Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

ONTARIO HUMAN RIGHTS COMMISSION

Submission Regarding

Accessibility for Ontarians with Disabilities Act Legislative Review

October 30, 2009

Overview

The Ontario Human Rights Commission (the OHRC) welcomes the opportunity to provide input into the independent mandatory review of the Accessibility for Ontarian's with Disabilities Act, 2005 (AODA).[1]

The OHRC has a long history of engaging its broad mandate promoting and protecting the rights of persons with disabilities, including providing advice to government dating back to 1998 on the development of successive pieces accessibility legislation[2] as well as more recent submissions on standards being developed under the AODA.[3]

From early on, the OHRC has stressed that the Human Rights Code (the Code), while an appropriate and necessary legislative tool for protecting and promoting rights, could not on its own effectively bring about wide scale barrier removal and equal access for persons with disabilities.

Rather, as the OHRC commented during the government's consultation prior to introducing and subsequently retracting the initial Ontarians with Disabilities Act 1998, it would take meaningful legislation with strong centralized regulatory and non-regulatory coordination, including a one-stop-shopping approach for information and resources, to ensure the necessary momentum for systemic change.

The OHRC called for the establishment of a responsible agency, a consumer input mechanism and sectoral standing committees charged with developing and recommending accessibility standards, procedures, and compliance timelines with incremental progress goals, for eventual adoption into regulation. The OHRC also recommended that government ministries and funded agencies be required to examine barriers, develop plans for barrier removal and inclusive design, and report publicly on progress.

The OHRC further recommended that accessibility legislation address not just physical barriers but also attitudinal ones as well as so called "neutral" rules and requirements that pose systemic barriers for persons with disabilities.

The responsible agency should also monitor accessibility and barrier removal by sector to determine whether progress was being made, including by means of annual reporting directly to the legislature. Sectoral standing committees should also play an ongoing role to help monitor and report on achievement of standards. Indicators should not only include progress on barrier reduction and accessible design, but also socio-economic measures including income level and equal access to education and the labour force.

The OHRC identified the importance of provincial government strategies for education, communication and cooperation, including with the Federal government and other entities and jurisdictions, to address barriers in areas of overlapping responsibility such as telecommunications and the finance industry.

Guiding Principles

In 2004, in response to the government's consultation prior to the enactment of the AODA 2005, the OHRC identified seven **principles** for strong effective accessibility legislation to be:

- **Universal** and apply to government, non-government and private sector environments
- **Forward-looking**, **harmonized** with and building on existing rights and established standards
- **Inclusive** of persons with non-mobility related disabilities
- **Achievable**, retaining and enhancing accessibility planning requirements as essential tools to achieving a barrier free Ontario
- **Clear** implementing mechanisms for the development, application and review of standards for accessibility
- **Strong**, including measures for receiving and resolving complaints, and enforcing the requirements of the Act and
- **Transparent**, including monitoring, public reporting and accountability measures for the body responsible for the administration and enforcement of the Act.

While a number of the OHRC's recommendations, along with those from others including the then ODA Committee (now AODA Alliance), were eventually realized, some through the ODA 2001 Act, and others through the AODA 2005, the OHRC continues to call for these principles and approaches to remain at the core of accessibility legislation going forward. They should also provide the basis for evaluating the effectiveness of these two pieces of legislation. In this regard, the OHRC offers the following observations for consideration under the AODA Review.

Harmonization

The relationship between accessibility legislation and the Code should be a harmonious and complementary one, albeit with necessary elements of natural tension.

The Code has legal primacy over all other laws including the AODA. That's important because it shows society recognizes "what should be": that persons with disabilities are inherently entitled to and should enjoy equal rights without discrimination; and that we all have legal obligations to ensure it happens. The AODA and other disability related legislation provide a means for getting us there.

Both the AODA and the Code intend systemic reach and change. The AODA is to accomplish this through development of prescriptive technical standards and timelines that will progressively realize accessibility for a broad range of disabilities and the greatest number of people.

The Code, on the other hand, is a rights-based framework with stronger but more general procedural and substantive obligations. It expects immediate compliance, and

has an individual complaints mechanism to help enforce this. But the Code can also contemplate limitations of undue hardship as well as interim and phased in measures and next best solutions, depending on the circumstances. It also has provisions that can be used to prevent or address systemic situations that have a discriminatory or adverse effect on entire groups. And it gives the OHRC a broad mandate and set of functions to promote and, if necessary, compel systemic change, including the development of interpretive policies and guidelines as well as powers to encourage education and cooperation, hold inquiries, intervene, or initiate applications. Ideally though, the Code's enforcement functions should be used as the avenue of last resort.

Neither the Code and OHRC policies nor the AODA and its standards should be viewed as static stand-alone instruments, when in fact, the understanding of human rights and standards advances and evolves over time, and obligations overlap and are far reaching.

This means that application of the Code and the AODA, and the development of respective policies and standards, must recognize and have regard for other relevant laws, jurisprudence and standards such as: the Building Code, the Planning Act, the Canadian Charter of Rights and Freedoms, the new UN Convention on the Rights of Persons with Disabilities, relevant tribunal and court decisions, as well as the best available research, information and experience across jurisdictions. It also means that policies and standards need to be updated on a regular basis.

Those responsible for the development and application of these and other laws, policies and programs must also account for the rights of persons with disabilities under the AODA and the Code as well as ongoing advancements.

AODA standards and other initiatives must set out a clear context so that individuals and organizations are aware of the full extent of their legal obligations. One way to help harmonize the AODA with the Code is to reference obligations under the Code and set out **interpretive human rights principles** directly into the standards so that those responsible can properly interpret and apply the standard in light of these obligations.

While some standards did reference the Code and principles and other relevant legislation to some degree, it was not necessarily done overtly, comprehensively nor consistently across all standards. That is why the OHRC recommended in its submissions that the standards should:

- Adopt the clause found in the proposed Employment Accessibility Standard acknowledging that nothing in the proposed Standard diminishes the duty under the Ontario Human Rights Code to accommodate persons with disabilities short of undue hardship
- Identify human rights principles as overall goals to help guide overall interpretation of the standard including:
    - Design universally / inclusively
    - Create no new barriers,
    - Identify and remove existing barriers

- Favour integration over segregation
- Provide interim or next best measures where ideal or full accommodation is not (yet) feasible
- Achieve results progressively to the maximum of available resources, and at the same time
- Consider and accommodate individual needs short of undue hardship by exploring solutions through a cooperative process that maximizes confidentiality and respect.

It is appropriate for standards to prescribe technical requirements and timelines by class and size of organizations and facilities in order to bring about accessibility for the largest number of people. However, they must also have regard for the Code's **duty to accommodate individual need**. The OHRC has raised concern in its submissions on standards, that individuals and organizations responsible might misinterpret the standards to mean they have no such duty to accommodate until after the timeline specified in the standard, or are exempt entirely because of their size or classification.

Under the Code, OHRC policy, and human rights jurisprudence, individuals and organizations responsible, regardless of class or size or timeline prescribed under the AODA, have a concurrent, immediate and ongoing duty to respond to individual accommodation requests and to explore and provide solutions as soon as possible, short of undue hardship. This should be acknowledged across all standards and in related education and other initiatives.

The requirements set out within a standard should not be developed or applied in isolation of each other. They must be written to ensure that they respect the interpretive human rights principles identified above, and include any other necessary provisions.

Specifically, standards should be written in a way that will not permit the **creation of new barriers**. The OHRC raised concerns on this issue in some of its submissions where, for example, inaccessible equipment could be purchased up until the prescribed deadline in the standard. Similarly, an exemption from applying an otherwise sound, safe and feasible prescribed standard, and instead purchase new inaccessible equipment, service or construction, on the basis of an undue hardship argument, is not in keeping with the human rights principle of creating no new barriers, and should not be permitted.

In addition to applying the above principles, the development of new standards also needs to factor in the **minimum gains** that have been established elsewhere in legislation or case law. New standards should not be lower, and implementation timelines should not be slower, than those already achieved. This can also lead to confusion for those responsible. The OHRC raised this as a concern in its submissions on standards, for example, in regard to calling out transit stops, closed captioning in movie theatres, and retrofits to heritage buildings.

Similarly, **elements governed by different bodies** also cause confusion and perpetuate barriers. For example, a building leased by a chain restaurant has

undergone major renovation and has been made accessible, but the exterior property and path owned by a separate landlord, has not. AODA standards should be developed in a manner to prevent or address these types of situations. For example, “new construction,” “extensive renovation” or “retrofit” obligations of one body might trigger a complementary obligation of another.

Similarly, **overlapping standards** with different compliance mechanisms can cause confusion as to which is most current, progressive or regressive, and which has the last word on compliance. New AODA standards should also represent clear significant progress over the status quo.

The OHRC raised these harmonization concerns in its submissions, for example, on the proposed Accessible Built Environment Standard in terms of confusion for those with legal responsibility for accessible design and use of built environments under various laws including the AODA, the Building Code, the Planning Act and the Ontario Human Rights Code.[4]

Simply recognizing the nexus between overlapping laws is insufficient. Proposing options for reducing or eliminating concurrent or competing provisions needs to be part and parcel of the standards development and consultation processes. The OHRC understands that this is more easily said than done. It also begs the age old question of whether it is preferable to give special attention to human rights by prescribing accessibility requirements separately, or, have requirements integrated into existing laws, policies and programs. At a minimum, the laws should not conflict with each other, and at best would allow users to understand their obligations without searching through multiple documents or statutes.

The issue of harmonization and the question of segregating or integrating human rights standards also arises between the Code and other laws, such as the Employment Standards Act, the Occupational Health and Safety Act, the Education Act, and the Pay Equity Act.

The OHRC recommends that the AODA Review and the Directorate give considerable attention to determining how to better examine and propose a strategic approach for addressing harmonization issues.

Application

The government and standards development committees can and should appropriately consider what matters might be prioritized for application now. Other standards might be developed now, but delayed through prescribed timelines. Still others might only be developed in the future under a new regulation or revisions to existing ones. Regardless of priority, the Code duty to accommodate individual requests short of undue hardship remains.

As well, any standard, including any retrofit requirements deemed a lower priority, should not be excluded in perpetuity through an exemption clause. An undue hardship exemption, for example, might appropriately permit an organization to delay implementing a standard, including a retrofit requirement, if it can demonstrate prohibitive cost or health and safety factors. But in the interim, the organization might be expected to comply partially with the standard through next best measures to an extent that would not cause undue hardship. Applying the ideal prescribed standard would still be expected at such time that doing so would no longer cause undue hardship. Either way, any claim of undue hardship must meet the high threshold set by the Human Rights Code, OHRC policy, and the courts.

While the delay of application of standards including retrofit requirements might be defensible, there should be no exemption that would permit the creation of new barriers. Moreover, standards would ideally include retrofit provisions to begin addressing existing barriers now – prioritizing elements for retrofit, staggering them over time if need be; starting with what is most essential from the user's perspective – so that accessibility is progressively realized.

Regardless of whether government sets out timelines now or in the future, barrier removal and retrofit requirements should still be fixed into the Standard to **promote understanding and voluntary compliance**. At minimum, standards could require **barrier identification and retrofit planning** to begin early as a prerequisite to barrier removal and retrofit.

The OHRC supports the **principle of objective based accessibility** adopted in the Building Code and the proposed Built Environment Standard that would permit another type of exemption to a prescribed standard. It allows for the possibility of alternative solutions while still achieving the stated objective of the prescribed standard. This flexible and creative approach is particularly well suited where a prescribed requirement might otherwise be unfeasible or result in undue hardship in situations involving change in use or extensive renovations or retrofit.

Localized Compliance

Building compliance planning and reporting requirements into the standards could be a positive first step to support compliance because it would provide the necessary information to monitor obligations and interim progress for those responsible to make their services, facilities and systems inclusive for persons with disabilities. Planning and reporting requirements should include timelines, and cover both the application of the prescriptive technical elements of the standard as well as barrier identification and removal.

The OHRC was pleased to see that the proposed Employment Standard included requirements for employers to identify indicators and collect data for measuring progress. Standards need not necessarily prescribe specific indicators. While setting out some indicators might help promote consistency, the OHRC also recognizes that measuring

progress requires some flexibility to apply relevant indicators across different size organizations, occupations, and sectors.

Government could provide helpful resources including both quantitative and qualitative research tools. For example, detailed census data on the representation of employees with disabilities and their needs across occupations, sectors and different levels of geography could help employers focus and prioritize their efforts to identify and remove barriers. Such data would also provide a comparative baseline, particularly for larger organizations, who may wish to survey representation and measure barrier removal and inclusive design efforts within their environment. Similar research data could be made available to support monitoring progress towards achieving other standards as well.

Centralized Compliance

As the OHRC has stated for a number of years now, an AODA compliance framework and its mechanisms should be strong, clear, and transparent. The AODA itself has some of the necessary provisions including the ability to set up an appeals tribunal and levy fines.

Compliance needs to be centralized as well as localized to ensure consistent application and progress towards a barrier free Ontario. The OHRC supports provincial government administration of standards compliance mechanisms, whether directly or through an arms length body.

Successful compliance begins with good **public education and information sharing as well as monitoring** impact on the lives of persons with disabilities. The importance of this should not be underestimated. To be truly effective, the goals of the AODA need to be accepted and internalized by society as a whole.

The administrative body needs to play an active role including the provision of resources that will help those responsible, particularly smaller organizations, implement the standards and achieve results, as well as help the broader public take up personal responsibility as seen with other social movements such as the “greening” of the environment.

The administration body in particular should have a mandate to:

- Receive **mandated compliance plans** by a set time prior to the date by which compliance is required under a particular standard.
- **Direct changes** to plans that fall short. Compliance might be delayed if the Administration agrees that it would otherwise cause undue hardship within the prescribed timeline.
- **Order adjustments** to timelines, the standard or means so that compliance to the highest possible level is achieved that does not result in undue hardship in the interim until such time the full standard can be met.
- Order compliance for **earlier timelines** than those set out in the standards if they

can be “reasonably” achieved without major impact on the organization.
- Require full or partial compliance through other means including **individual accommodation**.

This approach requires **compliance to the highest possible level** of any standard that can reasonably be achieved without causing undue hardship. At the same time, plans would maintain steps for eventual full compliance with the standards. Those responsible should not be permanently absolved of the potential for compliance at a future date.

The proposed Built Environment Standard has set out this creative and flexible approach that could be modelled for administering compliance across standards. It can help ensure progress continues towards the 2025 target but with the possibility of earlier compliance for those with the means, and an undue hardship defence for those who cannot comply to the standards within the required timelines.

Taken all together, an approach to compliance that incorporates monitoring, planning and reporting requirements alongside prescriptive standards and an undue hardship test for timelines, would also promote harmony with current public institution planning requirements under the ODA 2001, and with the obligation under the Code to consider and implement individual accommodation requests, regardless of prescribed standards, short of undue hardship.

There still remains the question of the interplay and harmonization of compliance and complaints mechanisms between the AODA and administrative body and tribunal, the Human Rights Code and Tribunal, the Building Code and municipal enforcement, the Planning Act and other relevant legislation and bodies. As stated above, this issue must be given much more attention.

Cost

While organizations and individuals responsible have a high threshold to meet under the principle of undue hardship, legislative and other approaches for making Ontario accessible must recognize the need to ensure ongoing economic viability. The answer is finding ways to spread the costs of accessibility as widely as possible.

Part of the challenge to social internalization of accessibility, is to understand that persons with disabilities should not carry the burden of accommodation. We all have responsibility to share the so called “burden” to such a degree in fact where ideally it would not be seen as a burden at all but just the way things are in order to make society work for everyone.

This is why the principle of maximizing integration over segregation is so important. Persons with disabilities should not be viewed or made to feel like a group that burdens the rest of us because of special costly treatment. In fact, the costs should be integrated as much as the accessibility features and barrier free designs themselves. By way of example, moviegoers should not cringe at a ticket hike to ensure all theatres have captioning equipment even if it only benefits a few patrons with disabilities. Because, for

example, the same might be said for arcade games that are found at many theatres but only used by some.

And while accessibility costs may be spread over time, human rights principles call for the maximum use of available resources to ensure that progress towards equality is actually realized.

Here too government can play a key role. Capital or operational funding, tax breaks or other incentive agreements, even if temporary, and limited to smaller more needy organizations, are just some of the options that can help create the necessary momentum towards internalization of these responsibilities.

Inclusive

Much has been said, positive and negative, about how inclusive and representative the AODA processes have been for persons with disabilities by those more directly involved in the advisory committees and the public consultations.

What is clear from human rights law, including the Supreme Court of Canada, is that the duty to accommodate is a shared responsibility and a process that must include people with disabilities themselves.

The OHRC would recommend that the AODA Review examine more closely and report on ways to ensure that the AODA and its processes are sufficiently inclusive, particularly for people with mental health conditions as well as intellectual and developmental disabilities. It is also important to recognize the intersection of other factors such as the relationship between disability and poverty, implications for racialized groups as well as newcomers to Ontario with disabilities, and access to accessible services, facilities and systems that are language appropriate, including for those with French language minority rights under Ontario and Canadian law.

Consistency

The OHRC would make a final observation that a number of the human rights considerations and approaches raised above were recognized and applied by different standards development committees, but in varying consistency and degree. The OHRC's view is that the application of human rights norms must be supported and carried out more consciously and strategically across the standards development process as well as all other AODA related initiatives. This suggests one more reason why centralized compliance is important.

ODA 2001 Repeal

The AODA Review is also examining the question of repealing the ODA 2001. The OHRC also views this issue as one of harmonization.

While the AODA is a mechanism for establishing prescriptive standards and timelines for both the public and private sectors, the ODA is focused more to barrier identification, barrier removal planning and reporting requirements for government and public institutions. Both have their unique consumer advisory mechanisms.

Most government and major public institutions now have accessibility obligations under both acts. This can lead to confusion and misplaced efforts, but both are important.

The ODA represents earlier gains in the development of accessibility legislation that should not be lost. Understanding and harmonizing the ODA planning and reporting requirements with AODA prescriptive standards might better help support and complement the objectives of each.

As the OHRC noted above, barrier identification and removal planning and reporting could act as a prerequisite for retrofit requirements. Taking an integrated approach could also allow the different aspects of these acts to universally apply to both public and private sectors.

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[1] The AODA review is examining: the standards development committee process; the role of the Municipal Accessibility Advisory Committees; the functions of the Accessibility Directorate of Ontario, including public education; recommendations for a repeal strategy for the Ontarians with Disabilities Act, 2001.

[2] OHRC Submission Regarding the Discussion paper: Preventing and Removing Barriers for Ontarians with Disabilities,1998. Also see OHRC 2004 Submission Regarding the Consultations to Strengthen the Ontarians with Disabilities Act 2001 /

[3] See OHRC 2009 Submission Regarding the Initial Proposed Accessible Built Environment Standard / soon to be published to website www.ohrc.on.ca
OHRC 2009 Submission Regarding the Initial Proposed Employment Accessibility Standard / http://www.ohrc.on.ca/en/resources/submissions/employaccess
OHRC 2009 Submission Regarding the Final Proposed Accessible Transportation Standard / http://www.ohrc.on.ca/en/resources/submissions/soserv
OHRC 2007 Submission Regarding the Initial Proposed Transportation Accessibility Standard / http://www.ohrc.on.ca/en/resources/submissions/transportsub
OHRC 2002 Submission Concerning Barrier-Free Access Requirements in the Ontario Building Code / http://www.ohrc.on.ca/en/resources/submissions/SubmBldngCode2

[4] "Harmonization" principle also addressed in the 2002 Submission Of The Ontario Human Rights Commission Concerning Barrier-Free Access Requirements In The Ontario Building Code / http://www.ohrc.on.ca/en/resources/submissions/SubmBldngCode2/view