



**Intervention of
ARCH Disability Law Centre submitted
to the Canadian Radio-television and
Telecommunications Commission**

**Telecom and Broadcasting Notice of Consultation
CRTC 2020-124: Call for Comments – Regulations to
be made under the *Accessible Canada Act***

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Introduction

1. ARCH provides this submission to the Canadian Radio-television and Telecommunications Commission to intervene in its proceeding Call for Comments – Regulations to be made under the *Accessible Canada Act* (Telecom and Broadcasting Notice of Consultation CRTC 2020-124). ARCH expresses its interest in participation in any future public hearing with respect to this matter.
2. ARCH's submission draws upon our legal knowledge of and experience with the *Accessible Canada Act (ACA)*,ⁱ the *Canadian Human Rights Act*, dispute resolution processes and decisions of the Canadian Human Rights Commission and Tribunal, and the federal courts that review decisions of those tribunals. In addition, our submission is informed by the experiences of persons with disabilities.
3. ARCH Disability Law Centre is a specialty legal clinic that practices exclusively in disability rights law. Since incorporation in 1979, ARCH has been dedicated to defending and advancing the equality rights, entitlements, fundamental freedoms and inclusion of persons with disabilities. ARCH provides a range of legal services directly to persons with disabilities in Ontario. ARCH's work extends nationally as well. ARCH represents persons with disabilities and disability organizations in precedent setting cases at various provincial and federal tribunals, including the Human Rights Tribunal of Ontario, the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, the Canadian Transportation Agency, as well as appellate courts, including the Court of Appeal for Ontario, the Federal Court of Appeal and the Supreme Court of Canada. ARCH has an extensive law reform practice, working on a variety of initiatives to advance the rights of persons with disabilities. ARCH provides public legal education to disability communities, and conducts community development projects to support our law reform work.

Summary of Recommendations

The CRTC Should Specify Essential Elements of Accessibility Plans in Mandatory Regulations

4. CRTC regulations regarding accessibility plans should require regulated entities to include the following information in their accessibility plans: concrete actions to be taken to remove barriers; the person responsible for taking these actions; timelines for completing these actions; performance indicators; the manner in which consultations with persons with disabilities were conducted; how consultation information was used to develop the plan; and how the section 6 principles in the *ACA* informed the plan.
5. It is important that regulations require this essential information to be included in accessibility plans. If the CRTC does not include this essential information in mandatory regulations, but leaves it to voluntary guidance documents, it is likely that accessibility plans will not be as effective as possible. The *ACA* grants the CRTC regulatory authority to include these essential elements in regulations.

Regulations Should Require that Progress Reports Measure Actions Taken against Performance Measures in the Accessibility Plan and Feedback Received

6. Progress reports should measure the regulated entity's actions to date, based on the timeframes and performance indicators in the accessibility plan, as well as input from consultations and specific barriers reported through feedback processes.

Regulations should include Requirements that Promote Meaningful Engagement of Persons with Disabilities in the development of Accessibility Plans and Progress Reports

7. For many persons with disabilities, facilitated, in-person engagement is a more accessible and meaningful form of consultation than an online or written process. Regulated entities may need to use a variety of modalities to meaningfully engage persons with disabilities. Whatever process is used to gather input, it must engage diverse communities of persons with disabilities; provide support and accommodations to ensure accessibility; compensate participants; and produce an accessible document summarizing what was learned from the process.

Feedback Mechanisms Must be Accessible and Responsive

8. Feedback mechanisms through which people with disabilities identify specific barriers to services and programs should be accessible and should include a response to the person who made the complaint or provided the feedback.

Feedback should be tracked and used to inform accessibility plans when they are updated.

The Timing of Accessibility Plans, Progress Reports and Feedback Processes Should be Coordinated

9. The CRTC should coordinate the timing of accessibility plans, progress reports, and feedback processes. Regulated entities should publish their feedback process on the same date as they publish their accessibility plan. They should publish a progress report a year before each update to the accessibility plan, and use this progress report to inform the updated plan.

The CRTC Should Publish its own ACA Reporting Database Online, and Accessible Formats should be Available from Regulated Entities on Request

10. The CRTC should publish its own database of accessibility plans, progress reports, and feedback processes for all regulated entities on its own website. Consequently, accessibility plans will be readily available in one location to many people immediately, even when a regulated entity does not have its own website.
11. Some persons with disabilities will not be able to obtain these documents from a website or they may require the document in another format. Regulated entities should ensure that they have internal processes established and personnel assigned to make accessibility plans, progress reports, and feedback processes available in alternate formats within a reasonable timeframe.

The CRTC Should Not Create Exemptions to Accessibility Requirements for All or Some Regulated Entities

12. As a general matter, operational realities should not justify the creation of blanket exemptions to accessibility requirements. However, if the CRTC does decide to create exemptions, the need for these exemptions must be supported by direct objective evidence; the regulated entity must develop a plan to address the identified barrier; and the exemption must be reviewed regularly to determine if it still applies. CRTC regulations should clearly state that regulated entities remain subject to an ongoing duty to accommodate, despite any exemptions.

ARCH's Response to the Call for Comments

A. Content of Regulations and Guidance Documents

13. In the CRTC's Call for Comments, the content of accessibility plans and progress reports is addressed only in voluntary guidance documents rather than proposed content of the regulations themselves. ARCH submits that it is very important that regulations, not guidance documents, specify all essential elements of accessibility plans, progress reports, and feedback processes. These essential elements include the concrete actions meant to address barriers, who is responsible for these actions, timelines for completing these actions, how the regulated entity will measure its own performance, how it will report its performance, and how it will consult with and gather feedback from persons with disabilities.
14. These essential elements must be required by mandatory regulations, rather than being left to voluntary guidance documents. This will achieve the purpose of the *ACA* by ensuring that regulated entities create robust accessibility plans and measure their implementation. Leaving essential elements to guidance documents will likely result in some regulated entities developing weak plans that do little to advance accessibility.
15. ARCH submits that the *ACA* provides ample scope and authority for the CRTC to develop regulations that specify these essential elements:
 - **Accessibility Plans:** Subsection 54(1)(b) of the *ACA* states that the CRTC may make regulations "specifying the form in which accessibility plans required by subsections 51(1) and (2) are to be prepared and the manner in which they are to be published". As well, section 51(1) states that regulated entities must "prepare and publish [...] an accessibility plan respecting (a) its policies, programs, practices and services in relation to the identification and removal of barriers, and the prevention of new barriers".
 - **Progress Reports:** Subsection 54(d) of the *ACA* states that the CRTC may make regulations "specifying the form in which progress reports required by subsection 53(1) are to be prepared and the time and manner in which they are to be published."
 - **Feedback Processes:** Subsections 54(b.1) and 54(c) of the *ACA* empower the CRTC to make regulations "respecting the feedback process required

by subsection 52(1)” and “specifying the form and manner in which descriptions of the feedback process required by subsection 52(1) are to be published” respectively. In addition, section 53 explains that, in completing their progress reports, “[t]he regulated entity must consult persons with disabilities”, and the progress report must explain how it consulted and how it considered the feedback it received.

16. A plain reading of these sections, with particular attention to Parliament’s words, necessarily implies that the CRTC has the regulatory authority to specify the content of accessibility plans and progress reports, not just their form and manner of publishing. In making regulations, the CRTC should require that accessibility plans, progress reports, and feedback mechanisms include the elements that are essential to achieving the goals of the *ACA*.
17. In addition, principles of statutory interpretation require that the scope of the CRTC’s regulatory authority be rationally related to the purpose of the *ACA*.ⁱⁱ The *ACA* is human rights-related legislation, and as such must be given a broad and purposive interpretation.ⁱⁱⁱ The *ACA*’s purpose is to institute a “proactive and systemic approach for identifying, removing and preventing barriers to accessibility without delay.”^{iv}
18. Parliament specifically connected this purpose to the accessibility plan provisions in subsection 60(9) of the *ACA*, which requires regulated entities to take into account the principles in section 6 when developing their accessibility plans. Since subsection 6(f) requires the involvement of persons with disabilities in “policies, programs, services and structures”, accessibility plans must communicate the information that persons with disabilities require in order to meaningfully participate. Similarly, subsection 6(g) refers to “achieving the highest level of accessibility”, which can best be attained and evaluated if specific actions, responsible persons, timelines, and performance indicators are required by regulations. Furthermore, a requirement that regulated entities explain how the section 6 principles inform the accessibility plan will ensure that plans accord with the human rights objectives of the *ACA*.
19. According to principles of statutory interpretation, precisely worded powers such as those found in subsections 52(1) and 54(1)(b) must imply any necessary elements to accomplish the purpose for which Parliament granted them.^v In this context, the necessary elements include concrete actions meant to address barriers, who is responsible for these actions, timelines for completing these actions, how the regulated entity will measure its own performance, how it will report this performance, and how it will consult with and gather feedback from

persons with disabilities. This information is necessary in order for regulated entities to effectively plan and act to remove barriers. Consistent with the overall purpose of the *ACA* as well as the specific grant of regulatory authority to the CRTC, this information should be required by regulation.

20. In contrast, guidance documents may be helpful in providing detailed and accessible templates and best practices. These documents should comprehensively address all regulatory requirements and recommendations. In this way, regulated entities can rely on this guidance to understand what they need to do and how best to do it without having to cross-reference multiple documents. This will promote better implementation of the *ACA* and its regulations.
21. In summary, it is important for the CRTC to regulate that certain essential information be included in accessibility plans, progress reports, and feedback processes. This approach is the most likely to achieve the *ACA* requirements for timely barrier removal as well as the meaningful participation of persons with disabilities. The *ACA* provides the necessary authority for the CRTC to include this essential information in regulations.

B. Content of Accessibility Plans

22. Accessibility plans should provide concrete information in plain language regarding how regulated entities will identify, remove and prevent barriers. This includes a description of what steps will be taken, who is responsible for those steps, when those steps will be complete, and how progress will be measured. Plans should also have detailed information about consultations with persons with disabilities, how the regulated entity addressed the feedback received, and, if necessary, why it did not adopt any particular recommendations. Each plan should also explain how it addresses the principles outlined in section 6 of the *ACA*.
23. To implement the human rights objectives of the *ACA*, ARCH submits that accessibility plans must include:
 - Specific, concrete actions the organization will take to remove and prevent barriers;
 - The position of the person responsible for ensuring that the entire plan and/or each of these actions is implemented;
 - Timeframes within which specified actions will take place;

- Indicators for measuring whether existing barriers have been successfully removed;
- A reporting of how the regulated entity conducted consultations with persons with disabilities and what steps it took to promote accessibility during those consultations. For example, whether the organization advertised the consultation, where it was advertised, how far in advance it was advertised, and whether outreach was done in an accessible way (for example, by providing information in ASL/LSQ, plain language, accessible formats, etc);
- A description of the discussions, submissions and other information received during consultations and how the regulated entity took these into account;
- A description of any feedback from consultations that was not used, adopted or implemented and why;
- A description of how the plan addresses and takes into account each of the principles outlined in section 6 of the *ACA*; and
- With respect to updated accessibility plans: barriers in the previous plan that were not removed, setbacks or limitations that explain why, strategies that address these challenges, and timelines for implementation of these strategies.

24. Second, regulated entities should have one accessibility plan that meets all relevant regulatory requirements imposed by the CRTC, the Canadian Transportation Agency, and the Federal government. This will enable people who request accessibility plans to more readily understand the scope of the organization's regulatory obligations. The CRTC, CTA and Federal government can streamline documents and processes under the *ACA* by coordinating their regulatory efforts.

C. Content of Progress Reports

25. Progress reports should meaningfully analyze actions taken to remove and prevent barriers and to address feedback received from persons with disabilities. They should measure whether the regulated entity has completed the relevant actions within the required timeframes, based on the performance indicators set out in the accessibility plan. Where the regulated entity has failed to meet its own performance measures, it should explain why. In doing so, it should discuss lessons learned and new approaches and strategies that may form part of its updated accessibility plans.

26. Regulated entities should also discuss any feedback received through feedback mechanisms and consultations with persons with disabilities. This feedback may show that certain performance indicators have not been met with respect to known barriers. In addition, feedback may identify previously unknown barriers for the regulated entity to address. Where the regulated entity is claiming that a barrier cannot be removed due to undue hardship, it should explain why, indicate what objective, quantifiable information exists to justify its claim, and continue to track this barrier in future accessibility plans and progress reports.

D. Feedback on Accessibility Plans

27. While ARCH agrees with the CRTC's statement that engagement regarding accessibility plans may take different forms, a facilitated, in-person engagement process may often be preferable to a process conducted in writing or online. For many persons with disabilities, facilitated, in-person engagement is a more accessible and meaningful form of consultation than an online or written process. Regulated entities should attempt to engage a diverse group of persons with disabilities, including both disability organizations and unaffiliated disability advocates, and to conduct a respectful, accessible process that values their expertise.

28. ARCH has received significant feedback from disability organizations that emphasizes the need to engage persons with disabilities in a dialogue that allows for meaningful input, problem-solving and opportunities to participate in decision-making. For example, to implement this approach, regulated entities could hire persons with disabilities to work on accessibility initiatives and facilitate engagement with persons with disabilities. They could also strike resource committees of persons with disabilities to contribute to drafting their accessibility plans and monitoring their progress.

29. Organizations must take steps to ensure accessibility throughout the process. For example, they can have scribes and support persons available, ensure that meetings are held in accessibly designed spaces that can be reached easily by public transportation, and account for travel costs. Participants should receive accessible resources and background information to overcome informational barriers to participation. As well, if participants are asked to provide any written feedback, documents, or follow-up materials, timelines should take into account disability accommodations. For example, it can take a few weeks to translate a written consultation document into ASL/LSQ video.

30. Participants and facilitators should also receive compensation for their time. This will assist in overcoming financial barriers to participation. It shows respect for the dignity and expertise that persons with disabilities bring to the engagement process. ARCH recommends that the CRTC communicate to regulated entities that they should resource persons with disabilities and disability organizations such that they may participate meaningfully.
31. Regulated entities should carefully select and train facilitators and staff to participate in consultations and work on ACA reporting. Facilitators should have experience working with disability communities so that they overcome barriers. Regulated entities should also consider providing staff training regarding anti-ableism, disability sensitivity and human rights before conducting consultations and developing an accessibility plan.
32. After the consultation process concludes, regulated entities should develop a summary explaining what they understood from this process. They should send this document to everyone who took part. This allows the participants to address gaps and engage in dialogue to collaborate with the regulated entity to find solutions.

E. Feedback on Barriers to Using Programs and Services

33. Feedback mechanisms meant to facilitate reporting of specific barriers to accessing programs and services should be accessible and should include a response to the person who made the complaint. That response should communicate what actions the regulated entity will take to address the feedback and when these actions will be taken.
34. A meaningful feedback process should include:
 - a. Information about how to provide feedback; for example, whether and how feedback can be submitted in person, by telephone, in writing, by email, in ASL/LSQ video, in plain language, etc. Information should also be provided identifying the point person who will receive the feedback, and where to send it. The information must be in plain language and in multiple accessible formats.
 - b. The identified point person should be trained to communicate and interact with persons with disabilities. They should also be knowledgeable about the regulated entity's accessibility plan, actions that are underway to improve accessibility, and the arrangement of accommodations.

- c. The point person should communicate with the person who provided the feedback about steps the regulated entity will take in response and the relevant timelines. If the regulated entity decides not to take certain actions because they believe that doing so constitutes undue hardship, they should explain why.
 - d. The feedback process should also include information about how and to whom a person can escalate the issue if they feel that the initial response is not adequate.
 - e. The point person or other regulated entity staff should track feedback and responses to be included in progress reports and updated accessibility plans.
35. In summary, a person with a disability should be able to easily access the feedback process and should be informed of the organization's response after making a complaint. While it is important for feedback to be incorporated into progress reports and accessibility plans, the person who brought the feedback forward should also receive a clear answer with next steps and timelines so that they understand what actions the regulated entity will take to address the feedback or barrier.

F. Timing of Accessibility Plans, Progress Reports and Feedback Processes

36. The CRTC should coordinate the timing of accessibility plans, progress reports and feedback processes.
37. Regulated entities should publish a progress report a year before each update to the accessibility plan. Since accessibility plans should be updated at least every three years, the first progress report should be completed two years after the first accessibility plan is due, and one year before that plan is to be updated. The content of that progress report, including actions completed, challenges, feedback, and consultations with persons with disabilities, should inform the next update to the accessibility plan.
38. A description of the feedback process, along with the contact information for the point person responsible, should be published on the same day the accessibility plan is published. Feedback processes are an important accountability mechanism under the *ACA*, and should accompany the accessibility plan for this reason. The feedback process should be updated each time the accessibility plan is updated, and every time the point person responsible changes.

G. Publication of Accessibility Plans, Progress Reports and Feedback Processes

39. To advance principles of human rights, regulated entities must ensure that their accessibility plans, progress reports and feedback mechanisms can be made available in a format that is fully accessible. This may require organizations to take additional steps to make the plan accessible, including contracting outside services such as Braille, sign language interpreters or plain language expertise.
40. Closely related to the human rights objective of substantive equality is the concept of universal design. Universal design aims to ensure that the building, space, technology or service being designed is usable by the greatest number of persons possible. Typically applied to the built environment, architecture, and information and communication technologies, the concept of universal design can also be applied to the design of systems and services.
41. In keeping with the concept of universal design, the CRTC should publish its own database of accessibility plans, progress reports, and feedback processes for all regulated entities on its own website. This will mean that accessibility plans are readily available in one location to many people immediately. This will reduce the burden on persons with disabilities and members of the public of having to request an accessibility plan from each individual regulated entity. It will reduce administrative burden on regulated entities and their staff since they will be required to handle fewer requests. Furthermore, this ensures that these documents are published online, even if a regulated entity does not have its own website.
42. Some persons with disabilities will not be able to obtain these documents from a website because they don't have access to a computer, they require the document in another format, or for other reasons. In those situations, the person would make a request to the regulated entity. Regulated entities should ensure that they have internal processes established and personnel assigned to make accessibility plans, progress reports, and feedback processes available in alternate formats within a reasonable timeframe. These personnel should receive training in accessibility and providing services to persons with disabilities.

H. Classes of and Possible Exemptions for Regulated Entities

43. The CRTC's Call for Comments asks whether it would be appropriate to create classes of regulated entities or to issue orders exempting a specific regulated

entity or classes of regulated entities from reporting obligations under the *ACA*. ARCH submits that as a general matter, operational realities should not justify the creation of blanket regulatory exemptions to accessibility requirements. Regulatory exemptions to accessibility requirements may have the unintended consequence of removing incentives for regulated entities to overcome barriers to accessibility.

44. If an exemption exists, regulated entities need not take steps to remove the barriers covered by the exemption. In this way, the creation of exemptions contravenes one of the *ACA*'s governing principles, outlined in subsection 6(g), which states that "the making of regulations must be done with the objective of achieving the highest level of accessibility for persons with disabilities."^{vi} Exemptions to accessibility requirements also undermine subsection 5.2 of the *ACA*, which affirms that the *ACA* should not require or authorize "any delay in the removal of barriers or the implementation of measures to prevent new barriers as soon as is reasonably possible."
45. If, however, the CRTC finds it necessary to create regulatory exemptions, these exemptions must be supported by evidence and information that is direct, objective and quantifiable. This is consistent with the human rights law principle that undue hardship cannot be established based on impressionistic assumptions, rather it is established only when there is actual evidence that providing the accommodation would cause a real, serious risk to health and safety or is impossibly costly.^{vii} Nonetheless, even where there is sufficient evidence to create an exemption, regulated entities should only be permitted to rely on these exemptions sparingly.
46. In addition, the CRTC should clearly state in its regulation that human rights principles, including undue hardship and a procedural duty to accommodate, continue to apply when a regulated entity relies on an exemption. The procedural duty to accommodate places an obligation on the regulated entity to take all necessary steps to investigate whether it is possible to provide an accommodation, or whether suitable alternative accommodations exist which meet the disability-related need. A particular accommodation may not be available at one time, but may become available in the future, as technology advances or circumstances change.
47. The procedural duty to accommodate should be taken up in the regulations in two ways. First, the regulations should include a provision reminding regulated entities that they are subject to an ongoing procedural duty to accommodate, even where the regulation creates an exemption to a particular accessibility

requirement. This will help to address the concerns raised above that the creation of exemptions undermines the purpose of the *ACA* and its requirement against delaying the removal of barriers.

48. Second, the procedural duty to accommodate should be applied so as to connect exemptions with regulations setting out planning and reporting obligations under the *ACA*. Once a regulated entity has availed itself of an exemption or otherwise been made aware of an accessibility barrier, the entity should be required to account for the relevant barrier in its accessibility plan and progress report under the *ACA*. This will allow the regulated entity to implement the procedural duty to accommodate by identifying the particular barrier in its accessibility plan, creating a plan to investigate how to remove the relevant barrier, tracking actions that have been taken to do so, and accounting for limitations and challenges that may constitute undue hardship. Consequently, exemptions will be less likely to create accessibility lacunae which are viewed as the accepted and permanent status quo, a situation that is inconsistent with human rights law and the purpose of the *ACA*.

49. Finally, if the CRTC finds it necessary to create exemptions, these exemptions should be reviewed every five years to ensure that they remain supported by direct, objective, and quantifiable information.

ⁱ *Accessible Canada Act*, SC 2019, c 10 [*ACA*]

ⁱⁱ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 291, 295-298

ⁱⁱⁱ *Ibid* at 599-600

^{iv} *ACA*, *supra* note 1, preamble

^v Sullivan, *supra* note 2 at 298

^{vi} *Accessible Canada Act*, *supra* note 1

^{vii} *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 78-79; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 31; *Soulli re v Canada (Blood Services)*, 2017 FC 689 at para 98-99.

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