

A Framework for the Law as It Affects Persons with Disabilities

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

FINAL REPORT

September 2012



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

A Framework for the Law as It Affects Persons with Disabilities

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

FINAL REPORT

SEPTEMBER 2012

Available online at www.lco-cdo.org

Disponible en français

ISBN: 978-1-926661-49-0

This publication may be cited as follows: Law Commission of Ontario, A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice (Toronto: September 2012)

ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. It is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

LAW COMMISSION OF ONTARIO FINAL REPORTS

Available in hard copy or at www.lco-cdo.org

A Framework for the Law as It Affects Older Adults (April 2012)

Modernization of the *Provincial Offences Act* (August 2011)

Joint and Several Liability Under the *Ontario Business Corporations Act* (February 2011)

Division of Pensions Upon Marriage Breakdown (December 2008)

Fees for Cashing Government Cheques (November 2008)

DISCLAIMER

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Upper Canada or of our supporters, the Law Deans of Ontario.

Law Commission of Ontario
2032 Ignat Kaneff Building,
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3

Tel: (416) 650-8406
TTY: 1 (877) 650-8082
Fax: (416) 650-8418
General E-mail: LawCommission@lco-cdo.org
www.lco-cdo.org

FOREWORD

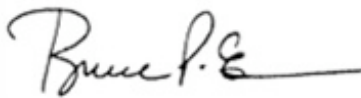
Persons with disabilities have often been marginalized because law and policy has failed to respond to particular needs. Significant steps have been taken in Ontario to address the situation of persons with disabilities, most notably by the *Accessibility of Ontarians with Disabilities Act*. Yet the project of inclusion remains to be completed. It is important that *all* law, policy and practice take account of the particular and diverse needs of persons with disabilities, whether directed specifically at persons with disabilities or indirectly affecting them. For this reason, in November 2007, the Board of Governors of the Law Commission of Ontario approved a project to develop a framework for law, policy and practice as it affects Persons with Disabilities. The resulting framework, a sister framework to *A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*, is meant to provide a systematic way to guide inclusion of the needs and experiences of persons with disabilities in the review and development of law, policy and practice.

Based on six principles and with substantive equality as an overarching value, the resulting *Framework* consists of questions and examples to assist in its application. We believe that the *Framework* will be helpful not only to policy-makers, those who develop laws, and those who interpret the law, but also to private actors who develop policies and programs that affect persons with disabilities, as well as to advocates and service providers.

As with our *Older Adults* project, the Law Commission offers the *Framework* itself in a separate volume and intends to develop a “plain language” version that will make its application easier.

The LCO has been pleased to contribute this *Report*, including the *Framework*, to ongoing initiatives in Ontario and elsewhere to include persons with disabilities as full participants in our society, in the pursuit of enhancing their lives and enriching society as a whole through their contributions.

The Board of Governors approved this *Final Report* in September 2012. The Board’s approval reflects its members’ collective responsibility to manage and conduct the affairs of the Law Commission, and should not be considered an endorsement by individual members or by the organizations to which they belong or which they represent.



Bruce Elman, Chair, Board of Governors



Patricia Hughes, Executive Director

The following individuals contributed to this project:

LCO Staff

Lauren Bates (Head of Project)

Sue Gratton (Research Lawyer)

Kirsten Manley-Casimir (Research Lawyer)

Osgoode Hall Law School Scholar in Residence and Special Project Advisor

Professor Roxanne Mykitiuk

Student Researchers

Sara Abraham (University of Toronto, Faculty of Law)

Daniel Bassili (Osgoode Hall Law School)

Jordan Birenbaum (University of Toronto, Faculty of Law)

Maria Pia Brunello (University of Windsor, Faculty of Law)

Jason Burns (University of Windsor, Faculty of Law)

Sapna Butany-Goyal (Osgoode Hall Law School)

Denise Cooney (University of Toronto, Faculty of Law)

Feruza Djamalova (University of Toronto, Faculty of Law)

Courtney Evans (Osgoode Hall Law School)

Zohra Hasham (Osgoode Hall Law School)

Michael Kostiuk (Osgoode Hall Law School)

Amanda Letourneau (Osgoode Hall Law School)

Stephanie Ligor (University of Ottawa, Faculty of Law)

Ari Linds (University of Ottawa, Faculty of Law)

Safina Lalani (Osgoode Hall Law School)

Michael Raykher (University of Maryland, Faculty of Law)

Julia Rendell (University of Toronto, Faculty of Law)

Chad Travis (Osgoode Hall Law School)

Members of the Project Advisory Group

Renee Brady, Northwestern Independent Living Services

Cam Crawford, Canadian Association for Community Living

Catherine Frazee, Ryerson University, School of Disability Studies

Ryan Fritsch, Psychiatric Patients' Advocacy Office

Raihanna Hirji-Khalfan, Ethno-Racial Persons with Disabilities Coalition of Ontario

Brenda Lewis/Robert Thompson, Ministry of Community and Social Services

Gary Malkowski, Canadian Hearing Society

Mary Marrone, Income Security Advocacy Centre

Nyranne Martin, Centre for Addiction and Mental Health

Fran Odette, Springtide Resources

Ivana Petricone, ARCH Disability Law Centre

Jeff Poirier, Ontario Human Rights Commission

Doug Surtees, University of Saskatchewan, College of Law

Diane Wagner, Learning Disabilities Association of Ontario

Kimberley Wilson, Canadian Coalition for Seniors' Mental Health

Eta Woldeab/Martha Viveros/Chavon Niles, Ontario Council of Agencies Serving Immigrants

Members of the Board of Governors

Bruce P. Elman, Member-at-large (from May 2012); Chair of the Board of Governors (from September 2012)

Larry Banack, Member-at-large, Chair of the Board of Governors (July 2009-August 2012)

Mark L. Berlin, Member-at-large (from January 2012)

Gwen Boniface, Law Foundation of Ontario (from September 2011)

Christopher D. Bredt, Law Society of Upper Canada (from March 2008)

Nathalie Des Rosiers, Member-at-large (from November 2009)

Adam Dodek, Ontario Law Deans (from July 2011)

Neil Finkelstein, Law Society of Upper Canada (January 2007-February 2008)

William Flanagan, Ontario Law Deans (January 2009-October 2009)

Stephen Goudge, Judiciary (from September 2009)

Neena Gupta, Member-at-large (July 2007-January 2012)

Marie Henein, Member-at-large (July 2007-May 2009)

Ian Holloway, Ontario Law Deans (November 2009-May 2011)

Frank Iacobucci, Law Foundation of Ontario (January 2007-June 2011)

Russell Juriansz, Judiciary (July 2008-September 2009)

Mark Leach, Ministry of the Attorney General (from June 2012)

Yves Le Bouthillier, Ontario Law Deans (January 2007-December 2008)

Jinyan Li, Osgoode Hall Law School (July 2009-May 2010)

James C. MacPherson, Judiciary (January 2007-June 2008)

Patrick Monahan, Osgoode Hall Law School, Chair of the Board of Governors (January 2007-June 2009)

Maria Páez Victor, Member-at-large (from January 2012)

Andrew Pinto, Member-at-large (from July 2012)

Murray Segal, Ministry of the Attorney General (January 2007-May 2012)

Lorne Sossin, Osgoode Hall Law School (from June 2010)

Members of the Research Advisory Board

Patricia Hughes, *ex officio*, Executive Director (from September 2007)

Jeffrey B. Berryman, University of Windsor, Faculty of Law (July 2007-December 2011)

Jamie Cameron, Osgoode Hall Law School (July 2007-June 2009)

Brenda Cossman, University of Toronto, Faculty of Law (July 2007-October 2008)

Tony Duggan, University of Toronto, Faculty of Law (October 2008-September 2011)

Markus Gehring, University of Ottawa, Faculty of Civil Law (June 2009-December 2011)

Sébastien Grammond, University of Ottawa, Faculty of Civil Law (July 2007-June 2009)

Kai Hildebrandt, University of Windsor, Department of Communication Studies (March 2008-June 2011)

Berend Hovius, University of Western Ontario, Faculty of Law (June 2008-December 2011)

Lesley Jacobs, York University, Faculty of Liberal Arts & Professional Studies (October 2008-December 2011)

Erik Knutsen, Queen's University, Faculty of Law (July 2007-December 2011)

James Leal, Law Society of Upper Canada (July 2007-December 2011)

Roxanne Mykitiuk, Osgoode Hall Law School (from June 2009-December 2011)

Mark Perry, University of Western Ontario, Faculty of Law (July 2007-June 2008)

Anne Marie Predko, Ministry of the Attorney General (July 2007-December 2011)

Carol Rogerson, University of Toronto, Faculty of Law (September 2011-December 2011)

Anthony Vanduzer, University of Ottawa, Faculty of Common Law (November 2007-December 2011)

Janice Vauthier, Representative of the private bar (March 2008-April 2010)

The Law Commission of Ontario would also like to extend its thanks to the numerous organizations and individuals who shaped this project through their involvement in the several stages of public consultations, or through their development of the Commissioned Research Papers. A full list of contributing organizations and individuals can be found in Appendix A.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	7
A. The LCO's Project on the Law as It Affects Persons with Disabilities	7
B. The Primary Goal of the Project: Advancing Substantive Equality through Law for Persons with Disabilities	8
C. Developing the Project: The Process	9
1. Identifying and Shaping the Project	9
2. The Research Process	10
3. Lived Experience and the LCO's Public Consultations	11
D. The Sister Project: The Law as It Affects Older Adults	14
1. The Project on the Law as It Affects Older Adults	14
2. The Intersection of Impairment, Disability and Aging	14
E. Key Approaches and Concepts for the Development of the Framework	17
1. Starting Points for Developing the Framework	17
2. Key Concepts in Developing the Framework	18
3. Key Elements for a Framework	23
F. This Report and Framework	24
II. THE LAW AND PERSONS WITH DISABILITIES	27
A. "The Law as It Affects Persons with Disabilities" – What Do We Mean?	27
B. Foundational Documents for the Law as It Affects Persons with Disabilities	32
C. Understanding the Context in Which Persons with Disabilities Encounter the Law	34
D. Key Themes in the Law as It Affects Persons with Disabilities	39
1. The "Visibility" of Persons with Disabilities in the Law	39
2. Negative Attitudes, Stigma and the Law	42
3. Complexity, Overlap and Silos	48
4. Implementation and Access to Justice Issues	54
III. PRINCIPLES FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES	63
A. Adopting a Principles-Based Approach	63
B. Substantive Equality As An Overarching Value	64
C. Principles For The Law As It Affects Persons With Disabilities	65
1. Respecting the Dignity and Worth of Persons with Disabilities	66
2. Responding to Diversity in Human Abilities and Other Characteristics	71
3. Fostering Autonomy and Independence	77
4. Promoting Social Inclusion and Participation	82
5. Facilitating the Right to Live in Safety	84
6. Recognizing That We All Live in Society	87
D. From Aspiration to Application: Addressing Challenges In Applying The Principles	93
1. Incorporating Lived Experience	93
2. The "Implementation Gap" – Taking a Broad View of "the Law"	93
3. Relationships Between Principles	94
4. Addressing Evolving Realities and Recognizing Constraints	96

IV. A FRAMEWORK FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES	98
Introducing The Framework.....	98
1. Using the Framework	98
2. Definitions	99
3. Principles for the Law as It Affects Persons with Disabilities	100
4. Implementing the Principles.....	101
Applying The Framework.....	105
Step 1: How Do the Principles Relate to the Context of the Law?.....	105
Step 2: Does the Legislative Development/Review Process Respect the Principles?.....	108
Step 3: Does the Purpose of the Law Respect and Fulfill the Principles?	110
Step 4: Who is Affected by the Law and How Does This Relate to the Principles?.....	113
Step 5: Do the Processes under the Law Respect the Principles?	116
Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?	119
Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?	121
Step 8:Addressing the Results of the Evaluation in Steps 1 to 7: Is the Law True to the Principles?	124
V. APPLYING THE FRAMEWORK: THE LAW AND ACCESS TO ATTENDANT SERVICES.....	126
A. Background	127
1. The Importance of Community Support Services	127
2. Home Care and Attendant Services Supports	128
3. Meeting the Need	130
B. Ontario’s Legal Framework for Attendant Services	131
1. Overview	131
2. Home Care and Community Services Act	132
3. Ministry of Community and Social Services Act – Grants for Direct Funding	139
4. Provision of Community Support Services Under the Social Inclusion Act.....	142
C. Evaluating the Legal Framework	143
1. How Do the Principles Relate to the Context of the Law?	143
2. Does the Purpose of the Law Respect and Fulfil the Principles?	144
3. Who is Affected by the Law and How Does this Relate to the Principles?	145
4. Do the Processes Under the Law Respect the Principles?.....	146
5. Do the Complaint and Enforcement Mechanisms Respect the Principles?.....	148
6. Do the Monitoring and Accountability Mechanisms Respect the Principles?.....	151
D. Conclusion: Is the Law True to the Principles?	152
VI. NEXT STEPS	154
VII. RECOMMENDATIONS.....	156
APPENDIX A: ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT	157
APPENDIX B: SOURCES FOR THE PRINCIPLES	161
APPENDIX C: LIST OF ACRONYMS	169
ENDNOTES	170

EXECUTIVE SUMMARY

I. Introduction

While the experiences of persons with disabilities vary widely, the experience of marginalization and discrimination based on disability is common. Negative attitudes and stereotypes, manifested at both the individual and the systemic levels, as well as the tendency to overlook the very existence of persons with disabilities, create barriers for persons with disabilities across a broad spectrum of environments. This may be referred to as “ableism”. Significant efforts have been made to identify, understand and address ableism and its effects on the opportunities and experiences of persons with disabilities, with the goal of achieving a more just and equal status for persons with disabilities at all levels of society. The LCO believes that an evaluative framework for law, policy and practice that is based on an overarching value of substantive equality for persons with disabilities will make a significant contribution, and is in harmony with the Law Commission of Ontario’s (LCO) mandate to address the relevance, effectiveness and accessibility of the law.

The *Framework* developed through this project will be of assistance to those who develop laws and policies, such as legislators, policy-makers and private actors who develop policies and programs that affect persons with disabilities; to those who interpret laws, such as courts and tribunals; and to those who identify needs and advocate for reform.

The term “law” as it is used in this project refers not only to statutes, but also to regulations, to the policies through which they are applied, and to the strategies through which statutory provisions, regulations and policies are implemented and experienced by persons with disabilities. The aim of the project was to develop a principled analytical framework for this area of the law that would be used as a tool for evaluating legislative and policy initiatives that affect persons with disabilities, whether new initiatives or reforms of existing ones. The project identifies a set of principles for the law as it affects persons with disabilities as well as a set of considerations and contexts for the application of those principles, and sets out an evaluative framework for the law that is based on those principles and considerations. This resulting *Final Report* includes case examples as a way of illuminating the principles and considerations.

This project was approved by the LCO’s Board of Governors in late 2007. This was a multi-year, multi-stage project. It involved four stages of public consultation, including a very broad community consultation in 2010 that involved seventeen focus groups held across the province with groups representing a range of perspectives, experiences and contexts. It also involved extensive research, including both internal research by LCO staff and Osgoode Hall Scholar in Residence Roxanne Mykitiuk, and six commissioned research papers. The project was guided by an Advisory Group that included representatives from government, service providers, academics, lawyers, and community and advocacy organizations.

This project is closely related to the LCO’s sister project on the law as it affects older adults. The projects were similar in their aims and their methodologies, and each informed the other. As well, there is a complex relationship between impairment, disability and aging. It was important that the projects take into account both the similarities and the differences between the two groups, and resist the common tendency to conflate the two. Finally, the projects aimed to take into account those persons who fall within the scope of both projects, older persons with disabilities, whether they age *into* disability or age *with* a disability.

In developing the *Framework for the Law as It Affects Persons with Disabilities*, the LCO adopted the following starting points:

1. Understanding that access to justice requires looking beyond the clarity, efficiency and effectiveness of the law to consider normative issues;
2. Recognition of the broader social and environmental contexts of the experience of disability, and how they may affect the ways in which persons with disabilities encounter the law;
3. The importance of building on the considerable existing foundation for the law as it affects persons with disabilities, including international documents, domestic law and numerous domestic policy documents at both the federal and provincial levels;
4. The benefits of a framework based on a set of principles, which can provide guidance while remaining flexible and applicable in changing circumstances;
5. The centrality of the experiences and perspectives of persons with disabilities to the identification and application of the principles; and
6. The design of the framework as a strong foundation for further research, analysis and discussion.

II. The Law and Persons with Disabilities

The second chapter discusses the factors relevant to understanding the lives of persons with disabilities, providing an example of challenges facing young adults with disabilities as they transition to living independently. It also explains what we mean by “law” and its impact, using the example of Ontario Disability Support Program processes, and the major documents that affect the development of law or to which it must conform. Additional case studies in this chapter include the hiring of persons with disabilities to illustrate ableism and the law; accessible rental housing to show how laws interrelate with each other; access to information about the law for culturally Deaf individuals; and the monitoring and transparency of law in the case of individual education plans to assist in the transition from school to work.

Any framework for the law as it affects persons with disabilities must be based on a solid understanding of the context in which persons with disabilities encounter the law. This includes the demographic reality of disability and its effects on loved ones, including the lack of adequate supports; the diversity of the experience of disability and its relation with other aspects of identity; and the socio-economic consequences arising from education and literacy levels, employment, income security and other aspects of life and their impact on the life course of persons with disabilities.

Persons with disabilities are affected by laws of general application, such as consumer protection, family formation and dissolution, zoning, rental housing, access to information and protection of privacy, and labour relations, some of which will affect persons with disabilities or some group of persons with disabilities differently from others. If a law of general application does not take into account the particular needs of persons with disabilities, they may be inadvertently disadvantaged through the law.

There are also a very significant number of laws that are specifically targeted to persons with disabilities or some group of persons with disabilities that aim to recognize and address particular circumstances connected to the experience of disability. Examples include the Ontario Disability Support Program, the special education provisions under the *Education Act*, laws related to decision-making capacity and guardianship, and many others. Some of these laws are implemented through lengthy policies and large bureaucracies; many have a profound effect on the opportunities and well-being of persons with disabilities.

The implementation of laws is as important as their substance: laws may be beneficial in intention and on paper, but in practice fall far short of their goals, or even have negative effects.

Through research and consultation, the LCO identified a number of key themes in the law as it affects persons with disabilities.

- 1. The “invisibility” of persons with disabilities in the law, both in the development of the law and in its content:** Without participation by persons with disabilities in the development of laws, laws may not take into account the ways in which those with disabilities may be differently circumstanced, and so may disadvantage persons with disabilities or be ineffective in meeting their needs.
- 2. Negative attitudes, stigma and the law:** These attitudes may be direct or subtle, manifested in individual interactions or in the content or implementation of laws, policies and practices. One example is paternalism, resulting in removing decisions from persons with disabilities “for their own good”.
- 3. Complexity, overlap and silos:** The law as it affects persons with disabilities is frequently fragmented and enormously complicated, presenting challenges, both for persons with disabilities and for service providers and advocates who attempt to assist individuals in navigating systems. Well-intentioned laws may be effectively inaccessible for persons with disabilities who do not have the supports and resources necessary to understand and make use of them. Persons with disabilities may not be able to make meaningful choices because they are not aware of the options available to them, or perceive them to be too difficult to exercise.
- 4. Implementation and access to justice issues:** Laws may be positive on paper, but may fall short of their goals in practice for several reasons, including barriers that persons with disabilities and other marginalized groups may face when attempting to obtain information about their rights and responsibilities under the law; failure to ensure that processes accommodate disability-related needs; reliance on self-advocacy to navigate complex systems; power imbalances between persons with disabilities and service providers; limited resources; and a lack of monitoring and accountability mechanisms.

III. Principles for the Law as It Affects Persons with Disabilities

Chapter III explains the benefits of a principles-based approach to developing and reviewing law, policy and programs and why substantive equality is an overarching value and not a specific principle. It discusses in detail the six principles that are the foundation of the *Framework*. Case examples in this chapter examine racialized individuals and the mental health system; sexuality and persons with disabilities; community treatment orders for persons with mental health disabilities; and Aboriginal older adults, access to community care and on-reserve communities.

The LCO’s *Framework* centres on a set of 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 also encourage the government to take positive steps to secure the well-being of persons with disabilities.

Each of the principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. There is no hierarchy among the principles, and the principles must be understood in relationship with each other; they may reinforce each other or may be in tension with one another as they apply to concrete situations. The *Report* explains each of the following principles in detail:

- 1. Respecting the Dignity and Worth of Persons with Disabilities:** 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:** All people exist along a continuum of abilities in many areas, abilities vary along a person's lifecourse and each person with a disability is unique in needs, circumstances and identities. Persons with disabilities also experience multiple and intersecting identities that may act to increase or diminish discrimination and disadvantage.
- 3. Fostering Autonomy and Independence:** Persons with disabilities must be able to make choices about issues 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:** Society should be structured to promote 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.

The application of the principles must be grounded in the lived experience of persons with disabilities, including attention to how the experiences of persons with disabilities are influenced by their life course, and on viewing persons with disabilities as whole persons rather than as sets of separate issues.

The circumstances of persons with disabilities will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of the experience of disability continue to evolve, and new perspectives emerge. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

Despite desires to implement all the principles to the fullest extent possible, there may be constraints that limit the ability of law and policy makers to do so, including policy priorities or funding limitations among others. Therefore it may be necessary to take a progressive realization approach to the full implementation of the principles. This involves concrete, deliberate and targeted steps, implemented within a relatively short period of time with a view to ultimately meeting the goal of full implementation. Such an approach mandates a continual, if gradual, movement forward towards the ultimate goal of substantive equality.

As well, attention must be paid to the relationships between principles. 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. Careful thought must be given to analyzing and responding to this tension, by being sensitive to the contexts in which these tensions arise, as well as their larger social context, and the overarching value of substantive equality to which the principles were intended to respond.

IV. A Framework for the Law as It Affects Persons with Disabilities

Chapter IV is the *Framework*, which is also available as a freestanding document. It explains how to use the *Framework*, factors important to its application and an eight step process for applying it and thereby evaluating the law, using questions to guide the application. The chapter also includes examples of applying the principles at the first seven steps of evaluation.

Chapter IV builds on the principles and considerations identified in the preceding chapters to create the step-by-step framework for evaluating laws, policies and practices in their affect on persons with disabilities. For each step, the *Framework* provides context, examples and questions to help assess the law in light of the principles. These steps are as follows:

- Step 1:** How Do the Principles Relate to the Context of the Law?
- Step 2:** Does the Legislative Development/Review Process Respect the Principles?
- Step 3:** Does the Purpose of the Law Respect and Fulfill the Principles?
- Step 4:** Who Does the Law Affect and How Does This Relate to the Principles?
- Step 5:** Do the Processes under the Law Respect the Principles?
- Step 6:** Do the Complaint and Enforcement Mechanisms Respect the Principles?
- Step 7:** Do the Monitoring and Accountability Mechanisms Respect the Principles?
- Step 8:** Assessing the Results of the Evaluation: Is the Law True to the Principles?

V. Applying the Framework: The Law and Access to Attendant Services

This Chapter illustrates the application of the *Framework* through consideration of a current issue in the law as it affects persons with disabilities: the legal framework through which persons with disabilities receive supports in the community for needs related to activities of daily living. Such services are sometimes referred to as “attendant services”. The intent of the illustration is not to provide a comprehensive description of this area of the law or to propose specific reform initiatives, but to reflect on this area of the law in light of the principles and considerations identified in the *Report*.

Attendant services are essential for some persons with disabilities to maintain the ability to live in the community; without such services, the only option may be some form of institutionalized living. Therefore, access to these services can be essential to all aspects of participating in and being included by the community. Attendant services in Ontario are provided through a number of laws and programs, directed at various target groups and using different delivery models. While the purposes of the law are on the whole consistent with the principles, particularly the principle of inclusion and participation, there are a number of concerns with the implementation, so that the law, as a whole, does not appear to meet its potential for advancing substantive equality for persons with disabilities. Overall, there is a shortage of resources, leading to excessive waitlists and rationing of services. There are shortfalls in communication and information requirements, so that persons with disabilities may have difficulty in accessing information to make choices about available services. The complaint and enforcement mechanisms are confusing and there is a lack of recourse to an independent third party to resolve issues. Nor does the system have an effective means of identifying and addressing systemic issues.

VI. Next Steps

The LCO has disseminated the *Report and Framework* broadly to a wide range of interested organizations and individuals and intends to develop simplified materials related to the *Framework*.

The *Report and Framework* should not be considered, and were not intended to be, a final word on the matter, but rather, the foundation of further research, discussion and analysis.

The LCO itself is applying this *Framework*, as well as the results of the sister project on *The Law as It Affects Older Adults*, to a law reform project focussed on Ontario's laws related to capacity and guardianship, that was begun in summer 2012.

VII. Recommendations

This Chapter briefly sets out the recommendations of the LCO for the future use of the *Framework* by a range of public and private actors and its review and evaluation after a period of seven years.

I. INTRODUCTION

A. The LCO's Project on the Law as It Affects Persons with Disabilities

This is the *Final Report* for the Law Commission of Ontario's (LCO) project on the law as it affects persons with disabilities, concluding this multi-stage, multi-year project.¹

...[A]lmost everyone will be personally affected by disability at some point during their life, whether because they have or will develop a disability, or through the experiences of a loved one. This is a reality which profoundly shapes the ways in which individuals encounter the law, and to which law and policy-makers have, over the past forty years, increasingly attempted to respond.

The experience of disability has a far reaching impact on the lives of Ontarians. According to 2006 Statistics Canada figures, over 15 per cent of Ontarians report living with an activity limitation, and the rate of disability is increasing.² This means that almost everyone will be personally affected by disability at some point during their life, whether because they have or will develop a disability, or through the experiences of a loved one. This is a reality which profoundly shapes the ways in which individuals encounter the law, and to which law and policy-makers have, over the past forty years, increasingly attempted to respond. There have been considerable advances as law and policy have more frequently aimed to reflect and address the needs, circumstances and aspirations of persons with disabilities. Still, there is much to be done. The myriad of laws that affect persons with disabilities and aim to address disadvantage may be difficult to access and implement, and so may not have the intended effect. Persons with disabilities continue to disproportionately live in low-income, and to experience barriers to education, employment, housing, and personal safety and security. The combined effect of these barriers is, for many persons with disabilities, social and economic marginalization.

This project aims to contribute to the ongoing development and evolution of the law as it affects persons with disabilities. It received its original inspiration in part from a proposal from the then Executive Director of ARCH Disability Law Centre for the LCO to address issues relating to persons with intellectual and mental health disabilities, particularly personal autonomy and supportive decision-making, and dignity and citizenship in one's own home. The LCO also received proposals related to other areas of disability law. Considering these proposals and the broader landscape surrounding the law and the experience of disability, in late 2007, the LCO's Board of Governors approved a project to develop a holistic, coherent framework for the law as it affects persons with disabilities.

While many laudable legislative initiatives related to disability have been developed in recent years, there was a sense that the law in this area was complex, contradictory, fragmented and not necessarily achieving the goals set for it. Because laws tend to be developed in response to immediate or particular needs, the impact and interrelationship of a particular law with other laws and policies may not have been assessed against clear standards. The project was therefore not intended to focus on reform of any one specific issue; rather, its purpose was to develop a principled analytical framework that could be used as a tool for shaping new legislative and other initiatives that affect persons with disabilities or reforming current law and policies.

The project identifies a set of principles for the law as it affects persons with disabilities, sets out an evaluative framework for the law that is based on those principles, and applies that framework to the legislative regime governing attendant care for persons with disabilities.

Work on the project commenced in early 2009. This multi-stage project included the distribution of two consultation papers and an interim report, four stages of public consultation, and the funding of six external research papers, as well as considerable internal research, including research on a number of transition points in the lives of persons with disabilities.

The framework developed through this project will be of assistance to those who develop laws and policies, such as legislators and policy-makers, and private actors who develop policies and programs that affect persons with disabilities; to those who interpret laws, such as courts and tribunals; and to those who identify needs and advocate for reforms.

While the experiences of persons with disabilities vary widely, the experience of marginalization and discrimination based on disability is common. Negative attitudes and stereotypes, as well as the tendency to overlook the very existence of persons with disabilities, create barriers for persons with disabilities across a broad spectrum of environments.

As is discussed at more length later in the next chapter, this project is closely related to the LCO's similar project on the law as it affects older adults, the *Final Report* for which was released in July 2012.³ There is an under-examined relationship between aging, impairment and disability, so that the projects intersected in important ways. As well, given the similarities in the nature of the projects, there were many opportunities for the projects to inform and support each other. Therefore, while there are many areas where the two projects diverged, they were developed in tandem, and have strengthened each other.

B. The Primary Goal of the Project: Advancing Substantive Equality through Law for Persons with Disabilities

While the experiences of persons with disabilities vary widely, the experience of marginalization and discrimination based on disability is common. Negative attitudes and stereotypes, as well as the tendency to overlook the very existence of persons with disabilities, create barriers for persons with disabilities across a broad spectrum of environments. These attitudes may manifest at the individual level. Importantly, they may also significantly shape structures, systems and institutions – including laws and legal institutions. These attitudes and stereotypes are often referred to as “ableism”.

Over the past several decades, significant efforts have been made to identify, understand and address ableism and its effects on the opportunities and experiences of persons with disabilities, with the goal of achieving a more just and equal status for persons with disabilities at all levels of society.

This goal of achieving substantive equality for persons with disabilities has been articulated in many important legal and policy documents, including the United Nations *Convention on the Rights of Persons with Disabilities*,⁴ the Canadian *Charter of Rights and Freedoms*,⁵ the Ontario *Human Rights Code*⁶ and *In Unison*.⁷

The achievement of substantive equality for persons with disabilities requires efforts from all sectors of society, and a multi-faceted approach. However, the LCO believes that this evaluative framework for law, policy and practice, based on the overarching value of substantive equality, makes a significant contribution to its realisation in the development of law, and is in harmony with the LCO's mandate to address the relevance, effectiveness and accessibility of the law. Therefore, considerations related to ableism and substantive equality are central to the LCO's development of a framework for the law as it affects persons with disabilities, and to this *Final Report*.

C. Developing the Project: The Process

1. Identifying and Shaping the Project

By its nature, this Project is very broad in scope. Given the wide range of Ontario laws and policies that affect persons with disabilities in areas as diverse as the legal system, employment, income support, transportation, the built environment, health law, caregiving supports, education and mental health, it was a significant task to comprehensively identify the current legal framework for persons with disabilities, the principles and assumptions that underlie it, and the way in which it has been operationalized, let alone develop a principled basis for reforming and developing this area of law.

The achievement of substantive equality for persons with disabilities requires efforts from all sectors of society, and a multi-faceted approach.

The LCO therefore commenced this project with a two-part preliminary consultation. The aim of the preliminary consultation was to assist in defining the scope of the project, determining foundational approaches to the issues raised, and identifying preliminary or working principles.

The LCO conducted a series of in-person interviews with key organizational stakeholders, including advocacy and community organizations, legal professionals, and experts and academics. Concurrently, the LCO developed for public release a preliminary consultation paper.⁸ This Paper outlined some of the key conceptual approaches to disability, and how they have evolved over time. It examined definitions of and approaches to disability found in key international documents, influential Canadian policy frameworks and demographic research. It also provided a brief overview of Ontario legislation relating to disability and the types of approaches to disability used in these statutes and regulations. Lastly, it raised questions for consideration in adopting approaches to the law and disability.

In early 2010, the LCO formed an *ad hoc* Project Advisory Group, consisting of representatives of government, the legal profession, academics, and various advocacy and community organizations. The purpose of the Advisory Group was to provide the LCO with advice on public consultations and on the substance of the project. It met on a regular basis from early 2010 until the end of the project in mid-2012. The Advisory Group provided the LCO with advice and practical assistance with consultations, input on the structure and format of the *Framework*, and considerable substantive expertise towards the development of the Consultation Paper and the *Interim* and *Final Reports*.

The LCO is very grateful for the work of the Project Advisory Group: this project could not have been successfully completed without it.

2. The Research Process

Given the size of this project, considerable research was required. Much of the foundational research was conducted internally, by LCO staff and by student researchers and *pro bono* students. In addition, three major research initiatives were undertaken as part of this project.

Osgoode Hall Law School Scholar in Residence: Professor Roxanne Mykitiuk of Osgoode Hall Law School, an expert in disability law, served as Scholar in Residence during winter 2009. Her research focused on identifying, analyzing and understanding sources for principles for the law as it affects persons with disabilities, including reviewing relevant caselaw, international documents and academic sources. This work significantly shaped the project and provided the groundwork for the identification for the principles. Following the completion of her time as Scholar in Residence, Professor Mykitiuk remained involved in the project as Special Advisor. She has generously given her time and expertise by assisting with the selection of Commissioned Research Papers, the development of the community consultation, and reviewing the LCO's consultation paper and *Framework*.

There is a very extensive array of laws and policies, federal, provincial and municipal, specifically targeted to persons with disabilities. Further, all laws of general application by definition affect persons with disabilities as well, sometimes differently or disproportionately compared to their peers who are not living with a disability.

Commissioned Research Papers: Based on the preliminary research and consultation, the LCO identified some principles and starting approaches to developing the *Framework for the Law as It Affects Persons with Disabilities*. In early 2010, the LCO issued a Call for Papers, the objective of which was to obtain expert input on the meaning and application of principles to such a framework, as well as to create critical debate about law reform and promote scholarly research in the area of the law as it affects persons with disabilities. The LCO funded two types of papers. Case Study Papers addressed a central issue related to the law as it affects persons with disabilities by considering how the preliminary principles might be applied in the context of the particular issues in the law as it affects persons with disabilities. Implementation Papers focussed on the practical challenges of implementing laws, policies and programs that both respect the principles and are effective. Six research papers were completed through this Call for Papers, which are listed in Appendix A to this *Final Report*.⁹ The Commissioned Research Papers contributed to the analysis throughout the *Final Report*, and in some cases form the basis for the extended examples in the *Framework*.

Transitions Research: A framework for the law as it affects persons with disabilities must be based on an understanding of patterns and issues in that law, something that may be difficult to achieve due to the extent and complexity of the law. There is a very extensive array of laws and policies, federal, provincial and municipal, specifically targeted to persons with disabilities. Further, all laws of general application by definition affect persons with disabilities as well, sometimes differently or disproportionately compared to their peers who are not living with a disability. Finally, the laws as they appear on paper may differ from laws as they are actually implemented, and the law may affect various groups of individuals with disabilities differently.

The LCO's 2010 community consultations, as well as some key institutional stakeholders, identified transition points as a key issue for the relationship of persons with disabilities with the law. Persons with disabilities generally want to move through their lives in a way that is similar to that experienced by persons who do not identify themselves as having a disability. However, they often find themselves impeded in moving through the standard life course – in transitioning from education to work, from living with parents to independent living, to finding a life partner and starting a family. Some of the barriers to these transitions are legal barriers.

Persons with disabilities generally want to move through their lives in a way that is similar to that experienced by persons who do not identify themselves as having a disability. However, they often find themselves impeded in moving through the standard life course – in transitioning from education to work, from living with parents to independent living, to finding a life partner and starting a family. Some of the barriers to these transitions are legal barriers.

Persons with disabilities may also face barriers at other types of transition points – for example, in moving between various systems. The lives of persons with disabilities are heavily regulated, through elaborate systems of interlocking laws and government policies. However, there is frequently a lack of coordination between the various laws and programs. Two common examples are the movement between social assistance and employment, and between the criminal justice and mental health systems. The law may not treat the individual with a disability as a whole person, so that programs intended to assist persons with disabilities may actually work against each other in a particular case.

A third type of transition point is where individuals move in and out of the status or experience of disability. Some disabilities are episodic – mental health disabilities are a good example. Other disabilities are temporary, or occur later in life. Individuals may have difficulty moving in and out of systems that are intended to assist persons with disabilities, but are based on a model of permanent, stable impairment.

Studying transition points allowed the LCO to understand the operation of the law from the perspective of the lived experience of persons with disabilities, and to approach it in a holistic fashion, as well as offering the opportunity to identify a somewhat representative sampling of the numerous legal issues that shape the lives of persons with disabilities and thereby to identify broader themes that can inform the project more generally.

The LCO therefore examined several transition points reflecting a range of legal issues, types of law, kinds of transitions, social areas and stages in the life course for persons with disabilities. This research forms the foundation of most of the Case Examples that are interwoven throughout this *Final Report*.

3. Lived Experience and the LCO's Public Consultations

Public consultations are essential to the law reform process. In addition to providing valuable sources of information not otherwise available, public consultation promotes the LCO values of transparency, accountability, open-mindedness, diversity, inclusiveness and collaboration.

Purposes of Public Consultation: One of the key themes emerging from the very outset of this project was the “implementation gap”, where laws intended to be

It was clear that, to understand how laws shape the lives of persons with disabilities and how they might be better designed or implemented, it would be essential to have a thorough understanding, not only of the laws as designed, but of the laws as they are actually understood and experienced by persons with disabilities.

beneficial for persons with disabilities either fall significantly short of their intended objectives or have unintended negative effects. It was clear that, to understand how laws shape the lives of persons with disabilities and how they might be better designed or implemented, it would be essential to have a thorough understanding, not only of the laws as designed, but of the laws as they are actually understood and experienced by persons with disabilities. Public consultation was therefore an essential mechanism, not only for ensuring that the principles and the *Framework* resonated with the values and aspirations of persons with disabilities, but also for understanding how this area of law works in practice. Public consultation was therefore central to the LCO's research agenda.

Through the LCO's public consultations, persons with disabilities and the organizations that serve, represent or advocate for them, shared with the LCO a massive amount of information about their lives and their experiences with the law, as well as their frustrations and hopes for the future, and their recommendations for meaningful change. LCO staff were profoundly moved by the stories of hardship and resilience that they heard from persons with disabilities, and the results shaped every aspect of the project. Service providers and government representatives assisted us in understanding the vast and intricate web of laws, programs and policies affecting persons with disabilities and the challenges in providing meaningful and effective services for this group, particularly in the current economic climate.

Principles for the Law as It Affects Persons with Disabilities and the Public Consultation Process: It was essential that, to the degree possible, the LCO's own project conform to the principles that it has identified for the law as it affects persons with disabilities. This means, in part, that it was essential that the process for developing the *Framework*

- Respect the value of the perspectives and experiences of persons with disabilities;
- Understand and incorporate the diversity among persons with disabilities;
- Ensure that persons with disabilities have a significant role in the process, and that their voices are heard throughout;
- Ensure that the process is inclusively designed and meets the accessibility needs of persons with disabilities;
- Protects the privacy and security of those who participate in the process; and
- Recognize that persons with disabilities are members of the broader society.

This shaped the role of consultation in the project, as well as the ways in which consultations were carried out.

Stages of Public Consultation: As noted above, in early 2009 the LCO conducted preliminary consultations to assist in shaping the project. A second and much more extensive set of consultations took place in the spring and summer of 2010. At that time, the LCO conducted cross-Ontario public consultations with persons with

disabilities, and with organizations that serve, represent or advocate for persons with disabilities. The LCO held seventeen focus groups in five locations across Ontario, including focus groups with Deaf Ontarians, Aboriginal and racialized Ontarians with disabilities, and persons living with mental health disabilities. The LCO also received responses to survey questionnaires from persons with disabilities, and conducted several one-on-one interviews.

In order to organize many of the focus group discussions, the LCO partnered with several organizations. Ethno-Racial People with Disabilities Coalition Ontario (ERDCO) partnered with us and provided a co-facilitator to run the session with racialized persons with disabilities in Toronto. Similarly, the Canadian Hearing Society helped find participants for the two sessions with persons who identify as culturally Deaf and those who are deaf, deafened or hard of hearing. In addition, the Thunder Bay Indian Friendship Centre and the N'Amerind Friendship Centre in London found participants and provided support to enable us to speak with Aboriginal Elders for those two specialized focus groups. Without the support of these and other community partners, the LCO would not have been able to reach out as effectively to individuals with disabilities, or to provide appropriate and comfortable settings for discussions.

The LCO held seventeen focus groups in five locations across Ontario, including focus groups with Deaf Ontarians, Aboriginal and racialized Ontarians with disabilities, and persons living with mental health disabilities. The LCO also received responses to survey questionnaires from persons with disabilities, and conducted several one-on-one interviews.

The LCO aimed to make the consultations as accessible as possible. It therefore ensured that consultations were conducted in accessible facilities and that accommodations such as personal support workers, ASL interpretation and real-time captioning were provided. Communications were made in accessible formats, including Braille and large-print. As well, the LCO reimbursed individual participants for expenses and provided honoraria. Some focus groups were specialized to create a more comfortable, accessible or culturally appropriate atmosphere for participants to share their thoughts and experiences.

While the 2010 consultations were a success overall, and received strong positive feedback from participants, there were some limitations. Because the disability community in Ontario is so diverse, there are many perspectives that we were not able to access during our focus group consultations, either because we were not able to hear from persons with disabilities from particular identity groups or from particular geographical locations. For example, despite significant efforts, the LCO was not able to successfully organize a focus group for francophones with disabilities. Limitations also arose as a result of the time limits for our consultations, stemming from the timeline constraints related to our project.

As well, the use of a focus group format for much of the consultations meant that the LCO heard disproportionately from those who were strong self-advocates and comfortable with speaking in a group setting. Further, it meant that some issues were not fully discussed. For example, concerns regarding stigma and negative attitudes towards persons with disabilities were raised mainly through individual interviews, and there was no discussion in the focus groups regarding sexuality and persons with disabilities.

Based upon the results of the 2010 community consultations, the Commissioned Research Papers and the LCO's internal research, the LCO developed a *Consultation Paper* which was released in the late summer of 2011.¹⁰ The purpose of the *Consultation Paper* was to synthesize the results of the research and consultations that had been completed to date, and to identify the key questions to be addressed to develop the proposed Framework.

Following the completion of the Transitions Research and the fall 2011 consultations, the LCO developed an *Interim Framework*. Given the extent and multiple stages of consultation already undertaken for this project, this consultation stage was relatively short and relied heavily on written submissions and one-on-one interviews. The *Interim Framework* was revised and this *Final Report* released based on the feedback received through this final consultation.

D. The Sister Project: The Law as It Affects Older Adults

1. The Project on the Law as It Affects Older Adults

One of the other initial LCO projects approved by the Board of Governors was a project on the law as it affects older adults. The aim of that project was to develop a coherent framework for the law as it affects older persons by articulating a set of principles and questions, rooted in the lived experience of older adults, that could form the basis of a consistent analytical framework for this diverse and rapidly evolving area of the law.

Given the similarity in their aims, the project on the law and older persons and the project on the law and persons with disabilities were considered as "sister projects" and assigned to the same Project Head to ensure consistency in approach, the opportunity to learn from each project aspects that could inform the other, and appropriate consideration of overlapping issues.

Preliminary work on the Older Adults project began in the early spring of 2008 – that is, several months before work commenced on the project on law and persons with disabilities. The projects proceeded in tandem and were completed within a few months of each other. As a result, it has been possible for the two projects to build on each other. For example, because of the areas of intersection between the two projects, in a number of cases, research was applicable to both projects. The law related to capacity and guardianship, which is of significant importance for both older adults and persons with disabilities, was the basis of a Commissioned Research Paper for both projects.¹¹ The LCO's research on transition points for persons with disabilities included research on the transition of Aboriginal older adults into long-term care; this research formed a case example for both projects. Similarly, a number of papers presented at the 2010 Canadian Conference on Elder Law co-hosted by the LCO were of direct relevance to the project on the law and persons with disabilities.¹²

2. The Intersection of Impairment, Disability and Aging

There is an under-examined relationship between impairment, disability and aging. Old age is often conflated with impairment and disability, but the relationship is not so simple.

There is an under-examined relationship between impairment, disability and aging. Old age is often conflated with impairment and disability, but the relationship is not so simple.

While it is true that the incidence of certain types of impairments and health and activity limitations increases with age, it is important not to overstate their extent. For most individuals, most of their life span will be spent in good health and without significant activity limitations. In 2003, almost 40 percent of those aged 65 and older considered themselves in good or excellent health.¹³ Older persons may also be affected, not by the experience of disability *per se*, but by the perception that they will inevitably *become* disabled, and therefore will become a burden, or will be requesting expensive or administratively onerous accommodations or services.

Some persons are born with disabilities, or acquire them during adulthood and age with their disabilities. Others live without disabilities throughout childhood, youth and much of their adulthood, and acquire disabilities only as they enter old age. Members of these two groups will often have profoundly different life experiences, and will therefore experience their impairments quite differently.

It is important to acknowledge the two ways in which age and disability may intersect. Some persons are born with disabilities, or acquire them during adulthood and age with their disabilities. Others live without disabilities throughout childhood, youth and much of their adulthood, and acquire disabilities only as they enter old age. Members of these two groups will often have profoundly different life experiences, and will therefore experience their impairments quite differently. A person who is born non-hearing and who becomes part of the cultural Deaf community will have his or her social, educational and employment experiences significantly shaped by that fact. A person who is born hearing and experiences a hearing loss in old age may have the same degree of hearing loss as a culturally Deaf person, but will have been shaped by a different life experience that has affected social networks, self conceptions and frequently access to education and employment. These two hypothetical individuals with similar impairments will require different types of services and supports in old age, and will have different views of their relationship to mainstream society. The differences are highlighted by the identifying terminology distinguishing between Deaf, deafened, or hard of hearing individuals.

There are similarities in the ways in which older persons and persons with disabilities are situated in society, particularly as both groups are largely excluded from the labour market, and therefore experience structural dependency; as a result, members of both communities may not be viewed as “adults”.¹⁴ Both groups, being associated with impaired bodies and incapacity, evoke fear of vulnerability and death, and therefore are subject to social distancing. Persons with disabilities and older persons frequently experience social and locational segregation, living in specialized residential institutions, an experience that some have characterized as a kind of “social death”.¹⁵

However, there are some significant differences between the perceptions of younger persons with disabilities and those who acquire disabilities in older age. While impairment at birth or in youth is commonly characterized as aberrant, impairment and activity limitations in older age are commonly understood as “normal”, even a defining characteristic of this stage of life. As a result, older persons with impairments are often not viewed as “disabled” in the same way that younger persons with similar impairments are. The onset of impairment, along with withdrawal from the workforce, may be the most important social markers of transition to “old age”. Impairment in older age may therefore have a different impact on identity than it would have at earlier life stages.¹⁶

Considerable advances have been made in both the disability and the older people's movements in recent decades. Interestingly, however, older persons are under-represented in the disability movement, especially considering the broad experience and impact of disability on older persons, and persons with disabilities have also been marginalized in some new ways of thinking about old age. As one author notes,

There is, then, a sense in which the political strategy of the [disability] movement has sought to distance disability debates from negative associations with old age and dependency by emphasizing adult-centred values and issues. Similarly, older people's movements and movements for the Third Age have advocated 'active ageing' as a way to distance their claims from the negative imagery of disability and dependency.

In this way, the strategy of both older people's movements and disabled people's movements has been to articulate claims for recognition of adult status and citizenship by distancing their struggles from negative associations with the other. These parallel claims may well be benefiting those at the margins of inclusion (i.e., younger disabled people and older adults in their fifties and sixties) by allowing them to liberate themselves from the imagery of frailty, dependence and burden so often attached to very old people with significant impairments.¹⁷

While both groups are subject to stigmas and stereotypes, there are significant differences in the particular attitudes and barriers experienced by each group. The effect of the life course on circumstances and identities cannot be ignored – particularly for those older adults who have not experienced discrimination or marginalization until the onset of older age. The Frameworks therefore must take careful account of both the similarities and the differences, and resist the common tendency to conflate the two.

These strategies, however, run the risk of further marginalizing a very disadvantaged group: persons of advanced older age with significant impairments.

This relationship between aging, impairment and disability has had a number of implications for the development of the LCO's two projects.

There are significant parallels between the experiences of older adults with the law and those of persons with disabilities (considered as distinct groups). Both groups incorporate considerable diversity despite general assumptions of homogeneity. Both experience a range of negative attitudes and stigma, and have a disproportionate experience of disadvantage and marginalization. As well, both groups are subjects of extensive laws and bureaucracies intended to address their distinctive experiences, and so share the experience of dealing with the complexities, fragmentation and unintended barriers associated with such laws, programs and policies. There are also, of course, significant differences between the two groups. While both groups are subject to stigmas and stereotypes, there are significant differences in the particular attitudes and barriers experienced by each group. The effect of the life course on circumstances and identities cannot be ignored – particularly for those older adults who have not experienced discrimination or marginalization until the onset of older age. The Frameworks therefore must take careful account of both the similarities and the differences, and resist the common tendency to conflate the two.

At the same time, the Frameworks must be able to address those who fall within both groups – those who have aged *with* disabilities and those who have aged *into* disabilities – as well as recognizing the differences between these two experiences.

Finally, the Frameworks must reject both ableism and ageism, as well as looking for opportunities, where appropriate, to apply novel or successful concepts or approaches from one group to the other.

E. Key Approaches and Concepts for the Development of the Framework

1. Starting Points for Developing the Framework

In developing the *Framework*, the LCO has employed a number of starting points, as briefly described below.

The LCO's Mandate and Access to Justice: The LCO's mandate is, in part, to recommend law reform measures to enhance the relevance, effectiveness and accessibility of the law, and to improve the administration of justice through clarification and simplification of the law: in short, to increase access to justice. In developing a framework for the law as it affects persons with disabilities, the LCO therefore considered issues not only of consistency, clarity and efficiency, but also such questions as the following:

- Does the law address the issues of importance to this group? Does it do so in ways that are meaningful?
- Does the law effectively address the needs and circumstances of individuals with disabilities?
- What principles and approaches can best ensure that the law is effective in addressing the needs and circumstances of these individuals?
- Where the law is ineffective, do the shortfalls result from the design of the law, or from its implementation?
- What do "access to the law" and "access to justice" mean for persons with disabilities? What barriers do persons with disabilities experience in accessing the law? What are best practices for promoting access to the law for persons with disabilities?

Building on What Has Been Done: There have been many important initiatives relevant to the law as it affects persons with disabilities, some applying to persons with disabilities as a whole and others targeted to particular groups. The LCO has aimed to incorporate and, where possible, synthesize the insights and frameworks employed by these initiatives as a foundation for this project. These include the Ontario Public Service's *Inclusion Lens*,¹⁸ the *Health Equity Impact Assessment Tool* (HEIA tool) developed by the Ontario Ministry of Health and Long-Term Care,¹⁹ the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*,²⁰ the work of the Mental Health Commission of Canada and in particular the recently developed equity lens,²¹ and Disability Rights Promotion International's disability rights monitoring tools,²² among others.

A Holistic and Contextual Approach: As the LCO's *Strategic Plan* outlines, the LCO undertakes both relatively narrow, focused and technical projects as well as large, socially oriented projects that require multi/interdisciplinary approaches and broad consultation and collaboration.²³ This project falls into the second category.

There have been many important initiatives relevant to the law as it affects persons with disabilities, some applying to persons with disabilities as a whole and others targeted to particular groups. The LCO has aimed to incorporate and, where possible, synthesize the insights and frameworks employed by these initiatives as a foundation for this project.

“Ableism” is 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, and 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.

In understanding the experiences of persons with disabilities with the law, the LCO has considered not only relevant legal research, but also findings from the disciplines of social science, critical disability studies and public policy. The LCO has sought to understand the social and economic contexts in which persons with disabilities encounter and experience the law, and to find approaches which will enable law-makers and policy-makers to take these circumstances into account in designing and implementing laws and policies that may affect this group. This includes consideration of a life course approach to the experiences of persons with disabilities, as described in section 2 below.

Principles-Based Approach: As identified in the preliminary consultation on this project and supported by the response that was received,²⁴ the LCO has based the foundations of this project on a set of principles. Principles can provide a normative framework for the law and identify the goals which laws and policies ought to seek to achieve with respect to persons with disabilities. A framework that is based on principles can provide guidance while remaining flexible and applicable in changing circumstances. Identification of these principles, while important, is a starting point rather than an end point. The difficult task remaining is to develop a nuanced understanding of what these principles could and should mean in the context of the lives of individuals with disabilities, and provide a practical guide to their implementation in a legal setting.

2. Key Concepts in Developing the Framework

In developing this project, the LCO reviewed a wide range of work in the areas of social science and critical disability studies, in order to identify lenses or concepts that would support this project. Identified below are some of the key concepts which the LCO adopted and which have fundamentally shaped the way in which the project has developed. These concepts are further explored throughout this *Final Report*.

“Ableism”: A 2004 Environics Research Group Report on Canadian attitudes towards disability-related issues found that while most like to think of themselves as being open to the participation of persons with disabilities in their day-to-day activities, many expressed significant discomfort with some aspects of relating to persons with disabilities, particularly those whose disabilities affect their communications, or where the disability involved “disfigurement” or behaviour that was not considered “normal”.²⁵ Such negative attitudes and stigma form part of the basis of what some have termed “ableism”.

“Ableism” is 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, and 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. Because attitudes and stereotypes may take different forms with different disabilities, ableism may manifest differently with respect to different types of disabilities, such as mental health, sensory or intellectual disabilities.

Ableism may manifest in negative attitudes towards persons with disabilities, discomfort in their presence and efforts to avoid them. These types of negative attitudes may have profound effects on the lives of persons with disabilities, not only in their social experiences, but in efforts to find and maintain paid employment, obtain and use services, and find adequate housing. Negative attitudes and stigma associated with persons with disabilities may create significant barriers to equality, dignity and participation, perhaps greater barriers than the actual impairment itself. These attitudes may affect the development and implementation of laws and policies. An example is the persistent use of zoning bylaws and definitions to exclude supportive housing for persons with psychiatric or intellectual disabilities from particular neighbourhoods, or to create additional barriers and requirements in the approval processes.²⁶

Ableism may also result in a failure to address the real needs and circumstances of persons with disabilities. The Ontario Bar Association (OBA) has stated that

The key change that must take place, therefore, is attitudinal or philosophical. Legislators have to act on the assumption that assistance, support and protection necessary to permit persons with disabilities to achieve equality and full participation in society are required as a right and are not offered as a privilege. The assumption has to be that society as a whole will benefit when persons with disabilities are encouraged and allowed to participate fully in society at all levels.²⁷

In its work, the LCO has taken a broad approach to the definition of disability, including both the experience of socially constructed (or environmental) barriers and the embodied aspects of the experience of disability.

Manifestations of ableism in the law are discussed in Chapter II.D.2 of this *Report*.

“Disability”: There exists an extensive literature surrounding what we mean by the term “disability”.²⁸ No single definition of “disability” can capture the full range of the experiences of persons with disabilities, and understandings continue to evolve and be debated. The Supreme Court of Canada has stated that in interpreting “disability”,

...[A] multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap”.²⁹

That is, definitions of disability must recognize the diversity of experience that results from the interaction of an individual with his or her environment.³⁰ For example, the particular context – 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.

In its work, the LCO has taken a broad approach to the definition of disability, including both the experience of socially constructed (or environmental)³¹ barriers and the embodied aspects of the experience of disability. In developing its *Framework*, the LCO has considered the experiences of persons with permanent disabilities, intermittent and temporary ones, disabilities that are present at birth and those that develop late in life,

and disabilities that manifest in physical, sensory, mental, intellectual, communications or learning impairments and perceived disabilities, as well as the experience of multiple disabilities. We have been guided by what we hear from persons with disabilities themselves regarding their experiences with the law.

A note on terminology: There is ongoing development and debate in the language used to discuss persons with particular disabilities and their experiences. The LCO recognizes that there is a range of views about the most appropriate language. The LCO does not intend its use of particular terms to be construed as definitive, and defers to persons with disabilities themselves as to the most appropriate language.

“Barrier”: Persons with disabilities may encounter a wide range of barriers to the achievement of substantive equality, some of which are explored in Chapter II of this *Final Report*. As is touched on in the definition of “disability” above, while popular understandings of the experience of disability tend to focus on the impairment itself as the source of barriers, an approach to the experience of disability that takes into account its social and environmental dimensions can provide a deeper understanding of the types of barriers that persons with disabilities experience.³² These 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”: The concept of diversity was important to the development of the project, both in understanding the social aspects of the experience of disability, and in avoiding the tendency to homogenize that experience.

The implications of a focus on diversity for this project are explored at greater depth in Chapter III.C.2 of this *Report*. Briefly, humans are infinitely variable, along many measures of ability. Inevitably, there is an element of arbitrariness and social construction to the determination of what differences are considered to be impairments, and which impairments will amount to a “disability” and will be excluded from “normalcy”. An understanding of this dynamic can assist in changing the parameters of the law and policy on disability-related issues, and move towards a more inclusive approach, as described below.

Further, the identification of an individual as “disabled” often has the effect of obscuring all other aspects of an individual’s identity, whether in characteristics such as gender, sexual orientation, racialization or age, or their roles such as “employee”, “parent” or “citizen”.

...[W]hile popular understandings of the experience of disability tend to focus on the impairment itself as the source of barriers, an approach to the experience of disability that takes into account its social and environmental dimensions can provide a deeper understanding of the types of barriers that persons with disabilities experience.

As well, the experiences of individuals will differ widely depending on whether their disability is physical, sensory, psychiatric, learning, intellectual, or other. As was noted in the Government of Canada Report, *Advancing the Inclusion of Persons with Disabilities*, “[a]ll people with disabilities have common experiences of exclusion, but each type of disability may give rise to unique needs.”³³ Needs are affected by the degree of disablement as well as the type. Experiences are also affected by social attitudes and barriers affecting the various types of disabilities. For example, persons with mental health or intellectual disabilities face particularly heavy stigma.³⁴ Others may face barriers in transportation or educational systems, for example, that make participation in society very difficult, despite relatively mild levels of impairment.

“Inclusive Design”: Inclusive (or universal) design is the development of environments, products and policies to “be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. The intent of inclusive design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost.”³⁵ Inclusive design is intended to benefit people of all ages and abilities.

...[T]he identification of an individual as “disabled” often has the effect of obscuring all other aspects of an individual’s identity, whether in characteristics such as gender, sexual orientation, racialization or age, or their roles such as “employee”, “parent” or “citizen”.

The universalism model posits that all people exist along a continuum of abilities and that people’s abilities will vary along this continuum throughout their lives.³⁶ This acknowledgement of the near universality of impairment highlights the way in which the line between disability and non-disability is socially and politically constructed.³⁷ This approach demands a widening of the range of what is considered “normal” in the context of human abilities, with the result being that more flexibility and adaptation is required in social, political and physical structures.³⁸ To put this principle into action, inclusive design with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.³⁹

It is important to emphasize the differences between inclusive design and a formal equality which simply treats “likes alike” and those who are not “alike”, differently (that is, it treats everyone in the same way). While formal equality is not concerned with addressing differences that may otherwise be irrelevant, inclusive design actively takes into account difference and incorporates it into a broader mainstream.

There are, of course, limits to the ability of universalism and inclusive design to remove or prevent barriers. In some cases, individual accommodation will be required in order to ensure equal access to a building, information or a program.⁴⁰ That is, inclusive design will reduce the need for individualized accommodations, but will not end it. On a broader scale, there are situations where it makes sense to have targeted programs to meet particular needs of persons with disabilities, rather than including persons with disabilities in a broader, inclusively designed program. There are also situations where competing needs make it challenging to identify inclusive design solutions. As a simple example, curb cuts, which improve access for persons with mobility disabilities and families pushing strollers, increase difficulties for persons with low vision who require a

demarcation of the end of the sidewalk. However, human rights law has articulated as a general principle the importance of beginning with an inclusive approach when designing policies, programs and services, and adopting specialized approaches only where inclusive design approaches are not effective for progressing towards substantive equality.

“Law”: There are laws whose provisions are problematic in terms of their effects on persons with disabilities, whether because they incorporate ableist attitudes into their substance or because they fail to take into account the realities of existence for those with disabilities. In many cases, however, the law is sound on paper, but problematic in practice. Laws, policies and practices that are in theory neutral or even intended to benefit individuals living with disabilities may fall short of their goal or have unintended negative consequences. There are many reasons for this, including negative attitudes on the part of those charged with implementing the law or policy, failure to provide disability-related accommodations for accessing programs or services, adversarial approaches to program implementation, resource limitations, or lack of accountability, monitoring and transparency.

...[T]he LCO has adopted a broad definition of “the law” for this project, as including not only statutes and regulations, but also the policies through which they are applied, and the strategies and practices through which they are implemented.

This points us to the importance of adopting a broad understanding of “the law” for this project. A close analysis of the language of statutes and policies is important, but it is equally important to develop a strong understanding of the effects of the law as implemented. For this reason, the LCO has adopted a broad definition of “the law” for this project, as including not only statutes and regulations, but also the policies through which they are applied, and the strategies and practices through which they are implemented.

Of course, to understand the effects of the law, we must hear directly from those affected by it – both those charged with implementing it, and the persons whose lives are shaped by it. In this way, the necessity of addressing the “implementation gap” points us again to the importance of including and respecting persons with disabilities in the process of developing and reforming the law.

“Life Course”: The project has adopted a life course approach to disability-related issues, as a means of better understanding the circumstances of persons with disabilities and the barriers that they face in a range of social areas. A life course approach is based on the understanding that 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. Situating this analysis in a legal context, 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.

A life course approach can help us to better understand the socio-economic barriers faced by persons with disabilities. Disability-related barriers to education, for example, will have a profound effect on the ability of individuals to obtain appropriate and remunerative employment and to access and employ information about rights and responsibilities, and will do so throughout life. It also provides a means of analyzing how differences based on gender, sexual orientation, racialization, or other aspects of identity may shape the experiences of persons with disabilities.

Thinking about the life course as a whole forces us to consider social issues as they affect people of all generations and throughout the life cycle (including birth and death). This is important when we consider disability issues, since it avoids oversimplification of the collective experience of people with disabilities and the marginalization of issues affecting underrepresented groups (e.g., children living with disabilities and older people). The life course can be considered as both an individual and a social construct. But the social approach is particularly useful in highlighting how societies and social institutions reproduce idealized notions of what it means to live a ‘normal’ life.⁴¹

Thinking about the life course as a whole forces us to consider social issues as they affect people of all generations and throughout the life cycle (including birth and death). This is important when we consider disability issues, since it avoids oversimplification of the collective experience of people with disabilities and the marginalization of issues affecting underrepresented groups.

The adoption of a life course approach significantly influenced the decision to undertake research on transitions along the life course for persons with disabilities and how those are shaped or constrained by law.

“Substantive Equality”: This project has been centred around substantive equality as a key value and goal for the law as it affects persons with disabilities. This concept has profoundly shaped all aspects of this project. The LCO’s understanding of substantive equality is dealt with at greater length in Chapter III. For the purposes of this Chapter, it suffices to note that substantive equality, as contrasted with “formal equality”, 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.

3. Key Elements for a Framework

Based on the results of the multiple consultation stages for this project, as well as the experiences of the LCO in developing the *Framework for the Law as It Affects Older Adults*, the LCO identified a number of essential characteristics for the *Framework for the Law as It Affects Persons with Disabilities*.

First, given the multiple inter-relationships between the principles themselves, and between the principles and the lived experiences of persons with disabilities, it must be **holistic**. Rather than dealing separately with each of the principles, or segregating the principles from the circumstances of persons with disabilities, the framework must bring the elements together, so that the principles are meaningfully grounded in the circumstances of persons with disabilities and in the current legal landscape.

Secondly, given the breadth of the experiences of persons with disabilities and the many different ways in which they must interact with the law, it must be broad and flexible enough to **apply across contexts**. It must have the capacity to address the experiences of persons with disabilities with the law in their sexuality, education, employment, living environments, family relationships, financial affairs and other areas. It must be capable of meaningful application both to laws directly targeted to persons with disabilities, and to those of general application that affect persons with disabilities differently.

Thirdly, it must reflect the **diversity of experience and identity** among persons with disabilities. This means that the *Framework* must be able to encompass not only a wide range of disabilities, but also different ethnic and cultural identities, divergences in the experiences of men and women, and diversity in sexual orientation, citizenship status, family relationships and age. As with the population at large, persons with disabilities may identify with a number of different communities at the same time. This diversity means that the law may affect persons with disabilities in diverse and sometimes inconsistent ways.

As with the population at large, persons with disabilities may identify with a number of different communities at the same time. This diversity means that the law may affect persons with disabilities in diverse and sometimes inconsistent ways.

Fourthly, it must be sufficiently **specific and practical** to provide meaningful guidelines for the development of law and government policy, and to help develop processes to be implemented by the private sector to make the law effective. It must assist users in concretely understanding the implications of the principles for the development and evaluation of laws, policies and practices.

Fifthly, given the importance of participation and inclusion for persons with disabilities, it must focus attention on both the **process of development and evaluation** and on the outcomes. It must apply equally to the development of new laws, policies and programs, and to the evaluation and reform of existing ones.

Finally, it must be **useable**. Its structure, layout and language must be sufficiently simple and clear to encourage its easy use as a practical tool. Reference to the other documents for further information and guidance must be made straightforward and simple.

F. This Report and Framework

The *Framework for the Law as It Affects Persons with Disabilities*, the culmination of this Project, is included as Chapter IV of this *Final Report*. It is also available as a stand-alone document, in hard copy and on the LCO's website. The *Framework* is intended to guide the development and evaluation of laws, policies and practices to ensure that 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. 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 deal with issues affecting them; and
- public and private actors that develop or administer policies or programs that may affect persons with disabilities.

The *Framework* is intended to be applicable across all laws and policies, including both those that apply specifically to those with disabilities and those that will affect persons with disabilities as members 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.

It is not the purpose of the *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 individuals with disabilities. The law and the circumstances of persons with disabilities are both broad and diverse. The nature of disability and our understanding of its personal and societal implications are constantly evolving. Rather, the *Framework* is intended to assist law and policy-makers to

The Framework is intended to be applicable across all laws and policies, including both those that apply specifically to those with disabilities and those that will affect persons with disabilities as members of the general population.

- consider and apply a consistent set of principles in developing laws, policies and practices that may affect those living with disabilities;
- ensure that potential barriers and sources of ableism in laws and policies are identified and addressed; and
- take into account key aspects of the relationships of persons with disabilities with the law.

This *Final Report* sets out the key research and analysis which forms the basis for the *Framework*, and is the product of extensive research and consultation, as outlined above.

The second Chapter of the *Final Report* gives a brief overview of what is meant by “the law as it affects persons with disabilities”; sets out the foundational documents for this area of the law; explores the context in which persons with disabilities encounter the law; and identifies key themes in the law as it affects persons with disabilities.

The third Chapter details the rationale for a principles-based approach to the *Framework*, identifies the key sources for the principles, outlines definitions and implications of the principles that are the basis for the *Framework*, and provides some analysis of the challenges in applying the principles to the law as it affects persons with disabilities.

The fourth Chapter sets out the *Framework* itself.

The fifth Chapter explores the application of the *Framework* through an analysis of the law related to community supports services, and particularly attendant services, for persons with disabilities.

Finally, the brief sixth and seventh Chapters of the *Final Report* set out recommendations for use of the *Framework* and some next steps for the LCO.

II. THE LAW AND PERSONS WITH DISABILITIES

This Chapter will examine how persons with disabilities encounter the law, based on the processes and approaches identified in the previous chapter. As a first step, the meaning of the term “law” as it is applied in this project will be outlined. The foundational documents for the law and persons with disabilities will then be briefly identified and described. The context in which persons with disabilities encounter the law will be briefly considered. Finally, the Chapter will examine key themes in the law as it affects persons with disabilities, which must be taken into account in identifying, defining and interpreting principles for this area of the law.

A. “The Law as It Affects Persons with Disabilities” – What Do We Mean?

In understanding the relationship of persons with disabilities with the law, it is essential to first understand that every law of general application that affects the population at large will also affect persons with disabilities. Laws relating to consumer protection, family formation and dissolution, zoning, voting rights, rental housing, protection of privacy and access to information, labour relations – all of these and many others are part of the law as it affects persons with disabilities.

In understanding the relationship of persons with disabilities with the law, it is essential to first understand that every law of general application that affects the population at large will also affect persons with disabilities. Laws relating to consumer protection, family formation and dissolution, zoning, voting rights, rental housing, protection of privacy and access to information, labour relations – all of these and many others are part of the law as it affects persons with disabilities. Some of these laws of general application may affect persons with disabilities or some group(s) of persons with disabilities differently from others. In some cases, this may be because the law does not take into account the particular needs of persons with disabilities. For example, if laws relating to voting and elections do not take into account accessibility barriers, persons with disabilities may find it more difficult to exercise their democratic rights than others. Because persons with disabilities may be invisible in the development of laws of general application, they may in this way be inadvertently disadvantaged through the law.

There are also a very large number of laws that are specifically targeted to persons with disabilities or some group of persons with disabilities. These laws aim to recognize particular circumstances connected to the experience of disability, and to address them. A review by the LCO early in this project identified over 150 Ontario laws and regulations specifically referencing persons with disabilities in general, or some particular group of persons with disabilities. The LCO’s June 2009 *Preliminary Consultation Paper* provides an overview of these targeted laws.⁴² They range over a broad spectrum of social areas, from income support, to education, to assistive devices to decision-making. Some have disability-related needs as a core focus, while others are directed to the population at large but provide specific supports or accommodations to persons with disabilities. Some provide supports or enhance opportunities, while others restrict roles or opportunities based on specific capacities or abilities. Many of these laws have very profound effects on the opportunities and well-being of persons with disabilities, the provisions for special education under the *Education Act* and of the *Ontario Disability Support Program Act* providing two obvious examples. A number of these laws are implemented through very complex policies and practices and large bureaucracies.

In understanding the law and persons with disabilities, the central analysis often, understandably, focuses on a careful review of the wording of the statute and regulation... [I]t [is] also important to pay attention to the ways in which laws are implemented. Laws may be neutral or even positive on their face, but may in practice have negative effects on persons with disabilities, as a result of problematic implementation.

In understanding the law and persons with disabilities, the central analysis often, understandably, focuses on a careful review of the wording of the statute and regulation. From the beginning of this project, however, the LCO heard that while there were concerns with the provisions of particular laws, it was also important to pay attention to the ways in which laws are implemented. Laws may be neutral or even positive on their face, but may in practice have negative effects on persons with disabilities, as a result of problematic implementation. This was one of the key motivations behind the LCO's expansive spring 2010 community consultations: without hearing from those directly affected by the law or directly involved in its implementation, it would not have been possible to truly understand the operations and effects of the law as it affects persons with disabilities.

Connected with this are concerns related to the ability of persons with disabilities to access their rights and responsibilities under the law. One aspect of the gap between aspiration and implementation of laws is access to justice for persons with disabilities. Unless the law is actually implemented and enforced, and is a living reality, it has little meaning for those whom it is intended to benefit. One element of access to the law is access to the legal system, which includes the ability to acquire information about one's legal rights and responsibilities, to obtain competent legal advice and representation as required, and to access existing legal dispute resolution mechanisms. However, access to the law can be ensured in many other ways: for example, through advocacy organizations such as ombuds offices, administrative complaint mechanisms, or proactive monitoring and auditing structures.

This project therefore includes, as part of the law as it affects persons with disabilities, both laws of general application and those specifically targeted to persons with disabilities. It includes law both as written on the page and as implemented in policy and practice, and considerations related to the ability of persons with disabilities to access rights or responsibilities under the law.

Given the LCO's mandate as a provincial organization, the focus of this project has been on Ontario laws. However, the LCO has considered federal laws insofar as they interact with provincial laws, and has of course taken into account the key relevant international documents. Because of the conceptual level of this project, there is a potential for the *Framework* to have applicability or influence beyond the borders of Ontario.

The following Case Example provides an illustration of how an examination of the law as it affects persons with disabilities must include not only the provisions of the statute and the regulations, but also the lived experience of the implementation of the law, in order to fully understand the effect of the law on persons with disabilities, and thereby the degree to which it advances substantive equality for this group.

CASE EXAMPLE: IMPLEMENTATION OF THE LAW

Ontario Disability Support Program Processes

The Ontario Disability Support Program (ODSP), as governed by the Ontario Disability Support Program Act, its regulations and extensive policy guidelines, provides essential income supports to persons with disabilities, who are often excluded from or marginalized in the labour force due to a range of barriers, including negative attitudes and stereotypes, a lack of accessibility and accommodations, the cumulative effect of barriers in education, and others. The supports provided through ODSP are essential to the fundamental security of many persons with disabilities and to their ability to live in basic dignity, and the Act recognizes the shared responsibility of government, families, communities and individuals to provide these supports.⁴³

However, the program, in addressing diverse goals, includes multiple procedural requirements, which can reduce its ability to meet its purpose of providing a program that “effectively serves persons with disabilities who need assistance”.⁴⁴ In her 2004 report on Ontario’s social assistance system (including both ODSP and Ontario Works), Deb Mathews noted that,

There are now approximately 800 rules and regulations within the [social assistance] system that must be applied before a client’s eligibility and the amount of their monthly cheque can be determined...Because there are so many rules, they are expensive to administer and often applied inconsistently from one caseworker to another, even within the same office. Further, the rules are so complicated that they are virtually impossible to communicate to clients and it takes years to train a caseworker.⁴⁵

The complexity of the requirements and procedures can create a significant barrier for persons with disabilities in understanding and accessing supports or programs that are intended to assist them. The government has established a Commission on the Review of Social Assistance in Ontario, a major review of social assistance which is intended to make social assistance both financially sustainable and easier to understand.⁴⁶ The Commission has identified this as a barrier and is seeking options to simplify the system and make it easier to understand.⁴⁷

These procedural barriers affect many aspects of the program. For example, the process by which persons with disabilities must apply to ODSP to have eligibility determined has been criticized, not only substantively, but as a lengthy, stringent and multi-layered process, one which persons with disabilities may find to be both demeaning and discouraging.⁴⁸

The complexity of the requirements and procedures can create a significant barrier for persons with disabilities in understanding and accessing supports or programs that are intended to assist them.

One example of the type of procedural issues that may create implementation issues can be found in the reporting and monitoring requirements related to retention of employment earnings.⁴⁹ ODSP permits persons with disabilities to earn employment or business income and retain some part of it, a measure which has the potential to increase participation and inclusion for persons with disabilities, recognize their ability to make contributions to the community, and enhance their economic security.⁵⁰ The treatment of employment earnings for ODSP purposes is a source of ongoing debate and raises substantive issues beyond the scope of this Case Example to address. However, the procedural aspects of monitoring and reconciling employment earnings were identified as a source of considerable frustration for persons with disabilities during the LCO's 2010 consultations.

ODSP recipients who regularly or occasionally have employment or business income are required to send in a report every month, so that their benefits may be adjusted accordingly. The ODSP process for monthly reporting and benefit adjustment is a problem for many ODSP recipients since it means that their income support is subject to frequent adjustments or overpayments. This prevents them from being able to rely on a stable income stream.⁵¹ For example, many employers pay their employees bi-weekly. This creates difficulties for ODSP recipients since their income is exaggerated in those months that contain three pay periods. The following month, their income will revert to two pay periods but this lower income will be subject to a higher ODSP deduction calculated in relation to the previous month's income. This kind of fluctuation can create chronic budgeting difficulties.⁵² This problem is particularly acute for seasonal or temporary workers who will have income earned during their last month of employment deducted from the much lower income that they receive in their first month without employment.

If individuals do not earn income in a particular month, they may not understand that they must nonetheless send in a report. However, ODSP staff may have the expectation of receiving a report and when they do not receive one they may send a letter suspending the recipient's benefits. Alternatively, ODSP may have received a report but misplaced it. The receipt of suspension letters, although mistaken, can be very upsetting to recipients. As one participant in the LCO's public consultations told us,

Where people end up in real problems in ODSP is in understanding their obligations to the system. And what the system requires them to do – register for this or declare that – then that's where people really get in trouble. It's not so much understanding their rights to what is there – it's

understanding what their obligation to the system is...The problem is, if you don't understand what you need to do if you're employed, what are the things you have to do – if you're employed you have to report your earnings – you have to do it in specific amounts of time – you have to be doing all of these different things – and because of all of the discretion in these program and services and it's there, the system can say, "oh I'm sorry, you're really actually late for all of this, we're not going to accept it this month, and you're beat."

LCO Focus Group, Individuals with Disabilities, Owen Sound, May 31, 2010

The calculations related to employment earnings are variable enough and complicated enough that ODSP recipients may feel their income is beyond their control. One recipient remarked:

When I was working, my worker wouldn't explain how clawbacks work. I never knew how much I was actually keeping. You don't know the difference between how much you made and how much you get to keep.

Understanding the math would make me feel like I knew what's going on.⁵³

Persons with disabilities commented during the LCO's consultations on the shift in roles of frontline ODSP workers from providing individual supports and assistance to a more hands-off role, so that individuals in receipt of benefits must navigate the system on their own. That is, despite the complexity of the rules and the system, there are few supports to assist individuals in navigating that system. Added to this is a perceived adversarial approach within the system, such that those in receipt of benefits may feel themselves the subject of pervasive suspicion and demeaning attitudes, undermining the principle of respect for dignity and worth.

This poses particular challenges for persons whose disabilities make it difficult for them to consistently be strong self-advocates – for example, those with mental health disabilities. These individuals may require extra supports to allow them to access the intended benefits of the program. The entire experience causes some individuals with disabilities to conclude that the barriers are too difficult for them and give up in frustration.⁵⁴

This provides an illustration of how laws, policies and programs with positive purposes may fail to achieve their intended outcomes through implementation problems, and of the importance of adopting a broad understanding of "the law".

Persons with disabilities commented during the LCO's consultations on the shift in roles of frontline ODSP workers from providing individual supports and assistance to a more hands-off role, so that individuals in receipt of benefits must navigate the system on their own. That is, despite the complexity of the rules and the system, there are few supports to assist individuals in navigating that system.

B. Foundational Documents for the Law as It Affects Persons with Disabilities

To understand the law as it affects persons with disabilities, it is important to pay attention to certain foundational documents that shape or constrain other laws or policies. The most important of the domestic statutes are the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act* (AODA). These documents (particularly the *Charter* and to a lesser extent, the *Code*) have a special status in law. The most significant international document is the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). These are very briefly described below.

As well as foundational documents, shaping or constraining other laws, policies and practices, these are also aspirational documents, founded on principles that speak to a vision of dignity, equality and inclusion for persons with disabilities. As such, they are also key sources for principles for the *Framework*. For a discussion of these documents as sources of principles and values for the *Framework*, see Appendix B to this *Final Report*.

The Charter's equality rights provisions have been very important in advancing the rights of persons with disabilities, articulating the right to inclusion and participation, and advancing the principle of accommodation.

Charter of Rights and Freedoms: Ontario laws affecting persons with disabilities are subject to, and must be understood through, the prism of the *Canadian Charter of Rights and Freedoms*. Section 15 of the *Charter*, which came into force in 1985, guarantees the right to equality before and under the law, and to equal protection and benefit of the law, without discrimination based on, among other grounds, physical or mental disability (terms which the *Charter* does not define). Section 15(2) protects laws, programs or activities that have as their object the improvement of the condition of persons or groups that have experienced disadvantage based on a number of grounds, including mental or physical disability.⁵⁵ The *Charter's* equality rights provisions have been very important in advancing the rights of persons with disabilities, articulating the right to inclusion and participation, and advancing the principle of accommodation.⁵⁶

The *Charter* is fundamental law, applying to any body exercising statutory authority or pursuant to governmental objectives. Section 52 gives the *Charter* overriding effect, such that any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. To the extent that the government acts under common law or prerogative powers, the *Charter* also applies to such government actions. Section 24(1) provides that anyone whose *Charter* guaranteed rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedies as the court considers appropriate and just in the circumstances.

Ontario Human Rights Code: The *Ontario Human Rights Code*,⁵⁷ has included disability (originally referred to as “handicap”) as a protected ground since 1982. Under the *Code*, persons with disabilities have the right to equal treatment without discrimination in the areas of employment; housing accommodation; goods, services and facilities; contracts; and unions and other professional associations. The *Code* provides for both proactive and reactive mechanisms for ensuring these rights.⁵⁸ It is

worth noting that in recent years, disability has been the most frequently cited ground of the *Code* in complaints of discrimination, cited in more than half of all complaints to the Ontario Human Rights Commission and in a similar percentage of applications to Human Rights Tribunal under the reformed system.⁵⁹

Section 47(2) of the *Code*, the “primacy clause”, states that where a provision of an Act or regulation appears to require or authorize conduct that would contravene the *Code*, the *Code* prevails unless the Act or regulation specifically states otherwise. Thus the *Code* enables persons with disabilities to challenge barriers to their equality and has the potential to transform laws, policies and norms related to disability.

Ontario’s law related to persons with disabilities is unique with respect to the Ontarians with Disabilities Act (ODA) and the subsequent AODA. These laws have as their central purposes the recognition of persons with disabilities as a group who has experienced disadvantage and the removal of barriers in order to achieve their full equality and participation. They require organizations to take proactive steps across a range of areas to achieve accessibility and inclusion for persons with disabilities.

Accessibility for Ontarians with Disabilities Act: Ontario’s law related to persons with disabilities is unique with respect to the *Ontarians with Disabilities Act* (ODA)⁶⁰ and the subsequent AODA.⁶¹ These laws have as their central purposes the recognition of persons with disabilities as a group who has experienced disadvantage and mandating the removal of barriers in order to achieve their full equality and participation. They require organizations to take proactive steps across a range of areas to achieve accessibility and inclusion for persons with disabilities. The ODA (which is to be repealed at a future date) applies only to the broader public sector, including transportation providers, education institutions and municipalities. It requires the development of accessibility plans, but contains no enforcement provisions. The AODA builds upon and is a significant advance over the ODA. Like the ODA, it has as its aim the systematic removal of physical, attitudinal, technological, informational or communications barriers for persons with disabilities, but is considerably broader in scope than the ODA. It aims to ensure full accessibility for persons with disabilities with respect to goods, services, facilities, accommodations, employment, buildings, structures and premises by 2025. It applies to the private as well as the public sector, and among other measures sets out a process for the development of accessibility standards for specific industries, economic sectors, or classes of persons or organizations. The standards set milestones that must be reached every five years or less, to be regularly re-examined and reviewed to meet the long-term goal. Standards have been developed addressing several sectors, including customer service, information and communication, employment, and transportation, and a standard for the built environment is nearing completion. It contains enforcement provisions to address non-compliance.⁶²

Convention on the Rights of Persons with Disabilities (CRPD): There are a number of international documents which speak directly to the experiences of persons with disabilities, but the most recent and comprehensive is the CRPD.⁶³ Most significantly, the CRPD codified the commitment of the international community to recognize the rights of persons with disabilities. The CRPD was ratified by Canada on March 11, 2010.⁶⁴ The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁶⁵ The CRPD does not provide for “new” rights for persons with disabilities, since they are entitled to all the

The experience of disability has a very extensive impact in Canada, and in the province of Ontario in particular. Statistics Canada's 2006 Participation and Activity Limitation Survey indicated that in 2006, 4.4 million Canadians reported an activity limitation, resulting in a disability rate of just over 14 per cent of the population. Ontario's disability rate was slightly higher, at 15.5 per cent.

rights accruing to persons under other UN conventions, but recognizes that “without a legally binding treaty that spelled out their rights, persons with disabilities faced being legally ‘invisible’ in their societies and even in the international arena”.⁶⁶

Signatory states are obliged to “respect, protect and fulfil” the rights under the CRPD. Respecting rights means that the state will not interfere with the rights. Protecting rights means that the state will prevent violations of rights by third parties. Fulfilling rights means that the state “must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights”.⁶⁷

Article 33 of the CRPD provides for “national implementation and monitoring”, including the designation by States Parties of “one or more focal points within government” to address the implementation of the Convention and consideration of establishing a mechanism to coordinate different parts of government. Furthermore, States Parties are to develop a framework (or strengthen existing ones) “to promote, protect and monitor implementation” of the CRPD that takes into account existing human rights regimes. Monitoring of the CRPD is to involve civil society organizations, especially persons with disabilities.⁶⁸

C. Understanding the Context in Which Persons with Disabilities Encounter the Law

To develop a framework for the law as it affects persons with disabilities, it is important to have an understanding of the context in which persons with disabilities encounter the law. How many people in Ontario identify themselves as persons with disabilities? How does the experience of disability intersect with other aspects of identity, such as gender, age, Aboriginal status or others? How are persons with disabilities situated with respect to income, employment, education, and other socio-economic factors? These all affect how persons with disabilities interact with the law, and assist us with understanding the “implementation gap”.

It is beyond the scope of this *Final Report* to provide a comprehensive answer to the questions highlighted above. This section will very briefly highlight some key aspects of the lives of persons with disabilities that are relevant to how they are situated with respect to the law in general. It is necessary, however, that law and policy-makers undertake the appropriate research to ensure they understand how persons with disabilities are situated with respect to the actual proposed law or policy or laws or policies that are being reviewed.

The experience of disability has a very extensive impact in Canada, and in the province of Ontario in particular. Statistics Canada's 2006 *Participation and Activity Limitation Survey* indicated that in 2006, 4.4 million Canadians reported an activity limitation, resulting in a disability rate of just over 14 per cent of the population.⁶⁹ Ontario's disability rate was slightly higher, at 15.5 per cent.⁷⁰ Interestingly, the disability rate is increasing, both in Canada as a whole and in Ontario. The aging of the populace is a partial, but not a complete explanation, since disability rates are increasing in all age groups.⁷¹

...[T]he advancement of substantive equality for persons with disabilities is rooted in the fundamental principles of respect for human dignity and worth, as is recognized in multiple instruments, including the CRPD, the Charter, the Code, and many government policy documents. Given the extent of the impact of disability, it has been argued that the disadvantage and marginalization experienced by persons with disabilities has significant negative effects on society at large in terms of lost talent and contributions.

In addition to the impact on persons with disabilities themselves, law and policy-makers must also take into account the effects on the spouses, parents, children and other loved ones of persons with disabilities. For example, parents of children with disabilities report significant effects on their financial security,⁷² as well as employment opportunities,⁷³ levels of stress,⁷⁴ and depression,⁷⁵ particularly in the context of a lack of supports.⁷⁶

As this *Final Report* emphasizes throughout, the advancement of substantive equality for persons with disabilities is rooted in the fundamental principles of respect for human dignity and worth, as is recognized in multiple instruments, including the CRPD, the Charter, the Code, and many government policy documents. Given the extent of the impact of disability, it has been argued that the disadvantage and marginalization experienced by persons with disabilities has significant negative effects on society at large in terms of lost talent and contributions, and many have pointed to a strong business case for inclusion, accessibility and accommodation.⁷⁷

As is emphasized throughout this *Final Report*, the experience of disability is not homogenous. The severity of impairments and of the accompanying activity limitations varies considerably. As well, there are many types of disability, including sensory, communication, mobility and agility, learning, intellectual, cognitive, psychological, pain-related, among others.⁷⁸ Persons with different types of disabilities will encounter different types of attitudinal, physical or institutional barriers, so that opportunities and experiences will vary considerably.

The experience of disability will also vary depending on how it intersects with other aspects of identity. Women, for example, are much more likely to report living with a disability than are men,⁷⁹ and are more likely to live with severe or very severe disabilities.⁸⁰ However, more women with disabilities are employed in Canada than are men with disabilities.⁸¹ As another example, Aboriginal persons are much more likely to experience disability than other Canadians,⁸² and Aboriginal persons with disabilities are much more likely to live in low-income than other Aboriginal persons, or than non-Aboriginal Canadians with a disability.⁸³ It is therefore important for law and policy-makers to take into account differences within the disability community, as well as differences between persons with disabilities and those without disabilities.

Considerations of the interaction of persons with disabilities with the law often focus on the effects and the accommodation of particular impairments – for example, ensuring that informational materials are provided in formats that are accessible to persons with sensory disabilities, that institutions that administer and enforce laws are physically accessible, and that service providers are trained to provide services to those with communications disabilities. There is no doubt that these considerations are fundamental. Despite the progress that has been made over recent decades, and the protections of the Ontario *Human Rights Code* and the AODA, there is still a considerable distance to travel before it can be said that these aspects of the experience

of disability have been fully taken into account. However, an understanding of the experience of disability that focuses solely on accessibility and accommodation is incomplete.

Despite the differences among persons with disabilities, there is a general commonality in the experience of barriers to inclusion, and the resultant disadvantage and marginalization. Income levels are markedly lower for persons with disabilities than for those without.

Despite the differences among persons with disabilities, there is a general commonality in the experience of barriers to inclusion, and the resultant disadvantage and marginalization. Income levels are markedly lower for persons with disabilities than for those without. For example, for those Canadians aged 25 to 34, while persons without a disability have an average income of \$33,078, the income of those with a disability is approximately a third lower, at \$23,087. As age increases, the discrepancies in income levels continue to increase; for example, for those aged 45 to 54, persons without disabilities have an average income of \$38,967 as compared to an income of \$20,319 for those who identify as having a disability.⁸⁴ The extent of the differential in income will vary according to a number of factors, including Aboriginal status, gender, severity and type of disability, and others. The widespread incidence of low-income among persons with disabilities will affect every other aspect of life, from health, to housing, to personal safety. It has many implications for the relationships of persons with disabilities with the law. For example, low-income creates a range of barriers for accessing the law, including most obviously a lack of resources for obtaining legal advice and representation. It also means that persons with disabilities are disproportionately affected by laws, programs and policies that address issues related to low-income, such as income support programs and social housing, and that persons with disabilities will generally have fewer resources for coping with life's adversities.

These lower levels of income security are obviously connected to lower levels of labour force participation for persons with disabilities. Canada's unemployment rate in 2006 for persons with disabilities was 10.4 per cent as compared to 6.8 per cent for persons without disabilities.⁸⁵ This rate skyrockets for persons with intellectual or mental health disabilities as well as for Aboriginal or other under-represented groups with disabilities.⁸⁶ Persons with disabilities are also more likely to be under-employed or employed in low-paying or precarious positions.⁸⁷ In 2006, employment earnings were the largest source of income for only 52.1 per cent of persons with disabilities. In contrast, 81.2 per cent of persons without disabilities reported employment earnings to be the largest portion of their income. Finally, persons with disabilities are much more likely to rely on social assistance as a source of income than persons without disabilities (disaggregated for sex, three times more likely for women and five times more likely for men).⁸⁸ Because in our society employment is a key point of access for many benefits (such as health benefits, Canada Pension Plan savings and many others) as well as for social inclusion and participation, low labour force participation has implications for all areas of life.

It is well documented that, despite requirements under the *Education Act* and some significant investments of resources, persons with disabilities continue to experience a range of significant barriers to education.⁸⁹ It is therefore not surprising that persons with disabilities have lower levels of education and literacy than persons without disabilities. In 2006, among working age adults (aged 25 to 64), 25 per cent of persons with disabilities had no high school diploma, as compared to 13.5 per cent of Canadians without disabilities. Only 8 per cent of persons with disabilities had a

bachelor's degree, as compared to 15 per cent of those without a disability.⁹⁰ Limitations in education and literacy obviously have a significant effect on opportunities for employment and financial security. They also affect the ability of individuals to access and understand information about the law, to identify options for securing their rights, and to effectively advocate for themselves.

As is discussed in Chapter III.C.5, persons with disabilities are at greater risk of violence and abuse than others without disability. There may be many reasons for this. Some persons with disabilities may be targeted because their particular disability makes it more difficult for them to complain. Because persons with disabilities are more likely to live in low-income, they are also more likely to find themselves in less safe or secure living conditions. Disability may also reduce the options for escaping violence or abuse – for example, concerns have been raised about the lack of accessible shelters for those seeking to escape domestic violence. These are dynamics that the law must take into account, for example in designing complaint mechanisms, or considering the power dynamics between persons with disabilities and service providers.

Laws, policies and practices which do not take into account these realities (and others) for persons with disabilities are less likely to set goals which are meaningful for persons with disabilities, or where they do, to be able to implement them effectively.

Laws, policies and practices which do not take into account these realities (and others) for persons with disabilities are less likely to set goals which are meaningful for persons with disabilities, or where they do, to be able to implement them effectively. The Case Example below highlights some of the contexts to be taken into account in considering the transition of young persons with disabilities from the parental home to living independently, and the ways in which laws have attempted to address the barriers that they experience.

CASE EXAMPLE: UNDERSTANDING THE CONTEXT IN WHICH PERSONS WITH DISABILITIES ENCOUNTER THE LAW

Young Adults with Disabilities and the Transition to Living Independently

During young adulthood, people are expected to become increasingly independent from their parents as they make “a wide range of choices about where and with whom they live, how they pursue their studies, what type of work they are interested in and whether or not they will get married and have children”.⁹¹ Moving out from the parental home is seen as part of the “normal” transition into adulthood and independence. Young adults with disabilities, like other young adults, often aspire to leave the parental home and to live independently. Young adults will frequently encounter a range of challenges in making this transition; those with disabilities will face additional or exacerbated barriers.

Young adults often face discrimination in the rental housing market, reflecting stereotypes of them as “being irresponsible, having too many parties, not paying the rent or destroying the property”.⁹² Although the Ontario Human Rights Code (Code) prohibits discrimination on the basis of disability in the provision of housing accommodation,⁹³ and the Residential Tenancies Act requires landlords to abide by the Code when selecting new tenants, including in the use of income

While young adults in general are more likely to have low incomes, this is exacerbated for young persons with disabilities, because of the barriers they experience in obtaining education and employment. For example, youth appears to be a particular disadvantage for persons with disabilities seeking employment. While persons with disabilities of all ages are disadvantaged in the labour market, as is outlined above, young persons with disabilities face additional difficulties.

information,⁹⁴ those with disabilities continue to face additional difficulties in securing rental housing due to concerns by landlords that they may require accommodations, or stigma associated with particular disabilities.⁹⁵ This means that young persons with disabilities that are apparent to potential landlords may face considerable discrimination in the rental housing market.

While young adults in general are more likely to have low incomes, this is exacerbated for young persons with disabilities, because of the barriers they experience in obtaining education and employment. For example, youth appears to be a particular disadvantage for persons with disabilities seeking employment. While persons with disabilities of all ages are disadvantaged in the labour market, as is outlined above, young persons with disabilities face additional difficulties. Persons with disabilities aged 15 to 24 were more likely than those in the 45 to 64 age group to report that they were refused an interview (10.4 per cent), a job (14.4 per cent) or were given less responsibility (11.2 per cent) because of their disability.⁹⁶ The labour force participation rate for persons without disabilities between the ages of 15 and 64 is approximately 80 per cent; for those with disabilities, it is closer to 60 per cent.⁹⁷ Similarly, the unemployment rate for persons with disabilities in this age group is considerably higher than that for those without.⁹⁸ As a result, many young persons with disabilities live in low-income. The Ontario Disability Support Program provides basic income supports to persons with disabilities, including young persons, who meet its eligibility criteria, although the low rates mean that it may be difficult to find housing within the available budget.

There is an overall shortage of affordable housing in many parts of Ontario, something the government has recognized through the creation of a Long-Term Affordable Housing Strategy, which includes a range of programs and initiatives related to affordable housing.⁹⁹ The combined issues of lack of affordable housing and higher risk of low income for young persons with disabilities mean that locating affordable housing that meets their needs may pose a significant challenge for this group.¹⁰⁰

Further, for some young persons with disabilities it may be difficult to locate housing that meets needs associated with their disability – for example, that is physically accessible (as is discussed in the Case Example following Chapter II.D.3 below), or is close to supports and services that they need.¹⁰¹ That is, young persons with disabilities may face a triple obstacle of affordability, accessibility, and attitudinal barriers in locating appropriate rental housing.

Finally, it is important to take into account the nature of the transition that young persons are making as they leave the parental home. This is a period where individuals are learning how to run a household and live independently, skills that must be gained through experience and over time. Often, young people make this

transition gradually, for example, by living part of the year in college or university residences, or by finding accommodation with friends. Young persons with disabilities may have less access to this assumed informal model of transition. Some programs or resources have been established, by organizations such as CanChild, Easter Seals and March of Dimes to assist with managing this transition.¹⁰²

These multiple barriers may create daunting challenges for young persons with disabilities in making a transition that others may take for granted. As identified above, there are a number of valuable Ontario laws, policies and programs that recognize and attempt to address some of these barriers, but these are fragmented, and there is little in the way of coherent supports for the particular nature of this transition for young persons with disabilities

During the consultations, persons with disabilities repeatedly emphasized the importance of ensuring participation by individuals with disabilities in the development of laws that affect them – and their sense that currently this rarely occurs to any meaningful extent, particularly when it comes to laws of general application.

D. Key Themes in the Law as It Affects Persons with Disabilities

As defined for the purposes of this project, the law as it affects persons with disabilities is extremely broad, so that a detailed analysis is not possible within the scope of this Report. However, based on the research described in section I.C.2, and the results of the LCO's public consultations, the LCO identified a number of key themes for this area of the law. These themes have shaped the *Framework*, including both the identification of the principles and their interpretation, and are briefly described below.

1. The “Visibility” of Persons with Disabilities in the Law

A recurring theme throughout the LCO's public consultations and in the critical literature is the invisibility of persons with disabilities, both in the development of the law, and often in its content. This is an extension of the more general marginalization of persons with disabilities in the public sphere.

During the consultations, persons with disabilities repeatedly emphasized the importance of ensuring participation by individuals with disabilities in the development of laws that affect them – and their sense that currently this rarely occurs to any meaningful extent, particularly when it comes to laws of general application. Without such participation, laws may not take into account the ways in which those with disabilities may be differently circumstanced, and so may potentially disadvantage persons with disabilities, or may be ineffective in meeting their needs.

It is often assumed that the barriers experienced by persons with disabilities are entirely accessibility barriers related to their impairments. The social and economic impacts of the experience of disability, and the way in which these may situate persons with disabilities differently with respect to the law, may be poorly understood. While accessibility for persons with disabilities is foundational to their participation and inclusion, and to the achievement of substantive equality, the lack of equal attention to social and economic barriers to inclusion for persons with disabilities highlights the

...[I]t is important for persons with disabilities, in all of their individuality and diversity, to be recognized as individuals whose experiences are important and whose perspectives are valued, and for them to be able to participate actively in the development of the law. Without that recognition and participation, laws that appear neutral or that are intended to benefit persons with disabilities may actually have a negative effect on their equality.

distance still to be travelled to the achievement of equality, and perhaps a continued tendency to focus on the functional aspects of disability rather than a broader social or human rights approach.

Moreover, the diversity of identities and experiences among persons with disabilities, such as the impact of gender, age, racialization, sexual orientation or other aspects of identity, may not be taken into account. Further, there is a natural tendency among policy and law-makers to view their initiatives in isolation, so that the overall effect of the fragmented web of laws and policies may not be fully considered in the evaluation of the potential effect of a law or policy.

It has been suggested that, given the persistent marginalization and exclusion of persons with disabilities from the public sphere, the disability rights movement might be conceived of as a “visibility project”:

To sum up, the relative or absolute invisibility of persons with disabilities has meant that the legal structures created to advance private freedom (protection against the abuse of power) and public freedom (participation in the mainstream) have either not been applied or have been applied with less rigour in the case of persons with disabilities.

This has produced a category of person who, while being dependent on the public sphere for survival, lacks access to or influence over public policy. Such persons are denied full admission to public power and full control over their individual destiny. They remain outside the mainstream of society. This lack of presence – or invisibility – serves to reinforce stereotypical assumption about persons with disabilities. It encourages a lack of respect for people with disabilities as rights holders on an equal footing with others.¹⁰³

That is, it is important for persons with disabilities, in all of their individuality and diversity, to be recognized as individuals whose experiences are important and whose perspectives are valued, and for them to be able to participate actively in the development of the law. Without that recognition and participation, laws that appear neutral or that are intended to benefit persons with disabilities may actually have a negative effect on their equality. The Case Example below provides an example of an initiative intended to increase the visibility and inclusion of persons with disabilities and other marginalized groups in law and in government policies and practices.

CASE EXAMPLE: VISIBILITY OF PERSONS WITH DISABILITIES IN THE LAW**The Ontario Public Service Inclusion Lens**

Often persons who are designing laws, policies and practices of general application may not have any particular knowledge or expertise related to disability, and may not be aware of the potential impacts of their choices on persons with disabilities. The necessity of taking persons with disabilities into account in their work may not even occur to them. As a result, well-intended laws may have unanticipated negative effects on persons with disabilities.

As was highlighted in Section II.A, in addition to being affected by laws, policies and practices specifically targeted to them, persons with disabilities are, by definition, affected by laws, policies and practices of general application, and sometimes those laws, policies and practices will affect them differently or disproportionately as compared to others. Often persons who are designing laws, policies and practices of general application may not have any particular knowledge or expertise related to disability, and may not be aware of the potential impacts of their choices on persons with disabilities. The necessity of taking persons with disabilities into account in their work may not even occur to them. As a result, well-intended laws may have unanticipated negative effects on persons with disabilities. The LCO's Framework is intended to assist in addressing this gap for a wide range of organizations and individuals involved with the law as it affects persons with disabilities, to raise awareness of issues related to substantive equality, and to create a common frame for discussion among stakeholders.

Another recent initiative that aims to assist in addressing this lack of visibility for a variety of marginalized groups is the Ontario Public Service Inclusion Lens. The Inclusion Lens was developed by the government of Ontario as a tool for supporting the adoption of a diversity and accessibility lens when developing or reviewing policies, programs and services. The Inclusion Lens aims to assist Ontario Public Service staff to

- become more knowledgeable about diversity, inclusion and accessibility;
- identify barriers within policy, program or service development processes; and
- identify and evaluate strategies to remove or mitigate barriers.¹⁰⁴

The Inclusion Lens identifies seventeen dimensions of diversity, including disability, age, gender, creed, family status and caregiving responsibilities, race, sexual orientation and others. It includes a series of probing questions for each of these seventeen identified dimension.

The Inclusion Lens can be applied across the broad range of policies, programs and services that the Ontario Public Service develops and delivers, and is built around the business cycles of policy and program development, and service delivery. An on-line and interactive tool, the Inclusion Lens includes links to resources, scenarios, and examples of barriers and suggestions for overcoming them. It also includes an Accessible Legislation Training Guide, which provides practical guidance for drafting legislation and regulations in a way that respects and promotes accessibility. The Inclusion Lens is therefore broader in some ways than the LCO's Framework, as it applies across multiple aspects of identity, though it is also more specifically focused

There are specific stereotypes and stigmas associated with particular disabilities. For example, during the LCO's consultations, many persons with mental health disabilities, particularly those who have been homeless, shared experiences which demonstrated that they had been subject to heavy judgment and negative assumptions when dealing with legal systems.

on accessibility in the specific context of provincial legislation and policy. As an internal document, it serves a different purpose than the LCO's Framework, which is intended as a foundation for fostering public discussion and debate as circumstances change.

The Inclusion Lens was launched across the Ontario Public Service in January 2011, with training provided across ministries. For the years 2009-2012, the priority areas for application are procurement, human resources, and new policies, programs and legislation. For 2013, the goal is to build accessibility criteria into decision-making, project management, procurement, technology infrastructure, information technology and training. It is anticipated that by 2016, the Inclusion Lens will be applied to all policies and practices, and accessibility will be part of all OPS business.¹⁰⁵

By increasing the visibility of marginalized groups, including persons with disabilities, in the legislative, policy and service development processes, the OPS Inclusion Lens has the potential to improve awareness of the accessibility-related experiences and needs of persons with disabilities, and increase awareness of good practices for accessibility and inclusion.

2. Negative Attitudes, Stigma and the Law

Understanding Ableism: There is a long history in Canada of negative attitudes towards persons with disabilities. Manifestations of ableism include involuntary institutionalization, forced birth control and sterilization, segregation away from the mainstream of the population and denial of basic rights.¹⁰⁶ As was noted earlier, while attitudes towards disability have evolved, a recent Environics Research Group Report on Canadian attitudes towards disability-related issues found that while most people like to think of themselves as being open to the participation of persons with disabilities in their day-to-day activities, many expressed significant discomfort with some aspects of relating to persons with disabilities.¹⁰⁷ And of course, many of the attitudinal barriers faced by persons with disabilities may not be conscious.

There are specific stereotypes and stigmas associated with particular disabilities. For example, during the LCO's consultations, many persons with mental health disabilities, particularly those who have been homeless, shared experiences which demonstrated that they had been subject to heavy judgment and negative assumptions when dealing with legal systems. Lack of supportive services for persons with mental health disabilities, together with stigma and fear about these disabilities may lead to increased contact with police and may contribute to the criminalization of persons with mental health disabilities, an issue of great concern to many participants. In other cases, there may be reluctance to acknowledge the validity of (and therefore to accommodate) particular disabilities, a concern raised in consultations by persons with learning, environmental, and chronic fatigue disabilities.

Ableism may also manifest in more subtle ways, such as the perception that persons with disabilities will inevitably request cumbersome and costly accommodations and the accompanying reluctance to include persons with disabilities in programs or services,¹⁰⁸ or the development of creative strategies for denying requests for inclusion and accommodation.

During the LCO's consultations, many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting "to game" the system, or obtain benefits to which they are not entitled.

During the LCO's consultations, many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting to "game" the system, or obtain benefits to which they are not entitled. This is particularly the case for persons with disabilities who are also poor.¹⁰⁹

As well, responses to disability have often been marked by paternalism, the tendency to remove decision-making from persons with disabilities "for their own good". This has been particularly marked for persons with intellectual or mental health disabilities.

[M]any people with more significant intellectual, cognitive and psychosocial disabilities face substantial or total restrictions in making their own decisions. They often encounter others who presume they are unable to guide their own lives, are people who need to be 'fixed', or protected, and who limit or completely restrict the scope of their decision making. Many people are physically isolated or socially and economically excluded and therefore without meaningful choices or the opportunity to develop a vision and direction for their own lives, and to make their own decisions. Service provision in the disability and older adult sectors is often based on charity and protection models, and an assumption that because people need supports and care, others should make decisions on their behalf. Often service providers also require that they are provided decision making authority on behalf of those they are supporting so they can more efficiently manage the range of individual decisions related to care, medications, activities, etc.¹¹⁰

These attitudes may influence the design or implementation of laws. As the Ontario Bar Association has noted,

[t]he key change that must take place, therefore, is attitudinal or philosophical. Legislators have to act on the assumption that assistance, support and protection necessary to permit persons with disabilities to achieve equality and full participation in society are required as a right and are not offered as a privilege. The assumption has to be that society as a whole will benefit when persons with disabilities are encouraged and allowed to participate fully in society at all levels.¹¹¹

The brief case examples throughout this *Report* provide some examples of how ableism may affect the design or implementation of the law. The discussion below briefly highlights some key themes.

Ableism in the design of the law: Ableism may influence the design of laws, policies or programs that touch the lives of persons with disabilities.

With laws of general application, most commonly this involves a lack of acknowledgement of the existence of persons with disabilities, and their exclusion from “the norm”.

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access...it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.¹¹²

Persons with disabilities may find themselves excluded and disadvantaged, not because of negative attitudes per se, but because laws, systems, policies and practices have been designed without consideration for the existence of persons with disabilities. An assumption is made, often unconsciously, that only those who are “able” will attempt to access the law, system, program or policy, and design choices are made that include only those who fall within this “norm” and exclude persons with disabilities who fall outside of it.

Persons with disabilities may find themselves excluded and disadvantaged, not because of negative attitudes *per se*, but because laws, systems, policies and practices have been designed without consideration for the existence of persons with disabilities. An assumption is made, often unconsciously, that only those who are “able” will attempt to access the law, system, program or policy, and design choices are made that include only those who fall within this “norm” and exclude persons with disabilities who fall outside of it. The recognition of the barriers created in this way is core to the social approach to disability, and the identification and removal of these barriers has been a central aim for disability activism.

An example of this kind of exclusion of persons with disabilities from the “norm” is provided by *Eldridge v. British Columbia (Attorney General)*. The individuals in this case were Deaf and communicated through sign language. When seeking health care services through a hospital, they found that the hospital did not provide sign language interpretation. This meant that, unlike other members of the population, they were unable to effectively and fully communicate with the health professionals attending on them. This was not a matter of negative attitudes or intent towards Deaf persons, but rather a failure to consider and respect their needs, or indeed their very existence, in the design of the delivery of hospital services. The Supreme Court of Canada ruled that this omission violated the equality rights of Deaf persons under the *Charter*, as without sign language interpretation, Deaf persons were not truly receiving the same health-care services as hearing persons. The Court stated that where governments provide a service, they must take steps to ensure that disadvantaged groups are equally able to benefit from those services.¹¹³

It is important here to distinguish between “inclusive (or universal) design” and these types of apparently neutral laws of general application. Laws that are inclusively designed may apply to the population at large, but in their provisions the existence and specific circumstances of persons with disabilities are taken into account (whether explicitly or implicitly). Laws which do not take into account persons with disabilities may provide “formal equality” (as opposed to substantive) but cannot be characterized as inclusively designed.

With laws that are specifically targeted to persons with disabilities, there is a greater risk that they will be affected by stereotypes or negative attitudes about persons with disabilities or some group of persons with disabilities. For example, the Canadian Association for Community Living has raised concerns that capacity and guardianship laws may be influenced by negative stereotypes and attitudes regarding persons with intellectual or cognitive disabilities.¹¹⁴ The LCO will examine this and other issues related to capacity and guardianship in a project applying this *Framework* and the *Framework for the Law as It Affects Older Adults*.

The provisions of the *Coroner's Act* which provide for mandatory inquests for persons who die in police custody or correctional facilities, but provide only for an investigation and discretion to hold an inquest where a person dies in a psychiatric facility, have also been challenged as placing a lower value on the lives of persons with psychiatric disabilities, and failing to appreciate the real vulnerability of those who are involuntarily detained in a psychiatric facility.¹¹⁵

Ableism may also affect how laws are implemented by justice system workers, service providers and others. No matter how well designed a law or program is, ableist attitudes on the part of those charged with implementing it will make it ineffective for persons with disabilities, and thus may be one of many contributing factors to the "implementation gap".

Ableism in the implementation of the law: Ableism may also affect how laws are implemented by justice system workers, service providers and others. No matter how well designed a law or program is, ableist attitudes on the part of those charged with implementing it will make it ineffective for persons with disabilities, and thus may be one of many factors contributing to the "implementation gap". As is noted elsewhere, these attitudes may not be conscious or explicit, or may be specific to particular groups of persons with disabilities, such as persons with mental health disabilities or low-income persons with disabilities. For example, parents with disabilities have expressed concerns that negative assumptions about the parenting abilities of persons with disabilities may lead to increased scrutiny and intervention by the child welfare system.

There was this fear of the health care profession calling CAS due to misperceptions and a lack of understanding of the independent living model...I planned the birth of my daughter around this fear. Initially, I had a fear of being in hospital with the baby and them calling CAS. CAS is a real threat – the fears of parents with disabilities are real. Two months before I gave birth, at the same hospital a newborn baby was taken away right at birth from a blind mother. The perception of what a parent is creates that fear in our society.

Individual Interview

The LCO's review of inquests under the *Coroner's Act* relating to the deaths of persons with disabilities highlighted the extreme consequences for persons with disabilities that may result from inappropriate implementation of laws and policies. Issues identified included inappropriate or excessive use of restraints, lack of appropriate supervision or safety procedures in institutional settings, and inadequate discharge planning for those individuals with mental health disabilities transitioning from institutional settings to the community.¹¹⁶

The Case Example below demonstrates some aspects of the interaction between ableism and the law.

Statistics Canada's 2006 Participation and Activity Limitation Survey found that persons with disabilities perceive a considerable degree of discrimination in the labour market. Over 25 per cent of unemployed persons with disabilities and nearly 13 per cent of those not in the labour force reported that in the last 5 years they had been refused a job because of their disability. Even employed persons with disabilities reported experiencing discrimination in hiring (7.6 per cent).

CASE EXAMPLE: ABLEISM AND THE LAW

Persons with Disabilities, the Hiring Decision and the Law

Statistics Canada's 2006 Participation and Activity Limitation Survey found that persons with disabilities perceive a considerable degree of discrimination in the labour market. Over 25 per cent of unemployed persons with disabilities and nearly 13 per cent of those not in the labour force reported that in the last 5 years they had been refused a job because of their disability. Even employed persons with disabilities reported experiencing discrimination in hiring (7.6 per cent).¹¹⁷

Discrimination in hiring was a recurring theme during the LCO's community consultations.

There have been problems with respect to employment, when I was a teenager applying for retail jobs, waitressing jobs, those were all fine, because I can bluff, really bluff. When you're hard of hearing it's sort of faking it right? And because I don't wear my hearing aid it's not a visible disability so I pass. As I move on into the business world, the law world job market, I find it's more difficult to bluff...So I think that employers feel that if you have a disability it's going to be a hassle to accommodate you, it's going to be expensive to accommodate you...No matter how people say "committed to equity", I think that given a couple of qualified options they might not necessarily choose someone with a disability, despite the commitment that they think they have made.

LCO Focus Group, Individuals with Disabilities, Owen Sound, May 31, 2010

...sometimes I hear people in the office asking about a job who might have trouble speaking, and they'll say, oh no, the job's not available anymore, and then you call back, and it is available, but only to someone who seems like they might be more able to do it.

LCO Focus Group, Organizations, Ottawa, June 15, 2010

One study of Canadians with learning disabilities found that the majority of individuals interviewed for a job chose not to disclose their disability to their prospective employer. One of the study participants commented, "When they find out you have a disability of any kind, that automatically means you can't do the job."¹¹⁸

The Ontario Human Rights Code (Code) requires equal treatment with respect to employment without discrimination because of disability.¹¹⁹ This extends to the hiring decision, and to the provision of disability-related accommodations in the hiring process, to the point of undue hardship. There is no discrimination where a person is incapable, even with accommodation to the point of undue hardship, of performing the essential duties of the job because of disability.¹²⁰ The Ontario

These [various] legal protections are important and powerful public commitments to the value of equality. For those who access the enforcement provisions of the [Human Rights] Code, these protections provide an opportunity to be heard and seek redress. However, for most persons with disabilities, there are limits on their practical utility.

Human Rights Commission (OHRC) has developed a number of policies and guidelines related to the hiring decision, including the Policy and Guidelines on Disability and the Duty to Accommodate, and a Policy on Employment-Related Medical Information. Discrimination on the basis of disability has for many years dominated the caseloads of the OHRC (under the previous system)¹²¹ and now of the Human Rights Tribunal of Ontario (HRTO). In the 2009-10 fiscal year, 52 per cent of all applications to the HRTO cited disability as a ground. Since 75 per cent of all applications were in the social area of employment, it is logical to presume that a substantial majority of the applications citing disability were related to employment, but the HRTO does not make that particular statistic publicly available.¹²²

The Integrated Accessibility Standards Regulation made under the Accessibility for Ontarians with Disabilities Act (AODA) includes accessibility standards to be implemented in the workplace, and has some provisions related to hiring and other aspects of employment.¹²³ Sections 22 and 23 of the Regulation require employers to notify job applicants about the availability of accommodations and to provide necessary accommodations during the recruitment process. Section 24 requires employers to notify successful applicants about its accessibility policies. Because the AODA focuses on accessibility issues, there are no provisions specifically regulating the employer's hiring decision.

*These legal protections are important and powerful public commitments to the value of equality. For those who access the enforcement provisions of the Code, these protections provide an opportunity to be heard and seek redress. However, for most persons with disabilities, there are limits on their practical utility. Hiring decisions are usually opaque to job seekers: as they are not privy to information about other applicants and the decision-making process, it may be difficult to identify whether disability has played a role in the hiring decision. As a result, it may be very difficult to prove that discrimination has taken place.*¹²⁴

And in any case, many persons with disabilities may be unwilling to undertake the drawn-out, adversarial proceedings associated with a human rights application – particularly where they are still seeking employment.¹²⁵ The recent reforms to Ontario's human rights system were intended to make enforcement of human rights simpler and faster, as well as create more capacity for systemic initiatives.¹²⁶ The system is still adapting and exploring its potential, and the government is currently undertaking a review of the human rights system reforms as mandated by the Human Rights Code Amendment Act which may lead to initiatives to further strengthen the system.¹²⁷ Nevertheless, it remains true that under both the new and old system, persons with disabilities have raised concerns that the process for enforcing human rights is challenging to navigate and lengthy by the standards of justice seekers who may be in vulnerable circumstances. While human rights applications are important for setting precedents and promoting and enforcing system change, by their nature human rights applications can provide effective

The law as it affects persons with disabilities is frequently fragmented and enormously complicated. This complexity can itself create a challenge, both for persons with disabilities and for service providers and advocates who attempt to assist individuals in navigating the system. Laws that are well-intended may fail to achieve their purposes, because they are effectively inaccessible for persons with disabilities who do not have the supports and resources necessary to understand and make use of them.

solutions for only a minority of those persons with disabilities who experience discrimination in employment.

During the LCO public consultations, individuals with disabilities grappled with how to improve the odds for persons with disabilities in the hiring process. Some suggested simplified complaint and monitoring procedures for employment barriers.

Let's say I come in and they say, 'this job isn't available'. I find out they lied. There should be some recourse. There should be someone I can call and report them to. Here's what they've done, they've lied to avoid dealing with someone like me, and this is an issue that needs to be dealt with.

LCO Focus Group, Deaf, Deafened and Hard of Hearing Individuals,
Toronto, June 21, 2010

Others suggested that a second look be taken at more proactive measures, such as employment equity.

One of the things I think we're missing most of all is some form of real employment equity in this province. We're in a nightmare scenario as far as employment for people with disabilities. It's not so hot for people without a disability, but people with disabilities basically have very little chance in getting in and keeping employment in this province because of the barriers that are put up, 95 per cent of which are completely artificial and don't need to be there... So employment equity and doing things properly as far as employment – if we don't fix that, then we're only going to have more and more people on social assistance, and that situation is just going to get worse.

LCO Focus Group, Individuals with Disabilities, Owen Sound, May 31, 2010

Ableism, whether conscious or unconscious, may have a pervasive influence on the lives of persons with disabilities. The available information indicates that it has a significant impact on the ability of persons with disabilities to locate employment. While the law includes provisions that prohibit employers from refusing to hire individuals because of their disabilities, in practice persons with disabilities perceive that there have been constraints on the ability of the law to have a significant systemic effect on this problem.

3. Complexity, Overlap and Silos

The law as it affects persons with disabilities is frequently fragmented and enormously complicated. This complexity can itself create a challenge, both for persons with disabilities and for service providers and advocates who attempt to assist individuals in navigating the system. Laws that are well-intended may fail to achieve their purposes, because they are effectively inaccessible for persons with disabilities who do not have the supports and resources necessary to understand and make use of them. Persons with disabilities may not be able to make meaningful choices because they are not aware of the options available to them, or perceive them to be too difficult to exercise.

Regulation of the lives of persons with disabilities: One reason for the difficulty in understanding and navigating the law is the sheer extent of the law that is specifically focused on persons with disabilities. For reasons both good and bad, the lives of persons with disabilities are heavily regulated, and persons with disabilities frequently find themselves dealing with an intricate web of laws and policies in attempting to address day to day needs. For example, persons with physical disabilities who wish to live independently may need to understand a range of laws and programs, including the Ontario *Building Code*, tax credits for accessibility renovations, human rights laws regarding rental housing and the duty to accommodate, and attendant services programs to address domestic or personal care needs, in addition to addressing the concerns that persons who do not have disabilities deal with in securing or adapting appropriate housing.¹²⁸

One reason for the difficulty in understanding and navigating the law is the sheer extent of the law that is specifically focused on persons with disabilities. For reasons both good and bad, the lives of persons with disabilities are heavily regulated, and persons with disabilities frequently find themselves dealing with an intricate web of laws and policies in attempting to address day to day needs.

Complexity of the laws: Particular laws addressing disability-related issues are themselves often exceedingly complicated, lengthy and technical, creating substantial bureaucratic structures and extensive policy frameworks. For example, low-income persons with disabilities may receive income support through ODSP, which provides a shelter allowance and provision for basic needs. ODSP, while an essential support, is a notoriously complex program, with many regulations and policies, and a complicated bureaucratic structure.¹²⁹ As the LCO heard repeatedly during its consultations, understanding and effectively navigating these systems requires considerable effort and expertise, so that persons with disabilities may not be able to access supports which are intended to benefit them, or may be discouraged from attempting to do so. Complexity may arise from efforts to take into account the diversity of experiences among persons with disabilities, to ensure that scarce resources are allocated where they are most needed, or to provide procedural fairness. That is, there may be good reasons for the complexity. However, it is important that this be recognized as a potential barrier to access and inclusion for persons with disabilities, and that it be addressed by simplification, or by providing navigational assistance for those accessing these systems.

Relationships between laws: As well, laws may overlap or interact in complicated ways as in the interrelationship of the Ontario *Building Code*, the Ontario *Human Rights Code*, and the AODA with its accompanying regulations. As is detailed in the Case Example following this section, all these statutes deal with accessibility for persons with disabilities in the context of housing, yet have different standards and processes.

Fragmented laws, policies and programs: The laws targeting persons with disabilities have, by and large, evolved over a period of many years to deal with specific pressing issues as they arise. While there have been some attempts to harmonize the laws, there are frequently gaps or inconsistencies, and the lived experience of persons with disabilities is often not addressed holistically. Laws, policies and programs often fail to take into account that an individual may, for example, be at one and the same time a mother, a person with a mental health disability, a person with a sensory disability and a

Laws, policies and programs often fail to take into account that an individual may, for example, be at one and the same time a mother, a person with a mental health disability, a person with a sensory disability and a job-seeker. Laws, programs and services will often deal with each of these attributes separately, so that although many supports may be available, the individual must cobble together a patchwork of services for themselves, none of which addresses the whole person or the particularity of the barriers she or he faces.

job-seeker. Laws, programs and services will often deal with each of these attributes separately, so that although many supports may be available, the individual must cobble together a patchwork of services for themselves, none of which addresses the whole person or the particularity of the barriers she or he faces. For example, Aboriginal individuals with disabilities face particular difficulties in finding accessible housing because of compounded stigma and discrimination, confusion arising out of jurisdictional issues, the increased likelihood of low-income, and the particular challenges of finding accessible housing in remote areas or in many First Nations communities.¹³⁰

Transitions: Related to the previous issue of fragmentation, is the issue of how the law supports or inhibits the ability of persons with disabilities to make transitions – a major theme during the spring 2010 consultations and one of the foci for the LCO’s research for this *Report*. Persons with disabilities generally aspire to move along the life course in a way similar to their peers who do not identify as disabled. As described earlier, young adults with disabilities often wish to live independently of their parents, but may experience many barriers to doing so, including finding appropriate housing and supports, and sourcing adequate funds and there are few programs that recognize the particular nature of the transition that young adults make to living on their own and support it for persons with disabilities. This lack of attention to transitions reinforces the fragmentation of the law referred to earlier.

The following case example looks at one example of the challenges that may be faced in understanding and navigating the law, through an examination of the relationships between laws regulating the accessibility of rental housing.

CASE EXAMPLE: RELATIONSHIPS BETWEEN LAWS

Accessible Rental Housing and the Law

The International Covenant on Economic, Social and Cultural Rights recognizes the right to adequate housing,¹³¹ and under Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD), States Parties recognize the “right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing”. Article 9 of the CRPD states, “[t]o enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment”. These measures must include the identification and elimination of obstacles and barriers to accessibility and apply to housing, among other facilities.

As was discussed earlier in this Chapter, persons with disabilities may encounter a range of barriers to housing, including the lack of disability-accessible housing that meets their needs.

In Ontario, the accessibility of housing has been regulated, for the most part, by the Ontario Human Rights Code (Human Rights Code) and the Ontario Building Code (Building Code). The Accessibility for Ontarians with Disabilities Act (AODA) may have some role to play in the area as well, through the enactment of a Built Environment Standard.

The Human Rights Code requires equal treatment in housing accommodation, without discrimination on the basis of disability.¹³² Following human rights caselaw, the Ontario Human Rights Commission (OHRC) has stated that “[h]ousing providers, and other responsible parties including government, are required to make sure that the housing they supply and programs they administer are designed inclusively.”¹³³ Housing providers must accommodate for disability-related needs to the point of undue hardship. This may, for example, require landlords to make accessibility-related modifications to their rental housing units, in order to meet the needs of tenants with disabilities.¹³⁴

The Building Code governs the construction of new buildings and the renovation, change of use or demolition of existing buildings. Most accessibility requirements are found in section 3.8 of the Building Code, which sets out barrier-free design requirements recognizing the needs of people with various disabilities. These include, for example, requirements related to barrier-free access, barrier-free path of travel, barrier-free washrooms and doorways.¹³⁵ These standards are enforced by municipal building inspectors.

The Human Rights Code and the Building Code therefore have overlapping areas of application. This raises issues with respect to their interrelationship and the extent to which they are co-ordinated. As a quasi-constitutional law, the Human Rights Code prevails over any Ontario law or regulation, unless that enactment specifically provides otherwise.¹³⁶ In other words, where there is a conflict between the Human Rights Code and the Building Code, the Human Rights Code will prevail. This means that an application under the Human Rights Code can challenge design elements that otherwise meet standards under the Building Code. An otherwise compliant building may need to be modified to comply with the Human Rights Code.¹³⁷ While in theory the relationship between the two laws is clear, in practice, their interrelationship still creates a number of difficulties, and the OHRC has been raising concerns about the relationship of the two laws for a number of years.¹³⁸

The two statutes differ in purpose and approach. The Human Rights Code creates a general standard of “equal treatment without discrimination” to the point of undue hardship; practically speaking, the requirements to meet this standard will vary from building to building and landlord to landlord, particularly since the undue hardship standard is situation-specific. As is noted above, the right to equal treatment without discrimination includes a duty to design inclusively and to

Because of the greater clarity and specificity of standards under the Building Code, housing providers will, in good faith, tend to defer to these statutes over the Human Rights Code, despite the fact that these are minimum standards and the Human Rights Code may in some circumstances require something more... Difficulties will arise, however, where the Building Code's minimum standards fall short of the requirements under the Human Rights Code, and housing providers may understandably fail to understand their obligations under both statutes.

remove barriers based on disability.¹³⁹ The Building Code creates clear, specific minimum standards which apply across classes of buildings.

Because of the greater clarity and specificity of standards under the Building Code, housing providers will, in good faith, tend to defer to these statutes over the Human Rights Code, despite the fact that these are minimum standards and the Human Rights Code may in some circumstances require something more. Indeed, the clarity and specificity of the Building Code is one of the benefits of that statute for moving forward accessibility for persons with disabilities. Difficulties will arise, however, where the Building Code's minimum standards fall short of the requirements under the Human Rights Code, and housing providers may understandably fail to understand their obligations under both statutes. For example, concerns have been raised that current Building Code standards do not ensure full access for people using the larger mobility devices that are becoming more common.¹⁴⁰ The Building Code mandates that corridors, aisles and exits be at least 1,100 mm in width; however, powered wheelchairs may be over 1,300 mm in width. Similarly, the turning radius of scooters may exceed the minimum standard in the Building Code.¹⁴¹

The OHRC has commented that "many housing providers continue to rely on the Ontario Building Code without considering their obligations under the Human Rights Code".¹⁴² This may be because housing providers are unaware of the Human Rights Code and are "under the incorrect impression that by complying only with Building Code requirements, they have met all of their legal obligations".¹⁴³ The result of this is that to the extent that the Building Code accessibility requirements do not take Human Rights Code obligations into account, housing providers are more likely to face human rights issues,¹⁴⁴ particularly where housing providers are not aware that the requirements of the Human Rights Code may differ.

There are also issues surrounding enforcement of accessibility requirements. Under the Building Code, municipal inspectors conduct inspections where Building Code permits are issued, to ensure that new construction and specified significant renovations comply with the standards under that statute. The system for enforcement of Building Code standards is therefore proactive. Under the Human Rights Code, enforcement of standards is reactive rather than proactive (although the Code does create opportunities for OHRC-initiated applications). Individuals can only make applications under the Human Rights Code where they believe housing providers have failed to meet the Human Rights Code standard, and an application under the Human Rights Code leads to a hearing by the Human Rights Tribunal of Ontario. These multiple avenues for addressing accessibility issues also contribute to the confusion around the issue, as housing providers may believe that approval by a building inspector means that they are in compliance with all accessibility requirements.

...[T]he requirements in the Building Code are predominantly prospective, applying to new buildings and some renovations. This leaves a large gap in the form of those older buildings that are not accessible.

Finally, the requirements in the Building Code are predominantly prospective, applying to new buildings and some renovations. This leaves a large gap in the form of those older buildings that are not accessible. The OHRC has identified this as a significant gap in the effort to achieve a barrier-free Ontario by 2025,¹⁴⁵ and it may be considered problematic from a progressive realization perspective. This is of particular concern for people on low incomes because most social housing in Ontario was built between the mid-1960s and the mid-1990s.¹⁴⁶ The average age of buildings with elevators owned by the Toronto Community Housing Corporation is 33 years.¹⁴⁷ However, requiring all buildings to be barrier-free, regardless of their age, would be costly for building owners. There are some initiatives under Ontario's Investment in Affordable Housing program that are intended to address this gap, including the Ontario Renovates program, which provides funding assistance for repairs and renovations to maintain the affordability and increase accessibility of units for persons living in low-income.¹⁴⁸ As well, the Housing Services Act prescribes a minimum number of social housing units to be modified for persons with physical disabilities.¹⁴⁹

The AODA provides for the development, implementation and enforcement of accessibility standards with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises.¹⁵⁰ The Act applies to the public and private sectors.¹⁵¹ The AODA explicitly states, "[n]othing in this Act or in the regulations diminishes in any way the legal obligations of the Government of Ontario or of any person or organization with respect to persons with disabilities that are imposed under any other Act or otherwise imposed by law".¹⁵² Standards have been completed in a number of areas, including information and communication, employment and transportation.¹⁵³ Work is continuing on standards that relate to the built environment, which potentially could impact on housing accessibility.¹⁵⁴

The relationship between the Human Rights Code and the Building Code, both important statutes that aim to increase inclusion and accessibility for persons with disabilities, illustrates the complexities that may arise from the relationships between laws. While in theory the Building Code and the Human Rights Code both work in different ways towards a shared goal of accessibility, in practice, a lack of clarity and harmonization between the two statutes makes it more difficult for both persons with disabilities and housing providers to understand their rights and responsibilities and to ensure effective enforcement of the requirements, thus constraining the attainment of their shared goals.

This issue also highlights the importance of progressive realization in understanding and addressing current limitations. As technology and understandings of disability-related accessibility needs evolve, standards must also evolve. The challenges are particularly acute in the context of the built environment, where decisions have long-term consequences and change may be costly. While acknowledging the

challenges, it is essential that means to ensure progress towards the ultimate goal of full accessibility continue to be explored and implemented.

The AODA itself builds on and exemplifies the concept of progressive realization. As the planned Built Environment Standard under the AODA has not yet been enacted, the impact of the new standard on the harmonization of the three statutes is not yet clear.

If one is not aware of one's rights and responsibilities under the law and of the mechanisms available to access those, it is highly unlikely that one will be successful in accessing and enforcing them. Access to information is essential to access to justice.

4. Implementation and Access to Justice Issues

As is noted elsewhere, there are a number of laws whose provisions are problematic in terms of their effect on persons with disabilities, whether because they incorporate ableist attitudes, or because they fail to take into account the realities of existence for persons with disabilities. In many cases, however, the law is sound on paper, but problematic in practice. Laws, policies and programs originally intended to benefit persons with disabilities may fall short of the goal or have unintended negative consequences.

There are many reasons for this, some of which have been touched upon above. Other issues are outlined below.

Access to information: If one is not aware of one's rights and responsibilities under the law and of the mechanisms available to access those, it is highly unlikely that one will be successful in accessing and enforcing them. Access to information is essential to access to justice. The government of Ontario has recognized this in a number of ways, including the creation of "Justice Ontario", a website and phone line intended to be a comprehensive, one-stop resource providing simple, easy-to-understand information in accessible formats on a wide range of justice related issues.¹⁵⁵

Persons with disabilities face many barriers to accessing information, and this was a recurrent theme in the LCO's public consultations. Some issues arise due to lack of disability-accessible information – websites that post information only in PDF, or organizations that provide information only via printed matter, for example.¹⁵⁶ Other barriers arise from the complexity of laws and systems discussed in the previous section. When service providers themselves find it difficult to navigate systems, it is not surprising that individuals, particularly those who live in low-income, will have significant difficulty in locating accurate and comprehensive information about the law as it applies to them. Barriers to accessing information may also relate to the disproportionate levels of low income among persons with disabilities, as individuals living in low-income will have less access to technology and to services (such as legal advice) that can help them in understanding their rights and responsibilities. As well, the need for information often arises when individuals are in crisis, and at such times, individuals are less likely to be able to navigate large and multi-layered bureaucracies without assistance. In this way, the autonomy of persons with disabilities may be undermined, as they are unable to make informed choices about laws, policies and programs that may affect them.

CASE EXAMPLE: ACCESS TO INFORMATION ABOUT THE LAW

Access to Information for Culturally Deaf Individuals

An understanding of the law and of the processes associated with it is essential to access to the law. Barriers to accessing information were a pervasive theme during the LCO's 2010 public consultations. During the LCO's focus groups with service providers and advocates, a number of individuals indicated that they themselves often had trouble locating information for their clients because of the silos and fragmentation of laws and programs, and the constantly changing nature of programs.

Barriers to accessing information may also relate to the disproportionate levels of low income among persons with disabilities, as individuals living in low-income will have less access to technology and to services (such as legal advice) that can help them in understanding their rights and responsibilities. As well, the need for information often arises when individuals are in crisis, and at such times, individuals are less likely to be able to navigate large and multi-layered bureaucracies without assistance.

Many persons with disabilities told the LCO that they had considerable difficulty in locating information about their rights and responsibilities under the law, whether because they did not know where to go in order to find it, because the laws and systems involved are inherently complex and difficult to navigate for the average person without specialized supports, or because of a lack of accessible information.¹⁵⁷ As one participant in the LCO's focus groups told us,

One of the issues I think for those of us who are blind or vision impaired is the paper work. Accessing, getting the forms, getting a format I can use, if it's online chances are it's not going to work because my screen reading program can't handle all of the extra pictures and icons. It's getting a staff person willing to assist to fill out the form, because usually there's a conflict of interest, they can't fill it out because they are acting on your behalf, and they are supposed to represent the agency. So where am I supposed to get the print read? And fill it in, and make sure it's done right, because I can't proof read it because it's in print. It goes on, and on.

LCO Focus Group, Individuals with Disabilities, Owen Sound, May 31, 2010

The Ontario Human Rights Code (Code) imposes requirements to provide services (including government services) equally and without discrimination on the basis of disability.¹⁵⁸ This includes a duty to accommodate for disability-related needs in the provision of services, unless that accommodation would result in undue hardship.¹⁵⁹ Service providers must therefore ensure that individuals with disabilities are able to access information about their rules, policies or services equally with those who do not have disabilities, unless to do so would cause undue hardship.

The Accessibility for Ontarians with Disabilities Act (AODA) also sets standards for provision of information to persons with disabilities, through the Integrated Accessibility Standards Regulation.¹⁶⁰ For example, under section 12, obligated organizations must, upon request, provide or arrange for the provision of accessible formats and communication supports for persons with disabilities, in a timely manner that takes into account the person's accessibility needs due to disability, at a cost that is no more than the regular cost charged to other persons. Organizations are to publicize information about the availability of accessible formats, and must consult with the person affected as to the suitability of the information or

Individuals who are culturally Deaf and whose primary language is sign language (whether ASL or LSQ) may face significant barriers to accessing information about the law. While it is often assumed that providing written information about laws, policies and programs will meet the needs of persons who are culturally Deaf, written English or French may be a second language for these individuals, so that some may have difficulty gleaned the information that they need from complicated written documents.

communication support. There are also requirements related to website and web content accessibility.¹⁶¹

Individuals who are culturally Deaf and whose primary language is sign language (whether ASL or LSQ) may face significant barriers to accessing information about the law. While it is often assumed that providing written information about laws, policies and programs will meet the needs of persons who are culturally Deaf, written English or French may be a second language for these individuals, so that some may have difficulty gleaned the information that they need from complicated written documents.

You know, you look at the issue that English presents. You know, there will be a job posting and you look at it and it's all a lot of verbiage and a lot of English description and there should be a plain language format required, that there be a straightforward use of language. You've got lots of new Canadians here and it would benefit them as well. But it's an issue, you look on the Internet, laws, government, the verbiage that's used, there's a lot of, you know, brochures, a lot of verbiage, a lot of dense use of English. We could cut that down, do something with a plain language format, make that a requirement, that would help a lot.

LCO Focus Group, Deaf, Deafened and Hard of Hearing Individuals,
Toronto, June 10, 2010

The growing trend towards providing information about laws and services primarily through written text on websites may therefore not provide sufficient means of communicating essential information about rights and responsibilities to this group.

You know they were having the G-20 and they were doing this emergency planning. For us, there is nothing visual available for us in terms of warning systems, communication systems. And some individuals have very poor English literacy and they won't know what to do anyway. So just communication with the police. If the police see a Deaf person, and their attitude is just maybe making some assumptions and they arrest that individual, they haven't done anything, they don't have full information. In today's world, right, Deaf people are still missing information because it's not presented to us visually. I mean, think about it, the G-20 is coming and we still don't have all the information about it. I mean, TTC, the GO train, nothing in a communication method that is accessible to us. Other people are maybe getting this information, but we are not.

LCO Focus Group, Deaf, Deafened and Hard of Hearing Individuals,
Toronto, June 10, 2010

There are limited numbers of qualified sign language interpreters, and they must often be booked far in advance, so that there is little capacity to respond to emergency needs. These shortages are particularly severe outside major population centres and in Northern Ontario, where it may be very difficult to obtain sign-

There are limited numbers of qualified sign language interpreters, and they must often be booked far in advance, so that there is little capacity to respond to emergency needs. These shortages are particularly severe outside major population centres and in Northern Ontario, where it may be very difficult to obtain sign-language interpretation or real-time captioning, even with considerable lead time. Developing technology, such as remote captioning or Video Remote Interpretation, may in time go some distance to alleviating these difficulties, but at the present, the need is acute.

language interpretation or real-time captioning, even with considerable lead time. Developing technology, such as remote captioning or Video Remote Interpretation, may in time go some distance to alleviating these difficulties, but at the present, the need is acute.

As well, service providers may resist providing sign language interpretation as an accommodation, preferring to use written communication even where the individual in question has requested otherwise:

When you say, we need an interpreter, we need this, we need that and they say, oh no, we can manage without. No. Please. I'm requesting this, please provide me with this accessibility. If the request is made, they should just do it. No questions asked. I've made the request, I need a note taker, or I need a real time caption or I need an interpreter, whatever the request is. I shouldn't have to get into a debate with them, well you know we can't really afford it, we'll just write notes back and forth, it's good enough. No, it's not good enough.

LCO Focus Group, Deaf, Deafened and Hard of Hearing Individuals,
Toronto, June 10, 2010

As well, when dealing with formal legal settings such as courts and tribunals, there are very few interpreters who are conversant with legal terms or procedures and qualified to work in these settings. The Canadian Hearing Society has raised concerns about the lack of testing or qualifications for sign language interpreters working in legal settings.¹⁶² During consultations, several Deaf individuals recounted courtroom experiences where the assigned sign-language interpreter was clearly not qualified to deal with the issues at hand.

I work with a lot of clients doing case management, so I'm out of the building a fair bit and I'm in the courts a fair bit and I'm having to insist on behalf of clients that interpreters be provided for them. And we'll attend and the interpreter will be there but they are not a qualified person. They are not qualified. They are an interpreter but they are not qualified for Court. So there we will be, and I can't, it's important that the client can understand, so I will ask the client if they understand what's happening. And if they really object, of course then I will speak up on their behalf...So, I'm wanting for there to be, there has to be an understanding of the reality of where the interpretation is being provided and the level of qualification that is necessary. There's some interpreters that are suitable for other settings, not for these other critical settings. So there needs to be a discussion of looking at qualifications and skills of interpreters for critical settings.

LCO Focus Group, Deaf, Deafened and Hard of Hearing Individuals,
Toronto, June 10, 2010

In a December 2008 report on linguistic and rural access, the Law Foundation of Ontario noted that many legal service providers and some administrative tribunals

The nature of certain types of impairments may make navigation particularly difficult – for example, a person in crisis related to a mental health disability is not likely, at that point, to be able on their own to locate and access supports. Persons who are living in poverty may be focused on day-to-day survival, and less able to concentrate personal resources to deal with large bureaucracies. Yet, most systems now rely on persons with disabilities themselves to identify their rights and advocate for themselves, assuming that individuals have the information, support systems and personal resources to do so.

simply do not provide sign language interpretation for people who are Deaf, and that some legal service providers expressed frustration with the lack of sufficient funding for sign language interpretation.¹⁶³ Persons who are Deaf may therefore find themselves in the midst of legal proceedings which may have considerable impact on their lives, but of which they have only partial understanding.

These kinds of barriers to access to information can significantly impede the ability of persons with disabilities to understand and enforce their rights and responsibilities under the law, and can thereby contribute substantially to the implementation gap.

Failure to accommodate disability-related needs: As is touched on above, services and programs that may affect persons with disabilities, and mechanisms for accessing and enforcing rights may not take into account disability-related needs and may fail to provide appropriate accommodations. While equal access to services without discrimination (to the point of undue hardship) is the law under the Ontario Human Rights Code and standards under the Accessibility for Ontarians with Disabilities Act are expected to spur significant advances, change takes time, and many disability-related barriers, whether physical, attitudinal, systemic, communications or otherwise, currently remain.

Reliance on self-advocacy to navigate complicated systems: As the previous section described, the law as it affects persons with disabilities is often fragmented and complex, so that persons with disabilities find it difficult to navigate through the necessary systems. The nature of certain types of impairments may make navigation particularly difficult – for example, a person in crisis related to a mental health disability is not likely, at that point, to be able on their own to locate and access supports. Persons who are living in poverty may be focused on day-to-day survival, and less able to concentrate personal resources to deal with large bureaucracies. Yet, most systems now rely on persons with disabilities themselves to identify their rights and advocate for themselves, assuming that individuals have the information, support systems and personal resources to do so.

Power imbalances: As well, there is often a significant power imbalance between the individual with a disability and the person or organization administering the law or program. For example, ARCH points out that persons with intellectual disabilities may rely on developmental services and supports for many activities of daily living, such as eating, dressing, bathing, toileting, managing finances, or navigating social assistance bureaucracies, and states,

[t]his dependence leaves people with disabilities vulnerable; they must work hard to maintain good relationships with support workers, family members and others on whom they rely in order to ensure that they continue to receive support and their basic needs are met. Making a complaint

about a support worker or raising a concern about services may threaten or sever those relationships, and this can have disastrous impacts for the person with a disability.¹⁶⁴

Limited resources: In some cases, adequate human or financial resources are not provided to ensure the appropriate functioning of a law or program, so that access to rights and benefits is, in effect, rationed. As one consultee noted,

The biggest gap that I see is in funding, is in supporting the programs that are out there. I mean, we all, I suspect, in this room, would all espouse community living as something that is integral to the inclusion of people with developmental or intellectual disabilities, or for that matter, any other disability, but when you don't have supports in place, when people can't access the supports that they need to be able to engage with the community, then it becomes nothing more than, you know, a saying. When, you know, there isn't money to transition from being in high school to living in the community, when there isn't money to I don't know, to pay support workers so that you have control over your own life and you can make choices and decisions. When there isn't any funding for the programs, the programs themselves are worthless.

LCO Focus Group, Organizations, Toronto, May 13, 2010

In many cases, it is difficult to tell whether a particular law, policy or program is having its intended effect, because there is no adequate mechanism for monitoring and evaluating its effectiveness. Data on the effect of a particular program, benefit or law on the lives of persons with disabilities frequently do not exist.

Courts have been reluctant to impose positive obligations on governments to provide supports to persons with disabilities, so that supports are at the discretion of governments.¹⁶⁵

Lack of monitoring and transparency: In many cases, it is difficult to tell whether a particular law, policy or program is having its intended effect, because there is no adequate mechanism for monitoring and evaluating its effectiveness. Data on the effect of a particular program, benefit or law on the lives of persons with disabilities frequently do not exist. For example, as is described further in the Case Example below, although Individual Education Plans for students with disabilities are required to include transition plans for students approaching school-leaving stage, concerns have been raised about the effectiveness of the limited requirements for monitoring and evaluating transition plans.¹⁶⁶ Clear and measurable standards can assist in enabling effective monitoring. For example, the Ministry of Education's standards for Individual Education Plans for exceptional pupils outline in detail province-wide standards that school boards must meet when developing, implementing and monitoring these plans.¹⁶⁷ One of the key benefits of the AODA is increased clarity about what employers, service providers and others must do to ensure that their activities better meet the accessibility-related needs of persons with disabilities. The Case Example below highlights the importance of monitoring the implementation of laws and programs to ensure that they are meeting the goals that are set for them.

Although there are many programs to support students with disabilities while they are in school and planning to enter the workforce and Ontario's special education system has made many advances in accommodating and including students with disabilities, significant barriers remain in the education system and transition planning may not adequately prepare persons with disability for the workforce. Employment service providers have indicated that most persons with disabilities seeking employment assistance need skills upgrading in order to compete in the labour market.

CASE EXAMPLE: MONITORING AND TRANSPARENCY

Planning the Transition from School to Work under Individual Education Plans

Moving from school to employment is a crucial time for all young people who are entering adulthood, when they gain greater independence and begin to exercise greater control over their lives. Gaining employment is a major aspect of this development. Employment allows an individual to contribute to and feel part of a community. It fosters social engagement and boosts self-esteem. It is a key factor in self-determination and financial independence. Article 27 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) sets out "the right of persons with disabilities to work, on an equal basis with others; this includes the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities."¹⁶⁸

As is detailed elsewhere in this Chapter, unemployment rates are higher than average for young persons, and this is exacerbated for persons with disabilities. The transition from education into employment may be a difficult one for this group. A recent OECD report concluded that, although youth with disabilities were increasingly able to access and succeed in tertiary education, this additional training has had little impact on their access to employment.¹⁶⁹

Although there are many programs to support students with disabilities while they are in school¹⁷⁰ and planning to enter the workforce and Ontario's special education system has made many advances in accommodating and including students with disabilities, significant barriers remain in the education system and transition planning may not adequately prepare persons with disabilities for the workforce. Employment service providers have indicated that most persons with disabilities seeking employment assistance need skills upgrading in order to compete in the labour market. Employers have similarly reported that as many as 40 per cent of persons with disabilities attending job fairs require more training before entering the workforce.¹⁷¹

Recognizing that almost all students will aspire to further education of some form, productive or supported employment or volunteer work and independent living with such supports as are necessary,¹⁷² Ontario's Education Act's requirements related to special education include provision for transition planning.¹⁷³

Under the Education Act, the Ministry of Education is responsible for ensuring that all "exceptional pupils" in Ontario have available to them appropriate special education programs and services without payment of fees. This includes responsibility for ensuring that school boards implement procedures for identifying student needs and set standards for identification of exceptional pupils.¹⁷⁴

Regulation 306 requires school boards to provide special education programs and services to exceptional students. As part of this requirement, each school board must prepare an annually reviewed special education plan¹⁷⁵ and establish Identification, Placement and Review Committees and Special Education Appeal Boards.¹⁷⁶

Individual Education Plans (IEPs) for identified students aged 14 and older must include a plan, developed in consultation with the student's parents or guardians, for transitioning to appropriate post-secondary activities including further education, work and community living.¹⁷⁷ Only those students aged 16 and older are entitled to be directly consulted in the planning process;¹⁷⁸ however, students age 14 and older may have some input in other ways, such as through the development of the Annual Education Plan.¹⁷⁹ Additionally, the principal is responsible for consulting with appropriate community agencies and post-secondary institutions.¹⁸⁰

According to Ministry standards, a transition plan must include the following:

- goals for the transition that are specific for the student;
- the actions, also specific to the student, required to achieve the goals;
- the person or agency responsible for helping to complete each action; and
- timelines.¹⁸¹

In different ways, a wide variety of people and organizations are involved either in the transition planning team (the student, parents, school personnel, relevant community representatives and workplace representatives) or through links developed by special education staff with the employment sector and community support organizations.¹⁸² The Ministry also emphasizes the importance of providing appropriate and barrier-free access to cooperative education and work placement programs,¹⁸³ considered to be an important and successful part of transition planning for some exceptional students.¹⁸⁴ Educators are required to ensure that the accommodations provided for in a student's IEP are similarly made available at the job placement.¹⁸⁵

Despite the positive provisions in law and policy regarding transition planning, it is difficult to tell how effective these provisions are in meeting their objectives. Although decisions as to identification and placement may be appealed to the Ontario Special Education Tribunal (SET), the SET has no explicit jurisdiction to determine whether or not appropriate supports were provided under the IEP. However, the Ontario Human Rights Tribunal has recognized that the SET does consider the appropriateness of programs and services in the context of placement decisions and that issues of appropriate accommodation, including the sufficiency of the programs and services provided to applicants, will be heard by the Human Rights Tribunal of Ontario,¹⁸⁶ an option about which many may be unaware.

...[I]n practice the extent to which transition planning actually takes place and its effectiveness vary among different high schools and different students. School boards operate on their own business models and take different approaches to interpreting and implementing the Ministry's Standards.

Further, in practice the extent to which transition planning actually takes place and its effectiveness vary among different high schools and different students. School boards operate on their own business models and take different approaches to interpreting and implementing the Ministry's Standards. The Ontario Human Rights Commission and Statistics Canada have both found that special education programs and services that exist on paper may be inadequate in their implementation,¹⁸⁷ and that transition planning has not necessarily been effective, particularly as the student ages.¹⁸⁸

Finally, there currently appears to be insufficient monitoring of the effectiveness of current approaches to transition planning. Although Ministry standards also include provisions for implementing and monitoring IEPs, in a 2008 Report on Special Education, the Auditor General of Ontario noted that, although transition plans were completed for special needs students as required by regulation, there was no documentation on whether intended actions were completed and with what degree of success.¹⁸⁹ In his 2010 Report, the Auditor General noted that a number of steps had been undertaken to begin to address this issue.¹⁹⁰ For example, the Ministry of Education is currently in the process of drafting a Policy and Program Memorandum on Transitions in response to the Auditor General's recommendations.¹⁹¹ This will require school boards to monitor the effectiveness of transitions as part of the IEP review process. As well, 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. The Ministry of Education has also instituted an annual survey to monitor implementation of a number of areas affecting students with Autism Spectrum Disorder, including transition planning.

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. This highlights the broad issue of the "implementation gap", which is a general challenge for law and policy-makers, as well as the value and importance of transparency and monitoring in progressive realization of the ultimate goals of the law.

When laws are designed or reviewed, these barriers must be taken into account and addressed, to ensure that the law is meaningful and effective for persons with disabilities.

III. PRINCIPLES FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

Based on the approaches identified in Chapter I and the contexts and themes outlined in Chapter II, this Chapter will identify and define principles which can form the basis for an evaluative framework for the law as it affects persons with disabilities, as well as some considerations for applying these principles. As was highlighted in the previous chapter, “law” includes not only statutes and regulations, but the policies and practices that are employed to implement them, and so should be understood broadly.

A. Adopting a Principles-Based Approach

As was noted in Chapter I, the LCO determined at an early stage in this project to base its *Framework* on a set of principles.¹⁹²

Principles are normative, and can act as a catalyst to change attitudes and awareness about persons with disabilities. They are also by their nature aspirational, and can help us to identify the goals which law and policy should seek to achieve with respect to persons with disabilities. A principles-based approach can assist in ensuring that the goals of the law are in harmony with the aspirations of persons with disabilities, while recognizing that those aspirations (and the law itself) are constantly evolving.

As discussed in the previous Chapter, the law as it affects persons with disabilities is vast, diverse and sometimes contradictory.¹⁹³ There are dozens of laws that directly target some or all persons with disabilities. Many of them, like special education and the Ontario Disabilities Support Program (ODSP), involve extensive and complicated webs of policies and processes and significant bureaucracies. And of course, by definition, all laws of general application affect persons with disabilities, sometimes differently or disproportionately compared with those who do not identify as having a disability. Not surprisingly, the law as it affects persons with disabilities is often fragmented and difficult to grasp, let alone navigate. A principles-based approach potentially provides a clear and consistent yet flexible means of assessing this wide range of laws.

As well, a principles-based approach builds on the extensive work that has been completed over the past few decades. Persons with disabilities, together with organizations that represent, serve or advocate for them, have worked to articulate principles that address their experiences and their aspirations, and to see them reflected in laws and public policy. The Canadian *Charter of Rights and Freedoms* (*Charter*) and the Ontario *Human Rights Code* (*Code*) (together with the caselaw developed under them), statutes such as the *Accessibility for Ontarians with Disabilities Act* (AODA), public policy documents such as *In Unison* and international documents such as the *Convention on the Rights of Persons with Disabilities* (CRPD) all reflect, to varying extents and according to their particular contexts, these fundamental principles. A principles-based approach therefore ensures that the work of the LCO builds on and complements all that has

Principles are normative, and can act as a catalyst to change attitudes and awareness about persons with disabilities. They are also by their nature aspirational, and can help us to identify the goals which law and policy should seek to achieve with respect to persons with disabilities. A principles-based approach can assist in ensuring that the goals of the law are in harmony with the aspirations of persons with disabilities, while recognizing that those aspirations (and the law itself) are constantly evolving.

gone before, and can make a contribution to the ongoing evolution of this area. A brief outline of the key sources for the LCO's principles can be found in Appendix B to this *Final Report*.

Because principles are abstract, a principles-based framework must meet the significant challenge of grounding these abstract principles in lived experience, and ensuring that their implications and interpretations are sufficiently concrete to permit practical application, a challenge that is discussed at greater length later in this Chapter, and explored in the context of particular laws in the Case Examples throughout this *Final Report* and the extended Case Example applying the *Framework* in Chapter V.

B. Substantive Equality as an Overarching Value

Equality is identified as a value or a principle in some of the documents discussed above. In particular, equality and non-discrimination are central to the *Charter* and to the *Human Rights Code*.

Because principles are abstract, a principles-based framework must meet the significant challenge of grounding these abstract principles in lived experience, and ensuring that their implications and interpretations are sufficiently concrete to permit practical application.

Rather than identifying equality as a discrete principle, the LCO has concluded that substantive equality is more appropriately described as “an underlying value” or a goal that observance of the principles will advance and that should influence the interpretation of the principles.

The interpretation of the concept of equality is subject to on-going debate and discussion and the case law relating to equality continues to evolve. Similarly, its meaning as a value underlying the principles will also evolve.

“Equality” is often linked with “non-discrimination” and in certain respects they are intended to achieve similar results. Anti-discrimination theory has become intertwined with the notion of equality, and as a result even the broader “equality” tends to carry with it the notion that particular groups (and not necessarily others) have been treated unequally and deserve to be treated equally. There is a major difference between the two, however. “Non-discrimination” requires a comparison with others who do not share distinctive characteristics with a person denied a benefit or opportunity, for example. There is an implicit assumption that the way the comparator group is treated or the opportunities available to the comparator group is the standard to meet. Both the claimant and the comparator group might be treated “badly”, but nonetheless equally and without discrimination, even though the way they are treated is at a low standard. Accordingly, governments required to extend benefits to a group previously excluded because the exclusion constitutes discrimination can decide not to provide the benefit rather than extend it.

The LCO's approach to the concept of equality is substantive, rather than formal. The Supreme Court of Canada, in a recent case dealing with age-based criteria, stated,

Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.¹⁹⁴

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in society. It incorporates but is not limited to non-discrimination.

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in society. It incorporates but is not limited to non-discrimination, meaning that no distinctions are imposed upon disadvantaged persons that, in purpose or effect, withhold or restrict access to opportunities, benefits or protection from the law, or impose burdens, obligations, or disadvantages that are not imposed on others. It also means, however, that persons with disabilities are not defined by the barriers they face, but are recognized as members of society who are able to make contributions and have obligations, as do other members. Substantive equality is about intangible concepts such as dignity and worth, but also about concrete opportunities to participate, have needs taken into account and have society and its structures and organizations develop in a way that does not treat persons with disabilities as outside mainstream society.

C. Principles for the Law as It Affects Persons with Disabilities

The LCO has identified six principles for the law as it affects persons with disabilities:

1. Respecting the dignity and worth of persons with disabilities;
2. Responding to diversity in human abilities and in other characteristics;
3. Fostering autonomy and independence;
4. Promoting social inclusion and participation;
5. Facilitating the right to live in safety; and
6. Recognizing that we all live in society.

The six principles are closely linked. They cannot be understood or successfully implemented in isolation. To a certain degree, the underlying concepts overlap. For clarity, they are outlined here separately, but the *Framework* applies them holistically, reflecting their connectedness.

As described in Chapter I, the LCO’s consultations assisted us in understanding what the principles might mean in practical terms. As well, the LCO funded six Commissioned Papers and carried out extensive internal research on the theme of

transitions in the lives of persons with disabilities and the law as a means of identifying implications and possible interpretations of the principles.

1. Respecting the Dignity and Worth of Persons with Disabilities

Definition: *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.*

The principle of respect for the dignity and worth of persons with disabilities is a direct challenge to stereotypes and negative attitudes towards persons with disabilities. It emphasizes that dignity is something that belongs to us because we exist: it is not something that we earn or receive, and it cannot be rightfully ignored or diminished. It does not depend upon our health status or our abilities.

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

As briefly discussed in Chapter II of this *Final Report*, there is a long history in Canada of negative attitudes towards persons with disabilities. As an example, until the relevant provisions were overturned through a court challenge, the *Ontario Disability Support Program Act* explicitly excluded from its supports and benefits those persons whose impairments and primary restrictions resulted solely from addictions to drugs or alcohol.¹⁹⁵ The Social Benefits Tribunal determined that this provision disadvantaged individuals with this particular type of disability based on assumed or unjustly attributed characteristics, denying them their essential human worth. The Ontario Divisional Court found that this exclusion was not in accordance with the purpose of the law; rather, it was based on “assumed or unjustly attributed characteristics” regarding individuals with substance abuse disabilities, and that it resulted in the denial of the “essential human worth” of persons with these disabilities.¹⁹⁶ This decision was upheld on appeal to the Ontario Court of Appeal.¹⁹⁷

A lack of respect for the worth and abilities of persons with disabilities may also affect how laws are implemented by justice system workers, service providers and others. For example, parents with disabilities have expressed concerns that negative assumptions may lead to increased scrutiny and intervention by the child welfare system.¹⁹⁸ Similarly, during the LCO's spring 2010 public consultations, many persons with disabilities expressed concern about demeaning treatment or processes for obtaining benefits and supports under ODSP. For example, one participant commented,

To get funding, you have to strip yourself of any itty-bitty inkling of dignity that you have...you need to sort-of strip yourself of all the dignity that you have and open your private spaces up absolutely, completely, risking legal ramifications even – I wonder, I wonder if that information could be used when there are issues of aggression and violence and abuse and all that kind of stuff, if that kind of information you end up documenting to get the support you need to save yourself from yourself, to gain your dignity and independence, may actually be used against you at some point.

LCO Focus Group, Organizations, Toronto, May 11, 2010

INTERPRETING THE PRINCIPLE

The principle of respect for the dignity and worth of persons with disabilities is a direct challenge to stereotypes and negative attitudes towards persons with disabilities. It emphasizes that dignity is something that belongs to us because we exist: it is not

something that we earn or receive, and it cannot be rightfully ignored or diminished. It does not depend upon our health status or our abilities. Every person is worth caring about and entitled to respectful treatment.

This means that those who make law and policy, or who implement it, must be sure that laws and policies, in their substance or implementation, are not tainted by negative or dismissive attitudes towards persons with disabilities, for example through demeaning processes or insulting treatment. Because barriers for persons with disabilities tend to push them towards the margins, socially and economically, there is a disproportionate incidence of low-income among persons with disabilities,¹⁹⁹ and the particular set of negative attitudes towards low income individuals with disabilities deserve special scrutiny.

...[P]ersons with disabilities should be understood as whole individuals – as employers as well as employees, parents and caregivers as well as recipients of care, volunteers and fully engaged citizens, and as sexual human beings, among other roles – rather than being reduced to the sum of their impairments, and as passive objects of charity. This requires us to see persons with disabilities in their full social context, and as individuals with multiple identities and evolving life courses.

It also means that persons with disabilities should be understood as whole individuals – as employers as well as employees, parents and caregivers as well as recipients of care, volunteers and fully engaged citizens, and as sexual human beings, among other roles – rather than being reduced to the sum of their impairments, and as passive objects of charity. This requires us to see persons with disabilities in their full social context, and as individuals with multiple identities and evolving life courses.

The following Case Example provides an illustration of how attitudes that do not recognize persons with disabilities as full persons, with all of the characteristics and needs of persons who do not have disabilities, may affect and be reflected in laws, policies and practices.

CASE EXAMPLE: RESPECTING DIGNITY AND WORTH

Sexuality, Persons with Disabilities, Attendant Services and the Law

The World Health Organization has recognized the importance of sexuality to human health and well-being, and framed sexuality as both a basic need and a fundamental right:

Sexuality is an integral part of the personality of everyone: man, woman and child. It is a basic need and aspect of being human that cannot be separated from other aspects of life...Since health is a fundamental right, so must sexual health also be a basic human right.²⁰⁰

It has been pointed out that in general, “The vast majority of people are born with emotional and sexual needs and no one thinks, in principle, to question the exercise of these rights per se, as long as lawful sexual activity is occurring and public decency is safeguarded.”²⁰¹

...[E]ven where attitudes towards the sexuality of persons with disabilities are not negative per se, paternalism may inhibit support for sexual expression based on the assumption that persons with certain kinds of disabilities should not engage in sexual behaviour or that the risks always outweigh the benefits or exercise of choice.

However, historically Western culture has viewed persons with disabilities as asexual, or even viewed their sexuality as deviant. While these attitudes have evolved somewhat, they continue to affect the lives of persons with disabilities.²⁰² These attitudes may have particularly significant effects on the lives of women with disabilities, given that women in general are identified with their nurturing roles, sexual attractiveness and reproductive capacity.²⁰³ Negative or dismissive attitudes towards the sexuality of persons with disabilities may be understood as a form of ableism:

In the context of sexuality, ableism includes beliefs that people living with disabilities are not sexy or sexual and are not capable of having a healthy sexuality or healthy relationships, specifically because of their disabilities. Ableism fails to acknowledge that people with disabilities are systemically marginalized and discriminated against in ways that make it more difficult for them to express and explore their sexuality, find sexual partners, and experience healthy relationships.²⁰⁴

This effect of this negative mindset may be exacerbated by the broader tendency towards paternalistic attitudes to persons with disabilities. That is, even where attitudes towards the sexuality of persons with disabilities are not negative per se, paternalism may inhibit support for sexual expression based on the assumption that persons with certain kinds of disabilities should not engage in sexual behaviour or that the risks always outweigh the benefits or exercise of choice. As is further considered in the discussion of the principle of fostering autonomy and independence later in this Chapter, paternalism can be a significant barrier to the substantive equality and independence of persons with disabilities; respect for the dignity and autonomy of persons with disabilities requires respect for their right to take risks.²⁰⁵

Some persons with disabilities require assistance in order to engage in sexual expression, as with other activities of daily living. Persons with disabilities may receive assistance with activities of daily living in institutional settings, or through attendant services in the community. The LCO's Final Report: A Framework for the Law as It Affects Older Adults, Advancing Substantive Equality through Law, Policy and Practice considers some issues related to the sexuality of older adults with disabilities in long-term care settings.²⁰⁶ This Case Example will focus on persons with disabilities living in the community and receiving services through attendant services.

The law surrounding the provision of attendant services in Ontario is described more generally in Chapter V of this Final Report. Essentially, attendant services providers may be provided through agency services or may be employed by persons with disabilities through direct funding programs. Their role is to provide assistance with activities of daily living such as dressing, eating, bathing and grooming, toileting and similar activities. Key to the role of the attendant is that the person

The issues (especially legal issues) raised by the provision of sexual supports by attendant services providers are very rarely discussed, in part because of the negative attitudes highlighted above. Generally speaking, there is a dearth of resources, training and infrastructure to guide service providers and persons with disabilities in addressing sexual needs.

with the disability retains control and decision-making authority over their own care: attendants assist persons with disabilities to lead more independent and autonomous lives. The relationship between users and providers of attendant services is of necessity a very intimate one, given the nature of the services provided and the fact that services are provided in the home of the persons with a disability. The dynamics may be complicated, as while the person receiving services directs the service provider, that person is also very dependent on attendant services in order to remain in the community.

The issues (especially legal issues) raised by the provision of sexual supports by attendant services providers are very rarely discussed, in part because of the negative attitudes highlighted above. Generally speaking, there is a dearth of resources, training and infrastructure to guide service providers and persons with disabilities in addressing sexual needs.²⁰⁷ Although sexual support through attendant services does occur, many organizations providing attendant care do not have policies on these issues and assistance occurs “below the radar”.²⁰⁸ It is rare for sexual support to be identified as an issue in job descriptions, contracts and service agreements.²⁰⁹ A survey on barriers to sexual expression by persons who use Augmentative and Alternative Communication²¹⁰ reported that in some agencies there is no clear consensus on what attendant services do and do not do in relation to assisting people in sexual activities.²¹¹ Not surprisingly then, both persons using attendant services and those providing them have indicated that they lacked knowledge and factual information about legal rights and obligations related to sexual support services by attendants.²¹²

Because of this silence in organizational policies and documents, it is left to attendants and attendant services users to address the issues individually. Although the WHO recognizes the importance of sexuality, many still experience sex and sexuality as something that is not often openly spoken about and may feel some discomfort when discussing sexuality. Both attendants and persons using attendant services may be uncomfortable raising issues regarding sexuality.

As well, without training or policies to set standards, attendant services users are dependent on the individual attitudes of attendants. Not surprisingly given the broader societal attitudes towards sexuality and disability, some studies have indicated that attendants may be unsupportive towards sexual activity on the part of persons with disabilities; some may be uncomfortable with assisting with sexual activity that falls outside their own norms.²¹³ Persons with disabilities may be reasonably concerned that they will be judged negatively for their sexual interests and that this will undermine what is for them a crucial support.²¹⁴

Where policies and formal support mechanisms regarding sexuality and persons with disabilities exist, they tend to focus more on sexual abuse and victimization.

Discussions about sexual support are particularly difficult because they occur in a work context, an arena where discussion of sexuality is usually considered off-limits. There are concerns that raising issues regarding sexual expression might be perceived as sexual harassment or abuse, or lead the other person to feel unsafe in the working relationship. Without clear guidelines, both persons using attendant services and attendants may be unsure as to whether or when raising questions about sex or asking for sexual support might be considered harassing.

While guidelines on these issues are crucial, they do not address the full range of needs and issues related to sexuality.²¹⁵ Given the overall silence on issues related to disability and sexuality, a sole focus on sexual abuse and victimization in dealing with sexuality may encourage a tendency towards a protective, rather than facilitative mindset towards the sexuality and autonomy of persons with disabilities. Silverberg and Odette note,

Many attendants consider it part of their job to protect the people they work with from harm. In stories from both attendants and people using attendant services, we saw how an attitude of paternalism prevails in many working relationships and how this idea of protection can easily lead to over-protection.²¹⁶

As well, there are concerns about legal liability. One article notes, “even if perfectly legal in theory, PAS [personal assistance services] for sexual activity would be a hot potato for policy-makers”, particularly given potential liability issues if sexual harassment concerns are raised.²¹⁷

Discussions about sexual support are particularly difficult because they occur in a work context, an arena where discussion of sexuality is usually considered off-limits. There are concerns that raising issues regarding sexual expression might be perceived as sexual harassment or abuse, or lead the other person to feel unsafe in the working relationship. Without clear guidelines, both persons using attendant services and attendants may be unsure as to whether or when raising questions about sex or asking for sexual support might be considered harassing.²¹⁸

As a result of these factors, there is a silencing effect around issues of sexuality for attendant services users, which may reinforce the perception that persons with disabilities are not or should not be interested in sexual expression. A survey of attendants and attendant service users found that both attendant service users and attendants tend to be reluctant to be the first to raise the topic, so that even those who agree that sexual support is part of attendant services may be wary of bringing up the topic.²¹⁹

The principle of dignity highlights the importance of recognizing persons with disabilities as individuals with the full range of human characteristics and needs, including sexuality, and of addressing stereotypes that see persons with disabilities as asexual and any expressions of sexuality as inappropriate. A failure in law and policy related to attendant services to recognize and address persons with disabilities as sexual may undermine the principle of dignity and worth by limiting the ability of persons with disabilities to express and enjoy all aspects of their humanity.

2. Responding to Diversity in Human Abilities and Other Characteristics

Definition: This principle requires recognition of and responsiveness to two dimensions of diversity: 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; and the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

All humans vary in their abilities. “Disability” may be thought of as part of this normal variance. Social and environmental barriers may, at some points along this continuum of abilities, create disabling experiences for some individuals.²²⁰ Certain impairments may not constitute a disability in the sense that they affect a person’s daily life. The most obvious example is eyesight: many people who have poor eyesight are able to wear glasses that sufficiently compensate to enable them to function in most aspects of their life as if their eyesight were not impaired. Without corrective lenses, however, their eyesight might, in fact, constitute a disability. In this way, advances in technology and changes in the physical and social environment may shift the lines around what is considered a “disability”.²²¹

All humans vary in their abilities. “Disability” may be thought of as part of this normal variance. Social and environmental barriers may, at some points along this continuum of abilities, create disabling experiences for some individuals.

As well, some conditions commonly considered as impairments may have positive aspects that are often ignored: for example, some recent studies associate the learning disability of dyslexia, which results in challenges in learning to read and write, with stronger than average skills in other areas, such as spatial perception.²²² That is, the differences associated with disability may be positive as well as negative. Persons with disabilities are not “the other”, but are part of the range of human experience.

Persons with disabilities are commonly viewed as a homogenous group, mainly defined by their impairments. This obscures the enormous diversity of the disability community. The experience of disability will differ considerably depending on the nature of the impairment: while the experience of exclusion and marginalization may be common, needs and experiences may be unique.²²³ For example, persons with episodic disabilities such as chronic fatigue or mental health disabilities will have distinctive experiences as they transition in and out of social and legal categories of “disability”. Since eligibility for programs and services may depend on meeting the criteria for “disability”, persons with episodic disabilities may face additional administrative burdens, as they may need to repeatedly re-apply for services as their condition changes. Programs or services may require applicants to demonstrate “permanent” disabilities, or may simply not have designed their systems to deal well with individuals whose status is subject to repeated change.²²⁴ As well, employers may be reluctant to deal with the uncertainty surrounding accommodation requirements for individuals whose needs may fluctuate unpredictably; for invisible disabilities (such as mental health disabilities), this may be compounded by a tendency to doubt the validity of disabilities that cannot be seen.

Disadvantages may accumulate throughout life. For example, a person who experiences barriers in education because of a disability will have lower levels of literacy and of educational attainment throughout life, resulting in greater difficulty in entering and remaining in the workforce, and therefore in maintaining stable income levels and adequate housing.

The impact of a disability may also differ depending on whether an individual is living in an urban area where access to supports and services may be greater, or in a remote or rural area;²²⁵ whether the individual has a supportive family and community surrounding him or her; his or her socio-economic status; and other factors. That is, individual lives, needs and experiences will differ widely even among persons with the same impairments, although the law may have difficulty in effectively recognizing and addressing this diversity.

As is noted above, one of the circumstances of persons with disabilities that should be taken into account is the disproportionate experience of low income. Whether as a result of their environments, their impairments or in most cases a combination of the two, individuals with disabilities tend to have lower socio-economic status than their peers without disabilities. On average, persons with disabilities live with lower incomes,²²⁶ have lower levels of education,²²⁷ and have a greater exposure to violence and victimization than the average.²²⁸ This is particularly true for certain groups of persons with disabilities, such as women and Aboriginal individuals.²²⁹ The level and type of disadvantage also may differ depending on the type of disability. For example, persons with intellectual disabilities report the lowest labour force participation rate of any group of persons with disabilities, with those with hearing or mobility disabilities faring relatively better in this respect.²³⁰ Disadvantages may accumulate throughout life. For example, a person who experiences barriers in education because of a disability will have lower levels of literacy and of educational attainment throughout life, resulting in greater difficulty in entering and remaining in the workforce, and therefore in maintaining stable income levels and adequate housing.

As well, there has been considerable scholarship about how the experiences of disability may differ based on gender, racialization, sexual orientation or other aspects of a person's identity. Women with disabilities, for example, have special concerns regarding reproduction and parenting.²³¹ Aboriginal persons with disabilities may have difficulty finding accessible support services that are sensitive to their culture and history. All of these forms of identity will help to shape the life courses of persons with disabilities.

Unfortunately, there is a tendency to carve off different pieces of our identities. So, you know, my experience has been that there's a lot of disability organizations that don't speak to issues around social location or multiple identities. So, they don't look at issues for racialized communities, they don't look at issues for queer communities within the disability community. And then those organizations that really do have a level of expertise around the complexities within the LGBT community, within racialized communities, don't often think about people with disabilities coming into their services.

LCO Focus Group, Organizations, Toronto, May 11, 2010

INTERPRETING THE PRINCIPLE

One of the implications of an acknowledgement of the near universality of impairment is the need to widen the range of what is considered "normal" in the context of human abilities, and to design social, political and physical structures more flexibly and

inclusively.²³² To put this principle into action, universal or inclusive design, with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.²³³ The *Convention on the Rights of Persons with Disabilities* (CRPD) imposes as a general obligation the promotion of universal design in standards and guidelines as a “default” approach that “shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.²³⁴

Inclusive design has been considered as part of the legal duty to accommodate under the *Code*.²³⁵ As the Ontario Human Rights Commission (OHRC) has emphasized, “[a]ccommodation with dignity is part of a broader principle, namely, that our society should be structured and designed for inclusiveness”.²³⁶ Inclusive design, with appropriate individual accommodations where necessary, is required to ensure full recognition of the spectrum of variance in human abilities.

To put this principle into action, universal or inclusive design, with a concomitant commitment to accessibility, is a key strategy to ensure the maximum inclusion of all people with their infinitely varying abilities.

[A]chieving integration and full participation for persons with disabilities requires barrier-free and inclusive design and removal of existing barriers. Preventing and removing barriers means persons with disabilities should be able to access their environment and face the same duties and requirements as everyone else with dignity and without impediment. Where barriers continue to exist because it is impossible to remove those barriers at a given point in time, then accommodation should be provided to the extent possible, short of undue hardship.²³⁷

In Unison 2000 highlights the intersectional aspect of diversity:

The framework [developed in *In Unison*] also acknowledges the importance of developing flexible policy solutions in order to meet individual needs. Each person with a disability is unique and their specific needs, aspirations and challenges are influenced by their type of disability, stage of life, family, community and cultural context, and other characteristics. Aboriginal persons with disabilities, for example, view disability issues within frameworks that reflect their own cultural principles.²³⁸

Inclusive design and accommodation must take into account the multiple aspects of identity for persons with disabilities.

The principle of diversity in human abilities and other characteristics also reinforces the recognition that persons with disabilities are individuals first and foremost. For many individuals and in many circumstances, their disability is not the most important aspect of their identities. This recognition helps us to move beyond stereotypes and to combat ableism and paternalism.

The Case Example below examines how racialized persons may encounter the mental health system differently from others, and thereby illustrates the principles of diversity.

Individuals from ethno-racial communities are at particular risk of experiencing mental health disabilities. There are several factors that contribute to this heightened risk. For ethno-racial individuals who are newcomers to Canada, arrival may bring with it economic hardship, isolation and the loss of career and social standing. They may be dislocated from established family and social networks. Some may have experienced trauma in their countries of origin.

CASE EXAMPLE: RESPONDING TO DIVERSITY

Racialized Individuals and the Mental Health System

Ontario is home to considerable ethnic, racial and linguistic diversity. More than half of Canada's "visible minorities" live in the province.²³⁹ According to the 2006 Census, 2.7 million individuals in Ontario were members of "visible minority" groups. This represented 23 per cent of Ontario's population. Approximately 80 per cent (2.2 million) of these individuals lived in metropolitan Toronto, representing 43 per cent of Toronto's population.²⁴⁰ Within the Toronto Central Local Health Integration Network (LHIN), immigrants make up 41 per cent of the population and, among this group, 20 per cent are recent immigrants, having arrived between 2001 and 2006. More than 160 languages are spoken in Toronto and 4.5 per cent of residents speak neither English nor French.²⁴¹

Individuals from ethno-racial communities are at particular risk of experiencing mental health disabilities.²⁴² There are several factors that contribute to this heightened risk. For ethno-racial individuals who are newcomers to Canada, arrival may bring with it economic hardship, isolation and the loss of career and social standing.²⁴³ They may be dislocated from established family and social networks. Some may have experienced trauma in their countries of origin.

Other issues that we have to deal with is a lot of clients that may have come from poor countries experiencing post-traumatic stress. Who knows what the encounters were of those individuals in their home country with say, the police system? They get arrested, they come into the Court, you know, they're being re-traumatized and they're reacting to old traumas and that is seen as aggression or lack of compliance or a question in terms of fitness, rather than understanding of the impact of mental illness, how it can manifest itself, what it is you will deal with when these individuals come to courts, all these things are missing. And it becomes more difficult because to deal, to work with those individuals, because they're being dealt with in a very punitive manner.

LCO Focus Group, Toronto, Organizations, May 11, 2010

Systemic racial discrimination may also lead to mental health issues or may result in a misdiagnosis of mental health disability.²⁴⁴

Ethno-racial minorities are also particularly vulnerable to poverty with its associated impact on mental health.²⁴⁵ These circumstances are exacerbated in rural settings where long distances and lack of transportation may hinder access to health care. For example, Ontario is host to approximately 18,000 migrant agricultural workers from Mexico and the Caribbean. These vulnerable workers cite depression and access to health services as two of their top health concerns.²⁴⁶

Language barriers are particularly acute for ethno-racial newcomers with mental health disabilities. A lack of access to interpreters pervades the health care and legal systems as it does other Ontario government services.

Ethno-racial minorities may experience mental health disabilities differently from the general population. The differences may be physical, cultural, and/or attitudinal. Certain ethno-racial groups have physical attributes that must be taken into account in their treatment.²⁴⁷ For example, members of Asian ethnic groups tend to be more sensitive to neuroleptic medications.²⁴⁸

It is important for those providing services related to mental health disabilities to have strong skills related to cultural competency in order to provide effective services to individuals from ethno-racial communities. The cultural beliefs of certain communities may prevent some members of the community from accepting a diagnosis of mental illness. For others, the nature of mental health may be understood in different terms.²⁴⁹ Furthermore, different cultures may use terminology referring to mental health issues that is not easily recognized by mainstream health care providers.²⁵⁰ Some research indicates that members of ethno-racial minorities with mental health disabilities may avoid the mental health system due to the stigma attached to mental illness in their community.²⁵¹ According to the Executive Director of the Hong Fook Mental Health Association, some may be uncomfortable turning to an unfamiliar system for support and are more likely to rely on their own community:

In the Asian culture, family is still the most important support, but the stigma attached to mental illness crosses cultures. Is it higher in Asian culture? I am not sure. They are not well informed. I can guarantee that there are patients who are not getting any form of assessment and treatment because the family does not feel comfortable exposing the fact that the family member is sick.²⁵²

As a result, racialized persons tend to enter the mental health system later than the general population and they are misdiagnosed more often.²⁵³ They are also less likely to participate in public health promotion/prevention programs.²⁵⁴

Even after persons belonging to ethno-racial minorities enter into the mental health system, several factors may prevent them from receiving optimal care. These include a lack of cultural awareness on the part of some mental health professionals, language barriers, and the client's fear or mistrust of a mental health system created and operated by the dominant culture.²⁵⁵

Language barriers are particularly acute for ethno-racial newcomers with mental health disabilities.²⁵⁶ A lack of access to interpreters pervades the health care and legal systems as it does other Ontario government services.²⁵⁷ Even a doctoral study specifically examining the experience of ethno-racial minorities with community treatment orders in Toronto was conducted solely in English because of a lack of funds.²⁵⁸ In spite of Ontario's commitment to two official languages, minority French-speaking communities also face significant difficulties in accessing mental health services in their own language.²⁵⁹ This problem is complicated by the

Attention to the principle of diversity assists us in identifying the ways in which persons from ethno-racial minorities will tend to encounter the mental health system from a different position and perspective than others.

private nature of mental health issues. In small communities, for example, an individual with mental health disabilities may be less likely to rely on an interpreter living in that same community.²⁶⁰

Ethno-racial persons with mental health disabilities are doubly affected by stigma – both in their capacity as members of racialized communities and in relation to their mental health disabilities. Both racist and ableist attitudes may impede their access to health care, even within the mental health system itself. For example, individuals with mental health disabilities commonly have difficulty finding a primary care physician willing to take them as patients.

Individuals from ethno-racial minorities are also more likely to fail to comply with mental health treatment. This is often the result of their adverse experiences with the mental health system and a lack of cultural competence among some service providers.²⁶¹

Among the general shortage of resources for persons with mental health disabilities, there is a particular shortage of mental health resources and services that meet the needs of ethno-racial communities. For example, in spite of the large percentage of people from ethno-racial minorities within the Greater Toronto Area and their unique experience with mental health disabilities, a disproportionately low amount of mental health funding is allocated to mental health services that are culturally competent or are specific to this population.²⁶²

The Ministry of Health and Long-Term Care (MOHLTC) has taken a number of steps to enhance the ability of the mental health system to provide linguistically and culturally appropriate information and services. For example, MOHLTC funds services designed specifically for immigrant, racialized and ethno-cultural groups.²⁶³ The Health Equity Impact Assessment tool developed by MOHLTC foregrounds equity issues in the development and implementation of policies and programs.²⁶⁴

The experience of individuals from ethno-racial communities in the mental health system illustrates the importance of the principle of diversity.

Attention to the principle of diversity assists us in identifying the ways in which persons from ethno-racial minorities will tend to encounter the mental health system from a different position and perspective than others. For a variety of reasons, including the systemic impact of racism and racial discrimination, individuals from this group may find themselves more likely than others to enter the mental health system, so that it may have a disproportionate impact on them. For those who are immigrants to Canada, their life courses will have affected their socio-economic status, their community connections, and their ability to understand and navigate the mental health system, so that processes and policies that may work well for others may not work so well for them. Language and culture may affect how individuals interact with the system.

The principle of diversity highlights the importance of ensuring that laws and policies have the capacity to respond flexibly to diversity among those potentially affected. In this case, it means ensuring that the system has the ability to provide linguistically and culturally appropriate information and services, reach out to ethno-racial communities and new immigrants, and take into account the effects of racism and racial discrimination on mental health.

3. Fostering Autonomy and Independence

Definition: *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.*

The response to paternalism has been an emphasis on the importance for persons with disabilities of the ability to make choices for themselves – including the right to make what others may consider to be bad or risky choices. Making choices allows us to express, in a fundamental way, our values and goals, and it is by seeing the outcomes of our choices – good, bad or indifferent – that we learn and grow.

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

As was highlighted in Chapter II.D.2, responses to disability have often been marked by paternalism, the tendency to remove decision-making from persons with disabilities “for their own good”.²⁶⁵ This has been particularly marked for persons with intellectual or mental health disabilities who may be deprived of the ability to make decisions for themselves because of the assumption that because they need supports, they are unable to make decisions, or because of needs for efficiency in large bureaucratic systems.²⁶⁶ The response to paternalism has been an emphasis on the importance for persons with disabilities of the ability to make choices for themselves – including the right to make what others may consider to be bad or risky choices. Making choices allows us to express, in a fundamental way, our values and goals, and it is by seeing the outcomes of our choices – good, bad or indifferent – that we learn and grow. Related to the opportunity to *choose* for oneself is the opportunity to *do* for oneself – to support oneself financially, to live independently, and to have, to the degree possible, the life options available to persons without disabilities. In *Via Rail*, the Supreme Court of Canada considered the principle of independence central to the finding that *Via Rail*’s failure to accommodate users of personal wheelchairs infringed the rights of persons with mobility disabilities to exercise their independence.²⁶⁷ In some cases, independence is difficult to achieve because of physical, social or institutional barriers. For example, discrimination on the part of landlords and a dearth of accessible housing may make it difficult for persons with disabilities to live independently,²⁶⁸ and limited accessible transportation services may reduce opportunities for employment or education.²⁶⁹ In some cases, persons with disabilities may require supports in order to achieve independence. For example, supporting persons with disabilities with self-advocacy tools can reduce the dependence of persons with disabilities on family members or service providers, and enhance skills and confidence.²⁷⁰

INTERPRETING THE PRINCIPLE

The principle of fostering autonomy and independence includes both the right to *choose* for oneself, and to *do* for oneself, and is a response to the various forms of paternalism that may affect persons with disabilities.

“Autonomy” has been defined by the World Health Organization (WHO) as “[t]he perceived ability to control, cope with and make personal decisions about how one lives on a daily basis, according to one’s own rules and preferences.”²⁷¹ In the context of section 7 of the *Charter*, the Supreme Court of Canada has articulated the principle of autonomy as including “decisions of fundamental personal importance” particularly with respect to bodily integrity.²⁷² Disability Rights Promotion International (DRPI) defines autonomy as

the right of an individual to make his or her own choices. Autonomy, or self-determination, means that the person is placed at the centre of all decisions affecting him or her and may choose forms of supported decision-making.²⁷³

In some circumstances, the autonomy of persons with disabilities may be perceived to be in tension with other principles. For example, in some cases limiting the choices of or enabling others to make choices on behalf of persons with disabilities has been seen as justified in order to achieve other ends, including the safety and security of persons with disabilities or of others in society. Also, some laws are put in place in recognition of the particular risks or vulnerabilities that persons with disabilities might experience because they lack appropriate supports. Although some limitation may be justified consistent with other principles, it is crucial that the focus remain on respecting the autonomy of persons with disabilities as much as possible and that limitations not be motivated by paternalism.

It is helpful to remember that autonomy is realized in the context of our relationships. This is not only true for persons with disabilities, but for all of us. Jennifer Nedelsky argues that it is relatedness which enables people to gain autonomy; the relationships between “parents, teachers, friends, loved ones” are what “provide the support and guidance necessary for the development and experience of autonomy”.

It is helpful to remember that autonomy is realized in the context of our relationships. This is not only true for persons with disabilities, but for all of us. Jennifer Nedelsky argues that it is relatedness which enables people to gain autonomy; the relationships between “parents, teachers, friends, loved ones” are what “provide the support and guidance necessary for the development and experience of autonomy”.²⁷⁴ This approach focuses on “structuring relationships so that they foster autonomy.”²⁷⁵ Relational autonomy recognizes that none of us makes decisions on our own but we do so in consultation with others, and that the provision of support to persons with disabilities in the context of decision-making does not undermine autonomy.

The WHO defines independence as “[t]he ability to perform an activity with no or little help from others, including having control over any assistance required rather than the physical capacity to do everything oneself.”²⁷⁶ In *Unison 2000* stresses that the promotion of independence or “citizenship” and other principles, including those defined by the LCO, is linked to the goal of improving disability-related supports:

Disability supports are tools for inclusion. They are critical if people with disabilities are going to lead fulfilling lives and participate fully in their communities. Without them, many people with disabilities are not able to fulfill their social and economic potential.”²⁷⁷

The principle of independence therefore requires that persons with disabilities are provided with appropriate levels of supports to do things for themselves to the greatest degree possible.

The principle of autonomy and independence applies to all areas of life for persons with disabilities. It includes within its scope fundamentally personal decisions and provides strong support for enhanced disability-related and income supports for persons with disabilities. Further, both autonomy and independence inform the duty to accommodate as requiring accommodations that maximize the ability of persons with disabilities to choose and do for themselves.

The concept of universal design, which requires those who develop or provide laws, policies, programs or services to take into account diversity from the outset, is connected to the principle of autonomy and independence in that, when properly implemented, universal design removes from persons with disabilities the burden of navigating onerous accommodation processes and negotiating the accommodations and supports that they need in order to live autonomously and independently. In this way, the principle of autonomy and independence is closely linked to that of participation and inclusion.

The principle of independence therefore requires that persons with disabilities are provided with appropriate levels of supports to do things for themselves to the greatest degree possible.

The following Case Example illustrates some key aspects of the principle of autonomy and independence through an examination of some of the issues surrounding community treatment orders for persons with mental health disabilities.

CASE EXAMPLE: FOSTERING AUTONOMY AND INDEPENDENCE

Community Treatment Orders for Persons with Mental Health Disabilities

As with the western world in general, Ontario's mental health system has followed a policy of deinstitutionalization over the last fifty years. Where once persons with significant mental health disabilities were detained in psychiatric hospitals as a matter of course, most of these persons are now treated in the community. The goal of deinstitutionalization is to provide persons with mental health disabilities with services, resources, community rehabilitation programs and early intervention services in the least restrictive setting feasible, a goal in harmony with several of the LCO's principles for the law as it affects persons with disabilities, including the principles of inclusion and participation, and of fostering autonomy and independence.

This commitment to care in the community has been hampered, however, by a shortage of community-based resources for persons with mental health disabilities.

The Auditor General concluded in 2008 that "adequate community-based supports may not be available for people being discharged from psychiatric hospitals as a

result of bed closures”.²⁷⁸ A lack of community-based supports leads persons with mental health disabilities to rely instead on higher-cost services such as emergency rooms and hospitals.²⁷⁹ The Auditor General also cited a 2004 report by CAMH to the effect that more than half of persons with serious mental illness living in the community were not receiving an appropriate level of care.²⁸⁰ Hospital readmission and repeat patient rates (the “revolving door syndrome”) also indicated a gap between the institutionalized and community-based system.²⁸¹ As the Auditor General explained it,

Too many individuals were returning to hospitals for care because there were poor integration of services, poor community follow-up, inefficient or inappropriate use of resources, poor planning or preparation for discharge, and insufficient help to people attempting to maintain themselves in the community rather than in an institutional setting.²⁸²

*The Legislative Assembly of Ontario Standing Committee on Public Accounts’ review of the Auditor General’s Report emphasized that the goal was to build a “patient-centered” system to ensure a smooth transition of clients from one provider to the next and to divert clients away from emergency scenarios and towards community-based services and supports.*²⁸³

Initiatives to improve community based treatments include Assertive Community Treatment Teams, Intensive Case Management and Crisis Response Services. Assertive Community Treatment Teams are mobile multi-disciplinary teams²⁸⁴ engaged in intensive case management and crisis response services, providing intensive 24/7 support to persons with serious mental illness as an alternative to hospitalization.²⁸⁵ Intensive Case Management involves a single case manager who coordinates appropriate community services and supports for clients, linking them with a range of treatment and rehabilitation services including social recreation, employment programs and supportive housing.²⁸⁶ Crisis Response Services are available in a variety of different formats (telephone, walk-in, residential, emergency and others) to persons with serious mental illness experiencing a psychiatric crisis in the community. These services are intended to provide immediate relief from symptoms, prevent the condition from worsening and resolve the crisis, as well as mobilize community resources to assist the individual and thereby prevent unnecessary hospitalization.²⁸⁷ Services are to be co-ordinated with community supports.²⁸⁸

Community Treatment Orders (CTOs) were introduced in 2000²⁸⁹ to permit physicians to mandate patients discharged from hospital to pursue community treatment in order to prevent the need for further hospitalization and to address the “revolving door syndrome” by which someone released from a psychiatric facility discontinues treatment in the community and is eventually admitted

An examination of CTOs can reveal the challenges that may be associated with interpreting and fulfilling the principle of fostering autonomy and independence. CTOs can be a valuable tool for helping individuals with mental health disabilities to return to the community, a much less restrictive environment than the hospital, and to maintain a level of health necessary for successfully remaining there. In this way, CTOs align with the principle of autonomy and independence... However, CTOs may also be perceived as coercive. CTOs will impose conditions which the individual must meet if he or she is not to be re-hospitalized.

hospital again. The orders, which last for a maximum of six months and are subject to renewal, involve the development of a community treatment plan that is agreed to by the physician issuing the CTO, the patient or her or his substitute decision-maker, and the community agencies that will be providing services under the plan, consented to by the patient or substitute decision-maker. Consent to a CTO is sometimes a condition to discharge from hospital and this is a powerful incentive for many patients to consent. Failure to abide by the plan can result in the individual's return to hospital. There is provision for challenging the issuance of the CTO and a process for review.²⁹⁰

An examination of CTOs can reveal the challenges that may be associated with interpreting and fulfilling the principle of fostering autonomy and independence. CTOs can be a valuable tool for helping individuals with mental health disabilities to return to the community, a much less restrictive environment than the hospital, and to maintain a level of health necessary for successfully remaining there. In this way, CTOs align with the principle of autonomy and independence. Moreover, the treatment plan is developed in consultation with the individual in question (or his or her substitute decision-maker), thereby recognizing the importance of involving individuals in decisions that affect them.

However, CTOs may also be perceived as coercive. CTOs will impose conditions which the individual must meet if he or she is not to be re-hospitalized. While these conditions must meet the requirements of the Mental Health Act (MHA) and be consented to by the individual or his or her substitute decision-maker, some have raised concerns that at times these conditions may be intrusive and may place significant restrictions on an individual's activities.²⁹¹ They may also affect the privacy of the individual affected.²⁹² As a result, CTOs have been controversial.

A study of 24 individuals who participated in CTOs highlighted this ambiguous status.²⁹³ Overall, the study presented a relatively positive picture of CTOs, as on the whole study participants reported benefitting from their experience with CTOs. Most of them had had little or no community support or services before going into hospital. In fact, in previous hospitalizations or incarcerations, several had been released without any arrangement for community support.²⁹⁴ It was only as a result of their placement under a CTO that they began to receive regular support from case managers, social workers, and/or psychiatrists. In most instances, they liked and trusted their case workers and believed that the regularity of the support they offered and the supervision of their medication was in their best interests. The CTO was thought to assist them in stabilizing their condition, keeping a routine, caring for their children, and, in one case, finding a job. Some ambivalence that they felt on first being placed under a CTO dissipated as they came to trust and respect these service providers.²⁹⁵

First the principle [of autonomy and independence] is closely linked to other principles. The principle of inclusion and participation is important, both in that the ability to transition to or remain in the broader community (as opposed to the hospital) is seen as an aspect of fostering autonomy and independence, and in the emphasis on involving the person with a disability, as much as possible, in the decisions about treatment orders.

However, several participants did indicate that they felt restricted and disempowered by the CTO. Many had consented to the CTO only to avoid further hospitalization. They still felt like a patient and did not like being monitored. They feared the threat of being forced to return to hospital if they failed to comply with their treatment plan.²⁹⁶

The Ministry of Health and Long-Term Care has undertaken two reviews of CTOs under section 33.9 of the MHA. The first was completed by Dreezer and Dreezer in 2005,²⁹⁷ and the second, conducted by R.A. Malatest & Associates, was very recently completed in late May 2012.²⁹⁸ The reviews canvassed many of the tensions and challenges outlined here. MOHLTC is currently reviewing the report completed by R.A. Malatest, including recommendations regarding safeguards for consumers, and will be developing a responsive action plan.

The tensions surrounding the application of the principle of autonomy and independence to CTOs highlight some important aspects of this principle.

First the principle is closely linked to other principles. The principle of inclusion and participation is important, both in that the ability to transition to or remain in the broader community (as opposed to the hospital) is seen as an aspect of fostering autonomy and independence, and in the emphasis on involving the person with a disability, as much as possible, in the decisions about treatment orders. The principle is also linked to that of respecting the right to live in safety, as one focus of CTOs is on ensuring that persons with mental health disabilities are able to remain well enough to remain safely in the community.

Further, the example highlights the importance of supports to enable autonomy and independence. A key context for CTOs is the difficulty of accessing community supports for some persons with mental health disabilities, and the role of CTOs in promoting access to those supports.

As well, the concerns expressed about the potentially coercive nature of CTOs highlight the importance placed on ensuring meaningful choices for persons with disabilities, and the risks of paternalism, particularly for persons with mental health disabilities.

4. Promoting Social Inclusion and Participation

Definition: 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 the involvement of persons with disabilities.

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

As was discussed in Chapter II.D.1, persons with disabilities have often tended to be marginalized in the public sphere, so that their values, priorities, concerns and even their existence are not visible to those who are developing, implementing or reviewing laws, policies and practices. This highlights the importance for persons with disabilities of inclusion and active involvement in advocacy organizations and government decision-making processes, to have processes and structures that value and take into account their expertise and perspectives.

Well, the laws are written by able-bodied people. You know, they don't sort of vet them. I guess they have some sort of experts, but you know, I worked for the Ontario government for a long time and I saw the policy. I tried to point out where the barriers were, actually in the Cabinet Submissions process in the first place, it's like the tail wagging the dog. We're too small of a group to really take that seriously. You know, I think that it's just peppered throughout all the legislation, it's really coming from that perspective.

LCO Focus Group, Organizations, Toronto, May 12, 2010

Participation is closely affiliated with the concept of inclusion. Persons with disabilities have often experienced physical or social exclusion or marginalization, whether arising from attitudinal, physical, social or institutional barriers. The long history of institutionalization of persons with disabilities is a particularly clear example of exclusion, but people with disabilities continue to be pushed to the margins in a variety of social areas, including employment, education and community life.

Participation is important at the individual level as well as at the broader societal one. For example, Mona Paré examined the ability of students with disabilities and their parents to have input in decisions that affect their ability to participate equally in the educational context, and found that, as a result of a range of barriers including lack of information, complex systems and power imbalances, such participation is minimal, despite laws and policies intended to facilitate it.²⁹⁹

Participation is closely affiliated with the concept of inclusion. Persons with disabilities have often experienced physical or social exclusion or marginalization, whether arising from attitudinal, physical, social or institutional barriers. The long history of institutionalization of persons with disabilities is a particularly clear example of exclusion, but people with disabilities continue to be pushed to the margins in a variety of social areas, including employment, education and community life. The principle of inclusion aims to redress this exclusion, and make persons with disabilities full members of their communities and of society at large.

INTERPRETING THE PRINCIPLE

The principle of promoting social inclusion and participation has a variety of aspects. It includes ensuring the ability of persons with disabilities to participate in the community, and to be heard as equal citizens on issues that affect them. *In Unison 2000*, for example, equates this principle with the concept of citizenship, which involves “the ability of a person to be actively involved with their community. Full citizenship depends on equality, inclusion, rights and responsibilities, and empowerment and participation.”³⁰⁰

As well, as Frédéric Mégret describes, participation as it is used in the CRPD constitutes “a broader demand, made not only to the state but also to society, to allow persons

The principle of inclusion and participation therefore promotes respect for the integration of persons with disabilities in society as desired, and attempts to recognize, prevent and remove various barriers to that integration. Such barriers include stereotypes, false assumptions, stigmas and ableist attitudes about the abilities of persons with disabilities.

with disabilities to fully become members of society and the various communities of which they are a part.”³⁰¹ The principle of inclusion and participation therefore promotes respect for the integration of persons with disabilities in society as desired, and attempts to recognize, prevent and remove various barriers to that integration. Such barriers include stereotypes, false assumptions, stigmas and ableist attitudes about the abilities of persons with disabilities. This principle may also manifest in a way that demands particular respect for the cultures that have evolved within a disability community. Education and various methods of awareness-raising are often identified as means to apply this principle effectively.

The Supreme Court has made the principle of inclusion by design a central aspect of its approach to human rights laws.³⁰² One element of this inclusion is attention to the accessibility of structures, programs and services, highlighted by the *Accessibility for Ontarians with Disabilities Act (AODA)*.³⁰³ The purpose of the AODA is to develop, implement and enforce accessibility standards in order to remove barriers and achieve accessibility for Ontarians with disabilities across a range of contexts by 2025. The AODA defines a barrier as “anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice”.³⁰⁴

Barriers to participation may affect different subgroups differently. For example, persons with intellectual, cognitive or mental health disabilities may be restricted from participation in decisions affecting their daily living if found to lack legal capacity. Persons with mobility disabilities may find it difficult to access social and recreational programs or to vote if buildings are not physically accessible. Participation, therefore, can require different considerations for different people depending on their particular experience of disability.

It is important to note that this principle may mean different things for different subgroups within the disability community. Those who are culturally Deaf, for example, believe that inclusion means that respect and space is made for the continuity of that particular linguistic and cultural community.³⁰⁵ Other subgroups within the disability community, such as the intellectual disabilities community, may consider the principle of inclusion to encompass the integration of persons with disabilities into all aspects of mainstream society.³⁰⁶ These positions are not necessarily mutually exclusive; however, the means of achieving inclusion might differ for various subgroups of persons with disabilities based on their particular vision of inclusion.

5. Facilitating the Right to Live in Safety

Definition: *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.*

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

Persons with disabilities are at greater risk of violence and abuse, whether by strangers or in the context of a trust relationship. Those who are most at risk are persons with disabilities who are living in an institutional setting, have severe disabilities or have mental health disabilities.³⁰⁷ Low income among persons with disabilities exacerbates the risk of violent victimization.³⁰⁸

People with mental health issues are forced to live in poverty. In social work, there's something called Maslow's hierarchy of needs. Maslow was a gentleman who determined that there's a hierarchy of needs that we need in order to be happy and healthy and mentally well, and it's a pyramid and if you don't have the things at the bottom of the pyramid, all of the things at the top aren't going to do any good. You won't be well. You need the things at the bottom. And at the very bottom of the pyramid is safety and security. If you're living in poverty, you cannot be safe and secure. Poverty makes us crazy, it doesn't keep us crazy, it makes us crazy in the first place. Unless we deal with poverty, people dealing with mental health issues, the numbers are going to go up, and soon it won't be one in five, it will be one in two.

LCO Focus Group, Individuals with Mental Health Disabilities, Toronto, June 11, 2010

Persons with disabilities are at greater risk of violence and abuse, whether by strangers or in the context of a trust relationship. Those who are most at risk are persons with disabilities who are living in an institutional setting, have severe disabilities or have mental health disabilities.

Despite the increased risk of victimization, the 2006 Statistics Canada Victims Services Survey reported that only 24 per cent of victim services agencies in Canada were able to provide services to persons with disabilities.³⁰⁹ As DAWN Canada pointed out to the LCO,

[i]t is important to note that women with disabilities (physical, mental, sensory, chronic illness) experience a much higher rate of abuse of all types, than their nondisabled counterparts and more abuse than men who have disabilities. This is important to keep in mind, as it is often very difficult for women with disabilities to even leave the abusive situation in which they find themselves, let alone take legal action against their abusers. Often, women's shelters and transition houses are not accessible to women with disabilities. Therefore, it would appear that it would be even more difficult for women with disabilities to access any legal help, especially if they could not find a safe haven first.³¹⁰

As well, public institutions may not be sufficiently equipped to respect and protect the safety of the persons with disabilities they serve. For example, persons with disabilities are less satisfied with the police response to their complaints than others, and have a less favourable view of the criminal justice system.³¹¹

I was at one time, about 10 years ago, put on a Form 1, which means that you can be danger to yourself or others. I wasn't a danger to anybody else, so I was obviously a danger to myself. When the police came to arrest me, he ordered me to kneel down in front and put my hands behind my back, then he proceeded to cuff me, after he cuffed me, he went over to my eyes and sprayed me with pepper spray for about 3 seconds. With pepper spray, it's like riding a bull, every second seems like an eternity. They want to play judge and jury and executioner in the field. I don't know what stimulates them to abuse and take advantage of vulnerable disabled people, I don't really understand where it comes from.

LCO Focus Group, Aboriginal Organizations, Thunder Bay, June 16, 2010

Persons with disabilities may not feel empowered to address institutional abuse or exploitation. There is often a significant power imbalance between the individual with a disability and the person or organization administering the law or program.

There have been a number of initiatives in recent years to improve the relationship between persons with disabilities and the criminal justice system. For example, the Ministry of the Attorney General has developed a Vulnerable Victims and Family Fund to provide financial and court-based supports for victims of crime and families of homicide victims, and this includes coverage for disability-related supports, such as sign-language interpretation or real-time captioning, to enable equal participation in the criminal justice system.³¹² Very recently, the Ontario Minister of Community Safety and Correctional Services announced that the Ministry would be undertaking a review of how police officers respond to individuals with mental illnesses and will be examining best practices to develop recommendations for improvements.³¹³

The LCO reviewed the results of the Coroner's Inquests into the deaths of 121 persons with disabilities between 1989 and 2010. The review identified the magnified risks to safety faced by some of the most vulnerable individuals with disabilities, including inappropriate or excessive use of restraints, lack of appropriate supervision or safety procedures in institutional settings, and inadequate discharge planning for those individuals with mental health disabilities transitioning from institutional settings to the community.³¹⁴

Persons with disabilities may not feel empowered to address institutional abuse or exploitation. There is often a significant power imbalance between the individual with a disability and the person or organization administering the law or program. For example, ARCH Disability Law Centre points out that persons with intellectual disabilities may rely on developmental services and supports for many activities of daily living, such as eating, dressing, bathing, toileting, managing finances, or navigating social assistance bureaucracies, and states,

[t]his dependence leaves people with disabilities vulnerable; they must work hard to maintain good relationships with support workers, family members and others on whom they rely in order to ensure that they continue to receive support and their basic needs are met. Making a complaint about a support worker or raising a concern about services may threaten or sever those relationships, and this can have disastrous impacts for the person with a disability.³¹⁵

Not surprisingly, persons with disabilities revealed lower than average perceptions of their personal safety and security.³¹⁶

INTERPRETING THE PRINCIPLE

This principle has its roots in the provisions of the CRPD that affirm the rights to liberty and security of the person; to freedom from torture or cruel, inhuman or degrading treatment; to freedom from exploitation, violence and abuse; as well as protections related to adequate standards of living and social protection and the attainment of the highest achievable standard of health.³¹⁷ The CRPD more specifically identifies one particular concern about the abuse and exploitation of women and girls with disabilities.³¹⁸ The right under section 7 of the *Charter* to security of the person and the

right not to be deprived thereof except in accordance with the principles of fundamental justice is also applicable. The principle affirming a right to live in safety requires consideration of the socio-economic barriers faced by persons with disabilities, as well as the higher than average rates of abuse and exploitation experienced by persons with disabilities,³¹⁹ and the challenges faced by persons with disabilities who experience abuse and exploitation in seeking services and supports.³²⁰

The history of the way in which the lives of persons with disabilities have often been curtailed as a result of both well-meaning and less well-meaning interventions by others make this principle contentious. There is a risk that a principle of entitlement to live in safety may be interpreted in a manner that would encourage paternalistic interventions in the lives of persons with disabilities. Nevertheless, it is crucial that law and policy be designed and private actions be conducted in a way that the security of persons with disabilities not be threatened. Protection against abuse of this principle can be found in the application of the other principles, such as the principle of fostering autonomy and independence. Where the principle of facilitating the right to live in safety exists in tension with other principles, Section D.3 of this Chapter suggests a means of addressing tensions between principles, including tensions between the principle of the right to live in safety and other principles such as that of fostering autonomy and independence, or respect for dignity and worth.

There is a risk that a principle of entitlement to live in safety may be interpreted in a manner that would encourage paternalistic interventions in the lives of persons with disabilities. Nevertheless, it is crucial that law and policy be designed and private actions be conducted in a way that the security of persons with disabilities not be threatened. Protection against abuse of this principle can be found in the application of the other principles.

6. Recognizing That We All Live in Society

Definition: 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.

THE PRINCIPLE AND THE EXPERIENCES OF PERSONS WITH DISABILITIES

All of us have multiple identities, ties, and communities; for those with disabilities, their experiences as persons with disabilities are only one part of that. To extend this point, persons with disabilities are members of the broader community, with which they have a wide range of ties, as well as reciprocal rights and obligations. The well-being of persons with disabilities – as citizens, as parents and family members, as workers and volunteers, as taxpayers and recipients of services – is closely connected to the wellbeing of the broader society. The reverse is, of course, true as well. Persons with disabilities, and the law as it affects them, cannot be considered as separate from this larger context.

INTERPRETING THE PRINCIPLE

The CRPD includes in its Preamble the realization that “the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights”.³²¹ In *Unison* defined citizenship as including “rights and responsibilities. It implies participation in and contribution to the systems and the ‘core’ services in which all Canadians can participate and to which most Canadians have access”.³²²

A principle that recognizes the various communities to which persons with disabilities belong may strengthen the recognition of difference and diversity and add further dimensions to the right to participation and inclusion. It may also provide a helpful means of articulating and analyzing tensions that may arise between the rights of persons with disabilities and those of other members of the community.

This principle also recognizes that many demands are made on governments and private actors and it is not always possible to satisfy them. Many of these demands also relate to goals of inclusion in society, for example. This principle is not intended to subordinate the claims of persons with disabilities to the claims of others; rather, it is to recognize that the claims and entitlements of persons with disabilities sometimes affect others in society, just as the claims and entitlements of others affect persons with disabilities. In assessing these various claims, it will be important to refer to the other principles to ensure that the needs of persons with disabilities are not treated as lesser in importance than other claims and to see when they are of greater importance.

The Case Example below provides an illustration of how laws, policies and programs that affect persons with disabilities must be understood in the broader context of the role of these individuals in their communities and how those policies may relate to and affect that broader community.

This principle also recognizes that many demands are made on governments and private actors and it is not always possible to satisfy them. Many of these demands also relate to goals of inclusion in society, for example. This principle is not intended to subordinate the claims of persons with disabilities to the claims of others; rather, it is to recognize that the claims and entitlements of persons with disabilities sometimes affect others in society, just as the claims and entitlements of others affect persons with disabilities.

CASE EXAMPLE: RECOGNIZING THAT WE ALL LIVE IN SOCIETY

Aboriginal Older Adults with Disabilities, Access to Community Care and On-Reserve Communities

Aboriginal³²³ older adults make up a relatively small proportion of their communities, as the Aboriginal population tends to be younger, on average, than other Canadian populations. In 2006, there were 242,495 Aboriginal people in Ontario, of whom Aboriginal older adults make up approximately 5 per cent (a Canada-wide figure).³²⁴ The Aboriginal population is relatively young because of higher fertility and birth rates. However, the number of older adults is expected to double by 2017, in part because of increasing life expectancy.³²⁵ Aboriginal older adults will increasingly represent a larger segment of the Aboriginal population.

Aboriginal older adults are more likely to live with a disability than non-Aboriginal older adults, and are likely to experience the onset of disability at a younger age. The majority of First Nations and Inuit older adults have experienced unhealthy living conditions and poor health for most of their lives.³²⁶ The rate of disability for on-reserve First Nations and Inuit adults is approximately 28 per cent. This is almost one and a half times the disability rate in the general population.³²⁷ First Nations older adults over 60 years of age with disabilities are more likely to report fair or poor health than those without disabilities.³²⁸ The lower health status of

Aboriginal peoples results in Aboriginal older adults becoming dependent at an earlier age than their non-aboriginal counterparts.³²⁹

An important element of many Aboriginal cultures is the emphasis placed on extended family and kinship groups for whom sharing and taking care of all members of the community are valued highly. For this reason, continuing care for Aboriginal older adults within the community is often preferred to institutional care in a long-term care home. The majority of Aboriginal older adults would prefer to receive care in their homes from paid caregivers or family members rather than moving into a long-term care home.³³⁰ Similarly, the majority of the children of these older adults would prefer that their parents receive home care from paid caregivers or family members.³³¹ A Nova Scotia study found that among the factors influencing Aboriginal access to long-term care,

[t]here was a strong sentiment that it is culturally unacceptable to have a family member placed in a long term care facility even if they would be better off from a health care perspective. One respondent noted that community members would look down on the family. Several communities noted the importance of language and that potential residents, especially seniors suffering from dementia, would not be able to communicate with facility staff or other residents. In addition respondents indicated that families and potential residents do not want to be in a facility surrounded by non-Aboriginal individuals.³³²

However, there are, in many reserve communities, significant challenges to providing care in the community. One of the issues is the severe shortage of adequate, accessible housing in many First Nations communities. A serious housing shortage on reserves contributes to the low socio-economic status experienced by First Nations older adults. The housing that does exist on reserve is often substandard and overcrowded.³³³ Many homes are in need of major repairs to structure, plumbing, heating and electrical systems.³³⁴ Over one-third of First Nations adults live in homes requiring major repairs.³³⁵ Accessibility in homes and buildings on reserve is often lacking and may be a factor in forcing frail and disabled First Nations older adults to move to facilities, particularly long-term care homes, that can accommodate their disabilities.³³⁶

As might be expected, community-based health services are also more difficult to access in Northern or remote communities.³³⁷ While the Ministry of Health and Long-Term Care funds community support and home-maker services in many First Nations communities, there are extra challenges in remote locations. In some remote communities, for example, nurses are available regularly but physicians fly in on a monthly basis.³³⁸ For 35 per cent of First Nations, primary care physicians are located more than 90 km away.³³⁹ In some cases, it is not economically feasible for smaller communities to support a health care facility³⁴⁰ and the recruitment and retention of qualified health care personnel can be difficult in remote

An important element of many Aboriginal cultures is the emphasis placed on extended family and kinship groups for whom sharing and taking care of all members of the community are valued highly. For this reason, continuing care for Aboriginal older adults within the community is often preferred to institutional care in a long-term care home.

Jurisdictional issues may create barriers to the development of effective community supports for Aboriginal older adults who develop disabilities. Ontario has jurisdiction over the administration of health services in the province, except in relation to populations falling under federal jurisdiction which includes jurisdiction over “Indians” and reserves. The federal government takes the position that its responsibility for reserves does not extend to providing long-term care homes.

communities.³⁴¹ Many communities do not have adequate caregivers or community health representatives to provide community-based services to frail Aboriginal older adults.³⁴² According to the Regional Longitudinal Health Survey, there is a significant discrepancy between needs for home care among First Nations seniors and services actually received, across a wide range of services.³⁴³ In 2011, the MOHLTC established a Trilateral First Nations Health Senior Officials Committee, consisting of senior-level representatives from Ontario, the federal government and First Nations, with the objective of identifying health service gaps for First Nations people living on-reserve and improving the integration and coordination of federally and provincially funded health services.³⁴⁴

Jurisdictional issues may create barriers to the development of effective community supports for Aboriginal older adults who develop disabilities. Ontario has jurisdiction over the administration of health services in the province, except in relation to populations falling under federal jurisdiction which includes jurisdiction over “Indians” and reserves.³⁴⁵ The federal government takes the position that its responsibility for reserves does not extend to providing long-term care homes. The Ontario government has funded long-term care homes in four of Ontario’s 126 First Nations communities, in Akwesasne, Southwold, Ohsweken and Wikwemikong.³⁴⁶

The federal government’s First Nations and Inuit Home and Community Care program (FNIHCC) in reserve communities offers community-based lower-level long-term care geared to providing minimal assistance with daily living activities and appropriate health care services, but does not provide the more intensive levels of care offered by institutional long-term care facilities.³⁴⁷ Ontario has developed a program specifically targeting Aboriginal health care, the Aboriginal Healing and Wellness Strategy (AHWS), which was launched in 1994 to promote the health and healing of Aboriginal peoples and to increase the cultural relevance of the health care services available to Aboriginal peoples within Ontario. The AHWS provides funding for many different programs including health centres, maternal and child centres, medical hostels, community workers, health outreach, shelters, healing lodges, treatment centres, translator and advocate services,³⁴⁸ but is not involved in the provision of long-term care. As a result, there is very little in the way of long-term care available to Aboriginal individuals within their home communities. As noted above, long-term care facilities located within First Nation communities are very rare³⁴⁹ and First Nations older adults on reserve may be required to move to a long-term care home outside their community, sometimes at great distances, or remain in the community but with inadequate care.³⁵⁰

When individuals decide to apply for long-term care, there is no guarantee that they will be able to find a placement in a long-term care home that is in or near their home community. Currently there is a significant shortage of public long-term care homes in both urban and rural regions of Canada.³⁵¹ The median wait time for a long-term care bed in Ontario in 2011 was 103 days, much longer than it was in

As a result of [many] factors, it may be necessary for Aboriginal individuals with disabilities to leave their home communities in order to obtain adequate care and supports. This may be a traumatic dislocation for Aboriginal older adults. Aboriginal older adults are more likely than their non-Aboriginal counterparts to have survived a traumatic event, such as child sexual abuse, residential school experiences, and/or relocation of their communities away from their ancestral territories.

2005.³⁵² Even a long wait does not ensure that Aboriginal older adults will be offered a place in their preferred long-term care home (such as one that is geographically closest to their community). In 2011, only 40 per cent of people being placed for the first time in an Ontario long-term care home were given their first choice of home.³⁵³ Long waits place considerable pressure on older adults to accept the first available placement even where it is not geographically or culturally appropriate.

As well, information about long-term care homes is often geared to non-aboriginal people and it is often unavailable in Aboriginal languages.³⁵⁴ This barrier to accessing information is complicated by the ambiguity over jurisdictional responsibility for health services to Aboriginal peoples. Aboriginal older adults may be confused about whether long-term care homes are available to them and, if so, which ones.³⁵⁵

As a result of all of these factors, it may be necessary for Aboriginal individuals with disabilities to leave their home communities in order to obtain adequate care and supports. This may be a traumatic dislocation for Aboriginal older adults. Aboriginal older adults are more likely than their non-Aboriginal counterparts to have survived a traumatic event, such as child sexual abuse, residential school experiences, and/or relocation of their communities away from their ancestral territories.³⁵⁶ An important factor that may affect the transition of Aboriginal older adults into long-term care homes is their experience with residential schools, operated jointly by the federal government and churches from the 1920s to the mid-1990s. About 43 per cent of First Nations adults over the age of 60 and 47 per cent of those aged 50-59 attended these schools.³⁵⁷ The residential school experience has had an ongoing effect on the health and well-being of Aboriginal older adults generally.³⁵⁸ It has been suggested that the residential school experience might also partly account for the poorer health status of Aboriginal peoples as compared to their non-aboriginal counterparts.³⁵⁹ Survivors are at particular risk for low self-esteem and increased dependence resulting from the devaluation of their culture and loss of traditional ways of life.³⁶⁰ The move to a mainstream long-term care institution far from home may be particularly traumatic for residential school survivors, and even more so for those who develop dementia or other mental health or cognitive disabilities later in life.

Aboriginal older adults may also experience isolation on a spiritual level when they are denied the opportunity to practice their faith or become disconnected from their cultural roots.³⁶¹ This may be exacerbated when they move into non-aboriginal long-term care homes lacking spiritual facilities such as healing lodges and access to spiritual leaders and ceremonies.³⁶²

As well, the departure of older adults for long-term care outside the home community can also have a significant effect on the community. Aboriginal older adults may constitute the most important link in sharing knowledge of traditions and language with younger generations, as the highest proportion of Aboriginal peoples who know and speak their Aboriginal language within the Aboriginal population.

As well, the departure of older adults for long-term care outside the home community can also have a significant effect on the community. Aboriginal older adults may constitute the most important link in sharing knowledge of traditions and language with younger generations, as the highest proportion of Aboriginal peoples who know and speak their Aboriginal language within the Aboriginal population.³⁶³ Historically and in contemporary Aboriginal cultures, Elders play a central role in family life and are considered an integral resource in providing discipline, spiritual guidance, cultural knowledge and traditional teachings to younger members of the community.³⁶⁴ While not everyone who reaches a certain age may be considered to be an Elder, a status gained through years of training and the development of expertise, in most Aboriginal cultures older members are generally accorded great respect.³⁶⁵ The necessity for Aboriginal older adults to leave their home communities to access needed care and supports thus has a significant effect, not only on the older adults themselves, but on their communities.

This Case Example highlights that, like all of us, persons with disabilities have responsibilities as well as rights. They have responsibilities to their families, to their particular communities and to the broader society, and laws, policies and practices should recognize these responsibilities and, where appropriate, support their fulfillment. This Case Example provides an example within the context of a particular history, culture and community, but it is also true in other contexts and at a broader societal level.

While the issues relating to shortage of community supports for Aboriginal older adults with disabilities can be understood in terms of the impact on the individuals with disabilities, it can also be helpfully considered in terms of the impact on their families and communities. To the degree that older adults with disabilities are not supported in their communities, they are not able to provide support to their families and to fulfil their community roles, a loss to their families and communities.

As well, the rights and responsibilities of persons with disabilities must be understood within the context of their communities – in this case, within the context of the history, culture and resources of Aboriginal communities.

As the principle of recognizing that we all live in society emphasizes, persons with disabilities, as members of society, have reciprocal responsibilities and obligations. There is a give and take between persons with disabilities and their families, their communities and broader society, which can be recognized and supported by laws, policies and practices.

D. From Aspiration to Application: Addressing Challenges In Applying The Principles

As noted in earlier in this Chapter, because principles are, by their nature, abstract and aspirational, challenges arise in translating them into a framework that can provide specific, practical assistance to law and policy makers. This section outlines some of the approaches that the LCO has adopted to meet the various challenges of application.

1. Incorporating Lived Experience

As important as it is to identify principles for the law as it affects persons with disabilities, these principles, without more, are an insufficient basis for an evaluative framework for this area of the law. They must be grounded in a close attention to the lived experiences of persons with disabilities. Applications of the principles which do not incorporate and reflect the lives of persons with disabilities will lead to ineffective programs, policies and laws. The LCO's Case Examples and the extended analysis in Chapter V of this *Final Report* provide some illustrations of how close attention to the experiences of persons with disabilities can inform and illuminate the application of the principles.

As important as it is to identify principles for the law as it affects persons with disabilities, these principles, without more, are an insufficient basis for an evaluative framework for this area of the law. They must be grounded in a close attention to the lived experiences of persons with disabilities. Applications of the principles which do not incorporate and reflect the lives of persons with disabilities will lead to ineffective programs, policies and laws.

This attention must include an understanding of how the experiences of persons with disabilities are influenced by their life courses. For all of us, how we encounter each stage of life is profoundly influenced by the resources and perspectives we have developed to that point. Barriers or opportunities experienced at one stage will reverberate throughout the course of life. For example, disability-related barriers in accessing adequate education may have life-long effects on employment prospects, and therefore on the socio-economic status of persons with disabilities, which will in turn have wide-ranging consequences for health, access to housing, ability to access the law, and many other aspects of life.

Laws are generally developed on an issue-by-issue basis, as particular problems arise or are identified. People do not, of course, experience their lives as a set of separate issues, or segregate aspects of their identities. For example, an individual may be a mother and a person with a disability: she does not cease to be a mother when she seeks disability-related services, or to have a disability when she seeks childcare or recreation programs for her children. The person with a disability seeking education is not a separate person from the one later seeking employment; these are two stages in a single experience. The categories through which we understand law – family, employment, housing, income supports, human rights for example – do not necessarily reflect the ways in which persons with disabilities experience the law. It is therefore useful to take a **person-centred** approach in understanding the law and applying the principles, and to see the law holistically, rather than as a series of separate systems.

2. The “Implementation Gap” – Taking a Broad View of “the Law”

There are laws whose provisions are problematic in terms of their effects on persons with disabilities, whether because they incorporate ableist attitudes into their substance

or because they fail to take into account the realities of existence for persons with disabilities. In many cases, however, the law is sound on paper, but problematic in practice. Laws, policies and practices that are in theory neutral or even intended to benefit persons with disabilities may fall short of their goal or have unintended negative consequences. There are many reasons for this, as outlined in Chapter II, including negative attitudes on the part of those charged with implementing the law or policy, failure to provide disability-related accommodations for accessing programs or services, adversarial approaches to program implementation, resource limitations, or lack of accountability, monitoring and transparency.

This points us to the importance of adopting a broad understanding of “the law” when applying the principles. A close analysis of the language of statutes and policies is important, but it is equally important to develop a strong understanding of the effects of the law as implemented. For this reason, the LCO has adopted a broad definition of “the law” for the *Framework*, as including not only statutes and regulations, but also the policies through which they are applied, and the strategies and practices through which they are implemented.

The principles of dignity and independence, for example, cannot be achieved without respect for the principle of safety. The principle of safety has sources in the respect for the inherent worth and dignity of persons with disabilities.

Of course, to understand the effects of the law, we must hear directly from those affected by it – both those charged with implementing it, and the persons with disabilities whose lives are shaped by it. In this way, the necessity of addressing the “implementation gap” points us again to the importance of including and respecting persons with disabilities in the process of developing and reforming the law.

3. Relationships Between Principles

As the brief discussions of the principles above indicate, the principles cannot be neatly separated from each other, and are interrelated in multiple ways. The principles of dignity and independence, for example, cannot be achieved without respect for the principle of safety. The principle of safety has sources in the respect for the inherent worth and dignity of persons with disabilities.

However, there may also be tensions between the principles. For example, two principles may be in tension in relation to the same individual. A frequently raised issue is the involuntary treatment of persons with mental health disabilities. The ability to make choices about one’s own medical treatment is fundamental to autonomy and physical integrity. On the other hand, some have argued for a “right to be well”, and that allowing persons with mental health disabilities to refuse treatment may undermine their achievement of the other principles, such as living in safety and social inclusion. Such tensions are not necessarily amenable to simple solutions, but it is important to acknowledge and address them.

Tensions between principles may also arise in relation to two different persons or two different communities. For example, members of the Deaf community may prefer as an educational option schools specifically for the Deaf community, where instruction is

provided in ASL, to ensure the continuation of their language and culture, whereas the intellectual disabilities community may prefer integration of students with intellectual disabilities into mainstream schools. Here the principles of respect for difference and diversity, as well as differing visions of inclusion and participation, come into tension. In assessing tensions between principles, it is essential to be sensitive to the contexts in which those tensions arise.³⁶⁶ What specific rights or outcomes are at issue in that particular situation? Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles? That is, the tensions must be examined in a nuanced and holistic manner.

As well, an examination of tensions, particularly between the principles of safety and of independence and autonomy, should be sensitive to the larger social context in which such tensions may exist. In the example cited above regarding involuntary treatment, one of the factors at play may be the policy and resourcing decisions that continue to result in a lack of other types of supports for persons with mental health disabilities. In such a case, the real issue may not be a tension between the principles of autonomy and security, but the impact on both principles of the limited available appropriate resources to maximize both. That is, we should not be too quick to reduce a challenge or difficulty to an instance of tensions between the principles.

...[A]n examination of tensions, particularly between the principles of safety and of independence and autonomy, should be sensitive to the larger social context in which such tensions may exist.

One potential pathway to resolving tensions that arise between principles is to create a hierarchy among the principles in order to determine which principle should prevail in the event of a tension with another principle. One advantage of such an approach is that it is predictable, as well as simple, to apply. However, the mechanical nature of such an approach ignores the diversity of the issues where such tensions arise.³⁶⁷ It also ignores the interrelatedness of the principles. To elevate the principle of dignity, for example, above all other principles ignores the potential that restrictions in the fulfillment of other principles, such as autonomy or participation, might contribute to an overall lessening of respect for the dignity of persons with disabilities. Hierarchical approaches have generally been rejected in the area of rights for this reason: for example, the preamble of the CRPD reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”. The Ontario Human Rights Commission (OHRC) has recently completed a comprehensive *Policy on Competing Human Rights* which emphasizes that no right is absolute, but is inherently limited by the rights and freedoms of others, and that “all rights are equally deserving and an approach that would place some rights over others must be avoided”.³⁶⁸

The concepts of “reconciling” or “balancing”, which have been explored in the context of competing rights, are useful to consider in this context.³⁶⁹ Reconciliation is an approach that attempts to give proper recognition of both principles to the greatest degree possible.³⁷⁰ Balancing may involve the weighing of one principle against the other. Using a balancing approach may have the disadvantage of creating the impression that the principles are actually competing and need to be considered

hierarchically.³⁷¹ The OHRC's *Policy on Competing Human Rights* states, "Where rights appear to be in conflict, *Charter* principles require an approach that respects the importance of both sets of rights, as much as possible...[P]otential compromises to both sets of rights, recently described as 'constructive compromises' by the Ontario Court of Appeal, are part of the reconciliation process." However, there may be cases where reconciliation is impossible, and one right may be forced to give way.³⁷²

An important element of addressing tensions that may arise between principles is to recollect that the principles themselves have been developed as a means of responding to the marginalization, exclusion and oppression of persons with disabilities. That is, in considering how to resolve tensions between principles, one might consider the particular types of barriers that the principles were intended to address, and how any specific approach to resolving the tensions might impact on the achievement of the broader goals of an anti-ableist approach to the law.³⁷³

Efforts to improve the law should be continually undertaken as understandings about the experience of disability evolve, or as resources or circumstances make progress possible. Where constraints exist, principles should be realized to the greatest extent possible at the current time, and concrete steps for future improvements continually identified and planned.

It is also important to realize that the principles in tension should not be viewed in isolation: in trying to resolve tensions, it is often helpful to ask how the other principles that might not be so obviously implicated help inform an appropriate resolution.

4. Addressing Evolving Realities and Recognizing Constraints

The application of the principles cannot be static. The circumstances of persons with disabilities will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of disability continue to evolve, and new perspectives are heard. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

As well, 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 realization** approach to the principles may be adopted, with the goal of continuous advancement. Efforts to improve the law should be continually undertaken as understandings about the experience of disability evolve, or as resources or circumstances make progress possible. Where constraints exist, principles should be realized to the greatest extent possible at the current time, and concrete steps for future improvements continually identified and planned.

In the realm of international human rights law, the framework of "**protect, respect, 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:³⁷⁴

...[C]omplete fulfillment of the principles may be progressively realized as understandings of the issues facing persons with disabilities become more sophisticated and resources...

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 of the issues facing persons with disabilities become more sophisticated and resources, including financial resources and technology, increase.

IV. A FRAMEWORK FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

This Chapter includes the complete text of the LCO's Framework for the Law as It Affects Persons with Disabilities. The Framework is the culmination of this project, and brings together the concepts and issues discussed in the first three Chapters of this Final Report into a practical evaluative document. Its application is explored in Chapter V of this Final Report. The Framework is an integral part of this Final Report. However, it also exists as a separate text, available in hard copy and on the LCO's website. For this reason, it is formatted and cross-referenced as a standalone document, rather than as another Chapter of this document.

INTRODUCING THE FRAMEWORK

1. 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.

2. 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.*

3. 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.*

4. 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?

Applying the Framework

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?

V. APPLYING THE FRAMEWORK: THE LAW AND ACCESS TO ATTENDANT SERVICES

This Chapter will illustrate the application of the *Framework* through consideration of a current issue in the law as it affects persons with disabilities: the legal framework through which persons with disabilities receive supports in the community for needs related to activities of daily living, such as bathing, grooming, meals or taking of medication. Such services are sometimes referred to as “attendant services”.

This issue was chosen because although it is vital to the well-being of many persons with disabilities and is a recurrent topic of policy concern, the law in this area is under-examined. It is an area of the law that connects in a fundamental way to many of the principles that have been identified. It also illustrates a number of the key themes in this area of the law, including the “implementation gap”.

...[T]he law in [the] area [of attendant services] is under-examined. It is an area of the law that connects in a fundamental way to many of the principles that have been identified. It also illustrates a number of the key themes in this area of the law, including the “implementation gap”.

The intent of this illustration is not to provide a comprehensive description of this area of the law or to propose specific reform initiatives. Rather, the aim is to reflect on it in light of the principles and considerations that have been identified in this *Report*, and where possible, to discover some concerns and general directions for reform that arise from the application of these principles and considerations, with the intent to provide some foundation for further research and reform initiatives.

The evaluation is based on a review of the legislation, caselaw, government documents and relevant social science research.

Because this is not an area that has been subject to intensive scrutiny, there are a number of aspects where information is lacking, and further research is required to make a thorough assessment of the impact of the law on persons with disabilities. Should a thorough evaluation of the law be undertaken, further research on the implementation and effects of the law would be beneficial, and consultation with service providers, persons with disabilities and the groups that represent or advocate for them would be necessary to provide a more thorough evaluation of how this area of the law may affect persons with disabilities.

The law in this area affects both younger and older persons with disabilities, although the circumstances of the two groups tend to be somewhat different, as is briefly highlighted in the following section. The LCO’s sister project on the law as it affects older persons examined this area of the law from the perspective of older persons who are frail or who have disabilities.³⁷⁵ This Chapter will focus on the experiences of younger adults with disabilities.³⁷⁶ (This Chapter will not examine the legal framework for community supports for children. While an important area for review, it raises separate issues which would benefit from a more lengthy examination than would be possible within the scope of this Chapter.) The intent of these separate examinations is not to deny the areas of commonality between these two groups – indeed, there are

Supports in the community for tasks related to activities of daily living are essential for some persons with disabilities to maintain the ability to live in the community. A 2002 analysis of the continuum of care for adults with physical disabilities based on comprehensive consultations with stakeholders, individuals and informal caregivers concluded, “Self-managed attendant services were considered to be ‘the most important of all the services’”, despite limited access across the country, because of their close connection to autonomy and community inclusion.

several.³⁷⁷ However, it highlights, as has been emphasized throughout this *Report*, the importance of paying close attention to diversity within the experience of disability, to the impact of the life course on the experience of disability, and to particular contexts within the experience of disability. It is within this kind of close examination that the principles take on meaning and the *Framework* allows us to evaluate laws, policies and practices.

There are many types of community support services that are vital to the lives of persons with disabilities. This Chapter focuses on services related to activities of daily living under the *Home Care and Community Services Act* (HCCSA)³⁷⁸ and the *Ministry of Community and Social Services Act* (MCCSA),³⁷⁹ while recognizing that this is one small (although vital) piece of a broader spectrum of services. It refers only briefly to the more recent *Social Inclusion Act*.³⁸⁰ Many persons with disabilities will be arranging and receiving a range of services, often from a number of different programs and service providers, and this will affect their experiences related to attendant services. That is, it may be somewhat artificial to examine this issue in isolation from a consideration of other types of community supports, and it would be important, in a fuller examination, to consider in-depth how attendant services are related to other supports and services.

A. Background

1. The Importance of Community Support Services

The United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) identifies the fundamental importance of community support services in enabling persons with disabilities to live in and participate in their communities, and the central role that governments play in ensuring access to such supports. The CRPD provides in Article 19 that:

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

...

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community....

Supports in the community for tasks related to activities of daily living are essential for some persons with disabilities to maintain the ability to live in the community. A 2002 analysis of the continuum of care for adults with physical disabilities based on comprehensive consultations with stakeholders, individuals and informal caregivers concluded, “Self-managed attendant services were considered to be ‘the most important of all the services’”, despite limited access across the country, because of their close connection to autonomy and community inclusion.³⁸¹

Without such services, the only option may be some form of institutionalized living. Institutionalized living is not only almost always a much less preferable option for individuals, reducing autonomy and social inclusion, it is much more expensive. Therefore, governments, including the government of Ontario, have invested in various types of community supports. Ontario's Auditor General has noted,

The Ministry has recognized the dual benefit of enhancing home care services. Having people receive care in their homes whenever possible not only means better quality of life for the patient, it is also far more cost effective than housing a patient in a hospital, long-term-care facility, or other institutional setting to receive care. One CCAC we spoke to informed us that, for instance, personal support services can enable individuals who have moderate risks/needs to continue living independently in their homes. Not having these services could lead to deterioration in a client's condition that could result in hospitalization or institutionalization.³⁸²

Access to such personal services can be essential to all aspects of participating in and being included by the community – to obtaining training and education, holding down a job, raising a family and engaging in civic or community activities. Access to community support services therefore has ramifications for all aspects of the lives of those persons with disabilities who require them.

Access to such personal services can be essential to all aspects of participating in and being included by the community – to obtaining training and education, holding down a job, raising a family and engaging in civic or community activities. Access to community support services therefore has ramifications for all aspects of the lives of those persons with disabilities who require them.

Supports may be provided informally, by family or friends. However, the needs of some persons with disabilities may exceed the capacity of family or friends to provide them, or some may not have sufficient networks to provide them. Further, sole reliance on family and friends may limit the ability of persons with disabilities to live independently and to make normal life transitions, such as living separately from parents. Finally, lack of formal supports may create intense pressure on family and friends providing informal supports. Where insufficient formal supports are provided, informal networks may collapse under the strain:

Traditional family roles are under stress, both health wise and financially and family supports will decline over time as the population ages. The lack of Attendant Services funding will mean that dependent adults remain with family well beyond the family's ability to humanly, physically and financially cope – unable to transfer, living [in] inaccessible environments with inappropriate assistive devices, and then the family support dies.³⁸³

2. Home Care and Attendant Services Supports

Both younger and older persons who have disabilities may need supports in the community. Because of the substantial numbers of older adults now needing supports to age in place, demographic trends that indicate a growing need in this respect, and the already acute pressures on long-term care and hospital systems,³⁸⁴ the needs of older adults who are frail or disabled have tended to receive more public attention in discussions of this issue, but the needs are equally acute for younger adults with disabilities. The needs of the two groups may differ somewhat, and it is important that systems have sufficient flexibility to address different needs.

Home care programs were originally established to provide care for people with long-term chronic illnesses, and most clients were over age 65. That is changing. Home care programs now provide services for people in all age groups with a much wider range of needs. But home care programs that were designed for the elderly may not be flexible enough to meet the...needs of people of all ages who have a disability...For example, unlike seniors who use home and community care to maintain their independence, people with disabilities need services that help them participate in the workplace and they want more control over their services....³⁸⁵

Older persons who are frail or have disabilities and require supports to age in the community have generally been provided with these supports through an “agency-based care model”, in which services are provided by staff or contractors of care provider organizations, and activities are directed through those agencies.³⁸⁶ In Ontario such services are mainly provided through Community Care Access Centres (CCACs) under the legislative scheme set out in the HCCSA. These services may include assistance with personal tasks such as bathing and grooming, homemaking services such as meal preparation and laundry, or other services such as caregiver supports or transportation. These services are generally referred to as “home care”.

While some younger adults with disabilities do access services through the home care (or agency care) model, the preferred type of service is often an “attendant services” model based on the independent living philosophy, in which the individual is able to direct their own care. Agency care approaches may be seen by persons with disabilities as being less consistent with values of independence, empowerment and security.

While some younger adults with disabilities do access services through the home care (or agency care) model, the preferred type of service is often an “attendant services” model based on the independent living philosophy, in which the individual is able to direct their own care. Agency care approaches may be seen by persons with disabilities as being less consistent with values of independence, empowerment and security.

[I]ndividuals [with disabilities] do not like the more formal medical model of care. They consider it to be the equivalent of institutional care in another setting. People with disabilities want to maximize their independence and take control of their lives, their health and their bodies. They want to be able to train their own care attendants to their own specific and particular needs, and to direct their own care...People with disabilities find the rules and regulations of the formal care system to be too medically oriented and inflexible.³⁸⁷

The attendant services model of community service supports has its roots in the independent living movement for persons with disabilities:

Attendant Services evolved out of the desire and the need of persons with disabilities to lead independent lives. It is a unique model which enables people with disabilities to direct their own services in the community. Before the advent of attendant services, most people with physical mobility disabilities would have remained in chronic-care hospitals, lived in institutions, or been cared for by family members long after the age when most non-disabled people would choose to live independently.

The Independent Living model embraces the notion that rights and responsibilities are shared between citizens and the state, focusing on building a society based on the principles of inclusion, equity, affordability and justice. It is founded on the right of people with disabilities to:

- a. Live with dignity in their chosen community
- b. Participate in all aspects of their life, and
- c. Control and make decisions about their own lives.³⁸⁸

The central aspect of attendant services is control by the client:

The key component in the provision of attendant services is self-direction of services by the consumer. The primary responsibility for the way services are delivered rests with the consumer; this means the consumer has to know:

- 1. What tasks (s)he needs the attendant to perform
- 2. When these tasks will be performed and
- 3. How the consumer wishes these tasks to be performed.³⁸⁹

This Chapter will focus on Ontario's attendant services, rather than home care services, as being more relevant to younger adults with disabilities. As is described in section B, attendant services may be provided through various service delivery models and legislative regimes.

With changing demographics, shifting health care needs and expectations, and the fiscal effects of the recent economic downturn, the full spectrum of health care services is under pressure.

3. Meeting the Need

Unfortunately, there is a general shortage of support services in the community, affecting both older and younger persons with disabilities. The Case Example in Chapter III.C.6 provides an illustration of the impact of lack of community services on First Nations older adults with disabilities and their communities. While the barriers and lack of support services in these communities are particularly severe, there are shortages in most communities. According to the 2001 Statistics Canada *Participation and Activity Limitation Survey*, about 70 per cent of adult Canadians with disabilities – 2.4 million individuals – required help with some type of daily activity due to their disability. About two-thirds of adults identifying a need for support in daily activities reported receiving it, while approximately one-quarter indicated that they receive some of the help they need, and 5 per cent indicated they received none of the help they need. Cost was the most frequently cited barrier to receiving support, with 52 per cent indicating that it was “too expensive”. Another 27 per cent said that “no informal help available” and 25 per cent said they “didn’t know where to obtain help”.³⁹⁰

With changing demographics, shifting health care needs and expectations, and the fiscal effects of the recent economic downturn, the full spectrum of health care services is under pressure. For example, in 2008 the Ontario government announced that reduction of emergency room wait times was a top health care priority. The community support services system faces multiple pressing priorities, particularly because acute care and long-term care are also under pressure, and there are limited resources for meeting these priorities.

In 2008, Attendant Services served approximately 6,000 individuals across Ontario:

- Direct Funded Services (under the MCSSA) received \$2.1 million in funding;
- Attendant Outreach Services (under the HCCSA) received \$48.8 million; and
- Assisted Living Services in Supported Housing (also under the HCCSA) received \$80.2 million.

There were significant waitlists for all of these programs. In Toronto in 2008, the waitlist for the Assisted Living in Supported Housing and Attendant Outreach services was 900 individuals. Ten per cent of those on the waitlist were living in Alternate Level of Care beds, chronic care hospitals, or long-term care homes (which tend to be less appropriate and more costly settings) and 15 per cent were living with their parents.³⁹¹ CILT, which manages Direct Funded services across the province, had over 450 individuals on its waitlist in 2007: on average, fewer than 30 spaces become available each year.³⁹² As the Ontario Community Support Association has remarked

The ‘known’ waitlists for Attendant Services across the province can range from 4 to 10 years. The ‘turnover’ for attendant services is very low because people need these services for the rest of their lives. Many people do not bother to fill out application forms with such long wait times, so it is difficult to determine the true needs across the province.³⁹³

In Toronto in 2008, the waitlist for the Assisted Living in Supported Housing and Attendant Outreach services was 900 individuals. Ten per cent of those on the waitlist were living in Alternate Level of Care beds, chronic care hospitals, or long-term care homes (which tend to be less appropriate and more costly settings) and 15 per cent were living with their parents. CILT, which manages Direct Funded services across the province, had over 450 individuals on its waitlist in 2007: on average, fewer than 30 spaces become available each year.

B. Ontario’s Legal Framework for Attendant Services

1. Overview

Most attendant services in Ontario are currently provided under the HCCSA. The HCCSA regulates the provision of a range of community services which are delivered through the network of CCACs and other community agencies situated across the province. Attendant services may be provided through the Attendant Outreach Services program and the Assisted Living in Supportive Housing program. Some younger adults with disabilities receive “home care” or other services that are coordinated through CCACs.

In addition to the services provided through the HCCSA, the MCSSA and the accompanying *Grants for Disabilities* regulation³⁹⁴ create a system whereby persons with disabilities can receive direct funding for attendant services, and can hire and direct their own attendant. This is sometimes referred to as “direct funded services”, in contrast to the agency funded services provided under the HCCSA.

Finally, the new *Social Inclusion Act, 2008*³⁹⁵ and accompanying regulations provide a regime for the provision of a wide range of community support services (including direct funding) for persons with intellectual disabilities. These provisions are not yet fully in effect. Parts IV and V of the *Social Inclusion Act* will form an important part of the legislative landscape for receipt of community support services when they come fully into effect, and so will be briefly described below. However, since the structures for implementation of some aspects of this system are still under development, this

Chapter will not attempt to evaluate the provisions of the *Social Inclusion Act* against the *Framework*.

Statistics about use of the programs under the HCCSA and the Direct Funding program are difficult to come by. The Canadian Home Care Association reported that in the fiscal year 2005-2006, Ontario's community care program (under the HCCSA) served 303,605 individuals. Just over half – 54 per cent – of these individuals were over the age of 65, 11 per cent were children under the age of 18, and the remainder – approximately 35 per cent – were adults between the ages of 19 and 64.³⁹⁶ Some of the individuals making up this 35 per cent (108,079 individuals) were doubtless individuals living with disabilities, but others will have been individuals with short-term, acute care needs resulting from illness. A full 40 per cent of those assisted under the home care models were provided with “acute care substitution” services.³⁹⁷ It is therefore difficult to know how many younger individuals with disabilities are provided with long-term supports for community living under the HCCSA.

2. Home Care and Community Services Act

OVERVIEW

The stated purposes of the HCCSA include ensuring that “a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist”, providing “support and relief to relatives, friends, neighbours and others who provide care for a person at home”, promoting “equitable access to community services through the application of consistent eligibility criteria and uniform rules and procedures”, and integrating community services with other types of services, including those provided by hospitals and long-term care homes.³⁹⁸

The HCCSA regulates the provision of the following services:

1. **community support services**, such as meals, transportation, caregiver support, home maintenance and recreational services;
2. **homemaking services**, such as housecleaning, laundry, shopping, banking, meal preparation and childcare;
3. **personal support services**, including assistance with or training for personal hygiene activities or routine personal activities of living; and
4. **professional services**, including nursing, occupational therapy, physiotherapy, social work, dietetics and similar services.³⁹⁹

The services governed by the HCCSA that are of most relevance to this Chapter are the following:

- **Attendant Outreach Services:** These services are generally provided in the homes of individuals on a pre-scheduled basis (some services are also provided in workplaces or educational institutions). There is a cap of 90 hours of service per month, unless a special exemption is obtained.

- **Assisted Living Services in Supportive Housing:** As part of supportive housing, which provides accessible and affordable apartments for persons with disabilities, tenants may be provided with attendant services, either on-call or pre-scheduled. This program provides a combination of personal support and homemaking services, security checks or reassurance services, and care coordination. Services may also be provided to congregate or group homes.⁴⁰⁰

Recipients of attendant services (through either program identified above) direct their attendants as they require, and are responsible for the decisions and training involved in the services they receive.⁴⁰¹

The HCCSA includes a Bill of Rights for those receiving services under its governance. This includes rights to

- be dealt with in a courteous and respectful manner, and to be free of any type of abuse;
- be dealt with in a way that respects autonomy, dignity and privacy;
- be dealt with in a way that respects individuality, and is sensitive to needs related to ethnicity, language, culture, spirituality or family;
- receive information about the community services he or she is receiving; the laws, rules and policies affecting the operation of the service provider; and the procedures for initiating a complaint;
- participate in the assessment of his or her needs and in the development of a plan of service;
- give or refuse consent to the provision of any service;
- raise concerns or recommend changes in connection with the services provided or policies and decisions that affect his or her services; and
- have records kept confidential.⁴⁰²

Recipients of attendant services (through either program identified above) direct their attendants as they require, and are responsible for the decisions and training involved in the services they receive.

SERVICE DELIVERY STRUCTURE

The HCCSA gives the Minister of Health and Long-Term Care (MOHLTC) considerable latitude in the provision of services: services may be provided directly by the government; the government may pay others to provide community services, whether through grants and contributions, or financial assistance for operating expenditures or capital expenditures; or the government may make agreements with others for the provision of services.⁴⁰³ The Minister has the power to approve agencies to provide services and to approve premises for the provision of services, and may impose terms and conditions for approval.⁴⁰⁴

Under the *Local Health System Integration Act*, Ontario has created 14 Local Health Integration Networks (LHINs) which are responsible for planning, funding, coordinating and integrating health care services in their areas.⁴⁰⁵ The LHINs allocate funds to agencies and service providers to provide the services regulated by the HCCSA. CCACs are approved agencies under section 5 of the HCCSA.⁴⁰⁶ They were created in 1996, replacing regional home care and placement services that had been criticized as fragmented and inequitable.⁴⁰⁷ Each CCAC is now accountable to one of the LHINs and

For those who are searching for information about available community support services and about attendant services in particular, the main venues for information appear to be the websites of the LHINs, the CCACs and other agencies, and telephone information services. Not all CCACs list their telephone numbers on their home page: in some cases, recourse must be made to the Ministry of Health website. LCO staff seeking information through telephone services were often re-directed to the websites. That is, information is mainly available through the internet and in a print format.

every LHIN is accountable to the Ministry.⁴⁰⁸ The CCACs assess potential clients for service eligibility, approve clients for services and determine the allocation of available funds.⁴⁰⁹ The CCACs do not themselves provide services. In theory, non-profit and for-profit organizations may compete to provide services by bidding for contracts through a Request for Proposals. In practice, the competitive process has been suspended on a number of occasions.⁴¹⁰ Services, including Attendant Services, may be administered through CCACs or other agencies.

ELIGIBILITY CRITERIA FOR ATTENDANT SERVICES

To be eligible for attendant services, applicants must satisfy the following criteria:

- Be insured under the *Health Insurance Act* of Ontario (i.e., possess a valid Ontario Health Card);
- Be at least 16 years of age or older;
- Have a permanent physical disability and require physical assistance with activities of daily living such as bathing, dressing, transferring and toileting;
- Be able to direct their own services. This means communicating with the attendants about what the individual wants done, when he or she wants it done and how; and
- Be able to have any medical/professional needs met by the existing community health network on a visitation basis.

In Toronto, there is a centralized application process through the Project Information Centre at the Centre for Independent Living Toronto (CILT); outside Toronto, individuals must apply directly to each separate service provider.⁴¹¹

SERVICE PROVISION

For those who are searching for information about available community support services and about attendant services in particular, the main venues for information appear to be the websites of the LHINs, the CCACs and other agencies, and telephone information services. Not all CCACs list their telephone numbers on their home page: in some cases, recourse must be made to the Ministry of Health website. LCO staff seeking information through telephone services were often re-directed to the websites. That is, information is mainly available through the internet and in a print format.

A review of the community support services information provided through the websites of the 14 LHINs and CCACs revealed significant variance in the extent and format of information. Some CCACs provide video presentations on their services and options, although most rely exclusively on print information. The majority of information is presented in pdf files, which may pose barriers to persons with visual disabilities who use screen readers. Some CCACs provide documents in large print formats, though many do not. Some, though not all, regions provide information in French as well as English; information in other languages is not accessible. Some CCACs provide detailed information about service providers in their region, while others do not.

In Toronto, applications for attendant services appear to be centralized through CILT's Project Information Centre (PIC) program, which simplifies the process considerably.⁴¹² Outside Toronto, it may be necessary for those seeking attendant services to apply to individual service providers. There is a searchable Ontario Attendant Services Directory maintained by CILT, to enable individuals to locate services in their area.

When an individual applies for community services to an agency under the HCCSA, the agency must conduct an assessment of the individual's requirements, determine eligibility and create a written plan of service for each individual receiving services. The plan of service must be regularly reviewed to adapt to changing circumstances, and the individual must have an opportunity to participate fully in the development, evaluation and review of the plan of service. The plan of service must take into account the person's preferences, including those based on ethnic, spiritual, linguistic, familial and cultural factors.⁴¹³

Services outlined in the plan of service must be provided within a reasonable time frame, and if services are not immediately available, the individual must be waitlisted.⁴¹⁴

A review of the community support services information provided through the websites of the 14 LHINs and CCACs revealed significant variance in the extent and format of information.

Service providers must post in their premises a copy of the Bill of Rights and of any service accountability agreement into which they have entered.⁴¹⁵ As well, each agency must provide to its clients or their substitute decision-makers a written notice outlining

- their rights under the Bill of Rights,
- the agency's complaint procedures,
- information regarding privacy and confidentiality issues, and
- (if applicable) information about service accountability agreements entered into by the agency.⁴¹⁶

Agencies must also develop and implement plans for preventing, recognizing and addressing abuse of persons who receive services, as well as a quality management system.⁴¹⁷ The HCCSA sets out requirements for the protection of the privacy and confidentiality of client information.⁴¹⁸

There is little information publicly available regarding training and education for service delivery staff. While the CCACs and other agencies no doubt consider the qualifications of staff in contracting with various service providers and as part of their quality management programs, the HCCSA and regulations do not set out any minimum requirements for staff qualifications or for ongoing training and education.

OVERSIGHT OF AGENCIES

To be selected by the Ministry, an agency must first be approved. To be approved, the agency must abide by the Bill of Rights and operate with "competence, honesty, integrity and concern for the health, safety and well-being of the persons receiving the service".⁴¹⁹ The HCCSA requires the agencies to provide annual reports to the Ministry on their operation, and enables the Ministry to appoint program supervisors where necessary, as well as revoke or suspend approvals.

...[W]hile the HCCSA mandates that service providers provide timely services, and maintain waitlists, it sets no specific standards in these areas. There are no legislative requirements as to timeliness beyond that it be “reasonable under the circumstances”, no guidance as to how agencies should prioritize service needs, and no requirements regarding qualifications and training for service staff. Not only does this lead to significant variances in policies and outcomes across the province, it reduces transparency and accountability within the system.

CCACs receive some information about clients’ experiences with their service providers from clients who choose to contact them and make complaints about their care, but there is no explicit requirement that CCACs ensure the adherence of service-providing agencies to the Bill of Rights. An explicit oversight requirement would enable CCACs to obtain comprehensive information about service providers’ compliance with the Bill of Rights across the province.

While the HCCSA requires every service-providing agency to “ensure that a quality management system is developed and implemented for monitoring, evaluating and improving the quality of the community services provided or arranged by the agency”,⁴²⁰ it does not specify what that system should involve. While the HCCSA allows the Minister to make regulations “governing the quality management system required to be developed and implemented”,⁴²¹ there is currently no oversight requirement under the HCCSA or its regulations relating to quality management.

Similarly, while the HCCSA mandates that service providers provide timely services, and maintain waitlists, it sets no specific standards in these areas. There are no legislative requirements as to timeliness beyond that it be “reasonable under the circumstances”,⁴²² no guidance as to how agencies should prioritize service needs, and no requirements regarding qualifications and training for service staff. Not only does this lead to significant variances in policies and outcomes across the province, it reduces transparency and accountability within the system. Clients do not have a clear sense of the services to which they are entitled.

The CCACs have undertaken a number of initiatives to ensure that safe and quality care is provided “in the right place at the right time”. These include the standard use of Board Quality Committees, annual quality improvement plans, common client satisfaction surveys, common satisfaction surveys with contracted service providers, and satisfaction surveys with employees.⁴²³ CCACs may visit the premises of service providers and review performance data such as rates of referral acceptance and number of missed visits. At least one CCAC has made it a priority to conduct *ad hoc* visits to each of its 14 service providers, in order to observe the quality of services rendered.⁴²⁴

The Auditor General’s office found that all three of the CCACs it visited had conducted *ad hoc* site visits to some of their service providers, though only one had commenced routine site visits to audit all of their service providers. These CCACs had identified some common issues related to monitoring and oversight. For example, three quarters of the service providers assessed had limited ability to assess whether their staff had delivered the required services in the client’s home in a timely manner, and a third of service providers did not evaluate personal support workers by actually observing them providing services to clients.⁴²⁵

The Minister may appoint program supervisors, who may conduct inspections of community service providers (with a warrant where necessary) and who have power to copy and remove records.⁴²⁶

The Minister may revoke or suspend approvals of agencies or premises designations where the Minister believes on reasonable grounds that there has been a contravention of the terms and conditions imposed by the Minister or of the Act or regulations, or breach of an agreement.⁴²⁷ The Minister may also “takeover” an agency, removing and replacing some or all of the directors or directly taking control of, operating or managing the agency or some part of it.⁴²⁸ These provisions do not, however, apply to CCACs.⁴²⁹ The Minister may issue directions on matters relating to the exercise of a CCAC’s rights and powers and the exercise of its duties under the law.⁴³⁰ As well, the Minister may appoint a supervisor in the public interest, who may, unless the appointment provides otherwise, exclusively exercise all the powers of the CCAC, its board or the Executive Director.⁴³¹

In late 2008, the Ministry announced a number of initiatives to strengthen the quality of services under the HCCSA, including

- requiring CCACs to use “fairness advisors” for all requests for proposals,
- requiring CCACs to publicly disclose their rationale for the selection of service providers at the conclusion of the request for proposals process,
- introducing public reporting of performance measures, and
- requiring all CCACs and service providers to develop annual continuous quality improvement plans.⁴³²

COMPLAINT MECHANISMS AND ENFORCEMENT

A study of the complaints received by three CCACs undertaken by the Auditor General of Ontario reported only a small number of formal complaints made by service recipients across Ontario to their local CCACs. In the first three quarters of the 2009/10 fiscal period, only approximately 3 to 8 out of 1,000 service recipients in these three CCACs had filed complaints. However, many concerns brought to the CCACs are not classified as formal complaints, but are simply resolved by case managers and included in the client files. These are considerably more frequent. In a review of the files of three CCACs, the Auditor General found approximately 1,300 “events” over a period over nine months at two of the CCACs, and more than 600 events in a period of six months at the third.⁴³³

Accessing information about complaint mechanisms: Currently, the HCCSA requires that agencies inform a person receiving community services in writing of the proceedings for initiating complaints about their service providers.⁴³⁴ The provincial CCAC website contains a very brief explanation about how to initiate a complaint, suggesting that clients contact their local CCACs directly for further details.⁴³⁵ Information about the different routes for service quality complaints, or about the options for breaches of the “Bill of Rights” are not outlined in the public materials of the CCACs.

Complaint mechanisms: The Bill of Rights provisions of the HCCSA are a deemed contract between the service provider and the person receiving the service, so that the

While in theory recourse to civil courts grants persons with disabilities an avenue outside the administrative system, in reality, such recourse is not accessible to most of the persons with disabilities receiving services under the HCCSA.

service recipient could, in theory, bring an action for breach of contract in order to enforce those rights.⁴³⁶ While in theory recourse to civil courts grants persons with disabilities an avenue outside the administrative system, in reality, such recourse is not accessible to most of the persons with disabilities receiving services under the HCCSA. Both the limited resources of Legal Aid Ontario and the lack of lawyers who are knowledgeable about this area of the law in Ontario pose a problem for persons with disabilities who might otherwise choose to pursue their case in court. In addition, the limited financial means of many of the persons with disabilities who rely on provincially-funded community support services may prevent those considering the option of pursuing lengthy and expensive court proceedings from doing so. Those who can afford civil litigation may decide to invest their resources in purchasing services out of pocket rather than to invest resources, time and energy into the uncertain process of civil litigation.⁴³⁷

Recently, clients of community services have also been provided with the option of contacting the Long-Term Care Action Line (LTCAL) to receive information and assistance with issues regarding the services they receive. The LTCAL can facilitate the intake and referral of community service complaints. Upon request, clients may be referred to an Independent Complaints Facilitator to discuss their concerns. These Facilitators are required to contact the client within 10 business days of the referral, and can, with permission, contact the client's CCAC to help address concerns.

Agencies approved to provide services are required to establish a process for receiving and reviewing complaints regarding

1. decisions about eligibility for services,
2. decisions to exclude a particular service from an individual's plan of service,
3. decisions about the amount of service to be included in an individual's plan of service,
4. decisions to terminate the provision of services to an individual,
5. the quality of service provided to an individual, and
6. violations of the provisions of the Bill of Rights.⁴³⁸

The agency must review and respond to all complaints regarding service quality or the Bill of Rights within 60 days. For all other types of complaints, the agency must give a written notice of its decision on the complaint within 60 days. Certain CCACs have an Ombudsperson who acts as a mediator between a client and his or her case worker,⁴³⁹ but others have only a client's CCAC case manager as an initial point of contact for a client who wishes to make a complaint.⁴⁴⁰

Appeals: Decisions not related to service quality or the Bill of Rights may be appealed to the Health Services Appeal and Review Board (HSARB). HSARB is then required to begin a hearing into the complaint within 30 days. HSARB may affirm the decision, rescind it and return the matter for a fresh decision, or rescind it and substitute its own decision for that of the agency. The decisions of HSARB are not appealable.⁴⁴¹

Systemic issues: Because the complaints mechanism is not centralized, it does not aid in gathering information at the provincial level about the care provided by various service providing agencies. Since complaints regarding quality of services do not require written responses, it may also be difficult to track exactly how many complaints are made, what their subject matters are, or how they are addressed. It also does not appear to facilitate the Ministry's task of ensuring that high quality services are rendered uniformly across the province.

Because the complaints mechanism is not centralized, it does not aid in gathering information at the provincial level about the care provided by various service providing agencies. Since complaints regarding quality of services do not require written responses, it may also be difficult to track exactly how many complaints are made, what their subject matters are, or how they are addressed.

3. Ministry of Community and Social Services Act – Grants for Direct Funding

OVERVIEW

The MCSSA enables the Minister to “make a grant to or on behalf of a person who has a disability and who is at least sixteen years old, to assist the person in obtaining goods and services that the person requires as a result of the disability” or to make such grants to organizations or agencies with which the Crown has entered into an agreement, which will then transfer such grants to persons with disabilities.⁴⁴² This is often referred to as “direct funding” or “self-directed funding”.

While it is generally recognized that self-directed funding will not be appropriate or desirable for all persons with disabilities, self-directed funding for attendant services allows persons with disabilities to manage their own needs, and is therefore perceived as enhancing the security, autonomy and dignity of those for whom it is appropriate. The Report on a 1997 Pilot Project on self-directed funding noted that:

Providing people with disabilities who use attendant services with the funding to hire and manage their own staff changes the usual relationship between consumers and attendants. With self-managed direct funding, the participants in this Pilot became the employers of their attendants, in most cases for the first time. Both self-managers and attendants pointed to the increased accountability to persons with disabilities that this change in the employer-employee relationship brought, and to the greater degree of mutual respect it fostered....

Direct funding provided to the participating self managers more control, choice, and flexibility in attendant services than they have had in the past. They pointed to the many ways in which this made a difference in their lives in terms of increased self-determination in all aspects of their lives, reduced vulnerability, greater independence, a stronger sense of self-esteem, more fulfilling personal relationships and increased social participation.⁴⁴³

SERVICES PROVIDED

Under the Ontario Regulation 367/94, attendant workers may provide the following services:

1. turning a person in bed, lifting a person, positioning a person or transferring a person from one place to another,

2. assisting a person with washing, bathing, showering, shaving or personal grooming,
3. assisting a person with dressing or undressing,
4. catheterization, emptying and changing a leg bag, assisting a person with using the toilet or otherwise assisting a person with urination or bowel routines,
5. assisting a person with breathing, caring for a tracheostomy or caring for respiratory equipment,
6. assisting a person with eating,
7. assisting a person with meal preparation, dishwashing, laundry or other housekeeping tasks,
8. assisting a person with essential communication.

Direct funding provided to the participating self managers more control, choice, and flexibility in attendant services than they have had in the past. They pointed to the many ways in which this made a difference in their lives in terms of increased self-determination in all aspects of their lives, reduced vulnerability, greater independence, a stronger sense of self-esteem, more fulfilling personal relationships and increased social participation.

ELIGIBILITY CRITERIA

The Regulation sets out a complex set of eligibility criteria for receipt of Direct Funding Grants. To be eligible for direct grants for attendant services, the Regulation requires that

- a) The person is at least 16 years old.
- b) The person requires attendant services as a result of a permanent physical disability.
- c) The attendant services required by the person include attendant services referred to in at least two of paragraphs 1 to 8 of subsection 1 (2), and at least one of the attendant services required by the person is referred to in paragraph 1, 2, 3 or 4 of the list of services provided above.
- d) The attendant services required by the person have been stable over a period of at least one year.
- e) The person's care requirements can be met while the person resides in his or her home.
- f) The person understands the nature of his or her disability and its impact on his or her ability to carry out the essential activities of daily living.
- g) The person is aware of the type of attendant services he or she requires, the times at which he or she requires the attendant services, the number of hours of attendant services he or she requires and the manner in which the attendant services should be provided.
- h) The person is capable of scheduling his or her attendant services and of making alternative arrangements to ensure that his or her requirements for attendant services are met in the event that an attendant worker is not available at a scheduled time.
- i) The person is capable of training or arranging the training of, supervising, instructing and otherwise communicating with attendant workers.
- j) The person is capable of recruiting, hiring and dismissing attendant workers.
- k) The person is capable of understanding and carrying out the responsibilities that he or she would face as an employer of one or more attendant workers.
- l) The person is capable of managing and accounting for the expenditure of the funds that the organization, agency or entity would grant to him or her.
- m) The person is capable of evaluating the attendant services he or she would receive and of communicating his or her evaluation to others.

- n) The person is prepared to undertake the functions referred to in clauses (h) to (m) and to assume the responsibility and risks inherent in undertaking those functions.

Notably, the program is restricted to adults (individuals over the age of 16) with physical disabilities (though it does not exclude individuals who have other disabilities in addition to physical disabilities). No definition of “physical disability” is provided in the legislation.

There is also a requirement that the need remain stable – both in the requirement that the physical disability be “permanent” and that service needs have been stable for a period of at least one year.

Finally, there is considerable emphasis on assessing the skills and understanding of the potential grant recipient for independently managing the administrative, financial and supervisory aspects of an employment relationship.

SERVICE DELIVERY MODEL

Funding for services under the Direct Funding program flows directly to the provider agency (CILT in cooperation with the Ontario Network of Independent Living Centres), which then determines eligibility through an intensive application and interview process and administers the allocation of the grants. CILT provides a comprehensive application guide for the Direct Funding program.⁴⁴⁴

Upon approval, the grant recipient then becomes the direct employer of the attendant, responsible for compliance with the *Employment Standards Act*, *Human Rights Code*, *Income Tax Act* and other laws relevant to the employment context. The provider agency may be able to provide supports and information regarding practical issues associated with being an employer, but the ultimate responsibility lies with the grant recipient.

COMPLAINTS MECHANISMS

CILT has set up a review mechanism for decisions related to eligibility for Direct Funding. If, after being interviewed, the applicant is declared ineligible for Direct Funding, the applicant can make a written request for a review. The request will be reviewed by an independent third party to determine whether the eligibility decision was both procedurally and substantively fair. If dissatisfied with the results of this review, the applicant may be able to appeal to HSARB.⁴⁴⁵

Because the individual with a disability is the direct employer of the attendant, the attendant is directly accountable to the individual for services provided, and any issues with quality of service will be dealt with as an employment matter.

4. Provision of Community Support Services Under the Social Inclusion Act

The *Social Inclusion Act*,⁴⁴⁶ enacted in 2008 to replace the *Developmental Services Act*, marks a major transformation in the delivery of services and supports to persons with intellectual disabilities. It is intended to shift this sector away from institutionalized care and towards a “system of services and supports that will enable people with intellectual disabilities to exercise more independence, have greater decision-making power over their day-to-day lives, and ultimately live as full citizens in communities of their choosing”.⁴⁴⁷

The *Social Inclusion Act* regulates the provision of a range of community support services, including those related to activities of daily living, community participation, caregiver respite, person-directed planning and others.⁴⁴⁸ Services and supports may be funded either through agreements with service agencies or through direct funding of persons with disabilities, administered through “application entities”.⁴⁴⁹ The provisions of the Act regarding direct funding have yet to come into force. Persons with intellectual disabilities may make application for services or supports to be provided either by service agencies, direct funding, or a combination of both.⁴⁵⁰

The Social Inclusion Act, enacted in 2008 to replace the Developmental Services Act, marks a major transformation in the delivery of services and supports to persons with intellectual disabilities.

“Funding entities” will develop service and support profiles for each eligible applicant, and will prioritize the provision of supports and services, based on rules to be set out in policy directives.⁴⁵¹

Service agencies are bound by the terms and conditions of their funding agreements, and any performance standards and measures required by policy directive,⁴⁵² as well as the quality assurance measures prescribed by regulation.⁴⁵³ Service agencies must report to the Minister as required, and must have in place written procedures for addressing complaints.

In terms of enforcement, the Act makes provision for inspections, and for the issuance of compliance orders. Where an agency fails to comply with such an order, the Minister may terminate any funding agreement with a service agency, or revoke the designations of funding or application entities.⁴⁵⁴ Agencies may also be subject to a takeover where there are reasonable grounds to believe that there has been misappropriation of funds or that the activities of a service agency are an immediate threat to the health, safety or well-being of those served.⁴⁵⁵

While the Act has been praised for moving away from an institutional model of services and supports, and for enabling greater choice and control in selection and receipt of services for persons with intellectual disabilities, concerns have been expressed about the lack of a rights-based approach to the receipt of services and a desire for stronger enforcement mechanisms.⁴⁵⁶ As well, implementation of the provisions related to direct funding is still underway.

C. Evaluating the Legal Framework

The following evaluation of the law surrounding attendant services in Ontario is based on the questions set out in the *Framework* that composes Chapter IV of this *Final Report*. As not all questions from the *Framework* are applicable to this particular area of law, not all are addressed. In particular, this evaluation does not address the *Framework's* "Step 2: Does the Legislative Development/Review Process Respect the Principles", as it is focused on the current state of the law. The results are therefore presented in a narrative format, rather than question by question.

As was noted at the opening of this Chapter, this is not intended as an exhaustive review of this area of the law. Rather, it is a preliminary evaluation that points to areas of strength and of concern, and issues for further examination.

The law regarding attendant services and policy and practice in implementing it are profoundly connected to the realization of the principles for persons with disabilities. As Article 19 of the CRPD highlights, availability of supports in the community is essential to the ability of persons with disabilities to live in the community and avoid more institutionalized living arrangements, something which affects all of the principles but most particularly those of social inclusion and participation, and of fostering autonomy and independence.

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

The law regarding attendant services and policy and practice in implementing it are profoundly connected to the realization of the principles for persons with disabilities. As Article 19 of the CRPD highlights, availability of supports in the community is essential to the ability of persons with disabilities to live in the community and avoid more institutionalized living arrangements, something which affects all of the principles but most particularly those of social inclusion and participation, and of fostering autonomy and independence. Provision of adequate supports may affect the ability of persons with disabilities to obtain or maintain employment, access education, participate in community activities or fulfil their roles as spouses, parents, friends and neighbours. That is, the effective achievement of the principles in this area will have a significant impact on the possibility of attaining the principles in all areas of life.

The way in which services are provided is as important to the realization of the principles as the fact of their provision. Disrespectful or abusive services can undermine the security, dignity and independence of persons with disabilities. Services which are inflexible, impersonal or not respectful of the diversity of persons with disabilities may undermine the principle of responding to diversity. As many persons with disabilities have pointed out, the ability to direct their own services can be fundamental to their autonomy.

As was briefly noted above, a lack of adequate supports may mean that those who provide informal supports for persons with disabilities may face significant strains in doing so, something that is particularly an issue of concern for aging parents of adults with disabilities. That is, the security and participation of those providing informal supports may also be affected by a lack of adequate appropriate formal supports and services for persons with disabilities who need them, highlighting the principle of membership in the broader community.⁴⁵⁷

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

HCCSA

The purposes of the HCCSA, and particularly the provisions of the Bill of Rights, are well-aligned with the principles for persons with disabilities. The intent of the law is to promote positive outcomes for those who need supports to live in and fully participate in the community and to remove barriers by providing supports.

The primary purpose of the Act, ensuring “that a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist”, is central to the principle of social inclusion and participation. This is also closely linked to the principle of autonomy and independence, in that provision of supports in the community can give persons with disabilities a greater range of choices, as well as opportunities for education, employment and interpersonal and civic engagement.

The nature of the services provided under the Act is itself a recognition of the principle of diversity in human abilities, and the purpose section of the Act recognizes other aspects of diversity, including “the importance of a person’s needs and preferences, including preferences based on ethnic, spiritual, linguistic, familial and cultural factors”.

The principle of respect for dignity and worth is reflected in the explicit recognition in the Bill of Rights of the rights of those receiving services, including persons with disabilities, to be treated in a manner that “respects the person’s dignity and privacy and that promotes the person’s autonomy”, and to be dealt with “in a courteous and respectful manner and to be free from mental, physical and financial abuse by the service provider”, as well as rights to have the confidentiality of their information respected, and to raise concerns or recommend changes in connection with community services provided. There are no stereotypes or negative attitudes towards persons with disabilities embedded in the legislation.

The Act recognizes risks to the right to live in safety arising from the dynamics between service providers and those who receive attendant services, and includes measures to prevent abuse of clients by service providers.

DIRECT FUNDING

The provisions of the MCSSA and the *Grants for Persons with Disabilities* Regulation are not explicit as to their purposes, but as with the HCCSA, their general intent – to provide persons with physical disabilities who can self-manage their services with the ability to obtain and direct the services they need to be included in the community – is clearly consistent with the principles of the *Framework*, particularly those of inclusion and participation, dignity and respect, and autonomy and independence.

Because direct funded services make the persons with the disability the employer, and thereby give her or him considerable control over the work and how it is done, this

The way in which services are provided is as important to the realization of the principles as the fact of their provision. Disrespectful or abusive services can undermine the security, dignity and independence of persons with disabilities. Services which are inflexible, impersonal or not respectful of the diversity of persons with disabilities may undermine the principle of responding to diversity. As many persons with disabilities have pointed out, the ability to direct their own services can be fundamental to their autonomy.

program is particularly closely tied to the principle of autonomy and independence. It is also seen as having positive effects on inclusion, in that users can target the services they receive more effectively, dignity and respect in that it transforms the relationship between the attendant and the person with a disability, and safety in that it reduces the risks of abuse by attendants.

A 2002 Report prepared for Health Canada reported that:

There was unanimous support for the Self-managed Attendant Services – Direct Funding program funded by the Ontario Ministry of Health and run through the Centre for Independent Living in Toronto...Participants commented that it was hard to access the program and it is not always the best option for some people, but at the same time they saw enormous potential for an expanded program, that they felt would be cost-effective, appropriate to their care needs, and retained elements of choice, flexibility, dignity and respect that are often absent from traditional modes of service delivery.⁴⁵⁸

Because direct funded services make the persons with the disability the employer, and thereby give her or him considerable control over the work and how it is done, this program is particularly closely tied to the principle of autonomy and independence. It is also seen as having positive effects on inclusion, in that users can target the services they receive more effectively, dignity and respect in that it transforms the relationship between the attendant and the person with a disability, and safety in that it reduces the risks of abuse by attendants.

Participants in CILT's Direct Funding Pilot Project reported that using self-managed services increased respect for their privacy and dignity, their sense of security from mental, emotional or physical abuse, and especially their sense of autonomy and personal control. They noted that the program increased the trust and respect between themselves and their attendants, and their comfort with the very intimate nature of some of the tasks performed. Some self-managers reported that the program enabled them to move out of their parents' home or meant that they did not have to return to living there.⁴⁵⁹

It should be noted that it is generally accepted that, as beneficial as direct funded services are for those who desire them and for whom they are appropriate, not everyone has both the desire to self-direct their services and the skills to do so. For some individuals, agency-sourced attendant services will better meet their needs. The existence of both the Direct Funding program and the Attendant Services programs under the HCCSA thereby acknowledges the diversity among persons with disabilities. The provisions of the *Social Inclusion Act* enable eligible individuals to obtain services either through an agency or by direct funding, or through a mix of both. Of course, the degree to which this choice will be meaningful will depend on how the direct funding provisions are implemented and resourced.

3. Who is Affected by the Law and How Does this Relate to the Principles?

The HCCSA itself is a law of general application, affecting all those who need community supports, including those recovering from acute illness, older persons who are frail or need supports to age in place, and persons with disabilities. The Attendant Services that are provided under the HCCSA are, however, specifically targeted to persons with disabilities, as are the provisions of the MCSSA and regulation creating the Direct Funding program.

Attendant services programs are targeted to persons with physical disabilities, but do not exclude individuals with multiple disabilities, unless those disabilities create obstacles to self-direction of services. The new provisions under the *Social Inclusion Act* will create opportunities to access self-directed services for more individuals.

There were no statistics publicly available regarding the gender, linguistic, ethnic, religious or other makeup of the current client base for services under the HCCSA or the Direct Funding program, information that would be valuable in properly assessing the impact and effectiveness of the law on the diverse populace that it targets. Nor was there information publicly available regarding the impact of the eligibility criteria on different groups of persons with disabilities. Without such information, it is difficult to assess the impact of the eligibility criteria on the fulfillment of the principles.

...[T]he HCCSA sets out strong, positive principles and identifies purposes that are generally in harmony with the LCO's principles and potentially very beneficial for persons with disabilities.

Concerns regarding attendant services most frequently derive from the implementation of the law – particularly since the law provides considerable discretion to the agencies and the service providers as to how they implement the law.

4. Do the Processes Under the Law Respect the Principles?

As is noted above, the HCCSA sets out strong, positive principles and identifies purposes that are generally in harmony with the LCO's principles and potentially very beneficial for persons with disabilities. Concerns regarding attendant services most frequently derive from the implementation of the law – particularly since the law provides considerable discretion to the agencies and the service providers as to how they implement the law.

Key implementation issues are a shortage of resources, broad discretion for agencies and service providers, and shortfalls in communication and education for both users and providers of attendant services. Because of these implementation issues, the legislation, although positive in intent, may not be effectively fulfilling the principles it was intended to promote.

RESOURCES

A significant aspect of the challenges faced in providing adequate and appropriate community support services lies in the resource constraints faced by those responsible for allocating and providing services. As described above in section A.3, there are significant waitlists for all of Ontario's attendant services programs.

As a result, the eligibility criteria as set out in legislation or policy lose some meaning, as a determination of eligibility may have little relation to the actual timely receipt of services. Given the central importance of these services to the achievement of the principles for persons with disabilities, and particularly the achievement of the principle of inclusion and participation, this shortage of resources raises significant concerns. Persons with disabilities may find themselves living in institutionalized settings, unable to make the transition to living independently from their parents, or otherwise unable to live in safety and be included in the community, as a result of these shortages.

DISCRETION AND ACCOUNTABILITY

A key concern with the processes under the HCCSA is that they provide wide discretion to the agencies (such as CCACs) and to the service providers themselves in terms of

levels of service provided, quality management programs, complaints processes and provision of information, without also providing sufficiently strong mechanisms for transparency and accountability. The shortage of resources identified above, together with uneven distribution of those resources, makes the problem more acute. The Auditor General has noted that the CCACs vary widely in their eligibility criteria, waitlist policies, level of services provided and monitoring of the quality of care provided. For example, the Auditor General found that

The absence of standard service guidelines has resulted in each CCAC developing its own guidelines for frequency and duration of services. As a result, guidelines varied in the time allocated for each task and the frequency of service visits recommended. This means that the level of service offered may vary from one CCAC to another.⁴⁶⁰

A key concern with the processes under the HCCSA is that they provide wide discretion to the agencies (such as CCACs) and to the service providers themselves in terms of levels of service provided, quality management programs, complaints processes and provision of information, without also providing sufficiently strong mechanisms for transparency and accountability.

Therefore, despite the laudable principles and purposes underpinning the HCCSA, it is difficult to determine whether or not those principles are actually being achieved, or whether there is adequate opportunity to take remedial action if they are not.

COMMUNICATION AND EDUCATION

Adequate, appropriate information is essential to understanding options and making choices, and therefore to the principle of autonomy and independence. As well, lack of information can hinder the opportunity to derive the intended benefit from laws and programs, and therefore reduce the likelihood that the law or program will fulfil its intent (and thereby the principles). Because there is fragmentation in the provision of community support services for persons with disabilities, clear and accessible information will be especially important in helping individuals to navigate what may be a confusing system.

However, persons with disabilities may have difficulty locating the information they need to make informed choices about attendant services programs. CILT's PIC program centralizes information about services in Toronto, but outside Toronto, the available information varies significantly across regions, is heavily dependent on websites, and is not always in accessible formats.

Training and information is also crucial for those who are delivering services, to ensure that services are provided effectively, and in accordance with the principles. The HCCSA does not set requirements for qualifications or ongoing training for service delivery personnel, and there is little information publicly available on this issue. A key concern that is frequently raised is high turnover among staff.

Recruitment and retention of staff is a serious concern, particularly given the much higher salaries and benefits in hospitals, long-term care homes and for the Developmental Support Workers in the Ministry of Community and Social Services.⁴⁶¹

This creates considerable difficulties for clients who are unable to build up relationships of trust with the individuals who are providing what are sometimes very personal services, and who must re-explain their needs to workers.⁴⁶² It also likely creates

difficulty in developing a skilled and experienced workforce, and in ensuring that the way in which services are provided respects the principles, particularly the principles of dignity and worth, and of living in safety.

For Direct Funded services, of course, the individuals themselves select workers who they believe have the skills and attitudes necessary to meet their needs, and provide the required training. In this way, these individuals have considerable control over the quality of services provided to them, within the limitations created by the local labour market and the level of funding provided. As noted above, users of the direct funding program have indicated that their approach has the capacity to fundamentally transform the relationship between users and providers of attendant services, increasing the respect with which the attendant services users are treated, and providing an additional safeguard against abuse.

Adequate, appropriate information is essential to understanding options and making choices, and therefore to the principle of autonomy and independence. As well, lack of information can hinder the opportunity to derive the intended benefit from laws and programs, and therefore reduce the likelihood that the law or program will fulfil its intent (and thereby the principles).

5. Do the Complaint and Enforcement Mechanisms Respect the Principles?

An effective complaint mechanism is essential to identifying and addressing those circumstances in which a law, policy or practice is failing to respect the principles, whether at an individual or a systemic level. Lack of an effective complaint system, particularly in the context of such crucial and intimate services as attendant services, may place the individual receiving services at risk of disrespectful or even abusive treatment. Given the central importance of attendant services to the achievement of the principles by those who need them and the shortage of services, complaint mechanisms must take into account the significant power imbalance between users of attendant services and those who provide them.

In a research paper commissioned by the LCO, ARCH Disability Law Centre evaluated enforcement mechanisms under the *Social Inclusion Act* and identified four key elements of a proposed “human rights-based approach” to enforcement, founded on principles of accountability, accessibility, participation and independence. The four elements are rights education, both for individuals receiving services and those providing them; accessible, meaningful and transparent complaint mechanisms; appeals to independent administrative bodies; and peer advocacy committees to promote self-advocacy.⁴⁶³ While that paper considered these elements in the context of services for persons with intellectual disabilities, the elements are more broadly relevant across enforcement mechanisms affecting services for persons with disabilities, as means of promoting independence and autonomy through information and education, participation and inclusion through empowerment of persons with disabilities, and respect for dignity and safety through the creation of meaningful safeguards against disrespect and abuse.

HCCSA

Several issues have been raised concerning the adequacy of the complaints mechanisms under the HCCSA, including the complexity of the system, lack of access to a neutral third party, lack of access to information about complaints processes, and the lack of transparency and accountability in the complaints processes.

As was described earlier, there are different complaint options for different types of issues.

- “Bill of Rights” issues may be the subject of a complaint to the agency, or may be treated as a breach of contract between the individual and the service provider.
- Issues regarding service levels or eligibility must be brought to the attention of the agency. The agency must respond in writing, and decisions may be appealed to HSARB.
- Service quality issues must be brought to the attention of the agency. The agency need not provide responses in writing, and there are no rights of appeal to HSARB.
- For any issue, concerns may now be brought to the attention of the LTCAL.

The complaints process is therefore complex, with different alternatives for different issues, and may be confusing for affected individuals trying to determine their options and the possible outcomes. And because the HCCSA has no specific requirements regarding such complaint processes, they vary between agencies, making it harder for clients to navigate the system. These barriers to understanding and navigating the complaint system may undermine the principle of autonomy by making it more difficult for persons with disabilities to identify options and make informed choices about them.

Lack of an effective complaint system, particularly in the context of such crucial and intimate services as attendant services, may place the individual receiving services at risk of disrespectful or even abusive treatment.

As noted earlier, information about complaint processes is hard to locate, and mainly provided in written form. While certain clients are comfortable reading written materials and initiating a complaint, accessibility issues arise for service recipients who have visual or cognitive difficulties or experience language barriers (such as individuals who have ASL or LSQ as a first language). Understanding the complaints process is necessary to understanding the different options that are available to care recipients (for instance the difference between calling the LTCAL versus contacting a care provider directly). Without having access to consultation with a party who has information about the complaints procedure and can ensure that the client understands all available options, the written complaints procedure may not facilitate the process for all individuals. While some may be able to rely on family members or friends to seek additional information when necessary and to paint a complete picture of the process, not all will have access to such secondary sources of information. As such, the “written notice” requirement under the HCCSA may not, in actuality, take into account the needs of persons with disabilities and may not suffice to inform service recipients of the complaints procedure. In this way, the provisions and practices surrounding access to information may not fulfil the principle of responding to diversity.

Concerns have been raised about the lack of recourse to a neutral third party for many complaints. Complaints about quality of care or about decisions regarding eligibility or service levels must be made to the service-providing agency. In other words, individuals must complain about the services they are receiving to the providing agencies themselves. Decisions of the agencies regarding complaints about eligibility or service levels can be appealed to HSARB; however, this is not true for responses to complaints regarding quality of care, so that for these complaints there is at no stage any recourse to a true third party. In other words, for service level and eligibility issues, the first level

of recourse is to complain to those responsible for providing that care, and for those who have received poor quality care, this is the only option.

The dynamics of attendant services and of the system may discourage service users from making complaints. Some recipients of services under the HCCSA (in the context of home care) report not using the complaint mechanisms available to them despite being dissatisfied by the care they receive.⁴⁶⁴ Service recipients often come to an understanding that the problems they are experiencing happen as a result of tensions within the community support sector. Some feel as though the power to improve the care they are receiving is out of their hands, and out of the hands of the individuals to whom they can complain.⁴⁶⁵ This intensifies their feeling of hopelessness and makes them less likely to complain even when they feel as though they are not receiving the care they need. In addition, some report that they do not want to complain because they fear that voicing their complaints about not receiving enough care could lead to their institutionalization. Others report not wanting to be seen as “troublemakers” for fear that it will negatively affect the care they receive.⁴⁶⁶ Given these dynamics, the fact that in most cases there is no independent body to hear the complaints likely worsens the task of complaining for persons with disabilities. The initiative by some CCACs to create an ombudsman may mitigate some of these difficulties: having the option to contact an ombudsperson instead of a client’s CCAC case manager increases the transparency of the complaints process and may make it a bit more comfortable for a client to file a complaint without being worried about confronting his or her caseworker directly.

The dynamics of attendant services and of the system may discourage service users from making complaints. Some recipients of services under the HCCSA (in the context of home care) report not using the complaint mechanisms available to them despite being dissatisfied by the care they receive.

In addition to raising questions of transparency, the lack of a mandatory neutral third party in the complaints process poses an accessibility problem: it may discourage adults from voicing their complaints. This can make it difficult for agencies to receive an accurate picture of service recipients’ experiences, and thereby to address systemic issues. A clearly articulated complaints mechanism within the HCCSA that includes a neutral third party would help to improve the accountability, accessibility and transparency of services provided under the HCCSA.

Overall then, there are significant gaps and shortfalls in the complaint and enforcement mechanisms for access to community supports under the HCCSA. Shortfalls in requirements and practices regarding the provision of information may undermine the principles of autonomy and of responding to diversity, a problem exacerbated by the complexity of the complaint system. A lack of clear and independent complaint processes may compromise the willingness of persons with disabilities to raise issues, and so may undermine the principles of dignity and worth, and of safety. Overall, in practice persons with disabilities, particularly those who experience socio-economic, linguistic or other barriers, may not be able to realize the principles that could and should be promoted through the law without a stronger complaint and enforcement mechanism.

DIRECT FUNDING

A key benefit of the Direct Funding is the greater control and accountability it creates for persons with disabilities themselves. Issues with service quality can be dealt with directly through the employer-employee relationship. As CILT noted in evaluating the 1997 Pilot Project that tested many elements of what became the Direct Funded program,

The choice in and control over attendant services exercised by self-managers enabled them to reprimand attendants, or replace those whose performance proved to be unsatisfactory. Self-managers identified various reasons for reprimanding and dismissing attendants, including:

- Abusive behavior;
- Stealing;
- Disclosing confidential information;
- Unreliability;
- Lack of respect for the self-manager's beliefs; and
- Reluctance to accept direction from the self-manager.⁴⁶⁷

In addition to raising questions of transparency, the lack of a mandatory neutral third party in the complaints process poses an accessibility problem: it may discourage adults from voicing their complaints. This can make it difficult for agencies to receive an accurate picture of service recipients' experiences, and thereby to address systemic issues.

6. Do the Monitoring and Accountability Mechanisms Respect the Principles?

This discussion has highlighted the "implementation gap" for the law regarding access to attendant services. Legislation which is positive in purpose and generally in harmony with the LCO Framework principles may be, in practice, falling significantly short of its goals. In such circumstances, ongoing monitoring and evaluation of the implementation of the law and its outcomes may be of significant benefit.

As described above, the HCCSA does contain several mechanisms for Ministerial oversight, and CCACs have undertaken several initiatives to monitor and improve the quality of care. However, unlike under the *Social Inclusion Act*, there have been no quality assurance standards developed under the HCCSA, so that there may be considerable variance between agencies in this respect. There are no standards for timeliness of services or management of waitlists, issues of particular concern given the shortage of resources.

There is little information publicly available regarding the impact and effectiveness of the Direct Funding program. It does appear to have strong support from those it serves, the key issue being the lack of resources and resultant extraordinarily lengthy waitlists.

Because of these gaps in monitoring and oversight, it is difficult to determine the degree to which the law is fulfilling the principles. Given the discretion built into the system, the shortage of resources and the importance of the services to persons with disabilities enhanced monitoring and accountability measures might assist in promoting the realization of the principles to the degree possible at the present time.

D. Conclusion: Is the Law True to the Principles?

Attendant services are vital to the attainment of the principles, and in particular the principle of social inclusion and participation. Lack of effective access to attendant services may significantly compromise the ability of persons with disabilities to live in and engage with the broader community. The attendant services programs under both the HCCSA and the MCSSA are a practical recognition of the importance of these types of supports to persons with disabilities, and have the potential to significantly advance the achievement of the principles.

The purposes of both the HCCSA and the direct funding program under the MCSSA are well-aligned with the principles, and in particular the principle of social inclusion and participation. The direct funding program is highly regarded for its potential to increase autonomy and independence for those who use it.

The application of the *Framework* to law regarding attendant services highlights the common problem of the “implementation gap”.

Given the discretion built into the system, the shortage of resources and the importance of the services to persons with disabilities enhanced monitoring and accountability measures might assist in promoting the realization of the principles to the degree possible at the present time.

- There is, in a number of areas, a lack of publicly available information with which to assess the degree to which the law fulfils the principles in practice. For example, it is not clear whether the law is having different effects based on gender, age, type or severity of disability, geographic location, or other factors.
- While the Direct Funding program under the MCSSA is an important element of the attendant services landscape, and is based on a philosophy that significantly advances the principles for those individuals for whom this form of program is appropriate, its potential is significantly constrained by a drastic shortage of resources to meet the demand.
- The HCCSA is largely discretionary rather than directive. Likely this was intended to provide for flexibility in meeting evolving and variable needs in a rapidly shifting environment. However, when combined with a lack of mechanisms for ensuring transparency and accountability, and an ongoing shortage of resources across the community support and health care sectors, it becomes difficult to determine the degree to which the law is fulfilling the principles as intended.
- The application of the *Framework* indicates some significant concerns about the complaint and enforcement mechanisms under the HCCSA. The complexity of the complaints system, shortfalls in the provision of information, lack of a neutral third party to address complaints, and power imbalances between users of attendant services and service providers may discourage persons with disabilities from complaining about inadequate, disrespectful or abusive services. This undermines the principles of dignity and worth and living in safety, as well as the potential of the law to assist persons with disabilities to achieve the principles.

These implementation issues are particularly troubling because those affected by the HCCSA are often living with long-term disabilities, will be highly dependent on the services provided, and therefore may have difficulty in obtaining information about and

asserting their rights. In practice, the legislation may fall significantly short of respecting and promoting the positive principles that underlie its design.

Recognizing that a shortage of resources may make it very difficult to fully attain the principles in this area at this time, the concepts of progressive realization and “respect, protect, fulfill” point towards the importance of clearly identifying the shortfalls, immediately addressing these where possible, and developing an implementable plan for addressing these shortfalls within a reasonable timeframe. Stronger provisions regarding monitoring, transparency and accountability would enhance the ability to identify the most urgent issues, develop practical solutions, and create plans for better fulfilling the principles, as intended by the law.

VI. NEXT STEPS

The experience of disability has a profound impact on our society. Almost everyone will be personally affected by disability during their lifetimes – whether because they have or will develop a disability, or through the experiences of a loved one. This is a reality to which law and policy-makers must respond. It is important that all of those involved in serving those with disabilities or developing law and policy affecting them better understand the needs and circumstances of this group. This includes government at all levels, service providers both public and private, community and advocacy organizations, and the legal profession (including its organizations). To ensure equitable and effective law and policy, this deeper understanding should be paired with a holistic, comprehensive and principled approach to the area.

As has often been noted, efforts to improve understanding among law and policy-makers must be paired with a shift in attitudes towards people with disabilities among the general populace, away from stereotypes and paternalism and towards recognizing the value, contributions and capacities of these individuals.

As the principle of recognizing that we all live in society highlights, we are all connected. Failure to respect the dignity, autonomy, safety, inclusion and individuality of persons with disabilities will affect the wellbeing of all of us.

Persons with disabilities themselves will benefit from better access to information and supports regarding laws, policies and practices that may affect them, as this will support their abilities to make informed choices and to be active participants in their communities and in the development of laws, policies and practices.

It was the intent of the LCO in developing this *Final Report* and the *Framework* which it supports, to assist in developing a better understanding of the effects of law, policy and practice on persons with disabilities, and in identifying positive approaches which will advance substantive equality for this group. This will benefit not only those with disabilities, but all of us. As the principle of recognizing that we all live in society highlights, we are all connected. Failure to respect the dignity, autonomy, safety, inclusion and individuality of persons with disabilities will affect the wellbeing of all of us.

The concept of progressive realization applies to this project, as to other activities that may affect persons with disabilities. The completion of this *Final Report* and *Framework*, while a significant landmark, is not the end of the process.

The LCO will disseminate the *Final Report* and *Framework* broadly to the groups identified above, and will provide information to encourage the adoption of the *Framework* as a key tool for law and policy development and reform.

As part of this broader strategy to encourage the use of the *Framework*, the LCO intends to develop simplified materials related to the *Framework*.

The LCO realizes that this is an evolving area. The *Final Report* and *Framework* should not be considered, and were not intended to be, a final word on the matter. Rather, the

LCO intends that these will form the foundation of further research, discussion and analysis, and that the *Framework* can be adapted for use in a variety of contexts. The LCO itself intends to apply this *Framework*, as well as the results of the sister project on *The Law as It Affects Older Adults* to a law reform project focussed on Ontario's laws related to capacity and guardianship, which commenced in summer 2012.

VII. RECOMMENDATIONS

In developing the *Framework*, it is the LCO's objective that the *Framework* and the accompanying *Final Report* will be broadly useful in advancing the law as it affects persons with disabilities, and in particular that it will assist in ensuring that laws, policies and practices reflect the aspirations of persons with disabilities, take into account their particular circumstances and experiences, are effectively implemented and are accessible to persons with disabilities. Therefore,

The LCO recommends that:

1. Organizations and individuals adopt and use the *Framework* in reviewing laws, policies and practices and in developing new laws, policies and practices that may affect persons with disabilities, and in particular that:
 - a. The Government of Ontario adopt the *Framework for the Law as It Affects Persons with Disabilities* and its Ministries disseminate it to their policy, program development and legislative staff, as an aid to reviewing and developing laws, policies and practices that are responsive to persons with disabilities.
 - b. Ontario municipalities adopt the *Framework* and disseminate it to their policy, program development and legislative staff, as an aid to reviewing and developing by-laws, policies and practices that are responsive to persons with disabilities.
 - c. Broader public sector organizations make use of the *Framework for the Law as It Affects Persons with Disabilities* in reviewing and developing policies and programs that may affect persons with disabilities.
 - d. Private actors, such as employers, landlords, financial institutions, service providers, professional organizations and others, make use of the *Framework* in reviewing and developing policies and programs that may affect persons with disabilities.
 - e. Legal organizations such as the Law Society of Upper Canada and the Ontario Bar Association adopt the *Framework* for their own advocacy, law reform and policy development work, and provide information about the *Framework* to their members.
 - f. Those who interpret the law have access to the *Framework* as a resource in understanding the potential effects of laws and policies on persons with disabilities.
 - g. Advocacy and community organizations that represent, serve or are made up of persons with disabilities make use of the *Framework* in their law reform efforts.
2. Where municipal, federal or provincial programs and services address the same subject matter or are otherwise related, the Government of Ontario identify the issues arising from the application of this *Framework* as relevant, and raise them with their counterparts in other levels of government.
3. The Government of Ontario, in consultation with the above identified organizations and with persons with disabilities themselves, review the use of the *Framework* after a period of seven years, with a view to ensuring that it remains current and meaningful.

...[I]t is the LCO's objective that the Framework and the accompanying Final Report will be broadly useful in advancing the law as it affects persons with disabilities, and in particular that it will assist in ensuring that laws, policies and practices reflect the aspirations of persons with disabilities, take into account their particular circumstances and experiences, are effectively implemented and are accessible to persons with disabilities.

APPENDIX A: ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

A. Organizations and Experts

The following list includes all organizations and experts who provided written submissions to one or more of the consultations, provided practical support to the Summer 2010 Public Consultations, attended the Focus Groups, or were interviewed by LCO staff. Some of the organizations listed participated in multiple ways over the course of the project.

The Advisory Group for this project was integral to its success. The members of the Advisory Group are listed at the front of this *Report*.

1. Across Boundaries
2. Advocacy Centre for the Elderly
3. Advocacy Gateway for Environmental Sensitivities
4. Alliance for the Equality of Blind Canadians
5. Anne Johnston Health Centre
6. AODA Alliance
7. ARCH Disability Law Centre
8. Association of Community Legal Clinics of Ontario
9. Association pour l'intégration sociale d'Ottawa
10. ATN Access
11. Augmentative Communication Community Partnerships CANADA
12. Autism Society of Ontario, Adults with ASD
13. Brain Injury Services of Northern Ontario
14. Canadian Association for Community Living
15. Canadian Association of Muslims with Disabilities
16. Canadian Association of the Deaf
17. Canadian Council of the Blind
18. Canadian Hearing Society
19. Canadian Mental Health Association, London & Middlesex
20. Canadian Mental Health Association (Ont. Division)
21. Canadian Mental Health Association, Grey-Bruce
22. Canadian Mental Health Commission
23. Canadian National Institute for the Blind
24. Centre 507
25. Centre for Addiction and Mental Health
26. Centre for Addiction and Mental Health (CAMH), Empowerment Council
27. Centre for Independent Living Toronto
28. Citizens with Disabilities Ontario
29. Clarendon Foundation
30. Clinique juridique francophone de l'Est d'Ottawa
31. Coalition Against Psychiatric Abuse

32. Community Legal Services (Ottawa-Centre)
33. Community Living Ontario
34. Community Living Sioux Lookout – FASD
35. Community Legal Services Ottawa Centre Confederation College, Disability Services
36. Empoword Consulting
37. Ethno-Racial People with Disabilities Coalition of Ontario
38. Grey Bruce Community Legal Clinic
39. Griffin Centre
40. HAGI Community Services for Independence
41. HIV/AIDS Legal Clinic of Ontario
42. Hong Fook Mental Health Association
43. Human Rights Tribunal of Ontario
44. Income Security Advocacy Centre
45. Independent Living Centre, London & Area
46. Independent Living Resource Centre (Thunder Bay)
47. Jim Meeks, Queen Street Community Health Centre, Peer Researcher and Outreach Worker
48. Ka-Na-Chi-Hih Solvent Abuse Treatment Centre (Northwest)
49. Kinna-aweya Legal Clinic
50. Law Society of Upper Canada
51. Learning Disabilities Association of Canada
52. Learning Disabilities Association of Ontario
53. Learning Disabilities Association of Ontario, London
54. Legal Assistance of Windsor
55. March of Dimes
56. Mental Health Legal Committee
57. Ministry of Aboriginal Affairs
58. Ministry of Community and Social Services
59. Ministry of Education
60. Ministry of Government Services
61. Ministry of Health and Long-Term Care
62. Ministry of Municipal Affairs and Housing
63. Ministry of the Attorney General
64. MS Society
65. N’Amerind Friendship Centre
66. National Educational Association for Disabled Students
67. National ME/FM Action Network
68. National Network for Mental Health
69. Nishnawbe-Aski Legal Services Corporation
70. Nishnawbe Aski Nation
71. Northwestern Independent Living Services
72. ODSP Action Coalition
73. Office of the Public Guardian and Trustee
74. Ontario Association of Community Care Access Centres
75. Ontario Bar Association
76. Ontario Human Rights Commission

77. Ontario Interpreting Services
78. Ontario Native Women's Association
79. Ontario Network of Injured Workers Groups
80. Options Northwest
81. Ottawa Children's Treatment Centre
82. Ottawa Independent Living Resources Centre
83. Ottawa Community Housing
84. Parkdale Community Legal Services
85. People United for Self Help
86. Persons United for Self-Help in Northwestern Ontario
87. Psychiatric Patient Advocacy Office
88. REACH Canada
89. Registered Nurses of Ontario
90. Royal Ottawa Health Care Group
91. Sam Savona, Community Activist
92. Social Benefits Tribunal
93. Soundtimes
94. South Ottawa Community Legal Services
95. Springtide Resources
96. Table provinciale francophones pour la personne handicapées
97. The In Community
98. Thunder Bay Indian Friendship Centre
99. Thunder Bay Metis Council
100. Toronto Lawyers Association
101. TTC Accessibility Committee
102. United Families of Eastern Ontario
103. University of Ottawa, Community Legal Clinic
104. Vanier Community Service Centre/Centre des services communautaire des vanier
105. Vanier Legal Clinic
106. VOICE for hearing impaired children
107. WOTCH Community Mental Health Services
108. York University Disability Services Office

B. Private Individuals

In accordance with our mandate, and reflecting the nature of this project, the LCO made efforts throughout not only to make participation accessible to individuals with disabilities, but also to actively encourage their participation. The LCO received input from over **150** individuals with disabilities. This includes **105** in person contacts during the 2010 consultations, through focus groups and one-on-one interviews, **18** written submissions, and many online comments and phone calls throughout the course of the project.

In accordance with the LCO's *Privacy Policy*, the names of contributing individuals are not listed here. However, the participation of these individuals fundamentally shaped this project throughout, and the LCO wishes to express our gratitude to them for sharing their expertise and experiences with us.

C. Commissioned Research Papers

In major projects such as this, the LCO issues a call for the preparation of research papers in particular subjects relevant to the project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views.

ARCH Disability Law Centre (Kerri Joffe), *Enforcing the Rights of Persons with Disabilities in Ontario's Developmental Services System*, Summer 2010. Available online at <http://www.lco-cdo.org>

ARCH Disability Law Centre (Tess Sheldon), *The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities*, Summer 2010. Available online at <http://www.lco-cdo.org>

Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, Summer 2010. Available online at <http://www.lco-cdo.org>

Bakerlaw (Meryl Zisman Gary, Cara Wilkie and David Baker), *A Case Study Paper on the Right to Supports*, Summer 2010. Available online at <http://www.lco-cdo.org>

Professor Mona Paré, University of Ottawa Faculty of Law (Civil), *The Participation of Persons with Disabilities in the Decisions that Concern Them: The Example of Education*, Summer 2010. Available online at <http://www.lco-cdo.org>

Lora Patton, Rita Sampson and Brendon Pooran, *A Principled Approach: Considering Eligibility Criteria for Disability-Related Support Programs through a Rights-Outcome Lens*, Summer 2010. Available online at <http://www.lco-cdo.org>

APPENDIX B: SOURCES FOR THE PRINCIPLES

The LCO looked to a broad range of sources to identify principles for the law and persons with disabilities. The description below outlines the key types of sources and the most foundational documents and processes. However, for reasons of length, not all sources considered can be identified or analyzed here.

A. Analyzing the Current Legal Framework

One cannot develop principles for an area of the law without first developing an understanding of that area – the issues that it does and does not address, the presuppositions on which it is based, and the approaches used to tackle issues. As a preliminary step therefore, the LCO undertook a review of all Ontario laws that directly reference persons with disabilities, as well as research on laws of general application that may affect persons with disabilities differently or disproportionately. This research formed one of the underpinnings of the LCO's *Preliminary Consultation Paper*.¹

This review identified a number of overarching issues that principles should either take into account or directly address. The following are examples:

- The lives of persons with disabilities are, for better and for worse, heavily regulated, so that the law is both broad and complex.
- Due to a tendency to develop laws that are focused on addressing specific issues, the law is fragmented and may be limited in its ability to address persons with disabilities in a holistic fashion; this issue is highlighted by the research that the LCO has undertaken on transition points for persons with disabilities and the law.
- There is a general tendency in designing laws to emphasize a functional model of disability.
- The law generally relies on persons with disabilities to navigate complex systems and advocate for themselves.
- Many laws that are crucial to the well-being of persons with disabilities lack monitoring and accountability mechanisms to ensure that they are operating effectively and as intended.

B. Public Consultations

As described in Chapter I of this *Final Report*, the LCO carried out public consultations at a number of stages in this project. These public consultations, particularly the extensive community consultations undertaken in the spring and summer of 2010, were crucial to the development of the principles and of the *Framework* in general. In particular, they assisted the LCO in the following ways:

- understanding the lived experience of persons with disabilities with various laws, including identifying common challenges and positive practices within the law,
- understanding how various groups of persons with disabilities may experience the law differently,
- identifying the aspirations of persons with disabilities for their lives, and how the law may act as a barrier or a bridge to achieving these aspirations,
- understanding the challenges that service providers and policy-makers face in designing and implementing policies and practices that are effective in meeting the needs of persons with disabilities within the constraints under which they operate, and,
- identifying how ableism may operate in both the substance and the implementation of the law.

In short, the consultations informed all aspects of this project.

¹ Law Commission of Ontario, *Preliminary Consultation Paper: Approaches to Defining Disability* (Toronto: Law Commission of Ontario, June 2009), online: www.lco-cdo.org.

C. International Documents

Two of the most influential international documents relating to disability are the World Health Organization's 2001 *International Classification of Functioning, Disability and Health* (ICF) and the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).

WORLD HEALTH ORGANIZATION ICF

The ICF is intended to provide a standard framework for the description of health and health-related states and to provide a tool for measuring function in society, regardless of the reason for a person's impairments.

The ICF advances a "biopsychosocial" model of disability, attempting to synthesize the biomedical and social models of disability. The WHO describes the conceptual approach underlying the ICF as follows:

ICF puts the notions of "health" and "disability" in a new light. It acknowledges that every human being can experience a decrement in health and thereby experience some degree of disability. This is not something that only happens to a minority of humanity. The ICF thus 'mainstreams' the experience of disability and recognises it as a universal human experience. By shifting the focus from cause to impact it places all health conditions on an equal footing allowing them to be compared using a common metric – the ruler of health and disability. Furthermore ICF takes into account the social aspects of disability and does not see disability only as a 'medical' or 'biological' dysfunction. By including Contextual Factors, in which environmental factors are listed ICF allows us to record the impact of the environment on the person's functioning.²

The implications of this shift are explored in more depth in the LCO's preliminary consultation paper for this project.³

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The international legal community has created numerous legal instruments that advance the rights of persons with disabilities.⁴ The most recent and encompassing is the United Nations Convention on the Rights of the Persons with Disabilities (CRPD).⁵

² World Health Organization, *Towards a Common Language for Functioning, Disability and Health: The International Classification of Functioning, Disability and Health* (Geneva: WHO, 2002) at 3, online: <http://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> [ICF].

³ Law Commission of Ontario, *Preliminary Consultation Paper: Approaches to Defining Disability* (Toronto: Law Commission of Ontario, June 2009) 35-36, online: <http://www.lco-cdo.org>.

⁴ International policy and legal instruments aimed at advancing the rights of persons with disabilities include: the *Declaration of the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 26th Sess, Supp No 29, UN Doc A/8429 (1971) 93; the *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, 30th Sess, Supp No 34, UN Doc A/10034 (1975) 88; the *World Programme of Action concerning Disabled Persons*, GA Res 37/52, UN GAOR, 37th Sess, Supp No 51, UN Doc A/37/51 (1982); the *International Labour Organization Convention 159 concerning Vocational Rehabilitation and Employment (Disabled Persons)*, 69th Sess (1983); the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights "Protocol of San Salvador"*, OAS Doc A-52, 18th Sess (1988); the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 46th Sess, Supp No 49, UN Doc A/46/49 (1991) 189; the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96, 48th Sess (1993); the *Declaration of Managua* (December 1993); the *Vienna Declaration and Programme of Action*, adopted by the UN World Conference on Human Rights, UN Doc A/Conf 157/23 (1993); "Situation of Persons with Disabilities in the American Hemisphere", GA Res 1249 (XXIII-O/93), 9th Sess; "Panama Commitment to Persons with Disabilities in the American Hemisphere", GA Res 1369 (XXVI-O/96), 6th Sess; *International Year of Disabled Persons*, UN Doc A/RES/36/77 (1981); and the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities*, GA Res 1608, OAS GAOR, 29th Sess (1999).

⁵ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010), online: <http://www.un.org/Docs/asp/ws.asp?m=A/RES/61/106> [CRPD].

Most significantly, the CRPD codified the commitment of the international community to recognize the rights of persons with disabilities. The CRPD was ratified by Canada on March 11, 2010.⁶ The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.⁷ It reflects social and human rights models of disability and therefore highlights the need for society to adapt to the specific circumstances and realities of persons with disabilities in order to ensure respect and inclusion. The CRPD does not provide for “new” rights for persons with disabilities, since they are entitled to all the rights accruing to persons under other UN conventions, but recognizes that “without a legally binding treaty that spelled out their rights, persons with disabilities faced being legally ‘invisible’ in their societies and even in the international arena”.⁸

The CRPD details the rights that all persons with disabilities enjoy and outlines the obligations of States Parties to protect those rights. These specific rights include, among others, the right to life, liberty and security of the person; equal recognition before the law and legal capacity; freedom from exploitation, violence and abuse; respect for mental and physical integrity; live in the community; privacy; expression of opinion; education, health and work; an adequate standard of living; and participate in political, public and cultural life. The State’s obligations are to “respect, protect and fulfill” the rights under the CRPD, concepts which are further described in Chapter III of the *Final Report*.⁹

The CRPD also sets out a number of general principles:

1. respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons,
2. non-discrimination,
3. full and effective participation and inclusion in society,
4. respect for difference and acceptance of persons with disabilities as part of human diversity and humanity,
5. equality of opportunity,
6. accessibility,
7. equality between men and women,
8. respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 33 of the CRPD provides for “national implementation and monitoring”. Furthermore, States Parties are to develop a framework (or strengthen existing ones) “to promote, protect and monitor implementation” of the CRPD that

⁶ Canada has not signed the Optional Protocol, see online: United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en. The Optional Protocol establishes, for those states parties that ratify it, a complaints procedure that allows for individual complaints to be lodged with the Committee where there is an allegation that a State party has violated its obligations under the CRPD and where the complainant has exhausted all available domestic remedies. It also established an inquiry procedure that allows the Committee to initiate its own inquiries where there is information to suggest that a State party has engaged in grave or systematic violations of the CRPD.

⁷ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106, art 1, online: <http://www.un.org/Docs/asp/ws.asp?m=A/RES/61/106>.

⁸ Secretariat of the Convention on the Rights of Persons with Disabilities, *Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights* (United Nations Department of Public Information, May 2008), online: United Nations Enable <http://www.un.org/disabilities/default.asp?id=476> [Secretariat].

⁹ Secretariat of the Convention on the Rights of Persons with Disabilities, *Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights* (United Nations Department of Public Information, May 2008) ch 2, online: <http://www.un.org/disabilities/default.asp?id=225>.

takes into account existing human rights regimes. Monitoring of the CRPD is to involve civil society organizations, especially persons with disabilities.¹⁰

D. Domestic Laws

THE CHARTER OF RIGHTS AND FREEDOMS AND HUMAN RIGHTS LAW

As was briefly noted in Chapter II, any discussion of Canadian law and persons with disabilities must begin with a consideration of the rights enshrined in the *Charter of Rights and Freedoms* and their interpretation in the caselaw over the past 30 years. The *Charter* applies to provincial, federal, territorial and municipal governments and to organizations with a nexus with government, such as bodies that are performing delegated functions (for example, hospitals).¹¹ It applies to legislation, regulations, municipal by-laws, government action and the executive branch. It does not apply to the private sector; however, the private sector may be influenced by the *Charter* when its actions are subject to legislation that is challenged under the *Charter*. The *Charter* rights most important to the identification of principles for the law as it affects older adults are those set out in sections 7 and 15.

Section 15(1) of the *Charter* provides for equality before and under the law, and for equal protection of the law without discrimination on the basis of a number of enumerated grounds, including physical and mental disability, age, sex, race, colour, national and ethnic origin, and religion. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those experiencing disadvantage due to their disability, from successful challenge on the ground that they are discriminatory.¹² In interpreting section 15 and the right to equality, the Supreme Court has given central place to the concept of dignity: while the Supreme Court has moved away from the use of dignity as part of a section 15 test, it remains a foundational value underlying the equality analysis.¹³ The principle of dignity means that the affected individual or group feels self-respect and self-worth, and is concerned with physical and psychological integrity and empowerment.¹⁴

Section 7 of the *Charter* guarantees the life, liberty and security of the person, and the right not to be deprived of these except in accordance with the principles of fundamental justice. The right to liberty has been interpreted as including the right to make fundamental personal decisions, as well as freedom from physical constraint and interference with physical freedom. Liberty includes the right to an irreducible sphere of personal autonomy regarding matters that “can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”¹⁵ Within that sphere, individual choices must be free from state interference. Security of the person has been interpreted by the Supreme Court of Canada as including an individual’s “psychological integrity”¹⁶ where the interference is sufficiently serious

¹⁰ Canadian Human Rights Commission, *Background Paper on the Convention on the Rights of Persons with Disabilities Article 33*, online: CHRC, http://www.chrc-ccdp.ca/unconvention_conventionnu/page1-eng.aspx [CHRC, Article 33].

¹¹ See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, online: <http://scc.lexum.org/en/1997/1997scr3-624/1997scr3-624.html> [Eldridge].

¹² For an exploration of the mixed legacy of section 15(2) for persons with disabilities, see ARCH Disability Law Centre, *The Sword Becomes the Shield: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities* by Tess Sheldon (Toronto: Law Commission of Ontario, June 2010) online: <http://www.lco-cdo.org/en/disabilities-call-for-papers> [Sheldon].

¹³ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, online: <http://scc.lexum.org/en/1999/1999scr1-497/1999scr1-497.html> [Law]. It is important to note that, although the concept of dignity was seen as a central value in the equality analysis under section 1 in *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483, online: <http://scc.lexum.org/en/2008/2008scc41/2008scc41.html> [Kapp], the Court has identified problems with the extreme emphasis on dignity in section 15 that followed *Law* as making it more difficult for claimants to prove their claims (para 22). As a result, the principle of dignity will remain part of the analysis in section 15, but may not take on such a predominant role.

¹⁴ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 paras 51-53, online: <http://scc.lexum.org/en/1999/1999scr1-497/1999scr1-497.html>.

Human rights statutes (in Ontario, the *Human Rights Code*) also provide a foundation for the identification of principles for the law as it affects persons with disabilities. The purpose of the Ontario *Human Rights Code*, as expressed in its Preamble, is to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.¹⁷

The *Code* prohibits discrimination on the basis of disability, as well as of sex, sexual orientation, age, family and marital status, race, ethnicity, place of origin, and several other grounds. Where it is necessary in order to ensure equal treatment without discrimination on the basis of disability, individuals have the right to accommodation up to the point of undue hardship for needs associated with their disability. These rights extend to the social areas of employment, housing, goods and services, professional and occupational associations, and contracts. Like the *Charter*, the *Code* permits special programs to alleviate hardship or economic disadvantage or that are designed to assist individuals or groups to attempt to achieve equal opportunity.¹⁸

The OHRC has broad powers to advance the purposes of the *Code* as expressed in the Preamble. These powers include the ability to develop statements of policy, interpreting the provisions of the *Code*. The OHRC has developed the *Policy and Guidelines on Disability and Duty to Accommodate* (2001). That document outlines three principles for consideration in providing equal treatment without discrimination:

1. *Respect for dignity*: this includes individual self-respect and self-worth, as well as privacy, confidentiality, comfort, autonomy, individuality and self-esteem.
2. *Inclusion and participation*: this includes ensuring that persons with disabilities are able to access their environment and face the same duties and requirements as everyone else, with dignity and without impediment, and involves inclusive design and the removal of barriers.
3. *Individualization*: each person with a disability must be considered, assessed and accommodated individually, as each person is unique.

The disability-related case law arising under both the *Charter* and human rights law is rich and complex. Fundamental principles emerging from that case law include:

1. an equality analysis that has as part of its foundation the recognition of the inherent dignity and worth of persons with disabilities,¹⁹
2. the recognition that laws and policies may reflect stigmas and negative assumptions related to particular disabilities,²⁰

¹⁵ *Godbout v Longueuil (City)*, [1997] 3 SCR 844 para 66, online: <http://scc.lexum.org/en/1997/1997scr3-844/1997scr3-844.html> [*Godbout*]; see also *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, online: <http://scc.lexum.org/en/1995/1995scr1-315/1995scr1-315.html> [*B(R) v Children's Aid Society*].

¹⁶ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, online: <http://scc.lexum.org/en/1999/1999scr3-46/1999scr3-46.html> [*NB v G(J)*].

¹⁷ *Human Rights Code*, RSO 1990, c H-19, s 1, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm [*Code*].

¹⁸ *Human Rights Code*, RSO 1990, c H-19, s 14, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm.

¹⁹ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 paras 56-58, [2000] 1 SCR 703, online: <http://scc.lexum.org/en/2000/2000scc28/2000scc28.html> [*Granovsky*]. It is important to note that human dignity underlies many *Charter* guarantees, and that it does not constitute a particular "test" which section 15 applicants must meet: *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483, online: <http://scc.lexum.org/en/2008/2008scc41/2008scc41.html> [*Kapp*].

3. the recognition that barriers in attitudes and the environment are a key component in the experience of disability, so that the focus of a disability rights analysis must be on dignity, respect and the right to equality rather than solely on biomedical impairments;²¹
4. the necessity of broadening the “mainstream” structures of society to include and respect the differences associated with disability;²²
5. an emphasis on the right of persons with disabilities to receive equal benefit of services, by design and from the outset, even where special measures are required to ensure this is the case.²³ Equal access includes consideration of the independence, comfort, dignity, safety and security of persons with disabilities,²⁴
6. the right of persons with disabilities to be assessed and accommodated based on their own personal characteristics, rather than assumptions related to their disability.²⁵

THE ACCESSIBILITY FOR PERSONS WITH DISABILITIES ACT (AODA)

The AODA is one of the most important and innovative statutes affecting persons with disabilities in Ontario. Developed after several years of concerted advocacy by Ontarians with disabilities, the AODA adopts the broad definition of “disability” used in the Ontario *Human Rights Code*²⁶ and creates a comprehensive scheme to develop standards with respect to disability accessibility in a number of specified areas and to require organizations to take proactive steps towards full accessibility in those areas. The purpose of the AODA is to ensure full accessibility for persons with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises by 2025²⁷, thereby facilitating the greater inclusion of persons with disabilities in the broader community. The purpose section of the AODA highlights that full accessibility for persons with disabilities will “benefit all Ontarians”.²⁸

The AODA takes a progressive implementation approach towards realization of the goal of full accessibility by 2025.

²⁰ *Battleford and District Cooperative Ltd v Gibbs*, [1996] 3 SCR 566 paras 30-31, online: <http://scc.lexum.org/en/1996/1996scr3-566/1996scr3-566.html> [Battleford], dealt with the history of stigma and marginalization affecting persons with mental health disabilities; on this same issue see also *R v Swain*, [1991] 1 SCR 933 at 994, online: <http://scc.lexum.org/en/1991/1991scr1-933/1991scr1-933.html> [Swain].

²¹ *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 paras 77-83, [2000] 1 SCR 665, online: <http://scc.lexum.org/en/2000/2000scc27/2000scc27.html> [Mercier].

²² *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 para 67, online: <http://scc.lexum.org/en/1997/1997scr1-241/1997scr1-241.html> [Eaton].

²³ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, online: <http://scc.lexum.org/en/1997/1997scr3-624/1997scr3-624.html> [Eldridge].

²⁴ *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 para 162, [2007] 1 SCR 650, online: <http://scc.lexum.org/en/2007/2007scc15/2007scc15.html> [Via Rail].

²⁵ *British Columbia (Superintendent of Motor Vehicles) v British Columbia Council of Human Rights*, [1999] 3 SCR 868 at paras 38-40, online: <http://scc.lexum.org/en/1999/1999scr3-868/1999scr3-868.html> [BC Council of Human Rights], following *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, online: <http://scc.lexum.org/en/1999/1999scr3-3/1999scr3-3.html> [Meiorin].

²⁶ *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 2 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA]; and *Human Rights Code*, RSO 1990, c H-19, s 10, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm [Code].

²⁷ *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 1 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].

²⁸ *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 1 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].

Roughly speaking, the standards set milestones that must be reached every five years or less, to be regularly re-examined and revised as necessary to meet the long-term goal.²⁹

The AODA recognizes the importance of the participation and inclusion of persons with disabilities, both in its substance and its processes. It defines a barrier (in part) as “anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability”.³⁰ The standards development process recognizes the importance of the participation of persons with disabilities in the creation of laws, policies and procedures that affect them, in that it requires the inclusion of persons with disabilities, along with representatives of government and of industry, in the development of the standards.³¹

E. Domestic Policy Documents

Canada and various provinces have, over the years, adopted a number of important policy frameworks surrounding persons with disabilities,³² many of which are helpful in identifying principles for evaluating laws and policies as they affect persons with disabilities and assessing their evaluation.

In 1998, the federal, territorial and provincial ministers responsible for social services³³ developed *In Unison: A Canadian Approach to Disability Issues*³⁴ which outlines a blueprint for promoting the integration of persons with disabilities in Canada. This report was also aimed at creating a coordinated approach to delivering services and benefits to persons with disabilities and to promoting inclusion and participation. The report articulates a vision of full citizenship for persons with disabilities in Canada:

Persons with disabilities participate as full citizens in all aspects of Canadian society. The full participation of persons with disabilities requires the commitment of all segments of society. The realization of this vision will allow persons with disabilities to maximize their independence and enhance their well-being through access to required supports and the elimination of barriers that prevent their full participation.³⁵

²⁹ *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11, s 9 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].

³⁰ *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11, s 2 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].

³¹ *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11, s 1 online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].

³² The Government of Canada also releases a regular report advancing the inclusion of people with disabilities, see online: Human Resources and Skills Development Canada http://www.rhdcc-hrsc.gc.ca/eng/disability_issues/reports/index.shtml. As well, some provinces have moved towards comprehensive policy frameworks for disability issues, including Saskatchewan (see online: Government of Saskatchewan Publications Centre <http://www.publications.gov.sk.ca/deplist.cfm?d=17&c=1040>) and Manitoba (see online: Manitoba Disabilities Issues Office <http://www.gov.mb.ca/dio/citizenship/account.html>)

³³ All provinces participated with the exception of Quebec.

³⁴ Federal-Provincial-Territorial Ministers Responsible for Social Services, *In Unison: A Canadian Approach to Disability Issues*, Cat No: SP-113-10-98E (Hull, QC: Human Resources Development Canada, 1998), online: http://web.archive.org/web/20090202214940/http://socialunion.gc.ca/pwd/unison/unison_e.html [*In Unison* (1998)].

³⁵ Federal-Provincial-Territorial Ministers Responsible for Social Services, *In Unison: A Canadian Approach to Disability Issues*, Cat No: SP-113-10-98E (Hull, QC: Human Resources Development Canada, 1998) 3, online: http://web.archive.org/web/20090202214940/http://socialunion.gc.ca/pwd/unison/unison_e.html [*In Unison* (1998)].

³⁶ Federal-Provincial-Territorial Ministers Responsible for Social Services, *In Unison: A Canadian Approach to Disability Issues*, Cat No:

In Unison aimed to achieve this vision of citizenship for persons with disabilities through the implementation of three building blocks: disability supports, employment and income. It endorsed principles of universal design “by focusing on policies that promote access to generic programs and services for all Canadians, including persons with disabilities.”³⁶ It emphasizes the values of equality, independence and inclusion.

In 2000, the federal, provincial and territorial ministers responsible for social services issued an updated version of *In Unison*, *In Unison 2000*. This Report compares the situation for persons with disabilities with that of persons without disabilities and provides examples of effective practices. It is more responsive to the distinct experiences and approaches of First Nations than the 1998 Report was. The Report indicates that the members of the disability community who participated in developing *In Unison 2000* believed that “an access and inclusion lens should be applied to all activities of governments, from human resources to the broad range of programs delivered”.³⁷

The Ontario Public Service *Inclusion Lens*,³⁸ more fully described in Chapter II of this *Report*, is a comprehensive analytical tool developed by the OPS Diversity Office to assist OPS staff in considering various dimensions of diversity in developing, implementing or reviewing policies, programs or services. Seventeen dimensions of diversity are identified in this tool, including (both younger and older) age, disability, gender and socio-economic status.

The *Health Equity Impact Assessment Tool* was developed by the Ministry of Health and Long-Term Care in collaboration with Ontario’s Local Health Integration Networks as a means of supporting improved health equity and reducing avoidable health disparities between population groups. It provides a step-by-step approach to analyzing how a particular program or policy may affect population groups in different ways.³⁹

The very recently completed *Mental Health and Human Rights Evaluation Instrument*⁴⁰ was developed by the Mental Health Commission of Canada as a means of evaluating laws, policies and practices related to mental health, and is founded on the principles and considerations enunciated in the CRPD.

SP-113-10-98E (Hull, QC: Human Resources Development Canada, 1998) 4, online:

http://web.archive.org/web/20090202214940/http://socialunion.gc.ca/pwd/unison/unison_e.html [*In Unison* (1998)].

³⁷ Federal/Provincial/Territorial Ministers Responsible for Social Services (Canada), *In Unison 2000: Persons with Disabilities in Canada* (Ottawa: Human Resources Development Canada, 2000), online: <http://publications.gc.ca/pub?id=101302&sl=0> [*In Unison* (2000)].

³⁸ See OPS Diversity Office, *2011 OPS Diversity Annual Report: Toward Inclusion* (Toronto: Queen’s Printer, 2011) 14, online: http://www.mgs.gov.on.ca/en/Diversity/STD01_081769.html [*Toward Inclusion* http://www.mgs.gov.on.ca/en/Diversity/STD01_081769.html “\s “Toward Inclusion” \c 3].

³⁹ Ministry of Health and Long-Term Care, *Health Equity Impact Assessment Template* (Toronto: Queen’s Printer, 2011), online: <http://www.health.gov.on.ca/en/pro/programs/heia/tool.aspx> [*HEIA Template*]; Ministry of Health and Long-Term Care, *Health Equity Impact Assessment Workbook* (Toronto: Queen’s Printer, 2011), online: <http://www.health.gov.on.ca/en/pro/programs/heia/tool.aspx> [*HEIA Workbook*].

⁴⁰ See “Human Rights Evaluation Project,” online: Mental Health Commission of Canada <http://www.mentalhealthcommission.ca/English/Pages/Reports.aspx> [MHCC, “Evaluation Instrument”]

APPENDIX C: LIST OF ACRONYMS

AHWS – Aboriginal Healing and Wellness Strategy
 AISO – Association pour l'intégration sociale d'Ottawa
 AODA – *Accessibility for Ontarians with Disabilities Act, 2005*
 ARCH – ARCH Disability Law Centre
 ASL – American Sign Language
 CAMH – Centre for Addiction and Mental Health
 CAS – Children's Aid Society
 CCAC – Community Care Access Centres
 CILT – Centre for Independent Living Toronto
 CRPD – United Nations *Convention on the Rights of Persons with Disabilities*
 CTO – Community Treatment Order
 DAWN – DisAbled Women's Network
 DRPI – Disability Rights Promotion International
 FASD – Fetal Alcohol Spectrum Disorder
 FNIHCC – First Nations and Inuit Home and Community Care Program
 HCCSA – *Home Care and Community Services Act*
 HRTO – Human Rights Tribunal of Ontario
 HSARB – Health Services Appeal and Review Board
 ICF – The World Health Organization's *International Classification of Functioning*
 IEP – Individual Education Plan
 IPRC – Identification, Placement and Review Committee
 LHIN – Local Health Integration Network
 LSQ – Langue des signes québécoise
 LTCAL – Long-Term Care Action Line
 MAG – Ministry of the Attorney General
 MCSSA – *Ministry of Community and Social Services Act*
 MOHLTC – Ministry of Health and Long-Term Care
 OBA – Ontario Bar Association
 OBC – *Ontario Building Code Act, 1992*
 ODSP – Ontario Disability Support Program
 OECD – Organization for Economic Co-Operation and Development
 OHRC – Ontario Human Rights Commission
 ONWA – Ontario Native Women's Association
 OPS – Ontario Public Service
 PAS – Personal Assistance Services
 PIC – Project Information Centre
 TTC – Toronto Transit Commission
 TTY – Teletypewriter
 UN – United Nations
 WHO – World Health Organization
 WOTCH – Western Ontario Therapeutic Community Hostel

ENDNOTES

- ¹ As noted in Chapter VI, “Next Steps”, the LCO will be developing simplified materials related to the *Framework*, and will be applying it to a new project on the law of capacity and guardianship.
- ² Some basic demographic information related to the experience of disability in Ontario is set out in Chapter II.C of this *Final Report*.
- ³ See Law Commission of Ontario, *A Framework for the Law as It Affects Older Persons: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: Law Commission of Ontario, April 2012). Online: <http://www.lco-cdo.org/en/content/older-adults> [*Older Adults Final Report*]. All project documents can be found online in this location.
- ⁴ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010). Online: <http://www.un.org/Docs/asp/ws.asp?m=A/RES/61/106> [CRPD].
- ⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Online: <http://laws-lois.justice.gc.ca/eng/charter/> [Charter].
- ⁶ *Human Rights Code*, RSO 1990, c H-19, s 1. Online: http://www.elaws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm [Code].
- ⁷ Federal-Provincial-Territorial Ministers Responsible for Social Services, *In Unison: A Canadian Approach to Disability Issues* (Hull, QC: Human Resources Development Canada, 1998). Online: http://web.archive.org/web/20090202214940/http://socialunion.gc.ca/pwd/unison/unison_e.html [*In Unison* (1998)]. Updated in 2000. Online: <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/income-security-reform/in-unison-2000> [*In Unison* (2000)].
- ⁸ Law Commission of Ontario, *Preliminary Consultation Paper: Approaches to Defining Disability* (Toronto: Law Commission of Ontario, June 2009). Online: <http://www.lco-cdo.org/disabilities/Disabilities%20Threshold%20Paper%20-%20July%202009.pdf> [Threshold Paper].
- ⁹ The Commissioned Research Papers can be found on the LCO website at <http://www.lco-cdo.org/en/disabilities-call-for-papers>.
- ¹⁰ Law Commission of Ontario, *The Law as It Affects Persons with Disabilities, Consultation Paper* (Toronto: Law Commission of Ontario, September 2011). Online: <http://www.lco-cdo.org/disabilities-consultation-paper.pdf> [*Disabilities Consultation Paper*].
- ¹¹ Michael Bach & Lana Kerzner, *A New Paradigm for Autonomy and the Right to Legal Capacity* (Law Commission of Ontario: November 2010). Online: <http://www.lco-cdo.org/en/disabilities-call-for-papers> [Bach & Kerzner]. Margaret Hall, *Developing an Anti-Ageist Approach with Law* (Toronto: Law Commission of Ontario, September 2009). Online: <http://www.lco-cdo.org/en/older-adults-lco-funded-papers-margaret-hall>. The LCO commenced a project on the law of capacity and guardianship in the summer of 2012.
- ¹² Information about the Conferences and copies of Conference Papers can be accessed online: <http://www.lco-cdo.org/en/older-adults-conference>.
- ¹³ For a more detailed discussion of the relationship between aging, health and impairment, see *Older Adults Final Report*, note 3, Ch II.C.2.
- ¹⁴ Michael Oliver, “Societal responses to long term disability” in Gale Whiteneck et al, eds, *Ageing with Spinal Cord Injury* (New York: Demos Publications, 1993), 253.
- ¹⁵ Mark Priestley, “Disability and Old Age” in *Disability: A Life Course Approach* (Cambridge: Polity Press, 2003), 143 [Priestley].
- ¹⁶ Priestley, note 15.
- ¹⁷ Priestley, note 15, 161.
- ¹⁸ The Ontario Public Service (OPS) *Inclusion Lens* is a comprehensive analytical tool developed by the OPS Diversity Office to assist OPS staff in considering various dimensions of diversity in developing, implementing or reviewing policies, programs or services. Seventeen dimensions of diversity are identified in this tool, including (both younger and older) age, disability, gender and socio-economic status. For a brief discussion of the *Inclusion Lens* see OPS Diversity Office, *2011 OPS Diversity Annual Report: Toward Inclusion* (Toronto: Queen’s Printer, 2011), 14. Online: http://www.mgs.gov.on.ca/en/Diversity/STD01_081769.html.
- ¹⁹ The HEIA is intended for use across the health system. As of fall 2011, all 14 LHINs had received training on HEIA. Training has also been provided to MOHLTC staff. This tool was developed by the Ministry of Health and Long-Term Care in collaboration with Ontario’s Local Health Integration Networks as a means of supporting improved health equity and reducing avoidable health disparities between population groups. It provides a step-by-step approach to analyzing how a particular program or policy may affect population groups in different ways. The HEIA tool consists of two parts, a template and a workbook: Ministry of Health and Long-Term Care, *Health Equity Impact Assessment Template* (Toronto: Queen’s Printer, 2011). Online: <http://www.health.gov.on.ca/en/pro/programs/heaia/tool.aspx> [HEIA Template]; Ministry of Health and Long-Term Care, *Health Equity Impact Assessment Workbook* (Toronto: Queen’s Printer, 2011). Online: <http://www.health.gov.on.ca/en/pro/programs/heaia/tool.aspx> [HEIA Workbook].
- ²⁰ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto, Ontario

- Human Rights Commission: 2000). Online: <http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate> [Disability Policy].
- ²¹ Christine Ogaranko, Beverly Froese, & Nicole Chammartin, *Mental Health and Human Rights Evaluation Instrument* (Winnipeg: Mental Health Commission of Canada, Public Interest Law Centre and Canadian Mental Health Association Winnipeg Region, November 30, 2011).
- ²² Disability Rights Promotion International (DRPI) is a collaborative project to establish a comprehensive, sustainable international system to monitor human rights of people with disabilities. DRPI has designed a template to help monitors collect and analyze disability rights law, policy and program information. The template covers all of the rights guaranteed by the *Convention on the Rights of Persons with Disabilities* (CRPD, see note 4). The template helps monitors to identify gaps in legislation and policy and includes cross-references to provisions of core international human rights treaties, including the CRPD. Information about DRPI and copies of its publications can be obtained online at <http://drpi.research.yorku.ca>.
- ²³ The LCO's most recent strategic plan, for January 2012 to December 2016, is available on the LCO website: Law Commission of Ontario, *LCO Strategic Plan: Jan 2012-Dec 2016* (Toronto: Law Commission of Ontario, 19 January 2012), online <http://www.lco-cdo.org/en/strategic-plan-2012-2016>.
- ²⁴ *Threshold Paper*, note 8. The OBA highlighted the limitations of using a model-based approach, including the fact that models are constantly being debated, modified and reformulated in academic circles (at p 4) and that it is difficult to come up with a model that will work across all areas and address all situations effectively; ARCH also took the position that a principles-based approach was more beneficial than a model-based approach: See Ontario Bar Association, Working Group on the Law as It Affects Persons with Disabilities, *Submission to the Law Commission of Ontario: Law as it Affects Persons with Disabilities* (Ontario Bar Association, 28 August 2009) (Chair: Mark Berlin). Online: http://www.oba.org/en/pdf/OBA_Law_as_it_Affects_Persons_with_Disabilities_Submission.pdf [OBA Submission]; ARCH Disability Law Centre, *Submission of ARCH Disability Law Centre to the Law Commission of Ontario: Law as it Affects Persons with Disabilities* (Toronto: ARCH Disability Law Centre, 30 September 2009). Online: <http://www.archdisabilitylaw.ca/?q=law-it-affects-persons-disabilities> [ARCH Submission].
- ²⁵ Environics Research Group, *Canadian Attitudes Towards Disability Issues, A Qualitative Study: Final Report*, prepared for the Government of Canada Office of Disability Issues (2004), 9, 32-34 [Canadian Attitudes].
- ²⁶ The Ontario Human Rights Commission recently expressed concern about this issue in Ontario Human Rights Commission, *Right at Home: Report on the Consultation on Human Rights and Rental Housing in Ontario* (Toronto: Ontario Human Rights Commission, 28 May 2008) 78-80. Online: <http://www.ohrc.on.ca/en/right-home-report-consultation-human-rights-and-rental-housing-ontario> [OHRC, *Right at Home*]. See also the discussion in Roeher Institute, *Disability, Community and Society: Exploring the Links* (North York, ON: Roeher Institute, 1996), 57.
- ²⁷ OBA Submission, note 24, 23.
- ²⁸ This issue was discussed at considerable length in *Threshold Paper*, note 8. Models of disability include the "biomedical model", which locates the experience of disability within the impairments of individuals; the "functional model" which focuses on the functional limitations caused by impairments (and thereby includes some consideration of the impact of environment on the experience of disability); the "social model" which locates disability within society rather than the individual, focussing on social and environment barriers to inclusion; the "human rights model", which recognizes persons with disabilities as a disadvantaged group; the "universalism model" described elsewhere in this Report and many others.
- ²⁹ *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665. Online: <http://scc.lexum.org/en/2000/2000scc27/2000scc27.html> [Mercier].
- ³⁰ The World Health Organization's *International Classification of Functioning* (ICF) includes, as part of its approach to disability, a series of "Contextual Factors" which highlight the role of the environment in the experience of disability. These include the natural environment and human-made changes to the environment, supports and relationships, attitudes, services, systems and policies, and products and technology. For an introduction to the ICF, see World Health Organization, *Towards a Common Language for Functioning, Disability and Health* (Geneva: World Health Organization, 2002). Online: <http://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> [Common Language].
- ³¹ Various terminology has been used to help identify the broader societal forces that contribute to the experience of disability. The influential decision of the Supreme Court of Canada in *Mercier* referenced the social element in the construction of "disability". International documents such as the ICF refer to "environmental" barriers. See *Mercier*, note 29; *Common Language*, note 30.
- ³² As is highlighted in note 28 above, there are a number of "models" of disability which may influence law, policy and practice. The *Threshold Paper* explores several of these models and their implications for this project (*Threshold Paper*, note 8). In general, an older approach that

understands disability as a bio-medical issue and focuses on “fixing” persons with disabilities has been broadened by the development of a social model that focuses attention on the disabling effects of environments and on the removal of these socially constructed barriers.

- 33 Human Resources Development Canada, *Advancing the Inclusion of People with Disabilities: A Report of the Government of Canada, December 2002* (Gatineau, QC: Queen’s Printer of Canada, 2002), 5. Online: <http://publications.gc.ca/collections/Collection/RH37-4-1-2002E.pdf> [Advancing Inclusion (2002)].
- 34 *Canadian Attitudes*, note 25, 9.
- 35 “About Universal Design Principles,” online: The Centre for Universal Design, http://www.ncsu.edu/www/ncsu/design/sod5/cud/about_ud/about_ud.htm.
- 36 See Irving Zola, “Disability Statistics: What We Count and What It Tells Us: A Personal and Political Analysis” (1993) 4 *Journal of Disability Policy Studies* 9, 24 [Zola (1993), note 36]; see also Richard Scotch & Kay Schriner, “Disability as Human Variation: Implications for Policy” (1997) 549 *Annals of the American Academy of Political and Social Science* 148, 154 [Scotch & Shriner]; see also Jerome Bickenbach et al, “Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps” (1999) 48 *Social Science and Medicine* 1173, 1182 [Bickenbach]; see also Douglas Surtees, “What Can Elder Law learn From Disability Law” in Israel Doron ed, *Theories on Law and Ageing* (Berlin: Springer Publications, 2009) 93, 101 [Surtees].
- 37 Scotch & Shriner, note 36, 154; Surtees, note 36, 99, citing Michael Stein, “Disability Human Rights” (2007) 95 *Cal L Rev* 75, 75, 86.
- 38 Irving Zola, “Toward the Necessary Universalizing of a Disability Policy” (1989) 67 *The Milbank Quarterly* 401, 410.
- 39 Scotch & Shriner, note 36, 158; Bickenbach, note 36, 1183.
- 40 This is acknowledged by the Ontario Human Rights Commission (*Disability Policy*, note 20), which proposes a three step approach to ensuring non-discriminatory employment, housing and services: first universal design to prevent barriers; then, barrier removal to identify and remove existing barriers; and, finally, individual accommodation to address remaining needs.
- 41 Priestley, note 15, 33.
- 42 *Threshold Paper*, note 8.
- 43 *Ontario Disability Support Program Act, 1997*, SO 1997, c 25, sch B, s 1. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_97o25_b_e.htm [ODSPA].
- 44 ODSPA, note 43, s 1.
- 45 Deb Mathews, *Review of Employment Assistance Programs in Ontario Works and Ontario Disability Support Program* (Ministry of Community and Social Services, December 2004), 25. Online: <http://www.mcass.gov.on.ca/documents/>

[en/mcass/social/publications/EmploymentAssistanceProgram_Matthews_eng1.pdf](http://www.mcass.gov.on.ca/documents/en/mcass/social/publications/EmploymentAssistanceProgram_Matthews_eng1.pdf).

- 46 Information about the Commission for the Review of Social Assistance in Ontario may be found at the Commission’s website at <http://www.socialassistancereview.ca>. The Commission’s report is expected in the summer of 2012. The Commission is intended to develop an action plan to help those who can and want to work to obtain jobs, provide security for those who cannot work and ensure social assistance programs work better with other federal, provincial and municipal income security programs.
- 47 Commission for the Review of Social Assistance in Ontario, *A Discussion Paper: Issues and Ideas* (June 2011), 28-29. Online: <http://www.socialassistancereview.ca>.
- 48 See, for example, Income Security Advocacy Centre, *Denial by Design: The Ontario Disability Support Program* (2003). Online: <http://www.incomesecurity.org/documents/DenialByDesignfinal.pdf> [Denial by Design].
- 49 The policies surrounding earnings exemptions should be understood in the context of other government initiatives and benefits intended to support ODSP recipients who are working, such as deductions for disability-related employment expenses, extending health benefits for those who leave social assistance for employment, rapid reinstatement programs and others. (*Denial by Design*, note 48, 10).
- 50 *Ontario Disability Support Program Act General Regulations*, O Reg 222/8, s 38. Online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_980222_e.htm. The calculation and policy intent is explained in ODSP Income Support Directive 5.3. Online: http://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp_Incomesupport.aspx. The Directive notes that the policy is intended “to encourage recipients to move towards financial independence”.
- 51 ODSP Action Coalition, *Dignity, Adequacy, Inclusion: Rethinking the Ontario Disability Support Program* (Toronto: Income Security Advocacy Centre, 2011), 30. Online: <http://sareview.ca/isac-resources/dignity-adequacy-inclusion-rethinking-the-ontario-disability-support-program/>; John Stapleton, “Zero Dollar Linda”: A Meditation on Malcolm Gladwell’s “Million Dollar Murray,” the Linda Chamberlain Rule, and the Auditor General of Ontario (Toronto: Metcalf Foundation, November 2010), 21-23. Online: <http://metcalfoundation.com/publications-resources/view/zero-dollar-linda-a-mediation-on-malcolm-gladwells-million-dollar-murray-the-linda-chamberlain-rule-and-the-auditor-general-of-ontario/>.
- 52 John Stapleton, Stephanie Procyk, and Lindsay Kochen, *What stops us from working?: New ways to make work pay, by fixing the treatment of earnings under the Ontario Disability Support Program* (Toronto: CAMH, May 2011) 14-15. Online: http://www.camh.net/Public_policy/Public_policy_papers/ODSP%20Report%20final.pdf [What

- Stops Us From Working?*].
- ⁵³ *What Stops Us From Working?*, note 52, 26.
- ⁵⁴ ODSP Action Coalition, *A Proposal for ODSP Rule Changes: 'Stupid Rules' have Dire Consequences* (Toronto: Scarborough Community Legal Services, January 2010), 11. Online: <http://www.odspaction.ca/story/stupid-rules-create-dire-consequences>.
- ⁵⁵ See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483. Online: <http://scc.lexum.org/en/2008/2008scc41/2008scc41.html> [*Kapp*] for the Supreme Court of Canada's most recent restatement of the section 15(1) test, and an important decision regarding the interpretation of section 15(2), in the context of the federal government's Aboriginal Fisheries Strategy. The Court ruled that a distinction in a government program based on an enumerated or analogous ground will not constitute discrimination if it has an ameliorative or remedial purpose (although this need not be its sole purpose), and it targets a disadvantaged group identified by enumerated or analogous grounds. The legislative goal of a program will by the paramount consideration in determining whether it falls within the ambit of section 15(2).
- ⁵⁶ See for example, *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650. Online: <http://scc.lexum.org/en/2007/2007scc15/2007scc15.html> [*Via Rail*]; *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703. Online: <http://scc.lexum.org/en/2000/2000scc28/2000scc28.html> [*Granovsky*]; *British Columbia (Superintendent of Motor Vehicles) v. BC (Council of Human Rights)*, [1999] 3 SCR 868. Online: <http://scc.lexum.org/en/1999/1999scr3-868/1999scr3-868.html> [*BC Council of Human Rights*]; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624. Online: <http://scc.lexum.org/en/1997/1997scr3-624/1997scr3-624.html> [*Eldridge*]; *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241. Online: <http://scc.lexum.org/en/1997/1997scr1-241/1997scr1-241.html> [*Eaton*]; *Battleford and District Cooperative Ltd v. Gibbs*, [1996] 3 SCR 566. Online: <http://scc.lexum.org/en/1996/1996scr3-566/1996scr3-566.html> [*Battleford*].
- ⁵⁷ *Code*, note 6, s 1.
- ⁵⁸ Section 29 of the *Human Rights Code* (see note 6, s 1), gives the Ontario Human Rights Commission broad powers to promote and advance human rights and to promote the elimination of discriminatory practices by, for example, developing policies and public education campaigns, undertaking enquiries, directing and encouraging research, and reviewing policies, programs and statutes. Part IV of the *Code* sets out the mechanism whereby applications may be brought to the Human Rights Tribunal of Ontario regarding allegations of discriminatory treatment.
- ⁵⁹ Statistics regarding human rights complaints from 1999-2008 can be accessed through the Annual Reports of the Ontario Human Rights Commission, available online at <http://www.ohrc.on.ca/en/resources/annualreports>. The *Annual Report* of the Human Rights Tribunal of Ontario for 2009 - 2010 can be found online at <http://www.hrto.ca/hrto/?q=en/node/26>, and indicates that approximately 52 per cent of all new applications that year cited disability as one of the grounds of discrimination.
- ⁶⁰ *Ontarians with Disabilities Act, 2001*, SO 2001, c 32. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_01o32_e.htm [ODA].
- ⁶¹ *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c 11. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05a11_e.htm [AODA].
- ⁶² *The Accessibility Standards for Customer Service*, O Reg 429/07. Online: http://www.e-laws.gov.on.ca/html/source/regs/english/2007/elaws_src_regs_r07429_e.htm, came into force 1 January 2010 for designated public sector organizations and 1 January 2012 for other providers of goods or services (O Reg 429/07, s 2). The *Integrated Accessibility Standards*, O Reg 191/11. Online: http://www.e-laws.gov.on.ca/html/source/regs/english/2011/elaws_src_regs_r11191_e.htm, sets standards related to employment, information and communications, and transportation, and there are various compliance deadlines for these standards. Work continues towards the development of standards for the built environment. Information about standards development under the AODA (note 61) can be found online at <http://www.mcsc.gov.on.ca/en/mcsc/programs/accessibility/>.
- ⁶³ CRPD, note 4.
- ⁶⁴ Canada has not signed the Optional Protocol, see online: United Nations Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-15-a&chapter=4&lang=en.
- ⁶⁵ CRPD, note 4, art 1.
- ⁶⁶ Secretariat of the Convention on the Rights of Persons with Disabilities, *Background: Disability Treaty Closes a Gap in Protecting Human Rights* (United Nations Department of Public Information, May 2008). Online: United Nations Enable <http://www.un.org/disabilities/default.asp?id=476> [Secretariat].
- ⁶⁷ Secretariat, note 66, ch 2. Online: United Nations Enable <http://www.un.org/disabilities/default.asp?id=225>.
- ⁶⁸ Canadian Human Rights Commission, *Background Paper on the Convention on the Rights of Persons with Disabilities Article 33*. Online: CHRC, http://www.chrc-ccdp.ca/unconvention_conventionnu/page1-eng.aspx.
- ⁶⁹ Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Analytical Report* (Ottawa: Software and Computer Services Division, 2007), 9. Online: <http://www5.statcan.gc.ca/bsolc/olc->

cel/olc-cel?catno=89-628-XIE2007002 [PALS 2006 Analytical Report].

⁷⁰ PALS 2006 Analytical Report, note 69, 16.

⁷¹ PALS 2006 Analytical Report, note 69, 13.

⁷² Approximately 21 per cent of Ontario families with a child with a disability report financial disabilities related to their child's disability. Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Tables* (Ottawa: Statistics Canada, 2008), 7. Online: <http://www.statcan.gc.ca/pub/89-628-x/89-628-x2007003-eng.pdf> [PALS 2006 Tables].

⁷³ In terms of employment, 28 per cent report that because of the effects of their child's disability, they did not take a job, while 22 per cent quit working altogether, 40 per cent reduced their work hours, and another 20 per cent turned down a promotion: PALS 2006 Tables, note 72, 12).

⁷⁴ Sixty per cent of Ontario parents caring for a child with a disability report stress related to their child, and 68 per cent indicated that they felt they should be doing more for their child (PALS 2006 Tables, note 72, 7-8).

⁷⁵ Ninety-two per cent reported that the child's disability caused stress or depression (PALS 2006 Tables, note 72, 10).

⁷⁶ Less than a quarter of Ontario families with a child with a disability receive financial assistance or subsidies for child care expenses: PALS 2006 Tables, note 72, 14. Just over a quarter of these families report full support from a professional or the community is available for their child, and almost 30 per cent report that no support is available at all: PALS 2006 Tables, note 72, 9. Almost half (46.5 per cent) desire additional help to care for their child: PALS 2006 Tables, note 72, 7.

⁷⁷ See, for example, Bill Wilkerson, *The Business Case for Accessibility* (Toronto: Queen's Printer, 2001); Martin Institute for Competitiveness and Prosperity, *Releasing Constraints: Projecting the Economic Impacts of Increased Accessibility* (June 2010); MaRS Best Practices, *Beyond Compliance to Innovation, the Business Case for Accessibility* (April 2011).

⁷⁸ The complexity of attempts to define "disability" and place parameters around who is and is not "disabled" is discussed in the *Threshold Paper* (note 8). It is not the intent here to limit the term, but to highlight the diversity of experiences that may fall within this broad category.

⁷⁹ PALS 2006 Analytical Report, note 69, 10.

⁸⁰ PALS 2006 Tables, note 72, 70.

⁸¹ Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Labour Force Experience of People with Disabilities in Canada* (Ottawa: Statistics Canada, 2008), 14. Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-628-XIE2008007> [PALS 2006 Labour Force Experience]. It is possible that this relates to differences in the types of disabilities that men and women face.

⁸² First Nations adults are 1.6 times more likely to live with a

disability than are other Canadians: RHS National Team, *First Nations Regional Longitudinal Health Survey 2002/3: Results for Adults, Youth and Children Living in First Nations Communities* (Ottawa: Assembly of First Nations, 2007), 52. Online: First Nations Information Governance Centre <http://www.rhs-ers.ca/node/11> [RHS].

⁸³ Of Aboriginal persons with a disability, 49.5 per cent have an income of less than \$15,000 per annum, as compared to 39.7 per cent of Aboriginal individuals without a disability, 29.4 per cent of Canadians with a disability and 19.4 per cent of Canadians without a disability (RHS, note 82, 64).

⁸⁴ Note, however, that discrepancy decreases (but does not disappear) in older age, so that by age 75, the difference in income is reduced to approximately \$1500 per year. Note also that the extent of the discrepancy will vary according to a range of other factors, including gender, Aboriginal status, reported severity of disability, and type of disability. Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: Tables Part V* (Ottawa: Statistics Canada, 2008), 8-10. Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-628-XIE2008011> [PALS 2006 Tables (Part V)].

⁸⁵ PALS 2006 Labour Force Experience, note 81, 12.

⁸⁶ Canadian Association for Community Living, *Achieving social and economic inclusion: from segregation to 'employment first'* (Toronto: Canadian Association for Community Living, 2011), 3. Online: <http://www.cacl.ca/publications-resources/achieving-social-and-economic-inclusion-segregation-employment-first>; Cameron Crawford, *The Employment of People with Intellectual Disabilities in Canada: A Statistical Profile* (Toronto: Institute for Research and Development on Inclusion and Society (IRIS), 2011). Online: http://irisinstitute.files.wordpress.com/2012/01/intellectual-disability-and-employment_iris_cr.pdf; Terry Krupa, Bonnie Kirsh, Rebecca Gewurtz, and Lynn Cockburn, "Improving the Employment Prospects of People with Serious Mental Illness: Five Challenges for a National Mental Health Strategy" (2005) 31:s1 Canadian Public Policy 59; WCG International Consultants, *Employment of Persons with Disabilities in the Province of Ontario: A Research Report* (June 2006) 28.

⁸⁷ Michael Mendelson, Ken Battle, Sherri Torjman and Ernie Lightman, *A Basic Income Plan for Canadians with Severe Disabilities* (Ottawa: Caledon Institute of Social Policy, 2010), 7. Online: <http://www.caledoninst.org/Publications/Detail/?ID=906>.

⁸⁸ *Advancing Inclusion* (2002), note 33, 49.

⁸⁹ See, for example, Ontario Human Rights Commission, *The Opportunity to Succeed: Achieving barrier-free education for students with disabilities* (Toronto: Ontario Human Rights Commission, 2003). Online: <http://www.ohrc.on.ca/en/>

opportunity-succeed-achieving-barrier-free-education-students-disabilities [OHRC, *Opportunity to Succeed*]; Mona Paré, *La Participation des personnes handicapées dans les décisions qui les concernent: L'exemple de l'éducation*, (Toronto: Law Commission of Ontario: 15 July 2010). Online: <http://www.lco-cdo.org/en/disabilities-call-for-papers-pare> [Paré]; Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey 2006: A Profile of Education for Children with Disabilities in Canada* (Ottawa: Ministry of Industry, 2008). Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-628-XIE2008004> [PALS 2006 Profile of Education]; Human Resources and Skills Development Canada, "Chapter 2: Education and Training," *Advancing the Inclusion of People with Disabilities 2009* (Gatineau QC: Human Resources and Skills Development Canada, 2009). Online: http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2009/page00.shtml [Advancing Inclusion (2009)]; Office of the Auditor General of Ontario, "Chapter 2: Public Accounts of the Province," *Annual Report of the Auditor General of Ontario 2008* (Toronto: Office of the Auditor General of Ontario, 2008). Online: http://www.auditor.on.ca/en/reports_2008_en.htm [Auditor General, 2008].

⁹⁰ *Advancing Inclusion* (2009), note 89, 27.

⁹¹ Warren Clark, "Delayed Transitions of Young Adults" (2007) 84 *Canadian Social Trends* 13, 13.

⁹² OHRC, *Right at Home*, note 26, 17.

⁹³ *Code*, note 6, s 2.

⁹⁴ *Residential Tenancies Act*, 2006, SO 2006, c 17, s 10. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06r17_e.htm.

⁹⁵ OHRC, *Right at Home*, note 26, 18-21.

⁹⁶ PALS 2006 Labour Force Experience, note 81, 21.

⁹⁷ PALS 2006 Labour Force Experience, note 81, chart 2.

⁹⁸ PALS 2006 Labour Force Experience, note 81, chart 5.

⁹⁹ Ministry of Municipal Affairs and Housing, Housing Policy Branch, *Building Foundations: Building Futures* (Toronto: Queen's Printer, 2010). Online: <http://Ontario.ca/HousingStrategy>.

¹⁰⁰ Wellesley Institute, *Precarious Housing in Canada* (Toronto: Wellesley Institute, 2010), 33. Online: <http://www.wellesleyinstitute.com/publication/new-report-precarious-housing-in-canada-2010/>.

¹⁰¹ The Ontario Renovates program provides funding assistance for repairs and renovations to maintain the affordability and improve the accessibility of eligible rental housing units. Ontario Renovates is one element of the Government of Ontario's broader Investment in Affordable Housing program. Ministry of Municipal Affairs and Housing, *Investment in Affordable Housing Ontario Program Guidelines* (Toronto: Queen's Printer, August 2011), 33. Online: <http://www.mah.gov.on.ca/AssetFactory.aspx>

?did=9288. The *Housing Services Act* prescribes minimum numbers of units modified for persons with physical disabilities; *Housing Services Act*, 2011, SO 2011, c 6, sch 1, ss 41, 77. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_11h06_e.htm [*Housing Services Act*]; *Housing Services Act General Regulations*, O Reg 367/11, s 22, sch 4. Online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_110367_e.htm.

¹⁰² Debra Stewart et al, "Best Journey to Adulthood" for Youth with Disabilities: An Evidence-based Model and Best Practice Guidelines for the Transition to Adulthood for Youth with Disabilities (Hamilton, ON: CanChild, McMaster University, 2009). Online: <http://transitions.canchild.ca/en/OurResearch/resources/BJAmodelandbestpracticeguidelinespdf2009.pdf>; "Life Stage Transitions Services" (10 August 2009).

Online: http://www.abilities.ca/organizations/2009/08/10/omd_easterseals_forum79/. See also "Growing Up," online: Holland Bloorview, Kids Rehabilitation Hospital http://www.hollandbloorview.ca/resourcecentre/growing_up/real_world_coaching.php; "Door to Adulthood," online: Holland Bloorview, Kids Rehabilitation Hospital <http://www.hollandbloorview.ca/door2adulthood/default.htm>; "On Campus Housing for Students with Disabilities," online: York University http://www.yorku.ca/stuhouse/Students_with_Disabilities.htm; and "Accessibility Services," online: University of Toronto <http://www.housing.utoronto.ca/Resources/Accessibility.htm>.

¹⁰³ Gerard Quinn & Theresia Degener, "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in Gerrard Quinn & Theresia Degener, eds, *Human Rights and Disability: The Current Use and Future Potential of United National Human Rights Instruments in the Context of Disability* (New York: United Nations Publication, 2002) 9, 17.

¹⁰⁴ Shamira Mudhany, "Inclusion Lens: An Innovative View into Inclusive Policies, Programs and Services", *Canadian Government Executive* (11 February 2011). Online: <http://cgeit.itincanada.ca/index.php?cid=311&id=13934&np=1>.

¹⁰⁵ Ministry of Government Services, *Ontario Public Service Multi-year Accessibility Plan: Leading the Way Forward* (Toronto: Queen's Printer, 1 January 2012), 14. Online: <http://www.ontario.ca/en/general/accessibilityplan/index.htm>.

¹⁰⁶ For a brief history of the treatment of persons with intellectual disabilities in Ontario, see Kerri Joffe (ARCH Disability Law Centre), *Enforcing the Rights of Persons with Disabilities in Ontario's Development Services System* (Toronto: Law Commission of Ontario: 30 June 2010), 12-20. Online: <http://www.lco-cdo.org/en/disabilities-call-for-papers> [Joffe].

- ¹⁰⁷ *Canadian Attitudes*, note 25, 9, 32-34. For a brief history of the treatment of persons with intellectual disabilities in Ontario, see Joffe, note 106.
- ¹⁰⁸ Interestingly, the LCO heard during the sister project on the law as it affects older persons that this is a significant issue for older persons because of the perceived link between aging and disability. See for example Charmaine Spencer, *Ageism and the Law: Emerging Concepts and Practices in Housing and Health* (Toronto: Law Commission of Ontario, 2009), 73. Online: <http://www.lco-cdo.org/en/older-adults-lco-funded-papers-charmaine-spencer> [Spencer]. The Ontario *Human Rights Code* explicitly includes perceived disabilities in its definition of disability, providing some protection against this form of discrimination: see *Code*, note 6, s 10(3). The Supreme Court of Canada decision in *Mercier* addressed a set of cases where individuals with mild impairments that created no functional limitations were excluded from employment based on the perception that functional limitations and therefore accommodation needs might arise at a future point in time: *Mercier*, note 29.
- ¹⁰⁹ This point is made in the research paper prepared by the Income Security Advocacy Centre, *Denial by Design*, note 48.
- ¹¹⁰ Bach & Kerzner, note 11, 6. Also see Joffe, note 106, 28.
- ¹¹¹ *OBA Submission*, note 24, 23.
- ¹¹² *Eaton*, note 56, para 67.
- ¹¹³ *Eldridge*, note 56.
- ¹¹⁴ Canadian Association for Community Living, *Response to the Law Commission of Ontario's Consultation Paper on the Law as It Affects Older Adults* (July 2008), 4.
- ¹¹⁵ These provisions were the subject of a human rights complaint, which was upheld at the Human Rights Tribunal of Ontario. HRTO Adjudicator Peter Cory noted in his decision that inquests are important to the families of the deceased because "It is the one opportunity for the families to hear the truth pertaining to the death of their family member and an ability to confront those who testify. Most importantly, it provides an opportunity for a family to participate in the framing of recommendations that may often be of tremendous benefit in future" (para 20). This decision was subsequently overturned by the Divisional Court. See *Braithwaite v Ontario (Chief Coroner)*, 2006 HRTO 15, 56 CHRR D/171. Online: <http://canlii.ca/t/1r78g>; and *Ontario (Attorney General) v Ontario Human Rights Commission*, 2007 CanLII 56481, 88 OR (3d) 455, 288 DLR (4th) 138, 165 CRR (2d) 228, 62 CHRR 315, 232 OAC 102 (ON SCDC). Online: <http://canlii.ca/t/1v9bd>.
- ¹¹⁶ Courtney Evans & Daniel Bassili, *Review of Coroners Inquests Involving Persons with Disabilities: 1989 – 2010* (April 2011) [unpublished, archived at the Law Commission of Ontario] [Evans & Bassili].
- ¹¹⁷ *PALS 2006 Labour Force Experience*, note 81, 21.
- ¹¹⁸ Gerber et al, "Beyond Transition: A Comparison of the Employment Experiences of American and Canadian Adults with LD" (August 2004) 37:4 *Journal of Learning Disabilities* 283, 287.
- ¹¹⁹ *Code*, note 6, s 7.
- ¹²⁰ *Code*, note 6, s 17.
- ¹²¹ The *Human Rights Code Amendment Act, 2006* (SO 2006, c 30. Online: http://www.ontla.on.ca/bills/bills-files/38_Parliament/Session2/b107ra.pdf) came into effect June 30, 2008.
- ¹²² Human Rights Tribunal of Ontario, *Annual Report 2009-10* (Toronto, 2010) 3. Online: <http://www.hrto.ca/hrto/?q=en/node/26>. Recent Annual related to employment made up approximately 75 per cent of complaints citing the ground of disability during the fiscal years 2006-07 and 2007-08.
- ¹²³ *Integrated Accessibility Standards*, O Reg 191/11. Online: http://www.e-laws.gov.on.ca/html/source/regs/english/2011/elaws_src_regs_r11191_e.htm [*Integrated Accessibility Standards*, O Reg 191/11].
- ¹²⁴ Diane Pothier, "Tackling Disability Discrimination at work: Toward a Systemic Approach" (2010) 4 *McGill J L & Health* 17.
- ¹²⁵ Roeher Institute, *Improving the Odds: Employment, Disability and Public Programs in Canada*, (Toronto: Roeher Institute, 2004), 78 [Roeher, *Improving the Odds*].
- ¹²⁶ Hon. Michael Byrant in Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 72A (8 May 2006), 3647-3652. Online: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2006-05-08&Parl=38&Sess=2&locale=en#P599_140181 [*Hansard*].
- ¹²⁷ Information on the mandate, timelines and activities of the Human Rights Review may be found at <http://www.ontariohumanrightsreview.org/human-rights>.
- ¹²⁸ For an extended discussion of these issues, see Julia Rendell, *Transitions into Housing* (26 August 2011) [unpublished, archived at the Law Commission of Ontario] [Rendell].
- ¹²⁹ This complexity, and the barriers it forms for users and potential users of ODSP, has been acknowledged by the Commission for the Review of Social Assistance in Ontario: Law Commission of Ontario, "Submission of the Law Commission of Ontario to the Commission for the Review of Social Assistance in Ontario" (29 August 2011), 8-9. Online: <http://www.lco-cdo.org/en/law-commission-submission-crsao>.
- ¹³⁰ See Rendell, note 128, "Aboriginal People," 20-21.
- ¹³¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 11, Can TS 1976 No 46.
- ¹³² *Code*, note 6, s 2.
- ¹³³ OHRC, *Right at Home*, note 26, 54. The most important case on the role of inclusive design in human rights is

decision of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3. Online: <http://scc.lexum.org/en/1999/1999scr3-3/1999scr3-3.html> [Meiorin]. The Court stated, in the context of employment rules, that “Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible” [at 38].

¹³⁴ A comprehensive discussion of the duty to accommodate in the context of rental housing may be found in Ontario Human Rights Commission, “Social and economic status,” *Policy on Human Rights and Rental Housing* (Toronto: Ontario Human Rights Commission, 21 July 2009), 29-37. Online: <http://www.ohrc.on.ca/en/policy-human-rights-and-rental-housing> [OHRC, *Rental Housing Policy*].

¹³⁵ *Building Code*, O Reg 350/06, s 3.8. Online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_060350_e.htm. As well as the Barrier-Free requirements set out in section 3.8, there are other accessibility requirements throughout the *Building Code*, such as requirements for visual fire alarms (ss 3.2.4.18, 3.2.4.18, 3.2.4.20); a requirement that there cannot be obstructions larger than 100 mm from the walls of public corridors “in a manner that would create a hazard for a person with a visual disability traveling adjacent to the wall” (ss 3.3.1.9(3), 9.9.5.3(1)); and a requirement that corridors (ss 3.3.1.1.9(1), 3.3.3.3(4)(b)), aisles (s. 3.3.2.4), exits (s 3.4.3.2), pool/spa ramps (ss 3.11.5.1, 3.12.3(2)), and secondary rapid transit exits (s 3.13.4.5(5)) be at least 100 mm in order to accommodate wheelchair access [Building Code].

¹³⁶ *Code*, note 6, s 47(2).

¹³⁷ Ontario Human Rights Commission, *Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code* (Toronto: Ontario Human Rights Commission, 1 March 2002), 4. Online: <http://www.ohrc.on.ca/en/submission-ontario-human-rights-commission-concerning-barrier-free-access-requirements-ontario> [OHRC, *Barrier-Free Access Submission*]. Reliance on relevant buildings codes has been rejected as a defence to a claim of discrimination under the *Code*: *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474.

¹³⁸ OHRC, *Barrier-Free Access Submission*, note 137, 4; Ontario Human Rights Commission, *Moving towards barrier-free services: Final report on the restaurant accessibility initiative*

(Toronto: Ontario Human Rights Commission, July 2002), 5-6. Online: <http://www.ohrc.on.ca/en/moving-towards-barrier-free-services-final-report-restaurant-accessibility-initiative>; Ontario Human Rights Commission, *The Cost of Caring: Report on the consultation on discrimination on the basis of family status* (Toronto: Ontario Human Rights Commission, 29 November 2006), 62. Online: <http://www.ohrc.on.ca/en/cost-caring-report-consultation-discrimination-basis-family-status> [OHRC, *Cost of Caring*]; and OHRC, *Right at Home*, note 26, 55.

¹³⁹ See *Disability Policy*, note 20, section 4.1, as well as note 133 above.

¹⁴⁰ OHRC, *Right at Home*, note 26, 55. The OHRC notes that during its consultations, “Concerns were raised about the failure of the existing *Building Code* to set standards for inclusive design...Many of the Commission’s concerns, noted in its 2002 submission on the *Building Code* have not yet been addressed. Tenant advocates noted that the *Building Code* still does not ensure access for many people with disabilities, including people with large mobility devices and persons with environmental sensitivities.”

¹⁴¹ *Building Code*, note 135. The provisions regarding aisles, corridors and exits are found in ss 3.3.1.1.9(1), 3.3.3.3(4)(b)), corridors, (s. 3.3.2.4) aisles, (s 3.4.3.2) exits. A helpful resource on this issue is C. D’Souza, E. Steinfeld, V. Paquet and J. White, *DR #15: Clear Floor Area for Wheeled Mobility: Redefining the ‘common wheelchair’* (Buffalo: Centre for Inclusive Design and Environmental Access, January 4, 2011).

¹⁴² OHRC, *Rental Housing Policy*, note 134, 75.

¹⁴³ OHRC, *Barrier-Free Access Submission*, note 137, 4.

¹⁴⁴ OHRC, *Barrier-Free Access Submission*, note 137, 5.

¹⁴⁵ See Ontario Human Rights Commission, *Ontario Human Rights Commission Submission to the Accessible Built Environment Standards Development Committee Regarding The Initial Proposed Accessible Built Environment Standard* (Toronto: Ontario Human Rights Commission, 16 October 2009), 8. Online: <http://www.ohrc.on.ca/en/ontario-human-rights-commission-submission-accessible-built-environment-standards-development>.

¹⁴⁶ Office of the Auditor General of Ontario, *Annual Report of the Auditor General of Ontario 2009* (Toronto: Office of the Auditor General of Ontario, 2009), 277. Online: http://www.auditor.on.ca/en/reports_2009_en.htm.

¹⁴⁷ Toronto Community Housing, “Frequently Asked Questions”. Online: http://www.torontohousing.ca/media_centre/faq.

¹⁴⁸ Ministry of Municipal Affairs and Housing, *Investment in Affordable Housing Ontario Program Guidelines* (August 2011), 33 and following. Online: <http://www.mah.gov.on.ca/AssetFactory.aspx?did=9288>. Ontario Renovates is one element of the Government of Ontario’s broader Investment in Affordable Housing program.

- ¹⁴⁹ *Housing Services Act*, note 101, ss 41, 77.
- ¹⁵⁰ AODA, note 61, s 1.
- ¹⁵¹ AODA, note 61, s 4.
- ¹⁵² AODA, note 61, s 3.
- ¹⁵³ *Integrated Accessibility Standards*, O Reg 191/11, note 123.
- ¹⁵⁴ See Ministry of Community and Social Services, "Accessibility Standard for the Built Environment" online: http://www.mcsc.gov.on.ca/en/mcsc/programs/accessibility/built_environment/index.aspx. A proposed Built Environment Standard was released in the summer of 2012, with consultations closing October 1, 2012. The proposed standard does not contain any provisions that directly relate to housing accessibility.
- ¹⁵⁵ Justice Ontario can be accessed at <http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/> or by telephone at 1-866-252-0104. Information is provided in multiple languages.
- ¹⁵⁶ Note that the CRPD (see note 4), requires states parties to take appropriate measures to ensure that persons with disabilities have access on an equal basis with others to information and communication, and to information and communication technology (Art 9); and to "Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost" (Art 21).
- ¹⁵⁷ In a very recent decision, the Federal Court of Appeal found that the section 15 *Charter* rights (see note 5) of Jodhan, a person with a visual disability, had been violated, because she was not able to apply for jobs and access government information using her screen reading technology. The Court found that it was not sufficient for the information to be available by telephone or by fax, in that requiring Jodhan to rely on sighted assistance was demeaning and unequal: *Jodhan v Canada (Attorney General)*, 2012 FCA 161 (30 May 2012). Online: <http://decisions.fca-cf.gc.ca/en/2012/2012fca161/2012fca161.html>.
- ¹⁵⁸ *Code*, note 6, s 1.
- ¹⁵⁹ *Code*, note 6, s 17.
- ¹⁶⁰ *Integrated Accessibility Standards*, O Reg 191/11, note 123.
- ¹⁶¹ *Integrated Accessibility Standards*, O Reg 191/11, note 123.
- ¹⁶² For a discussion of these issues see Karen Cohl & George Thompson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Toronto: Law Foundation of Ontario, December 2008), 19. Online: http://www.lawfoundation.on.ca/linguistic_rural_access.php [Cohl & Thompson].
- ¹⁶³ Cohl & Thompson, note 162, 20.
- ¹⁶⁴ Joffe, note 106, 31. The author notes that stakeholders have described situations where persons with disabilities who made complaints were reprimanded or harmed by their support worker, or were the subject of threats, for instance to cut off ODSP benefits.
- ¹⁶⁵ For a thorough discussion of the legal issues surrounding rights to supports for persons with disabilities see Bakerlaw, *The Law As It Affects Persons with Disabilities: A Case Study Paper on Rights to Supports*, by Meryl Zisman Gary, Cara Wilkie, & David Baker, (Law Commission of Ontario: July 2010). Online: www.lco-cdo.org/en/disabilities-call-for-papers.
- ¹⁶⁶ The *Exceptional Pupils Regulation*, under the *Education Act* requires IPRC review committees to consider, with permission, the progress of the student under his or her IEP, which includes the transition plan (s 23(2)), see *Identification and Placement of Exceptional Pupils*, O Reg 181/98. Online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_980181_e.htm [*Exceptional Pupils Regulation*, O Reg 181/98]; *Education Act*, RSO 1990, c E-2, s 8(3). Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e02_e.htm [*Education Act*]. This provides an opportunity for review, as does the requirement for schools, under their guidance and career education programs, to provide exist programs for students who leave school upon or before graduation, a requirement that includes a review of the information in the transition plan for exceptional students. The Auditor General, in his 2008 Report, raised concerns about the effectiveness of the systems in place at that time: Auditor General, 2008, note 89, 381. Also see the update on this issue in Office of the Auditor General of Ontario, *Annual Report of the Auditor General of Ontario 2010* (Toronto: Office of the Auditor General of Ontario, 2010), 392. Online: http://www.auditor.on.ca/en/reports_2010_en.htm [Auditor General, 2010].
- ¹⁶⁷ Ministry of Education, *Individual Education Plans: Standards for Development, Program Planning and Implementation* (Toronto: Queen's Printer, 2000). Online: <http://www.edu.gov.on.ca/eng/general/elemsec/spced/iep/iep.html>.
- ¹⁶⁸ CRPD, note 4, art 27.
- ¹⁶⁹ OECD, *Inclusion of students with disabilities in tertiary education and employment* (Paris: OECD Publishing, 2011), 106. Online: <http://dx.doi.org/10.1787/9789264097650-en>.
- ¹⁷⁰ The Ministry of Education has been active in developing policies promoting equity and inclusive education: Ontario Ministry of Education, *Equity and Inclusive Education in Ontario Schools: Guidelines for Policy Development and Implementation, 2009* (Toronto: Queen's Printer, 2009). Online: <http://www.edu.gov.on.ca/eng/policyfunding/inclusiveguide.pdf>. Under the ODA the Ministry and school boards are each responsible for developing accessibility plans: ODA, note 60, ss 10, 15.
- ¹⁷¹ Roeher, *Improving the Odds*, note 125, 46.
- ¹⁷² Ontario Ministry of Education, *Transition Planning: A Resource Guide, 2002* (Toronto: Queen's Printer, 2002), 20.

- Online: <http://www.edu.gov.on.ca/eng/general/elemsec/speced/transiti/transition.html> [Ontario, *Transition Planning*].
- ¹⁷³ *Education Act*, note 166, s 8(3). Subsection 1(1) of the *Education Act* defines “exceptional pupil” as “a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee”. Regulation 181/98 sets out a process for the identification and placement of exceptional students: *Exceptional Pupils Regulation*, O Reg 181/98, note 166.
- ¹⁷⁴ *Education Act*, note 166, s 8(3).
- ¹⁷⁵ *Special Education Programs and Services*, RRO 1990, Reg 306, ss 2(2) - 2(3). Online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900306_e.htm.
- ¹⁷⁶ *Exceptional Pupils Regulation*, O Reg 181/98, note 166, ss 10, 26.
- ¹⁷⁷ *Exceptional Pupils Regulation*, O Reg 181/98, note 166, s 6(4).
- ¹⁷⁸ This restriction disadvantages students between the ages of 14 and 16 who may wish to have a say in planning for their future: Paré, note 89, 13.
- ¹⁷⁹ From Grade 7 onwards, students complete an Annual Education Plan (AEP), with support from their teacher-advisor, that sets out the student’s goals and plans for achieving those goals. Ministry Guidelines recommend that the Annual Education Plan be integrated with transition planning, and that students take on as much responsibility as possible for planning their own future: Ontario, *Transition Planning*, note 172, 30.
- ¹⁸⁰ *Exceptional Pupils Regulation*, O Reg 181/98, note 166, s 6(7).
- ¹⁸¹ Ontario Ministry of Education, *Individual Education Plans, Standards for Development Program Planning and Implementation* (Toronto: Queen’s Printer, 2000). Online: <http://www.edu.gov.on.ca/eng/general/elemsec/speced/iep/iep.html>. More detailed guidelines are available in Ontario, *Transition Planning*, note 172.
- ¹⁸² Ontario, *Transition Planning*, note 172, 7.
- ¹⁸³ Ontario, *Transition Planning*, note 172, 14. On the success of the co-operative program: Interview with Diane Wagner, Senior Manager, Public Policy & Education, Learning Disabilities Association of Ontario (22 July 2011) [Interview with Diane Wagner].
- ¹⁸⁴ Ontario Ministry of Education, *Cooperative Education and Other Forms of Experiential Learning: Policies and Procedures for Ontario Secondary Schools, 2000* (Toronto: Queen’s Printer, 2000), 34. Online: <http://www.edu.gov.on.ca/eng/document/curricul/secondary/coop/cooped.pdf> [Ontario, *Cooperative Education*]; Ontario, *Transition Planning*, note 172, 30. Other programs include school-work transition programs, specialized programs directed at students intending to enter the workforce directly after graduating from high school: Ontario, *Cooperative Education*, 11. Other programs developed as part of the Ministry’s 2005 Student Success strategy to reduce high school drop-out rates are not specifically directed at students with disabilities, but are increasingly seen as doing so: Interview with Diane Wagner, note 183. Ontario, Ministry of Education, Background, “Ontario Launches Third Phase of Student Success Strategy” (8 December 2005). Online: <http://www.edu.gov.on.ca/eng/document/nr/05.12/bg1208a.pdf>.
- ¹⁸⁵ Ontario, *Cooperative Education*, note 184, 24, 34-35. Also see Ontario, Ministry of Education, Factsheet, “Students with Special Education Needs,” online: <http://www.edu.gov.on.ca/eng/teachers/studentsuccess/coopSpecialNeeds.pdf>. The new *Integrated Accessibility Standards* (O Reg 191/11, note 123) include accessibility standards to be implemented in the workplace under which employers are to notify job applicants about the availability of accommodations, to provide necessary accommodations during the recruitment process and to notify successful applicants about its accessibility policies.
- ¹⁸⁶ *Schafer v Toronto District School Board*, 2009 HRTO 785, paras 34-36. Online: <http://canlii.ca/t/23v5b>; *Sigrist and Carson v London District Catholic School Board*, 2010 HRTO 1062. Online: <http://canlii.ca/t/29qpt>.
- ¹⁸⁷ See OHRC, *Opportunity to Succeed*, note 89, 14: “In many cases, stakeholders report that special education practices and procedures in school settings at the local level are not consistent with the Ministry of Education’s own directives, and that this inconsistency is resulting in human rights violations.” The Report goes on to emphasize that “education providers,” in both the publicly-funded system and in private schools, have a legal duty “to accommodate students with disabilities up to the point of undue hardship” (6-7). See also *PALS 2006 Profile of Education*, note 89, 13-17.
- ¹⁸⁸ Roeher Institute, *Scoping Inclusive Education for Canadian Students with Intellectual and Other Disabilities*, (Toronto: Roeher Institute, 2005).
- ¹⁸⁹ Auditor General, 2008, note 89, 381. Also see the update on this issue in Auditor General, 2010, note 166, 392.
- ¹⁹⁰ Auditor General, 2010, note 166, 392.
- ¹⁹¹ Ontario, Ministry of Education, *Special Education Update* (February 2011). Online: http://www.edu.gov.on.ca/eng/general/elemsec/speced/SpecialEd_Update2011.pdf.
- ¹⁹² This discussion of the merits and limitations of a principles-based approach is indebted to the thoughtful submissions to the LCO’s 2009 Preliminary Consultation from the Ontario Bar Association (*OBA Submission*, note 24) and ARCH Disability Law Centre (*ARCH Submission*, note 24).
- ¹⁹³ An overview and classification of the types of laws affecting

persons with disabilities may be found in *Threshold Paper*, note 8.

¹⁹⁴ *Withler v Canada (Attorney General)*, 2011 SCC 12 para 39, [2011] 1 SCR 396. Online: <http://scc.lexum.org/en/2011/2011scc12/2011scc12.html>.

¹⁹⁵ ODSPA, note 43, s 5(2).

¹⁹⁶ In *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513. Online: <http://scc.lexum.org/en/2006/2006scc14/2006scc14.html>, the Supreme Court of Canada ruled that the Social Benefits Tribunal had the power to declare a provision of the ODSPA inapplicable on the basis that the provision was discriminatory, and remitted to the Social Benefits Tribunal for a ruling on the applicability of s 5(2) of the ODSPA. In *Ontario Disability Support Program v Tranchemontagne*, 2009 CanLII 18295, 95 OR (3d) 327, 250 OAC 23 (ON SCDC). Online: <http://canlii.ca/t/2377z>, the Court upheld the finding of the Social Benefits Tribunal that the exclusion of persons disabled solely by addiction from the Ontario Disability Support Program was inconsistent with the Ontario Human Rights Code (Code, note 6, s 1).

¹⁹⁷ Kapp, note 55, para 55.

¹⁹⁸ This issue arose during the LCO's public consultations, as highlighted in section II.D.2 of this *Report* (on page 49).

¹⁹⁹ Some of the dynamics and statistics around this issue are briefly highlighted in *Disabilities Consultation Paper*, note 10.

²⁰⁰ World Health Organization: *WHO Technical Report No. 572: Education and Treatment in Human Sexuality: The Training of Health Professionals* (Geneva: World Health Organization, 1975), as cited in Joan M Gilmour & Roxanne Mykitiuk, "The Legal Regulation and Construction of the Gendered Body and of Disability in Canadian Health Law and Policy" (Working Paper, 2 March 2011), 104. Online: SSRN <http://ssrn.com/abstract=1775204> [Gilmour & Mykitiuk].

²⁰¹ Vancouver Coastal Health Authority, *Supporting Sexual Health and Intimacy in Care Facilities: Guidelines for Supporting Adults Living in Long-Term Care Facilities and Group Homes in British Columbia* (15 July 15 2009), 13. Online: http://www.vch.ca/media/FacilitiesLicensing_SupportingSexualHealthandIntimacyinCareFacilities2.pdf [VCHA, *Sexual Health*].

²⁰² Gina Di Giulio, "Sexuality and People Living with Physical or Developmental Disabilities: A Review of Key Issues" (2003) 12 Canadian Journal of Human Sexuality 53, 53 [Giulio].

²⁰³ Gilmour & Mykitiuk, note 200, 99.

²⁰⁴ Springtide Resources, *Sexuality and Access Project: Survey Summary*, by Cory Silverberg & Fran Odette (Toronto: Springtide Resources, 2011), 20. Online: http://www.crnc.ca/knowledge/related_reports/pdf/Sexuality%20and%20Access%20Survey%20Summary.pdf [Silverberg & Odette].

²⁰⁵ Silverberg & Odette, note 204, 32-33.

²⁰⁶ Law Commission of Ontario: *Final Report: A Framework for the Law as It Affects Older Adults* (Toronto: Law Commission of Ontario, April 2012), Ch. IV.F. Online: <http://www.lco-cdo.org>.

²⁰⁷ William Burr, "Sexuality of the Disabled Often Overlooked" (22 March 2011) 183:5 *Canadian Medical Association Journal* E259. Online: <http://www.cmaj.ca/content/183/5/E259>.

²⁰⁸ Megan McChesney, "Sex for Disabled Moves Forward", *Toronto Star* (29 September 2006). Online: <http://www.thestar.com/living/article/96524—sex-for-disabled-moves-forward>. This article noted that Participation House in Waterloo/Wellington has developed a policy on sexual facilitation by attendants. The policy covers "providing sexuality training, assistance in masturbation, access to legal sexually explicit materials, intimacy aids and assistance in partner inclusion."

²⁰⁹ Silverberg & Odette, note 204, 24-25. Silverberg & Odette note that, given the communication dynamics and concerns about perceptions, it is not clear that explicitly addressing sexual support in these documents would necessarily facilitate greater access to sexual support services.

²¹⁰ Augmentative and Alternative Communication refers to the communication methods used to supplement or replace speech or writing for those with impairments in the production or comprehension of spoken or written language. Communications disabilities may arise from sensory, motor, intellectual or cognitive or language-based impairments. AAC may include a wide range of strategies, including speech generation devices, communications assistants, communication software, and may others. Information on these issues may be found on the website of Augmentative Communications Community Partnerships Canada (ACCPD) at <http://www.accpd.ca>.

²¹¹ Speak Up, *Barriers Which May Be Experienced by AAC Users in Accessing Community Resources, Information and Services Relating to Sexual Health and Abuse* (October 2003). Online: http://www.accpd.ca/Speak_Up/resources-barriers_aac_u.htm [Speak Up].

²¹² See Silverberg & Odette, note 204, 5.

²¹³ Sarah Earle, "Facilitated Sex and the Concept of Sexual Need: Disabled Students and Their Personal Assistants" (1999) 14 *Disability & Society* 309. Online: <http://www.tandfonline.com/doi/pdf/10.1080/09687599926163>. This small study of students with disabilities and their attendants found significant divergence between the two groups in the attitudes towards facilitated sexual activity, with some attendants expressing surprise that the students were interested in engaging in sexual activity, reluctance to assist with sexual activity that differed from their own norms (such as activities between same-sex partners) and concern about their moral responsibilities.

Interestingly, attendants tended to refer to sexual “wants” as opposed to the users of attendant services, who referenced sexual “needs.”

²¹⁴ Speak Up, note 211.

²¹⁵ Silverberg & Odette, note 204, 36.

²¹⁶ Silverberg & Odette, note 204, 32.

²¹⁷ Linda R Mona, “Sexual Options for People with Disabilities: Using Personal Assistance Services for Sexual Expression” (2003) 26 *Women & Therapy* 211, 220.

²¹⁸ Silverberg & Odette, note 204, 31-32.

²¹⁹ Silverberg & Odette, note 204, 29.

²²⁰ Joffe, note 106, 39.

²²¹ The CRPD, recognizing the potential of technology to advance inclusion for persons with disabilities, specifically commits States Parties “To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost”: CRPD, note 4, art 4(1)(g). The potentially transformative effect of technology is recognized throughout the CRPD, as well as the barriers that may be created when technology is not designed or implemented inclusive. For example, Art 20 requires states parties to facilitate access to technologies that may promote personal mobility, including by making them available at reasonable cost; Art. 21 regarding access to information requires states parties to provide information intended for the general public to persons with disabilities in accessible formats and technologies at no cost; Art 10 requires states parties to promote access for persons with disabilities to new information and communication technologies.

²²² Alanna Mitchell, “The Gift of Dyslexia”, *The Globe and Mail* (26 July 2003), F7.

²²³ *Advancing Inclusion* (2009), note 89, 5.

²²⁴ Ernie Lightman et al, “‘Not Disabled Enough’: Episodic Disabilities And The Ontario Disability Support Program” (2009) 29:3 *Disabilities SQ* 7 ¶45. Online: <http://dsq-sds.org/>; *Denial by Design*, note 48, 17-22.

²²⁵ During the LCO’s consultations, much was said about the difficulties of accessing services, supports and accommodations outside of major urban centers. For example, it was the LCO’s experience that arranging for real-time captioning and American Sign Language interpretation in northern Ontario was extremely challenging, even with considerable lead time.

²²⁶ Persons with disabilities are disproportionately likely to live in poverty. For example, within the age cohort 25 to 34, a Canadian without a disability can expect to earn an income on average of \$33,078, while a Canadian with a disability within the same age cohort can expect an income of a third less, \$23,087. And while Canadians without

disabilities can expect to increase their incomes until the age of 55, the incomes of persons with disabilities actually decrease on average after the age of 35. Canadians living without a disability in the age cohort 35 to 44, report an average income of \$36,553, while Canadians living with a disability in the same age cohort have an average income of \$22,447, almost a \$15,000 discrepancy in reported income: *PALS 2006 Tables (Part V)*, note 84, 8-10.

²²⁷ According to 2001 data collected by Statistics Canada, 36.5% of Ontarians with disabilities between the ages of 15 and 64 had less than a high school education, while 11.5% of that group had completed university. By comparison, only 23.7% of Ontarians without disabilities between the ages of 15 and 64 had less than a high school education, and 22.2% had completed university – a striking differential with lifelong implications for employment, income and well-being. These are overall figures; breaking them down on the basis of certain factors (such as Aboriginal status) would show lower average levels for some groups than for others: Statistics Canada, “Education, Employment and Income of Individuals With and Without Disabilities - Tables”, *Participation and Activity Limitation Survey 2001* (Ottawa: Ministry of Industry, September 2003), 19, 35. Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-587-X>.

²²⁸ Information from Statistics Canada’s General Social Survey confirms that persons with disabilities are at greater risk for violence and victimization. Persons with activity limitations are victims of both physical assault and sexual assault about twice as often as persons without limitations. Those who are most at risk are persons with disabilities who are living in an institutional setting, have severe disabilities, or have mental disorders: Statistics Canada, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* by Samuel Perreault (Ottawa, Canadian Centre for Justice Statistics: 2009), 8. Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=85F0033MIE2009021> [Perreault].

²²⁹ See *PALS 2006 Tables (Part V)*, note 84, 11.

²³⁰ *PALS 2006 Labour Force Experience*, note 81, 9-10.

²³¹ For an overview of some of these issues, see Gilmour & Mykitiuk, note 200, 104.

²³² Scotch & Shriner, note 36; Surtees, note 36; Zola (1993), note 36, 14, citing M Stein, “Disability Human Rights” (2007) 95 *Cal L Rev* 75, 75, 86.

²³³ Scotch & Shriner, note 36, 158; Bickenbach, note 36, 1183.

²³⁴ CRPD, note 4, art 1(f). Article 2 states that “‘Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”; however, universal design “shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

- ²³⁵ See *Disability Policy*, note 20.
- ²³⁶ *Disability Policy*, note 20, s 4.1.
- ²³⁷ *Disability Policy*, note 20, s 4.1.3.
- ²³⁸ *In Unison* (1998), note 7.
- ²³⁹ “Visible minorities” is the term used by Statistics Canada for Census purposes. The definition used is that of the *Employment Equity Act*, which defines visible minorities as “persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour” (*Employment Equity Act*, SC 1995, c 44, s 3. Online: <http://laws-lois.justice.gc.ca/eng/acts/E-5.401/index.html>). Under this definition, regulations specify the following groups as visible minorities: Chinese, South Asians, Blacks, Arabs, West Asians, Filipinos, Southeast Asians, Latin Americans, Japanese, Koreans and other visible minority groups, such as Pacific Islanders.
- ²⁴⁰ Ontario, Ministry of Finance, Factsheet, “Census Highlights Fact Sheet 11: Ethnic Origin and Visible Minorities,” online: <http://www.fin.gov.on.ca/en/economy/demographics/census/cenhi06-11.html>.
- ²⁴¹ Toronto Central Local Health Integration Network, *Annual Report 2009/10: Delivering High-Value Local Health Care Through Collaborative Action* (Toronto: Toronto Central Local Health Integration Network, 2010), 5. Online: <http://www.torontocentrallhin.on.ca/annualreports.aspx> [TCLHIN, *Annual Report 2009/10*].
- ²⁴² Kwame McKenzie et al, *Improving mental health services for immigrant, refugee, ethno-cultural and racialized groups: issues and options for service improvement* (Ottawa: Mental Health Commission of Canada, 2009). Online: <http://www.mentalhealthcommission.ca/SiteCollectionDocuments/News/en/IO.pdf>. Also see June Ying Yee et al, *Striving for Best Practices and Equitable Mental Health Care Access for Racialized Communities in Toronto* (Toronto: School of Social Work, Ryerson University, 2006), 6-7. Online: <http://accessalliance.ca/sites/accessalliance/files/documents/EquitableMentalHealthCareAccessResearchReport.pdf>; US Department of Health and Human Services, *Mental Health: Culture, Race, and Ethnicity—A Supplement to Mental Health: A Report of the Surgeon General* (Rockville, MD: U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Mental Health Services, 2001), 30-31. Online: <http://www.ncbi.nlm.nih.gov/books/NBK44243/> [Surgeon General]; Ruby Dhand, *Challenging Exclusion: A Critique of the Legal Barriers Faced By Ethno-Racial Psychiatric Consumer/Survivors in Ontario* (LLM Thesis, Faculty of Law, University of Toronto, 2010), 5. Online: <http://hdl.handle.net/1807/18275> [Dhand], citing Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees, *After the door has been opened: mental health issues affecting immigrants and refugees in Canada* (Ottawa: Health and Welfare Canada/Multiculturalism and Citizenship Canada, 1988).
- ²⁴³ Mental Health Commission of Canada, *Toward Recovery & Well-Being: A Framework for a Mental Health Strategy for Canada* (Calgary: Mental Health Commission of Canada, November 2009), 49. Online: <http://www.mentalhealthcommission.ca/English/Pages/Reports.aspx> [MHCC, *Toward Recovery*].
- ²⁴⁴ Dhand, note 242, 54.
- ²⁴⁵ TCLHIN, *Annual Report 2009/10*, note 241, 7; Kwasi Kafele, *Racial Discrimination and Mental Health: Racialized and Aboriginal Communities* (December 2004). Online: <http://www.ohrc.on.ca/en/racial-discrimination-and-mental-health-racialized-and-aboriginal-communities> [Kafele].
- ²⁴⁶ Canadian Mental Health Association Ontario, *Backgrounders: Rural and Northern Community Issues in Mental Health* (27 August 2009). Online: <http://www.ontario.cmha.ca/backgrounders.aspx?cID=289773>. Also see the LCO’s project on *Vulnerable Workers*. Online: <http://www.lco-cdo.org/en/content/vulnerable-workers>.
- ²⁴⁷ Dhand, note 242, 73.
- ²⁴⁸ This evidence was heard at the 1999 Coroner’s Inquest into the death of Mr. Edmond Yu, a man of Chinese Canadian heritage suffering from paranoid schizophrenia. See Evans & Bassili, note 116.
- ²⁴⁹ MHCC, *Toward Recovery*, note 243, 50.
- ²⁵⁰ MHCC, *Toward Recovery*, note 243, 50.
- ²⁵¹ Dhand, note 242, 39.
- ²⁵² Raymond Chung, Executive Director, Hong Fook Mental Health Association, in Canada, Senate, *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 38th Parl, 1st Sess, No 7 (17 February 2005), 29. Online: <http://www.parl.gc.ca/Content/SEN/Committee/381/soci/07ev-e.htm> [Social Affairs Proceedings 2005].
- ²⁵³ Raymond Chung, Executive Director, Hong Fook Mental Health Association, in *Social Affairs Proceedings 2005*, note 252, 7-9, 29.
- ²⁵⁴ Branka Agic, “Health Promotion Programs on Mental Health/Illness and Addiction Issues in Ethno-Racial/Cultural Communities: A Literature Review,” (23 June 2003). Online: Centre for Addiction and Mental Health, http://www.camh.net/education/ethnocult_healthpromore/s02.pdf.
- ²⁵⁵ Surgeon General, note 242, 14; Kafele, note 245.
- ²⁵⁶ Sarah Bowen, “Language Barriers in Access to Health Care”, in *Certain Circumstances: Issues in Equity and Responsiveness, a collection of papers and reports prepared for Health Canada* (Ottawa: Public Works and Government Services Canada, 2001). Online: <http://www.hc-sc.gc.ca/hcs-sss/pubs/acces/2001-certain-equit-acces/index-eng.php>; Marie Kwok, “Access to Culturally Competent Services for People with Mental Illness” in Psychiatric Patient Advocate Office, ed, *Honouring the Past, Shaping the Future, 25 Years of Progress in Mental Health Advocacy and Rights Protection* (Toronto: Queen’s Printer, May 2008), 141. Online:

- <http://www.sse.gov.on.ca/mohltc/PPAO/en/Documents/pu b-ann-25.pdf>.
- ²⁵⁷ See Cohl & Thompson, note 162, 20, for a comprehensive discussion of issues related to linguistic and rural access to justice in Ontario.
- ²⁵⁸ Magnus Mfoafo-M'Carthy, "Experience is the Best Teacher": Community Treatment Orders (CTOs) among Ethno-Racial Minority Communities in Toronto: A Phenomenological Study (PhD Thesis, Department of Social Work, University of Toronto, 2011), 156. Online: <http://hdl.handle.net/1807/26490> [Mfoafo-M'Carthy].
- ²⁵⁹ MHCC, *Toward Recovery*, note 243, 49.
- ²⁶⁰ MHCC, *Toward Recovery*, note 243, 53.
- ²⁶¹ Mfoafo-M'Carthy, note 258, 41.
- ²⁶² Martha Ocampo, Co-director, Across Boundaries, Ethnoracial Mental Health Centre, in *Social Affairs Proceedings 2005*, note 252, 7-9, 29.
- ²⁶³ Government of Ontario, "Submission to the Law Commission of Ontario" (10 July 2012), 7 [unpublished, archived at the Law Commission of Ontario] [Ontario, "Submission"].
- ²⁶⁴ HEIA Template & Workbook, note 19.
- ²⁶⁵ Paternalism has been defined as follows: "When [rules, policies and actions] are justified solely on the grounds that the person affected would be better off, or would be less harmed as a result of the rule, policy etc., and the person in question would prefer not to be treated this way, we have an instance of paternalism." Gerald Dworkin, "Paternalism" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Summer 2009). Online: <http://plato.stanford.edu/archives/sum2009/entries/paternalism>.
- ²⁶⁶ Bach & Kerzner, note 11, 6. Also see Joffe, note 106, 28.
- ²⁶⁷ *Via Rail*, note 56, para 162.
- ²⁶⁸ OHRC, *Right at Home*, note 26, 18-21 and 54-55.
- ²⁶⁹ The *Integrated Accessibility Standards* (O Reg 191/11, note 123.), deal extensively with removal of barriers to accessible public transportation, an issue which has been of concern for some time: see for example, Ontario Human Rights Commission, *Consultation Report: Human Rights and Public Transit in Ontario* (Toronto: Ontario Human Rights Commission, 27 March 2002). Online: <http://www.ohrc.on.ca/en/consultation-report-human-rights-and-public-transit-services-ontario>.
- ²⁷⁰ For a fuller discussion of self-advocacy and the principle of independence, see Joffe, note 106, 58.
- ²⁷¹ World Health Organization, *A glossary of terms for community health care and services for older persons* (Kobe, Japan: World Health Organization, 2004), 10. Online: http://whqlibdoc.who.int/wkc/2004/WHO_WKC_Tech.Ser._04.2.pdf.
- ²⁷² *R v Morgentaler*, [1988] 1 SCR 30. Online: <http://scc.lexum.org/en/1988/1988scr1-30/1988scr1-30.html>.
- ²⁷³ Paula Pinto et al, *National Law and Policy Monitoring Template: Extended Version* (Toronto: Disability Rights Promotion International, 2008), 4. Online: <http://drpi.research.yorku.ca/resources/LawPolicyTemplate>.
- ²⁷⁴ Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1:7 Yale J Intl L 7, 12 [Nedelsky (1989)].
- ²⁷⁵ Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev Const Stud 1, 8 [Nedelsky (1993)].
- ²⁷⁶ World Health Organization, "Active Ageing: A Policy Framework", *A Contribution of the World Health Organization to the Second United Nations World Assembly on Ageing* (April 2002) 12, 34. Online: <http://www.who.int/ageing/publications/active/en/index.html>.
- ²⁷⁷ *In Unison* (1998), note 7.
- ²⁷⁸ Auditor General, 2008, note 89, 178.
- ²⁷⁹ Auditor General, 2008, note 89, 180.
- ²⁸⁰ Auditor General, 2008, note 89, referring to Christopher Koegl, J Durbin & P Goering, *Mental Health Services in Ontario: How Well is the Province Meeting the Needs of Persons with Serious Mental Illness?* (Toronto: Health Systems Research & Consulting Unit, Centre for Addiction and Mental Health, 2004).
- ²⁸¹ In 2004, 22 per cent of people with mental-health issues discharged in Ontario were either readmitted to hospital or seen in an emergency department within 30 days of discharge. 26 per cent of Ontarians hospitalized for mental illness had multiple admissions during one year: Auditor General, 2008, note 89, 179.
- ²⁸² Auditor General, 2008, note 89, 179. These conclusions by the Auditor General were echoed by the Legislative Assembly of Ontario, Standing Committee on Public Accounts which held its own review in response to the Auditor General's report: Ontario, Legislative Assembly, "Community Mental Health" in *Hansard*, note 126, No 37A (31 May 2010), 1773. Online: http://www.ontla.on.ca/web/house-proceedings/house_current.do. The Committee heard evidence that "the Ontario health care system tends to perform poorly when faced with transitions from one provider to another". For example, persons with mental health disabilities being released from shelters or group homes often become the responsibility of emergency workers such as police officers and emergency room departments.
- ²⁸³ Ontario, Legislative Assembly, Standing Committee on Public Accounts, "Consideration of section 3.06, Community Mental Health" in *Hansard*, note 126, No P-13 (18 February 2009), P-215. Online: http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/18-FEB-2009_P013.htm.

- ²⁸⁴ Teams are made up of 9-12 professionals including a psychiatrist, registered nurses, a program assistant, a team coordinator, a social worker, peer specialist, occupational therapist, substance abuse specialist, vocational specialist and others. ACTs tend to have a roster of 80 to 100 clients and members of the team are mobile, able to assist their clients within the community. As of 2008, there were 79 ACT teams in Ontario. See Auditor General, 2008, note 89, 191.
- ²⁸⁵ Ontario Ministry of Health and Long-Term Care, *Ontario Program Standards for Assertive Community Treatment (ACT) Teams*, 2nd ed, (January 2005), 31. Online: http://www.health.gov.on.ca/english/public/pub/ministry_reports/mentalhealth/act_standards.pdf [Ministry of Health, *ACT Program Standards*]. In particular, they must provide competent services in the client's preferred language at no cost to each client with limited English proficiency: Ministry of Health, *ACT Program Standards*, 32.
- ²⁸⁶ Ontario Ministry of Health and Long-Term Care, *Intensive Case Management Service Standards for Mental Health Services and Supports* (May 2005), 2, 6. Online: http://www.health.gov.on.ca/english/public/pub/ministry_reports/mentalhealth/intens_cm.pdf.
- ²⁸⁷ Human Services and Justice Coordinating Committee Ontario (HSJCC), *Police & Mental Health: A Critical Review of Joint Police/Mental Health Collaborations in Ontario* (January 2011), 7. Online: http://www.hscc.on.ca/Uploads/PHSJCC_Police-MH_Final_Report_January_31_2011.pdf.
- ²⁸⁸ Ontario Ministry of Health and Long-Term Care, *Crisis Response Service Standards for Mental Health Services and Supports* (May 2005), 6-11. Online: http://www.health.gov.on.ca/english/public/pub/ministry_reports/mentalhealth/cris_resp.pdf.
- ²⁸⁹ *Mental Health Act*, RSO 1990, c M-7, ss 33.1-33.8. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m07_e.htm [MHA].
- ²⁹⁰ MHA, note 289, s 39.1(1).
- ²⁹¹ Letter from Vahe Kehyayan, Psychiatric Patient's Advocate Office, to Anne Bowlby, Manager, Mental Health and Addictions, Ministry of Health and Long-Term Care (22 February 2011). The PPAO raised concerns that Community Treatment Plans may include terms which are "based on stigmatizing notions of mental illness. Examples are conditions such as 'you must maintain [specific] hygiene practices', 'you may not have visitors without prior landlord approval', 'you may not take public transit or go to the shopping mall' etc."
- ²⁹² CTO restrictions are especially invidious since community living is typically more independent than being in hospital. In this sense, CTOs have been described as "therapeutic stalking": N Snow & W J Austin, "Community treatment orders: the ethical balancing act in community mental health" (February 2009) 16:2 *Journal of Psychiatric and Mental Health Nursing* 177, 181. Online: <http://onlinelibrary.wiley.com/doi/10.1111/j.1365-2850.2008.01363.x/pdf>.
- ²⁹³ Mfoafo-M'Carthy, note 258.
- ²⁹⁴ Mfoafo-M'Carthy, note 258, 97-103.
- ²⁹⁵ Mfoafo-M'Carthy, note 258, 104-110.
- ²⁹⁶ Mfoafo-M'Carthy, note 258, 111-114.
- ²⁹⁷ Dreezer & Dreezer Inc, *Report on the Legislated Review on Community Treatment Orders, Required Under Section 33.9 of the Mental Health Act* (Ministry of Health and Long-Term Care, December 2005). Online: <http://www.health.gov.on.ca/en/common/ministry/publications/reports/dreezer/dreezer.pdf>.
- ²⁹⁸ RA Malatest & Associates Ltd, *The Legislated Review of Community Treatment Orders: Final Report* (Ministry of Health and Long-Term Care, 23 May 2012). Online: http://www.health.gov.on.ca/en/public/programs/hepatitis/docs/cto_review_report.pdf.
- ²⁹⁹ Paré, note 89, 61.
- ³⁰⁰ *In Unison* (2000), note 7, 10.
- ³⁰¹ F Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" (2008) 30 *Human Rights Quarterly* 494, 509.
- ³⁰² See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3. Online: <http://scc.lexum.org/en/1999/1999scr3-3/1999scr3-3.html> [Meiorin]; and *BC Council of Human Rights*, note 56.
- ³⁰³ AODA, note 61.
- ³⁰⁴ AODA, note 61, s 2.
- ³⁰⁵ Gary Malkowski, Audism Workshop, Canadian Hearing Society and Toronto Association of the Deaf (3 June 2010).
- ³⁰⁶ In *Eaton*, note 56, the Council of Canadians with Disabilities (CCD), the Canadian Association for Community Living (CACL), People First, and the Confédération des Organismes de Personnes Handicapées du Québec (COPHAN) advocated for a presumption towards integration in the educational setting for students with disabilities: see Sarah Armstrong, "Disability Advocacy in the Charter Era" (2003) 2 *J L & Equality* 33 para 53 [Armstrong].
- ³⁰⁷ Perreault, note 228, 8.
- ³⁰⁸ Perreault, note 228, 8-9.
- ³⁰⁹ Perreault, note 228, 11.
- ³¹⁰ DAWN – RAHF Canada, *Response to the Law as It Affects Older Adults Consultation Paper* (Toronto: Law Commission of Ontario: 7 July 2008), 1 [DAWN Submission].
- ³¹¹ Perreault, note 228, 10.
- ³¹² See Ontario Ministry of the Attorney General, *2011-2012 ODA Accessibility Plan* (2011). Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/>.

- ³¹³ Carys Mills, "Ontario to Review How Police Respond to the Mentally Ill" *The Globe and Mail* (2 May 2012). Online: The Globe and Mail <http://www.theglobeandmail.com/news/toronto/ontario-to-review-how-police-respond-to-the-mentally-ill/article2420940/>.
- ³¹⁴ Evans & Bassili, note 116.
- ³¹⁵ Joffe, note 106, 31. The author notes that stakeholders have described situations where persons with disabilities who made complaints were reprimanded or harmed by their support worker, or were the subject of threats, for instance to cut off ODSP benefits.
- ³¹⁶ Perreault, note 228, 13.
- ³¹⁷ CRPD, note 4, arts 14, 15, 16, 25, 28.
- ³¹⁸ CRPD, note 4, preamble: "Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation".
- ³¹⁹ Perreault, note 228, 8.
- ³²⁰ Perreault, note 228, 11. Also see *DAWN Submission*, note 310, 1.
- ³²¹ CRPD, note 4, preamble.
- ³²² *In Unison* (1998), note 7.
- ³²³ The term "Aboriginal" is used here to refer to First Nations, Metis and Inuit people, while the term "First Nations" is used to refer to those who are considered Status or Non-Status Indians as provided for under the *Indian Act*. A helpful guide to terminology is provided by Aboriginal Affairs and Northern Development Canada, *Words First: An Evolving Terminology Relating to Aboriginal Peoples in Canada* (October 2002). Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014642>. Some of the studies and research relied on for this Case Example deal specifically with First Nations people, while others look at Aboriginal people more generally.
- ³²⁴ Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (Ottawa: Minister of Industry, 2008), 14. Online: <http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/index-eng.cfm> [*Aboriginal Peoples in Canada in 2006*]. It is important to highlight that the numbers in the Aboriginal Peoples Census 2006 may not include all people identifying as Aboriginal within urban areas. For First Nations people with status under the *Indian Act*, for example, the Census may significantly undercount status Indians for several reasons, including: many First Nations refuse to participate in the Census; status Indians outside of Canada are not included; and those with status who are homeless or living in institutions may not be counted. Therefore, the numbers of Aboriginal people, both within Ontario and throughout Canada, are likely to far exceed the figures set out in the Aboriginal Peoples Census 2006.
- ³²⁵ Statistics Canada, *Projections of the Aboriginal populations, Canada, provinces and territories 2001 to 2017* (Ottawa: Minister of Industry, 2005), 9. Online: http://www5.statcan.gc.ca/access_acces/archive.action?loc=/pub/91-547-x/91-547-x2005001-eng.pdf.
- ³²⁶ Susan Judith Ship & Reagan Tarbell, "Our Nations Elders Speak, Ageing and Cultural Diversity: A Cross-Cultural Approach" (1997), 7:4 *In Touch* 1. Online: [http://www.niichro.com/2004/pdf/INTouch/in-touch-vol-07-\(04\).pdf](http://www.niichro.com/2004/pdf/INTouch/in-touch-vol-07-(04).pdf) [Ship & Tarbell].
- ³²⁷ RHS, note 82, 54.
- ³²⁸ RHS, note 82, 56.
- ³²⁹ Claudette Dumont-Smith, "Aboriginal Elder Abuse in Canada" (2002), 6. Online: Aboriginal Healing Foundation http://www.ahf.ca/downloads/ahfresearchelderabuse_eng.pdf [Dumont-Smith].
- ³³⁰ Health Canada, *An Assessment of Continuing Care Requirements*, cat no H34-172/1-2007E, ISBN 978-0-662-45736-7 (Ottawa: Health Canada, 2008), 18. Online: http://www.hc-sc.gc.ca/fniah-spnia/pubs/services/_home-domicile/2008_assess-eval-exam/index-eng.php [Health Canada, *Continuing Care*], citing E E Chapleski, J Sobeck, & C Fisher, "Long-term care preferences and attitudes among Great Lakes American Indian families: Cultural context matters" (2003) 4:2 *Case Management Journals* 94 [Chapleski et al].
- ³³¹ Health Canada, *Continuing Care*, note 330, 18, citing Chapleski et al, note 330.
- ³³² Nova Scotia Aboriginal Home Care Steering Committee, *Aboriginal Long Term Care in Nova Scotia* (Halifax: Nova Scotia Department of Health, 2010). Online: <http://www.gov.ns.ca/health/ccs/aboriginal/documents/Aboriginal-Long-Term-Care-in-Nova-Scotia.pdf>. The Report identified the following barriers: linguistic and cultural issues; fear of institutional care (reflecting the experience in residential schools and also fear that people would not visit them); lack of transportation; and economic considerations (the loss of the senior's pension as a contributor to the family's income, loss of the house or economic loss to the community at large).
- ³³³ For some discussion of these issues, see Charlotte Loppie Reading & Fred Wien, *Health Inequalities and Social Determinants of Aboriginal People's Health* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2009), 8. Online: http://www.nccah-ccnsa.ca/docs/social%20determinates/NCCAH-loppie-Wien_report.pdf [Loppie Reading & Wien]; Martin Turcotte & Grant Schellenberg, *A Portrait of Seniors in Canada, 2006* (Ottawa: Statistics Canada, Social and Aboriginal Statistics Division, 2007), 225. Online: <http://www.statcan.gc.ca/pub/89-519-x/89-519-x2006001-eng.pdf>; Heidi J Kuran, "Coming Full Circle: Towards Assisting the Frail and Elderly in Aboriginal Communities" (2002) 25 *In Touch* 9. Online: <http://www.niichro.com/2004/pdf/INTouch/in-touch-vol->

- 25.pdf [Kuran]; Assembly of First Nations, *Sustaining the Caregiving Cycle: A Report from the Assembly of First Nations to the Special Senate Committee on Aging* (May 2007), 12. Online: <http://64.26.129.156/misc/SCC.pdf> [AFN, *Caregiving Cycle*]; Jeff Reading & Brenda Elias, *An Examination of Residential Schools and Elder Health* (Ottawa: First Nations and Inuit Regional Health Survey National Steering Committee, 1999), 37. Online: http://uregina.ca/library/holdings/FN_regional_survey_ch2.pdf [Reading & Elias].
- ³³⁴ Kuran, note 333, 9.
- ³³⁵ AFN, *Caregiving Cycle*, note 333, 12. One third of First Nations adults in 2003 also reported living in a house with mould or mildew problems.
- ³³⁶ Kuran, note 333, 9.
- ³³⁷ Ship & Tarbell, note 326, 20.
- ³³⁸ Personal communication with Lorraine Land, Government of Nunavut Legal Counsel on 11 September 2009. In Loppie Reading & Wien, note 333, 15, citing Statistics Canada, *The Health of the Off-reserve Aboriginal Population* by Michael Tjepkema (Ottawa: Statistics Canada, 2002), 10. Online: <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=82-003-S20020016323>. Loppie Reading & Wien, note 333, indicate that in 2000-01 Aboriginal peoples had statistically significant lower access to physicians and dentists and higher access to nurses than non-aboriginal people. Further, they found that Aboriginal peoples had significantly higher unmet health care needs than non-aboriginal people.
- ³³⁹ Health Canada, *Continuing Care*, note 330, 17, citing L. Lemchuk-Favel & R Jock, "Aboriginal Health Systems in Canada: Nine Case Studies" (2004) 1 J Aboriginal Health 28.
- ³⁴⁰ Health Canada, *Continuing Care*, note 330, 17.
- ³⁴¹ Health Canada, *Continuing Care*, note 330, 18, citing Inuit Tapiriit Kanatami, *Background on Inuit Health: For Discussion at Health Sectoral Meeting* (Ottawa: Inuit Tapiriit Kanatami, 20 October 2004). Online: <http://web.archive.org/web/20061110075506/http://www.itk.ca/roundtable/sectoral-health-background.php>.
- ³⁴² Kuran, note 333, 23.
- ³⁴³ RHS National Team, *First Nations Regional Longitudinal Health Survey 2002/3: Report on First Nations Homecare* (Ottawa: Assembly of First Nations, 2006), 2. Online: First Nations Information Governance Centre http://www.rhs-ers.ca/sites/default/files/ENpdf/RHS_2002/rhs2002-03-report_on_first_nations_homecare.pdf.
- ³⁴⁴ For a description of this Committee see Health Canada, *Health Services Integration Fund (HSIF) Q & A* (January 2012), 2. Online: <http://www.gct3.net/wp-content/uploads/2012/01/FNIHB-OR-HSIF-Fact-sheet-Jan12-final.pdf>.
- ³⁴⁵ *Constitution Act, 1867*, s 91(24). Online: <http://laws-lois.justice.gc.ca/eng/Const/>.
- ³⁴⁶ Ontario, "Submission", note 346, 8.
- ³⁴⁷ Aboriginal Affairs and Northern Development Canada, *Assisted Living Program* (15 September 2010). Online: <http://www.aadnc-aandc.gc.ca/eng/1100100035250>; AFN, *Caregiving Cycle*, note 333, 15; Natalie N. Desimini, *Facility-Based Long-term Care in Canada: Examining the Potential for a Federal Role in Improving Quality and Consistency of Access* (Victoria, BC: School of Public Administration, University of Victoria), 8. Online: <http://dspace.library.uvic.ca:8080/handle/1828/3195?show=full> [Desimini].
- ³⁴⁸ For more information see the Aboriginal Healing and Wellness Strategy website: http://www.ahwsontario.ca/programs/prog_top.html.
- ³⁴⁹ AFN, *Caregiving Cycle*, note 333, 3. The AFN reports that only 0.5 per cent of First Nations communities have long-term care facilities.
- ³⁵⁰ Desimini, note 347, 16.
- ³⁵¹ Canadian Healthcare Association, *New Directions for Facility Based Long Term Care* (Ottawa: Canadian Healthcare Association 2009). Online: http://www.cha.ca/documents/CHA_LTC_9-22-09_eng.pdf.
- ³⁵² Health Quality Ontario, *Quality Monitor: 2011 Report on Ontario's Health System* (Toronto: Queen's Printer, 2011), 16 [Health Quality Ontario]. For individuals living in the community, this wait time was over 5 months and for individuals in hospital, it was just under 2 months. In 2010, it is estimated that there were over 25,000 individuals on the waiting list for a long-term care home.
- ³⁵³ Health Quality Ontario, note 352, 16.
- ³⁵⁴ It seems to be necessary to check each program to see in which languages information is available. Neither on the Ministry of Health nor the Ministry of Aboriginal Affairs is there a list of programs available in one or more Aboriginal languages.
- ³⁵⁵ Loppie Reading & Wien, note 333, 15.
- ³⁵⁶ Ship & Tarbell, note 326, 17.
- ³⁵⁷ RHS, note 82, 134. It is important to note that each Aboriginal student who attended residential school experienced it differently and some survivors do not view the residential school experience as a decidedly negative experience.
- ³⁵⁸ Vrtar-Huot suggests that Aboriginal older adults' minds and bodies are battered with the pain and stress of the past and the unresolved issues they have faced as a result of the residential school experience: Arlene Vrtar-Huot, "Residential Schools and their Historical Effects on the Elders of Today" (2004) 27 *In Touch* 1, 7. Online: http://www.niichro.com/inspired/ibe_3.html. Ontario's Aboriginal Healing and Wellness Strategy (AHWS) Joint Management Committee has recommended grief counseling services for Aboriginal older adults who are

- residential school survivors: Joint Management Committee, *Aboriginal Healing and Wellness Strategy: Phase III Longitudinal Study Final Report* (Toronto: AHWS, 2009) 106. Online: http://www.ahwsontario.ca/publications/AHWS_Longitudinal_Study2009.pdf.
- ³⁵⁹ Reading & Elias, note 333, 31.
- ³⁶⁰ Kathy Bent, *Literature Review: Aboriginal Senior Abuse in Canada*, A Document Prepared for the Native Women's Association of Canada (Ottawa: NWAC, 2009) 31; Ship & Tarbell, note 326, 4.
- ³⁶¹ Ship & Tarbell, note 326, 4.
- ³⁶² Ship & Tarbell, note 326, 20.
- ³⁶³ Loppie Reading & Wien, note 333, 19, citing *Aboriginal Peoples in Canada in 2006*, note 324, Table 23.
- ³⁶⁴ Reading & Elias, note 333, 37, citing Barbara W Yee, "Gender and family issues in minority groups" (1990) 14:3 *Generations* 39; Dumont-Smith, note 329, 10.
- ³⁶⁵ Métis Centre, National Aboriginal Health Organization (NAHO), *In the Words of Our Ancestors: Métis Health and Healing* (Ottawa: NAHO, 2008), 20. Online: http://www.naho.ca/documents/metiscentre/english/TK_IntheWordsofOurAncestorsMetisHealthandHealing.pdf; Health Canada, *Reaching Out: A Guide to Communicating with Aboriginal Seniors* (Ottawa: Minister of Public Works and Government Services, 1998) 32. Online: http://www.phac-aspc.gc.ca/seniors-aines/alt-formats/pdf/publications/public/various-variee/communicating_aboriginal/reachingout_e.pdf.
- ³⁶⁶ The Honourable Justice Frank Iacobucci, "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) SCLR (2d) 137, 158 [Iacobucci]; see also Nedelsky (1989), note 274, 10; and see also BJ Wray, "Balancing Conflicting Rights: Towards an Analytical Framework" (Toronto: Ontario Human Rights Commission, 2005), 17. Online: <http://www.ohrc.on.ca/en/balancing-conflicting-rights-towards-analytical-framework> [Wray].
- ³⁶⁷ See Iacobucci, note 366, 158. The Honourable Justice Frank Iacobucci argues that the first and potentially most important aspect of reconciling tensions between principles is sensitivity to context. See also Nedelsky (1993), note 275, 10; and see also Wray, note 366.
- ³⁶⁸ Ontario Human Rights Commission, *Policy on Competing Human Rights* (Toronto: Ontario Human Rights Commission, January 2012), 18-19. Online: <http://www.ohrc.on.ca/en/policy-competing-human-rights> [OHCR, *Competing Rights*].
- ³⁶⁹ For a variety of perspectives on these issues, see the compendium, Association for Canadian Studies (Summer 2010) 8 *Canadian Diversity: Balancing Competing Human Rights* 3.
- ³⁷⁰ Iacobucci, note 366, 167.
- ³⁷¹ Patricia Hughes, *Legal Frameworks: The Reconciliation Model, Balancing Competing Human Rights* (Ottawa: Ontario Human Rights Commission, 2010).
- ³⁷² OHCR, *Competing Rights*, note 368, 27-28, citing *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 para 31, [2001] 1 SCR 772. Online: <http://scc.lexum.org/en/2001/2001scc31/2001scc31.html>; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 877. Online: <http://scc.lexum.org/en/1994/1994scr3-835/1994scr3-835.html>; and *R v. NS*, 2010 ONCA 670 para 84. Online: <http://canlii.ca/t/2cx09>.
- ³⁷³ It has been noted that "Human rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice": L Foster & L Jacobs, "Shared Citizenship as the Context for Competing Human Rights Claims" (Summer 2010), 8 *Canadian Diversity: Balancing Competing Rights Claims* 3, 13.
- ³⁷⁴ M Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement" (2001) 23 *Human Rights Quarterly* 1062, 1062-1097.
- ³⁷⁵ See Law Commission of Ontario, *Final Report: The Law as It Affects Older Adults*, Ch. VI "Applying the Framework: The Law and Access to Home Care". Online: <http://www.lco-cdo.org/en/content/older-adults>. As is discussed later in this Chapter, older adults mostly use "home care" rather than attendant services, home care being agency-provided and directed services.
- ³⁷⁶ There may also be differences in service preferences and access between older persons who age **with** disabilities and those who age **into** disabilities. It is possible that those who age with disabilities may have preferences and service needs more like those of younger adults with disabilities, or that they have needs different from either younger adults with disabilities or those who have aged into disability. Very little information has been gathered about this group, which has generally been neglected in public policy. Due to the lack of information, the LCO has not provided an analysis for this group, but recognizes that it would be important in any comprehensive examination of these issues to conduct research on and carry out consultations with this group.
- ³⁷⁷ An interesting article by Phillip G. Clark explores the differences between the "narrative frames" of the aging and disability perspectives on home care, but also suggests some potential areas of convergence, such as models of consumer empowerment, a focus on an ethic of interdependence, and an emerging interest in an "ethic of care" approach: Phillip G Clark, "Understanding Aging and Disability Perspectives on Home Care: Uncovering Facts and

- Values in Public-Policy Narratives and Discourse" (2007) 26:supp1 Canadian Journal on Aging 47.
- ³⁷⁸ *Home Care and Community Services Act, 1994*, SO 1994, c 26. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_94l26_e.htm [HCCSA].
- ³⁷⁹ *Ministry of Community and Social Services Act, RSO 1990, c M-20*. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m20_e.htm [MCSSA].
- ³⁸⁰ *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, SO 2008, c 14*. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_08s14_e.htm, Part v. "Access to Services and Supports and Funding" [Social Inclusion Act]; *Quality Assurance Measures*, O Reg 299/10. Online: http://www.e-laws.gov.on.ca/html/source/regs/english/2010/elaws_src_regs_r10299_e.htm [O Reg 299/10].
- ³⁸¹ Malcolm Anderson et al, *Analyses of Interfaces Along the Continuum of Care, Technical Report 3: Adults with Physical Disabilities* (Ottawa: Health Canada, Health Policy and Communications Branch, February 2002), 10 [emphasis in original]. Online: <http://www.teamgrant.ca/M-THAC%20Greatest%20Hits/Bonus%20Tracks/Third%20Way/continuum-tech-3.pdf> [Continuum: Physical Disabilities].
- ³⁸² Auditor General, 2010, note 166.
- ³⁸³ Ontario Community Support Association, Attendant Services Advisory Committee, *Unleashing Attendant Services: Enhancing People's Potential, Reducing Wait Times in Acute and Long-Term Health Care* (Toronto: Ontario Community Support Association: July 2008), 7. Online: <http://www.ocsa.on.ca/userfiles/OCSA%20Attendant%20Services%20Report%20Aug%2011-08.pdf> [Unleashing Attendant Services].
- ³⁸⁴ For a fuller discussion of the community care needs of older persons who are frail or have disabilities, see the LCO's *Final Report: The Law as it Affects Older Persons*, Ch. VI, which provides an in-depth discussion of those issues. See online: <http://www.lco-cdo.org/en/content/older-adults>.
- ³⁸⁵ Health Charities Coalition of Canada, *Position Statement on Access to Home Care* (Revised for approval 22 September 2011), 7. Online: <http://www.healthcharities.ca/resources/position-statements.aspx>.
- ³⁸⁶ This term is used by Hollander in Marcus J Hollander, *Analysis of Interfaces Along the Continuum of Care, Technical Report 1: Literature Review* (Health Canada, Health Policy and Communications Branch: February 2002), 38. Online: <http://www.teamgrant.ca/M-THAC%20Greatest%20Hits/Bonus%20Tracks/Third%20Way/continuum-tech-1.pdf>. [Continuum: Literature Review]
- ³⁸⁷ *Continuum: Literature Review*, note 386, 38.
- ³⁸⁸ *Unleashing Attendant Services*, note 383, 9.
- ³⁸⁹ "Attendant Services FAQs" Project Information Centre Application for Attendant Services in Toronto (March 2012). Online: Centre for Independent Living http://www.cilt.ca/pic_questions.aspx.
- ³⁹⁰ An analysis of the results of the PALS 2001 data was provided by Canadian Council on Social Development, *Disability Information Sheet No 17 – Supports and Services for Persons with Disabilities in Canada: Requirements and Gaps* (Ottawa: Canadian Council on Social Development, 2005). Online: <http://www.ccsd.ca/drip/research/index.html>.
- ³⁹¹ *Unleashing Attendant Services*, note 383, 4-5.
- ³⁹² *Unleashing Attendant Services*, note 383, 10-11.
- ³⁹³ *Grants for Persons with Disabilities*, O Reg 367/94, online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_940367_e.htm [O Reg 367/94].
- ³⁹⁴ O Reg 367/94, note 393.
- ³⁹⁵ *Social Inclusion Act*, note 380, Part V, "Access to Services and Supports and Funding"; O Reg 299/10, note 380.
- ³⁹⁶ Canadian Home Care Association, *Portraits of Home Care in Canada* (Toronto: The Canadian Home Care Association, March 2008), 89 [Portraits (2008)].
- ³⁹⁷ *Portraits (2008)*, note 396, 90.
- ³⁹⁸ HCCSA, note 378, s 1.
- ³⁹⁹ HCCSA, note 378, ss 1(3) - 1(7).
- ⁴⁰⁰ For a description of these services, see the Ministry of Health website at: http://www.health.gov.on.ca/en/public/programs/ltc/13_housing.aspx.
- ⁴⁰¹ *Unleashing Attendant Services*, note 383, 6.
- ⁴⁰² HCCSA, note 378, s 3.
- ⁴⁰³ HCCSA, note 378, s 4.
- ⁴⁰⁴ HCCSA, note 378, ss 5-6.
- ⁴⁰⁵ *Local Health System Integration Act, 2006*, SO 2006, c 4. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06l04_e.htm.
- ⁴⁰⁶ Originally 42 in number, in 2006 the CCACs were consolidated into 14 organizations in order to align them with the LHINs. *Community Care Access Corporations Act, 2001*, SO 2001, c 33. Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_01c33_e.htm [CCACA]; *Community Care Access Corporations*, O Reg 554/06. Online: http://www.e-laws.gov.on.ca/html/source/regs/english/2006/elaws_src_regs_r06554_e.htm [emphasis in original].
- ⁴⁰⁷ For a discussion of the reform, its rationale and some of its effects, see Margaret Denton et al, "Managed Care, Its Impact on Job Satisfaction and Propensity to Leave in Home Care" (2007) 33:supp Canadian Public Policy S81 [Denton].
- ⁴⁰⁸ Auditor General, 2010, note 166, 114.
- ⁴⁰⁹ Auditor General, 2010, note 166, 119.
- ⁴¹⁰ Auditor General, 2010, note 166, 115. Competitive procurement processes, while intended to ensure that the

- best value is obtained from providers in terms of both services and costs, tend to disrupt continuity of care, and so is a major concern for users of services provided through the CCACs. The Auditor General recommended that a formal evaluation be undertaken of the expected cost savings from reinstating a competitive procurement process, keeping in mind the potential effects on those receiving services.
- ⁴¹¹ ARCH Disability Law Centre has provided a description of the processes for Attendant Services: ARCH Disability Law Centre, *Attendant Services Fact Sheets* (13 October 2011). Online: <http://www.archdisabilitylaw.ca/?q=attendant-services-fact-sheets> [*Attendant Services Fact Sheets*].
- ⁴¹² For information on PIC and the application process, see online: Centre for Independent Living Toronto <http://www.cilt.ca/overview.aspx>.
- ⁴¹³ HCCSA, note 378, s 2.
- ⁴¹⁴ HCCSA, note 378, s 23.
- ⁴¹⁵ HCCSA, note 378, s 31.
- ⁴¹⁶ HCCSA, note 378, s 25.
- ⁴¹⁷ HCCSA, note 378, ss 26-27.
- ⁴¹⁸ HCCSA, note 378, ss 33-36.
- ⁴¹⁹ HCCSA, note 378, s 5(1)(ii).
- ⁴²⁰ HCCSA, note 378, s 27.
- ⁴²¹ HCCSA, note 378, s s 68(26).
- ⁴²² HCCSA, note 378, s s 23(1).
- ⁴²³ Ontario Association of Community Care Access Centres, *Submission to the Standing Committee on Finance and Economic Affairs* (1 February 2011), 3. Online: <http://www.ccac-ont.ca/Upload/on/General/OACCAC%20Pre-budget%20Submission%20%20February%202011.pdf>.
- ⁴²⁴ Auditor General, 2010, note 166, 124.
- ⁴²⁵ Auditor General, 2010, note 166, 124.
- ⁴²⁶ HCCSA, note 378, ss 61-62.
- ⁴²⁷ HCCSA, note 378, ss 50-52.
- ⁴²⁸ HCCSA, note 378, s 53.
- ⁴²⁹ CCACA, note 406, s 3.
- ⁴³⁰ CCACA, note 406, s 11.
- ⁴³¹ CCACA, note 406, s 14.
- ⁴³² Ontario Ministry of Health and Long Term Care, News Release, 2008/nr-120, "Ontario Strengthens Home Care Services" (15 December 2008). Online: http://www.health.gov.on.ca/en/news/release/2008/dec/nr_20081215_2.aspx.
- ⁴³³ Auditor General, 2010, note 166, 125.
- ⁴³⁴ HCCSA, note 378, s 3(8).
- ⁴³⁵ "About Us: Complaints, Appeals & Feedback," online: Community Care Access Centre - Toronto Central <http://www.ccac-ont.ca/Content.aspx?EnterpriseID=7&LanguageID=1&MenuID=8> [CCAC-TC, "Feedback"].
- ⁴³⁶ HCCSA, note 378, s 3(3).
- ⁴³⁷ Spencer, note 108.
- ⁴³⁸ HCCSA, note 378, s 39.
- ⁴³⁹ CCAC-TC, "Feedback", note 435.
- ⁴⁴⁰ CCAC-TC, "Feedback", note 435.
- ⁴⁴¹ HCCSA, note 378, ss 40-48.
- ⁴⁴² MCSSA, note 379, s 11.
- ⁴⁴³ Centre for Independent Living in Toronto, *Final Evaluation Report: Self-Managed Attendant Services in Ontario, Direct Funding Pilot Project* (Centre for Independent Living in Toronto: March 1997), i-ii [CILT, *Attendant Services Final Evaluation Report*].
- ⁴⁴⁴ Centre for Independent Living Toronto, *Direct Funding Application Guide*, 5th ed (Toronto: Centre for Independent Living Toronto: August 2001). Online: http://cilt.operitel.net/Documents%20of%20the%20CILT%20Website/direct_funding_guide.pdf.
- ⁴⁴⁵ *Klemm v Centre for Independent Living in Toronto*, 2005 LTC 7211 (HSARB), *aff'd* (2007) 228 OAC 98 (Div Crt). See also *Attendant Services Fact Sheets*, note 411, 6: "The jurisdiction of HSARB to hear these appeals is unclear. An HSARB decision of 2005 ... found that HSARB had jurisdiction to hear such appeals, however, HSARB is currently deciding on a case by case basis whether they have jurisdiction to hear appeals related to Direct Funding."
- ⁴⁴⁶ *Social Inclusion Act*, note 380.
- ⁴⁴⁷ Joffe, note 106, 5.
- ⁴⁴⁸ *Social Inclusion Act*, note 380, s 4.
- ⁴⁴⁹ *Social Inclusion Act*, note 380, s 9.
- ⁴⁵⁰ *Social Inclusion Act*, note 380, s 13(2).
- ⁴⁵¹ *Social Inclusion Act*, note 380, ss 18-21.
- ⁴⁵² *Social Inclusion Act*, note 380, s 23.
- ⁴⁵³ O Reg 299/10, note 380. The *Regulation* sets out specific standards for various types of services, such as behavioral intervention strategies, residential services and supports and application entities. It also includes several general requirements; for example, every service agency shall address quality assurance measures for the promotion of social inclusion, individual choice, independence and rights, abuse prevention and reporting, safety and security and others (s 3).
- ⁴⁵⁴ *Social Inclusion Act*, note 380, s 30.
- ⁴⁵⁵ *Social Inclusion Act*, note 380, s 31.
- ⁴⁵⁶ See Joffe, note 106.
- ⁴⁵⁷ Recent reports emphasize the strains under which many informal caregivers live: see, for example, OHCR, *Cost of Caring*, note 138; The Change Foundation, *Because This Is the Rainy Day: A Discussion Paper on Home Care And Informal Caregiving for Seniors with Chronic Health* (Toronto: The Change Foundation, February 2011). Online: <http://www.changefoundation.ca/library/because-this-is-the-rainy-day/>. This was also a key preoccupation of the Focus Group that the LCO held with informal caregivers in 2011.

- ⁴⁵⁸ *Continuum: Physical Disabilities*, note 381, 32.
- ⁴⁵⁹ CILT, *Attendant Services Final Evaluation Report*, note 443, 36-48.
- ⁴⁶⁰ Auditor General, 2010, note 166, 115.
- ⁴⁶¹ *Unleashing Attendant Services*, note 383, 7.
- ⁴⁶² Denton, note 407; see also *Continuum: Physical Disabilities*, note 381, 32.
- ⁴⁶³ Joffe, note 106. The key features of a human rights-based approach are found in section III.C of that paper, and a detailed description of the proposed elements of an effective enforcement system in Part V.
- ⁴⁶⁴ Jane Aronson, "Silenced Complaints, Suppressed Expectations: The Cumulative Impacts of Home Care Rationing" (2006) 36 *International Journal of Health Services* 535 [Aronson].
- ⁴⁶⁵ Aronson, note 464, 546.
- ⁴⁶⁶ Aronson, note 464, 545.
- ⁴⁶⁷ CILT, *Attendant Services Final Evaluation Report*, note 443, 36.

Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3

Tel: (416) 650-8406
Toll Free: 1 (866) 950-8406
TTY: 1 (877) 650-8082
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org
Website: www.lco-cdo.org



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO