

**SUBMISSION OF ARCH DISABILITY LAW
CENTRE**

To the Law Commission of Ontario

In response to

Law As it Affects Persons with Disabilities

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**ARCH Disability Law Centre
425 Bloor Street East, Suite 110
Toronto, Ontario
M4W 3R5**

**Tel.: (416) 482-8255 Toll-free: 1-866-482-2724
TTY: (416) 482-1254 Toll-free: 1-866-482-2728
Fax: (416) 482-2981 Toll-free: 1-866-881-2723
www.archdisabilitylaw.ca**

Submission to the Law Commission of Ontario **The Law as it Affects Persons with Disabilities**

About ARCH

ARCH Disability Law Center is an Ontario-based community legal clinic that is dedicated to defending and advancing the equality rights of persons with disabilities. ARCH is governed by a volunteer Board of Directors, the majority of whom are people with disabilities. We provide a summary advice and referral service to Ontarians with disabilities and represent individuals as well as provincial and national disability organizations in test case litigation at all levels of tribunals and courts. We provide education to people with disabilities on disability rights and to the legal profession on disability law. We make submissions on matters of policy and law reform. ARCH maintains a website on disability law at:

www.archdisabilitylaw.ca

ARCH's experience with persons with disabilities is broad and is based on our contacts with people with disabilities themselves, their families and support people, advocates and community organizations.

LCO Background Paper

ARCH is pleased that the Law Commission has initiated such a broad and wide ranging consultation on laws as they affect persons with disabilities. We thank you for the opportunity to participate in this consultation.

As the Law Commission itself notes, virtually every piece of legislation has a potential impact on the lives of persons with disabilities, although some may have greater and/or more direct influence than others. Nevertheless, we believe it is essential that all prospective laws concern themselves with their impact on persons with disabilities, and that retrospective laws also be reviewed from the perspective of persons with disabilities to ensure that their views and concerns are reflected in them. Given that most of our current laws were drafted without considering their impact on persons with disabilities, or were drafted based on a medical/functional or pity/charity model, we urge a wholesale review of all legislation and policy that will take into account the lived experiences of persons with disabilities, and include their perspectives.

Definitions of Disability

Defining disability is a value-laden task. Definitions of disability often stem from a paternalistic view of persons with disabilities, as demonstrated in our present laws and ways of thinking. Persons with disabilities have been distinguished as being different from "normal", having some sort of defect or condition that causes them to deviate from the experiences of the majority of Ontarians. Seen in this

way, persons with disabilities can be hived off as a minority special interest group. This gives the state an “out” in terms of funding, legislative, policy and program decisions. The powerful “normals” play a very large role in crafting the definition of disability in order to protect resources and ensure that popular discourse defines and treats disability in ways that accord with the dominant groups’ ideals, needs and wants. It becomes very difficult for a “special interest minority group” to alter those definitions, especially if they are marginalized, vulnerable and lack political power.

It may be worth thinking about what we mean by “disability” if only to encourage the development of a definition broad enough to be inclusive. Because individual Ministries and bureaucrats tend to draft legislation, policies and programs in isolation from one another, there is no “big picture” that promotes or takes into account the lives of persons with disabilities. Indeed, because we often do not share the same language when we speak of disability, it makes it difficult to know how to start a discussion. This is particularly so because persons with disabilities are not a homogenous group. For example, some Deaf persons identify themselves as a separate community with their own language and culture. Some injured workers do not consider themselves persons with disabilities, because they are workers who were injured on the job. Of course persons with disabilities also represent the full spectrum of intersecting gender, ethnic, sexual orientation and other identities.

Considerations that have arisen in trying to define disability include:

- whether the disability is permanent or temporary;
- whether it is substantial, or serious or impacts on an ability to perform activities of daily living;
- whether it includes illness or not;
- whether it is acquired or not;
- whether the person with a disability has the option of describing what disability means to them, or whether it is determined by a third party, and if so, who that third party is;
- whether disability can be a perceived one, and if so, whose perception matters;
- whether context matters ie does disability for a poor, uneducated and unskilled person mean something different than a disability for someone with financial resources, an education and a work history or job skills;
- are episodic or recurrent disabilities included;
- are hidden disabilities included, and if so, do people have to self identify and to what degree?

All of these issues demonstrate that there are pitfalls in trying to define disability. If there is a single definition, people would have to fit themselves into that description. The focus would then be on the disability, and would ignore the

individual person in terms of their personal context of culture, economics, education, skill set – their whole social, political and economic circumstances. Taking this position would focus on exclusion because of difference. The remedy would be to rely on the state or others to take action or promote change in order to facilitate inclusion. This disempowers persons with disabilities, and continues the medical/functional model that sees persons with disabilities as something other than “normal”.

One way to try to define “disability” is to consider what we mean by “normalcy”. As Tanya Titchkosky and Rod Michalko point out in “Rethinking Normalcy”, normalcy itself is taken for granted creating the dichotomy between “disabled” and normal. Perhaps if we had a better understanding of what we think it means to be “normal”, we would have a better understanding of what we mean when we talk about persons with disabilities. As the authors point out,

“Our thoughts or feeling about disability are typically negative character. It is rare, for example, for anyone who is not disabled to want to become so It is also the case that disability more often than not disability conjures up sympathy, since disability is often thought of ... as a misfortune. Disability is often defined as an unfortunate tragedy that happens to a few individuals and we almost always hope that such a tragedy will not happen to us.”¹

This forces people with disabilities to the “margins” of society”. In reframing the question of how to define disability, that authors ask:

“What is it about marginality that can allow us to resist the temptation to desire normalcy? How can the margins show the centre that the margins are not merely voids, but instead are spaces where it is possible to reveal the otherwise concealed character of the centre, this uncovering of the fact that the centre is not natural, but is human made, and can be otherwise. Desiring normalcy, then, is not the problem: the problem is developing a relationship to this desire that does not simultaneously reject life on the margins”.²

Viewed this way, disability really is about power – who gets to make the choices about who is, or is not valued; and who is or who is not outside of the norm.

Other academics have promoted the idea that “disability” actually is the normal: everyone has or will have a disability at some point in their lives – the question is not whether but when; not which condition, but how many and in what combination. This theory of disability is referred to as “universalism”.

¹ Tanya Titchkosky & Rod Michalko, eds., *Rethinking Normalcy: a disability studies reader* (Toronto: Canadian Scholars’ Press Inc., 2009) at 2.

² *Ibid.* at 8.

“Disability is a constant in human experience, a fundamental feature of the human condition, in the sense that no human being can be said to have a perfect repertoire of abilities suitable for all contexts ... the ability – disability distinction is not so much a contrast as a continuum, and the complete absence of disability, like the complete absence of ability is of theoretical interest only.”³

This theory defines disability as a fluid concept that will affect every human being at some point in their lives. People who do not yet have a disability are often referred to as the “not yet disabled”.

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

We have no specific definition to propose on what is meant by disability. We only raise issues that we believe are not adequately addressed by the background paper and are deserving of some consideration. However, we do believe that definitions of disability must involve persons with disabilities themselves in order to have legitimacy in formulating how disability impacts on them in a personal and contextual way. We also believe that disability is a fluid, not a static, concept. Its definition depends on the socio-political, economic, environmental, and cultural context of the day; one that shifts and changes as society itself changes.

However, we also believe that there are central principles that must be applied, below which society cannot go so that disability does not remain a condition of charity or pity, a condition to be treated, cured or gotten rid of, forcing some persons in our society to remain on the margins, instead of allowing diversity to be integrated into the norm. We also believe that these principles must oblige the government to commit resources to the issue of disability, so that underfunding or not funding of accommodations, affirmative action programs, supports, services or other programs for persons with disabilities becomes the first order of the day in tough economic times. If lack of financial resources can be used as an excuse, persons with disabilities will continue to find themselves on the margins, perpetuating further discrimination against them.

³ Jerome Bickenbach, “Disability, Human Rights, Law and Policy” in Gary Albrecht, Katherine Seelman & Michael Bury, eds., *Handbook of Disability Studies* (California: Sage Publications Inc., 2001) 565 at 580.

Do Models Help Us?

While models may help to (re)define a concept – for example, the social model has shifted thinking on about barriers to thinking about accessibility, or the human rights model has started to shift thinking about conferred benefits in legislation to thinking about entitlements that all human beings have as a consequence of citizenship, ARCH believes there is a problem with adopting a particular model over another.

Instead of having people with disabilities define how best to approach laws that affect them, a model will confine how it is that we think about disability, and let the ‘box’ determine actions, as opposed to encouraging us to think outside of the ‘box’, to be creative and innovative about approaching laws, policies and programs that have an enormous impact on the lives of persons with disabilities.

Moreover, there are other models that have not been considered by the Law Commission: the feminist model, the universalism model or the human rights paradigm model, all of which lend additional considerations to this conversation.

ARCH has had the benefit of reviewing the OBA submission to the Law Commission on The Law As It Affects Persons With Disabilities, and we are generally in agreement with their discussion of the advantages and disadvantages of the various models outlined in the Law Commission’s background paper. We will not repeat their discussion here.

ARCH therefore supports taking a principled approach to framing legislation to include people with disabilities. As noted above, it is important that our understanding of disability evolves, and that the principles that underlie our laws evolve in a complimentary way.

It is perhaps artificial to rely on principles in the absence of corresponding models but it is equally limiting to rely solely on one model, as each model has both its strengths and limits. The advantage of drawing principles from various models gives more flexibility and the potential for creating new paradigms as thinking about disability progresses.

For example, we see two key problems with using the social model as a sole concept:

1. It fails to adequately understand and address individual circumstances and the context of disability.
2. From a practical point of view, it is limited because not every disability can be addressed by removing socially constructed barriers.

We therefore look to the principles enunciated in the UN Convention on the Rights of Persons With Disabilities as our guide to appropriate principles to consider when (re)drafting laws, policies and programs that impact on the lives of persons with disabilities.

1. Laws 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.
2. Discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.
3. Law should strive to promote the individual autonomy and independence of persons with disabilities including the freedom to make their own choices.
4. Law should recognize the critical need to address the negative impact of poverty on persons with disabilities.
5. Law should promote positive perceptions and greater social awareness towards persons with disabilities.
6. Law should recognize that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.
7. 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 who require them to participate fully in society.
8. Ensuring 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.
9. In developing laws with a direct or clear impact on persons with disabilities shall ensure that those impacted are consulted.
10. Laws should be created with the idea of “Universal Design” in mind – ie the law should apply to and be accessible by all citizens.

ARCH would propose two caveats to this list. First, at least in Ontario, the word “should” must be replaced with the word “shall” in order to create positive

obligations that will not be undermined by funding arguments. Second, the stated goal of these principles and laws shall be to empower persons with disabilities and achieve substantive equality, choice, self-direction and change. In short, we must “embrace an understanding of disablement that validates the multiple dimensions of disablement and the continuum of human experience.”⁴

These principles will also assist us in answering some questions posed by Jerome Bickenbach:

1. Should persons with disabilities expect to have rights or to be given benefits (money, services, opportunities, privileges and exceptions to the rules applicable to other people)?
2. Should entitlements be negative, positive or both?
3. Should policies focus on means or results?
4. Should policies be concerned with net social benefit or with the individual’s benefit?⁵

The Social Model

The social model has many detractors, who criticize the way that it does not really connect with impairment. For example, visual impairments impose social restrictions that can’t be resolved by the removal of a barrier, like the inability to recognize people, or read or emit non-verbal cues in social interactions. As Oliver points out:

“...there is a tendency within the social model to deny the experience of our own bodies, insisting that our physical differences and restrictions are entirely socially created. While environmental barriers and social attitudes are a crucial part of our experience of disability – and do indeed disable us – to suggest that this is all there is to deny the personal experience of physical or intellectual restrictions, of illness, of the fear of dying.”⁶

The basic message of the social model is that contingent social conditions rather than inherent biological ones constrain individuals’ abilities and create a disability category. In other words, factors external to a person’s actual limitations are what really determine that person’s ability to function within society. While this may make sense as a guide for policy and law, the implications and practical

⁴ Pauline Rosenbaum & Ena Chadha, “Reconstructing Disability: Integrating Disability Theory into Section 15” (2006), 33 S.C.L.R. (2d) 343 at 365.

⁵ Jerome Bickenbach, “Summary of Disability Policy Development” in Anne Crichton & Lyn Jongbloed, eds., *Disability and Social Policy in Canada* (North York: Captus Press Inc., 1998) 9 at 13.

⁶ Michael Oliver, “The Social Model in Context”, *citing Morris 1991, p.10.* in Tanya Titchkosky and Rod Michalko, eds., *supra* note 1 at 25.

application of the model are neither clear, nor is it obvious how the model will play out in terms of barrier removal for all persons with disabilities.

The social model also assumes that by changing the environment to produce more equality of opportunity, that equality of treatment for persons with disabilities will follow automatically. That is neither guaranteed, without a paradigm shift in society's thinking about disability and normalcy, nor does it address one of the underlying problems we need to confront when addressing disability. The social model creates "normalcy" – a person is no longer a person with a disability because they are now able to function more "normally" given the removal of a barrier. It also does not address many of the issues faced by people with certain disabilities, particularly intellectual and cognitive disabilities. Therefore, a social model risks assuming that equality is achieved when the built or social environment is changed and people with disabilities can go where and do what "normal" people do.

The social model can also be seen to suggest that limited resources should be focused on changes that enhance the ability of those who could potentially function within society, leaving few or no resources for those who cannot function at some minimum level. Moreover, it is not clear how the social model considers context as part of the barriers faced by persons with disabilities. Will the social model seek to eradicate poverty as a barrier? This brings us back to one of the initial questions we posed: does treating all people with disabilities the same mean that we have treated them equally? As LaForest J. noted in Eaton, this bespeaks a thin and impoverished notion of equality.

Neither does the social model address the imbalance of power relations in society, and the extent to which powerless or marginalized groups – the social outcasts or the minority – impact the formulation of legislation, policy and programs.

Is there a way to try to integrate both the political and personal experiences of disability? ARCH believes that relying on the principles we have outlined above will ensure that laws embrace the lived experiences of persons with disabilities.

A rights based approach, as advocated by the UN Convention principles, could enhance the social model by looking not just at a "collective" removal of barriers, but also at individual accommodations and an individual approach, supported by enforceable legal obligations that attach to these rights. Marcia Rioux states:

"The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. People with disabilities are members of society and have the right to remain in their local

communities. They are entitled to receive the support they need within the ordinary structures of education, health, employment and social services.”⁷

In brief, a principled approach would ensure that the resources needed to ensure substantive equality, dignity, participation, choice and empowerment would be available to all persons, regardless of the nature or type of longevity of disability. People are entitled to rights simply by virtue of the fact that they are people, and not a special interest group or category.

A principled rights based approach would also mirror the struggle for equality that has been fought on the basis of race, gender, sexuality and religion. As in any of these struggles, context matters. This is particularly the case with disability, when there is such a diverse nature of disabilities, the significance of any one of which might have a different outcome if you are poor, uneducated, in the workforce, not in the workforce, eligible for some benefits but not for others. Context is crucial and significant and an individualized, rights based approach to disability is the only way to ensure that context matters.

The United Nations Convention of the Rights of Persons with Disabilities is a good place for us to start to think about how to incorporate a more rights based approach into the development of laws. The UN Convention has had significant input from disability organizations and individual members of the disability community, giving it the legitimacy that some of the models described by the Commission lack.

Principles that emphasize the rights and obligations of citizens, persons with disabilities included, as well as state obligations, are more likely to promote full citizenship. Any one sided approach or model that speaks only to the obligations of the state can be misconstrued to promote the out-moded views of disability as charity provided to helpless recipients. Equal citizens are those who have obligations as well as rights and entitlements and who can be active participants in society and who can contribute to the overall well-being of society in accordance with their own talents and abilities. Only when people are truly, substantively equal can full citizenship, with all its individual entitlements and obligations, be achieved. ARCH believes that a principled approach, that may draw from other models, but that is not limited to a particular model, will better accomplish the goals we seek to achieve.

Universal Design as a Legal Principle

As a legal principle, universal design is helpful when considering a practical approach to achieving equality. The use of universal design principles is not only the built environment, but in legislating and developing policies, practices and

⁷ Marcia Rioux, “Bending Towards Justice” in Tanya Titchkosky and Rod Michalko, eds., *supra* note 1 at 205.

standards, and in communication, as well as the delivery of public services such as education, facilitates the creation of the ultimate goal, an inclusive society.

Universal design is a principle of a human rights approach. Universal design not only advances the interests and concerns of persons with disabilities – it is for everyone. It is not about designing for the average – it is about designing for the widest possible group of users. This is very different from barrier free or accessible design that is the focus of the social model. It enables the realization of full citizenship because design choices must reflect the strengths and needs of all people, respecting dignity and accommodation. It reminds us that all people will have needs that vary over the course of their lifetimes.

The Convention on the Rights of Persons with Disabilities defines universal design at article 2 and as its general obligations at article 3, lists the promotion of universal design in the development of standards and guidelines. Our current legislative framework fails to acknowledge a strong role for universal design. The *Accessibility for Ontarians with Disabilities Act (“AODA”)* and its regulations do not adopt universal design as a guiding principle. ARCH argues that any set of principles in considering disability and legislative schemes be designed with universal design as a first step.

Access to Justice and Enforcement

ARCH believes that access to justice and enforcement is a critical piece to consider and include in law, since access to justice is unattainable for many people, especially those with disabilities. This is particularly so in the administrative law context, where the lives of marginalized and vulnerable people are subject to significant regulation, complex procedures and lack of resources.

Legal Aid is not an option for many people with disabilities who want to complain about how laws affect them on a daily basis. Legal Aid is available for family, criminal and immigration matters, and even then, only a sub-set of issues that arise in those cases. Community Legal Clinics deal with “poverty law” matters. But years of under-funding for Community Legal Clinics, coupled with extremely low financial eligibility guidelines and high demand for services, have meant that many Clinics are forced to accept caseloads restricted to the most essential issues like housing and income support. People who have problems with issues like transportation, attendant care, direct funding, education, powers of attorney and substitute decision makers are often left to their own devices. Yet they are the very people who require legal assistance in navigating the complex procedures that are barriers to them living independently and autonomously and the freedom to make their own choices or take their own risks.

Even the new Human Rights Tribunal of Ontario has its problems. Over one half of the complainants remain unrepresented, despite the creation of the Human Rights Legal Support Centre.⁸

Moreover, any system that requires that a person with a disability take the first step towards the enforcement of their rights, or someone else's obligations, will most often result in disadvantage to the person with a disability. Disability is often accompanied by poverty, low education, lack of supports and access to services that might assist them in asserting their rights. In many cases, vulnerable persons with disabilities fear that any attempt to complain about inadequate services or to assert their rights will lead to the withdrawal of vital services or some other form of retaliation.

Accessibility to a tribunal or court can often be an issue for persons with disabilities. For example:

- is the building itself accessible?
- Does the tribunal or court offer telephone hearings, or other accommodations depending on the nature of the disability?
- Is transportation to the tribunal or court paid for in the event of an in-person hearing?
- Are alternative forms of communication acceptable at a hearing?
- Are parties given notice of a hearing in alternative forms of communication?
- How do people find out if there are legal resources available to them for assistance at the hearing?
- How is that assistance funded?
- Should there be a right to funding for the matters that affect persons with disabilities who are unable to pay for legal representation?

We are aware of a change in practice at the Landlord and Tenant Board, where telephone hearings are now held when credibility is considered not to be an issue. In one such case, the landlord, who had applied for an eviction order, argued that there should be an in-person hearing as he was aware that the tenant did not have a telephone. The Board proceeded with the hearing anyway, and the tenant was evicted.

In order to appeal a decision of the Disability Adjudication Unit, the Ontario Disability Support Program or the Ontario Works Act, a recipient first gets a letter telling them of a decision that has been made about their benefits. The person then has 10 days by which to file a Request for an Internal Review. A second decision is then made, and most often will be another negative decision. The

⁸ Glenn Kauth, "Signs of trouble in the human rights system" *Law Times* (28 September 2009), online: Law Times <http://www.lawtimesnews.com/200909285489/Commentary/Editorial-Signs-of-trouble-in-the-human-rights-system>

recipient of the benefits then has 30 days in which to appeal the second negative decision. Anecdotally, we have been told that many persons with disabilities do not pursue an appeal because they have been told twice that they do not have a case and don't want to hear that a third time. In addition, since all of the correspondence with the recipient is in writing, many persons with disabilities are further disadvantaged by this type of communication. Finally, if the person with a disability is homeless, they will not receive the communication and not even know of their appeal rights. All this despite the fact that the whole system is supposed to be about providing benefits to persons with disabilities! The entire process seems designed to prevent persons from disabilities to get the benefits to which they are entitled.

Certainly, a constitutional challenge pursuant to the *Canadian Charter of Rights and Freedoms* are beyond the means of most persons with disabilities when they are faced with government's infinitely larger resources to mount a case, provide expert reports, and cover filing fees and other disbursements. The potential of costs awards is also a significant barrier. Yet the Charter is not only meant to prevent discrimination, it is also supposed to promote equality, which eludes most persons with disabilities. While ARCH is available to assist persons with disabilities in systemic or test case litigation, our resources prevent us from taking on every worthwhile case that is brought to us. Now that the Court Challenges Program has been discontinued, many persons with disabilities have no recourse to fund and bring forward a Charter challenge.

A lack of government commitment to providing sufficient resources for persons with disabilities to enforce their rights means that such rights are empty ones. The goals of full equality and inclusion, participation empowerment and choice are illusory for persons with disabilities. Furthermore, any cost-benefit analysis would surely affect persons with disabilities. As a small "special interest group", they do not have the political power to argue that their rights are no less meaningful than those who have power. As Bickenbach points out:

"Inequality in resource and opportunity allocation fundamentally violates basic human rights, insofar as inequality undermines the realistic achievement, within a social context, of equality of opportunity, respect for difference, and full participation. The concrete value of human rights, it can be argued, lies in resources and opportunities that flow from a viable and enforceable social commitment to these rights. The range of particular entitlements is intended to address resource and inequality opportunity directly, and as such (at least in theory) can be argued to further human rights for persons with disabilities more concretely".⁹

In order for rights to be meaningful, they must be enforceable, and not merely the object of goodwill or moral suasion.

⁹ *Supra* note 3 at 579.

Anecdotal and Practical Examples

ARCH has seen many examples of barriers to persons accessing the supports and services they need, navigating complicated procedures for applying for supports, services and benefits, or enforcing the rights to which they are entitled.

For example, it appears to be very easy to violate the rights of persons with capacity issues. People attempting to defend their rights to autonomy, independence and choice in decision making are often faced with ill-defined, cumbersome, and/or expensive legal proceedings that are more likely to deter a person from defending their rights, rather than promoting them.

There are often different processes in place for each different type of substitute decision maker (“SDM”). In some cases, it is less than clear which process to pursue. These problems are aggravated by the fact that people attempting to challenge their need for an SDM often lack resources to cover the costs of such action (in any case, their financial resources are controlled by the very person they are trying to confront. Often, they cannot rely on legal aid to fund their proceeding. In some cases the very right of the person to retain counsel to defend their rights is challenged on the basis that they, as an incapable person, are not competent to retain or instruct counsel. It is fairly easy, therefore, for an SDM to create barriers and hurdles to deter a supposedly incapable person from asserting their rights, leaving them vulnerable to abuse. If a person is placed in Long-Term Care it can be very easy for them to end up isolated and completely under the control of a SDM, as there are no formal or automatic processes in place to review their placement.

For example, if an SDM or Guardian for Property deals improperly with the property of a person deemed to be incapable at some point in their lives, it is difficult to regain control of said property and protect the person with a disability from financial abuse. While there may be guidelines as to how an SDM or guardian should deal with the property, the Public Guardian and Trustee (“PGT”) rarely enforces them, given the high demand for their services. Even when problems are brought to the PGT’s attention, it takes a very long time before steps are taken to address the situation. If a SDM or guardian does abuse their financial control, there are processes in place to force them to account for their decisions and actions, but it means that the person with a disability, who may no longer be incapable, although they may still have a disability, is forced to launch an application in court – which is next to impossible when someone else has control of their money. Even if an application is launched, and the SDM/guardian is found guilty of abusing their authority, there is no guarantee that the finances or assets will be returned to the rightful owner of the finances.

With attendant care cases, we routinely hear of situations where a person with a disability suffers abuse at the hands of the care provider but they don’t want to

take any steps, because it would mean that they would essentially be left without services. Care providers will often document events from their perspective, which may not accord with that of the person with a disability. If the person with a disability does not document, then credibility becomes an issue, which is a further barrier to complaints. Moreover, service providers often stand behind their employees to the detriment of the person receiving service.

While Direct Funding for attendant care workers is an extremely beneficial and empowering tool for those requiring services, it is often the subject of much concern. Persons with disabilities often live in supportive housing, with whom an attendant care service provider has a contract. Should a person with a disability finally get approval for direct funding (and there are waiting lists of five years or longer, in addition to a complicated application process), the person is told that they will have to move because they are employing their own attendant rather than using the service provider that is connected to their home. Assistance in finding an accessible and modified unit is almost as impossible to find as a unit itself, making direct funding a deceptive “right” for a person who wants to control their own care.

People with intellectual disabilities often live in group homes where their rights are often violated. ARCH has been made aware of numerous situations in which a person’s right to access their own property, to make choices about the food they should be served, to make choices about the community in which they should live, are not respected. In homes that are regulated under the *Developmental Services Act*, for example, there are no avenues of complaint or appeal when a unilateral decision is made about where a person should live. A resident can be moved from a home where she has lived for many years to a home in another community without having any right to decide if she wants to move. Once moved, the person is virtually powerless in an attempt to reverse such a move. There are also often issues of improper use of restraints or the over-use of chemical forms of restraints. If parents or guardians object to these practices, they are told to remove the person from the home. Given limited alternatives people are forced to accept whatever form of care is provided, or do without; which is rarely an option for most families.

ARCH has received countless calls from parents and students who do not receive appropriate accommodations, or in a timely manner. Children have also not been permitted to access their neighborhood regular school in the guise of “best interests”. In terms of education, society accepts that public funding of primary and secondary education is a priority, but fails to support the public funding of specific programs and/or services that will meet the needs of all children, including those with disabilities. In this context, children who are on the “more able” end of the spectrum are more likely to receive an education best suited to them, while children on the “less able” end of the spectrum must find their own resources to meet this same need.

Generally, a problem with many programs aimed at persons with disabilities, including programs dealing with income support for example, is that they compensate the disability rather than the person; entitlement varies according to how disabled the individual becomes. As well, this format serves people with episodic disabilities poorly – since their entitlement is often linked so directly to the overt signs of their disability that they either go on and off support with no security – or are deemed ineligible – even though the overall impact of their disability is to render them largely unemployable. Thus, a focus on the person – not the disability – is needed.

Conclusion

As the Law Commission has identified, there is much work to be done to address the Law As It Affects Persons With Disabilities. We appreciate that this is only the beginning of the consultation, and we look forward to participating in the next phases. Should you have any questions or comments about our submissions, we would be happy to discuss them with you. Kindly contact Ivana Petricone, Executive Director, ARCH Disability Law Centre, 416-482-8255 ext 230, or perticoi@lao.on.ca