



Ontario Agencies Supporting Individuals with Special Needs
Agences ontariennes de soutien pour les personnes qui ont des besoins spéciaux

OASIS Submission Regarding Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*

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Executive Summary

Bill 148 arises at a point of tremendous uncertainty for the developmental services sector in Ontario. The sector is in crisis due to a lack of funding by relevant government Ministries. This crisis has been accurately reflected recently through the Developmental services system Select Committee report “Final Report: Inclusion and Opportunity: A New Path for Developmental Services in Ontario” in 2014; the Ombudsman’s Office report “Adults with Developmental Disabilities in Crisis” in 2016; and, unfortunately through two well publicized Coroner’s Reports. Bill 148, although laudable in its efforts to enhance working conditions, will significantly increase operational costs in the sector.

The Ministry of Community and Social Services has confirmed those increased costs for the developmental services sector will be unfunded.

This submission represents a comprehensive response to Bill 148 with particular consideration given to its impact on those individuals served by the developmental services sector. OASIS is a provincial association made up of over 195 member agencies that support people with developmental disabilities to live in communities across Ontario. Our mission is to advance the interests of the people the sector supports and the people it employs through a wide range of educational and professional programs, promotion of ethical best practices, and compliance with applicable employment laws and regulations. An essential part of the mission is to advocate for appropriate regulation of the industry and the efficient and effective enforcement of such regulations.

OASIS supports, in principle, the objectives that the Government identified in undertaking the Changing Workplaces Review and that underlie Bill 148. The developmental services sector has been underfunded for many years, resulting in lower than average pay and benefits. However, OASIS is concerned about provisions in Bill 148 in the context of the developmental services sector, its funding realities, the nature of its operations and in respect of the impact on client service to those with developmental disabilities.

Our member organizations support approximately 65,000 of Ontario’s most vulnerable citizens, while employing over 25,000 full and part-time staff. Based on input from those organizations, it is clear that without additional funding from the relevant Ministries, and primarily the Ministry of Community and Social Services, those employed in the sector and those served by the sector, will experience a loss if Bill 148 is passed without amendment. For the individuals employed in the sector, they will experience a loss in jobs and/ or a reduction in hours of work; for the individuals supported by the developmental services sector, they will experience a decline or possible elimination of the support available, and correspondingly, an impact on their standard of living.

Accordingly, absent a commitment by the relevant Ministries to fund the increased costs to the sector, OASIS cannot support Bill 148 as drafted. In the areas described below, OASIS asks the Government to reconsider the amendments proposed by Bill 148 or provide an exemption to the developmental services sector.

Part I. Developmental Services Sector

The developmental services sector is unlike other sectors. Its core purpose is to serve the individuals the sector supports in such a way that provides those individuals with the opportunity to live with dignity and allows them to live full lives in their respective community. Without increased funding to the sector by the relevant Ministries, Bill 148 threatens the sector's ability to carry out this work. It cannot be overstated that it will have an impact on the lives of the people served by the sector.

The developmental services sector is a 24 hour a day, 7-day a week service. Where once the sector was primarily institution-based, we have moved to independent living where individuals with Developmental Disabilities have a role and a place in the community. A decrease in available resources, of the kind that will result from the implementation of Bill 148, will result in a corresponding decrease in the sector's ability to operate on an independent living model and will make the sector's ability to support the developmentally disabled less individualized and more institutional. The unique characteristics of the sector distinguish it from other sectors that will be impacted by this proposed legislation. The increased budgetary costs that will result from the changes contemplated by Bill 148 cannot be passed on to a consumer and cannot be funded by finding more operational efficiencies. This is a sector that has been finding operational efficiencies for years and has long ago maximized operational efficiencies in order to absorb mounting, unfunded, costs. A shut down of operations, as has been suggested in some commentaries for marginal employers, would have a cataclysmic result for the developmental services community. In this sector, the harm is not about bankruptcies or businesses moving out of province. This is about the lives of Ontario's developmentally disabled population; where they live, how they live and the quality of their life.

For example, in this sector, the vast majority of agencies carry large, unfunded pay equity obligations. This alone places the sector in jeopardy. Furthermore, looking back, conservative estimates indicate that between \$75 - \$100 million in resources in the sector have been pulled from operations in order to meet the unfunded Pay Equity obligations over the past 8 years. In this context, the additional cost pressures that will be generated by the enactment of Bill 148, will create enormous uncertainty in terms of whether agencies can ever achieve pay equity and/or can continue to provide proper support to the individuals it serves.

Part II. Bill 148 Submissions

OASIS has identified a number of areas, below, where Bill 148 will have damaging consequences for the developmental services sector, and where the general rules being proposed would have a particularly negative impact on the developmental services sector and the individuals that rely on the sector. In these areas we urge reconsideration of the amendments proposed by Bill 148 or an exemption for the developmental services sector.

(a) Scheduling

(i) Scheduling in the Developmental Services Sector

The Special Advisors extensively considered the issue of scheduling rules during the Changing Workplaces Review. They concluded in their Final Report:

“...Scheduling can be a very complex and difficult subject... In sum, one size does not fit all.”
(page 192 – The Changing Workplaces Review – Final Report)

OASIS submits that the developmental services sector will be impacted in a significantly negative manner by the “one size fits all” approach of Bill 148 because of the unique needs of the people supported, the funding contracts and direct funding arrangements.

The developmental services sector is not a sector which requires scheduling regulations. Voluntary and/or negotiated scheduling rules have been undertaken in the sector on an agency by agency basis. The scheduling arrangements in each agency provides the flexibility required to meet pressing requirements of the sector in serving the needs of the individuals it supports as well as provide as much stability to its employee population as possible.

Developmental services agencies providing support to individuals in assisted living have unique scheduling pressures. For example, developmental services agencies:

- regularly respond to changing needs of individuals supported related to family schedules, illnesses, death, etc.;
- have significant variability in individual demands;
- cannot be flexible in relation to scheduling that will impact safety and support to individuals;
- respond to needs on an individualized basis. This is critical to our fundamental values of enhancing the dignity of those we support.

In summary, flexibility is critical to our success and to the lives of those we support. OASIS is seeking an exemption for the developmental services sector from the new scheduling rules contemplated by Bill 148.

Specifically, OASIS seeks an exemption related to the right to refuse work, the right to request a change and the expanded three hour reporting pay.

(ii) Right to Refuse Work

OASIS submits that the developmental services sector ought to be exempt from the new scheduling rule that provides employees with a right to refuse work if not provided at least 96 hours notice as set out in section 12 of Schedule 1 of Bill 148. Requiring developmental services sector employers to provide lengthy notice periods to our employees will compromise our ability to meet individualized demands. The support agencies provide to individuals with developmental disabilities is fundamental to their well-being.

Unexpected scheduling requirements arise. This is connected to the fundamental value of providing individualized support to those with developmental disabilities. The right to refuse work if not provided at least 96 hours notice could result in a scheduling gap that would mean the absence of an essential service to one or more of the individuals supported by an Agency.

Many agencies allow that staff who are on casual lists may refuse shifts up to an established number of shifts, after which they will be removed from the casual list. Other agencies provide that after refusing

shifts over an established period of time, for example 6 months, the individual will be removed from the casual list. Rules such as these have been developed over time within the sector to ensure that when those individuals supported in the sector require support, the agency has responsive and available staff to meet that need. The right of employees to refuse work if not provided at least 96 hours notice would undermine these carefully developed standards and the principles that underlie those standards: responsive support to individuals with developmental disabilities, individualized support, community living and enhancing quality of life.

(iii) Right to Request a Change

Under the Bill 148 amendments, employees with three (3) or more months' of service would have the right to request in writing a change to their work schedule or location without fear of reprisal. If passed, employers will have an obligation to discuss the request with the employee and notify the employee of the decision within "a reasonable time". If the request is denied, the employee must be informed of the reasons his/her request was denied.

In the developmental services sector, scheduling is a complex matter that has been carefully crafted between employers and unions or employers and employees over decades. Scheduling is a constant issue, driven by the needs of the individuals served. The introduction of this entitlement will create an additional hurdle, with less than positive outcomes, in an already complicated area of the operations. OASIS submits that the developmental services sector ought to be exempt from the rules entitling employees to a right to request a change to their work schedule.

(iv) Expanded Three-hour Reporting Pay

Bill 148 proposes an *Employment Standards Act* amendment to clarify that, if an employee is required to present him/herself at work and works for fewer than 3 hours, he/she must be paid a minimum of 3 hours *at his or her regular rate of pay* (i.e. not at minimum wage). The three-hour reporting rule will apply to employees who are on-call, if they are either not called in to work or work fewer than 3 hours. The three-hour reporting rule will apply if an employer cancels a scheduled shift (including an on-call shift) fewer than 48 hours prior to the time that the shift was scheduled to start. Any conflicting collective agreement provision that addresses payment when an employer cancels a scheduled shift will prevail over this proposed section. This entitlement would apply only once in a 24-hour period.

In the developmental services sector, changes will arise based on the needs of the individuals supported. These changes cannot always be anticipated. In the developmental services sector, it is not a question of employers failing to implement appropriate scheduling regulations. In large part, developmental services employers do implement predictable and stable scheduling regimes for its employees. However, the direct support realities of the sector are such that needs of the individuals will, on numerous occasions, change. When this arises, the cost of the expanded reporting pay obligations under Bill 148 create an additional financial burden for which there is no funding to absorb these costs. Furthermore, many funding sources would not provide funding to the Agency in this situation. This would arise, for example, in direct funding relationships when a family may cancel the support they contracted the Agency to provide, with little notice.

In addition, given the nature of the developmental services operations, many agencies have arrangements with management staff who remain on call as a resource to front line staff and are paid an on-call premium. These agencies would have an on-call manager staffed 365 days a year. A

requirement to pay each individual three (3) hours of pay for each twenty-four hours they are on call would represent a large unfunded cost increase. Again, we emphasize the significant erosion of service capacity that will directly result without an increase in funding.

We submit that the developmental services sector should be exempt from the proposed changes to the 3 hour reporting pay.

(b) Unfunded Cost Increases: Minimum Wage, Vacation Pay, Public Holiday Pay, Equal Pay to Full Time Employees, Child Death Leave

Service reductions in the developmental services sector will result if Bill 148 is passed without an exemption for the developmental services sector in respect of the increases to the general minimum wage, the enhancement to vacation pay after 5 years of service, the changes to Public Holiday Pay, equal pay with Full-Time employees, and child death leave.

OASIS conducted a sector survey to gather aggregate data of the cost implications of Bill 148 (as well as Bill 145, WSIB Coverage for Workers in Residential Care Facilities and Group Homes Act, 2017) on the developmental services sector.

The survey sought cost estimates from agencies of Bill 148 amendments in the areas of: (1) equal pay for equal work provisions; (2) public holiday pay; (3) minimum wage; (4) personal emergency leave; and, (5) vacation pay. It also gathered data in respect of the increased cost to the sector as it relates to the impact of Bill 145 and WSIB.

In respect of the five (5) Bill 148 areas described above, the survey results demonstrate an approximate cost impact to the sector of over \$55 million. Specifically, the extrapolated costs for the province are set out in the below table:

	Equal Pay for Equal Work	Public Holiday Pay	Minimum Wage	Personal Emergency Leave	Vacation Pay
Extrapolation for the Province	\$34,889,000	\$6,975,000	\$5,657,000	\$6,216,000	\$2,223,000
TOTAL					\$55,960,000

These estimates represent a minimum cost. They do not capture the cascading effect of these amendments for workers earning greater than minimum entitlements. It is certain that unions across the province will view these amendments as creating new, and higher, expectations for employees throughout organizations who presently earn greater than minimum standards. In consequence, these amendments will have an exponentially increasing effect on human resources costs throughout the sector. Without a corresponding increase in funding from the relevant Ministries, and specifically the Ministry of Community and Social Services, the scale of harm that will be experienced by individuals with developmental disabilities is severe.

Below, we discuss particular areas in which the unfunded cost increases of Bill 148 will be harmful to the sector.

(i) Equal Pay for Equal Work

OASIS submits that the equal pay for equal work provisions of Bill 148, in the absence of funding to support the changes, would disproportionately affect the developmental services sector. The sector relies on its part time, casual and temporary work force given that it operates 24 hours a day, 7 days a week. Although in principle, equal pay for equal work is a worthy objective, its implementation in the developmental services sector would have immediate service reduction impacts. Without additional funding from the Ministry of Community and Social Services, which is not forthcoming, agencies will not be able to employ part time, casual or temporary workers at the full time rates. Job loss and service reductions will result. OASIS submits the Committee should provide an exemption to the developmental services sector in respect of the equal pay for equal work provisions of the proposed amendments.

(ii) Minimum Wage

Likewise the increases to the minimum wage contained in Bill 148 would have dire consequences on the developmental service sector. OASIS submits that the Committee should delete section 14(1) of Schedule 1 of Bill 148, and instead revert to the *Employment Standards Act's* existing process of annual increases to the minimum wage based on changes in the Consumer Price Index or provide an exemption to the developmental services sector. To the extent that any OASIS member employees are currently paid below \$14 or \$15 an hour, frequently, those positions are overnight asleep positions in which the employee is present at the home to provide aid, when needed, but is entitled to sleep through the night unless a need arises. An increased minimum wage will have a significant effect on employers with employees who have such overnight, asleep, positions.

Even if there are no employees paid below \$14 or \$15 an hour, these amendments will still place upwards pressures on the wages of lower-paid employees. In this sector, freely negotiated wage increases in the last several years have frequently been less than 1%. The funding realities in the sector prohibit large increases of the kind that the increase to the minimum wage contemplated by Bill 148 would produce through upward pressures on all wages.

Direct funding to families, rather than agencies, is becoming a government mandate. Increasing the minimum wage will result in an approximate 25% reduction in buying power for those families looking to provide support to the individuals in their family with developmental disabilities. In sum, the unfunded increase in employee costs can only result in service reductions to individuals supported by our member Agencies. Developmental services employers are paid out of funding envelopes that are not changing with the Bill 148 amendments to minimum employment standards. As described at the outset, in the developmental services sector there is no ability to absorb the costs or pass along these additional costs to a customer.

Finally, an increase to the minimum wage will have a direct impact on individuals supported within the developmental services sector. A number of agencies have arrangements that provide opportunities for supported individuals to hold meaningful jobs in the community where they are compensated at minimum wage. In that respect, a higher income level for individuals with a developmental disability is supported. However, these partnerships will be placed in jeopardy by an increased minimum wage as employers

may need to reduce positions. The important role these jobs play in the lives of the individuals we support will be threatened.

For the foregoing reasons, we urge reconsideration of the increase to minimum wage. At minimum, we request that the minimum wage amendment be phased in over a longer period of time. The current timeframe and insufficient notice will negatively impact the sector and individuals with developmental disabilities.

(iii) Public Holiday Pay (Increased Agency Cost)

Furthermore, the changes to Public Holiday pay will significantly add to the public holiday pay costs of individual agencies who provide work to several employees on part time or casual basis, such as OASIS members. The below table demonstrates the kind of additional, unfunded, costs that an agency would be required to incur, or cut from its operations entirely:

Scenario	Public Holiday Pay Cost under Existing Formula per Employee	Public Holiday Pay Total cost under Existing Formula	Public Holiday Pay Cost per Employee under Bill 148 Formula	Public Holiday Pay Total cost under Bill 148 Formula
An employer has fifteen (15) part time employees who each earn \$100 per shift and work one shift per week	\$20	\$300	\$100	\$1,500

The Bill 148 amendments represent a 400% cost increase to the employer in public holiday pay in the above scenario. Below, in the section titled “Multiple Job Holders” is a further discussion of the increased cost, in that case to the sector, that would accompany these amendments to public holiday pay.

OASIS therefore submits that the Government ought to decline to move forward with the proposed changes to the calculation of public holiday pay [section 15 of Schedule 1 of Bill 148] in light of the significant cost increases those changes will have on employers who provide part time or casual work to employees.

(iv) Child Death Leave

The Child Death Leave, while clearly a laudable goal, would pose further additional costs to developmental services agencies. Agencies who experience absences pursuant to this leave will incur the replacement costs of staffing and training a replacement who could be only required for a short term absence, which term can be changed with four weeks notice by the employee. OASIS requests an exemption for the developmental services sector.

(v) Vacation Pay

In respect of the changes to vacation pay, this represents a substantial direct cost increase which the sector is not funded to absorb. It is expected that the increased vacation pay alone will cost the sector approximately \$2.2 million. Again, there is no increased funding to offset the impact.

OASIS requests an exemption for the developmental services sector.

(c) Multiple Job-Holders – Public Holiday Pay and Personal Emergency Leave

Over the course of the Changing Workplaces Review, it was observed that a number of Ontario employees are “multiple job-holders” – i.e. employees who hold two or more jobs at the same time. Within the development services sector, it is not uncommon for employees to be employed with more than one agency simultaneously.

OASIS submits that certain of the proposed Bill 148 amendments may have negative consequences by creating a potential windfall for multiple job-holders and a corresponding cost to the sector as a whole. There are two consequences in particular to which OASIS would like to draw the Committee’s attention.

(i) Public Holiday Pay (Increased Sector Cost)

The first derives from the proposed new definition of “public holiday pay”, which is found in section 15 of Schedule 1 of Bill 148. In its Background to Bill 148, the Ministry of Labour described the purpose of the changes as follows:

The proposed changes would simplify the formula for calculating public holiday pay so that employees are entitled to their average regular daily wage.

OASIS accepts that this is a laudable goal and does not oppose the principle being expressed. However, in practice, the new formula can apply to allow an individual who holds multiple jobs to receive more than one payment of public holiday pay for the same holiday.

The problem arises because the new calculation divides an employee’s regular wages during the pay period preceding the holiday by the number of days worked during that pay period:

Public holiday pay

24. (1) An employee’s public holiday pay for a given public holiday shall be equal to,

- (a) the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period; or
- (b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation. [Emphasis added.]

For example, if employee X earns \$100 per shift and works ten shifts during the pay period, her public holiday pay will be $\$1000 \div 10 = \100 . If employee Y also earns \$100 per day but only works one day during the same pay period, his public holiday pay will be $\$100 \div 1 = \100 . On its face, this result is in accord with the Government’s stated purpose set out above.

However, if employee Y holds another job with a different employer and works one shift during the same pay period for that other employer, employee Y will have a separate entitlement to public holiday pay from that other employer. Thus, employee Y could be entitled to receive two days’ pay as public holiday pay for a single holiday. If employee Y worked for three (or more) employers, as can be the case in the developmental services sector, this effect could be magnified, and employee Y could be entitled to

multiple days' pay as public holiday for the same holiday. In turn, this could incentivize employees to hold multiple part-time positions and work fewer hours for any one agency. This consequence is not a concern under the existing formula for calculating holiday pay, which averages out the regular wages over twenty days, regardless of how many days are actually worked.

We are concerned that the Government may not have considered the cost consequences to employers and to the developmental disabilities sector as a whole, of the proposed amendment to the public holiday pay provisions.

This represents a significant windfall to multiple job holders and a significant cost to the sector. OASIS submits that this very real potential consequence is not consistent with the Government's stated intention, and recommends that the Committee consider amendments to Bill 148 to address this situation.

(ii) Emergency leave

A similar circumstance could arise in relation to the new entitlement to two days of paid personal emergency leave, as provided for in section 29 of Schedule 1 of Bill 148. As currently structured in Bill 148, all employees would have an entitlement to personal emergency leave, with the first two days being paid (the employee would be entitled to the wages he or she would have received but for the leave).

For multiple job-holders, the new provisions will create an entitlement to two days' paid personal emergency leave that can be claimed from each of their employers. An employee with two jobs could claim up to four days' paid personal emergency leave, while an employee with three or more jobs could claim six or more days of paid personal emergency leave. This consequence would be magnified in the developmental services sector which employs a significant number of multiple job-holders. Again, this would create additional cost to agencies, to the sector as a whole, and would provide incentive to employees to hold multiple part-time positions.

OASIS submits that this consequence does not appear to be consistent with the purpose of the proposed changes, which is presumably to ensure that all employees have access to ten days of personal emergency leave each year, two of which must be paid.

OASIS recommends that the Committee consider amendments to Bill 148 to clarify that *Employment Standards Act* entitlement to paid days is limited to the first two personal emergency leave days an employee accesses, regardless from which employer.

(d) Evidence of Entitlement to Leave

The issue of attendance management is another complex and carefully crafted area of employment and labour relations. The prohibition that would be introduced if Bill 148 is passed, on requiring an employee to provide a certificate from a qualified health practitioner as evidence to support a personal emergency leave, will make the difficult issue of attendance management even more challenging.

The matter of what evidence might reasonably be required to support a personal emergency leave is unconnected to the laudable goal of enhancing the personal emergency leave entitlement to include some paid days to employees. OASIS submits that preventing employers from access to information, on an as-needed basis, from a qualified health care practitioner will have a significant impact on reasonable attendance management.

(e) Card-based Certification

OASIS opposes the introduction of card-based certification to the home care and community services industry.

During the Changing Workplaces Review, the Special Advisors considered whether Ontario should return to a card-based certification process. They received extensive submissions on this issue from all workplace parties, and developed recommendations based on what they heard. Notwithstanding numerous submissions in support of a return to card-based certification, the Special Advisors recommended against returning to such a process, citing four key reasons:

1. The secret ballot vote is the norm for the expression of democratic outcomes, at least in elections, and should not be discarded without greater proof that it cannot be made to work effectively.
2. The secret ballot vote has been the norm in labour relations in Ontario for over 21 years now, and the clock is not easily set back.
3. The results of a secret ballot vote have greater credibility with everyone, including employees, employers and the public. Legitimacy and credibility are important and are undermined by not having secret ballot votes as the norm.
4. Perhaps most importantly, we have not had a secret ballot process where illegal employer conduct in the certification process, which makes the true wishes of employees unlikely to be known, would lead to certification without a vote and to first contract arbitration, if necessary.

[Final Report of the Changing Workplaces Review, Section 11.2, page 323.]

The fourth point, above, references a range of other changes recommended by the Special Advisors to limit the potential abuse of the secret ballot vote, some of which have been adopted into Bill 148.

OASIS submits that the reasoning of the Special Advisors should be adopted by this Committee and by the Government.

OASIS strongly opposes the introduction of card-based certification in the home care and community services industry. In the development services sector, some agencies provide services that may be considered to fall within the home care and community services industry. This has the consequences of some employees having rights to one form of certification and others having right to another form of certification. OASIS recommends that section 5 of Schedule 2 of Bill 148 be amended to delete all references to the home care and community services industry from the proposed new section 15.3 of the *Labour Relations Act, 1995*.

Part III. Conclusion

The individuals supported by the developmental services sector deserve consideration within the Bill 148 consultations. To that end, we emphasize that if operational costs in the sector go up, as will be the case if Bill 148 is passed without amendment, the people we support will suffer. As such, despite the very admirable principles that may underlie many of the Bill 148 amendments, we cannot support this legislation.

OASIS has identified a number of areas where Bill 148 will have detrimental consequences, and where the general rules being proposed would have a particularly negative impact on the developmental services sector and the individuals that rely on the sector. In those areas, we seek relief from those provisions for the developmental services sector.

OASIS would be pleased to continue its longstanding role of working cooperatively with the Government to develop appropriate regulation for the industry in a manner that reflects its unique features and that can be implemented in an effective manner.