

Disability Law Policy Brief for the Access Alliance

Purpose

The purpose of this brief is to provide context for the Access Alliance proposal for disability legislation. The purpose of this brief is not to endorse the Access Alliance proposal but to set out key consideration that will be taken into account by decision makers.

What are we actually trying to achieve?

The broad purpose of disability policy and law is to promote and protect peoples' rights and allow them to participate in society. These policies and laws are about basic human rights. Laws can be used to challenge the status quo and move boundaries when the shifts are judged as reasonable.

There are good reasons why a society and a government might want to actively promote the rights of people with disabilities. Participation of people with disabilities (PWD) in education and employment can be important for the economic and social well-being of a society. Participation also includes access to social and cultural activities.

The NZIER Report *Valuing Access to Work*¹ identified the potential benefits of getting more people with disabilities into education and work. Highlights from that report include:

- 40,000 PWD are unemployed.
- 184,000 PWD are not active labour market participants.
- The rate of unemployment for people with a disability is 50% higher than the unemployment rate of the total workforce.
- Decreasing the unemployment rate for PWD from (9.2%) to the national rate (6.1%) would reduce the number of people on benefits by 14,000.
- The absorption of 14,000 workers into the labour market over several years would not be a major adjustment given that the number of people employed increased by 51,700 from 2014 to 2015.
- If jobs were readily available, and no one was displaced from work, equalising the unemployment rate for PWD to the national rate would add \$1.45 billion to real gross domestic product.
- If jobs were readily available, and no one was displaced from work, the fiscal savings from reducing the unemployment for PWD to the national average would be \$270 million per annum from social support payment.
- The cumulative 10-year fiscal saving in this scenario to the social support ranges between \$2.9 billion and \$3.0 billion.

Where are we: outcomes for people with disabilities?

New Zealand appears to be performing similarly to Australia, Canada and the United Kingdom on outcomes for education and income. New Zealand outperforms these other countries on employment for people with disabilities. It is not clear if this is due to active labour market policies, high levels of employment or other factors.

¹ https://nzier.org.nz/static/media/filer_public/b1/be/b1be61f9-cf49-4cde-a0d1-2d2e8bc2ba8f/valuing_access_to_work.pdf

Table 1 International outcomes for people with a disability

	Australia	Ontario/Canada	United Kingdom	New Zealand
Education	17% of working aged PWD have a Bachelors or higher compared to 30% of PwOD	14% of working aged PWD have a university certificate or higher compared to 26.7% of PwOD	14.9% of working age PWD hold degree-level qualifications as against 28.1% for PwOD.	14.9% of working age PWD hold a degree-level qualification compared to 26% for PwOD
Not participating in the labour force	46.6% of PWD are not in the labour force	45.1% of PWD not in labour force	44.3% of PWD not in labour force	31.8% of PWD not in labour force.
Income	49% of PWD in bottom two quintiles	median income for PWD was \$20,420, compared with \$31,160 for PwOD	19% of households live in relative poverty (60% of median income)	38% of PWD live in households with incomes under \$30,000.
Experience with disability (participation, access and discrimination)	8.6% of PWD reported they had experienced discrimination in 12 months	12% of PWD reporting having been refused a job because of their condition. over the last five years	19% of PWD experienced unfair treatment at work compared to 13% of PwOD	7.8% of PWD report four or more instances of discrimination compared to 3.9% for PwOD in last year

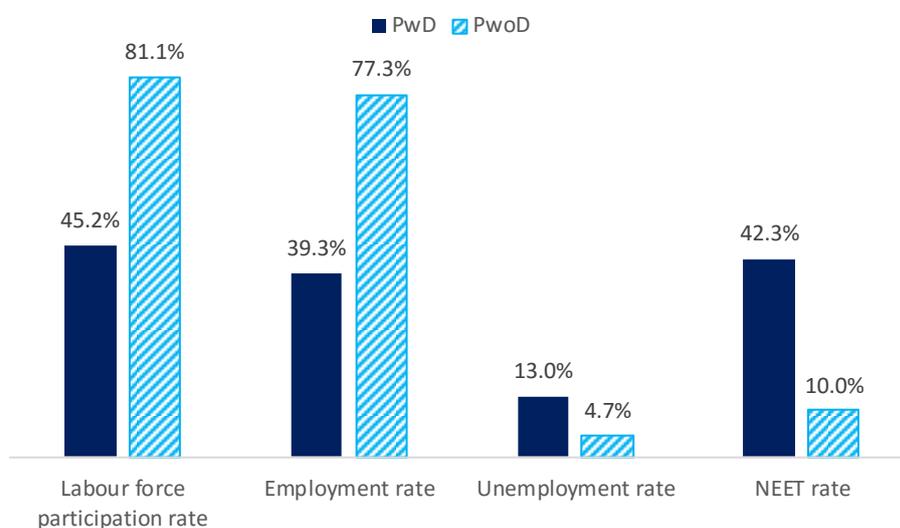
Source: See full NZIER Disability Law Report for source details for each country

However, in June 2017 there were more than 59,800 New Zealanders with disabilities who were not looking for work and 6,400 unemployed from the disabled population aged 15 to 64 years old. Labour market outcomes for people with disabilities are much worse than those without a disability (Figure 1). The employment rate for people with disability was about half of the rate for those without a disability. The unemployment rate was more than double for people with disabilities.

The outcomes young people (15 to 24 year olds) with disabilities that were not in employment, education or training (NEET) are striking. In June 2017, the NEET rate for young people with disabilities was 42.3%, compared to 10% for other young people.

Figure 1 Labour market outcomes for people with disabilities are worse

Population aged from 15 to 64 years old, except for the NEET rate, which is from 15 to 24 years old



Source: Statistics New Zealand, Labour Market Quarterly Statistics for June 2017 (September release)

New Zealand has signed on to ensure accessibility...

New Zealand has responsibilities under the United Nations Convention for the Rights of People with Disabilities. Article 9 of the Convention requires State Parties to take appropriate measures to ensure accessibility in the physical environment, transportation, information, communications (including technology), and services. Article 9 specifies that these appropriate measures are to include, amongst other things:

- identification and elimination of obstacles and barriers to accessibility
- development, promulgation and monitoring the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public and
- ensuring that private entities that offer facilities and services that are open or provided to the public take accessibility into account.

...with a mixed record of implementation

Since signing the United Nations Convention for the Rights of People with Disabilities, New Zealand has received a favourable first review by the United Nations and from disability sector representatives. New Zealand receives good marks for establishing a Disability Issues ministerial portfolio and a disability strategy. New Zealand's approach to reporting, including the tripartite independent monitoring mechanism was well received. The New Zealand delegation at the United Nations review was inclusive of people with disabilities.

Areas cited by the United Nations for New Zealand to work on include implementation and the lack of minimum enforceable standards for accessibility. The low threshold for exemptions and lack of a positive duty to provide for accessibility have been cited as needing improvement.

New Zealand has broad based discrimination law...

New Zealand deals with disability discrimination primarily through a combination of the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993 (HRA).² Both of these laws are consolidated rights legislation rather than specific to disability discrimination. They provide a principle-based framework with broadly worded obligations about not discriminating. There is no explicit positive duty to make reasonable adjustments for people with a disabilities, although the New Zealand courts have found an implied duty. The threshold for exceptions to discriminatory actions is low and easy to meet. There no flexibility to adapt the regulatory approach or to evolve to changing circumstances and no way to provide for standards. The law relies on individual faults-based complaints to achieve compliance.

NZBORA sets out a range of civil and political rights, such as the rights to freedom of expression, religious belief, freedom of movement, and the right to be free from discrimination on the grounds set out in the HRA. NZBORA requires the government and anyone carrying out a public function to observe these rights, and to justify any limits placed on them.

The HRA prohibits discrimination on a range of grounds (e.g., race, sex, age, disability) in specified areas of life (e.g., employment, education, goods and services, access to public places, vehicles and facilities).

² Legislation specific to a particular area may also have provisions about disability discrimination. For example, the Education Act 1989 s 8 states "people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at State schools as people who do not".

The HRA applies to discrimination by private organisations and individuals, as well as to the public sector; however the Act has two non-discrimination standards:

1. The first non-discrimination standard applies to the majority of public sector activities and incorporates relevant NZBORA sections concerning that standard (that is, an unjustifiable limitation on the right to be free from discrimination).³
2. The second non-discrimination standard applies to private sector activity. Discrimination on any of the specified grounds is illegal only if it occurs in one of the specified areas of life and no exemption applies. This standard also applies to discrimination by the public sector in the area of employment (and the related areas of sexual harassment, racial disharmony, racial harassment, and victimisation).⁴

... that places the responsibility on the person with a disability

Complaints about discrimination on any of the specific grounds in other areas of government activities (e.g., provision of services) can be brought under the HRA but the NZBORA standard will be applied when determining whether unjustified discrimination has occurred.

The HRA is enforced through confidential mediation of individual fault-based complaints made to the New Zealand Human Rights Commission; unresolved complaints can be taken to Human Rights Review Tribunal. Complainants can request that the independent Director of Human Rights Proceedings provide publicly funded representation for their case at the Tribunal. The Director makes decisions on representation according to criteria in the HRA.⁵ Complainants can also choose to take their case to the Tribunal themselves or to engage their own counsel.

The HRA does not have a general definition of discrimination and instead defines what is meant by discrimination in each area of life. However, each definition is similarly worded in terms of 'less favourable treatment'. None of these individual definitions of discrimination contains an explicit positive duty to reasonably accommodate a person with a disability. However, the Court of Appeal has found that the HRA contains an implied positive duty to accommodate a person with a disability.⁶

Likewise, the HRA does not contain a general exception. Exceptions in relation to disability are specified in relation to each area of life. Again, the exceptions are similarly expressed, referring to 'reasonableness'; for example:

- a. Employment and disability – not reasonable to expect the employer to provide special services or facilities to enable person to carry out job⁷
- b. Access public places, vehicles and facilities and disability – not required to provide for any person, by reason of the disability of that person, special services or special facilities to enable any such person to gain access to or use any place or vehicle, when it would not be reasonable to require the provision of such special services or facilities⁸

³ HRA Part 1A.

⁴ HRA Part 2.

⁵ HRA s 92 – criteria include such things as whether the complaint raises a significant question of law, the likelihood of success and whether resolution would affect a large number of people.

⁶ *Smith v Air New Zealand Ltd* [2011] NZCA 20; [2011] 2 NZLR 171 (18 February 2011) concerning HRA ss 44 and 52, which found the two sections, read together, created an implied positive duty to accommodate the person with a disability subject to a reasonableness requirement.

⁷ HRA s 29

⁸ HRA s 43.

- c. Provision of goods and services and disability - cannot reasonably be expected to provide the facilities or services in the special manner required for the person with a disability⁹
- d. Land, housing and other accommodation and disability – special services or facilities designed to make accommodation suitable for occupation by a person with a disability cannot reasonably be provided in the circumstances¹⁰
- e. Education establishments and disability – special services or facilities required to enable the person to participate in the educational programme of an establishment or to enable the person to derive substantial benefits from that programme cannot reasonably be made available.¹¹

The Access Alliance proposal for disability specific legislation

The Access Alliance is campaigning for the introduction of an Accessibility for New Zealanders Act. The principles and purpose of the proposed Act are in Appendix A.

As noted in the Australian Human Rights Commission’s National Inquiry into employment discrimination, anti-discrimination legislation has several roles,¹² including:

- influencing attitudes and behaviours in society
- providing remedies to individual complainants who have experienced discrimination on the basis of attributes such as disability that are protected under federal discrimination laws.

Legislation has the potential to provide a stronger foundation for improving accessibility for people with disabilities. It can also result in unintended consequences (e.g., UK Equality Act appears to have resulted in lower protection for disability) and potentially work against the very outcomes sought (e.g., Ontario’s Act has arguably diverted focus and/or resources toward bureaucracy and administrative compliance).

Laws that address the distinctive/particular issues associated disability would be expected to meet the *Government Expectations for Good Regulatory Practice* and in particular:

- **clear objective(s)** that are not overly broad or too aspirational (“... breadth of scope has an inverse relationship to effectiveness, not to mention cost.”) against which performance is able to be clearly measured and monitored
- **flexibility** to respond to the changing needs of people with disabilities in society and the economy.

Laws have to be well designed. The disability legislation in some other countries have been criticised for being overly prescriptive and bureaucratic. When laws get ahead of the ability of the obligation holders to implement, they can be counterproductive if compliance is the exception.

Moving ahead: where does the law fit into policy design?

Legislation is one of several tools in policy toolkit to achieve an objective. For any given objective, the government can draw on a range of interventions depending on the nature of the problems and these include:

⁹ HRA s 52.

¹⁰ HRA s 56.

¹¹ HRA s 60.

¹² Australian Human Rights Commission, *Willing to Work National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*, May 2016, p. 331.

- legislation / regulation
- funding
- monitoring
- service delivery
- provision of information.

Because resources and budgets are always finite, it is important to design the most cost-beneficial mix of policies in order to get the best result.

Laws to help people with disabilities participate in the economic and social life is part of a suite of policy measures. The law can be an important component of disability policy because:

1. law can be clear and precise in purpose and intent of what society thinks is important
2. codification of the law brings greater certainty and a common reference point
3. law in code can be adjusted to changes in society over time.

Laws can be designed to do any number of things. Some countries that New Zealand compares itself to have developed laws that focus on standards that must be met as a way to support the full participation of people with disabilities in the economy and society. There are choices as to where the burden of responsibility rests among people with disabilities, obligation holders or a third party.

Australia have legally binding standards that cover public transport, access to premises and education. These standards place obligations on transport agencies, employers and building owners. The Australian approach is complaints-based.

In Canada, Ontario (and other provinces more recently) has legally binding standards for:

- information and communication
- employment
- transport
- customer service
- built environments.

The Ontario legislation places a positive duty on organisations subject to the standards and these organisations must report on their compliance.

In the United Kingdom, there no specific disability-specific regulation. The Equality Act covers discrimination issues across society. The law contains a positive duty to make reasonable adjustments for disabled persons. More specifically, where a disabled person is placed at a substantial disadvantage in comparison with non-disabled people, the Act requires reasonable steps to be taken to avoid the disadvantage. The duty comprises three requirements:¹³

1. to change the way things are done (such as changing a practice);
2. to make changes to the built environment (such as providing access to a building); and
3. to provide auxiliary aids and services (such as providing special computer software or providing a different service).

¹³ Equality Act 2010 s. 20; see also Explanatory Note to the Equality Act 2010 paras 82 – 86.

Different approaches but similar outcomes

The educational, employment and income outcomes are similar across the countries examined. New Zealand appears to be doing better on employment but the attribution of this to legislation, active labour market policies or other economic conditions is not clear.

What is clear is that a large portion of the population of people with disabilities are not participating in the economy and society as the overall population. New technology and evolving social attitudes are making it easier to improve outcomes for people with disabilities. Regulation that can adjust and gradually tighten in pace with technology and social attitudes are more likely to achieve the long run result if they are perceived as reasonable changes on those with responsibilities and obligations under the law.

Making a case for change: what does good regulation look like?

The latest version of the *Government Expectations for Good Regulatory Practice* was issued in April 2017. “The government believes that durable outcomes of real value to New Zealanders are more likely when a regulatory system:

1. has clear objectives
2. seeks to achieve those **objectives in a least cost way**, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility
3. is flexible enough to allow regulators to adapt their regulatory approach to the attitudes and needs of different regulated parties, and to **allow those parties to adopt efficient or innovative approaches** to meeting their regulatory obligations
4. has processes that produce **predictable and consistent** outcomes for regulated parties across time and place
5. is **proportionate, fair and equitable** in the way it treats regulated parties
6. is **consistent with relevant international standards** and practices to maximise the benefits from trade and from cross border flows of people, capital and ideas (except when this would compromise important domestic objectives and values)
7. is **well-aligned with existing requirements** in related or supporting regulatory systems through minimising unintended gaps or overlaps and inconsistent or duplicative requirements
8. **conforms to established legal and constitutional principles** and supports compliance with New Zealand’s international and Treaty of Waitangi obligations
9. sets out legal obligations and regulator expectations and practices in ways that are easy to find, easy to navigate, and **clear and easy to understand**, and
10. **has scope to evolve** in response to changing circumstances or new information on the regulatory system’s performance.”¹⁴

How well is current disability law aligned with good regulatory practice?

The New Zealand Bill of Rights Act and the Human Rights Act have clear objectives and arguably seek to achieve those objectives in a least cost way through some fairly minimal and broadly worded obligations and exceptions. As the obligations are fairly minimal and broadly worded, they are easy to find and understand. The Human Rights Act has been drafted so as to ‘dovetail’ with other legislation (particularly the New Zealand Bill of Rights Act).

¹⁴ Government Expectations for Good Regulatory Practice, 21 April 2017, <http://www.treasury.govt.nz/regulation/expectations>, p 2.

However, there is no flexibility to adapt the regulatory approach or to evolve to changing circumstances or the regulatory system's performance without further legislation. Also, the reliance on individual faults-based complaints means the New Zealand approach may not be proportionate, fair and equitable in the way regulated parties are treated. This approach also means processes may not necessarily produce predictable and consistent outcomes for regulated parties across time and place.

Looking at standards: what are they?

The UNCRPD calls for minimum enforceable standards for accessibility. New Zealand's low threshold for exemptions and lack of a positive duty to provide for accessibility have been cited as needing improvement.

There is a formal standard setting process used by the Ministry of Business, Innovation and Employment. MBIE says that:

A standards and conformance system makes it easier for consumers and producers to make informed decisions when buying or producing

Standards are published documents that set out agreed specifications for products, processes, performance or services. Standards can cover safety, compatibility, performance, information and quality

Conformance is judging whether a product, process or service meets a standard or complies with a regulatory requirement.¹⁵

How might standards help?

From an economic perspective, standards:

- address information asymmetry - so that everyone has the same expectations
- allow and encourage innovation - by providing a common platform for new technologies
- create economies of scale - when goods and services are produced at lower production costs
- allow network externalities - when each new user adds value by making the network bigger
- reduce transaction costs – by reducing the amount of time needed to search and assess.

Standards also have compliance costs, switching costs, and can drive up costs to both consumers and producers. The benefits need to outweigh these costs to warrant action.

Fairness or equity is a key concept in economics, that although difficult to 'value', is nonetheless very real and a valid part of the benefits ledger.

Do the standards need to be in statute

New Zealand has disability standards for transport, access to public buildings and for accommodation. The Building Act and Building Code have high level requirements for the built environment. At present these standards are voluntary. If standards are part of a legislative framework there is the opportunity to be clear about expectations, place obligations on certain parties and enforce compliance with standards.

It has to be demonstrated how effective and efficient standards are in comparison with alternative policy measures such as active labour market policies. New Zealand appears to be doing well in employment for people with disabilities in the absence of mandatory standards. It is not clear why this is the case. It could be related to high employment or positive and inclusive employer attitudes.

¹⁵ <http://www.mbie.govt.nz/info-services/business/standards-conformance>

It also has to be demonstrated how direct regulation by government is needed over other types of voluntary regulation.

What would successful standards look like within an Act?

A proposal to government to create an Accessibility for New Zealanders Act would be require a regulatory impact assessment (RIA). RIA is used to test whether legislative proposals are the best way to fix a problem or achieve an objective <http://www.treasury.govt.nz/regulation/impact-analysis/ia-bestprac-guidance-note.pdf>

In particular, the case has to be made why legislation and regulation are better and less costly than alternative policy instruments.

For the statutory standards to be successful they would need to perform well against the *Government Expectations for Good Regulatory Practice*.

Standards would need to be implementable. This means that employers and others subject to standards need to be able to achieve implementation.

How do we get there?

Public policy development is slowly changing to be more open and inclusive. Collaborative processes may produce enduring outcomes and better buy-in with implementation. When well-designed, they appeal to obligation holders and the people who benefit if they manage stakeholder tensions in an open and transparent manner. Establishing disability standards is ideal for an open process because it will reveal the wide range of stakeholder interests and concerns. A well run process can address misunderstandings and take the fear out of achieving the objective.

An **open process with stakeholders** to establish standards would have the following *broad* stages:



It becomes easier for legislators to consider and pass law that has wide community support in advance. Widely supported standards are also easier to implement and gain early compliance.

Some standards and gains for people with disabilities (e.g. new enabling technologies) may be ‘more ready’ than others, so prioritisation is important. The ability to ‘turn up the dial’ on any one standard as new technologies and social expectations evolve is an important design principle.

Disability specific legislation and minimum enforceable standards could take the form of specific legislation or be part of an amended Human Rights Act. Ensuring compliance is an important consideration if standards are to achieve the desired result.

Who are the stakeholders?

The main stakeholders for this work that you would want to include:

- people with disabilities and disabled persons organisations (DPOs)
- education and training providers
- employers /employer associations
- industry representatives for the sectors subject to a proposed standard (e.g. ICT)
- city councils (including their transport, built environment and universal design teams)
- disability service providers
- government policy advisors.

Who would administer and enforce standards?

Responsibilities for administration, and enforcement depend on what form legislation takes. Assessment of compliance and enforcement depend on the complexity and scale of what is required by the law. How new regulatory requirements integrate with existing anti-discrimination law is a central consideration of the principles in the *Government Expectations for Good Regulatory Practice*.

There are several options for the administration of standards. It can be done by government, industry bodies, at firm level or by a mix. Where the responsibility is best placed depends on the nature of the obligations and the degree to which standards sit with existing legislation. Administration should be carried out in a manner that is cost-effective in line with the *Government Expectations for Good Regulatory Practice*.

Appendix A

Accessibility for New Zealanders Act: key principles

The Access Alliance is campaigning for the below principles to form the core of the Accessibility for New Zealanders Act.

1) The Act applies to all:

a) The Act will cover all persons with disabilities, whether their disability is considered physical, sensory, cognitive, communication or mental health related and will include visible, invisible, permanent or episodic conditions. The definition used will be the same definition as the United Nations Convention on the Rights of Persons with Disabilities.

b) The Act will apply to all government departments, crown corporations, companies, organisations and any other entity that is regulated by statute. The Act will apply also to key private and corporately owned organisations operating in New Zealand. These principles will refer to affected organisations as obligated parties.

2) The Act sets a timeline:

The goal of the Accessibility for New Zealanders Act is to greatly improve the accessibility of New Zealand within a specific and clearly defined deadline set by the legislation. This timeline will begin immediately upon the Act passing into law and will include checkpoints at regular intervals until existing and on-going access barriers are removed.

3) The Act sets the bar:

The Accessibility for New Zealanders Act will build on all other disability and human rights legislation, regulations or policies which provide lesser protections or entitlements, and will protect any rights which persons with disabilities have already earned and currently enjoy.

4) The Act provides accessibility in all areas of life:

The Act will require all obligated parties to become fully accessible to all persons with disabilities by providing accessibility in all areas of life and ensuring the removal of existing obstacles and preventing the creation of new obstacles. These obstacles may include, but are not limited to, physical, legal, information, communication, attitudinal, technological or other barriers. (Note: standards will provide for compliance thresholds.)

5) The Act sets policy:

The Accessibility for New Zealanders Act will influence and affect the development and implementation of public accessibility policy, thereby enhancing and improving access to a full range of goods, services and programmes not currently available to persons with disabilities in New Zealand.

6) The Act champions access to all goods, services and facilities:

The Act will require all obligated parties to ensure that their services and facilities are fully accessible by persons with disabilities, based on principles of universal design and the provision of reasonable accommodations. Obligated parties will be required to develop and implement detailed plans to ensure accessibility within their organisations. Accessibility will be part of a 'business as usual' approach.

7) The act champions accessible workplaces, employment and education:

The Act will require organisations to take proactive steps to provide obstacle-free workplaces and provide changes that will accommodate people in their employment, including for job opportunities. Employers will be required to develop and implement plans to remove existing workplace and employment obstacles and to prevent new ones from being put in place. Education providers will ensure that places of study and all study resources are fully accessible.

8) The Act will charge government with the responsibility to lead, educate, train, inform and review:

The Act will require government to lead the country toward achieving the goals of the Act and fulfilling its mandate. The Act will require government to provide education, information and resources to assist regulated businesses and organisations to comply with the access requirements. The government will be required to appoint an independent person to periodically review and publicly report (at regular intervals) on progress towards the goal of full accessibility.

9) The Act is enforceable:

The Act will provide for a prompt, independent and effective process for enforcement. This will include a comprehensive and clearly defined avenue for persons with disabilities who encounter obstacles which are in violation of the legislation to raise and submit complaints to enforcement officials.

10) The Act is made real through regulations:

The government will be required to make regulations that clearly define the steps needed for full compliance under the Act, and it will be independently reviewed at a minimum of every four years. It will be open to recommendations made on an industry-by-industry or sector-by-sector basis. This will include a requirement that input be obtained from persons with disabilities and disability-related organisations as part of these reviews.

11) The Act will ensure public funds are not used to create or perpetuate obstacles to full accessibility in all areas of life:

The Act will require that the government ensures that no public money is used to create or perpetuate inaccessibility for persons with disabilities. Government departments, agencies, and crown corporations should be required to make it a strict condition of funding and finance for programmes, transfer payments, subsidies, loans, grants, capital or infrastructure projects that no such funds may be used to create or perpetuate access obstacles. There should also be a requirement that procurement of goods, services or facilities be fully accessible to and usable by persons with disabilities. The government should be required to monitor and enforce these requirements and to periodically report to the public on compliance with them.

12) The Act is a lens through which to vet legislation:

The Act will require the government to review existing legislation and regulations identifying possible accessibility obstacles, and develop timelines to address the shortcomings. The government will review all future proposed legislation and regulations before they are enacted to ensure accessibility obstacles are not about to be created.

13) The Act has real force and real effect:

The Act must be more than mere window dressing. It should contribute meaningfully to the improvement of the position of persons with disabilities in New Zealand, enabling them to fully participate and to enjoy community life. It must be underpinned by effective enforcement mechanisms which lead to real effect.