ONTARIO BAR ASSOCIATION

LAW AS IT AFFECTS PERSONS WITH DISABILITIES

SUBMISSION TO THE
LAW COMMISSION OF ONTARIO

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Submitted by:

Carole Brown
President
Ontario Bar Association

Mark Berlin
Chair
Working Group on the
Law as it Affects Persons with
Disabilities

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About the Ontario Bar Association

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 17,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

PART 1: PRELIMINARY MATTERS

1)   Diversity of Opinion

The following comments provided by the OBA Working Group represent a diversity of opinion from a wide variety of perspectives such as Health Law, Administrative Law, Employment Law and Civil Liberties. While every attempt was made to provide consistent commentary to the Law Commission consultation questions, the Working Group felt that there was value in canvassing a variety of opinions on various issues, as long as there were no glaring contradictions in our presentation.

2)   General Comments

The Working Group's comments have, for the most part, been kept general in nature. The possible range of issues to be canvassed was vast and any one of the issues canvassed could, by itself, be the subject of detailed discussion. It was simply not possible to engage in detailed discussions about the application of specific laws or legislation in any particular area. It was hoped that future consultations might allow for a more thorough analysis of specific topics.

Our comments are, therefore, intended to simply identify key areas and major issues or trends rather than provide any form of in-depth analysis of any specific points or areas of law.

3)   Definitions of Disability

The Working Group is well aware that various definitions of disability are employed in different contexts, and that these definitions can and have changed over time. Due to the general nature of our commentary, however, we have not attempted to provide any precise definitions of disability or to apply particular definitions to specific segments of our commentary. We were more concerned with articulating the principles to be employed when defining disability than with the specific definitions themselves. For simplicity's sake, we have, therefore, used the terms 'disabled' or 'disability' without qualification throughout our commentary, although we are well aware that the meaning of these terms may vary from one context to another.

4) Duty to Accommodate and Undue Hardship

It is understood that when it comes to accommodation persons with disabilities have obligations as well as rights. The promotion of the human rights and dignity of persons with disabilities is furthered by ensuring that persons with disabilities participate in processes of accommodation by identifying their needs and assisting employers and others to determine forms of accommodation that are acceptable to the person with the

disability while at the same time fitting within the 'up to the point of undue hardship' framework.

It is understood that often it is necessary to find a balance between the rights and obligations of all parties. Persons with disabilities should play a crucial role in finding the appropriate balance in individual situations.

5)   Theory v. Practical Application

When discussing various 'models' of disability, it became apparent that the content and application of a model varied depending upon whether one pursued a theoretical or practical approach. For instance, some academics, taking a theoretical approach to the social model have argued that it might be possible to eradicate 'disability' as we know it. On a more practical level, most people accept the reality that, while changes to the environment and social attitudes can greatly reduce the negative aspects of the experience of 'disability', it is most likely not possible to eliminate disability entirely, and that there will always be certain types of disability that will remain essentially unaffected by environmental or attitudinal change.

It was also accepted that is debate within some communities of persons, such as the Deaf or hearing impaired, who may be defined by others as 'disabled' have no desire to eliminate the characteristics that cause others to see them as persons with a disability. While such groups may require accommodation in particular instances, it is clear than many would see no benefit to eliminating their 'disability' – and some would in fact be offended by the assumption that they needed to be changed or altered in any way to help them appear or function in a manner that could be seen as more 'normal'.

In the discussion that follows, the Working Group focussed on the practical elements of the social model, such as the need to redesign the physical environment to reduce barriers for persons with disabilities, rather than the more theoretical aspects of the model which suggest the elimination of disability is the goal.

6)   Models v. Principles

While the Working Group agreed that some discussion of the various models was useful, the general feeling was that applying principles could be far more useful than using any particular model of disability.

Models, such as the bio-medical/functional model or the social/human rights model are constantly being debated among academics and are consequently being modified and re-formulated on a regular basis. It is debatable whether there is actually any general consensus as to the precise content or definition of any particular model at any specific time. It is not always clear that two people purportedly speaking about the 'same' model actually understand the model in the same way.

The Working Group, therefore, agreed that it would be more useful to identify general principles rather than focus on particular models. Principles should be more flexible and easier to apply in a wider range of contexts. Employing principles as a guide rather than models would also eliminate the confusion that may arise when attempting to discuss areas of the law where elements of more than one model have been employed.

7)   Practical Suggestions

The Working Group suggests the following be included or added to the paper:

- *Glossary*: it would be useful to add to the Consultation Paper a glossary with clear definitions of the various approaches – as the paper is currently set up, the definitions become blurred.

- *Executive Summary*: An executive summary should be added that outlines why the paper is being pursued; why now in particular; and what specific problems have been identified to provoke the consultation. It would be useful to include a segment outlining the purpose and role of the Law Commission of Ontario, who it involves, how it is funded and how specific topics of investigation are selected. Further information is required concerning the purpose of the Consultation Paper project. What are the key goals? What is the expected impact or outcome of the project?

- References to the MHA on pages 8 and 25 should be changed to HCCA

- Information about how other jurisdictions approach disability related legislation would be helpful.

- Information is required concerning how the various approaches to disability are evaluated; what are the markers of success and how are outcomes evaluated?

- Is any information in the Federal Report, "In Unison" useful to this consultation?

- More detail concerning the increase in disability related cases before the OHRC would be useful.

- More detail concerning an economic approach that addresses the reality of the lack of resources and how this can be addressed would be useful.

PART 2: RESPONSES TO QUESTIONS

1) IDENTIFYING THE CONCEPTUAL APPROACHES TO DISABILITY THAT SHOULD INFORM THE LAW COMMISSION OF ONTARIO'S FRAMEWORK FOR THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

a) *What are the advantages and disadvantages of the various approaches as bases for the development of laws affecting persons with disabilities?*

Advantages of Human Rights/Social Model

The key advantage of the social model is that offers a useful lens through which to re-examine society and re-imagine the legal foundations for a more inclusive and accommodating society.

A human rights or social approach assumes that persons with disabilities represent a normal segment of the spectrum of the human condition. The social model also argues that it is not simply a person's impairments that disable them, but that the way society is constructed often creates or exacerbates 'disabilities' and exclusion. As the UN Convention explains, disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The human rights model therefore promotes the concept that society as a whole has an obligation to ensure that all barriers to the full and equal participation of persons with disabilities in all aspects of social, economic and political life are removed. This involves ensuring that social and physical environments are constructed in a manner that allows for the widest possible range of individuals to participate fully in all aspects of life. The human rights model, therefore, places the burden on government and society as a whole to ensure that a wide range of abilities and disabilities are accommodated.

The human rights/ social model also makes it clear that as persons with disabilities are a normal part of society, all laws apply to them. Therefore all law, not just laws that relate specifically to disability issues, apply to and impact upon persons with a disability. There is no special or segregated area of 'disability law'. Instead all law should be created on the basis of 'universal design' – meaning that consideration should always be given to whether any new or existing law in any area would directly or indirectly promote or thwart the goals of inclusion and participation of all citizens.

Equality is more likely to be promoted by laws rooted in a human rights/social approach than those embedded in a bio-medical or functional approach. It is

important to note that the United Nations Convention on the Rights of Persons with Disabilities (UN Convention) employs a human rights approach.

Disadvantages of the Social/Human Rights Model

Critical appraisal of the social/human rights model reveals that despite its numerous advantages as far as promoting inclusiveness and accommodation, applying the model in all cases would impose major challenges in areas such as health services. It is difficult to see how the provision of services such as physiotherapy for instance, could be determined without some reliance on the bio-medical/functional approach.

Similarly, the provision of social assistance or other support to persons with disabilities would seem to have to be based, at least some extent, upon medical diagnosis and analysis of a person's needs and impairments. Despite the insights provided by the human rights/social model, there remains a large medical/functional element to most forms of disability.

While the social/human rights model provides insight into the degree to which societal and environmental factors exacerbate the impact of many disabilities, there does not seem to be an obvious way to entirely eliminate a bio-medical approach from most determinations of 'disability'.   It is also necessary to recognize that some forms of disability will remain unaffected by changes to the physical environment or social attitudes. To focus entirely on social/human rights factors to the exclusion of bio-medical/functional issues could therefore create as many problems as would relying on bio-medical/functional models to the exclusion of social/human rights considerations.

Based upon examples provided in the Consultation Paper it appears that The Human Rights/Social model also suggests the definition of disability be expanded in the human rights context to include even minor illnesses or infirmities, to the extent that a person can show that she was treated unfairly because of the perception of disability. If the goal of the Consultation is to come up with a unified understanding of the term disability, the understanding of disability cannot be dependent upon the definition of disability being employed with within the human rights context.

If we accept that not every illness requires accommodation then determining practically what constitutes a disability is a key issue that must be addressed. To expand the notion of disability to include even what have been referred to as minor illnesses or infirmities may dilute support for programs intended to assist persons with disabilities. While there may be some value to helping the general population realize that a large portion of the population suffers from some form of illness or disability and that almost every person, if they live long enough, will most likely experience some form of disability, it would be counterproductive to

allow the public to think that minor illnesses or infirmities are in the same category or require the same level of attention, accommodation or support as disabilities which produce serious impairments. As definitions of disability tend to change over time, exactly how or where the line should be drawn between 'minor' illnesses and infirmities and disabilities that require accommodation and support is an issue that will most likely demand constant attention and re-negotiation.

Advantages of the Bio-Medical/Functional Approach

The bio-medical/functional model is simple and easily applied. The focus on the individual allows considerations of the how the environment or circumstances in which the individual must operate to be downplayed or ignored, thus reducing the need for the state or public support systems to acknowledge and deal with many of the more complex and challenging aspects of disability (as outlined below, this is also the model's major disadvantage)

Disadvantages of the Bio-Medical/Function Approach

The bio-medical/functional approach fails to acknowledge the extent to   which disability can be constructed or at least impacted by the built and/or social environment. The   bio-medical   model   'problematizes'   the   impairment without considering the physical and social environment in   which persons with disabilities must function.

The bio-medical and/or functional approach focuses on the individual, assuming the person with a disability is deviant or abnormal, in the sense that their impairments (or differences) are what prevent them from participating fully in all aspects of society. It is essentially the person with a disability who has to fit themselves into society. There is, therefore, less emphasis on the need for changes to how society is constructed or organized in order to accommodate or support persons with disabilities. The assumption is that the state has only a residual obligation to either eliminate or reduce the impact of impairment on the individual, usually thought medical intervention, or to help individuals fit themselves into society.

In most cases, this involves the provision of medical and income support, for persons defined by the bio-medical model as too disabled to effectively support themselves (essentially those persons who cannot 'fit' themselves into the employment market). This model also, at least indirectly, permits stereotypes and negative assumptions about persons with disabilities to persist by promoting the notion that disability is abnormal and problematic.

It should be noted that the bio-medical model is, or at least can be, distinct from a medical diagnosis or a medically based determination of disability. The bio-

medical/functional approach encompasses far more than the use of medical diagnosis or information. The various assumptions that inform the bio-medical/functional approach do not necessarily flow from the use of a medical diagnosis per se. Similarly, using medical diagnosis to determine eligibility is not necessarily incompatible with programs established according to social/human rights principles. However, the tendency appears to be that the more a program relies upon on medical information and diagnosis to determine disability or eligibility for benefits, the more likely it is that the assumptions inherent in the bio-medical/functional approach dominate decisions concerning the provision of services. Hence the tendency to assume that the use of medical diagnosis to determine eligibility for benefits implies the application of the bio-medical/functional approach to the provision of those benefits.

So while employing medical diagnosis or medical information to determine who may be entitled to particular benefits or supports does not necessarily determine the kinds or scope of support and assistance that may be offered, the tendency to conflate the use of medical information with the application of the bio-medical/functional approach tends to limit the scope of the support offered in most cases.

In areas such as income maintenance law, for instance, the goal is usually the maintenance of the status quo and the provision of basic support. There is rarely any emphasis on altering the social, economic or physical environment to encourage the full inclusion of persons with disabilities. Rarely do income support systems provide sufficient or effective supports to allow persons with disabilities to fit themselves into society, even in instances where this might otherwise be possible given adequate resources. These programs intentionally or unintentionally create in the minds of the general public the impression that persons with disabilities are incapable of being productive or self-supporting members of society. This situation would appear to contravene Article 8 of the UN Convention which obliges state parties to promote positive perceptions and greater social awareness of persons with disabilities.

An over-emphasis on bio-medical/functional approaches to law directly or indirectly permits, if not encourages, the isolation and marginalization of persons with disabilities. It is widely acknowledged that poverty is the key barrier to the full participation of persons with disabilities in society. Income support programmes based upon the bio-medical model that provide only a subsistence level of support for persons with disabilities, do nothing to eliminate poverty among persons with disabilities and therefore permit the isolation, marginalization and exclusion that accompany poverty to persist.

While human rights codes and the Charter may promote the human rights and equality of persons with disabilities and protect them from discrimination, as long as income support programs are based only upon bio-medical or functional

approaches to law rather than taking into account human rights or social approaches, poverty and the barriers it creates will be more likely to continue.

This is largely because the bio-medical approach promotes that idea that services and supports for persons with disabilities are provided as a form of charity or privilege for a disadvantaged minority. Essentially persons with disabilities receive what society is willing to offer. Support is offered on the basis that persons with disabilities are 'deserving' of assistance since the impairments that prevent them from supporting themselves through employment are 'no fault of their own'. The assumption is that impairments are what prevent people from earning a living, not the failure of society to accommodate impairments. A social/human rights approach promotes the provision of supports and accommodation as a right or entitlement of citizenship. Society is therefore obliged to provide more than economic support sufficient to keep people alive. Instead persons with disabilities are entitled to receive the degree of support and assistance required to promote equality, independence and full participation in society.

Approaches vs. Principles

Although the various approaches provide some useful insight to help understand the impact laws can have on individuals as well as society's attitude towards certain populations, theoretical models may be difficult to apply to the actual formulation of law.

Rather than approaches or models of disability, such as the bio-medical approach or the social/human rights approach, it may be more useful to speak in terms of guiding principles. Principles may prove more flexible than any particular model. Also, models and approaches undergo frequent academic re-evaluation. Since particular models and approaches to disability change over time, sometimes quickly, it may be better to outline general principles that can be used to decide what direction a particular law should take rather than base law on a specific model or approach which could end up being seen as obsolete by the time the law came into effect. There is already a sense among academics that the social model needs to be revisited and a more progressive model put forward.

The following principles are in large part taken from the UN Convention on the Rights of Persons with Disabilities (UN Convention). It is appropriate to employ the principles articulated in this document given that once Canada ratifies the UN Convention, it will be necessary for all provinces to ensure that their laws comply with its terms. The UN Convention, which applies a human rights model, is therefore, a suitable place to begin any attempt to create a coherent approach to the law as it affects persons with disabilities.

- Law should strive 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.

▪ Discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person

▪ Law should strive to promote the individual autonomy and independence of persons with disabilities including the freedom to make their own choices.

▪ Law should recognize the critical need to address the negative impact of poverty on persons with disabilities

▪ Law should promote positive perceptions and greater social awareness towards persons with disabilities.

▪ Law should recognize that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others

▪ It is the obligation of society and law makers to ensure that all aspects of social, legal and political life are accessible to the widest possible spectrum of citizens, ensuring that adequate supports and accommodation are available to all persons who require them to participate fully in society.

▪ Ensuring the full and equal participation of persons with disabilities in all aspects of society is a collective and shared social obligation of all citizens and governments.

▪ In developing laws with a direct or clear impact upon persons with disabilities shall ensure that those impacted are consulted

▪ Laws should be created with the idea of 'universal design' in mind – i.e. the law should apply to and be accessible by all citizens.

b) **Is it necessary to have a single conceptual approach to disability as a basis for the law, or may there be a place for multiple or mixed approaches?**

The Consultation Paper does not provide any clear indication of why it is necessary to have one approach to disability, what might be achieved by doing so, or what potential problems might be associated with not having a single approach.

It does not appear that it is necessary or even useful to attempt apply any one approach or model to all areas of law and legislation. Given that disability can be understood and defined differently in different contexts and different pieces of legislation have difference goals, it may not even be possible or desirable to apply the same model in all contexts.

As noted above, it is also clear that models and approaches to disability change over time, therefore, it would be necessary to either apply different approaches over time, as models changed, or, for the sake of consistency, apply 'out-dated' models to newer laws. It is not clear what benefit would be achieved by either of these tactics.

This is why it may be more useful to speak in terms of the principles to apply when formulating law rather than trying to apply any single model in all cases. There are useful elements in both the social/human rights model and the bio-medical/functional model. The principles attempt to capture and privilege the most useful and positive elements of both approaches. While the principles outlined above may have much in common with many elements of the social/human rights model, there is no reason the same principles could not be applied in situations, such as the determination of disability/degree of impairment, where elements of the bio-medical/functional approach tend to dominate.

Applying principles that relate to the promotion of the human rights, equality and human dignity of persons with disabilities should ensure that all areas of law achieve the same basic equality goals regardless of the specific purpose of the particular pieces of legislation or what particular model or approach to disability may have informed policy in each individual context.

c) **If so, what contexts, considerations or principles should be taken into account in selecting a particular approach to disability as the basis for a particular law or program?**

The Working Group suggests that the question above be re-formulated. The issue is what principles should be applied to the reform and formulation of the law rather than which principles should be used to determine which model to employ.

There should be a clear rejection of models or approaches to law which see persons with disabilities as the objects of charity, or which place the onus on persons with disabilities to fit themselves into society or which limit the need of society as a whole to strive towards the creation a fully accessible and accommodating environment.

The priority is not to find any one model or approach to disability as much as it is to ensure the promotion of the equality and full participation in society of all persons, disabled or otherwise.

d) Does the categorization of approaches to the definition of disability in the consultation paper work?

The Working Group feels that it would be wrong to ask which of the approaches shall we adopt. All the approaches are facets of a multi-dimensional understanding of disability. The experience of disability may involve physical limitations and/or socially constructed barriers; often both are present.

The approaches outlined may have limited application or resonance to the decision-making authority in charge of administering government programs or to the decision-maker in charge of the adjudication of existing legislation.

As stated above, the Working Group suggests that it would be more advantageous to apply broad principles, rather than a single framework, to guide consideration of the appropriate legislative or governmental response.

2) EXPERIENCES WITH THE LAW AND THE VARIOUS APPROACHES TO DISABILITY

a) **If you are a person who has attempted to gain access to rights and benefits under these laws and programs, or an advocate on behalf of persons with disabilities, does the approach to defining disability in a law or program affect you ability to effectively gain access? If so, how?**

Note:
What follows is a very general sample of some of the issues and challenges facing persons with disabilities attempting to access particular services or legal remedies. They are not presented in any particular order and the list is certainly not exhaustive. The goal is simply to provide an indication of the types of issues and problems that require attention and which may benefit from law reform initiatives based on the principles outlined above.

This section of the Working Group's response is presented from the perspective of persons with disabilities and those who advocate on behalf of persons with disabilities.

It is also understood that persons with disabilities may be parties appearing before Boards and Tribunals, but that adjudicators and other members of Board and Tribunal staff may also be persons with disabilities who may also be affected by any barriers or failures to accommodate that may exist within the justice system.

a) Disability Issues Before Boards and Tribunals

The rights of people with disabilities are more likely to be at stake in an administrative tribunal than in court. Boards and Tribunals deal with some of the most basic issues of daily life, such as housing, the right to be free from discrimination, access to social assistance, the right to a safe workplace, and the right to avoid institutionalization. Yet, despite the importance of boards and tribunals when it comes to defending these basic rights, it appears that people with disabilities, particularly those with capacity issues, still experience a wide range of barriers in relation to their access to tribunals.

Although Courts and Tribunals alike have made major advances in ensuring accessibility for people with physical disabilities, barriers remain, particular for people with non-physical disabilities.

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

What follows is an outline of some of the most common barriers faced by persons with a disability when appearing before a Board or Tribunal.

BARRIERS BEFORE THE HEARING

• Parties with capacity issues may have difficulty navigating the process or preparing for a hearing

• Tribunal forms may no always be available in accessible formats

• Many people, not only people with disabilities have difficulty understanding tribunal forms

• Parties have difficulty accessing help to fill in forms. It is often difficult to reach tribunals for assistance. Parties may not have reliable phone or internet connections

• Meeting application or other deadlines may be a particular problem for persons with capacity issues

• Tribunals increasingly rely on providing information about people's rights and tribunal processes via the internet. This presents a variety of barriers

for persons with disabilities - people who do not have internet access cannot access this essential information, people with sensory disabilities like hearing and vision disabilities are not able to access the information if it is not provided in accessible formats.

BARRIERS TO ACCESSING REPRESENTATION

• Legal Aid does not issue certificates for many areas of law that are essential to people with disabilities. For example, a legal aid certificate is not available for representation at HSARB hearings, which determine whether essential CCAC and attendant services will be terminated.

• Legal Aid does not pay lawyers for extra time required to serve clients with special needs or capacity issues – this may cause lawyers to avoid representing clients with capacity issues.

• Persons with capacity issues will often rely on their friends, family or health care or social workers for advice – even in instances of potential conflict.

BARRIER AT HEARINGS

• Little training is provided to tribunal members about conducting barrier free hearings.

• Not always clear how tribunals will deal with parties who lack capacity to instruct counsel.

• If a person appearing before a board or Tribunal lacks capacity to instruct counsel and no SDM is in place, it becomes very complicated for the person to pursue their case, even before the Human Rights Tribunal. Some tribunals have ruled that they lack jurisdiction to appoint litigation guardians. It has also been argued that the Superior Court is unable to appoint a litigation guardian for tribunal matters. This leaves the complicated process of having a statutory guardian appointed. A less expensive, complicated and time consuming process is required for ensuring that people who lack capacity to instruct counsel are able to pursue their case.

• Many people with disabilities do not know what accommodations they can receive or how to request them. Tribunal staff do not often offer assistance in providing accommodations.

• Parties may be reluctant to request accommodation because they fear negative reactions, stigma or stereotypes

- Parties may not know they have a right to accommodation. They may assume that accommodation applies to only physical disabilities

- Parties may feel rushed at hearings

- It may be difficult for a party with a capacity issue to even find a hearing room

- It may be difficult for a party with a disability to sit still at all times during hearing

- The pace of tribunal proceedings is often fast,   making it hard to follow

- If accommodations are offered, they are often on an ad-hoc basis only.

BARRIERS AFTER HEARING

- Many unrepresented parties assume the tribunal decision is final – they may not understand they have a right of appeal

- Tribunal correspondence may not communicate right of appeal in a simple language. The appeal forms contain language that is complicated

Note: It is also understood that some of the barriers that create problems for persons with disabilities appearing before Boards and Tribunals as parties may also impact upon the participation of persons with disabilities as adjudicators or as tribunal staff.

b) *Income Maintenance Programmes*

The UN Convention recognizes the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. States Parties are required to take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. They are also required to ensure access to assistance from the state with disability related expenses including adequate training, counselling, financial assistance and respite care.

Currently, in Ontario eligibility for income support related to disability is determined on the basis of medical reports and a bio-medical model of disability. People qualify for assistance or support depending upon whether they meet some standard level of impairment, as determined by a medical practitioner. In most income maintenance programs the extent to which an impairment is

exacerbated by the built environment or the attitudes of the community plays almost no role in determining whether there are limitations on the persons ability to earn an income sufficient to support themselves. The key problem with income support programmes is that support is allocated on the basis of what the state is prepared to provide rather than any realistic determination of what a particular individual requires to fully participate in and integrate into society. This system has not served persons with disabilities well.

The obvious problems with Ontario's current system of income maintenance of persons with disabilities have been outlined in numerous ways over the years. Some of the more glaring issues can be listed briefly:(please see "Denial by Design" http://www.incomesecurity.org/documents/DenialByDesignfinal.pdf)

• A flawed disability determination process

• Application process is very complicated and burdensome and there are few or no supports provided through this process

• inadequate levels of support

• failure to cover the cost of some essential assistive devices

• failure to cover cost of transportation and extra wear and tear on vehicles essential to ensure the mobility of persons with disabilities

• failure to cover cost of certain medical treatments, such as physiotherapy or chiropractic treatments

• failure to cover additional cost of special diets

• failure to respond adequately to emergency requests or needs

• a bureaucratic system that devotes more time to 'policing' and monitoring recipients of ODSP than providing the assistance that could help many become independent and self-supporting

The government's new Poverty Reduction Legislation and the promised review of social assistance offer an opportunity to address these and other issues. It is essential that, as a starting point, that the government re-evaluate the principles used to guide social welfare policy, particularly as it impacts persons with disabilities. Any reform of the welfare system should abide by the principles outlined in the UN Convention – and provide to persons with disabilities adequate levels of support to promote their full and active participation in all facets of society. Support programs that exclude and isolate persons with disabilities due

to poverty and unnecessarily restrictive rules would not be consistent with the human rights/social approach to law or the principles of the UN Convention.

Applying the principles behind the human rights model would effect a major change in the determination of 'disability' as well as the manner in which income maintenance plans operate. Income support as a human right required to ensure the full and active participation of persons with disabilities in society would be a very different beast than support provided as a kind of charity to those determined eligible on the basis of their medical condition. This goal should be pursued to the extent viable.

i) *Financial considerations*

It is acknowledged that a compromise has to be found between what the state is realistically capable of providing and what low-income individuals with disabilities might require to participate fully in society. Nevertheless, it should not be assumed that offering the more generous support associated with a social/human rights approach to assistance would necessarily lead only to increased costs. An application of human rights principles to social assistance would also lead a reduction in the monitoring and policing of social assistance recipients which could produce major cost savings. In addition, higher levels of support could lead to a higher and healthier standard of living for many recipients which could reduce health care costs, and higher levels of employment support should ensure that a greater number of people with disabilities would be able to enter the workforce and become self-sufficient. While continuing support may be required for these people, the overall cost to social assistance programs would be reduced and the overall benefit for both the individuals and society increased.

c) *Capacity and Decision Making*

The UN Convention (Article 12) states that persons with disabilities have the right to recognition everywhere as persons before the law; persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life to the extent possible; States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

As it currently stands, the law surrounding issues of capacity and decision making would appear to promote allowing persons with capacity issues to remain as autonomous as possible and encourage the enhancement of a person's decision making abilities wherever practical, through the acceptance of supportive decision making and other forms of assistance or accommodation. However, in practice it is clear that the intent of the law is often thwarted either because few people understand the law or are willing to take the extra time and

effort required to put into practice accommodations such as supportive decision making.

It is the general ignorance of nuances of capacity law rather than any glaring omissions in the law that create the most obvious barriers to persons with capacity impairments. Although there are also gaps in the law that permit institutional administrators and substitute decision makers to ignore the rights of persons with intellectual or cognitive disabilities or deny them the ability to participate in decision making, even when they might be able to do so if provided with adequate supports.

The following is a list of but a few of the ways in which the intentions of capacity law are thwarted.

- Third parties, such as banks, hospitals or long-term care facilities do not understand capacity law and assume that a finding of incapacity in one area applies to all areas of decision making.

- Institutions and care facilities tend to take a very simplistic approach to capacity, assuming people to be incapable when they could make decisions with proper assistance.

- Institutions tend to take instruction from anyone who claims to have SDM (substitute decision maker) authority without demanding some form of proof concerning either a finding of incapacity or the appointment of the SDM.

- Institutions and long-term care facilities take instructions from SDM that include using of constraints, such as placing a person with a disability in a locked unit of the facility, when SDM do not have the authority to consent to the use of such constraints beyond a few exceptional and clearly defined situations.

- Both institutions and SDMs fail to distinguish between different types of incapacity. A person found incapable in one area, such as treatment decisions will often be assumed to be incapable in all areas and treated as such.

- Neither the Courts nor the Public Guardian and Trustee provide adequate supervision of SDMs or Court Appointed Guardians. There is currently ample opportunity for substitute decision makers to take advantage of persons with capacity issues either by misusing their authority over financial issues or by restricting the freedom and autonomy of persons with disabilities far more than necessary.

A major education campaign is required to educate the general public and professionals, particularly persons who administer long-term care facilities, about capacity law and the rights of persons with capacity issues, as well as the obligation to assist persons with capacity issues with decision making to the extent possible, rather than simply assuming that the views of the incapable person are always irrelevant or illegitimate.

People with intellectual disabilities are often denied the rights to make decisions for themselves regarding where they live, their personal care and medical care. Often once these decisions are made, there are no means by which such decisions can be challenged.

d) Education and Students with Disabilities

Note: The views of persons such as educators and administrators were not canvassed by the Working Group. These comments represent the views of users (students with disabilities and their parents/guardians) and various groups who advocate on their behalf (advocates), although it is also understood that educators and administrators within the education system also see themselves as advocates for students with disabilities. The goal of these comments is not to make any final statements concerning the issues outlined. The intent is simply to identify areas where further study, in which the views of all interested parties could be canvassed fully, would be useful.

In Ontario the *Education Act* and the *Human Rights Code* both apply in the context of primary and secondary education. The *Education Act*, sets out a process whereby students with disabilities are identified as "exceptional" and then placed in a classroom or educational setting intended to meet the student's individual learning needs. The process involves elements of both the bio-medical/functional approach and the social/human rights approach, although there are certain aspects of the process where the bio-medical approach seems to dominate.

Overall, the process is complex. Students with disabilities and parents/guardians can find it difficult to navigate and understand.

The following is a basic outline of issues that users most frequently identify as barriers or challenges to accessing the services and/or accommodations they seek.

- Delays in receiving assistive devices such as laptops and specialized software programs, delays in the school arranging for individual supports such as a teaching assistant or special needs assistant, and delays in determining whether a student with a disability will even be permitted to attend his or her neighbourhood school.

- Difficulties securing the individual accommodations required by students, such as more time to take tests, modified work load or assignments, assistance with reading and comprehension.

- Concerns that students with disabilities may be suspended or expelled from school due to behaviour which is perceived to be aggressive or violent, which may have been prevented with appropriate accommodation.

The feeling among advocates is that a greater emphasis on the social/human rights approach or the principles outlined above may help eliminate or lessen the impact of some of the challenges faced by students with disabilities – at least to the extent that a social/human rights approach may lead to educational services for students with disabilities receiving greater priority when it comes to the distribution of funding and resources. A greater emphasis on a social/human rights approach could also encourage the creation of more inclusive school cultures and help ensure that each student is able to access the accommodations s/he requires. Principles of universal or inclusive design would be built into curricula and teaching techniques so that students with various abilities are better able to participate in education. Implementation of a social/human rights approach could also lead to practical reform, such as:

- Overcoming attitudinal barriers which may impede accommodation

- Increase understanding and implementation of human rights obligations at the school level.

- Increase in oversight and accountability by the Ministry of Education for inclusion and implementation of appropriate accommodation of students with disabilities

- Provision of adequate resources where schools and school boards require those in order to provide accommodations

b) **If you are a person or organization responsible for developing or applying the law as it affects persons with disabilities, what are the practical implications of the different conceptual approaches in terms of the implementation, application and enforcement of laws and programs?**

The key challenge appears to be the constant refrain that insufficient resources are available to permit the implementation of programs that adequately address the needs of persons with disabilities.

Other examples of challenges associated with the application of particular models:

Autistic Children
Autistic Children may not be able to seek redress before human rights tribunals given that there are questions about whether relevant legislation covers minors.

The social/human rights model, however, seems the best approach to ensure that autistic children can access education and the supports required.

A bio-medical/functional approach may be best in identifying the children who may require access to special education programs and support, but at the same time children can be denied entry into special education programs if they do not demonstrate certain cognitive skills.

A functional approach can help secure treatment and funding for children but may not ensure access or entry into educational programs.

Board and Tribunals
There may be practical considerations, such as lack of expertise or statutory limitations, such as limitations in terms of remedies within the jurisdiction of tribunals, which prevent an administrative tribunal from providing all necessary forms of accommodation: (See above for the challenges related to persons who lack capacity).

Accommodation:
There may be conflicts between the definition of the degree of accommodation required according to a human rights approach and the extent to which employers or others can afford to provide such accommodation.

3) IMPLEMENTING THE SOCIAL MODEL

a) *Are You Aware of Laws or Programs that are Based on a Social Approach*?

While most laws or programmes tend to contain elements of both social and functional approaches to disability, most tend to emphasize one approach or set of values more than other. For instance, social assistance programs, focus on the bio-medical/functional approach almost to the exclusion of the social/human rights approach, while legislation such as the *Accessibility for Ontarians with Disabilities Act* focuses more on a social or human rights approach.

The Ontario Courts Accessibility Program for People with Disabilities, in operation since 2005, is a project started by the Ontario Court of Appeal. (see http://www.ontariocourts.on.ca/en/accessiblecourts.htm for more detail). From a perspective that employs a largely human rights approach this program examines every external feature that could prevent someone from accessing the courts and modifies this feature accordingly, to the extent possible. It involves

gathering information about who requires accommodation, educating staff and the public and changing the built environment.

The new accessibility standards legislation appears to employ a more human rights based approach to accommodation for persons with disabilities. The legislation recognizes the social and public responsibility to alter the built environment to ensure that all persons have access and are able to participate fully in all social activities. The key drawback to this program is that it does not appear to involve sufficient consideration of the cost of implementation in all areas and the economic constraints faced by many of those expected to comply with the new standards.

b) *What changes to the scope, mandate, eligibility criteria or other features of current legislation or programs would be necessary in order to implement a social approach?*

NOTE:
As noted above, the Working Group is not convinced that the question posed above is necessarily the best question to ask, as it is not entirely clear that it is desirable to implement the social/human rights approach in all cases. The comments below assume that it is more desirable to employ the principles articulated above (which admittedly include many elements of the social/human rights approach, but are nevertheless broader and more flexible than the social/human rights approach) rather than striving to apply the social/human rights approach (or any other approach) exclusively or in all cases.

It was also felt that there was simply insufficient time to list all the potential specific changes necessary to implement either the social/human rights model or the general principles.

Overall, the key change required is a re-prioritization of disability related issues.

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

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

Resources and Identifying Priorities

It is understood that there is not an unlimited amount of resources to devote to providing the necessary supports and assistance required for either individual persons with disabilities or to the public and private institutions who must accommodate persons with disabilities. However, a key element of a shift from a bio-medical/functional approach to disability, which sees services to the disabled as a form of charity, to either a social/human rights model, or an application of the general principles outlined above, would be the recognition of the need to place disability related issues higher on the list of society's priorities when it came to the allocation of limited resources. While this might not mean that every need could be met, giving higher priority to disability related issues should mean at the very least that there will be an increase in the share of overall resources devoted to ensuring the rights of persons with disabilities are met.

c) ***Are you able to identify significant barriers or challenges to the development of a legal framework based on a social approach?***

The Working Group expresses concern about the assumption apparent in the Consultation Paper that the social/human rights model was the "way to go". In general it was felt that further evidence or explanation is required concerning how this conclusion was reached.

There were concerns that a purely social/human rights model might lead to problems, in particular, the application of an overly broad definition of disability in areas where a more narrow definition might be more suitable.

It was noted that according to some definitions of disability almost any member of society could be defined as disabled or likely to become disabled. Clearly such definitions would not be useful when applied to programs intended to target only those persons who face significant limitations or barriers to achieving equality and full participation in society.

Employing a purely social/human rights model in all cases could prove unworkable and in fact could result in a reduction in the overall level of support provided to those persons with disabilities experiencing the greatest need. In some cases, therefore, it may not be unreasonable to define disability more narrowly, as long as the basic principles of equality and access are observed when deciding who among the larger population of persons with a disability might be included and who might be excluded from any particular service of program. Limiting services and support to certain segments of the population of persons with disabilities may be the only way to ensure that limited public resources are employed in the most effective manner.

i) *Communication and Dialogue with Persons with Disabilities*

Regardless of which model or principles are applied, it is clear that another barrier to implementation will be a lack of communication between policy makers and the people being served. This is important given that it is necessary for persons with disabilities to identify what types of accommodation are required and which are most effective.

It is also important that persons with disabilities play a key role in identifying priorities and helping to achieve a suitable balance between the overall needs of the population of persons with disabilities and the public resources available to meet those needs.

In order to develop policies and laws that effectively serve and promote the interests of the persons with disabilities, there is a need for more dialogue between policy makers and the community of persons who actually live with disabilities. While, there are positive signs that law makers are willing to encourage such dialogue, it is not clear that all lines of communication are sufficiently open to ensure the necessary level of input from all segments of the disabled community.

We are only beginning to grapple with and understand how many of the limitations experienced by people with disabilities are socially constructed. Therefore we should not assume that a broader, de-contextualized definition of disability will automatically create a more inclusive society for people with disabilities or that the application of any particular model of disability will offer an adequate solution to the problems being addressed by any particular piece of legislation. Only input from those persons who actually live with disabilities and experience the impact of various policies in their daily lives can offer truly useful information as to what needs to be done to create a truly inclusive society. While discussing theoretical approaches and principles may be a useful aspect of law reform, the key focus should be on understanding and addressing the actual needs of persons with disabilities to the greatest extent possible.

PART 3: WORKING GROUP MEMBERS

Mark Berlin, Chair
Stella Luk
Edgar Montigny
Hugh Scher
Ian Mackenzie
Melissa Pang
Shelley Birenbaum
JoyAnn Cohen
Julia Hanigsberg
Shireen Sondi
Kenning Marchant