



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

The Law as it Affects Persons with Disabilities

CONSULTATION 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 Ontario law deans. It is situated at York University, officially housed at Osgoode Hall Law School.

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 is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is 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.

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. Purpose of the Project	1
B. What Has Been Done	2
C. Purpose of This Paper	3
II. THE LAW AND PERSONS WITH DISABILITIES.....	5
A. Introduction	5
B. Taking Persons with Disabilities Into Account	6
C. Ableism and the Law	11
D. Complexity, Overlap and Silos	14
E. Implementation Issues.....	16
III. PRINCIPLES FOR THE LAW AND PERSONS WITH DISABILITIES.....	19
A. Introduction	19
B. The Purpose of Principles	19
C. Sources for Principles.....	20
D. The Principles	20
1. <i>Respecting the Dignity and Worth of Persons with Disabilities</i>	21
2. <i>Responding to Diversity in Human Abilities and in Other Characteristics</i>	22
3. <i>Fostering Autonomy and Independence</i>	25
4. <i>Promoting Social Inclusion and Participation</i>	27
5. <i>Facilitating the Right to Live in Safety</i>	28
6. <i>Recognizing That We All Live in Society</i>	29
E. Applying the Principles: Addressing Implementation Challenges	31
IV. CONSIDERATIONS FOR THE DEVELOPMENT OF A FRAMEWORK.....	35
V. NEXT STEPS.....	39
APPENDIX: SUMMARY OF THE CONSULTATION QUESTIONS.....	41
ENDNOTES.....	43

I. INTRODUCTION

A. Purpose of the Project

The lives of persons with disabilities are significantly shaped by the law. There is an extensive and complex web of laws dealing specifically with disability-related issues, including laws dealing with income supports, special education, accessibility of services and structures, discrimination, assistive devices, service animals, legal capacity to make decisions and many other issues. As well, persons with disabilities will also encounter the laws that apply to the population at large, such as labour law, family law and housing law – although they may find that such laws fail to take into account their particular needs and experiences.

Early in its mandate, the LCO heard that while there were many laws, policies and programs that are, or are intended to be, of benefit to persons with disabilities, the overall legal framework within which persons with disabilities live is often complex and contradictory, and not infrequently counterproductive.

As a result, in 2009 the LCO commenced a project to develop a coherent and principled approach to the law as it affects persons with disabilities. The intent of this project is not to recommend changes to any particular law relating to persons with disabilities, although law reform is certainly needed in many areas. Rather, the intent is to develop a holistic, coherent, principles-based approach to this area of the law as a whole, an approach that can be used in developing new laws or evaluating and reforming existing ones.

At the end of this project, the LCO intends to produce two documents:

1. A relatively brief Framework document that outlines a set of principles for the law as it affects persons with disabilities and provides a set of questions that will assist in evaluating proposed or existing laws and policies against those principles.
2. A much more comprehensive Report that provides a broader context and more extensive information for those seeking a deeper understanding of the issues or assistance with applying the Framework.

It is intended that this project assist in the development of fairer and more effective and just laws as they relate to persons with disabilities.

The Framework document and the accompanying Report will be of assistance to all those concerned with the development and implementation of the law as it affects persons with disabilities, including:

- Policy-makers and legislators;
- Advocacy organizations and community groups that deal with issues affecting persons with disabilities; and
- Public or private actors that develop or administer policies or programs that may affect persons with disabilities.

B. What Has Been Done

Considerable work has been completed on this project since its inception.

1. Advisory Group: In 2010, the LCO formed a project Advisory Group, consisting of representatives of government, the legal profession, academics, and various advocacy and community organizations, to provide the LCO with advice on public consultations and on the substance of the project.
2. Preliminary Consultations: in 2009, the LCO conducted preliminary consultations to define the scope and approach of this project. This included in-person meetings with key stakeholder organizations, the development of a Preliminary Consultation Paper, and the review of submissions responding to that paper.
3. Research: In addition to considerable internal research on the law and persons with disabilities, during 2009, the LCO had the benefit of research conducted by Professor Roxanne Mykitiuk, as Osgoode Hall Law School Scholar in Residence. In 2010, the LCO funded seven research papers on principles and issues related to the law and persons with disabilities, six of which were completed.
4. Public Consultations – the Experiences of Persons with Disabilities with the Law: in 2010, the LCO conducted extensive 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 psycho-social disabilities. The LCO also received

responses to survey questionnaires from persons with disabilities, and conducted several one-on-one interviews.

C. Purpose of This Paper

This Paper aims to synthesize the results of the research and consultations¹ that have been completed to date, and to identify the key questions that must be addressed to develop the proposed Framework. Based on the responses to this Consultation Paper and on the LCO's further research, the LCO will prepare an Interim Report, including the Draft Framework, for circulation and comment.

II. THE LAW AND PERSONS WITH DISABILITIES

A. Introduction

As a starting point for developing an evaluative framework for the law as it affects persons with disabilities, it is important to develop a broad understanding of the current relationship of persons with disabilities with the law.

What Do We Mean By “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 through which statutory provisions, regulations and policies are implemented. As such, 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.

Ontario has a very wide array of laws that may affect persons with disabilities. In understanding the law as it affects persons with disabilities, it is helpful to think of the law in four major categories:²

1. Laws of general application: In addition to the myriad of laws that explicitly reference “disability”, “handicap” or terms related to mental “capacity”, all of the laws of general application that affect the populace at large will also affect persons with disabilities. This includes a very wide range of laws, such as those related to family creation and dissolution, consumer protection, residential tenancies and zoning, and protection of privacy. Because the experiences of persons with disabilities may differ from those of their non-disabled peers, whether because of their impairments or because of socially-constructed barriers, laws of general application may have a different or greater impact on persons with disabilities than on others.
2. Laws promoting the removal of barriers for persons with disabilities: Laws such as the *Accessibility for Ontarians with Disabilities Act*, the *Ontarians with Disabilities Act*, and the *Ontario Human Rights Code* are unique in that they have as central roles the recognition of persons with disabilities as a group that has experienced disadvantage, and the removal of barriers in order to achieve full equality and participation for persons with disabilities.

3. Laws that provide access to benefits, supports and accommodations for persons with disabilities: This is the largest category of laws directly targeted to persons with disabilities. These laws aim to recognize the particular circumstances of persons with disabilities and to provide access to programs or protections aimed at ameliorating disadvantage, providing supports or enhancing opportunities. Some of these have disability-related needs as their core focus, while others are directed to the population at large but provide specific accommodations or supports for persons with disabilities.³
4. Laws that restrict the roles, activities or decisions of persons with disabilities: Laws not infrequently identify specific capacities or abilities – most often, legal decision-making capacity - as a requirement for participation in various roles or decisions. Frequently this restricts roles or opportunities for persons with psychiatric, cognitive or intellectual disabilities.⁴

These laws differ considerably in their subject matters, approaches and forms, but the LCO's research and public consultations identified a number of concerns with the law as it affects persons with disabilities that apply across these categories and types. These are explored below.

B. Taking Persons with Disabilities Into Account

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, Toronto, May 12, 2010
Organizations**

During the LCO's Spring 2010 Public Consultations, individuals with disabilities consistently raised concerns regarding the lack of a consistent formal mechanism to provide a voice for persons with disabilities in the development of laws, policies and programs that affect them.

[I]t's so important that we have organizations run by people with disabilities or who advocate, or that you have anything that you are doing about people with disabilities to have people with disabilities at the table – because, otherwise, it's just going to be, you know, the lens that people use will be the one

that they are most familiar with. And people are familiar with an able-bodied or, you know, able lens, they are going to assume that you can't do something as opposed to what your abilities are, and how inventive people are.

LCO Focus Group, Toronto, May 12, 2010

Organizations

The concerns, experiences and perspectives of persons with disabilities are not adequately reflected in laws, policies and practices, whether laws of general application or those specifically focused on persons with disabilities. As a result, laws may not adequately or appropriately address the circumstances of persons with disabilities.

What Do We Mean By “Disability”?

No single definition of “disability” can capture the complexity of the experiences of persons with disabilities. 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”. [*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, para. 77]

That is, 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 - 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 to date, the LCO has taken a broad approach to the definition of disability, including both the experience of socially constructed barriers and the embodied aspects of the experience of disability. In developing its Framework, the LCO will consider 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, development or learning impairments and perceived disabilities, as well as the experience of multiple disabilities. We will be guided by what we hear from persons with disabilities themselves regarding their experiences with the law.

Considering the needs and experiences of persons with disabilities: As an example, persons with disabilities may face extra difficulties beyond those faced by the general population in finding information about their legal rights and responsibilities, because public information and education strategies may not take the needs and circumstances of persons with disabilities into account. At the simplest level, information may not be provided in disability-accessible formats. Common examples of this are the use of pdf files, which are inaccessible to many screenreaders, and the failure to provide American Sign Language interpretation for those who are culturally Deaf.⁵

I had to take a landlord through the tenants' rights acts and through their independent tribunal, which is a quasi-legal action which didn't make a lot of sense, but the starting point was access to the forms- access to the forms that every sighted person can pick up. I can't pick them up and read them, I need assistance. If those forms are available online, again, is it online, the screen reading program the blind and the seeing-impaired people use to access that information. Access can take many forms, but for me as the visually impaired person, the print is a problem again. For those of us that have literacy problems, again, they can see the print, it doesn't make sense, are the words jumbled up when they read it, is there an easier way, or is there an aid or assistant that can perhaps assist with the paper work involved in taking an action. These sorts of facts are things that I think are important for everybody.

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

Communication strategies may also fail to take into account that lower income levels among persons with disabilities may reduce access to technology and thereby to information provided only via the internet, and that barriers in education may leave persons with disabilities with lower literacy levels and therefore greater difficulties dealing with complex print-only information.⁶ During the consultations, many persons with disabilities emphasized that the people who most need information are likely to be those who are in crisis, and therefore less able to jump through hoops to find information. For example, persons who have mental health disabilities may be unable to advocate for themselves within the employment, housing, mental health or criminal justice systems just when they most need assistance.⁷

There are people who have the ability to go after these things and research them; then, there's the issue of understanding it and how to implement it. I don't understand why there isn't advocacy available in the community [...] to help people in these processes and how to bring their rights challenges forward. That's a huge issue.

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

Taking institutional and systemic barriers into account: As well, even where the needs of persons with disabilities are taken into account the focus is often mainly on the impairment, rather than on the full experience of persons with disabilities in their social context. Persons with disabilities face a multitude of institutional or systemic barriers. For example, a shortage of supportive housing options, paired with sometimes Kafka-esque application protocols, means that finding an acceptable place to live can be difficult and sometimes impossible.⁸ Endemic shortages of adequately skilled sign-language interpreters create barriers for Deaf individuals in every area of life, from accessing education, to pursuing their legal rights in court, to obtaining health care or basic services, so that even the simplest activity becomes a monumental endeavour.⁹ Cumbersome processes for accessing accommodations and supports in public education, together with complex power dynamics create challenges for parents attempting to navigate these systems.¹⁰

Taking the accumulation of barriers over the life course into account: Persons with disabilities, whether as a result of their environments, their impairments or in most cases a combination of the two, tend to have lower socio-economic status than their non-disabled peers. On average, persons with disabilities live with lower incomes,¹¹ have lower levels of education,¹² and have a greater exposure to violence and victimization than the average.¹³ This is particularly true for certain groups of persons with disabilities, such as women and Aboriginal individuals.¹⁴ Disadvantages may accumulate throughout life. For example, a person who experiences barriers in education due to 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. Lower socio-economic status may itself create barriers to accessing and benefiting the law for persons with disabilities, which may not be taken into account.¹⁵

Taking the diversity of persons with disabilities into account: 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.¹⁶ 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;¹⁷ 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. 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.

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 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, Toronto, May 11, 2010
Organizations**

Making persons with disabilities visible: 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.¹⁸

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 actively participate 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.

TOWARDS A FRAMEWORK: YOUR FEEDBACK

1. *How might the voice of persons with disabilities be better incorporated into the development and application of laws and policies?*
2. *What should law and policy makers know about the needs and circumstances of persons with disabilities in developing and reviewing laws, policies and practices?*
3. *How can the law meaningfully incorporate the diversity of experience and circumstance among persons with disabilities?*

C. Ableism and the Law

This sort of underlying suspicion about people who are poor with disabilities – I have not met one person with disability who does not want to work, and they will attend Tribunals and will exaggerate what they can do because they have pride, because they have dignity, because they don't want, you know, to be looked down on with pity and charity, which is what the medical model engages you with. They don't get ODSP because they are people who do not want to do what I sort of suggested: exaggerate their symptoms, they will undermine themselves because of their pride and dignity.

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

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.¹⁹ 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, particularly those whose disabilities affect their communications, or where the disability involved “disfigurement” or behaviour that was not considered “normal”.²⁰

What Do We Mean By “Ableism”?

Ableism may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worth 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.

Stigma and stereotypes: 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. These attitudes may contribute to the criminalization of persons with mental health disabilities, an issue of great concern to many participants.

Paternalism: 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 psycho-social 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.²¹

Disability and low-income: During the 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.²²

Ableism in the design and implementation of the law: Ableism may affect the design of laws and policies and may be incorporated into their substance. For example, capacity and guardianship laws have been subjected to persistent criticism on the basis that they are founded in ableist notions about the abilities and worth of persons with intellectual disabilities.²³ Similarly, there is ongoing controversy regarding a number of aspects of mental health law.²⁴ Ableism 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.

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 impact of ableism on persons with disabilities is a reality that must be taken into account in the design of laws, programs and policies.

TOWARDS A FRAMEWORK: YOUR FEEDBACK

- 1. How can ableism in the substance of laws and policies be identified?*
- 2. How do stereotypes and negative attitudes towards persons with disabilities influence the design of laws?*
- 3. How can ableism in the implementation of laws and policies be prevented?*
- 4. How can government and other service providers ensure that persons with disabilities are treated with respect when seeking services or assistance?*

D. Complexity, Overlap and Silos

What we know is that the experience of individuals is that the system is made such that each little box has its own criteria to provide services to individuals with disabilities. You go from each little box to the next, and you repeat your history and then there's another criteria that bounces you out of that particular service and then you're off to the next one, and you repeat your history and then you . . . that is what they face, day after day, year after year. This year, I get support from whatever, oops, and it's not there anymore. Off I go to something else and then I get thrown out again. There needs to be better coordination between all of these services, all of these programs, and the law needs to make it happen so that it's easier to get access.

LCO Focus Groups, Ottawa, June 15, 2010
Organization serving Francophones

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.

Regulation of the lives of persons with disabilities: One reason for the complexity 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 a complex 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 *Building Code*, tax credits for accessibility renovations, human rights laws regarding rental housing and the duty to accommodate, and home care support programs to address domestic or personal care needs, in addition to addressing the concerns that non-disabled persons deal with in securing or adapting appropriate housing.

Complexity of the laws: Particular laws addressing disability-related issues are themselves often exceedingly complex, lengthy and technical, creating substantial bureaucratic structures and extensive policy frameworks. The Ontario Disability Support Program and Ontario's special education programs for primary and secondary students with disabilities are two examples of complex laws and bureaucracies. Understanding and effectively navigating these systems requires considerable effort and expertise.

Relationships between laws: As well, there may be complex relationships between laws. Laws may overlap or interact in complicated ways – a case in point being the interrelationship of the

Ontario *Building Code*, the Ontario *Human Rights Code*, the *Accessibility for Ontarians with Disabilities Act* with its accompanying regulations and the *Ontarians with Disabilities Act*, all of which deal with accessibility for persons with disabilities, but with inconsistent standards and processes.

Fragmented laws, policies and programs: Finally, 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 be at one and the same time, for example, a mother, a person with a mental illness, 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 address the whole person or the complexities of the barriers she or he faces. As an example of the type of concerns raised by persons with disabilities, during the consultations one parent with a disability told the LCO although she received home care supports for domestic tasks due to her disability, the rules of the program only permitted the home care support worker to do the laundry for the person with a disability – and not for the remainder of the family.

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. Persons with disabilities generally aspire to move along the life-course in a way similar to their non-disabled peers – to transition from living with their parents to living independently or from education to employment, for example. However, current laws, policies and programs may not support these life-course transitions, or may even create roadblocks. Similarly, persons with disabilities may find it difficult to make transitions between program areas – from income support to employment, or between the mental health and criminal justice systems because of a lack of coordination between systems. For example, while the Ontario Disability Support Program includes a variety of programs and mechanisms to support transitions into the workforce, a number of barriers have been identified, such as the “benefits trap”, that discourage this transition.²⁵ This lack of attention to transitions reinforces the fragmentation of the law referred to earlier.

TOWARDS A FRAMEWORK: YOUR FEEDBACK

1. *What can be done to improve the ability of laws and policies to address persons with disabilities as whole persons?*
2. *What can be done to improve linkages and coordination between laws, policies and programs?*
3. *What can be done to improve navigation through systems intended to assist persons with disabilities?*

E. Implementation Issues

I guess I'm not thinking so much in terms of 'gaps' [in the law]. The laws are all there. They just need to be enacted the way they're supposed to be. You know, the spirit of that law, the spirit of those laws: that's what we need to do. As long as you have a rationing approach as opposed to a rights based approach to things like housing, transportation, critical support services, access to justice, whatever you want to talk about, I think these problems are going to emerge.

**LCO Focus Group, Toronto, May 10, 2010
Organizations**

As is noted above, 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.

Some reasons for this have been identified in the preceding discussion, such as 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, or adversarial approaches to program implementation. Other issues are outlined below.

Reliance on self-advocacy to navigate complex 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 due to a mental health disability is not likely, at that point, to be able to on their own 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 complex 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.

There is no case management approach anymore to provide assistance to people to access services that are available to them. Even within the context of services that are provided within one organization - let alone, [...] where there are multiple presenting [...] issues that a person may have. So, in terms of access, the bureaucracy is not responsive to peoples' needs the legislation is not responsive to peoples' needs and doesn't provide the kinds of supports that people need to be able to actually access and enforce their rights.

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

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 that:

This 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.²⁶

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.²⁷

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.²⁸

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, although Individual Education Plans for students with disabilities are required to include transition plans for students approaching school-leaving stage, there is, as of yet, no requirement for monitoring and evaluating transition plans. 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.²⁹

TOWARDS A FRAMEWORK: YOUR FEEDBACK

- 1. What measures can be put in place to ensure that laws affecting persons with disabilities are implemented effectively?*
- 2. How can the law be made more accessible for persons with disabilities?*
- 3. What might effective monitoring and evaluation mechanisms for laws and programs affecting persons with disabilities look like?*

III. PRINCIPLES FOR THE LAW AND PERSONS WITH DISABILITIES

A. Introduction

The previous section of this Paper provided a very brief overview of some key aspects of the relationship of persons with disabilities with the law. This broad understanding of the ways in which that law shapes, enables and constrains the lives of persons with disabilities provides a foundation for the LCO's evaluative framework for the law as it affects persons with disabilities.

Based on the analysis set out in the previous section, the LCO has identified a set of principles which will form the foundation for the development of its Framework. These principles should assist law and policy makers in developing and reforming laws and policies in ways that will be just and effective for persons with disabilities.

B. The Purpose of Principles

The LCO's Framework will be based on a set of principles for the law as it affects persons with disabilities. The principles will provide a basis for a series of questions that will assist law and policy-makers in developing and evaluating laws and policies that may affect persons with disabilities.

Identifying a set of principles to guide the law as it affects persons with disabilities can help to ensure that this area of the law is as a whole is consistent and coherent, that the goals of the law are in harmony with the aspirations of persons with disabilities themselves, and that the law is effective in its approach to the needs and experiences of persons with disabilities.

A principles-based approach to analyzing and evaluating the law has the benefit of articulating general standards, while remaining sufficiently flexible to apply to multiple contexts and evolving social norms. Principles can act as a catalyst to change attitudes about persons with disabilities.

However, in adopting a principles-based approach, there is a risk of developing an overly abstract approach to the complexity of the experiences of persons with disabilities. Principles must be rooted in the lived experiences of persons with disabilities, and in the realities of a complex and evolving legal context.

C. Sources for Principles

The primary source for identifying and understanding principles for the law as it affects persons with disabilities must be the lives and perspectives of persons with disabilities themselves. The LCO's extensive Spring 2010 consultations with persons with disabilities and with organizations that serve, advocate for or represent persons with disabilities have significantly shaped the LCO's approach, and some key results have been highlighted in the previous section.

As well, there has been significant effort over the past 40 years, both domestically and internationally, to identify foundational principles for policies and programs affecting persons with disabilities. Key sources include:

1. International Documents: The most important of these is the new *Convention on the Rights of Persons with Disabilities* (CRPD), but there are also many other instruments and documents, such as the *Convention on the Rights of the Child*, the *Convention on Economic, Social and Cultural Rights* and many others.
2. Domestic Legal Frameworks: The *Charter of Rights and Freedoms* has been an important source of rights and principles for persons with disabilities, particularly through the equality rights analysis developed under section 15. As well, the Ontario *Human Rights Code* and its accompanying policies, and the *Accessibility for Ontarians with Disabilities Act* (AODA) articulate principles of inclusion, participation and dignity for persons with disabilities.
3. Domestic Policy Frameworks: Canadian governments have developed a number of policy documents related to disability, the most important of them for our purposes being *In Unison: A Canadian Approach to Disability Issues*, which set out a blueprint for promoting the integration of persons with disabilities in Canada, articulated a vision of full citizenship for persons with disabilities, and aimed to create a coordinated approach to delivering services and benefits to persons with disabilities.

D. The Principles

Based on the above, the LCO has identified six principles to guide the law as it affects persons with disabilities.

Underlying all six principles is a fundamental value of substantive equality. That is, the ultimate goal of the six principles is to advance substantive equality for persons with disabilities, and this value should influence how all of the principles are interpreted.

Equality, while it includes non-discrimination, is a broader concept, and not limited to a comparative approach. Substantive equality can be interpreted to create a standard that recognizes, permits or encourages as full participation as is possible. It may require different treatment of some individuals or groups in order to achieve that standard; the test is not how someone else is treated, but how close to that standard any given person's or group's treatment is. Many of the stories that the LCO heard during its consultations were about the lack of substantive equality for persons with disabilities. The social and economic marginalization of persons with disabilities, negative attitudes and stereotypes, and persistent institutional and systemic barriers illustrate some of the sources of inequality, and why finding ways to address them are essential to the realization of substantive equality and the enjoyment of full "citizenship" for persons with disabilities in Canadian society.

The six principles are closely linked, and must be understood in relationship to each other. They cannot be achieved in isolation from each other, although it is also true that in some situations the principles may be in tension with each other.

1. Respecting the Dignity and Worth of Persons with Disabilities

To get funding, you have to strip yourself of any itty-bitty inkling of dignity that you have, um, you know ... to... 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, Toronto, May 11, 2010
Organizations**

During the LCO's Consultations, persons with disabilities shared many stories of being treated with disregard and disrespect, of being stereotyped and dismissed, and of assumptions that because of their disabilities they were of lesser worth or had less ability to feel, learn and contribute than others.

The principle of dignity has been recognized in Articles 1 and 3(a) of the CRPD,³⁰ in the preamble of the *Code*,³¹ and in Supreme Court of Canada jurisprudence in relation not only to section 15 of the *Charter*,³² but as underlying the *Charter* more generally.³³

In *Law v. Canada (Minister of Employment and Immigration)*, the Court says that human dignity “means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment”.³⁴ The Court also emphasizes that stereotyping and political and social prejudice can have a negative impact on a person’s dignity.³⁵ The Court has also found the principle of dignity central to the provision of services to persons with disabilities³⁶ and to the duty to accommodate in the context of employment.³⁷

Living up to the principle of respecting the dignity and worth of persons with disabilities is a direct challenge to “ableism”, the tendency to link expectations to disabilities, instead of to the whole person.

The principle of respect for the dignity and worth of persons with disabilities 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 capacity for growth and expression, 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 in Other Characteristics

If a person is not able to express themselves and be forthcoming it is very easy to be not validated or talked over and not everybody has the ability to express themselves or a sense of self-esteem so many, many times something will be said about a person or be done and they are not able to speak up for themselves “Oh that is a head injury person with a drinking problem.” Or a person with physical disabilities with something like the flu and staff will sometimes look at the disability and factor that into the way the person is diagnosed and treated. It is rehumanizing the system and it does take more time, if a person will take more time with a person you get a better result for the future but it takes a lot of time to make that initial connection.

**LCO Focus Group, Thunder Bay, June 17, 2010
Organizations**

I sat as Chief for my community for about two years. There was no service for persons with disabilities ...When people need services, we ship them out to Thunder Bay and the urbanization provides a huge challenge. There are language barriers, plus if they lived off the land most of their life the very structure of urban community will shock them...[Aboriginal] people moving into the city are used to a certain food

source. They are not used to this fancy food. They eat fish, waterfowl, moose, deer, berries from the land. And when they ask for this traditional food in old folks homes or hospitals, they are made fun of. One old person said a nurse said that this was food for cave people. The staff discouraged use of traditional food, instead of supporting it.

**LCO Focus Group, Thunder Bay, June 16, 2010, Thunder Bay
Organizations serving Aboriginal Persons**

There is a tendency to think of “disability” as an exceptional and homogenous experience. This obscures the variety of individual experiences and needs among persons with disabilities. This is especially true when individual experiences are considered across the lifespan.

The CRPD identifies respect for diversity and difference as one of the general principles that guide the human rights approach to disability rights.³⁸ The *Code* provides another source for this principle through its implicit recognition of the importance of the “worth of each person” and requirement to accommodate without undue hardship.³⁹ A final source for this principle can be found in Supreme Court of Canada jurisprudence, in particular with respect to s.15 of the *Charter* and the duty to accommodate in education and employment.⁴⁰

Ability and disability as a continuum: 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.⁴¹ 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.

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.⁴² The principle of diversity therefore 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.⁴³ 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.⁴⁴ The CRPD imposes as a general obligation the promotion of universal design in standards and guidelines.⁴⁵

Inclusive design has been considered as part of the duty to accommodate.⁴⁶ Appropriate accommodations are required to ensure full recognition of the spectrum of variance in human abilities. 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”.⁴⁷

Diversity in the experience of disability: This principle also reminds us that “disability” may be manifested in many ways. People with one form of disability have needs that persons with a different form do not; thus a person with a visual impairment has different needs to address the impairment than does someone with a mobility restriction⁴⁸ or someone with an intellectual or developmental disability. It also recognizes that people who may be currently described as “able-bodied” may develop disabilities; for example, as people age their eyesight or capacity to walk may become sufficiently impaired to constitute a disability or an individual may have an accident that causes paraplegia.

Intersecting identities: As well, people are different from each other because of their sex, cultural community, age, sexual orientation or other characteristic. Needs also differ on the basis of factors such as whether people live in rural or urban areas or live with their families or in a congregate setting or on their own. *In Unison 2000* highlights this aspect of diversity:

The framework [developed *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.⁴⁹

The principles of responding to diversity in human abilities and in other characteristics requires recognition of and responsiveness to the reality that all people exist along a continuum of abilities, 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 discrimination and disadvantage.

3. Fostering Autonomy and Independence

I cringe when I hear people say, 'I have to go through my social worker'. I cringe because I am ... independent. I want to think what my life is, not being judged or determined by a decision by another human being. It should be my decision.

**LCO Focus Group, Thunder Bay, June 17, 2010
Individuals with Disabilities**

The importance of fostering autonomy and independence has been explicitly recognized in several sections of the *CRPD*.⁵⁰ Although not explicitly mentioned in the *Charter*, the Supreme Court of Canada has linked the principle of autonomy and independence to the right to equality in s.15⁵¹ and to life, liberty and security of the person in s.7.⁵²

Decision-making: “Autonomy” is often understood as the ‘right to choose’, and expressed as a response to the persistent paternalism of legal and policy responses to persons with disabilities. According to the World Health Organization (WHO), autonomy is “[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.”⁵³ In the context of s.7, the Supreme Court of Canada has articulated the principle of autonomy as including “decisions of fundamental personal importance” particularly with respect to bodily integrity.⁵⁴ 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.⁵⁵

While the recognition of autonomy has long been considered central to advancing the rights of persons with disabilities, 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. Some examples include consent and capacity laws and laws relating to involuntary treatment. Also, some laws are put in place in recognition of the particular vulnerability 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.

Recognizing the role of relationships in achieving autonomy: In addition to placing people at the centre of decision-making, it may be useful to recognize the relational aspects of autonomy. 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”.⁵⁶ This approach focuses on “structuring relationships so that they foster autonomy.”⁵⁷ 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.

Supporting independence: “Independence”, while linked to autonomy, is often conceived of as the ‘right to do for oneself’. 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.”⁵⁸ 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.⁵⁹ In *Unison 2000* stresses that the promotion of independence or “citizenship” and other LCO principles 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.”⁶⁰

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 and 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 principles of fostering autonomy and independence 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 desired, with appropriate and adequate supports as required.

4. Promoting Social Inclusion and Participation

My son's opportunities of integration in summer disappeared because he was too old to go to programs ... His world gets smaller and smaller as he gets older because he's supposed to be a certain age, chronologically he's that age, but developmentally he's not. There's no capacity for that: you can't fit [it] on the form.

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

Persons with disabilities may find themselves excluded from the mainstream in a variety of ways. As the Ontario Court of Appeal noted in *Eaton v. Brant County Board of Education*, "The history of disabled persons, which the Charter sought to redress and prevent, is a history of exclusion".⁶¹ As noted in the previous section, some of this arises from attitudinal barriers, and some from broader institutional and systemic barriers. As a result, persons with disabilities tend to find themselves pushed to the margins in a variety of social areas, including employment and education.

The principle of participation and inclusion aims to address this exclusion. The principle of inclusion and participation is mentioned in the CRPD in several contexts.⁶² The *Code* also recognizes the principle of inclusion and participation in its preamble.⁶³ Several other Ontario legislative instruments also promote the principle of inclusion and participation. Most notably, the AODA⁶⁴ attempts to apply the principle of inclusion and participation within a legislative framework.⁶⁵ Finally, Supreme Court of Canada jurisprudence has also considered the principle of inclusion and participation in the context of persons with disabilities.⁶⁶

Participation and the right to be heard: Participation can include making decisions about daily life, accessing social and recreational programs, voting in public elections and other activities. Participation may also include the right to be a part of the community, to be consulted and to be heard with respect to decisions that affect the lives of persons with disabilities. 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 with disabilities to fully become members of society and the various communities of which they are a part."⁶⁷ Each of these manifestations of participation may affect different subgroups differently. For example, persons with intellectual, cognitive or psychosocial 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.

Including persons with disabilities in the broader community: Inclusion may also mean different things for different subgroups within the disability community, as was evidenced by discussions at some of the LCO focus groups. 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.⁶⁸ Other subgroups within the disability community, such as the intellectual and learning disabilities communities, may consider the principle of inclusion to encompass the integration of persons with disabilities into all aspects of mainstream society.⁶⁹ 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.

The principles of fostering social inclusion and participation refers to designing society in a way that promotes the ability of all persons with disabilities to be actively involved with their community by removal of physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and facilitating involvement as required.

5. Facilitating the Right to Live in Safety

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, Thunder Bay, June 16, 2010
Aboriginal Organizations**

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.⁷⁰ The CRPD more specifically identifies one particular concern about the abuse and exploitation of women and girls with disabilities.⁷¹ 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,⁷² and the challenges faced by persons with disabilities who experience abuse and exploitation in seeking services and supports.⁷³

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 would 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.

The principle of facilitating living in safety 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

...[O]ur society created us, now it's our societies job to take care of what they created. We choose not to protect children, everyday, and when we choose not to protect them, then we have to be willing to embrace them with open arms when they become unmanageable adults, I'm not saying that everyone with mental health issues have been abused, but studies show that a great majority of us have been, and our society and the legal community, need to take some responsibility for this and say the buck stops here. You are a victim and you deserved to be treated like one, you are not the enemy, the enemy was the people who did this to you.

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

As the previous sections have made clear, like all of us persons with disabilities have multiple identities, ties, and communities; 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.

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”.⁷⁴ *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”.⁷⁵

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 principle of recognizing we all live in society acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and also acknowledges that other members of society also have entitlements and responsibilities.

E. Applying the Principles: Addressing Implementation Challenges

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 approaches to application of the principles.

Progressive Realization: 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. In such circumstances, a progressive implementation approach to the principles should be undertaken, such that the principles are realized to the greatest extent possible at the current time, and concrete steps for future improvements are identified and planned for.⁷⁶

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 persons with disabilities into the overall design of the law will be the most effective approach. Everyone will benefit from a focus on dignity, autonomy, inclusion, security and diversity in the design of laws. Many, if not most of the measures required to fulfil 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.⁷⁷

Protect, Respect, Fulfil: In the realm of international human rights law, the framework of “protect, respect, fulfil” 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:⁷⁸

1. The obligation to respect – Governments must refrain from interfering with the enjoyment of rights. For example, governments must not exclude individuals from access to employment or education on the basis of their disabilities.
2. The obligation to protect – Governments must prevent violations of these rights by third parties. For example, States must require private employers to refrain from discriminating in employment because of disability.
3. The obligation to fulfil– Governments must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights. For

example, governments might create special programs to provide supports for persons with disabilities who face particular barriers to transitioning into employment following the end of their education.

Resolving Tensions Between Principles: In some areas of law or policy, there may be tensions between two or more of the principles. For example, the autonomy of persons with disabilities is often perceived to conflict with protection of their safety.

1. Consider Context: Consider the larger context in which the tension is perceived to arise. Often, the difficulty does not arise from irreducible tensions between two principles, but from a larger context in which limited resources, societal attitudes or institutional structures inhibit the simultaneous achievement of two principles.
2. Analyze the Tension: Where a true tension between principles exists, carefully examine the tension in a nuanced and holistic way. What specific rights or outcomes are at issue? Who might be affected? How might a reduced implementation of one principle affect the achievement of other principles?
3. Consider the Effect of the Other Principles on the Tension: Where two principles appear to be in tension, it is important to consider how the other principles may affect the dynamic, and how particular resolutions of the tension may impact on the realization of the other principles.
4. Maximize Implementation of the Principles: Consider whether solutions may be identified that permit expression of both principles, to at least some degree.
5. Promote Substantive Equality: Keep in mind that the purpose of the principles is to address the barriers to equality experienced by persons with disabilities. What solutions to tensions between principles are most likely to advance this larger goal?

TOWARDS A FRAMEWORK: YOUR FEEDBACK

1. *Are the principles identified the appropriate principles on which to base an evaluative framework? Do they meaningfully capture the experiences and aspirations of persons with disabilities?*

2. *Do you have anything to add on the interpretation and definition of the any of the six principles as set out above?*

3. *How should a principles-based framework for the law as it affects persons with disabilities address tensions between the various principles that may arise in the implementation of the framework?*

IV. CONSIDERATIONS FOR THE DEVELOPMENT OF A FRAMEWORK

As noted in the Introduction, this project will result in two documents: a relatively brief evaluative Framework and an accompanying report that provides more extensive information for those that require it. This section of the Paper considers the characteristics required for a practical and effective Framework.

The work of the LCO thus far has provided us with an understanding of the relationship of persons with disabilities with the law, and a set of principles that can assist in improving the development and application of the law. The next step is to develop an approach and structure for the Framework, based on these foundations.

What Do We Mean by a “Framework”?

The LCO plans to develop a relatively brief practical document that will assist legislators, policy-makers and others who are concerned with the development and reform of laws, policies and practices that may affect persons with disabilities in evaluating existing and potential laws and policies. The document will outline a set of principles to guide the law, and a set of questions that will assist in evaluating whether laws or policies are consistent with those principles. This will be the LCO’s “Framework for the Law as it Affects Persons with Disabilities.”

As in the LCO’s companion project on the law as it affects older adults, the LCO proposes to structure its framework as a series of questions, arising from the principles. Principles, without more, are an insufficient basis for an analytical framework for this area of the law, as they are on their own too abstract to provide sufficient practical guidance to law and policy-makers. Questions can assist law and policy makers to determine how closely the law, policy or practice shows adherence to or realization of the principles. Similarly, where the principles are not being satisfied, it becomes necessary to review where gaps may be, determine whether this is a case in which all the principles cannot be satisfied, identify where there may be tensions to be resolve and finally, to be clear about why it is not possible to satisfy the principles in the particular case.

Based on the work completed to-date, the LCO has concluded that any framework designed to guide the law as it affects persons with disabilities must have certain characteristics.

First, given the complex 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 in age itself. 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 different, complex 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 more comprehensive Report for further information and guidance must be made straightforward and simple.

TOWARDS A FRAMEWORK: YOUR FEEDBACK

1. *Are there characteristics other than those identified that are essential to the development for an evaluative framework for the law as it affects persons with disabilities?*
2. *Do you have any other comments on this Paper or on the LCO's project related to persons with disabilities more generally?*

V. NEXT STEPS

The LCO invites your comments on one or more of the issues raised by this Consultation Paper. Based on the results of this consultation and the LCO's ongoing research, the LCO will prepare a Draft Framework and Interim Report for circulation and comment. A final report is anticipated in mid-2012.

You can mail, fax or e-mail your comments to:

Law Commission of Ontario
Project on the Law as it Affects Persons with Disabilities
2032 Ignat Kaneff Building, Osgoode Hall Law School, York University
4700 Keele Street
Toronto, ON M3J 1P3
Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

You may also use the LCO website comments form at www.lco-cdo.org.

Submissions must be received by **Friday, November 25, 2011**.

LCO staff would also be pleased to meet to discuss the issues raised in this Consultation Paper, by telephone or in person. If you wish to set up a consultation meeting with the LCO at your organization, you may contact the Project head to discuss possible arrangements. Meetings can take place in person, by conference call or via other interactive technologies.

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.

APPENDIX: SUMMARY OF THE CONSULTATION QUESTIONS

1. How might the voice of persons with disabilities be better incorporated into the development and application of laws and policies?
2. What should law and policy makers know about the needs and circumstances of persons with disabilities in developing and reviewing laws, policies and practices?
3. How can the law meaningfully incorporate the diversity of experience and circumstance among persons with disabilities?
4. How can ableism in the substance of laws and policies be identified?
5. How do stereotypes and negative attitudes towards persons with disabilities influence the design of laws?
6. How can ableism in the implementation of laws and policies be prevented?
7. How can government and other service providers ensure that persons with disabilities are treated with respect when seeking services or assistance?
8. What can be done to improve the ability of laws and policies to address persons with disabilities as whole persons?
9. What can be done to improve linkages and coordination between laws, policies and programs?
10. What can be done to improve navigation through systems intended to assist persons with disabilities?
11. What measures can be put in place to ensure that laws affecting persons with disabilities are implemented effectively?
12. How can the law be made more accessible for persons with disabilities?

13. What might effective monitoring and evaluation mechanisms for laws and programs affecting persons with disabilities look like?
14. Are the principles identified the appropriate principles on which to base an evaluative framework? Do they meaningfully capture the experiences and aspirations of persons with disabilities?
15. Do you have anything to add on the interpretation and definition of the any of the six principles as set out above?
16. How should a principles-based framework for the law as it affects persons with disabilities address tensions between the various principles that may arise in the implementation of the framework?
17. Are there characteristics other than those identified that are essential to the development for an evaluative framework for the law as it affects persons with disabilities?
18. Do you have any other comments on this Paper or on the LCO's project more generally?

ENDNOTES

¹ Throughout this Paper, the LCO has made use of the stories and perspectives of persons with disabilities conveyed to us during the consultations, as illustrations of the way that persons with disabilities may relate to the law. The LCO has selected quotes and stories that illustrate themes and concerns that surfaced repeatedly during the consultations. We did not attempt to investigate or validate each particular incident recounted.

² This categorization of the law as it affects persons with disabilities is explored more fully in the LCO's preliminary consultation paper for this project, *Preliminary Consultation Paper: Approaches to Defining Disability* (July 2009), online: <<<http://www.lco-cdo.org/en/disabilities-threshold-paper>>>.

³ Examples include the provision of special education programs under the *Education Act*, the provision of income supports for persons with disabilities under the *Ontario Disability Support Programs Act*, and the day nursery programs provided for children with disabilities under the *Day Nurseries Act*.

⁴ For example, under the *Evidence Act*, persons who are found to lack mental competency may not have their evidence form the basis of a legal decision unless it is otherwise corroborated, a measure which may have serious consequences for the ability of persons with mental disabilities to seek redress where they have been abused or exploited: see R.S.O. 1990, c. E.23, s. 14..

⁵ The new regulations under the *Accessibility for Ontarians with Disabilities Act* address some of the accessibility-based communications barriers experienced by persons with disabilities: see O. Reg. 191/11, *Integrated Accessibility Standards*, in force July 1, 2011.

⁶ 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: Statistics Canada, *Education, Employment and Income of Individuals With and Without Disabilities*, Participation and Activity Limitation Survey (PALS), 2001 (Ottawa: Statistics Canada, 2003) at 19 and 35. 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.

⁷ As one participant in the LCO's Toronto Focus Group for Racialized Persons with Disabilities (May 18, 2010) told us: "There's the cognitive, then there's also physical. It's almost like they know you're weak because they have your file, and they know how far they can keep pushing you and dismiss you. I was just dysfunctional for 6 years, I still am, where I don't really leave my house, I'm housebound for the most part, and they seem to know that and they capitalize on it. So if you're messed up mentally and physically, you're a bonus for them, they don't need to help you because they know they have you."

⁸ During the consultations, the LCO heard that this was particularly a problem for persons with complex needs, such as individuals with mental health disabilities.

⁹ This was a dominating theme during the LCO's two focus groups with Deaf individuals. Focus group participants shared many stories of barriers faced in all areas of life due to lack of accessible sign language interpretation. The LCO also heard that some institutions won't deal with individuals through interpreters or Bell Relay due to "third party" rules, creating major hurdles in accessing services. This issue was highlighted as a significant barrier to access to justice in K. Cohl and G. Thompson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Law Foundation of Ontario: December 2008) at 20.

¹⁰ See Mona Paré, "La Participation des personnes handicapées dans les décisions qui les concernent: L'exemple de l'éducation", Paper prepared for the Law Commission of Ontario (July 2010), online: Law Commission of Ontario <www.lco-cdo.org>. Paré writes at 15: "Participer, dans le contexte social, implique la levée de tous les obstacles qui empêchent les personnes handicapées d'être pleinement incluses dans tous les secteurs et dans toutes les activités de la société."

¹¹ 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* at 8-10.

¹² Note 6.

¹³ 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: S. Perreault, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* (Canadian Centre for Justice Statistics: Ottawa, May 2009) at 8.

¹⁴ See for example *PALS 2006: Tables Part V* at 11.

¹⁵ For example, Legal Aid is available only in limited amounts, and for specific types of issues, so that low-income individuals may not have access to the full range of legal remedies that are available to others.

¹⁶ Government of Canada, *Advancing the Inclusion of People with Disabilities* (December 2002) at 5.

¹⁷ During the LCO's consultations, much was said about the difficulties of accessing services, supports and accommodations outside of major urban centres. 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.

¹⁸ Gerard Quinn & Theresia Degener, "The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform" in Gerrard Quinn and 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 at 17.

¹⁹ 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* (Law Commission of Ontario: June 30, 2010) at ss. 12 – 20, online: <<www.lco-cdo.org>>.

²⁰ 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 s 9, 32-34.

²¹ Michael Bach and Lana Kerzner, *A New Paradigm for Autonomy and the Right to Legal Capacity* (Law Commission of Ontario: November 2010), at 6, online: <<www.lco-cdo.org>>. Also see Kerri Joffe, ARCH Disability Law Centre, *Enforcing the Rights of Persons with Disabilities in Ontario's Development Services System* (Law Commission of Ontario: June 30, 2010) at 28 (available online at www.lco-cdo.org).

²² This point is made in a the research paper prepared by the Income Security Advocacy Centre, *Denial by Design: the Ontario Disability Support Program* (Toronto, 2003), online: <<<http://www.odspaction.ca/sites/odspaction.ca/files/denialbydesign.pdf>>>

²³ Bach and Kerzner, note 21, at p. 32.

²⁴ Meeting of LCO staff with representatives of the Coalition Against Psychiatric Assault, January 9, 2011.

²⁵ A crucial financial limitation for people living with disabilities, which flows from employment is the relationship between employment and government support. In many instances social and economic supports are available to people with disabilities only if they are unemployed. This is a policy choice meant to ensure an income for people with disabilities who are unemployable. However, the flip side of this policy choice is that many people living with disabilities who are employable but who may not be able to command a salary higher than what they receive from governmental support choose not to participate in the workforce, for want of a higher income. For example, according to the PALS survey data, people with learning limitations identified numerous barriers discouraging them from looking for jobs, and the second and third most reported barriers (behind feelings of inadequate training reported at 28%) were: 20.5% were concerned that they would lose some or all of their income and 18.4% were concerned that they would lose some or all of their additional supports (i.e. housing or a drug plan).

²⁶ Kerri Joffe, ARCH Disability Law Centre, *Enforcing the Rights of People with Disabilities in Ontario's Developmental Services System* (Law Commission of Ontario: June 30, 2010), at 31, online: <<www.lco-cdo.org>>. 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.

²⁷ LCO Focus Group, Toronto, Organizations, May 13, 2010.

²⁸ For a thorough discussion of the complex legal issues surrounding rights to supports for persons with disabilities see Meryl Zisman Gary, Cara Wilkie, & David Baker, Bakerlaw "The Law As It Affects Persons with Disabilities: A Case Study Paper on Rights to Supports" (July 2010), online: Law Commission of Ontario <<www.lco-cdo.org>>.

²⁹ Office of the Auditor General of Ontario, *2008 Annual Report* at 381. Also see the update on this issue in the Auditor General's *2010 Annual Report* at 392.

³⁰ United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106 (CRPD). Article 1 of the *Convention* states: "The purpose of the present Convention 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" (4). Along with the "equal and inalienable rights" of all persons, the *Convention* recognizes dignity as "the foundation of freedom, justice, and peace in the world" (1). The *Convention* lists "[r]espect for inherent dignity" as one of the general principles guiding the document, and articulates a strong connection between the principles of non-discrimination and dignity. In Article 3(a), it states that any act of discrimination on the basis of disability "is a violation of the inherent dignity and worth of the human person" (5).

³¹ *Human Rights Code*, R.S.O. 1990, c. H.19 [Code]. The preamble states that states that part of its purpose is the "recognition of the inherent dignity [...] of all members of the human family" and that this purpose is in agreement with the *Universal Declaration of Human Rights*.

³² "Dignity" was treated as central to the meaning of equality in section 15 of the Charter in *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 [Law]. In *R. v. Kapp*, [2008] 2 S.C.R. 483, [2008] S.C.J. No. 42 [Kapp], the Court acknowledged that Law had been interpreted in a way that resulted in 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 take on a more peripheral role in future cases.

³³ Chief Justice Dickson identified dignity and other values reflected in the LCO principles as "essential" to a free and democratic society; these values "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society": *R. v. Oakes*, [1986] 1 S.C.R. 103, at para. 64. In *Blencoe*, Bastarache J., speaking for the majority, stated, "The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter*...": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 76 [citations omitted]. The pervasiveness of human dignity as an underlying value was affirmed in *R. v. Kapp*: "There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity": [2008] 2 S.C.R. 483, 2008 SCC 41, at para. 21 (per McLachlin C.J. and Abella J., for the majority).

³⁴ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 at para. 53.

³⁵ *Law*, above note 34 at para. 51.

³⁶ *Council of Canadians with Disabilities v. Via Rail Canada*, [2007] S.C.J. No. 15 [Via Rail].

³⁷ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] S.C.J. No. 46 [Meiorin].

³⁸ CRPD, see note 30. Preamble, (i) & (m); Article 3(d). Specifically, the CRPD at Preamble (p) emphasizes diversity through its recognition of the intersectional experiences of some persons with disabilities. This recognition is also articulated in Article 6 (women with disabilities) and Article 7 (children with disabilities).

³⁹ *Code*, see note 31, Preamble and s.17, respectively. The ODA also recognizes the principle of respect for diversity and difference in its preamble in the context of the provision of educational services and

welfare assistance. Similarly, the Ontario *Education Act* emphasizes the need for individualized assessment and accommodation to meet the needs of exceptional pupils in s. 1.

⁴⁰ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, on accommodation in education and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, on accommodation in the employment context.

⁴¹ Joffe, note 26 at 39.

⁴² Richard K. Scotch and Kay Schriener, "Disability as Human Variation: Implications for Policy" (1997) 549 *Annals of the American Academy of Political and Social Science* 148 at 154; Doug Surtees, "What Can Elder Law Learn from Disability Law?" in Israel Doron, ed., *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Heidelberg, Germany: Springer, 2009) 93 at 99 citing Michael Ashley Stein, "Disability Human Rights" (2007) 95 *Cal. L. Rev.* 75 at 75 and 86.

⁴³ Zola, "Toward the Necessary Universalizing of a Disability Policy" (1989) 67 *The Milbank Quarterly* 401 at 410 ["Toward the Universalizing of Disability Policy"].

⁴⁴ Scotch and Schriener, above note 42 at 158; Jerome E. Bickenbach, Somnath Chatterji, E.M. Bradley, T.B. Usten, "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48 *Social Science & Medicine* 1173 at 1183.

⁴⁵ CRPD, note 30, 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."

⁴⁶ See the Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 2000), at section 4.1, online: <<www.ohrc.on.ca/en/resources/policies/policydisaccom2>>.

⁴⁷ OHRC, note 46 at 6.

⁴⁸ To take this point further, someone who identifies with the Deaf community will take a different view of how to respond to this physical condition from someone who does not consider him or herself part of the Deaf community. The physical condition is the same, but the perspectives and experiences may be very different.

⁴⁹ *In Unison 2000*, online: <<www.socialunion.gc.ca/pwd/union/unison_e.html>>.

⁵⁰ CRPD, note 30, see specifically the preamble, Articles 3(a), 25 & 26. The preamble at (n) states that the CRPD recognizes "the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices". It is important to note that this articulation of autonomy and independence in the CRPD is not confined to a physical dimension and instead encompasses the opportunity or ability for persons with disabilities to make their own decisions. This suggests that persons with disabilities are to have the same freedoms that all members of the human family have to make their own choices. It is not limited, as it is sometimes in s.7 jurisprudence, to fundamental personal decisions. Article 3(a), which articulates general principles by which the Convention is guided and bound, articulates the first principle as "[r]espect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons". The *Convention* also mentions the principle of autonomy and independence in the context of peer support, habilitation, and rehabilitation (Art. 26) and in relation to health (Art. 25).

⁵¹ *Law*, note 34, at para. 53.

⁵² *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

⁵³ World Health Organisation, *A glossary of terms for community health care and services for older persons* (Kobe, Japan: WHO, 2004) at 10 (Technical Report Vol. 5 WHO Centre for Health Development Ageing and Health. WHO/WKC/Tech.Ser./04.2), online: <<http://whqlibdoc.who.int/wkc/2004/WHO_WKC_Tech.Ser._04.2.pdf>>.

⁵⁴ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [Morgentaler].

⁵⁵ Paula Pinto, ed., "National Law and Policy Monitoring Template: Extended Version" (Toronto: Disability Rights Promotion International, 2008) at 4.

⁵⁶ Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1:7 *Yale J. Int'l L.* 7 at 12.

⁵⁷ Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Rev. Const. Stud.* 1, at 8.

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- ⁵⁸ 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) at 12-13, online: <<<http://www.who.int/ageing/publications/active/en/index.html>>> at 34.
- ⁵⁹ *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15 at para. 162.
- ⁶⁰ *In Unison 2000*, note 49.
- ⁶¹ *Eaton v. Brant County Board of Education* (Court of Appeal for Ontario) 1995 CanLII 980 (ON C.A.) at p. 20.
- ⁶² CRPD, note 30, Preamble (e), Art. 24, 29, 30..
- ⁶³ Code, note 31, Preamble.
- ⁶⁴ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 (AODA).
- ⁶⁵ Provisions within the *Planning Act*, R.S.O. 1990, c. P.13, s. 2 (h.1), s. 41(4)(1), (2)(f), (7)(a)(4.1) & s. 51(24) and the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, O. Reg 299/10, s. 4, also promote the principle of inclusion, participation and accommodation. Similarly, the *Ontarians with Disabilities Act*, S.O. 2001, c. 32, and the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, S.O. 2008, c. 14 are both intended to advance the principle of inclusion, participation and accommodation in their entirety.
- ⁶⁶ For example, *Eaton v. Brant County Board of Education*, note 40, and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29. In *Canadian Association of the Deaf v. Canada*, the CAD successfully maintained that “the federal government’s Guidelines for administration of its Sign Language Interpretation Policy den[ie]d deaf and hard of hearing Canadians the opportunity to fully participate in government programs” and thus contravened section 15 of the Charter (*Canadian Association of the Deaf v. Canada*, [2007] 2 F.C.R. 323 (FC)).
- ⁶⁷ Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 *Human Rights Quarterly* 494 at 509.
- ⁶⁸ Gary Malkowski, Audism Workshop, Canadian Hearing Society and Toronto Association of the Deaf (3 June 2010).
- ⁶⁹ *Eaton*, note 40, 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 at para. 53.
- ⁷⁰ CRPD, note 30, articles 14, 15, 16, 28 and 25.
- ⁷¹ CRPD, note 30, 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”.
- ⁷² Samuel Perreault, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* (Canadian Centre for Justice Statistics: Ottawa, May 2009) at 8.
- ⁷³ Perreault, note 72 at 11. Also see DAWN – RAFH Canada, *Response to the Law as it Affects Older Adults Consultation Paper* (Law Commission of Ontario: July 7, 2008) at 1.
- ⁷⁴ CRPD, note 30, Preamble.
- ⁷⁵ *Unison*, note 49.
- ⁷⁶ For a description and analysis of the concepts of progressive realization and the duties to respect, protect and fulfill, see Maria Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement” 23 *Human Rights Quarterly* 1062 at 1062-1097.
- ⁷⁷ “Inclusive design” requires that a system be established in a way that allows everyone to participate; if necessary, it may include accommodations. See Scott Raines, “What is Universal or Inclusive Design”, Ashoka Changemakers (June 4, 2009), online: Ashoka, <<<http://www.changemakers.com/node/52208??>>>.
- ⁷⁸ Green, note 76, at 1062-1097.