

A Framework for the Law as It Affects Persons with Disabilities

Advancing Substantive Equality for Persons with
Disabilities through Law, Policy and Practice

THE FRAMEWORK

September 2012



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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Advancing Substantive Equality for Persons with Disabilities
through Law, Policy and Practice*

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PREFACE

The *Framework* is the culmination of the Law Commission of Ontario's (LCO) project on the law as it affects persons with disabilities. It distills the LCO's research and public consultations into an evaluative framework that can assist in understanding how laws, policies or practices may affect persons with disabilities, and in making them more fair and effective.

For those who would like more information or assistance in understanding and applying the Framework, the LCO has published the *Final Report: A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*. The *Report* includes information on the development of the project, the LCO's principles for the law as it affects persons with disabilities and how the circumstances of persons with disabilities may affect their interactions with the law. It also includes extended examples of the application of The *Framework*.

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INTRODUCING THE FRAMEWORK

Using the Framework

This *Framework* is based on the legal foundations of the *Charter of Rights and Freedoms (Charter)*, the *Ontario Human Rights Code (Code)*, the *Accessibility for Ontarians with Disabilities Act (AODA)* and international documents which have been ratified by Canada, such as the *United Nations Convention on the Rights of Persons with Disabilities (CRPD)*. It also draws on key policy documents such as the federal government's *In Unison: Advancing the Rights of Persons with Disabilities*. It therefore has its roots in the legal obligations and policy commitments that bind governments. It does not replace any of these documents, but is intended to build on these foundations and provide the basis for the further development of the law as it affects persons with disabilities. The LCO recognizes that this is an evolving area of the law, and this project is not intended as a final word on the subject but as a contribution to ongoing research, analysis and debate.

The *Framework* is intended to guide the development and evaluation of laws, policies and practices to ensure that the realities of the circumstances and experiences of persons with disabilities are taken into account, and that laws, policies and practices promote positive outcomes for these members of society to the greatest degree possible, while acknowledging the constraints that may be faced by governments and other actors. It is composed of principles and factors to take into account in applying the principles, and uses a step-by-step approach. It has been developed for use by

- Policy-makers, courts and legislators;
- Advocacy organizations and community groups that work with persons with disabilities and/or deal with issues that affect them; and
- Public or private actors that develop or administer policies or practices that may affect persons with disabilities.

Those who develop or review laws, policies or practices have an important responsibility to be informed about issues related to the experience of disability, to be aware of their own attitudes related to disability, and to commit to continuous learning. The *Framework* can be an important tool for improving law, policy and practice as they relate to persons with disabilities, but its effectiveness will be influenced by the knowledge and attitudes of the users.

Throughout the *Framework*, we have linked to other project documents which form the basis of or provide context for the *Framework*, all of which are available on the LCO website.

This *Framework* is intended to be applicable across all laws and policies, including both those that are specifically targeted to persons with disabilities and those that will affect persons with disabilities as part of the general population. As it is general in this sense, some may find it helpful to adapt it to their own particular area of law or policy. It should be noted that, given the breadth and diversity of the law as it affects persons with disabilities, not all sections of the *Framework* will be relevant for every law, policy or practice. Further, as the process of developing new laws, policies and practices differs from that of evaluating existing ones, the *Framework* will apply differently in those two situations.

It is not the purpose of this *Framework* to point to simple, definitive answers to all of the difficult issues that may arise in developing laws, policies and practices that may affect persons with disabilities. The law and the circumstances of

persons with disabilities are extensive and diverse. The nature of disability and our understanding of it are constantly evolving. Rather, the *Framework* is intended to ensure that law and policy-makers:

1. Consider and apply a consistent set of principles in developing laws, policies and practices that may affect persons with disabilities;
2. Ensure that potential barriers and sources of ableism in laws, policies and practices are identified and addressed; and
3. Take into account key aspects of the relationships of persons with disabilities with the law.

There may be circumstances where the user is not sure how to answer a particular question. In such cases, it may be helpful to refer to the full *Report* that accompanies this *Framework* for more information about context or application. It may also be the case that further research or consultation would be helpful in addressing the question.

Definitions

“The Law”: The term “law” as it is used for this project includes both statutes and regulations. It also includes the policies through which statutes and regulations are applied, and the strategies and practices through which statutory provisions, regulations and policies are implemented. The implementation of laws is as important as their substance. Laws may be beneficial in intention and on paper, but in practice fall short of their goals or even have negative effects. Whenever the term “law” is used in this *Framework*, it is used in this broad sense.

“Disability”: No single definition of “disability” can fully capture experiences of persons with disabilities. Definitions of disability must recognize the complexity that results from the interaction of an individual with his or her environment. For example, the particular context in which the term is raised – such as employment or housing – will matter, as well as the way in which stereotyping affects the perception of an impairment. Definitions must relate to particular contexts and purposes, and a definition that is of assistance in considering one aspect of the experience of disability may not be illuminating in another.

The LCO has taken a broad approach to the definition of disability, including both the experience of socially constructed (environmental) barriers and the embodied aspects of the experience of disability. For the purposes of this *Framework*, the term “disability” includes persons with permanent disabilities, intermittent and temporary ones, disabilities that are present at birth and those that develop later in life, and disabilities that manifest in physical, sensory, mental, intellectual or learning impairments and perceived disabilities, as well as the experience of multiple disabilities.

“Ableism”: Ableism may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.

“Barrier”: Persons with disabilities may encounter a wide range of barriers to the achievement of substantive equality. Barriers may arise as much or more from the environment of persons with disabilities as from the effects of impairments. They may include physical barriers, resulting from the failure to design the built environment in a way that takes persons with disabilities into account, informational and communications barriers, or barriers that are

embedded in laws or in written or unwritten policies and practices. Barriers may also be found in attitudes that dismiss, devalue or render invisible persons with disabilities and may be manifested directly in poor treatment in providing services or interpreting and applying laws and policies, or more subtly, for example in decisions about which services to provide or how those will be delivered. There may also be less obvious barriers resulting from the effects of life-long disadvantage for persons with disabilities, for example in the effects of lower educational or literacy rates on the ability to access services, employment or other opportunities.

“Diversity”: For the purposes of this *Framework*, diversity refers to a number of aspects of difference among individuals that may impact on the way that they encounter the law. This includes the broad range of differences in human abilities and characteristics, some of which are experienced as or defined as disabilities. It includes the wide range of identities that individuals may hold and that may intersect with the experience of disability, such as those related to sexual orientation, racialization, citizenship, Aboriginal identity, age and many others. It also includes the range of circumstances that individuals may encounter that may complicate the experience of disability, such as those related to geographic location or place of residence, caregiving responsibilities, low-income and many others. Finally, it recognizes that the experiences of each individual will be shaped by their life course, and that this may lead to differences that must be taken into account.

“Substantive Equality”: Substantive equality is often contrasted with “formal equality”. It goes beyond simple non-discrimination. It includes values of dignity and worth, the opportunity to participate, having one’s needs met, and the opportunity to live in a society whose structures and organizations include them. It recognizes and responds to societal patterns that result in different outcomes on the basis of irrelevant characteristics, as well as real differences that inappropriately disadvantage members of a particular group (such as women’s capacity for reproduction). Substantive equality may require differential treatment in order to fulfill these values.

- For more extensive consideration of relevant terms, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, *Chapter I.E.*

Principles for the Law as It Affects Persons with Disabilities

In order to counteract negative stereotypes and assumptions about persons with disabilities, reaffirm the status of persons with disabilities as equal members of society and bearers of both rights and responsibilities, and encourage government to take positive steps to secure the wellbeing of persons with disabilities, this *Framework* centres on a set of principles for the law as it affects persons with disabilities.

Each of the six principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. The concept of equality is central to both the *Charter* and the *Code*. The Supreme Court has recognized that governments, in providing services, must respect the equality rights of disadvantaged groups. Observance of the principles ought to move law and policy in the direction of advancing substantive equality, and interpretation of the principles must be informed by the concept of substantive equality.

There is no hierarchy among the principles, and the principles must be understood in relationship with each other. Although identified separately, the principles may reinforce each other or may be in tension with one another as they apply to concrete situations.

- 1. Respecting the Dignity and Worth of Persons with Disabilities:** This principle recognizes the inherent, equal and inalienable worth of every individual, including every person with a disability. All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
 - 2. Responding to Diversity in Human Abilities and Other Characteristics:** This principle requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.
 - 3. Fostering Autonomy and Independence:** This principle requires the creation of conditions to ensure that persons with disabilities are able to make choices that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
 - 4. Promoting Social Inclusion and Participation:** This principle refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.
 - 5. Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
 - 6. Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.
- *For more information on the principles, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.C.*

Implementing the Principles

As principles are relatively abstract and aspirational, challenges may arise in their implementation. For example, resources are not unlimited, so that it may not be possible to fully implement all of the principles immediately. In some cases, the principles may point to different solutions for the same issue. The LCO suggests the following factors to be taken into account in the application of the principles.

Taking the Circumstances of Persons with Disabilities into Account: While it is generally recognized that persons with disabilities make up a significant and growing proportion of Canada's population, and that they may have needs, circumstances and experiences that differ from their non-disabled peers, laws and policies do not always systematically and appropriately take these into account. As a result, laws and policies may have unintended negative effects on persons with disabilities, may work at cross-purposes with each other, or may fail to achieve their intended goals. In some cases, stereotypes or negative assumptions about persons with disabilities may shape the degree to which or the way in which persons with disabilities are taken into account. In this way, the law may be ableist in its impact. As part of respecting and implementing the principles, the circumstances of persons with disabilities must be

taken into account in the development and implementation of all laws, policies and programs that may affect them. This includes the recognition that persons with disabilities are themselves a highly diverse group, with widely varying perspectives, circumstances and experiences. The LCO's *Final Report*, which is a companion to this *Framework*, along with the resources linked to throughout the *Framework*, may provide assistance in understanding the circumstances of persons with disabilities.

Life Course Analysis: Following from the above, in applying the principles, it is important to consider the full life course of persons with disabilities. The life experiences of each of us will profoundly shape the resources and perspectives we bring to each stage of life. Barriers or opportunities experienced at one stage of life will have consequences that will reverberate throughout the course of life. The life course of an individual will shape the way in which that individual encounters a particular law; in return, laws will significantly shape the life course of individuals. That is, the impact of laws must be understood in the context of every stage of the life of persons with disabilities, from birth to death, and how these stages relate to each other.

Treating Law as Person-Centred: Law is often developed, implemented and analyzed as a set of separate and largely independent systems. A person-centred approach highlights the ways in which individuals encounter law – often as a confusing web of fragmented systems – and requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. This requires law to respond to individuals as whole persons with unique needs and identities, and to take into account the ways in which individuals transition through the life course or between systems.

Inclusive Design: While in some cases it may be necessary or most appropriate to design specific laws, practices, programs or policies to meet the needs of persons with disabilities, in many cases an inclusive design approach that incorporates from the outset the needs of persons with disabilities as well as others into the overall design of a law of general application will be the most effective approach. Persons with and without disabilities will benefit from a focus on dignity, autonomy, inclusion, safety and diversity in the design of laws. Many of the measures required to fulfill the principles and to make the law more fair, accessible and just for persons with disabilities will also make the law more fair, accessible and just for others. Designing laws, policies and programs of general application to include persons with disabilities from the outset can make the law more effective overall.

Effective Implementation of Laws: Even where laws are based on a thorough and nuanced understanding of the circumstances of persons with disabilities and aim to promote positive principles, their implementation may fall far short of their goals. This is a common phenomenon. There are two aspects to this “implementation gap”: implementation strategies for the law, and mechanisms for ensuring that persons with disabilities are adequately able to access and enforce their rights. In developing and analyzing laws, as much attention must be paid to the implementation of laws as to their substance.

Progressive Realization: The fulfillment of the principles is an ongoing process, as circumstances, understandings and resources develop. Efforts to improve the law should be continually undertaken as understandings of the experiences of persons with disabilities evolve, or as resources or circumstances make progress possible. And of course, even where one aspires to implement these principles to the fullest extent possible, there may be constraints in doing so, such as resource limitations or competing needs or policy priorities. Therefore, a progressive implementation approach to the principles should be undertaken, such that the changes to law and policy respect and advance the principles, principles are realized to the greatest extent possible at the current time, there is a focus on continuous advancement while regression is avoided, and concrete steps for future improvements are continually identified and planned.

Respect, Protect, Fulfill: In the realm of international human rights law, the concept of “respect, protect, fulfill” is used to analyze and promote the implementation of human rights obligations. In this analysis, states must address their human rights obligations in three ways:

1. The obligation to respect – States parties must refrain from interfering with the enjoyment of rights.
2. The obligation to protect – States parties must take immediate steps to prevent violations of these rights by third parties and provide access to legal remedies for when violations do occur.
3. The obligation to fulfill – States parties must take appropriate legislative, administrative, budgetary, judicial, promotional and other actions towards the full realization of these rights.

This approach can be useful in analyzing and promoting the realization of the principles in the law as it affects persons with disabilities, or indeed any group. At minimum, governments must not violate the principles (i.e., they must respect and protect them), but complete fulfillment of the principles may be progressively realized as understandings and resources develop.

- *For more information, see the Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter III.D.*

EVALUATING THE LAW: A STEP-BY-STEP APPROACH

Note: “Law” here refers to law, policy and practice as appropriate.

The *Framework* uses a step-by-step approach to evaluating a law against the principles. The process is broken down into eight steps. For each step, the *Framework* provides context, examples and questions to help assess the law in light of the principles.

Step 1: How Do the Principles Relate to the Context of the Law?

Identify the context in which the law will operate and its relationship to the principles.

Step 2: Does the Legislative Development/Review Process Respect the Principles?

Consider whether the process that has been designed for developing or reviewing the law respects the principles.

Step 3: Does the Purpose of the Law Respect and Fulfill the Principles?

Assess the goals of the law, including the assumptions on which it is based.

Step 4: Who Does the Law Affect and How Does This Relate to the Principles?

Analyze the way in which the law may affect persons with disabilities and how this may impact on respect for the principles.

Step 5: Do the Processes Under the Law Respect the Principles?

Consider the procedural aspects of the law, including provisions related to accessibility, information provision and supports for applicants.

Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?

Assess how the law is enforced, whether through proactive measures like audits, or individual complaint mechanisms.

Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?

Does the law contain provisions to ensure transparency, accountability and monitoring of its effectiveness?

Step 8: Assessing the Results of the Evaluation: Is the Law True to the Principles?

Based on the results of the previous steps, is the law true to the principles? What more must be done?

Step

1

How Do the Principles Relate to the Context of the Law?

As a first step in undertaking an evaluation of a particular law, it is helpful to begin by understanding the context in which that law will operate and analyzing how the principles may relate to that context. This includes the general social area which the law addresses, as well as the existing laws and policies that interact with the law that is proposed or under review. This section considers how the context of the law may situate it in relation to the principles.

Applying the Principles to Step 1

Note: “Law” here refers to law, policy and practice as appropriate.

As a first step in the evaluation of a law, it is helpful to consider the specific social area in which the law operates, such as employment, housing, education, family relationships or caregiving, among others. Different social areas will have different relationships to and effects on the attainment of the principles. For example, the attainment of *safety* and of *participation and inclusion* will be significantly affected by laws related to housing. Laws related to decision-making will impact heavily on the *independence and autonomy* of some persons with disabilities.

Some contexts may involve particular challenges or constraints for the attainment of the principles. For example, residence in a long-term care home by its very nature constrains the ability of residents to participate in and be *included* by the broader community. Such particular challenges to the principles should be taken into account when designing the law in question.

Existing laws, policies and programs at various levels of government are an important part of the context to be considered, and careful attention should be paid to how the proposed law will affect the principles in combination with existing laws. Law in one area may affect attainment of the principles in quite another area of the law. For example, law related to access to assistive devices may affect access to housing or employment. Law related to income security will affect access to housing.

Questions for Consideration in Applying Step 1

1. What area(s) of life does the law potentially affect? What are the particular contexts and concerns of persons with disabilities in this area of life?
2. Which principles seem relevant for this context?
3. Are there aspects of this context that tend to constrain the implementation of any of the principles? If so, are there strategies that can be employed to address this?
4. How might law in this one particular context affect other areas, and the attainment of the principles in those areas?

Applying the Framework: Examples of Relating the Principles to the Context of The Law

Access to Adequate Housing and the Principles

Like everyone, persons with disabilities want to have access to housing that meets their needs. We all need housing that is safe, affordable and enables us to be part of our community. The *International Covenant on Economic, Social and Cultural Rights*, which Canada has ratified, recognizes adequate housing as a fundamental right, although no laws to this effect have been enacted in Canada, and the CRPD recognizes a right to “adequate food, clothing and housing” for persons with disabilities. Persons with disabilities face a range of barriers to adequate housing, such as a lack of physically accessible housing stock and supportive housing for those with non-physical disabilities, discriminatory attitudes on the part of landlords, income barriers that are particularly acute because of the association of disability with poverty, and the complex and fragmentary nature of existing laws and programs intended to assist individuals (including those with disabilities) in obtaining housing.

Access to adequate housing is essential to the attainment of the principles for persons with disabilities. The lack of accessible housing speaks to ongoing shortcomings in society’s *response to diversity in human abilities*. As has been emphasized by the community living movement, for persons with disabilities, appropriate housing can be essential to being part of the broader community, and thereby *social inclusion and participation*. The availability of adequate, accessible, affordable housing is central to the ability of many persons with disabilities to make one of the “normal” life course transitions, that of learning to live independently, and is thus central to the principle of *fostering independence and autonomy*. Housing that is in poor repair, does not have appropriate accessibility features or is in unsafe areas will jeopardize *living in safety*. Inadequate housing may disrespect the *dignity and worth* of persons with disabilities. As well, lack of access to adequate housing may jeopardize the attainment of the principles in other areas of life. The federal government has recognized housing as central to reducing poverty and exclusion and as the Ontario Human Rights Commission has pointed out, “without appropriate housing, it is often not possible to get and keep employment, to recover from mental illness or other disabilities, to integrate into the community, to escape physical or emotional violence, or to keep custody of the children”.

- See LCO, Final Report: A Framework for the Law as It Affects Persons with Disabilities, Chapter II.D.

First Nations Older Adults with Disabilities and Access to Supports

The onset of disability and the resultant need for supports poses challenges for all affected older adults. First Nations older adults, however, face significant additional challenges. The lower than average socio-economic status of First Nations communities leads to higher than average rates of disability and significantly reduced lifespans, so that the pressures surrounding disability and aging, acute across all groups, are particularly severe for these communities. In some First Nations home communities, inadequate and overcrowded housing, together with a lack of community services, makes it impossible for older adults who have developed significant health or ability limitations to remain in their home communities. A move to a major centre where long-term care is available may mean a very significant dislocation, separating the resident not only from family and community, but also from culture and in some cases language. In this way, the principle of *social inclusion and participation* is engaged, although the particular cultural context of First Nations persons must be taken into account in interpreting and applying it. As well, because many First Nations individuals who are now older will have experienced the residential school system, re-institutionalization at the end of the life course may have a profound negative emotional and psychological impact. That is, the principle of the right to live in safety may be in jeopardy, given the shortage of community-based and culturally

appropriate options for these individuals. Finally, historically and in most contemporary Aboriginal cultures, older members are accorded great respect and Elders play a central role in family, community and spiritual life. When First Nations older adults leave their home communities for geographically distant long-term care institutions, it is a significant loss for the community as well as the individual older person, raising issues related to the principle of *recognizing that we all live in society*.

- See LCO, Final Report: A Framework for the Law as It Affects Persons with Disabilities, Ch. III.C.6

Step

2

Does the Legislative Development/Review Process Respect the Principles?

This section focuses on the process through which laws are developed and reviewed. The process, like the substance of the law in question, should comply with the principles. Laws may be analyzed and evaluated for their impact on persons with disabilities both at the time of their development, and later as part of a law reform initiative or assessment of their effectiveness. This section deals with the issues raised by either kind of process, with a particular emphasis on research and public involvement.

Applying the Principles to Step 2

Note: “Law” here refers to law, policy and practice, as appropriate.

The process for developing or reviewing laws and policies is often lengthy and multi-layered, and will differ depending on the particular issue or the level of government involved. This process will have a significant effect on the final shape of the law. Because persons with disabilities are often marginalized, their perspectives and experiences may be missing from this process, so that the law does not appropriately take them into account. This is especially the case for laws of general application, where the potential effects on persons with disabilities are not immediately apparent. It is essential that the principles be applied to the process of evaluating and reviewing laws, as well as to the substance of those laws.

The overriding principle at stake here is that of promoting *social inclusion* and participation, ensuring that persons with disabilities have the opportunity to be involved as citizens in the development of laws and policies. The principle of *recognizing that we all live in society* highlights that participation in the development of laws and institutions is a responsibility as well as a right for persons with disabilities, as it is for others, and the principle of *autonomy and independence* highlights the importance for persons with disabilities of the right to make choices on issues that affect them, not only in their day to day lives, but at a broader societal level. Implicit in the principle of *dignity and worth* is respect for the value of the experiences and perspectives of persons with disabilities, indicating that these experiences and perspectives should be sought out, included in the process and meaningfully considered. As well, this principle requires that the processes through which persons with disabilities are included should embody respect for their contributions. Finally, the principle of *responding to diversity* emphasizes that in the law development or reform process, a wide variety of voices should be heard from, including the range of experiences and opinions within the disability community, and that needs associated with differences in abilities or other characteristics should be acknowledged and accommodated.

Questions for Consideration in Applying Step 2

1. How has research been carried out to determine how persons with disabilities may be affected by the (prospective) law, and to ensure understanding of the particular circumstances of those persons with disabilities who will be affected?
2. Is the law based on current research and evidence regarding the needs and circumstances of persons with disabilities, so as to avoid reliance on ableist assumptions, attitudes and stereotypes?

3. How have persons with disabilities been directly involved and integrally included in developing or reviewing the law?
4. What steps have been taken to ensure that a wide range of persons with disabilities and organizations that represent them have been informed about and had the opportunity to be meaningfully consulted in the development or review of this law? What efforts have been made to reach out to persons with different disabilities, as well as persons with disabilities who are of different ages, socio-economic status, racial or ethnic identities, creeds, sexual orientations, places of residence, or other aspects of diversity?
5. What steps have been taken to ensure that all stages of public consultation are accessible to persons with disabilities, within the requirements of the Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*?
6. What steps have been taken to ensure that all stages of public consultation are accessible to persons with disabilities who may face barriers because of their low-income, caregiving responsibilities, newcomer status, geographic area of residence or other issues?
7. Is the process through which persons with disabilities are involved respectful of their contributions and mindful of their circumstances and experiences?
8. How have the perspectives and concerns shared by persons with disabilities been meaningfully considered in shaping the outcomes?
9. How have the analyses and decisions made throughout the development or review process been documented?

Applying the Framework: Example of the Relationship of the Principles to Legislative Development

Participation in the Development of the *Convention on the Rights of Persons with Disabilities*

The adoption of the *Convention on the Rights of Persons with Disabilities* (CPRD) by the United Nations General Assembly on December 13, 2006 was a major step forward for the human rights of persons with disabilities around the world. Although the actual process of negotiation was unusually rapid, commencing only in 2001, persons with disabilities had long been pressing for such a convention. The participation of civil society in the development of this convention was unprecedented, with over 400 representatives attending some of the later meetings. The Expert Working Group that transformed proposals into a comprehensive draft convention was comprised of representatives of government and civil society, working together on an equal basis. One commentator noted that the process truly reflected the disability rights slogan, “nothing about us without us”. The extensive participation of persons with disabilities in the development of the CRPD is evident in its content, for example in its practical focus on the challenges and requirements of persons with disabilities in their interaction with society, its broad and inclusive definition of disability, and its focus on disability as a human right rather than a social welfare issue. In this way, the process for the development of the CRPD not only embodied the principle of *social inclusion and participation*, but also highlighted how respect for this principle can assist in fulfilling the other principles.

- See D. MacKay, “The United Nations Convention on the Rights of Persons with Disabilities”, 34 *Syracuse Journal of International Law* 323.

Step

3

Does the Purpose of the Law Respect and Fulfil the Principles?

Laws generally begin with an issue, large or small, that is perceived to be of concern and that needs to be addressed. The purpose of a law may be explicitly identified, for example in a preamble, or may be implicit in the provisions. While in practice, a law may or may not achieve the goals set out for it, the purpose of the law and the assumptions that underlie that purpose (or purposes) will shape the general approach of the law. This section sets out considerations for evaluating the purpose of a law against the principles.

Applying the Principles to Step 3

Note: “Law” here refers to law, policy and practice, as appropriate.

The overall goal or purpose of a law will of course profoundly shape every aspect of that law, and will itself be shaped by a set of underlying assumptions or values. In the case of laws that directly target persons with disabilities, many of those assumptions and values will be directly associated with disability, while for laws of general application, they will be less directly connected with disability, but still influential in terms of the impact of the law on persons with disabilities. Those assumptions and values may be positive for persons with disabilities, or they may be influenced by ableist attitudes and assumptions. For this reason, it is very important to carefully evaluate the purpose(s) of a law, and the underlying attitudes against the principles.

Most commonly, any law will engage multiple principles, particularly since the principles are interdependent. Frequently, the principles will support each other; for example, initiatives that increase the *inclusion and participation* of persons with disabilities will generally also thereby promote *respect for their dignity and worth*. However, sometimes two or more of the principles may be in tension with each other in a particular case. An initiative to facilitate the *right to live in safety* might, in some cases, be framed in such a way as to decrease the *independence or autonomy* of persons with disabilities. In such cases, careful thought must be given to analyzing and responding to this tension. The analysis of the relationships between the principles may be relevant at any of the steps in the evaluation process.

Questions for Consideration in Applying Step 3

1. How does the purpose of the law take into account the variance in capacity and abilities among all individuals, including how this may vary over the life course?
2. What assumptions about persons with disabilities underlie the purpose of the law? How does the law recognize persons with disabilities as persons of worth, value their contributions, and treat them as of equal value with other members of society?
3. How does the law take into account the actual needs and circumstances of persons with disabilities, and respond appropriately?
4. How does the law take into account variances among persons with disabilities, whether arising from their life courses, differences in their experience of impairment, or intersecting aspects of their identity such as gender, racialization, sexual orientation, Aboriginal identity, age, citizenship, socio-economic status, marital or family status, or other aspects of identity?

5. How does the purpose of the law enhance the ability of persons with disabilities to be meaningfully involved in their communities, be civically engaged, and to be heard on issues that affect them?
6. How does the purpose of the law address potential abuse, exploitation, mistreatment or victimization of persons with disabilities?
7. How does the purpose of the law foster the ability of persons with disabilities to make choices for themselves, including by providing appropriate supports?
8. How does the purpose of the law enhance the economic or personal independence of persons with disabilities, and provide support for such independence as required?
9. How does the purpose of the law recognize persons with disabilities as members of the broader society, and support their ability to take on the responsibilities associated with such membership?
10. Are there tensions between any of these considerations, so that satisfying one may threaten to undermine the realization of another? If so, have you considered:
 - a. Whether there are broader contextual issues (such as a lack of appropriate resources) causing the tensions between principles, and if so, whether these issues can be addressed to resolve the tension?
 - b. Whether there are approaches to the issue that will permit either complete or at least partial achievement of both competing principles?
 - c. Which of the potential approaches will best advance substantive equality for persons with disabilities?
 - d. Have persons with disabilities been consulted in determining how to resolve the tensions?

Applying The Framework: Examples Of The Relationship Between The Principles And The Purpose Of The Law

Ableism and the Laws Regarding Legal Capacity

Ontario has a complex web of laws that address situations where individuals, because of a disability, are adjudged to have lost the capacity to make certain types of important decisions. This legal framework is based on a system of substitute decision-making, to occur in the best interests of the person lacking legal capacity. There are difficult issues raised by these laws and multiple perspectives. On the one hand, some see these laws as a careful balance between the *security* and *autonomy* of persons with disabilities which, if properly implemented can promote the well-being of persons with diminished legal capacity. On the other hand, many persons with disabilities have long raised concerns about the assumptions that underlie both the substance and the implementation of the law. As Michael Bach and Lana Kerzner outline, the law is believed by some to embody presumptions about the abilities of persons with intellectual or cognitive disabilities that are based on unexamined assumptions and undermine their recognition as full persons, thereby undermining the principle of *dignity and worth*. Because the law removes the power to make certain decisions from persons who are found to lack legal capacity, it has a very significant effect on the *independence and autonomy* of those persons with disabilities who are affected. Many persons with disabilities, particularly those with intellectual disabilities, have therefore advocated for a shift to a system of “supported decision-making” as advancing these two principles by better reflecting the manner in which people make and communicate decisions, as well as empowering persons with disabilities in fundamental aspects of their lives.

- See *LCO Commissioned Research Paper, Michael Bach and Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (2010).

Community Treatment Orders and Tensions Between Principles

Community Treatment Orders (CTOs) were introduced in 2000 to provide physicians with a means of mandating that mental health patients discharged from hospital pursue community treatment in order to prevent the need for further hospitalization. These orders are intended to address the “revolving door syndrome”, that is, a person with serious mental illness is admitted to a psychiatric facility where she or he receives treatment and her or his condition improves, but when discharged into the community, he or she discontinues treatment and his or her condition deteriorates until she is once again admitted to hospital. That is, the purpose of the law addresses the principles of *living in safety* and the principle of *social inclusion and participation* (in the sense of facilitating discharge from hospital back into the community).

One of several conditions for the issuance of a CTO is the development of a community treatment plan that is agreed to by the physician issuing the CTO, the patient or his or her substitute decision-maker, and the community agencies that will be providing services under the plan. The patient or his or her substitute decision-maker must give informed consent to the plan. In this sense, CTOs are entered into voluntarily. However, the reality is that consent to a CTO is often a condition to being released from hospital and this is a powerful incentive for many patients to consent. Further, failure to comply with a CTO may result in apprehension by the police and involuntary readmission to the hospital. These requirements are intended to facilitate *living in safety* and the ultimate goal of *social inclusion and participation*, but they mean that although strictly speaking the CTO regime is voluntary, it may be considered to contain a significant degree of coercion. In this way, CTOs may both support and undermine the principle of *autonomy and independence*, depending on one’s understandings of the principle – illustrating some of the difficulties in applying the principles. There is therefore a tension between principles in this policy, one which runs through much of mental health law, and is a subject of ongoing debate and discussion.

- See LCO, Final Report: A Framework for the Law as It Affects Persons with Disabilities, Ch. III.C.3.

Step**4****Who is Affected by the Law and How Does This Relate to the Principles?**

To conduct a meaningful evaluation, it is essential to identify which persons with disabilities may be affected by a particular law and how. In some cases, laws are specifically targeted to persons with disabilities, or some particular persons with disabilities. The Ontario Disabilities Support Program Act and the Social Inclusion Act are examples of laws of this type. As well, persons with disabilities are of course affected by laws of general application, just as are their peers who do not identify as having a disability. In some cases, laws of general application may affect persons with disabilities or some group of persons with disabilities differently or disproportionately compared to others. This section considers how specific instances of the ways in which laws may affect persons with disabilities may interact with the principles.

Applying the Principles to Step 4

Note: “Law” here refers to law, policy and practice, as appropriate.

There are a plethora of laws that specifically target persons with disabilities – some targeting persons with disabilities in general, and others that target some particular group of persons with disabilities. These laws generally include definitions or criteria setting out who is affected by restrictions or has access to rights or entitlements in the law. These criteria or definitions must be carefully scrutinized for stereotypical or ableist assumptions or attitudes that violate the principle of *dignity and worth*. The principles of *responding to diversity* and of *participation and inclusion* also indicate that the laws should be scrutinized to ensure that they appropriately respond to the real needs and circumstances of the range of persons with disabilities.

As persons with disabilities are often invisible in the law development process, the effects on them of a particular law of general application may not be identified or considered. This may be especially true for some groups of persons with disabilities who are particularly marginalized, such as Aboriginal persons with disabilities, or persons with multiple disabilities. The principles of *participation and inclusion*, and of *responding to diversity* require that persons with disabilities, in all their variety, be carefully considered whenever a law of general application is designed or reviewed to ensure that it takes into account their particular needs and circumstances.

Questions for Consideration in Applying Step 4

1. a. Has consideration been given to the potential application of inclusive design approaches to the issue?
- b. Has consideration been given to whether the principles, and thereby substantive equality for persons with disabilities, will be better advanced by a law of general application with appropriate accommodation as required, or by law targeted specifically to persons with disabilities?

Laws Targeted to Persons with Disabilities

2. If the law uses disability-based eligibility criteria, has the law been appropriately targeted? For example:
 - a. How does the definition of disability recognize the socially constructed barriers that persons with disabilities face in the particular area of life that the law addresses?
 - b. Are the criteria based on ableist assumptions or negative attitudes towards persons with disabilities or particular groups of persons with disabilities?
 - c. Has care been taken to ensure that the experiences of those with disabilities that are less recognized or understood are taken into account?

- d. How do the criteria recognize the different experiences of disability depending on the nature of the life course, the nature of the disability or intersecting identities?
3. If the law uses non-disability-based eligibility criteria, has the impact on persons with disabilities, or particular groups of persons with disabilities, been taken into account? For example:
 - a. If the law uses age-based criteria, how do the criteria take into account the different ways in which disability may intersect with the experience of aging, such as, for example, the particular experiences of those who age with a disability?
 - b. If the law uses income-based criteria, how do the criteria take into account the disproportionate experience of low-income among persons with disabilities, and the particular barriers experienced by low-income persons with disabilities?

Laws of General Application

4. Does the law appear to be one of general application? If so, taking the circumstances of persons with disabilities into account, might it affect persons with disabilities differently or in greater numbers than the general population?
5. If the law is one of general application, might it affect some particular groups of persons with disabilities differently or in greater numbers than the general population? For example:
 - a. Does the law have a significant effect on persons who live in low-income? If so, given the disproportionate number of persons with disabilities who live in low-income, what might be the effect on this group?
 - b. If the law has a different or disproportionate effect on persons with disabilities, has consideration been given to how this might differ for men and women with disabilities?
 - c. If the law has a different or disproportionate impact on persons with disabilities in general, has consideration been given to how that impact might differ for persons with different disabilities?
 - d. Has consideration been given to how the law might affect persons with disabilities who are from historically marginalized communities, such as Aboriginal or racialized persons with disabilities, or those who are LGBT or newcomers to Canada?
 - e. Has consideration been given to how the law might affect persons facing barriers related to their family or marital status, area of geographic residence (such as in rural or remote areas), age or socio-economic status or other factors?
6. If the law does affect persons with disabilities or some group of persons with disabilities differently, how does the law address that differential impact?

Applying the Framework: Examples of the Relationship Between the Principles and the Scope of the Law

Laws of General Application and Parenting with Disabilities

Persons with disabilities are too often conceptualized as dependents and recipients of care, and their roles as providers of care and support to others are often overlooked. As one example, the needs and circumstances – indeed, the very existence – of parents with disabilities is often overlooked. Laws, policies and programs that apply to parents may not take into account the needs of those who have disabilities. For example, childcare services and even schools may not be physically accessible, so that parents with disabilities may have difficulty accessing appropriate services

for their children. On the other hand, laws, policies and programs for persons with disabilities may not take into account their roles as parents. For example, para-transit programs may not allow parents with disabilities to have their children accompany them when using these services, or homecare services may provide housekeeping supports only for the needs of the parent with a disability and not the child.

This lack of visibility for parents with disabilities, based as it is on stereotypes about parenting and about persons with disabilities, has its roots in a lack of *dignity and respect* for persons with disabilities and a failure to recognize *diversity and individuality*. It has the effect of reducing their *inclusion and participation*, and insofar as it impairs the ability of parents with disabilities to fulfil their responsibilities and disadvantages their children, raises concerns related to the principle of *membership in the broader society*.

Targeted Laws: Eligibility Criteria under the Ontario Disability Support Program

The Ontario Disability Support Program (ODSP) is a social assistance program targeted to those with a disability who have little available income or assets. It is separate from Ontario's general social assistance program (Ontario Works). Those who meet the financial criteria for Ontario Works and also meet the definition of disability within the *ODSP Act* qualify for a range of income and employment support benefits. There is a stringent and multi-layered process for determining eligibility for ODSP.

When the *ODSP Act* was drafted, it explicitly excluded persons whose impairments and primary restrictions resulted solely from addictions to drugs or alcohol, despite extensive expert evidence that established substance abuse as a mental disorder which is often experienced together with other aspects of mental illness. This exclusion was challenged through the courts, and was eventually overturned. The Ontario Superior Court (in a decision upheld by the Court of Appeal) noted that making distinctions about eligibility based on "assumed or unjustly attributed characteristics" resulted in the denial of "essential human worth", and found that the distinction discriminated on the basis of disability. In other words, this eligibility criterion for this particular program was based on negative attitudes towards this group of persons with disabilities and violated the principle of *dignity and worth*.

- See *LCO Commissioned Research Paper, L. Patton et al., A Principled Approach: Considering Eligibility Criteria for Disability-Related Supports Programs Through a Rights-Outcome Lens* (2010).

Step

5

Do the Processes Under the Law Respect the Principles?

The implementation of a law, policy or program is equally as important as its substantive provisions. Laws may be positive in their conception and on paper, but in practice may be cumbersome, difficult to access, or otherwise ineffective in achieving their goals. This section applies the principles to the implementation of the law, including considerations related to training and education, resources and provision of adequate accommodation for disability-related needs.

Applying the Principles to Step 5

Note: “Law” here refers to law, policy and practice, as appropriate.

Well-intentioned laws may fail to achieve their purposes because of problems in implementation. Many laws are exceedingly complex, so that understanding and navigating them requires considerable effort and expertise, and persons with disabilities may be expected to do so on their own, without supports or the appropriate accommodations. Those operating such systems may have an imperfect understanding of the needs and circumstances of persons with disabilities, or may harbor ableist attitudes or assumptions. Often such systems are under-resourced and under strain.

Applying the principles to these processes requires that persons with disabilities be treated with *dignity* when seeking to access the law. Those implementing the law must have the skills, knowledge and resources to treat those accessing it with respect, accommodate their needs, and ensure they receive any supports or benefits to which they are entitled. *Responding to diversity* requires that systems are able to accommodate the actual needs of individuals, including needs arising from particular impairments, from the intersection of disability with other aspects of identity, or from the common overlap of disability with poverty. The principles of *autonomy and independence*, and of *participation and inclusion* require that the systems that serve persons with disabilities can be understood and navigated by them, which requires provision of appropriate information and supports.

Questions for Consideration in Applying This Step

1. Have sufficient human and financial resources been allocated to ensure that persons with disabilities can access their rights or responsibilities under the law, in a way that respects the principles?
 - a. Are there mechanisms in place for identifying significant unmet needs?
 - b. Where resources are limited, does the law include clear, transparent and principled criteria and priorities for how scarce resources should be allocated?
 - c. In the implementation of laws of general application, where resources are limited, have the needs of persons with disabilities been given equal consideration with those of other groups?
2. How have the processes under the law been designed to be as simple and transparent as possible for users?
3. Does the law include clear rights to services to be provided and accountability for providing those services in a timely, respectful, accessible and appropriate manner?

4. How have those charged with implementation of the law been provided with adequate ongoing training and education to enable them to implement the law in a way that respects the principles, including training and education on the following:
 - a. The substance of the law in question, as well as the *Charter*, the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*?
 - b. Anti-ableism, including common negative stereotypes and assumptions about persons with disabilities in general and persons with particular disabilities, accessibility issues, and systemic barriers for persons with disabilities?
5. How have mechanisms been developed to ensure that persons with disabilities are informed about their rights and responsibilities under the law, and that they have access to the information necessary to seek access to their rights or fulfill their responsibilities? How do these mechanisms address common barriers?
For example:
 - a. Has information been provided on where individuals can seek further information or supports for accessing their rights or exercising their responsibilities?
 - b. Have strategies been developed to disseminate information to organizations that represent, advocate for or support persons with disabilities?
 - c. Is information available in disability-accessible formats that comply with the provisions of the *Accessibility for Ontarians with Disabilities Act* and the *Ontario Human Rights Code*?
 - d. Is information available in plain language?
 - e. Is information available in non-written formats (such as by telephone or video)?
 - f. Is information available to persons living in restrictive settings, such as long-term care homes or psychiatric institutions?
 - g. Is information available to persons living in rural or remote settings?
 - h. Is information available in multiple languages?
6. If the access mechanism is complicated or multi-stage, how have supports or advocacy services been provided to ensure that persons with disabilities are able to navigate the system, particularly for persons with disabilities who face additional barriers as a result of low-income, language barriers or other issues?
7. How have the processes been designed to include and accommodate the specific needs of persons with disabilities, including those who are facing additional barriers arising from low-income, or who have needs related to other aspects of their identities, or who are transitioning between programs or life-stages?
8. What mechanisms does the law provide to review or evaluate unique needs or requests for accommodation from affected individuals with disabilities?

Applying the Framework: Examples of the Relationship of the Principles to Processes

Limited Resources and the Passport Program

There are a variety of programs for children with disabilities and their families, including those offered through the educational system. However, as these children enter adulthood, supports tend to drop off, making the standard transitions along the life course more difficult. For some persons with disabilities, the transition into adulthood may actually decrease *participation and inclusion* and realization of other principles.

In 2005, the Ministry of Community and Social Services launched the Passport Program for young adults with an intellectual disability who are no longer eligible for school supports, but who would benefit from community participation supports. Through the Passport Program, these individuals can receive funding for activities that help them grow personally, participate in community programs, develop volunteer and employment skills, develop their own life plans, and other activities that assist them in meeting their life goals. The program has significant benefits for recipients, as well as for their families, and supports the fulfilment of the principles, particularly the principles of *respecting dignity and worth, fostering autonomy and independence, and promoting social inclusion and participation*.

While the program has been lauded, the demand greatly outstrips the available resources. According to ARCH Disability Law Centre, the waiting list for the Passport Program has grown year by year, and in early 2010, there were more eligible individuals on the waiting list than receiving services. The Passport Program creates no positive right to services, a not-uncommon approach to services for persons with disabilities. A paper prepared by Bakerlaw argues that the lack of clear rights to supports for persons with disabilities may impair the ability of persons with disabilities to achieve substantive equality, and suggests alternative approaches that may facilitate *inclusion and participation* for persons with disabilities.

- LCO Commissioned Research Paper, Meryl Zisman Gary, Cara Wilkie and David Baker, A Case Study Paper on Rights to Supports (2010).

Complexity and Provision of Special Education Services Under the *Education Act*

Under Ontario's *Education Act* and regulations, "exceptional pupils" are entitled to receive specialized programming, accommodation and supports in order to provide them with equal educational opportunities. Children who are identified through a hearing of the Identification, Placement and Review Committee (IPRC) may be placed in a regular or specialized classroom, and an Individual Education Plan (IEP) must be completed to identify supports and accommodation (and may be completed for students who have not been identified through an IPRC). While the overall intent of Ontario's special education laws and policies is viewed positively, and the legislation and policies include many measures to promote participation and inclusion, many have raised concerns regarding the processes for accessing disability-related supports and accommodations in this system. Professor Mona Paré has noted that the system is based on an "expert model" which parents and students may find intimidating. The IPRC and IEP processes are complex and involve considerable paperwork, and parents and students may find it difficult to understand their rights and the processes. While parents and students must be consulted in the development of IEPs, there is no clear, formal means for parents and students to resolve disputes regarding the adequacy and implementation of the IEPs, so that the process is not transparent. As well, there is limited access to supports or advocacy for those navigating the system. The process for accessing supports under the *Education Act* therefore does not appear to fulfill in practice the principle of *inclusion and participation*.

- See LCO Commissioned Research Paper, Professor Mona Paré, The Participation of Persons with Disabilities in Decisions That Concern Them: The Example of Education (2010).

Step

6

Do the Complaint and Enforcement Mechanisms Respect the Principles?

No law, policy or program will operate perfectly: errors and problems will inevitably arise, and mechanisms must be put in place to identify and address these. Therefore, persons with disabilities require meaningful access to the law. Some laws rely on complaint mechanisms of various types to identify and resolve issues, while others use proactive mechanisms like audits or institutional advocates for this purpose, and others use a combination of mechanisms. This section applies the principles to complaint and enforcement mechanisms.

Applying the Principles to Step 6

Note: “Law” here refers to law, policy and practice, as appropriate.

Meaningful complaint and enforcement mechanisms are important, not only for addressing individual issues that may arise in the implementation of a program, but also for identifying and addressing systemic problems with a law or its implementation. Persons with disabilities may face a range of barriers in accessing the law, including a lack of clear rights and remedies; multilayered, fragmented or inaccessible systems that fail to take into account their needs and circumstances; power imbalances and a lack of information and advocacy supports. Some programs or services provide no meaningful complaint or enforcement mechanisms.

The principles of respecting *dignity and worth* and of *facilitating the right to live in safety* mean that there must be meaningful mechanisms to ensure that persons with disabilities are able to raise concerns about mistreatment, exploitation or abuse, that there is meaningful redress when such issues arise, and that they are not subject to retaliation for doing so. *Responding to diversity* requires that complaint and enforcement mechanisms take into account the diverse needs and circumstances of persons with disabilities, including ensuring that all aspects of complaint and enforcement mechanisms are accessible for persons with disabilities. This includes ensuring that complaint mechanisms are sufficiently simple and transparent for unrepresented individuals to navigate – or if not, that they have the advocacy supports necessary to do so. To ensure *autonomy and independence*, persons with disabilities must have access to the information that they need to understand and enforce their rights. The principle of *inclusion and participation* requires that complaint mechanisms facilitate the ability of persons with disabilities to be actively involved in claiming their rights, including provision of the supports necessary to empower them to do so.

Questions for Consideration in Applying This Step

1. Does the law include access to a complaint and enforcement mechanism that clearly and meaningfully identifies, addresses and remedies both individual and systemic violations of the law, including for those individuals who are particularly disadvantaged or at heightened risk?
2. How have the complaint and enforcement mechanisms been designed to address power imbalances and prevent potential retaliation against those who raise issues?
3. How have the complaint and enforcement mechanisms been designed to be accessible for persons with disabilities, including providing appropriate accommodations, addressing barriers related to low-income and recognizing intersecting identities?

4. How have the complaint and enforcement mechanisms been designed to be navigable for persons with complaints, for example through ensuring the mechanisms are simple and transparent, or by providing navigational assistance?
5. How are persons with disabilities provided with meaningful and accessible information about their rights and how to enforce them?
6. How have supports been made available to persons with disabilities to empower them to understand their rights and advocate for themselves?

Applying the Framework: Example of the Relationship of the Principles to Enforcement Mechanisms

Enforcing Rights in Ontario's Developmental Services System

Ontario's *Social Inclusion Act* marked a major and positive paradigm shift in the provision of services to persons with intellectual disabilities, moving the focus for services and supports away from institutions and into communities. However, it appears that some limitations remain in the legislation's enforcement mechanisms, which may compromise the full achievement of the legislation's promise. A strong complaint system is essential to preventing or addressing exploitation or abuse, and thereby to the *right to live in safety*. Kerri Joffe (ARCH Disability Law Centre) points out that the Act does not take a rights-based approach to the provision of services. Rather, the Act and accompanying regulations establish minimum standards with which service providers and community agencies that administer funding or process applications must comply to ensure quality assurance. Enforcement of these minimum standards occurs predominantly via government oversight, through mandatory reporting requirements, inspections, orders and government take-overs of agencies. Complaints must be made directly to the service providers; this raises concerns about power imbalances, transparency and neutrality, and therefore about the *right to live in safety*, as it may expose persons with disabilities to reprisal from service providers. To respond to this, regulations under the Act do require agencies to ensure that those who provide feedback or make complaints are not risking reprisal by doing so. There is no provision for rights education, or empowerment supports for persons with intellectual disabilities who wish to raise concerns about the services they receive, although complaint procedures must consider the role of persons receiving support. The lack of rights education and empowerment supports for persons with intellectual disabilities raise concerns about the *autonomy* of these individuals, as they may not be able to access the information needed to make choices, and about their *inclusion and participation* as they will face barriers in successfully navigating the complaints system.

- See LCO Commissioned Research Paper, Kerri Joffe, ARCH, Enforcing the Rights of Persons with Disabilities In Ontario's Developmental Services System (2010).

Step**7****Do the Monitoring and Accountability Mechanisms Respect the Principles?**

In general, laws benefit from the inclusion of mechanisms to ensure accountability, transparency and effectiveness. Often there is a lack of monitoring and oversight mechanisms for systems disproportionately or exclusively affecting persons with disabilities; as a result, it is difficult or impossible to determine whether these systems are operating effectively or the degree to which persons with disabilities are subject to abuses or violations of their rights. Monitoring of the law and regular evaluation of its effects provides a strong foundation for meaningful law reform, and mechanisms for monitoring and evaluation should be built into the law from the outset. This section considers the mechanisms within laws for accountability, transparency, monitoring and evaluation.

Applying the Principles to Step 7

Note: “Law” here refers to law, policy and practice, as appropriate.

Monitoring and accountability mechanisms relate to the principles in a general way, in that without them, we cannot determine whether a particular law is respecting or advancing the principles or ensure that it is. As well, accountability mechanisms can promote the principle of *participation and inclusion* by giving persons with disabilities the opportunity to have a voice in the operation and reform of laws that affect them.

Questions for Consideration in Applying This Step

1. What mechanisms does the law include to allow those affected, including persons with disabilities, to provide feedback on the effectiveness of the law and on any unanticipated negative consequences for persons with disabilities?
2. How does the law require meaningful information about its impact and effectiveness to be systematically gathered and documented?
3. How does the law require that information about its operation and effectiveness be made publicly available?
4. How does the law ensure that those charged with implementing and overseeing the law regularly report on their activities and the effectiveness with which the law, program or policy is administered?
5. Where the law provides significant discretion to those charged with its implementation, what additional reporting and monitoring mechanisms does it include to ensure that this discretion is exercised consistently, fairly, transparently and in a principled manner?
6. How does the law require regular review of its goals, to determine whether they are still meaningful and appropriate?
7. How does the law require regular review of the effectiveness of its implementation and whether the aims of the law are being achieved?

8. If the law was developed as a partial response to an issue because of resource or other constraints, what mechanisms are in place to ensure that the issue is regularly reviewed and that progress is made towards better fulfillment of the law's aims?
9. How are the resources allocated to the law or policy regularly reviewed to ensure that they remain adequate and appropriate for its effective implementation?
10. Where reviews are carried out, are steps taken to act on the results of the review? Has consideration been given to making available to the public the results of significant reviews?

Applying the Framework: Examples of the Relationship Between the Principles and Monitoring and Accountability Mechanisms

Monitoring of Transitions under Individual Education Plans

Students who are determined to be "exceptional" under Ontario's *Education Act* receive Individual Education Plans (IEPs). For students aged 14 and older, the IEP must contain a plan for transitioning to appropriate post-secondary activities, including further education, work and community living. These provisions are of substantial importance in supporting the principles of *independence and autonomy* (enhancing the ability of students to make informed choices about their future and successfully transition into adulthood), as well as *social inclusion and participation* (in ensuring that students do not fall into isolation or marginalization after graduation). The transition plan is developed in consultation with the student's parent or guardian and, for those students aged 16 and older, the students themselves. The Ministry of Education sets specific standards for transition plans in IEPs, including provisions for implementing and monitoring them.

However, it appears that often transition plans exist on paper rather than in practice, in part as a result of implementation issues at the school board level. In his 2008 Report, Ontario's Auditor General noted that although transition plans are completed for exceptional students as required, there is no documentation on whether intended actions were completed and with what degree of success. There is currently no specific requirement for monitoring and evaluating transition plans, except as part of the general monitoring of IEPs. Therefore, it may be that the laudable purposes of these provisions are being only imperfectly achieved, and that the progress towards fulfilment of the principles could be improved. A number of steps have been taken recently to improve review and monitoring of transition plans. The Ministry of Education is currently developing a Policy and Program Memorandum on Transitions in response to the Auditor General's comments, and this will require school boards to monitor the effectiveness of transition plans as part of the IEP review process. For the 2011-2012 school year, school boards have been asked to conduct a formal review of IEPs with a view to sharing best practices and promoting improvement. As well, the Ministry of Education has instituted an annual survey to monitor implementation of a number of areas affecting students with Autism Spectrum Disorder, including transition planning.

- See LCO, Final Report: A Framework for the Law as It Affects Persons with Disabilities, Ch. II.D.4.

Review of the Accessibility for Ontarians with Disabilities Act

The *Accessibility for Ontarians with Disabilities Act* (AODA) is a groundbreaking statute, long advocated for by Ontarians with disabilities, which aims to make Ontario fully accessible by 2025 through a process of accessibility standards setting, overseen by the Accessibility Directorate of Ontario. An innovative provision of the AODA is the requirement for a review and report, within four years of the statute coming into effect, and every three years

thereafter, of the effectiveness of the Act and regulations. The review must include consultation with the public and specifically with persons with disabilities.

Charles Beer completed the first review of the AODA in February 2010, submitting a report that comprehensively reviewed developments under the AODA to that date and set out a number of recommendations for strengthening the Act and its implementation. The review was notable for its open and participatory process, as well as its commitment to accessibility. It included extensive public outreach, close to 90 public meetings, four roundtable sessions, a survey questionnaire and a call for written submissions that resulted in 58 briefs.

The monitoring process therefore not only provided an effective mechanism for assessing the degree to which the AODA has succeeded in advancing the principles, but in itself has embodied the principles by respecting the *dignity and worth* of the perspectives of persons with disabilities and promoting their *social inclusion and participation* in the review.

- See Report of the Independent Review of the Accessibility for Ontarians with Disabilities Act (February 2010).

Step

8

Addressing the Results of the Evaluation in Steps 1 to 7: Is the Law True to the Principles?

Having evaluated the various aspects of the law through Steps 1 to 7, the final Step is to gather the results, evaluate the degree to which the law is true to the principles, and develop strategies for addressing any identified shortfalls.

Applying the Principles in Step 8

Note: “Law” here refers to law, policy and practice as appropriate.

It is not uncommon for laws to fall short of fully promoting or achieving the principles for persons with disabilities. After all, we live in a world of competing policy priorities and limited resources. However, the principle of *dignity and worth* reminds us that these shortfalls should occur only where truly unavoidable, and not as a matter of course or without serious consideration. Where an evaluation identifies a shortfall, it should be carefully assessed, and any determination that a shortfall cannot be immediately rectified should be made in a transparent and accountable manner.

International human rights law recognizes that not all rights can be immediately and fully attained: the legal principles of progressive realization and “respect, protect, fulfill” come into play in these circumstances, and can be applied in the context of this *Framework*. While laws may not completely fulfill all the principles, actual contraventions of the principles should be immediately addressed as a matter of priority. Further, where it is not possible to attain the principles immediately and fully in either the substance or the implementation of a particular law, concrete plans should be developed, with clear accountability and timelines, for fully realizing the principles over time.

Questions for Consideration in Applying This Step

1. In addition to meeting minimum standards required by the *Charter*, the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*, has consideration been given to whether going beyond these standards would both be feasible and would further promote the achievement of the principles?
2. For new laws, how does the law, overall, represent progress towards the full attainment of the principles?
3. Are there areas in which the substance or implementation of the law contravenes the principles? If so, what steps will be taken to ensure that the law does not undermine the principles?
4. Have issues or areas been identified where the principles are in tension? If so, has the tension been analyzed as proposed in Step 3, and the analysis and response clearly articulated and documented?
5. Are there areas in which the substance or implementation of the law falls short of fully achieving the principles? If so, can steps be taken to ensure immediate complete fulfillment of the principles?
6. If complete fulfillment of the principles cannot be achieved immediately, for example because of a shortage of resources, does the law move as far as possible at this time towards the fulfillment of the principles? Has a clear plan been made to address the shortfall over time? Does the plan include clear timelines and accountability for implementation?

7. Have the results of the evaluation and the decisions made in response to the results been fully documented and considered?
8. Are the results of the evaluation available to persons with disabilities, to the extent possible while respecting rights to confidentiality and privacy?

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