

# COMMENT OF THE ONTARIO HUMAN RIGHTS COMMISSION

On the

## **Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities**

**APRIL 15, 2004  
CANADA**

The Ontario Human Rights Commission, (the "Commission") would like to commend the work of the Working Group to the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (the "Draft Convention"). Overall, the Commission finds the text of the Draft Convention to be comprehensive and salient, consistent with the breadth of the Commission's understanding and experience in protecting and promoting the human rights of persons with disabilities.

Notwithstanding the Commission's support for the text of the Draft Convention, the Commission will limit and focus its comments to particular Articles of the Draft Convention. The Commission's comments are based on its expertise as a domestic human rights institution with a broad mandate and comprehensive powers for the protection and promotion of human rights consistent with the 'Paris' *Principles Relating to the Status of National Institutions*. The Commission's comments derive from its interpretation of its enabling legislation, the *Ontario Human Rights Code* (the "Code"), the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (the "Disability Policy"), as well as several other Commission policies and reports and relevant domestic case law. All Commission documents are available on its Web site at [www.ohrc.on.ca](http://www.ohrc.on.ca).

### **Preamble paragraph (h)**

*Concerned that, despite the efforts and actions undertaken by Governments, bodies and relevant organizations, persons with disabilities continue to face barriers in their participation as equal members of society and violations to their human rights in all parts of the world,*

This has been the experience of the Ontario Human Rights Commission. Despite the ground of disability being introduced into Ontario's *Human Rights Code* more than 20 years ago, today disability continues to be the highest single ground cited in complaints to the Commission, averaging above 50% over the last few years.

A 2001 national survey of persons with disabilities in Canada continues to indicate that persons with disabilities do not enjoy full and equal participation in society, particularly with respect to economic and social rights, including lower rates of higher education, total income, and labour force participation.<sup>1</sup>

**Preamble paragraph (m)**

*Concerned about the difficult conditions faced by persons with severe or multiple disabilities and of persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*

There is legal jurisprudence in Canada that supports the notion that individuals can face multiple or “intersecting” forms of discrimination. In its majority decision in *Law v. Canada*,<sup>2</sup> the Supreme Court of Canada recognized that a discrimination claim can present an intersection of grounds that are a synthesis of those listed in s. 15(1) of the Canadian *Charter of Rights and Freedoms* or are analogous to them.

The Commission has dealt with a number of cases where the ground of disability intersects with other enumerated grounds of discrimination as well as other factors such as language. The Commission has published a discussion paper on the broader topic: *An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims*.

**Preamble paragraph (r)**

*Convinced that a convention dealing specifically with the human rights of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities...*

It is the Commission’s own experience that laws and policies that specifically address the human rights of persons with disabilities can make a significant impact. The Commission’s first version of its *Policy and Guidelines on Disability and the Duty to Accommodate* was released in 1989 and was substantially revised and re-released in 2001. It has been the Commission’s most sought after publication. The Disability Policy provides a comprehensive interpretation and understanding of the rights of persons with disabilities set out under Ontario’s *Human Rights Code*. It has helped give focus to the work of the Commission as well as assisting other organizations and individuals involved in promoting and protecting disability rights. The Disability Policy has been

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<sup>1</sup> *Disability in Canada: A 2001 Profile*. Office for Disability Issues, Human Resources Development Canada (December 2003), an analysis of data from the 2001 Participation and Activity Limitation Survey (PALS), Statistics Canada. Source: [www.sdc.gc.ca](http://www.sdc.gc.ca).

<sup>2</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497

referenced in case law<sup>3</sup> and has been the catalyst of other activities and reports of the Commission including its public consultations on accessible education for students with disabilities, the rights of older persons, access to public transit, shortcomings of the *Building Code*, and barriers in the restaurant and hospitality industry.

## Article 2 – General principles

The Commission is supportive of all the fundamental principles set out in this Article. In addition, the Commission would suggest adding what it believes to be another fundamental principle: the “duty to accommodate” persons with disabilities. Also see the Commission’s comments under draft Article 7 below.

## Article 3 – Definitions

### “Communication”

The Commission would suggest adding “digitized text” to this enumerated list as it is fast becoming one of the most common alternate or intermediary format facilitating the production of other alternate formats including Braille, large text and audio.

### “Disability”

*Footnote 12: Many members of the Working Group emphasized that a convention should protect the rights of all persons with disabilities (i.e. all different types of disabilities) and suggested that the term “disability” should be defined broadly. Some members were of the view that no definition of “disability” should be included in the Convention, given the complexity of disability and the risk of limiting the ambit of the Convention. ... There was general agreement that if a definition was included, it should be one that reflected the social model of disability, rather than the medical model.*

The Commission supports the view set out in the footnote 12 under the draft Article, that any definition of “disability” should reflect a social model of disability rather than simply a medical model. Similarly, the Commission’s Disability Policy supports a broader understanding of disability to include a social perspective. As well, the Disability Policy recognizes environmental sensitivities as well as drug and alcohol addictions as disabilities within the meaning of Ontario’s *Human Rights Code*.

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<sup>3</sup> *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.). Also see *Entrop v. Imperial Oil* (2000), 50 O.R. 3d 18 (C.A.).

The Supreme Court of Canada has shed new light on the approach to be taken in understanding disability. In *Mercier*,<sup>4</sup> the Supreme Court made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations. The Court chose not to create an exhaustive definition of disability. Instead, it opted for an equality-based framework that takes into account evolving biomedical, social and technological developments.

Another Supreme Court of Canada decision<sup>5</sup> has since confirmed that "social handicapping", i.e., society's response to a real or perceived disability, should be the focus of the discrimination analysis.

### *"Universal design" and "Inclusive design"*

The Commission is supportive of including definitions of these concepts. The Commission identifies in its Disability Policy the principle of universal and inclusive design as critical to achieving integration and full participation for persons with disabilities. Barrier prevention is much more preferable to barrier removal. And it is consistent with the notion of disability as a social model.

Case law in Canada also supports the notion of universal and inclusive design. The Supreme Court of Canada has noted the need to "fine-tune" society so that structures and assumptions do not exclude persons with disabilities from participation in society<sup>6</sup> and it has more recently affirmed that standards should be designed to reflect all members of society, insofar as this is reasonably possible.<sup>7</sup>

## **Article 4 – General obligations**

*4.1: States Parties undertake to ensure the full realization of all human rights and fundamental freedoms for all individuals within their jurisdiction without discrimination of any kind on the basis of disability...*

The Commission would support the view, as set out in footnote 20 to this draft Article, that there should be a general obligation to include the rights of non-citizens with disabilities who otherwise enjoy some degree of legal status within the State. For example, it has been reported to the Commission that persons with disabilities who are visitors to Ontario are ineligible to access para-transit

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<sup>4</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 ["*Mercier*"]

<sup>5</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28

<sup>6</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

<sup>7</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ["*Meiorin*"] at para.68

vehicles in some regions because of the lack of reciprocal agreements or waivers.

*4.1(b): To adopt legislative, administrative and other measures to give effect to this Convention, ...*

The Commission supports this provision. In Canada, all provincial and federal jurisdictions have legislated the rights of equality and non-discrimination on the ground of disability, set out in federal, provincial and territorial human rights codes as well as being entrenched in the *Charter of Rights and Freedoms* under Canada's *Constitution Act*. In addition, Ontario has legislated barrier-removal planning and reporting requirements for government and para-public sectors under its *Ontarians with Disabilities Act* (2001).

*4.1(e): To take all appropriate measures to eliminate discrimination on the ground of disability by any person, organization or private enterprise;*

In Ontario and other provincial and territorial jurisdictions in Canada, the protection in human rights codes providing that persons with disabilities be free from discrimination in employment, services, housing, contracts and trade unions, extends beyond government and the public sector to include private enterprise.

## **Article 6 – Statistics and data collection**

*In order to formulate and implement appropriate policies to protect and promote the rights of persons with disabilities, States Parties should encourage the collection, analysis and codification of statistics and information on disabilities and on the effective enjoyment of human rights by persons with disabilities. ...*

The Commission supports this draft Article and all its subparagraphs. The Commission's *Guidelines on Special Programs* set out similar principles for the process of collecting and maintaining statistics for the purpose of monitoring and ameliorating social and economic disadvantage in the context of "affirmative-action" type programs.

The Commission is also of the view that statistics and data collection may be warranted in situations where a service provider, employer or other organization has an objective basis to believe that systemic infringement of rights may be occurring, or there are persistent allegations or perceptions of systemic discrimination, or where it is an organization's intent to prevent or ameliorate disadvantage already known to be faced by persons with disabilities. This is in keeping with the remedial purpose of the *Code* and with recent human rights

jurisprudence that finds organizations have an obligation to take into account a person's already disadvantaged position within Canadian society.<sup>8</sup>

In two of its recent public inquiry reports, the Commission has recommended to government that statistics and data collection be undertaken in order to monitor and take action on reported systemic and adverse discrimination. These reports are: *Paying the Price: The Human Cost of Racial Profiling*; and, *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*.

## **Article 7: Equality and non-discrimination**

### *7.1 re protection against discrimination on any ground*

See the Commission's comment above under paragraph (m) of the Preamble of the Draft Convention.

*7.2. (a) Discrimination shall mean any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by persons with disabilities, on an equal footing, of all human rights and fundamental freedoms;*

The Commission agrees with the meaning of discrimination set out in this paragraph. In addition, the Ad Hoc Committee might wish to consider the three broad inquiries set out in the Commission's Disability Policy, as suggested by the Supreme Court of Canada, for determining if discrimination has taken place:<sup>9</sup>

(1) Differential Treatment

Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the complainant's already disadvantaged position within Canadian society?

(2) An Enumerated Ground

Was the differential treatment based on an enumerated ground?

(3) Discrimination in a Substantive Sense

Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential

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<sup>8</sup> The notion that substantive differential treatment can result from either because of a distinction, exclusion or preference, or because of a failure to take into account a person's already disadvantaged position within Canadian society was first articulated in *Law v. Canada*, Supra note 2,. The approach has been affirmed in several subsequent cases, most notably two cases dealing with discrimination on the basis of disability: *Mercier*, Supra note 4, and *Granovsky v. Canada*, Supra note 5.

<sup>9</sup> See *Law v. Canada*, Supra note 2.

treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

(b) *Discrimination shall include all forms of discrimination, including direct, indirect and systemic, and shall also include discrimination based on an actual or perceived disability.*

The Commission would agree that setting out forms of discrimination is important to forward a full understanding of rights and obligations. At the same time, discrimination in all its forms has the same effect and individualized accommodation for persons with disabilities will still be necessary. As a result of two landmark decisions of the Supreme Court of Canada,<sup>10</sup> the distinction between direct discrimination and adverse effect discrimination has become of much less practical significance in Canada.

With respect to the inclusion of “perceived” disability, the Commission is supportive of this broad understanding, which is also reflected in Ontario’s *Human Rights Code* and in jurisprudence from the Supreme Court of Canada as noted above in the Commission’s comments under draft Article 2 on the definition of disability.

7.3 *Discrimination does not include a provision, criterion or practice that is objectively and demonstrably justified by the State Party by a legitimate aim and where the means of achieving that aim are reasonable and necessary.*

The Commission would recommend qualifying or revising this exception or defence with the notion of the duty to accommodate short of undue hardship (see the Commission’s comment under subparagraph 7.4 below). In this regard, the Commission would recommend consideration of the three-step inquiry set out in the Commission’s Disability Policy, as suggested by the Supreme Court of Canada in *Meiorin*,<sup>11</sup> for determining whether *prima facie* discrimination can be demonstrably justified and the duty to accommodate has been met. If *prima facie* discrimination is found to exist, the person responsible for accommodation must establish on a balance of probabilities that the standard, factor, requirement or rule:

- (1) was adopted for a purpose or goal that is rationally connected to the function being performed;
- (2) was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

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<sup>10</sup> See *Meiorin*, supra note 7, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [“*Grismer*”]

<sup>11</sup> See *Meiorin*, supra note 7

Sections 3.2 and 3.3 of the Commission's Disability Policy set out a number of considerations for the application of this framework.

*Footnote 26: The Working Group discussed three options for the consideration of the Ad Hoc Committee: (a) The paragraph should not appear in the text at all; (b) the paragraph should be included only as an exception to the specific prohibition on indirect discrimination; and (c) the paragraph should apply to all forms of discrimination.*

The Commission recognizes that the inclusion of subparagraph 7.3 is intended to strike a balance between the legitimate aims of the State and the needs of persons with disabilities. At the same time, the Commission is of the view that, as with Ontario's *Human Rights Code*, such a balance should be struck on the basis of the notion of duty to accommodate short of undue hardship described above.

And, for the reasons the Commission set out under paragraph 7.2(b) above, including the landmark decisions of the Supreme Court of Canada cited in this regard, subparagraph 7.3 should apply to all forms of discrimination and not be limited to indirect discrimination.

*7.4: ... reasonable accommodation, defined as necessary and appropriate modification and adjustments to guarantee to persons with disabilities the enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.*

The Commission agrees in principle with a balanced definition of "accommodation", though arguably, the definition of the term "reasonable" used in this draft Article may not set a sufficiently high standard, particularly without any test for undue hardship. Ontario's *Human Rights Code* states that there is a duty to accommodate the needs of persons with disabilities, short of undue hardship. The Commission's Disability Policy sets out the Commission's interpretation of this provision of the Code:

The duty to accommodate requires that the most appropriate accommodation be determined and then be undertaken, short of undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation, and ensures confidentiality. ... [I]t will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity...

The "appropriateness" of an accommodation is a determination that is distinct and separate from whether it would then result in "undue hardship". It should be viewed as a process and as a matter of degree along a continuum, rather than an all-or-nothing proposition. Undue hardship might be avoided by implementing next best alternatives or providing accommodation at a later date or phasing it in over time.



The *Code* prescribes three factors for determining whether undue hardship exists: cost; outside sources of funding, if any; and health and safety requirements, if any. Human rights jurisprudence in Canada has set a high threshold for demonstrating undue hardship. The Supreme Court of Canada has said that, "one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment".<sup>12</sup>

Section 4 of the Commission's Disability Policy sets out a number of considerations for understanding and applying the undue hardship defence.

*7.5: Special measures aimed at accelerating de facto equality of persons with disabilities shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; those measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*

The Commission supports this provision, including the notion that *measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved*. Similarly, Ontario's *Human Rights Code* sets out a provision for "special programs". The Commission's Guidelines on Special Programs elaborate on its understanding of this provision.

## **Article 11 – Freedom from torture or cruel, inhuman or degrading treatment or punishment**

The Commission is supportive of this draft Article. The Commission's report, *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*, addresses the possible discriminatory impact of the discipline provisions of Ontario's *Safe Schools Act* on students with disabilities and students from racial minority groups. The report recommended that educators be required to use discretion in their application of the *Safe Schools Act* and assess whether a student with a disability has been accommodated appropriately before that student can either be suspended or expelled. The report also recommended that school boards collect and analyze data on which students are being disciplined under the *Act* to ensure that the legislation is not having an adverse impact on individuals protected by the Ontario *Human Rights Code*.

## **Article 12 – Freedom from violence and abuse**

The Commission is supportive of all the provisions of this draft Article. The Commission's consultation report, *Time for Action: Advancing Human Rights of Older Ontarians*, identifies that the prevalence of disabilities and chronic conditions increases with age, and that this "intersection" creates an even more vulnerable population to the problems of abuse and discrimination.

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<sup>12</sup> See *Grismer*, *Supra* note 10, at para.41.

The Report outlines the many forms of elder abuse and discusses ageism; social and economic vulnerability; caregiver stress; lack of regulation in care facilities; the shortage of long-term care beds; and inadequate accessible and affordable housing, as contributors to elder abuse. The Report made recommendations to government and community organizations in this regard.

### **Article 13 – Freedom of expression and opinion, and access to information**

*... that persons with disabilities can exercise their right to freedom of expression and opinion through Braille, sign language and other modes of communication of their choice, and to seek, receive and impart information, on an equal footing with others...*

The Commission is supportive of this draft Article and its subparagraphs.

The Commission's report, *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*, recommends that government only purchase from or give subsidies to publishers which agree to provide publications in alternative accessible formats simultaneous with print (also see the Commission's comment under draft Article 19 below with respect to the "power of procurement").

The National Library of Canada has established the Council on Access to Information for Print-Disabled Canadians with a mandate to provide advice, identify funding requirements, monitor progress and make recommendations regarding accessible information.<sup>13</sup>

*Footnote 40: Some members of the Working Group considered that this draft article should include a reference to sign language as the natural language of deaf people in their access to information, communication, services, participation and education.*

As paragraph (g) of the Preamble to the draft Convention recognizes the "diversity of persons with disabilities", the Commission would suggest modification of any such reference as it implies that sign language is the natural language of all deaf people. This would be an over generalization and would not recognize the diversity that exists among deaf individuals. There are many deaf individuals, for example, who primarily use oral-aural communication methods and augmentative devices and do not necessarily know sign language or identify with Deaf culture.

The Commission is of the view that the draft Article as written is appropriate as it acknowledges that deaf individuals would have a right to "choice" of their preferred mode of communication.

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<sup>13</sup> Council on Access to Information for Print-Disabled Canadians – [www.collectionscanada.ca/accessinfo/](http://www.collectionscanada.ca/accessinfo/)

(e) *Promoting other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;*

*Footnote 43: The Ad Hoc Committee may wish to consider expanding this subparagraph to cover the provision and training of live assistance and intermediaries, such as Braille and caption transcribers, note-takers, sign language and tactile communication interpreters, and readers.*

The Commission's report, *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*, identifies that there is a shortage of specialized professionals for students with disabilities, particularly in rural and remote areas, and recommends that government take action to encourage training and recruitment.

#### **Article 14 - Respect for privacy, the home and the family**

*14.2: States Parties to this Convention shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage and family relations, ...*

*Footnote 46: The Ad Hoc Committee may wish to consider whether the phrase "marriage and family relations" might be too limiting.*

The Commission is supportive of this Article and its subparagraphs. The Commission agrees with the concern raised in footnote 46 that the phrase "marriage and family relations" is too limiting. The Ad Hoc Committee may wish to consider the terms "marital status and same-sex partnership status" in place of "marriage" and define the meaning of these terms. Under Ontario's *Human Rights Code*, "marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage. "Same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage.

An even more inclusive approach would be to define "marital status" to also include a person of the same sex in a conjugal relationship outside or inside marriage. Belgium and the Netherlands have legalized same-sex marriage. And a recent court decision in Ontario<sup>14</sup> has reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others" to apply immediately. As well, other countries have already accorded in varying degrees equal rights to persons in same-sex conjugal relationships outside of marriage.

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<sup>14</sup> *Halpern v. Attorney General of Canada*, Ontario Court of Appeal, June 2003. The Attorney General of Canada did not seek leave to appeal. Instead it submitted draft legislation legalizing same-sex marriages to the Supreme Court of Canada for a reference, opinion pending.

## **Article 15 – Living independently and being included in the community**

*States Parties to this Convention shall take effective and appropriate measures to enable persons with disabilities to live independently and be fully included in the community, ...*

*Footnote 51: Some members of the Working Group expressed the concern that the words “living independently” in the title and the chapeau of this draft article did not reflect the cultural norm in many countries, and that the words might suggest that persons with disabilities should be separated from their families.*

The Commission is supportive of this Article. With respect to the concerns raised at footnote 51, the Commission would caution that the notion of independence not be lost in any revision. For example, the title of the Article might simply read “Living independently in the community”, and that the Article might be revised to read “... enable persons with disabilities to live independently of an institution and be fully included in the community... “.

*(b) Persons with disabilities are not obliged to live in an institution or in a particular living arrangement;*

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

The Commission is supportive of these subparagraphs.

In the *Submission of the Ontario Human Rights Commission to the Ministry of Citizenship and Immigration Regarding the Consultations to Strengthen the Ontarians with Disabilities Act*, the Commission raised the importance of measuring and monitoring the rate of unnecessary or “undue” institutionalization of persons with disabilities in order to safeguard the principle of integration over segregation.

The concept of “undue institutionalization” was comprehensively addressed by the United States Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999). By a clear majority, the Court held that under the *Americans with Disabilities Act*, undue institutionalization qualifies as discrimination by reason of disability and that a person with a mental disability is “qualified” for community living when the state’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the individual, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

## Article 16 – Children with disabilities

4. *Recognizing the needs of children with disabilities, assistance extended in accordance with paragraph 3 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child and shall be designed to ensure that a child with a disability has effective access to and receives education, training, health-care services, comprehensive [re]habilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.*

The Commission is supportive of all the subparagraphs of this draft Article.

The Commission has referred a series of cases before a human rights tribunal and will be arguing that children with autism have a right to access intensive habilitation services necessary for their communicative and social development and ability to exercise and benefit from their right to education.

There is related case law in this regard. In a recent decision of the British Columbia Court of Appeal in *Auton*,<sup>15</sup> the Court confirmed that behavioural therapy for children with autism is a medically necessary treatment, and that if untreated, autism will likely lead to an individual being unable to access service programs such as education. The Court ordered the government to fund the treatment.

## Article 17 – Education

*Footnote 55: ... whether this draft article should cover training more extensively...*

*Footnote 56: ... whether the focus of the chapeau should be solely on “children”...*

The Commission is of the view that this draft Article should be inclusive of all levels of education – primary, secondary and higher education, and include vocational education and other forms of training. In this regard, not all provisions of the draft Article should be limited to “children”. At the same time, certain provisions might appropriately be directed to the unique needs of children.

2.(a) *That all persons with disabilities can choose inclusive and accessible education in their own community (including access to early childhood and pre-school education);*

*Footnote 58: The intent of this draft article is to provide the right to choose inclusive and accessible education. There is no intention to create an obligation on students with disabilities to attend general schools where their needs may not be adequately met. ...*

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<sup>15</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] B.C.J. No. 2258.

3. *States Parties shall ensure that where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available. ...*

*Footnote 61: While members of the Working Group considered that choice was an important element of this paragraph, some members considered that the right to education was more important. Other members would have liked greater emphasis on the best interests of the child in this choice.*

*Different approaches were also identified with respect to setting out the relationship between the provision of specialist education services and the general education system. Some members considered that education of children with disabilities in the general education system should be the rule, and the provision of specialist education services the exception. Others thought that specialist education services should be provided not only where the general education system was inadequate, but should rather be made available at all times without a presumption that one approach was more desirable than the other. ...*

The Commission has particular concern with the notions above. The appropriateness of integrated versus segregated settings for the education of students with disabilities fosters much debate in the Ontario context.

The Supreme Court of Canada has also addressed this debate in the case of *Eaton vs. Brant County Board of Education*.<sup>16</sup> According to the Court:

While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality .... Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

The Commission's view is set out in its report *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*: Before considering placing a student in a self-contained, or specialized classroom, education providers must first consider inclusion in the regular classroom. In most cases, appropriate accommodation will be accommodation in the regular classroom with supports. However, every student with a disability is unique. In order to provide appropriate accommodation to all students with disabilities, education providers must, with the assistance of parental input, assess each student's particular strengths and needs, and consider these against a full range of placements, programs and services. Ultimately, appropriate accommodation will be decided on an individual basis.

Finally, with respect to the use of the term "adequately" in paragraph 3 of draft Article 17 above, the Commission's view is that whether a general education

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<sup>16</sup> See *Eaton*, Supra note 6.

system “adequately” meets the needs of students with disabilities is more a question of the status of the progressive realization of the right. In keeping with the notion that integration should be the norm of general application, the Commission suggests substituting into this paragraph the term “appropriately” to read, “*States Parties shall ensure that where the general education system does not appropriately adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available. ...*”

## **Article 18 – Participation in Political and Public Life**

The Commission is supportive of this draft Article. In 2000, the Commission reached a settlement in cases where two individuals with visual disabilities filed complaints against the City of Ottawa alleging they were unable to cast a secret ballot independently as required by law during the 1997 municipal elections because the City could not accommodate their needs. The City agreed to review its practices and ensure accessibility for future elections.

## **Article 19 – Accessibility**

1. *States Parties to this Convention shall take appropriate measures to identify and eliminate obstacles, and to ensure accessibility for persons with disabilities to the built environment, to transportation, to information and communications, including information and communications technologies, and to other services, ...*

The Commission is supportive of this draft Article and all its subparagraphs.

The Commission is of the view that ensuring accessibility to transportation should be at minimum with respect to “public transit” (as apposed to personal transit vehicles), and regardless of whether such transit is owned or operated by private or public entities.

2.(c) *Develop, promulgate and monitor implementation of minimum national standards and guidelines for the accessibility of public facilities and services;*

The Commission is supportive of this provision and has prepared several public reports and submissions and recommendations on accessible public facilities and services in this regard including: *Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code; Human Rights and Public Transit Services; Submission of the Ontario Human Rights Commission to the Ministry of Citizenship and Immigration Regarding the Consultations to Strengthen the Ontarians with Disabilities Act; Dining Out Accessibly – An Accessibility Audit of Select Restaurant Chains in Ontario.*

2.(d) *Encourage private entities that provide public facilities and services to take into account all aspects of accessibility for persons with disabilities;*

The Commission would be supportive of a stronger positive obligation being placed on private entities and on the State in this regard.

Under Ontario's *Human Rights Code*, private entities that provide public facilities and services have a duty to accommodate persons with disabilities short of undue hardship.

With respect to the State's obligation, the Ad Hoc Committee might wish to consider one of the recommendations made in the Commission's report *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*: that governments at all levels use "the force of procurement" to promote the adoption of universal design standards for accessibility, and that only materials complying with such standards should be purchased (also see the Commission's comment under draft Article 13 above).

### **Article 21 – Right to health and rehabilitation**

*States Parties recognize that all persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall strive to ensure no person with a disability is deprived of that right, and shall take all appropriate measures to ensure access for persons with disabilities to health and rehabilitation services.*

The Commission is supportive of this Article. The notion, "shall take appropriate measures to ensure access" is in essence the duty to accommodate persons with disabilities in accessing health and rehabilitation services. The Supreme Court of Canada has made a landmark decision in this regard. In the case of *Eldridge v British Columbia*,<sup>17</sup> deaf individuals successfully challenged being denied sign language interpreters while attending at a hospital for medical services. The Court found:

Para.94 ...Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. ...

*(b) Strive to provide those health and rehabilitation services needed by persons with disabilities specifically because of their disabilities;*

The Commission is supportive of this paragraph. Also see the Commission's comment above under draft Article 16.

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<sup>17</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624



## **Article 22 – Right to work**

(e) *Ensure the reasonable accommodation of persons with disabilities in the workplace and work environment;*

The Commission is supportive of this paragraph and the other paragraphs of the draft Article. Ontario's *Human Rights Code* legislates the right to equal treatment in employment without discrimination and requires employers to accommodate the needs of disabled employees short of undue hardship. Similarly, in this paragraph the Ad Hoc Committee might wish to consider substituting the term "ensure" with the requirement to "Protect through legislation" as similarly used at paragraph (h) of this Article. The Ad Hoc Committee might also consider that any legislated requirement extend to private sector employers as well. The requirements of Ontario's *Human Rights Code* cover all sectors including government and para-public entities as well as all private enterprises. The Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* comprehensively sets out the rights of employees with disabilities as well as the obligations of employers under the *Code*.

*Footnote 89: ... the Committee may wish to consider whether transportation to the workplace for persons with disabilities is covered under the provision of access to the workplace under draft article 19.*

The Commission is of the view that access to transportation to the workplace should be at minimum with respect to accessible "public" transit, and would more appropriately be covered under draft Article 19.

## **Article 23 – Social Security and adequate standard of living**

*Footnote 104: Some members of the Working Group also considered that non-discriminatory access to privately provided housing should also be specified.*

The Commission agrees with this suggestion. Under Ontario's *Human Rights Code*, persons with disabilities have the right to be free from discrimination in housing accommodation including privately provided housing. Under the *Code*, landlords also have a duty to accommodate the needs of occupants with disabilities, short of undue hardship.

(f) *Ensure that persons with disabilities are able to access life and health insurance without discrimination on the basis of disability.*

*Footnote 106: The Ad Hoc Committee may wish to consider the extent to which States parties can determine the provision of insurance, which in many countries is typically the domain of the private sector.*

In Canada, the provision of insurance is typically the domain of the private sector. Ontario's *Human Rights Code* provides for the right to be free from discrimination in insurance (including the private sector) on the basis of disability and other grounds. At the same time, the *Code* permits certain exceptions and defences, for example, where a contract of insurance makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of disability among other grounds.

The Supreme Court of Canada in *Zurich*<sup>18</sup> qualified this defence in finding that the insurance industry must demonstrate that its reliance on enumerated grounds of discrimination are rational in that there currently is no alternative to viably assess risk. The Court also stated that the industry must strive to move away from relying on enumerated grounds by attempting to develop viable alternatives.

In another case involving insurance, the Supreme Court of Canada recognized the distinct disadvantage and negative stereotyping faced by persons with mental disabilities, and held that discrimination against individuals with mental disabilities is unlawful. In *Gibbs v Battlefords*,<sup>19</sup> the Court struck down an insurance plan for employees with disabilities that limited benefits for mental disabilities to a lower level as compared to physical disabilities.

A more detailed analysis can be found in the Commission's discussion paper and report on *Human Rights Issues in Insurance*.

2. *States Parties recognize the right of all persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing, housing and access to clean water, and to the continuous improvement of living conditions, and will undertake appropriate steps to safeguard and promote the realization of this right.*

The Commission is supportive of this provision. The Commission recognizes that poverty is inextricably linked with inequality, particularly for persons with disabilities as well as single mothers, the elderly and racial minorities among others. The Commission also recognizes that human rights institutions are challenged in their ability to deal with the issue of adequate standard of living. For a full discussion, see the Commission's research paper, *Human Rights Commissions and Economic and Social Rights*. The paper explores the concept of "social condition" as a prohibited ground of discrimination as one potential way that social and economic rights may be protected.

## **Article 24 - Participation in cultural life, recreation, leisure and sport**

1.(c) *Enjoy access to television programmes, films, theatre and other cultural activities, in all accessible formats, including captioning and sign language*

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<sup>18</sup> *Zurich Insurance Co. v. Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/255 (S.C.C.)

<sup>19</sup> *Gibbs v. Battlefords and Dist. Co-operative Ltd.* (1996), 27 C.H.R.R. D/87 (S.C.C.)

1.(d) *Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and the hospitality industry, and, as far as possible, enjoy access to monuments and sites of national cultural importance.*

The Commission is supportive of this draft Article.

In relevance to paragraphs 1(c) and (d), the Commission has made recommendations to government on the issue of captioning in theatres in two of its reports: *Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code*; and, *Submission of the Ontario Human Rights Commission to the Ministry of Citizenship and Immigration Regarding the Consultations to Strengthen the Ontarians with Disabilities Act*.

There is case law relevant to subparagraph 1(c). In the decision of *Vlug v. Canadian Broadcasting Corp.*,<sup>20</sup> the Canadian Human Rights Tribunal ruled that the CBC discriminated against Henry Vlug, who is deaf, by failing to provide captioning of all of its programming.

The decision of the Human Rights Tribunal of Ontario (then *Board of Inquiry*) in *Turnbull v. Famous Players Inc.* (2001), 40 C.H.R.R. D/333 (Ont. Bd.Inq.) has relevance for subparagraph 1(d). The Tribunal found that the movie theatre chain discriminated based on disability by having theatres that were inaccessible to wheelchair users or which barred admission to wheelchair users because they did not have appropriate facilities for them. The Tribunal also found that the theatre chain could not make out a defence of undue hardship and ordered the chain to make the theatres accessible within two years.

3. *Persons who are deaf shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity.*

Similar to the Commission's comment under draft Article 13 above regarding the diversity of deaf individuals, the Commission suggests that this provision be specifically directed to persons who are Deaf and who identify themselves with the Deaf culture/community and use sign language as their preferred mode of communication.

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<sup>20</sup> *Vlug v. Canadian Broadcasting Corp.* (2000), 38 C.H.R.R. D/404 (Can.Trib.)