

To: Law Amendments Committee
From: Claire McNeil, Dalhousie Legal Aid Service
Re: **Bill 131: Powers of Attorney Act**
Date: April 11, 2022

While the amendments to the *Powers of Attorney Act* (PAA) contained in Bill 131 are a welcome step forward in providing clearer safeguards and direction concerning the obligations of attorneys, the amendments continue the current discriminatory practices of leaving out many people with disabilities.

The Bill's failure to recognise and include the different needs of people with disabilities perpetuates a statutory framework for capacity and decisionmaking that is fundamentally discriminatory.

The concern is not what this Bill does, but what it fails to do. This Legislature has an obligation to fulfill the rights of persons with disabilities to meaningful access to supports and services to make their own decisions. These amendments are regressive in the sense that they fail to fulfill those rights.

The PAA is not alone in this failure. The need for a comprehensive review of consent and capacity laws¹ to establish a legal framework to protect and promote the right to legal capacity and supported decision making was most recently referenced in the statutory review of the *Adult Capacity and Decision making Act* (ACDMA) released in February 2022.²

The ACDMA report's first recommendation is to:

Nova Scotia's capacity laws should be reviewed to ensure that they reflect modern concepts of capacity and a commitment to greater support for persons with cognitive disabilities, to enable **their equal right to decision-making autonomy as members of the community to the greatest extent possible**. [emphasis added]

And at recommendation 26:

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

¹ The PAA is part of the Nova Scotia legislative framework that provides for substitute decision making that includes: *Adult Capacity and Decision making Act*, *Adult Protection Act*, *Hospitals Act*, *Involuntary Psychiatric Treatment Act* and the *Personal Directives Act*

² *Report on the Review of the Adult Capacity and Decision making Act*, Nova Scotia, 2022
<https://novascotia.ca/adult-capacity-and-decision-making-act-consultation/docs/ACDMA-review-2022.pdf>

Bill 131's piecemeal approach to the issue of capacity and decision making is at complete odds with the repeated calls for a comprehensive legislative review in order to address the discriminatory impacts of the current legislative framework with respect to legal capacity and formal supported decision making models.³

While the proposed amendments contained in this Bill reference the definition of "support" in the ACDMA, both statutes provide for a substitute decision making model rather than a supported decision making model.⁴ The PAA legislation represents a form of substitute decisionmaking based on a test for legal decision making capacity (the cognitive and functional test) that fails to accommodate the needs of persons with disabilities.

An alternative formal legal standard of capacity for appointing a supporter is required, allowing for the authority to obtain information and otherwise assist with, but not make, decisions for the person. There is nothing under this Bill or the PAA (or any other Nova Scotia statute addressing legal capacity) whereby supporters are provided with the necessary legal recognition, despite advances in other jurisdictions that allow for more full inclusion of people with disabilities, like British Columbia.

The result of these PAA amendments is to effectively exclude people with disabilities from meaningful access to advance planning tools and to continue the discriminatory approach in the current PAA legislation in failing to accommodate the needs of people with disabilities in supporting them to make decisions for themselves, including choice and self determination in the appointment of an attorney under this legislation.

Conclusion

In order to create a non discriminatory legislative framework for capacity and decision making legislation must include measures designed to provide persons with disabilities meaningful access to supports and clear legal recognition and safeguards.

Supported decision making requires meeting the different needs of persons with disabilities. Accommodation in the human rights sense of the word lies at the heart of this legislative reform, which means that differential treatment may be required to achieve equality, rather than the current system that imposes identical treatment on all persons in their access to advance planning by way of power of attorney.

³ The need for a comprehensive review is also found in the 2015 Law Reform Commission Report recommendations that formed the basis of many of the changes in Bill 131 "The Government of Nova Scotia should conduct a broad review of legislation and administrative programs and processes which regulate the right to legal capacity. The review should be dedicated to ensuring that Nova Scotia's laws and public programs respect, protect and promote the autonomy of all persons, in accordance with Canada's commitments under the United Nations Convention on the Rights of Persons with Disabilities."

⁴ See Bill 131 s 1A(j): "(j) "support" has the same meaning as in the Adult Capacity and Decision-making Act."

In order to fulfill this Legislature's obligation to provide legal capacity and decision making mechanisms without discrimination based on disability in Nova Scotia, as a "state party" it must institute an immediate comprehensive process for legislative reform including the PAA, ACDMA and related statutes dealing with capacity and decisionmaking.⁵

⁵ With Canada's ratification of the Convention on the Rights of Persons with Disabilities, it endorsed an approach to capacity and decision making that provides at Article 12 for equal recognition before the law:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities **enjoy legal capacity on an equal basis** with others in all aspects of life.
3. **States Parties shall take appropriate measures** to provide access by persons with disabilities to the support they may require in exercising their legal capacity.