

**Submission of the Ontario Human Rights Commission
to the Ministry of Citizenship and Immigration
Regarding the Consultations to Strengthen the *Ontarians with
Disabilities Act***

March 31, 2004

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This submission is in response to the Ministry of Citizenship and Immigration's public consultation on strengthening the *Ontarians with Disabilities Act* (ODA).

The Ontario Human Rights Commission (OHRC) commends the Ministry for this initiative to make the ODA stronger and more effective. We believe that a strong ODA can lead to significant improvements in the lives of Ontarians with disabilities.

The Ontario Human Rights Commission and the ODA

Equal treatment without discrimination because of disability in the areas of employment, accommodation, and services, goods, and facilities has been protected under the Ontario *Human Rights Code* (the *Code*) for over 20 years. The aims of the *Code*, as stated in the Preamble, include the creation of a climate of mutual respect and understanding, in which each person feels a part of the community and able to contribute fully to the development and well-being of the community. The OHRC has actively worked to advance the rights of persons with disabilities through public education, policy development, research, public consultations and reports, communications, and its enforcement mechanisms. The OHRC's recent initiatives in the area of disability rights include:

- The 2000 *Policy and Guidelines on Disability and the Duty to Accommodate*, which sets out the OHRC's interpretation of the *Code*'s provisions that relate to disability, including the definition of disability, the principles of accommodation, and the test for undue hardship;
- Public consultations and a report and recommendations on accessible transit systems;

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- Public consultations and a report and recommendations on barriers to equal opportunity for students with disabilities in Ontario's education system;
- Public submissions on the OHRC's concerns with the accessibility provisions of the *Building Code*; and
- An initiative to increase access in the restaurant sector.

Persons with disabilities can file complaints with the OHRC: currently almost 2/3 of the complaints filed with the OHRC cite disability as a ground of discrimination. The OHRC has investigated and referred for hearing many high-profile complaints related to disability, including complaints regarding access to movie theatres, specialized transit, and services for children with autism.

However, the impact on the lives of persons with disabilities has been slow and limited. In 2001, over 1.5 million Ontarians, approximately 13.5 percent of the province's population, reported disabilities that limited their activities.¹ As Ontario's population continues to age, this number is likely to increase. Data on a number of key indicators shows that Ontarians with disabilities continue to experience disadvantage. Only 28 percent of adult Ontarians with disabilities have a college or university education, as opposed to almost 40 percent of adult Ontarians who do not have disabilities. Only 41 percent of Ontarians with disabilities between the ages of 15 and 65 are employed, while the employment rate among adult Ontarians without disabilities is 76 percent. The average income for adults with disabilities in Ontario is \$22,543 per year, as compared to \$34,144 per year for adult Ontarians without disabilities.

The work of the OHRC itself confirms that persons with disabilities continue to face numerous barriers to full and equal participation in society. These barriers affect the most basic aspects of day-to-day life. For example, students in Ontario's primary, secondary, and post-secondary education systems continue to face numerous challenges in obtaining an education, including inadequate funding, physical inaccessibility, cumbersome and time-consuming accommodation processes, and negative attitudes and stereotypes.² For many persons with disabilities, limited access to public transit services restricts access to employment, education, and community activities.³ The OHRC each year receives numerous complaints from employees who believe that their employers have dismissed, refused to accommodate, or otherwise treated them unfairly

¹ *Participation and Activity Limitation Survey*, Statistics Canada, 2001

² *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*, Ontario Human Rights Commission, October 2003.

³ *Human Rights and Public Transit Services in Ontario: Consultation Report*, Ontario Human Rights Commission, March 2002.

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because of their disabilities.⁴ Our work with fast-food restaurant chains has demonstrated that there are significant limitations in this sector in terms of awareness and understanding of accessibility issues.

Complaints by persons with disabilities to the OHRC have climbed steadily in recent years, both in absolute numbers, and in terms of percentage of the OHRC's caseload. The OHRC has developed efficient and fair mechanisms for investigating, mediating and resolving complaints. At the same time, the OHRC, as a complaints-based body, cannot on its own resolve the numerous issues faced by persons with disabilities. Individual investigation and litigation of complaints is, even at its most effective, a lengthy process, and costly for all involved. Individual complaints may raise industry or system-wide issues that require a coordinated approach beyond the scope of any single complaint. Many complaints raise broad systemic issues, such as access to public transit and educational services, or lack of captioning at movie theatres. While Tribunal decisions can potentially clarify human rights principles, and do have an educational (and perhaps a deterrent) effect, they are not binding beyond the parties to the particular complaint. Individual complaints are therefore a slow, and not always an effective means for resolving the systemic barriers facing persons with disabilities.

As a complement to its work in responding to complaints, the OHRC has used its powers under section 29 of the *Code* to promote and advance rights through reviewing legislation, developing policies, and raising public awareness. In recent years, the OHRC has focussed many of its s. 29 initiatives on tackling issues faced by persons with disabilities, including the work described above related to education, transit, restaurant access and the *Building Code*. Despite these significant efforts of the OHRC to tackle the many systemic issues facing persons with disabilities, the pace of change is unavoidably slow, given the resources and mandate of the OHRC.

The ODA as it currently exists has not led to any reduction in the number of complaints received by the OHRC, or in the number of pressing systemic issues that are being brought to our attention. In fact, these continue to increase. The OHRC believes that, unless the ODA is significantly strengthened, this will remain the case.

A strong and effective ODA would complement and build on the work of the OHRC in the area of disability. The OHRC strongly supports amendments to the ODA that would make it an agent of real change for persons with disabilities in the Province of Ontario. The OHRC believes that in order to be effective, an ODA must be:

⁴ Allegations of discrimination in employment make up the majority of disability-related complaints filed with the OHRC. For example, in 2002-2003, 745 of the 1142 disability-related complaints were in the area of employment.

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1. **universal**, applying to the private as well as the public sector;
2. **forward-looking**, building on the protections of the *Code* and the accepted human rights principles set out in OHRC policy;
3. **inclusive**, addressing more precisely the issues of persons with non-mobility-related disabilities;
4. **achievable**, retaining and refining the use of accessibility plans as essential tools for achieving a barrier-free Ontario;
5. **clear**, implementing mechanisms for the development, application and review of standards for accessibility;
6. **strong**, including measures for receiving and resolving complaints, and enforcing the requirements of the Act; and
7. **transparent**, including monitoring, public reporting and accountability measures for the body responsible for the administration and enforcement of the Act.

Each of these recommendations is discussed in greater detail below.

1. Scope of the *Ontarians with Disabilities Act*

The rights under the *Code* apply to both the private and public sector. However, the OHRC has repeatedly encountered in the private sector a lack of awareness or commitment to the rights of persons with disabilities to inclusion and full participation. For example, private schools at the primary, secondary and post-secondary level have turned away students with disabilities on the basis that “the school is not in the business of providing these types of services”, or have required students to sign waivers of their *Code* rights to accommodation as a condition of gaining admittance. The OHRC’s recent audit of several high-profile restaurant chains found a variety of barriers for persons with disabilities, ranging from inaccessible entrances and washrooms, to lack of appropriate signage, to lack of adequate interior routes or seating options for persons with disabilities.⁵ During our consultations on age discrimination, the OHRC heard that the stock of accessible housing for persons with disabilities is inadequate to meet current needs.⁶ Private services and facilities may comply only with the requirements of the *Building Code*, and often fail to consider their obligations under the *Human*

⁵ *Dining Out Accessibly: An Accessibility Audit of Select Restaurant Chains for Ontario*, Ontario Human Rights Commission, not yet released.

⁶ *A Time for Action: Advancing Human Rights for Older Ontarians*, Ontario Human Rights Commission, June 2001.

*Rights Code*⁷ or current best practices and standards in barrier-free and universal design.⁸

Without effective legislation requiring progressive steps on the part of private-sector actors, persons with disabilities will continue to experience major challenges in accessing such fundamentals as health-care services, education, and housing, and in accessing community goods and services, such as shopping, dining, or entertainment facilities, that non-disabled persons take for granted. They will also continue to experience significant barriers with respect to employment. The cost of inaccessibility to persons with disabilities and the community is high, and considering the sizeable proportion of Ontario's population with disabilities, the cost to the private sector in lost business and access to skilled employees is also high. Accessibility makes good business sense, particularly in light of our growing aging population and the greater numbers of Ontarians exhibiting varying degrees of ability, as well as families with small children.

The OHRC therefore recommends that the ODA cover private as well as public sector organizations. There are a number of alternatives for doing so, including adding sectors gradually by regulation, creating tax incentives for private sector organizations that increase accessibility, or limiting the application of the ODA to private sector organizations over a certain size. Given the significant barriers in persons with disabilities face in employment, accessibility requirements for the private sector should apply with respect to employment, as well as services, goods and facilities.

2. Harmonization of the Code and the ODA

The *Code* is a quasi-constitutional law, which binds the Crown, and prevails over any other Act or regulation, unless the Act or regulation specifically provides that it is to apply despite the *Code*. The current ODA specifically states that nothing in it limits the operation of the *Code*. The ODA and the *Code* share some common purpose: to permit persons with disabilities to enjoy equal opportunity and to participate fully in the life of the province. The ODA provides a mechanism through which organizations can bring themselves into compliance with the requirements of the *Code*. The provisions and principles of the *Code*, including the undue hardship standard, continue to apply. Compliance with the ODA does not constitute a defence under the *Code*.

⁷ The OHRC has outlined its concerns regarding the *Building Code* at length in its *Submission Concerning Barrier-free Access Requirements in the Ontario Building Code*, submitted to the Ministry of Housing on March 1, 2002.

⁸ CSA Standard B651-M95 "Barrier Free Design" and CSA Standard B480-02 "Customer Service for People with Disabilities" (www.csa.ca)

The *Code* and the ODA are therefore complementary pieces of legislation. Clarifying the relationship between the *Code* and the ODA will increase the effectiveness of the ODA, and reduce confusion among those regulated by both pieces of legislation.

It may be helpful to keep in mind that the powers and activities of the OHRC extend well beyond dealing with individual complaints. The OHRC has broad powers under section 29 of the *Code*. Through its *Policy and Guidelines on Disability and the Duty to Accommodate*, the OHRC has set out the human rights principles that guide the interpretation of the provisions of the *Code* related to disability. These include the principles of integration and full participation for persons with disabilities, respect for dignity, and individualization. The OHRC has also used its powers under section 29 to conduct broad public consultations or inquiries on issues affecting persons with disabilities, and to issue reports which identify barriers affecting persons with disabilities and make recommendations for action. As well, despite limited resources, the OHRC maintains an active public education program.

It is the OHRC's belief that the ODA will be most effective if its requirements are clearly and explicitly tied to the *Code* and the work of the OHRC. It should be clear in the ODA and to the public that:

- the ultimate goal of accessibility planning and implementation is compliance with the *Code*,
- the principles of the *Code* and its interpretation in OHRC policy should be incorporated into the development and implementation of accessibility plans, and
- the standard for the sufficiency of accessibility plans and implementation is ultimately that of the human rights duty to accommodate short of undue hardship.

3. Addressing the Needs of Persons with Non-mobility-related Disabilities

While many think of accessibility as an issue particular to persons with mobility-related disabilities, persons with sensory, mental, learning, or other non-evident disabilities also face barriers to access. Because the needs of persons with non-mobility-related disabilities are less evident to the eye, they are sometimes less understood or accepted. Persons with sensory disabilities, for instance, may face fewer barriers in gaining access to buildings, but face greater obstacles getting the information they need to use the building safely and conveniently.

Conveniences that are taken for granted, such as pay phones, may not be accessible to persons with sensory disabilities. As well, stereotypes, myths and prejudices about certain types of disabilities may themselves create formidable barriers to access. For example, during our consultation on students with disabilities in the educational system, the OHRC heard of comments such as

“learning disabilities do not exist, there are just lazy students who watch too much television”.

The current ODA appropriately uses the broad definition of disability found in the *Code*, and therefore applies to persons with non-mobility-related disabilities. However, the legislation does not otherwise explicitly address the unique barriers faced by persons with non-mobility-related disabilities. This could be addressed in a number of ways. For example, the ODA could require that accessibility plans include specific consideration of the needs of persons with non-mobility-related disabilities.

The OHRC is also concerned with the provisions of the current ODA that use the *Building Code* as a standard for accessibility.⁹ The *Building Code* includes persons with sensory disabilities in its definition of “barrier-free”, but it does not include persons with other forms of disability such as mental disorders or learning disabilities, who might also benefit from barrier-free requirements. As well, the *Building Code* does not fully address the needs of persons with sensory disabilities. For example, there are no requirements with respect to tactile signage; alarm systems do not appear to require visual as well as auditory signals, and there are no requirements with respect to rear-window captioning/descriptive video services in movie theatres, or access to TTY or phones with volume controls. The *Building Code* should not be used alone as a definitive standard for accessibility until it has been amended to reflect current standards in disability rights.

4. Enhanced Accessibility Plans

Accessibility plans can be effective tools for removing and preventing barriers for persons with disabilities. The OHRC has recommended the use of accessibility plans in its work in the areas of transit, education, and most recently, in the restaurant sector.

However, in order to be most effective, accessibility plans should, in the OHRC’s view:

- Set as a goal compliance with the *Code*, as well as current barrier-free standards;
- Incorporate the principles of the *Code* and OHRC policy, including integration and full participation, respect for dignity, and individualization;

⁹ Section 4(2) of the ODA requires government to develop guidelines for the accessibility of its buildings, based on the *Building Code* as a minimum standard.

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- Consider issues raised by the OHRC in its public documents, such as its consultation reports;
- Meet the *Code* standard of undue hardship. That is, the steps and timelines outlined in the accessibility plan should address issues of access until they reach the legal limit defined in the *Code* as undue hardship;
- Use current barrier-free standards and set benchmarks for planning and measuring progress; and
- Incorporate timelines, performance measures, and accountability structures.

5. Adopt and Require Compliance with Standards

Currently, the ODA provides no definition of accessibility. Nor are there sector-specific standards for accessibility. Without clear standards and benchmarks in place, many organizations are unsure as to what they are required to do in order to be accessible. Private sector organizations have at times expressed to the OHRC frustration with the lack of clear standards, stating: “Tell us what we have to do, and we will do it”. In addition to providing clarity and certainty, standards can also play an important role in motivating and sustaining improvements to accessibility. Further, without standards, levels of accessibility will inevitably vary widely across the province. Equal access to services, facilities, housing or employment for persons with disabilities is a fundamental human right, and should not be dependant on accidents of geography. As well, a requirement to set benchmarks is a constructive way to help organization take steps progressively towards meeting standards.

The OHRC therefore recommends that the ODA require the development of clear, measurable standards and benchmarks, together with reasonable and specific timelines. In order to reflect the range of issues affecting persons with disabilities, standards should not be tied only to physical access. For example, rates of unnecessary institutionalization of persons with disabilities could be measured over time against benchmarks and standards towards progressive realization of the human rights principle of integration over segregation. Standards could build on or reference the accessibility standards developed by the Canadian Standards Association. Standards should be reviewed on a regular basis to ensure that they continue to reflect current best practices. A sectoral approach to developing, applying and reviewing standards may be fruitful. The OHRC has worked on a sector-by-sector basis to address barriers to persons with disabilities in transit, education, and the restaurant industry, and this cooperative approach has proven effective in building a consensus on the actions to be taken in the community involved.

It is essential that persons with disabilities be involved in the development and ongoing review of standards: as the OHRC has heard repeatedly in its consultations, persons with disabilities know what barriers they face, and what works best for them. Based on the OHRC's experience, it is also essential to obtain input from those who will be implementing those standards. We have found it helpful to develop relationships with key players in each sector, such as industry associations, or industry leaders. As well as providing valuable information and insights, these partnerships can assist in raising awareness and understanding about accessibility issues throughout the sector.

6. Complaints, Dispute Resolution and Penalties

The ODA will not be effective unless there are mechanisms for ensuring that:

1. plans meet standards and requirements set out in the legislation,
2. plans are completed and made public in a timely, coordinated, and easily accessible fashion, and
3. the plans are actually implemented.

An administrative complaint mechanism to ensure compliance with these aspects of the ODA is distinct from the much broader responsibilities of the OHRC, as an independent statutory human rights agency, to enforce, advance, and promote understanding of the *Code*. Organizations may fail to maintain compliance with the *Code* while complying with the ODA, and *vice versa*. The *Code* and the OHRC do not provide recourse for the failure of organizations to meet the requirements of the ODA. At the same time, a strong ODA that pairs barrier-removal planning and standards setting with an administrative complaints procedure can have a significant impact on the need to pursue remedies under the *Code*. Further, the type of complaints mechanism set out in the *Code*, while appropriate to an independent human rights agency such as the OHRC, is unlikely to provide an appropriate mechanism for ensuring that organizations meet the type of standards and planning based requirements of an ODA.

All plans should be submitted to the Accessibility Directorate. Regular audits by staff of the Accessibility Directorate may be sufficient to ensure that plans are made public in a timely fashion, and that they meet the basic criteria set out in the legislation. The input of persons with disabilities and other members of the public can help ensure that the plans are meaningful and are actually implemented. The OHRC recommends that an administrative process be put into place for the Accessibility Directorate to receive and report publicly on complaints regarding compliance with the requirements of the ODA, including the development and implementation of accessibility plans. The ODA should

also include clear consequences, such as fines, for failure to comply with its requirements.

7. Monitoring and Reporting

The ODA should require the Accessibility Directorate to conduct annual monitoring of access and barrier removal by sector to determine whether substantive progress towards the goals of the ODA is achieved, maintained, and advanced over time. Use could be made of regular statistical analyses at the provincial level or by sector, to determine whether real advances have been made for persons with disabilities. The Accessibility Directorate should report publicly on the results of this monitoring.

The Accessibility Directorate should be required to submit an annual report and be able to report publicly on the completion of plans and achievements made; the number, nature and resolution of complaints received; as well as findings made under its monitoring and auditing function.

Regular or annual public reporting by the Accessibility Directorate on the degree to which institutions in the public and para-public sectors are complying with the ODA may be an effective means of measuring and encouraging progress towards full accessibility. Some degree of institutional independence for the Directorate would be necessary in order for a complaints mechanism, as well as this monitoring and reporting function, to take place effectively.

The Accessibility Advisory Council should also be required to provide annual public reports on their activities.

Conclusion

The OHRC's recent work on disability has made it clear that government, institutions, and private sector organizations need to work together proactively to create a province that allows all its citizens to contribute and participate fully. A strong ODA, together with the *Code*, can ensure that no new barriers are created for persons with disabilities, and that existing ones are removed. The OHRC looks forward to a time when the rights of persons with disabilities do not have to be advanced one complaint at a time, and persons with disabilities will see the substantial changes they have so long awaited. The OHRC hopes that this submission will be helpful to the Ministry in achieving this goal and would like to offer its ongoing support to the Ministry in this process. In keeping with the OHRC's commitment to public accountability and its duties in serving the people of Ontario, this submission will be made public.