



February 21, 2017

Accessibility Advisory Council  
Disabilities Issues Office  
240 Graham Avenue  
Winnipeg, MB R3C 3J7

## **Re: Proposed Accessibility Standard for Employment**

The Manitoba Human Rights Commission appreciates the opportunity to provide feedback and input into the proposed Employment Standard developed under the *Accessibility for Manitobans Act* (“AMA”). We confirm that our Chairperson, Yvonne Peters, has not been involved in discussing or preparing this submission.

Because *The Human Rights Code* (“*The Code*”) has paramount status over all other provincial laws, we recognize the importance of ensuring that the standards are consistent with fundamental principles in *The Code*. We appreciate the effort made to root the discussion around accessibility in those principles.

As the agency of the Government of Manitoba responsible for administering *The Code*, we have a mandate to promote human rights and educate the public about the rights and responsibilities in *The Code*. Our comments on the proposed Employment Standard are based in part on our experiences educating the public about human rights and in particular, the duty of employers to accommodate the disability-related needs of individuals in the workplace.

### **Reasonable Accommodation**

In our experience the concept of reasonable accommodation can be challenging to understand and apply in the workplace. Employers frequently focus on approving or denying accommodation requests and struggle with understanding the extent of their entitlement to ask for more or clarifying information when presented with a request for accommodation in the workplace. As a result, our education programs focus on the core principles of accommodation that include an employer’s duty to accommodate an individual’s disability related needs to the point of undue hardship. We rely on the definition of disability in *Québec (Comm. des droits de la personne et des droits de la jeunesse) et Mercier v. Montréal (Ville)* (2000), 2000 SCC 27, and emphasize both that a person may not be disabled for all purposes and at all times and that not every individual with a disability will need or request accommodation in the workplace.

As such, the accommodation process relies on an individual making a request for accommodation and being able to substantiate their disability-related need. In some

cases, an employer may have a duty to enquire about the need for accommodation such as if an employee has disclosed a mental disability or if there is a reasonable suspicion of an addiction, but we caution employers not to assume that all individuals with disabilities will require accommodation. Once an employer's duty to accommodate is triggered being that they are aware of an employee's disability-related need, we emphasize that the employer has the responsibility of assessing what a reasonable accommodation of that disability-related need would look like. We rely of course, on the well established principles that the search for accommodation is a multi-party enquiry and that there must be a dialogue between employee and employer or accommodation process. We have increasingly focused on this latter point as it appears that employers often feel that they do not have a right to question or seek clarification of the employee's disability-related need or believe that the employee and/or the employee's health care provider can mandate what the accommodation will look like.

We encourage you to consider capturing the responsibilities of both employee and employer in a workplace accommodation process and the notion that the employer, with the legal duty to accommodate, is entitled to make an offer to accommodate the employee's disability-related need or restriction. The employee has a corresponding obligation to cooperate in that process which often includes accepting that offer and dialoguing with the employer about it. We also encourage you to clarify for the public in your materials that a health care provider can certainly identify the employee's medical restrictions or disability-related needs and suggest workplace accommodation but cannot dictate what the accommodation must look like in the workplace. To that end, we commend your reference to an accommodation plan based on our understanding that an accommodation plan is developed between employer and employee but is based on the employer's offer of accommodation.

### **Scope of Standard excludes unpaid workers**

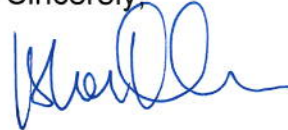
Given that section 14(13) of *The Code* provides that the prohibition against discrimination in employment applies to work that is "actual or potential, full-time or part-time, permanent, seasonal or casual and paid or unpaid", the Commission encourages you to consider having the Employment Standard apply to all workers.

### **Standard suggests cost of a medical assessment will be borne solely by employer**

Given that an employee has the responsibility of substantiating a request for accommodation, often with medical or para-medical information about restrictions or disability-related needs, the Commission encourages you to consider removing the reference to "an evaluation by an outside expert, at no cost to the employee, to assist the employer in determining if and how reasonable accommodation can be achieved in accordance with the principle of undue hardship as prescribed by human rights law." We are mindful of situations in which an employee may have the responsibility of getting further medical information or assessment to establish a disability-related need, which in our view should not in all cases be borne by the employer.

We commend your effort to describe terms simply and in plain language. We also commend you on your extensive consultations with the public and for developing this process to seek further input. Please contact our A/Executive Director & Counsel, Isha Khan, at (204) 945-3016, Isha.Khan@gov.mb.ca if you wish to discuss further or have questions.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Isha Khan', written in a cursive style.

for

Board of Commissioners