components using a Cartesian coordinate system along two axes:

NORTH TO SOUTH = BROAD TO NARROW SCOPE AND APPLICATION

EAST TO WEST = PROTECTIONIST TO INDEPENDENCE MODELS

Various legislation is evaluated and given a score on each axis. The exact score for each statute is not as relevant as is position on the graph in relation to other statutes. Again, this is not meant to be a complete statistical representation, but rather a useful visual tool.

1.1 Explaining the Broad – Narrow Axis (North – South)

- ☐ The **Broad – Narrow axis** (North - South) contains the following eleven indicia that evaluate the scope of the statute's scope and application:

1. Does the legislation apply to long-term care facilities?
2. Does the legislation apply to people receiving care or who are in "group home" environments?
3. Does the legislation apply to people in private care accommodations?
4. Does the legislation apply to the entire community?
5. Does the legislation apply to hospitals?
6. Does the legislation cover neglect?
7. Does the legislation cover abuse?
8. Does the legislation cover self-neglect?
9. Does the legislation avoid the concept of intention or a *mens rea* requirement?
10. Does the legislation apply to people who are vulnerable?
11. Does the legislation apply to people who are mentally capable?

- The score for each piece of legislation is created by adding up the number of "Yes" answers on the questionnaire under the Broad-Narrow heading.
- Answering "Yes" to all the questions will create the broadest and most encompassing possible scope for the legislation. Conversely, answering "No" to all the questions will create the narrowest and most limited possible scope for the legislation.
- The median value for the axis, 6.5, is subtracted from the raw score in order to create the value that is plotted on the graph.
- A low score on this axis indicates that a statute applies to fewer people or applies in limited situations, whereas a high score would mean that the statute is broad in the sense that it applies to many people and covers numerous situations.

1.2 Explaining the Protectionist – Independence Axis (East – West)

- The **Protectionist – Independence axis** (East - West) contains the following twenty-three indicia that evaluate the underlying philosophy and intention of the statute:

1. Does the definition in the legislation include physical abuse?
2. Does the definition in the legislation include financial abuse?
3. Does the definition in the legislation include emotional / psychological abuse?
4. Does the definition in the legislation include sexual abuse?
5. Does the definition in the legislation include chemical abuse?
6. Does the definition in the legislation include spiritual abuse (religious or cultural)?
7. Does the definition of abuse include a component that mentions violation of other rights?
8. Is there protection for whistleblowers?
9. Is there protection from liability?
10. Is there a system to deal with false claims, such as making it an offence?
11. Is there more than one place to report incidents of abuse?
12. Does the legislation avoid a "best interests" test for capable adults?

13. Is reporting voluntary for community members?
14. Is reporting voluntary for members of the health care sector or government?
15. Are there mandatory investigation processes in the legislation?
16. Is there a broad range of possible outcomes to the investigation available?
17. Do investigators have strong powers to investigate?
18. Is there a process of community support or networks identified?
19. Is there system that allows the freezing or other protection of assets?
20. Does the adult have to be consulted to the greatest extent possible?
21. Is there a statement of guiding principles in the legislation?
22. Is there a regime for financial support?
23. Is there an established mechanism for determining capacity?

- The score of each piece of legislation is created by adding up the number of "Yes" responses on the questionnaires under the Protectionist – Independence heading.
- Answering "Yes" to all the questions will indicate the most independence-based theory of the legislation, promoting such values as the least possible intervention, the right to live at risk and individual referencing. Conversely, answering "No" to all the questions will indicate the most protectionist model, promoting a state's right to decide what is in the best interests of the adult, using the measurement of what a reasonable person would do in the circumstance.
- The median value for the axis, 11.5, is subtracted from the raw score in order to create the value that is plotted on the graph.
- A high score indicates that the statute in question adopts a significant number of provisions that stress independent decision-making. A low score indicates that the statute in question adopts a model that is based on more paternalistic standards.

APPENDIX
C

INDEX OF CAPABILITY ASSESSMENT RESOURCES

British Columbia

- BC Public Guardian and Trustee, *Practice Guidelines for Incapacity Assessments under the Patients Property Act* (2005)
- BC Public Guardian and Trustee, *Practice Guidelines for Incapacity Assessment (Adult Guardianship Act)* (2001)
- VCH Re: Act, *Adult Abuse and Neglect Quick Assessment Guide*
- Interior Health Authority, various policies provided by Linda Myers
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Canada

- Yukon, *Guidelines for Conducting Incapability Assessments for the Purpose of Guardianship Applications under Part 3 of the Adult Protection and Decision-making Act* (2005)
- Ontario, *Guidelines for Conducting Assessments of Capacity under the Substitute Decisions Act* (2005)
- Manitoba Law Reform Commission, Informal Assessments of Competence (1999)
- Silberfeld and Fish, "When the Mind Fails: A Guide to Dealing with Incompetency" (1994)
- Peteris Darzins, D. William Molly & David Strang, eds, *Who can Decide? The Six Step Capacity Assessment Process* (2000)
- Peteris Darzins, D. William Molly and David Strang, eds, *Capacity to Decide: A Comprehensive and Clear Guide on how to Measure Capacity* (1999)

United States

- American Bar Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005)
- American Bar Association, *Judicial Determination of Older Adults in Guardianship Proceedings: A handbook for Judges* (2006)
- Guardianship Association of New Jersey, *Assessing Capacity for People with Developmental Disabilities* (2004)

- Guardianship Association of New Jersey, Pre*ference/Choice/Decision: A Model for Limited Guardianship* (2001)
- Texas Health and Human Services Commission, *Executive Order RP 33 Relating to Reforming the Adult Protective Services Program* (2004)

Europe

- UK, *Mental Capacity Act Code of Practice* (2007)
- Hampshire County Council, *Mental Capacity Act Guidance* (2007)
- British Psychological Society, *Assessment of Capacity in Adults: Interim Guidance for Psychologists* (2006)
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- Scotland, Adults with Incapacity Code of Practice (2003)

Australia

- Queensland Department of Justice and Attorney-General, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*
- Karen Williams, *Determining Capacity - A Legal Perspective* (2007)
- New South Wales, Are the Rights of People whose Capacity is in Question being adequately Promoted and Protected? (2006)

Africa

- South African Law Reform Commission, *Assisted Decision-Making: Adults with Impaired Decision-making Capacity* (2004)

APPENDIX
D

HOUSING, HOMELESSNESS, CAPABILITY AND THE ABUSE OF VULNERABLE ADULTS

HOME AND HOUSING ARE PIVOTAL TO WELL-BEING. The home is much more than a roof over a person's head; it is the source of stability in a person's life and the centre of meaningful relationships. In fact, stable, appropriate and adequate housing is inextricably linked to an adult's inherent right to life, security, health, as well as social, spiritual and moral well-being and development.

There are many ways in which the home can become a tool of abuse, especially for vulnerable older adults. It may be the material asset exploited by adult children or other persons in financial abuse. An abusive spouse may use coercion and fear of losing the family home to induce fear in the victim—"If you leave, you'll get nothing but the clothes on your back." In other cases family may threaten to remove vulnerable persons from the home and place them in a long-term care facility to gain cooperation with demands.

There are many ways in which the home can become a tool of abuse, especially for vulnerable older adults.

Some family members may have informal agreements to provide care to an aging parent or other relative in exchange for the possession and title of home; and the care agreement might be subsequently reneged upon, leaving the older adult without the home and without support.

Financial abuse may occur as the older person becomes more physically or mentally vulnerable or more socially isolated as their spouse and friends die. Hospital admission is often a transition point in which family or others escalate or perpetuate financial abuse, including unplanned property sales.

There are other potential abuse and neglect situations connected with housing. When the home is sold and parents come to live with children, power dynamics may change as they begin living in their children's home. Conversely adult children may come to live with and depend on parents as a result of loss of housing, changes in their own life, or because of mental health, addiction, or gambling problems. Substance use and mental health problems are a factor in 17-33% of the senior abuse cases reported to agencies across Canada.

Some abuse evolves through a gradual encroachment on the home, where adult offspring, a tenant, or pseudo tenant start by "helping", but gradually take over the person's life and home, often isolating them. The victim may end up confined to a basement, room, or attic of his or her own home.

The home is often the abuse battlefield, and it becomes very important for vulnerable adults and their abuser "who stays" and "who leaves" the primary residence. While the *Family Relations Act* and policy for *Violence Against Women in Relationships* offer some safeguards regarding exclusive occupancy and protection orders, these may not be sufficient to cover the diverse types of relationships that abused older adults and other vulnerable adults may have or the types of harm they may experience. The fear of becoming homeless can be significant for vulnerable

persons, and indeed fleeing domestic violence is one of the main reasons for homelessness, particularly among women.

- **[LEAVING ABUSE]** While there are a number of transition homes and other safe housing options for people fleeing abuse, many of these are not suited to "vulnerable adults", a general term that may include seniors, people with physical disabilities, developmentally disabled persons, people with mental health or substance use problems etc. Existing shelter and longer term housing options are typically unable to meet the needs of abused people with complex needs; immigrants (because of language, culture issues); abused men (especially older men); and gay or lesbians.

  Research indicates that vulnerable persons in an abusive situation face a number of practical and legal problems. Some persons leaving domestic violence or other abuse may be turned down for rental housing because they are considered higher risk tenants. Sponsored immigrants have to "prove" abuse in order to be eligible for social housing. "Crime free multi housing policies" in social housing in British Columbia may leave some at risk of eviction because of the abuser's violent or other criminal acts.

- **[VICTIMIZATION IN PUBLICLY FUNDED (SUBSIDIZED) AND MARKET HOUSING]** Victimization can occur in a variety of housing settings including publicly funded and market housing and may be perpetrated by family, other tenants, or operators. The increasing lack of affordable and appropriate housing for older adults, other vulnerable and marginalized adults increases their exposure to a wide variety of harms as tenants. Basically they may be forced to put up with unacceptable housing and social conditions because of a lack of alternatives.

  For example, some landlords may manipulate and misuse tenancy law, intentionally neglect suite or building repairs, or unlawfully evict the occupants. Landlords might also develop and enforce arbitrary and unreasonable house rules that violate tenants' rights, or withhold information from tenants. Abuse in rental housing by landlords may involve use of power and control, rationalization and justification, or authoritarian approaches, as well as many of the divisive tactics commonly seen in family violence (divide and conquer). The existing legal remedies, such as arbitration under the *Residential Tenancy Act* ("RTA") are often ill suited to address the types of situations that often affect many tenants in the same building. Moreover the RTA does not apply to some types of rental housing, such as assisted living.

- **[VICTIMIZATION OF HOMELESS PERSONS]** The term homeless refers to three different groups: chronically homeless adults, newly homeless adults, and adults at risk of homelessness (near homeless). People who are homeless are extremely vulnerable to a wide variety of increased physical and mental health risks, as well as victimization in shelters or on the streets.

  In recent years traditional "seniors housing" has begun providing shelter for persons with chronic mental health or substance use problems who have been homeless or whose housing has been unstable. This mixed housing environment has raised

a variety of concerns ranging from the screening process to the amount of mental health and other support the formerly homeless tenant receives in the community. Other concerns include increased risks of harm from the tenant or his or her associates to other tenants, many of whom are elderly and frail. The extent of the problem is unclear, but the perception of risk is significant.

CAPABILITY AND HOUSING

Mental capability issues arise in many ways in the context of homes and housing. Persons living in a long-standing abusive situation may be severely depressed, which may be mistaken as mental incapacity. Questioning a person's mental capability, especially if he or she is older, is a common strategy that abusers use to undermine the perceived reliability of the victim.

Persons whose mental capability is diminishing may be more susceptible to persuasion ("undue influence") by exploitative friends, neighbours or family members, and they might relinquish control of their home or other assets. Existing procedural safeguards for powers of attorney for real estate may mitigate potential financial abuse, but there may be means of working around these protections.

Mental capability may be raised when a person is in the hospital. Part of hospital discharge planning involves assessing the capacity of the abused, neglected, or self-neglecting person when they decide to go home ("is it safe, is it appropriate; do they need to live some place else"). The accuracy of the assessment often depends on the ability to adequately assess risk, take needed time with the person, and connect with the appropriate resources to adequately follow through.

Older tenants whose mental abilities are deteriorating or unstable are very susceptible to the risk of eviction. A building manager, who may be concerned about the tenant's ability to safely reside in the home, may legitimately call a tenant's mental capability into question. The building manager might also fear for the safety of other tenants from fire or other risks.

When looking at mental capability issues in the context of housing it is important to separate out the adult's lack of knowledge (understanding implications, short and long term consequences of decisions), depression/ anxiety, power dynamics, or the inadequacy of available options. Mental capability is also more likely to be called into question when family, housing providers, or other tenants lack needed information or are unaware of useful community resources.

- **[SPECIAL CAPABILITY ISSUES IN HOUSING WITH SUPPORTS]** Over the years a wide variety of housing models such as supportive housing and assisted living have developed in the province to provide some level of support and assistance to adults. Supportive housing falls under the RTA, while assisted living comes under the *Community Care and Assisted Living Act* ("CCALA"). The latter uses a functional approach to capability focusing on self care (dressing), safety, and wandering. Capability for admission to subsidized units is through Continuing Care and regional

health authority. There may be differences in assessing capability; operators of non-subsidized units are expected to have a prospective resident's doctor assess function and capability. Section 26.3 of CCALA provides a number of restrictions on which persons with reduced mental capability can be accepted into assisted living facilities, and how long they can continue to live there.

Increasingly, there is a tension between health care expectations, and legal responsibilities under different Acts. Housing providers struggle with what they can reasonably provide the person in terms of services, given the type of staff and resources they have. At the same time, the BC Human Rights Code creates a duty to reasonably accommodate the needs of persons with physical or mental disabilities.

- **[FUTURE DIRECTIONS]** It is increasingly recognized that responding appropriately to mental capability issues for abused or otherwise vulnerable adults in the context of housing requires a multi-pronged approach that necessitates coordination of services, improved legal education for services providers, renters and housing providers, along with strong legal and social advocacy.

  Community representatives in the diverse areas of housing, seniors' advocacy, law, and health are increasingly becoming activists and advocates for frail older adults and other vulnerable groups in the area of housing.

APPENDIX
E

IMMIGRATION, ABUSE AND CAPACITY

IMMIGRANTS AND PERSONS BORN OUTSIDE of Canada who are legal permanent residents comprise over one quarter of British Columbia's population. For well over a century, they have added greatly to the social fabric of the province. Immigrants are a diverse group. Members of this group vary in terms of country of origin, age, gender, education, income, and religion. They may be members of a visible or ethnic minority, in Canada or within their country of origin.

Immigrants can be broadly divided into two different classes – immigrants (Sponsored Family, Economic, Other) and refugees (Assisted, Sponsored, Asylum). In British Columbia the largest proportions of sponsored immigrants currently come from Asia and South Asia. Sponsored immigrants (including for example spouses, parents, dependent children) and refugees face a number of social conditions that leave them vulnerable to abuse, neglect or exploitation.

The lives of sponsored immigrants and refugees are affected by a complex intersection of provincial and federal laws and policies related to immigration, health care, social assistance, and housing. Existing settlement services are geared largely to economic immigrants (labour oriented) and refugees. Recent immigrants can experience significant challenges in trying to negotiate their way through complex and sometimes contradictory provincial and federal systems to meet their responsibilities or seek out needed services.

- **[Basics of sponsorship]** Sponsorship is a legal commitment made to the federal government by one or more Canadian citizens or permanent residents. The sponsor gives an undertaking to be directly or indirectly financially responsible for the all of the basic needs of the sponsored person for a specified period of time. This includes food, clothing, a place to live, fuel, utilities, household supplies, and health care not provided by public health including dental and eye care. The length of sponsorship commitment for spouses and common law partners is 3 years, while the length for sponsored parents is 10 years. Applicants must meet basic financial eligibility to be sponsors, and the sponsored person must meet health and security requirements.

Compared to the general population, sponsored immigrants are usually in 'good' or stable health when they arrive in Canada.

Compared to the general population, sponsored immigrants are usually in 'good' or stable health when they arrive in Canada. This status often declines over time however, reflecting the social conditions facing many immigrants including lack of affordable housing, low income, and poverty.

- **[Sponsorship and abuse]** There is a growing body of research recognizing that the sponsorship model creates significant and long lasting dependency, as well as an environment of vulnerability. Sponsorship can lead to a fundamental role reversal within the family, as older family members may not be accorded the status they previously held. This may create a significant power imbalance, which is a well-recognized risk indicator for abuse. The reliance on family for everything from transportation to interpretation can be problematic, and increase the social isolation of sponsored

immigrant. Neglect can occur in some sponsored immigrant families as a result of cultural values, limited personal resources, and a lack of culturally appropriate long term care options in the community.

Sponsors are often immigrants themselves, and some may experience the stresses of "racialized poverty", which varies according to factors such whether they are a visible minority, their length of time in Canada, age, and education. This can leave the sponsor's economic circumstances less stable over the long run than the general population. Even after the ten-year sponsorship has ended, the sponsored immigrant will continue to be economically vulnerable because he or she will only receive partial old age security benefits.

- **[Abuse issues among immigrants]** Abuse and neglect is often defined in the context of mainstream ideas and values. Service providers often have stereotypes or misconceptions about family relationships within different cultures, including about abuse and neglect. The subtleties of abuse or neglect, and the specific types experienced by immigrants who come from many diverse ethnic and cultural backgrounds may not be adequately recognized in existing legal or community organization definitions. Harms may come from the sponsor, extended family, employers, and others within the community. Abuse may occur in either community or long term care settings.

Abuse and neglect is often in defined in the context of mainstream values.

Some forms of abuse include verbal abuse, disrespect by the sponsors or their children, isolation, or social abuse. It may also take the form of economic exploitation (by the family, or by employers i.e. expecting sponsored parents to provide unpaid child care, domestic chores or paid labour at an advanced age or when in poor health), conflict over or neglect of important religious and cultural values and beliefs, passive neglect (e.g. family unable to afford the needed care and assistance). The sponsor may use the sponsorship status as a lever by threatening to have the sponsored person "sent back home". Sponsored immigrants face many systemic barriers to accessing help if they are experiencing abuse, neglect or other problems.

It is important for service providers to gain a better understanding of immigrants' cultural values, and how these can be different or similar to their own values. This can be very important for developing useful interventions and assistance efforts in abuse and neglect, to avoid stereotypes or misconceptions, and to avoid re-victimizing the abused person.

For immigrants experiencing abuse or neglect, decision-making may less reflect meeting their personal needs than fulfilling family needs and cultural expectations, including ways of maintaining "face" in the community. Factors such as language, communication difficulties, reliance on family or others to interpret and lack of familiarity with Canadian systems will affect the person's decisions in ways that may not be obvious. The service provider's "competence" in understanding the person's culture and values, and having effective ways of meeting these issues is crucial.

- **[Sponsorship breakdown]** Sponsorships may breakdown, for many reasons, including unwillingness of the sponsor, abuse, or the sponsor's inability to provide support as a result of loss of employment, disability, or death. If the sponsored person applies for social assistance following sponsorship breakdown, the sponsor is legally required to repay this amount plus interest to the provincial government. The policy has profound financial and social effects on the family relationships for immigrants. The process by which sponsored immigrants are expected to "prove" abuse before being eligible for social assistance can leave them at risk of further harm.

- **[Mental capacity issues for immigrants]** The mental capacity and decision-making issues for immigrants are similar to those for other persons in many respects, and reflect everyday but often complex decisions related to personal finances, housing, income / employment, and relationships among others. However decision-making may occur in the absence of reliable information. Immigrants also often have to deal with alien and more complex systems than most people do.

  An immigrant's mental capacity may be affected by injury, stroke, mental health problems, or special environmental risks. Longer processing and wait times in recent years have meant that sponsored adults will tend to be much older when they arrive in British Columbia. The current wait time from application to entry to Canada may be as long as ten years for many sponsored immigrants. As a result, the likelihood of developing a serious health disease or a cognitive impairment while still under the sponsorship is higher today than for example, a decade ago.

  Depression and acculturation problems for immigrants may be sometimes confused with mental incapacity. Some refugees who are trauma survivors may face impairment or post traumatic stress following their arrival here. For older immigrants, concerns about mental capacity may also arise in the context of suspected abuse or neglect or perceived self-neglect.

  Various levels and departments of government are likely to have internal disputes about paying for care or services the mentally incapable sponsored adult may need, leading to significant delays in receiving appropriate care.

- **[Assessing mental capacity for immigrants]** The process of assessing mental capacity is not culturally neutral. A successful assessment of decision-making capacity for immigrants is contingent upon the assessor's fluency in the other person's language, and the other person's fluency in English. It depends heavily on the assessor's cultural competence, which includes understanding the other person's values, cultural and religious beliefs. A "good" assessment is often contingent on accuracy of any interpretation services being used, and having a gender appropriate assessor for that culture. It also requires valid and reliable screening tools for that culture and people of that age, social class, and educational attainment (e.g. reliance on the MMSE may give inaccurate information on mental status).

  Terms such as "abuse" often do not have a ready equivalent in other cultures. A valid and reliable assessment requires availability of appropriate vocabulary in the other

person's language for concepts discussed during the assessment (e.g. specific physical or mental health conditions, abuse, neglect, mistreatment). Religious values, cultural values, or language problems should not be mistaken for incapability.

- **[Law, policy and practice]** There are a number of key areas in law, policy, and practice that profoundly affect the well being of immigrants in British Columbia. There is a need for an increase and improvement in legal and social advocacy for immigrants, particularly older sponsored immigrants. There is a need for better access to affordable and age appropriate English as a second language courses for older immigrants, as well as other resources that can reduce their social isolation. There is also a need for appropriate community supports in areas such as health, home care, and housing to help immigrant families better "maintain family harmony".

  There is also a pressing need to address some of the underlying systemic factors of abuse and neglect among immigrants, which may include the processing time for applicants, the length of sponsorship, and federal / provincial policies that may reinforce poverty (such as the refugee transportation loan, Old Age Security, and the sponsorship debt).

  The lives of immigrants can be significantly improved by providing training at all levels of service delivery to build and strengthen service providers and government staff's cultural competence. Similarly there is a need for federal and provincial court systems that deal with immigrants to develop better awareness and understanding of cultural norms and values when designing legal "remedies". Efforts to help abused or neglected immigrants can benefit from culturally appropriate capacity and other assessments, and the use of protocols that reflect the cultural diversity of the province.

Specific Policy Options for Future Consideration

RIGHTS INFORMATION

1. To reduce the vulnerability of older immigrants who may not know their rights, the following options might be considered:

(a) Rights information and other information commonly needed by sponsored immigrants be made available in the manner most useful to them (for example culturally acceptable alternatives such as social theatre for immigrants who may not be functionally literate).

Government systems constantly change. As a result, it would be helpful if:

(b) immigrant supportive agencies that act as information and referral points be provided funding for ongoing staff training in order to have current/reliable information on benefits or entitlements for immigrants who call.

IMPROVED ACCESS TO JUSTICE

2. It can be challenging for many immigrant adults to properly access justice. In order to improve this current situation, the following options may be considered:

(a) the provincial government provide adequate funding for interpreter services to facilitate immigrants' access to appropriate victim support services;

(b) future judicial training on issues affecting older adults, such as family violence, include cultural and immigration dimensions be provided; and

(c) unimplemented recommendations identified in the Briefing Document "Critical elements of an effective response to violence against women" and the BC Association of Specialized Victim Assistance and Counseling Programs paper "Family law services for women who are victims of violence" (2005) be addressed on a priority basis.

SOCIAL AND LEGAL RESEARCH

3. There is a lack of social and legal research in the area of immigration, abuse, capacity, vulnerability issues in Canada, which is much-needed. It is suggested that the following would be of assistance:

(a) qualitative and quantitative research on issues raised by sponsorship de faults in British Columbia, looking at the extent, circumstances, and consequences on families to provide a better foundation for policy making;

(b) research conducted on the impact of the permanently reduced Old Age Security benefits on older immigrants and older families, using a legal, economic, and social equality framework; and

(c) further legal and social research on abuse and neglect of immigrants in the context of systemic harms and human rights.

ADVOCACY

Immigration is within joint federal-provincial jurisdiction. Government as well as public and private organizations are often unaware of the significant challenges that immigrants face in trying to figure out and work their way through the intricate maze of immigration, social assistance, employment and housing systems. These systems are complex and contradictory.

4. It is suggested that:

(a) legal and community advocates be funded, or where some advocacy services exist, these be increased, to help more sponsored and other immigrants make their way through these complex systems including any review or appeal systems, e.g. social assistance.

MENTAL CAPACITY ASSESSMENTS

Mental capacity issues for immigrants can arise in the context of deteriorating physical or mental health, brain injury, or environmental risk factors. It is essential that the assessment process be far more culturally appropriate and culturally sensitive, which includes improving the assessment tools being used. Assessment tools are often not reliable for persons with little education, low literacy, or poor English language skills.

5. In order to address these current challenges, it is suggested that:

(a) all aspects of the assessment process be reviewed from a cultural perspective to assure that it is able to give an accurate assessment of the person's capabilities.

PROVINCIAL POLICY AND PRACTICE

6. In order to reduce the significant stress on immigrants created by current immigration policy, the provincial government might consider or explore some of the following options:

(a) fund training for provincial government staff (e.g. in social assistance, victim services, health services, police services) to help them become more "culturally competent" about immigrant and ethno-cultural families, with greater awareness of their capacity and better responsiveness to the types of harm being experienced.

(b) develop culturally sensitive guidelines, protocols and definitions of abuse and neglect that reflect the kinds of harms and situations that sponsored immigrants experience.

(c) conduct a review of information and services that immigrants are likely to need, with a view to simplify / streamline these processes.

(d) review its third party verification process when sponsored immigrants seek social assistance to take into account the special types of harms they may experience (psychological harms, neglect, financial abuse). This review may involve relaxing the burden of proof.

8. To help reduce social isolation (one of the reinforcing factors for abuse among sponsored immigrants), the following options should be considered by the provincial government:

(a) provide additional funding for English as a Second Language (ESL) classes so that these are more available to older immigrants

(b) expand the BC Bus pass program so that is also available to low income sponsored immigrants under the age of 65.

(c) provide funding to increase the number of Multicultural Outreach programs available, and identifying older immigrants as a priority group for outreach.

Additionally, ESL providers should consider developing classes that are more appropriate and relevant to the lives and circumstances of older immigrants.

9. Neglect of older family members can occur in immigrant families, for a number of reasons, including cultural expectations and the lack of culturally appropriate long term care facilities. To improve this challenges, it is suggested that:

(a) the regional health authorities and the provincial government work together jointly to explore alternatives to reduce the risk of neglect. This might include:

- ☐ providing additional supports so that immigrants families can contribute to provide that care at home;
- ☐ supporting the development of long term care facilities that can meet the social, cultural, and religious needs of various older immigrants.

COMMUNITY PRACTICE AND COMMUNITY RESOURCES

10. In order to reduce the concerns created by practice and resource issues, some of the following options might be considered:

(a) the provincial government help communities build their cultural competence skills by funding

- cross cultural training;
- training on the immigration system, policies, and laws;
- training on trauma that immigrants and refugees may have experienced in their country or origin; and
- training on the intersection of abuse and the immigrant experience.

(b) any intra- and interagency protocols that are developed use a cultural lens.

(c) the community develop safe housing models and other safety resources that take into account the religious and cultural diversity of abused and neglected vulnerable persons.

FEDERAL IMMIGRATION LAW, POLICY AND PRACTICE

11. In order to reduce the significant economic stress on immigrant families created by current immigration policy, the federal government might consider or explore some of the following options:

(a) reducing the length of sponsorship for sponsored parents and grandparents from ten years to three years to match other sponsored groups including sponsored spouses and sponsored refugees;

(b) eliminating refugee travel loan repayment;

(c) working with the provincial government to develop equitable criteria for pursuing sponsorship debts that make allowance for changes in personal economic circumstances; and

(d) working with the provincial government to conduct a review of information and services that immigrants are likely to need from both levels of government, again with a view to simplify/ streamline these processes.

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- Advocacy Centre for the Elderly
- Alzheimer Society of British Columbia
- American Bar Association Commission on Law and Aging
- BC Association of Community Response Networks
- BC Centre for Elder Advocacy and Support
- BC Developmental Disabilities Association
- BC Law Institute
- BC Ministry of Health
- BC Ministry of Attorney General
- BC Ministry of Public Safety and Solicitor General
- BC Ministry of Healthy Living and Sport
- BC Non-Profit Housing Association
- BC Psychogeriatric Association
- BC Seniors Services Society
- Canadian Bar Association BC Elder Law Section
- Canadian Bar Association National Elder Law Section
- Canadian Network for the Prevention of Elder Abuse
- Centre for Elder Justice and Policy
- Centre for Research on Personhood in Dementia
- Fraser Health
- G.F. Strong Rehabilitation Centre
- Interior Health
- International Federation on Aging
- Mental Disabilities Advocacy Centre
- National Initiative for Care of the Elderly
- Northern Health
- Participants in various conferences, focus groups and presentations
- Providence Health
- Public Guardian and Trustee of BC
- Public Trustee New South Wales
- Public Trustee New South Wales Fellow in Elder Law
- Simon Fraser University Gerontology Dept.
- Simon Fraser University Gerontology Research Centre
- Simon Fraser University School of Criminology
- Society of Notaries Public of BC
- Stetson University College of Law
- Tenant Resource and Advisory Centre
- Uniform Law Commission (US)
- Vancouver Coastal Health
- Vancouver Island Health
- Various Commonwealth Law Reform Commissions