



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

Background Paper

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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. It is officially located at Osgoode Hall Law School, although currently situated at York University during Osgoode's renovation. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario.

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 study areas that are underserved by other research. The LCO 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
276 York Lanes, York University
4700 Keele Street
Toronto, Ontario, Canada
M3J 1P3

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

I. The LCO's Project on the Law as it Affects Persons with Disabilities

A. *Project Description*

Soon after its inception, the LCO received project proposals identifying complex issues related to the law as it affects persons with disabilities. Based on these proposals and the LCO's internal research, the Board of Governors approved a multi-year project to develop a coherent framework for the law as it affects persons with disabilities.

The purpose of this project is not to recommend specific reforms to particular laws affecting persons with disabilities, although certainly law reform may be needed in many areas. Rather, the purpose of the project is to articulate a set of principles and considerations that may form the basis of a coherent analytical framework for this large, diverse and complex area of the law. The end result of this project will be a document that provides a basis for evaluating current laws and policies, and developing new ones that respect the rights and circumstances of persons with disabilities.

The LCO recognizes that this is a challenging endeavour. The disability community is diverse in its needs, perspectives and circumstances. The laws in question span the range of individual experience, including housing, education, employment, income supports, decision-making, accommodations and benefits, and many more. The issues at stake are difficult and complex. However, the LCO believes that such a tool will be a valuable contribution to the law as it affects persons with disabilities, and will provide a basis for important discussions that will no doubt continue to evolve.

The LCO's project on the law as it affects persons with disabilities is a sister project to its similar project on the law as it affects older persons. In some areas, the issues raised by the two projects will overlap, and in others they will significantly diverge. In either case, the completion of the two projects in tandem allows each to shed light on the other.

B. *The Process*

Given the complexity and diversity of the issues raised by this project, in addition to its own research, the LCO will be consulting widely and drawing on the knowledge, experience and perspectives of persons with disabilities, advocates, service providers, government officials and experts.

The process commenced in the spring of 2009 with a Preliminary Consultation Paper on Approaches to Defining Disability. The intent of that Paper was to assist the LCO in scoping approaches to the project. The Paper was widely disseminated, and the LCO received substantive comments and submissions from organizations, individuals and experts. During the summer of 2009, the LCO also conducted a series of preliminary interviews with organizations serving, representing or advocating for persons with disabilities, in order to identify key issues and perspectives from a variety of viewpoints.

In early January 2010, the LCO will be issuing a Call for Papers and will be funding a series of expert papers on topics related to the law as it affects persons with disabilities. This will be followed in the spring of 2010 by in-person consultations across the province.

There will be further events and consultations in the fall, leading up to the release of an Interim Report in the early months of 2011. The public will have an opportunity to comment on the Interim Report before the development of a Final Report.

C. The Purpose of this Paper

This Paper is based on the preliminary research of the LCO, as well as its initial stakeholder interviews, and the responses received to the Preliminary Consultation Paper.

This Paper has been developed to provide context for the LCO's Call for Papers. Therefore, the purpose of this Paper is not to provide an exhaustive discussion of any of the many issues raised by this Project. Rather, it outlines the scope of the Project, the approach that the LCO is taking at this point, and the issues that have been identified thus far.

II. Persons with Disabilities – Definitions and Diversity

A. Conceptual Approaches and Definitions

As noted above, in the late spring of 2009, the LCO released a Preliminary Consultation Paper on Approaches to Defining Disability. The Paper discussed, at some length, the various conceptual approaches to disability and their relationship to the current framework of disability law in Ontario, and raised a number of questions related to the approach to defining disability in the context of the law.

The LCO is grateful to all those who provided comments and submissions on this Paper. The issues raised are complex, and will be explored throughout this

Project. However, as a starting point, it is clear that conceptions of disability are complex, contested and evolving. The Human Rights Tribunal of Ontario pointed out the challenges inherent where statutes embody divergent approaches to disability, and a statute that has barrier removal as its core mandate (the *Human Rights Code*) is used to challenge statutes, such as the *Building Code*, the *Ontario Disability Support Program Act* or the *Education Act*, that take a narrower approach to the concept of disability.¹

No one approach or definition can fully capture all facets of the experience of disability, or appropriately address all circumstances where notions of disability are in play. It was suggested to the LCO that, rather than focusing on the appropriate model of disability, applying principles could be far more useful than any particular model of disability in actually formulating the law.² The LCO will make use of a variety of approaches or models of disability in understanding the impact of the law on persons with disabilities, and will consider how various models and definitions of disabilities may serve particular policy goals for the law, as those policy goals are formulated through identified principles.

ARCH notes that definitions of disability often stem from a paternalistic view of persons with disabilities, that distinguishes them as different from the “norm” and therefore in some way defective. ARCH emphasized the importance of having persons with disabilities themselves shape definitions of disability:

One step in achieving greater equality for persons with disabilities is to ensure that definitions of disability are formulated by them. Once persons with disabilities are able to influence or control the definitions and meanings attached to disability, it will be possible to challenge many of the old assumptions that continue to influence legislation and law reform. The key is to create a framework that people with disabilities feel represents their own lived experience, the meaning of disability in their own lives, and the impact of disability upon their lives, rather than having definitions thrust upon them.³

B. Diversity in the Experience of Disability

While persons with disabilities may have common experiences of exclusion or marginalization, the disability community is far from being a homogenous group.

To begin with, 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*, “All people with disabilities have common experiences of exclusion, but each type of disability may give rise to unique needs.”⁴ 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 psychiatric, intellectual or developmental disabilities face particularly heavy stigma.⁵ Others may, for example, face barriers in transportation or educational systems that make participation in society very difficult, despite relatively mild levels of impairment.

The same level of impairment may give rise to quite different experiences depending on when it is experienced, and the surrounding social environment. The experience of a person who was born with a hearing impairment, who is culturally Deaf, and who uses Sign Language as a first language will be quite different from a person who has acquired a similar level of hearing impairment at an advanced age, who does not know Sign Language, and is not part of a deaf community.

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. Aboriginal persons with disabilities may have difficulty finding accessible support services that are sensitive to their culture and history. A man who is Black, as well as having a disability will have compounded difficulties in seeking employment, as he will face a double set of barriers, based both on his colour and his disability.

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; whether the individual has a supportive surrounding family and community; his or her socio-economic status; and other factors.

III. Identifying Principles for the Law as it Affects Persons with Disabilities

There has been considerable work done over the past forty years to formulate the principles upon which any approach to the rights of persons with disabilities should be based. While there are areas of debate and divergence regarding these principles, there is considerable agreement in many areas, and the difficulty lies not so much in identifying the principles that should underlie the law as it relates to persons with disabilities, as in clarifying their application and implementation.

A. Sources of Principles

1. The Charter and the Human Rights Code

The rights of persons with disabilities are protected in Canada under the Canadian *Charter of Rights and Freedoms* and under the various provincial

human rights statutes. In Ontario, the applicable statute is the *Human Rights Code*.

Section 15 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 mental or physical disability. Section 15(2) of the *Charter* shields laws, programs and activities that aim to ameliorate the conditions of disadvantaged groups or individuals, including those with physical or mental disabilities.

The Ontario *Human Rights Code* prohibits discrimination on the basis of disability in the provision of services, goods and facilities; employment; housing accommodation; contracts; and membership in professional associations and unions. The Preamble of the *Code* roots its provisions in the recognition of the inherent dignity, worth and equal rights of all; the creation of a climate of mutual respect and understanding; and the ability of all to contribute and to participate in the community.⁶

The disability-related caselaw arising under the *Charter* and human rights laws is rich and complex. Fundamental principles emerging from that caselaw include:

1. An equality analysis that focuses on recognition of the inherent dignity and worth of persons with disabilities.⁷
2. The recognition that laws and policies may reflect stigmas and negative assumptions related to particular disabilities.⁸
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.⁹
4. The necessity of broadening the “mainstream” structures of society to include and respect the differences associated with disability.¹⁰
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.¹¹ Equal access includes consideration of the independence, comfort, dignity, safety and security of persons with disabilities.¹²
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.¹³

In discussing principles for the law as it affects persons with disabilities, it is helpful to consider the Ontario Human Rights Commission’s *Policy and Guidelines on Disability and the Duty to Accommodate*, which outlines three principles for consideration in providing equal treatment without discrimination for persons with disabilities:¹⁴

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.

2. Policy Documents

Canadian governments have developed a number of policy documents related to disability.¹⁵ Most importantly in terms of developing a set of guiding principles for law and policy, in 1998 the federal, provincial and territorial ministers responsible for social development released *In Unison: A Canadian Approach to Disability Issues*, describing their vision and long-term policy directions for promoting the full inclusion of persons with disabilities in Canadian society. *In Unison* identified a vision 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 the 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.¹⁶

This vision is based on the values of equality, inclusion and independence.

3. The United Nations' Convention on the Rights of Persons with Disabilities

The *Convention on the Rights of Persons with Disabilities* is the response of the international community to the ongoing marginalization and disadvantage of persons with disabilities. It was negotiated over a period of three years, with the participation of civil society, Governments, national human rights institutions and international organizations. The aim of the *Convention* is to protect the fundamental human rights of persons with disabilities and to promote their ability to participate in the opportunities offered to persons without disabilities.

The *Convention* 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; to live in the

community; to privacy; to expression of opinion; to education, health and work; to an adequate standard of living; and to participate in political, public and cultural life.

The *Convention* 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.

C. Initial Principles for the Project

Based on the above, the LCO has adopted the following six principles for this project, on a preliminary basis:

1. Respect for the dignity and worth of persons with disabilities,
2. Autonomy and independence,
3. Inclusion and participation, and accommodation,
4. Equality and non-discrimination,
5. Recognition that humans vary infinitely along a spectrum of abilities and that society must accommodate these variances into its mainstream, and
6. Respect for the diversity among persons with disabilities and in the experience of particular disabilities.

The meaning and application of these principles will be developed through the course of this Project. This includes consideration of approaches to situations where principles are in tension with each other, as well as consideration of how each of the principles support and enrich the others.

IV. Ableism, the Law, and Barriers to Equality for Persons with Disabilities

A. Ableism and Stigma

A recent 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 wasn’t considered “normal”.¹⁷ 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.¹⁸ Because attitudes and stereotypes may take different forms with different disabilities, ableism may manifest differently with respect to different types of disabilities, such as psychiatric, sensory or developmental 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.¹⁹

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.²⁰

B. Ignoring Difference and 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.²¹

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 of 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.²²

B. Social and Economic Marginalization

While many people with disabilities have high levels of education, and are fully employed and participating in their communities, persons with disabilities tend to face disproportionate levels of unemployment and low-income, and to face the extra challenges in terms of well-being and participation that are associated with unemployment and low-income.²³ Persons with disabilities therefore continue to experience social and economic marginalization and its consequences.

Low employment and low income has some roots in the barriers experienced early on by persons who are born with disabilities or develop them early in life. Barriers, both attitudinal and systemic, may reduce the opportunities of children with disabilities to receive an adequate education.²⁴ As well, the lack of supports for those who live with and provide care for children with disabilities mean that the families of children with disabilities are disproportionately low-income.²⁵ This early disadvantage has consequences throughout life. However, persons with

disabilities tend to face lower levels of employment and higher levels of low-income even when compared to persons with a similar level of education and training, pointing to barriers in the labour market.

This social and economic marginalization has many consequences. Persons with disabilities experience lower levels of personal security, and are more vulnerable to violence and exploitation. They are, for example, significantly more likely to be victims of violent crime and domestic violence. Some have traced the vulnerability of persons with disabilities to violence and abuse to the persistent devaluation of persons with disabilities, and social systems that place them in disempowered relationships.²⁶

Low income itself can form an additional barrier for persons with disabilities to participation and inclusion in society. Poverty creates barriers to adequate housing, to mechanisms for access to justice, and to civic and communal participation and engagement. For example, the OBA notes that:

Even where Courts and Tribunals are technically accessible to persons with disabilities, poverty remains a serious barrier to access to justice. The threat of cost awards, finding affordable representation, and locating counsel who have the experience, ability or even willingness to take the extra time required to represent a person with a disability, particularly a cognitive or mental health disability, all place limitations on the ability of persons with disabilities to defend their rights.²⁷

V. The Law and Persons with Disabilities

A. Overview

Ontario has a very wide array of laws that affect persons with disabilities. Some have disability-related issues as a central concern, while others deal with disability only tangentially. These laws touch on a broad range of issues, including transportation, education, employment accommodation, income-support and security, assistive devices and the administration of justice. It may be helpful to consider the law as it affects persons with disabilities in the following four general categories.

Laws of General Application: Many laws that do not deal explicitly with disability nevertheless have a significant and disparate impact on persons with disabilities. Laws that ignore the existence of persons of disabilities, and thereby fail to take into account the experiences and circumstances of persons with disabilities, may create barriers. For example, laws that require members of the public to provide information and complete forms to access programs and benefits and do not take into account the needs of persons with communications or intellectual disabilities may unintentionally create barriers to access.

Laws Promoting Equality and Barrier Removal: There are a number of laws that are explicitly aimed, in whole or in part, at removing barriers to equality for persons with disabilities. Section 15 of the *Charter* has played a central role in advancing the rights of Canadians with disabilities. Ontario's *Human Rights Code* provides important anti-discrimination protections. As well, the Ontario Human Rights Commission has employed the broad powers given it under section 29 of the *Code* to address systemic issues affecting persons with disabilities through initiatives related to education for persons with disabilities, transit accessibility, accessibility standards for services, and police record checks, and by developing policies and guidelines.

Ontario's newest and most innovative approach to removing barriers for persons with disabilities is the *Accessibility for Ontarians with Disabilities Act* (AODA).²⁸ The AODA applies to both the public and private sectors, while a sister statute, the *Ontarians with Disabilities Act*,²⁹ is also aimed at barrier removal, but is more limited in its scope. The AODA sets out a process for developing accessibility standards and for ensuring the removal of physical, attitudinal, informational, technological or communications barriers for persons with disabilities. The aim of the AODA is to achieve full accessibility by 2025. Standards have been developed for customer services, and will be developed in the further four areas of employment, communications and information, transportation, and the built environment.

Laws Providing Supports, Accommodations and Benefits to Persons with Disabilities: There are numerous Ontario laws that recognize the unique circumstances of persons with disabilities and provide special supports, benefits and accommodations either to all qualifying persons with disabilities, or to particular groups of persons with disabilities. These laws include those creating the Ontario Disability Support Program, the special education provisions under the *Education Act* and accompanying regulations, services and supports targeted to children with disabilities, and the provision for disabled parking permits under the *Highway Traffic Act*.

Laws Restricting the Activities and Participation of Persons with Disabilities: Laws relating to legal capacity or competency may restrict the activities of persons with psychiatric, intellectual, developmental or cognitive disabilities. The *Health Care Consent Act* and the *Substitute Decisions Act*, for example, set out procedures for decision-making related to health, property or personal care decisions where a person is determined to be lacking in legal capacity.

B. Some Key Themes and Issues

Based on the LCO's preliminary consultations and initial research, some themes and issues have begun to emerge regarding the current framework for the law as it affects persons with disabilities.

Overlaps and Inconsistencies: Perhaps not surprisingly with such a complex web of laws and policies, at times the law as it relates to persons with disabilities is beset by overlaps and inconsistencies, which can cause confusion and inefficiency in the attainment of the policy goals of the law. Concerns have been raised for example, about the interaction of various laws and policies related to income support for persons with disabilities.³⁰

A prime example of overlap and inconsistency is the relationship between the three statutes regulating accessibility for persons with disabilities: the *Ontario Building Code*, the *Ontario Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*. No formal mechanism exists for coordinating these three statutes. In practice, the approaches to accessibility under each of these legislative frameworks often differ considerably, and the Ontario Human Rights Commission has frequently highlighted concerns with both the OBC and the AODA.³¹ Service providers may therefore be required to meet three separate standards on any one accessibility issue; however, individuals may seek recourse regarding a lack of accessible services only under the *Ontario Human Rights Code*.

Eligibility Criteria and Gatekeepers: Programs that provide services, benefits and supports to persons with disabilities generally have in place eligibility criteria to determine who is and is not entitled to receive the service, benefit or support in question. Such criteria may require an individual to demonstrate that he or she has a particular impairment, that it meets a certain threshold for severity, and/or that it has particular effects on the ability to perform specific functions.

Determination of which individuals meet eligibility criteria may require the development of complex administrative systems and considerable resources. Persons with disabilities may find such systems difficult and even demeaning to access, and persons who are in genuine need of supports or services may fail to apply or demonstrate eligibility for those services or supports.

Demonstration of eligibility for a particular benefit or service may require verification from specific health services professionals. This can give health practitioners considerable power over the lives of persons with disabilities, as their decisions become essential to meeting basic needs. This reliance on health professionals has been critiqued as placing persons with disabilities in a position of dependence, and giving professional excessive power to label, evaluate and define persons with disabilities.

For example, the current system for determining eligibility for the Ontario Disability Support Program has been the subject of considerable criticism. Delays in disability adjudication and internal reviews were critiqued by the Ontario Ombudsman's Office in a 2006 report: at that time, the adjudication process could take months, with only limited rights to back pay of benefits where eligibility

was upheld.³² The program is complex, so that applicants may have difficulty understanding their rights and how to access them.³³ Eligibility criteria that employ, in part, a bio-medical approach prevent some individuals with disabling conditions from accessing the benefit and, as a submission to the LCO pointed out, “makes doctors the gatekeepers to the definition of disability, placing them in a position of power over the client.”³⁴

Access to Supports: Persons with disabilities may require supports in order to achieve equality, whether it be assistive devices to enable a student to access course materials, personal supports to assist with homemaking or the activities of daily living, specialized rehabilitative or training services, or financial supports to defray the costs of disability-related needs. Where necessary supports are not available, persons with disabilities are denied the opportunity to develop to their potential and to contribute fully to their communities, and may be relegated to poverty and the margins of society.

Concerns have been repeatedly expressed that there are insufficient resources allocated to supports for persons with disabilities, so that programs intended to benefit persons with disabilities cannot be adequately implemented. As the OBA states:

Laws that focus on providing only what taxpayers are willing to pay for leave persons with disabilities and other unable to access all the services and benefits society has to offer, not because of their impairments, but due to a lack of personal or societal resources necessary to permit participation. The longer people are left in this situation, the greater the ultimate cost to the individual as well as society as a whole.³⁵

In *Auton (Guardian ad litem) v. British Columbia (Attorney General)*, parents of children with autism argued that the failure of the province to fund Intensive Behaviour Intervention (IBI) therapy for pre-school-aged children with autism violated equality rights guarantees under the *Charter*. While lower courts found a violation of section 15, the Supreme Court of Canada ruled that the government’s conduct did not infringe equality rights. The Court held that the legislative scheme under the *Canada Health Act* and related health care legislation was not discriminatory in providing funding for some non-core services to some groups, while not providing IBI therapy to children with autism, noting that the legislative scheme for health care “does not have as its purpose the meeting of all medical needs” and that “It is, by its very terms, a partial health plan”.³⁶

Ableism in the Law: As noted above, there are concerns that the law itself may in some cases adopt and perpetuate ableist attitudes and assumptions. For example, capacity and guardianship laws have been criticized as being based on negative stereotypes and attitudes regarding persons with intellectual or cognitive disabilities:

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Despite legislative developments in other jurisdictions and the UN Convention, long-standing negative stereotypes persist about the intellectual, and therefore legal capacity of people with intellectual disabilities, and similarly about older persons who experience cognitive or intellectual decline of their former capacities. In both cases, these stereotypes, along with assumptions about what intellectual capacities should characterize those who maintain legal capacity, are profoundly discriminating and devaluing. Too often, these stereotypes find their way into the administration of justice and result in individuals with intellectual disabilities, and older persons who have cognitive difficulties, losing their personhood before the law.³⁷

The provisions of the *Coroner's Act* which provide for mandatory inquests for persons who die in police custody or correctional facilities, but only provide for an investigation 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.³⁸

Implementation and Enforcement: A commonly expressed issue is the gap between laws that on their face are positive for persons with disabilities, but that in actual implementation may be very problematic. Problems may arise in a number of ways, including underfunding of programs, negative or ableist attitudes on the part of program delivery staff, lack of training on the part of delivery staff, lack of viable enforcement mechanisms or problems inherent in the design of implementation or enforcement systems.

As an example, considerable attention has been paid in recent years to difficulties with Ontario's special education system. The Auditor General identified special education as an area of particular concern in its 2001 Annual Report.³⁹ In 2003, the Ontario Human Rights Commission released *The Opportunity to Succeed*, based on extensive public consultation, and detailing shortfalls in Ontario's education system for students with disabilities, together with recommendations for reform. Frequently, while the law and Ministry of Education policies were based on appropriate principles and approaches, actual practice fell short of the law and policy. The accommodation process, for example, could be exceedingly slow, so that students did not receive accommodations until the school year was well advanced. Assistive devices might be purchased but remain unused because staff did not know how to use them. Educators and administrators at times treated accommodation of students with disabilities as an imposition. No formal recourse was available where Individual Education Plans were inadequate or not implemented.⁴⁰

These kinds of concerns point to the need for greater attention to the implementation and enforcement of laws and policies intended to benefit persons with disabilities. In some cases, access and enforcement mechanisms are not designed with the needs of persons with disabilities in mind. In many cases, it is

difficult to know whether a particular program is being implemented in accordance with the original vision, as there is no system for monitoring the success of the program or policy.

VI. Conclusions and Starting Points

This is a multi-year, multi-phase project that will continue to evolve. However, based on the LCO's initial research and consultations, the following starting points will shape the direction of this project:

As with its other projects, the LCO will take a multi-dimensional and holistic approach to the law. This will include consideration of the socio-economic conditions in which persons with disabilities are situated, and within which the law is made, interpreted, accessed and enforced.

The LCO recognizes that persons with disabilities are experts on their own lives and on the barriers they encounter in seeking equality, dignity, autonomy and inclusion. The LCO is committed to facilitating the participation of persons with disabilities in the law reform process.

The LCO also recognizes the considerable diversity within the disability community, and is committed to seeking out and hearing from a variety of voices and perspectives.

The LCO will adopt as a starting point for its analytical framework the principles and approaches embodied in the *Charter*, the *Human Rights Code*, the *Convention on the Rights of Persons with Disabilities*, and *In Unison*.

The LCO will include in its approach a consideration not only of the letter of the law, but how it may be effectively implemented, accessed and enforced, so as to ensure access to justice in its broadest sense.

VII. Endnotes

¹ Human Rights Tribunal of Ontario, *Comments on Consultation Paper* (August, 2009) at page 2.

² Ontario Bar Association, *Submission to the Law Commission of Ontario, Law as it Affects Persons with Disabilities* (August 2009) at pages 4-5.

³ ARCH Disability Law Centre, *Submission to the Law Commission of Ontario in Response to the Law as it Affects Persons with Disabilities* (September 2009) at page 5.

⁴ Government of Canada, *Advancing the Inclusion of People with Disabilities* (December 2002) at page 5.

⁵ Environics Research Group, *Canadian Attitudes Towards Disability Issues, A Qualitative Study: Final Report*, prepared for the Government of Canada Office of Disability Issues (2004) at pages

9, 32-34; also see Ontario Human Rights Commission, *Mental Health Consultation Paper* (August 2009) at pages 10 - 11.

⁶ *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, Preamble.

⁷ *Granovsky v. Canada (Minister of Employment and Immigration)* [2000] 1 S.C.R. 703, 2000 SCC 78 at para 56 - 58.

⁸ *Battleford and District Cooperative Ltd. V. Gibbs* [1996] 3 S.C.R. 566 dealt with the history of stigma and marginalization affecting persons with mental health disabilities: see para 30 – 31; also see *R. v. Swain* [1991] 1 S.C.R. 933 at p. 994 on this same issue.

⁹ *Quebec (Commission des droits de la personne et des droits de la jeunesse v. Montreal (City))* [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 77 – 83.

¹⁰ *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 at para. 67.

¹¹ In *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, the Supreme Court of Canada upheld the right of Deaf citizens, under section 15 of the *Charter* to receive sign language interpretation to ensure equal access to hospital services.

¹² *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 SCC 15, at para 162.

¹³ *British Columbia (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)* [1999] 3 S.C.R. 868 at para. 38 - 40, following *B.C. (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.

¹⁴ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (November 2000), at section 4.1., available online at <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>.

¹⁵ The Government of Canada also releases regular reports on *Advancing the Inclusion of People with Disabilities*, which are available online at http://www.hrsdc.gc.ca/eng/disability_issues/eports/fdr/2008/page00.shtml. As well, some provinces, such as Saskatchewan and Manitoba have moved towards comprehensive policy frameworks for disability issues.

¹⁶ Available online at www.socialunion.gc.ca/pwd/union/unison_e.html.

¹⁷ Environics Research Group, *Canadian Attitudes Towards Disability Issues, A Qualitative Study: Final Report*, prepared for the Government of Canada Office of Disability Issues (2004) at pages 9, 32-34.

¹⁸ For a definition of “ableism” see Ontario Human Rights Commission, *Mental Health Consultation Paper* (August 2009) at page 10.

¹⁹ The Ontario Human Rights Commission recently expressed concern about this issue in *Right at Home*, its 2008 report on its public consultation on human rights and housing (see pages 78-80). The Report is available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport. See also the discussion in *Disability, Community and Society: Exploring the Links* (Roehrer Institute: 1996) at page 57.

²⁰ Ontario Bar Association, *Submission to the Law Commission of Ontario: The Law as it Affects Persons with Disabilities* (August 2009) at page 23.

²¹ *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 at para. 67.

²² *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.

²³ 2006 data indicated that 51 per cent of Canadians with disabilities were employed at the time of the survey, as compared to 75 per cent of their non-disabled peers. Labour force participation for persons with disabilities is lower across all age groups. Persons with disabilities were also more likely to be employed in part-time or precarious work. See Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Labour Force Experience of Persons with Disabilities in Canada* (Ottawa: Minister of Industry, 2007). The average income for an Ontarian with a disability in 2006, based on PALS data, was \$25,304, as compared to \$38,358 for an Ontarian without a disability: Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Tables (Part V)* (Ottawa: Minister of Industry, 2007) at Table 1.3.

²⁴ See Ontario Human Rights Commission, *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities* (Toronto: 2003), available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/ConsultEduDisabty2; also see ARCH Disability Law Centre, *Submission to the Law Commission of Ontario in Response to the*

Law as it Affects Persons with Disabilities (September 2009) at page 15, and Ontario Bar Association, *Submission to the Law Commission of Ontario, Law as it Affects Persons with Disabilities* (August 2009) at pages 20-21.

²⁵ See Fraser Valentine, *Enabling Citizenship: Full Inclusion of Children with Disabilities and Their Parents* (Canadian Policy Research Networks, June 2001).

²⁶ Roeher Institute, *Harms Way: The Many Faces of Violence and Abuse Against Persons with Disabilities*, (North York: 1995) at pages 15-18.

²⁷ Ontario Bar Association, *Submission to the Law Commission of Ontario: The Law as it Affects Persons with Disabilities* (August 2009) at page 14.

²⁸ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11.

²⁹ *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32.

³⁰ See, for example, André Marin, Ombudsman of Ontario, "Losing the Waiting Game" (May 2006); Centre for Addiction and Mental Health, "Barriers to ODSP: Experiences of People with Mental Health and Addictions"; HIV/AIDS Legal Network, "Support for Survival: barriers to income security for people living with HIV/AIDS and directions for reform" (2005); Tanya Hyland, "A Critical Analysis of the Ontario Disability Support Program Act and Social Citizenship Rights in Ontario" (2001); Income Security Advocacy Centre, "Denial by Design: The Ontario Disability Support Program Act" (January 2003), and Pro Bono Students Canada, Faculty of Law at the University of Western Ontario, "Pathway to Progress: ODSP – Accountability, Reform & Systemic Change" (March 2006).

³¹ See, for example, the Ontario Human Rights Commission's Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code (March 2002); Moving Towards Barrier-Free Services: Final Report on the Restaurant Accessibility Initiative (July 2006); Submission of the Ontario Human Rights Commission to the Transportation Standards Review Committee Concerning the Initial Proposed Transportation Accessibility Standard (August 2007), all available online at www.ohrc.on.ca. This issue has also been raised by the AODA Alliance in their brief to the Independent Review on the Effective Implementation of the AODA, available online at www.aodaalliance.org.

³² See André Marin, Ombudsman of Ontario, "Losing the Waiting Game" (May 2006), available online at http://www.ombudsman.on.ca/media/3289/losing_the_waiting_game_20060531.pdf

³³ See DAWN Ontario, *Ontario Disability Support Program: Summary of Forum Reports*, section D.1., available online at <http://dawn.thot.net/odsp.html>.

³⁴ See Legal Assistance of Windsor, *Response to the Law as it Affects Persons with Disabilities* (August 2009) at page 2.

³⁵ Ontario Bar Association, *Submission to the Law Commission of Ontario: The Law as it Affects Persons with Disabilities* (August 2009) at page 23.

³⁶ *Auton (Guardian ad litem) v. British Columbia (Attorney General)* [2004] 3 S.C.R. 657, 2004 SCC 78, at para. 43.

³⁷ 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), at page 4.

³⁸ These provisions were the subject of a human rights complaint, which was upheld at the Human Rights Tribunal of Ontario, but subsequently overturned by the Divisional Court. See *Braithwaite v. Chief Coroner* (2006), 56 C.H.R.R. D/171 (H.R.T.O.), and *Ontario (Attorney General) v. Ontario (Human Rights Commission)*, [2007] O.J. No. 4978 (Div. Ct.).

³⁹ Office of the Provincial Auditor of the Province of Ontario, *2001 Annual Report*, Section 3.06, "Special Education Grants to School Boards".

⁴⁰ Ontario Human Rights Commission, *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities* (Toronto: 2003), available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/ConsultEduDisabty2