



Access Alliance's Discussion Paper

Developing the Accessibility for New
Zealanders Bill

The Access Alliance

website: accessalliance.org.nz | social media:   @AccessForAllNZ



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Developing the Accessibility for New Zealanders Bill

To: Hon Carmel Sepuloni, Minister for Disability Issues
From: The Access Alliance
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Date: 20 April 2018

Whakarongo mai.

Tēnei te reo e kawea rā ngā wawata me ngā roimata o te pā harakeke.

Tēnei te reo e kawea rā ngā wawata me ngā roimata o tēnā o tēnā o tātou kua whetūrangitia.

Listen and you will hear the voice that carries the hopes, dreams, and tears of present and future generations of disabled people, like the outer layers of the flax bush protecting the heart where new life will one day grow. This is the voice that carries the dreams and tears of those who dwell in the heavens like the stars that decorate the night sky and have guided navigators around our land. Our national icon, the kiwi, is blind and flightless, and is regarded as the older and wiser sibling to all birds.

Vision: New Zealand is a non-disabling society – a place where disabled people have an equal opportunity to achieve their goals and aspirations, and all of New Zealand works together to make this happen.

Purpose: Every New Zealander should be able to fully participate in society, have the opportunity to learn, to get a job, and to take part in community and social life. Without government action to ensure all businesses, buildings, and services are accessible, one in four of us continue to be excluded from accessing or fully participating in parts of life that other New Zealanders take for granted.

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- Goals:**
- Include accessibility legislation in the Government's legislative timetable, before the end of 2018.
 - Pass the accessibility legislation, before the end of 2019.
 - Commence the development of accessibility standards using the Standards New Zealand framework in 2020.
 - Roll out the accessibility standards between 2021 and 2029. Public and Private organisations employing more than 10 people would begin to make adjustments and reasonable accommodations to fully implement the standards.
 - By 1 January 2030, all organisations with 10 or more employees would be required by law to comply with the accessibility standards under the ANZA. The enforcement and compliance measures would be activated in cases of non-compliance.

1. This paper provides an overview of the case for accessibility legislation in Aotearoa, New Zealand and outlines the work being undertaken by the Access Alliance (Alliance) in this regard. It seeks the Minister's agreement that there is a need to develop the Accessibility for New Zealanders Act (ANZA, also referred to as the Accessibility Act) and to develop this in consultation with disabled people and the wider sector.
2. The Alliance represents a wide number of disability organisations.¹ The Alliance believes there are deficiencies in New Zealand's current legal and policy settings to address the many accessibility barriers that disabled people still face.

Executive Summary

3. While the legislation is fundamentally about improving the lives of disabled New Zealanders, it will also produce benefits for many other groups including young families, older people, for firms and businesses, and sectors such as transport, housing, retail, hospitality and tourism.
4. Accessibility means that people with disabilities of all kinds will be able to make full use of the built environment, public infrastructure and

¹ Auckland Disability Law, Association of Blind Citizens New Zealand Incorporated, Blind Foundation, CCS Disability Action, Cerebral Palsy Society, Deaf Aotearoa, Disabled Person's Assembly, Inclusive New Zealand, Kāpō Māori Aotearoa, National Foundation for the Deaf Inc., Parents of Vision Impaired New Zealanders, People First, Ngā Tāngata Tuatahi

transportation, workplaces, all goods and services and the digital environment.

5. Our current human rights legislation does not give organisations clear and specific expectations and guidance on what they must do to become fully accessible as employers and service providers. There are no standards, no specific requirements that an organisation needs to meet and no penalties for non-observance.
6. In 2008 New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and ratified the Optional Protocol in 2016. The Convention is monitored by the Independent Monitoring Mechanism (IMM), whose second report (Making Disability Rights Real) in 2014, commented:
“Developments such as the increasing engagement between Disabled People’s Organisations (DPOs) and government agencies are to be applauded. Moves towards the introduction of people driven service models are also encouraging. However, there is still a long way to go and some changes are occurring too slowly.”²
7. The Human Rights Act only deals with disability discrimination issues after the fact. This means that disabled people have to bear an unfair burden of being the watchdogs for the accessibility system. The lack of legislation with any proactive means around accessibility is the major problem.
8. Disability discrimination claims are higher comparative to other claim grounds.³
9. Disability discrimination accounts for a large proportion of claims made to the Office of Human Rights Proceedings. An Official Information Act request in December 2017 revealed that for the 2017 reporting year, 34% of the Director of Human Rights Proceedings decisions identified disability as the primary ground of discrimination. Given there are 13 grounds of discrimination as per the Human Rights Act, disability

² IMM “Making Disability Rights Real”, p. 5. 2014 <https://www.hrc.co.nz/your-rights/people-disabilities/our-work/making-disability-rights-real/>

³ HRC Annual report 2017, p. 29.

https://www.hrc.co.nz/files/3515/1683/2197/HRC_Annual_Report_2017_1.pdf



discrimination at just over 34% is a large proposition of the Director's decisions.⁴

10. Disability sector agencies have had a long-standing concern about the pervasive negative effects of non-accessibility. The Alliance has consulted widely with its constituencies, has reviewed the current policy settings on accessibility, and commissioned an economic and social policy evaluation. The Alliance has also commissioned research on the comparative jurisdictions' approaches to disability and accessibility. The economic and social policy evaluation and the research on comparative jurisdictions' approaches to disability and accessibility is available for download at <http://www.accessalliance.org.nz/resources>.

11. The key findings of the research are:

- a. the prevalence of disability is increasing as the population ages, and the overall numbers of people with disabilities will grow significantly over the next three decades.
- b. the proxy measures for social outcomes for people with disabilities (educational attainment, workforce participation and income) are consistently less than for people without disabilities.
- c. those measured discrepancies have remained largely unchanged since 2001.⁵
- d. people with disabilities continue to report major areas of continued non-accessibility and uneven compliance with voluntary accessibility standards.⁶
- e. New Zealand law on accessibility is substantially less detailed and prescriptive than most other OECD countries, is not as comprehensive in its cover, and is not as effectively enforced.⁷
- f. the improved accessibility of workplaces, the built environment, all goods and services, public infrastructure, and the digital environment will lead to increased workforce participation by people with disabilities.⁸
- g. the increase in workforce participation will lead to consequential reductions in the government's future welfare liability and other

⁴ The Office of Human Rights Proceedings, Response to Official Information Act request (Request made December 2017, Response received January 2018)

⁵ AUT Longitudinal Study Disability Labour Market

⁶ IMM Report 2014 (page 15)

⁷ NZIER Disability Law and Outcomes (Paper for the Access Alliance) Dec 2017

⁸ NZIER Valuing Access to Work (Report for the Access Alliance) Feb 2017



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positive economic benefits, estimated at adding \$1.45 billion per year to real gross domestic product and an annual reduction in fiscal cost to the government of \$270 million.⁹

- h. the current human rights legislation does not give organisations clear and specific directions on what they must do to become fully accessible as employers, landlords and goods and service providers.
- i. vague concepts of “discrimination”, “equality before the law”, and “reasonable accommodation” do not assist those working in many public sector and most private sector organisations how to provide inclusive or accessible employment, goods and services in a way that ensures that disabled people fully benefit from them.
- j. improved accessibility law and the alignment of human rights, disability and accessibility law will improve New Zealand's compliance with the CRPD.¹⁰

12. The Blind Foundation initiated research to examine the long-term trends in social and economic outcomes for people with disabilities. The hypotheses was that while some gains had been made over the last 15 years, people with disabilities were in general no better off than they were before New Zealand had signed CRPD or established the Disability Strategy and Action Plans. This overall outcome of the research was a conclusion the missing element was legislation suited to a modern approach to disability discrimination and specifically dealing with accessibility as the major enabler of improved social and economic outcomes. The full research accompanies this discussion paper as *Attachment 1 - BF Accessibility Legislation Feasibility Study*.

13. Such legislation would promote changes to New Zealand disability law and the enactment of specialised legislation dealing with accessibility (the ANZA). The aim of the legislation is to expand the opportunities that people with disabilities must have to be able to fully participate in all aspects of life, to be active members of their communities and contribute to the economy. The Act would ensure that all disabled people are able to make full use of the built environment, public infrastructure, workplaces, all goods and services and the digital environment.

⁹ Ibid

¹⁰ AUT School of Law, Disability Law Review, N Drake, 2016



14. The Alliance will continue to meet with business, local government and community agencies to consult on the proposal for an Accessibility Act. In addition the Alliance is willing to seek funding to draft a model Accessibility Act to ensure that the ANZA is progressed within the current Government's term of office.
15. The Alliance seeks the Minister's support to continue this work.

Background

16. In the 2013 Disability Survey¹¹ there were an estimated 1.1 million disabled New Zealanders. Out of this number, an estimated 632,000 people had a physical impairment (14% of the total population) and an estimated 484,000 people had a sensory impairment (11% of the total population). An estimated 89,000 people had a learning disability (2% of the total population).¹² All these types of impairment can create access needs.¹³
17. It is very common for people to have multiple impairments. In the 2013 Disability Survey, 53% of disabled people had multiple impairments. Amongst disabled children aged 0 to 15, 48% had multiple impairments. For disabled people aged over 65, 63% have multiple impairments. As a result, people often have a variety of access needs.¹⁴
18. An estimated 242,000 people, or 5% of New Zealanders, are living with disability caused by psychological and/or psychiatric conditions (i.e. limitations in their daily activities due to long-term emotional, psychological or psychiatric conditions), according to the 2013 Disability Survey. Out of this estimated 242,000 people, 122,000 people (13% of the disabled population), have a psychological/psychiatric disability as their main impairment.¹⁵
19. Research in the USA indicates that approximately 20% of the over-65 population have difficulty leaving their homes due to mobility related

¹¹ For all NZ Statistics references, see PDF and Excel tables at:

http://www.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx

¹² 53% of disabled people have more than one impairment type

¹³ NZ Statistics Disability Survey 2013

http://archive.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx

¹⁴ 2013 Disability Survey table 7.01

http://archive.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx

¹⁵ 2013 Disability Survey table 8.02

http://archive.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx

impairments. These people are “especially vulnerable to the physical conditions of the built environment creating barriers to mobility.”¹⁶

20. New Zealand's population is aging and this will increase the number of people with impairments. The over-65 age group is projected to make up over 20% of New Zealand's population from late 2031, compared with 13% in 2011.¹⁷ In the 2013 Disability Survey, people over 65 had a disability rate of 59%, compared to 21% of people aged 15 to 64.¹⁸

Life outcomes and measures of inclusion

21. Three key enablers of being able to lead a good life are education, employment and income. Considerable effort and time has gone into programmes and initiatives directed at education uptake and to improve labour force participation. However, proportionately disabled people remain significantly underrepresented in the workforce, and little or no improvement has been made over the years. Current programmes, policy settings, and legislation are not collectively sufficient to get the outcomes people with disabilities deserve.¹⁹ For example:

- a. In 2016, The Ministry of Business, Innovation and Employment, undertook a disability access in New Zealand review. The outcome was an Accessibility Plan for Public Buildings that doesn't have the enforcement incentive to create the conditions for accessible public buildings and public housing that was promised post the Christchurch earthquakes.²⁰

22. New Zealand's approach to disability discrimination and accessibility standards is within the mainstream for OECD countries but with some clear differences in the legislative framework.

23. The Accessibility eco-system in New Zealand does not have the enforcement mechanisms that removes barriers and stops new barriers from being created in the built environment, public transport, public

¹⁶ Harvard School of Public Health and Harvard Design Centre, Health and Places Initiative, 2015, p. 6

¹⁷ NZ Statistics Population Estimates and Projections:
http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/projections-overview/nat-pop-proj.aspx

¹⁸ Supra note 10

¹⁹ Supra note 5

²⁰ <http://www.mbie.govt.nz/info-services/building-construction/safety-quality/disability-access-review/accessibility-plan-public-buildings>

information and communications, education and employment, and in customer service

24. Over the last two decades disability policy has shifted globally from the financial compensation of disabled people (such as easily accessed benefits, employment subsidisation etc.) to policies that encourage disabled people to integrate into mainstream education and employment.²¹ New Zealand has initiated policies within the latter approach but has relied on social marketing techniques and voluntary compliance with standards to provide the necessary support to accessibility. This differs significantly from other OECD jurisdictions where assertive legislation is used to underpin disability policy that focuses on the integration and inclusion of disabled people.²²
25. The New Zealand Human Rights Act 1993 (HRA) does contain provisions outlawing disability discrimination and it refers to accessibility issues. For instance, the HRA requires employers to provide reasonable accommodation for disabled workers. But the caveat is that the employer/other duty holder can claim an exemption on the grounds of unreasonable hardship – and in this case “unreasonable hardship” often has a very low threshold.²³
26. Furthermore, the New Zealand human rights system is designed to achieve a mediated or conciliated solution for complaints which means in most cases resolutions do not constitute a precedent for like cases. Complaints-based systems can be a barrier to a person with a disability from achieving resolution or for the community making sustainable systemic improvements.²⁴
27. Compared to other similar jurisdictions (Australia, Canada, USA, the UK and the European Union), the New Zealand framework is less detailed, has lower compliance thresholds and is not effectively enforced.

²¹ OECD "Breaking the Barriers", 2010 <http://www.oecd.org/publications/sickness-disability-and-work-breaking-the-barriers-9789264088856-en.htm>

²² NZIER "Disability Law Reform", 2017

²³ Human Rights Act 1993 Sec 29, 44 and 52

²⁴ Refer Belinda Smith University of Sydney "Complaints Based Disability Discrimination Law", 2008 https://www.researchgate.net/publication/228144219_Australian_Anti-Discrimination_Laws_Framework_Developments_an

28. Effective enforcement of strong accessibility legislation is needed to convince obligated organisations to resist the powerful impulse to keep doing business exactly as they always have. It is wrong to assume that obligated organisations merely need to be educated on the benefits of accessibility to incentivise compliance. The experience of Ontario, Canada has shown that this approach was unsuccessful.²⁵
29. Enforcement is pivotal to the success of an Accessibility Act. Obligated organisations are far less likely to comply if they do not think they will otherwise face significant legal consequences. Accessibility laws require organisations to break with deeply-rooted habits. The Canadian experience is that accessibility's powerful economic benefits alone have not persuaded many organisations to significantly increase their levels of disability accessibility.²⁶
30. The Alliance proposes the development of the ANZA which consolidates the existing standards, develops new standards where required, and specifies their comprehensive application and enforcement. The Act will align with existing human rights legislation and will set a timeline for its implementation.

Consultation

31. The Alliance has consulted widely with its constituencies²⁷ and will continue to meet with business, local government and community agencies.
32. All of the Access Matters Grass Roots campaigners either have lived experience of disability, or are whanau, or supporters of disabled people.
33. In July 2017 UMR, a market research company²⁸, did a national poll on accessibility legislation for the Access Alliance. More than 80% of New Zealanders supported mandatory accessibility legislation and regulations on enforceable access standards.

²⁵ Lepofsky, What Should the Canadians with Disabilities Act Include? A Discussion Paper, [page 2]

²⁶ Ibid, p. 17

²⁷ Including Be. Accessible, Diversity Works New Zealand, Business New Zealand, the Office of Disability Issues, the Disability Rights Commissioner, International Human Rights experts (including a month long study trip to Canada), Council of Trade Unions, and Academics

²⁸ See <http://www.umar.co.nz/who-we-are>

Financial Implications

34. Establishing the costs of a legislated accessibility regime is largely unknowable without an understanding of the degree of change that any one or more of the policies/standards require. That detail will be able to be estimated as the detail of the framework is developed. It is however, anticipated that the standards in the proposed Accessibility Act would be implemented over time to mitigate any financial impact (in a similar way to the smoke-free environment standards).
35. The potential economic impacts of having more people with disabilities in the productive workforce are significant. The Alliance has commissioned a study from the New Zealand Institute of Economic Research (NZIER) which has modelled the impacts of a change in labour force participation rates where unemployment rates of disabled people and non-disabled people populations are equalized. The modelling shows a transfer of 14,000 people from Supported Living and Job Seeker payments into the workforce, with an annual gross fiscal saving to the government of \$270 million and a reduction in future welfare liability over 10 years of approximately \$3 billion.²⁹ It also shows an additional \$1.45 billion annually to real gross domestic product.
36. Most economic benefits stem from labour market participation but the full impact of improved accessibility is much more pervasive and will positively impact the uptake of health, disability and other government services across all age ranges.

Human Rights

37. The CRPD requires New Zealand to adopt all appropriate legislative, administrative and other measures to ensure disabled people realise all rights without discrimination. The CRPD makes it clear that this obligation includes modifying or abolishing existing laws, regulations, customs and practices that do not meet the requirements of the CRPD.
38. More specifically, Article 9 of the CRPD addresses accessibility. Amongst other things it requires New Zealand to develop and monitor the implementation of minimum standards for the accessibility of facilities and services open or provided to the public. The Government's obligation

²⁹ NZIER "Valuing Access to Work" 2017



does not stop at publicly owned facilities and services but extends to the private sector.

39. New Zealand's current law on disability and accessibility does not meet its binding legal obligations under the CRPD. New Zealand is required to report to the United Nations Committee on the Rights of Persons with Disabilities on its implementation of the Convention in October 2018 – and will be reviewed in late 2019.
40. In relation to accessibility the Committee recommended – in its previous concluding observations (2014) that New Zealand enact measures to ensure that all public buildings, as well as public web pages, were made accessible to people with disabilities and that consideration be given to making all new future private houses fully accessible. The Committee also recommended that the exemption for factories and industrial premises employing less than five people be discontinued.
41. The Committee also recommended that consideration be given to amending the HRA to include a definition of reasonable accommodation to better comply with the CRPD.
42. These recommendations were reiterated by the Committee on Economic, Social and Cultural Rights in March 2018.

Legislative Implications

43. The proposed ANZA is not intended to replace existing legislation. However, in order to establish a robust framework across the statute book there will be consequential amendments required to a number of pieces of legislation including the Human Rights Act 1993, the Building Act 2004, the Land Transport Act 1988 and the Land Transport Management Act 2013, and Employment Relations Act. Secondary and tertiary legislation may also be affected.
44. For example, the HRA provides an exemption to the prohibition on discrimination in relation to disabled people where it is unreasonable to provide accommodations (special services or facilities) or it poses a risk of harm to the disabled person or others. The threshold for this exemption has been interpreted as being low – one of reasonableness rather than undue hardship (See *Smith v Air New Zealand Ltd* [2011] 2NZLR 171). The

High Court in Smith stated at [104] that “the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting the Act imposes an obligation to provide accommodation for the disabled.” Part 2 of the HRA may need to be amended to provide a positive obligation to accommodate (including ensuring accessibility). In addition consequential amendments would need to be made to provide an avenue for any breaches of this obligation to be taken directly to the Human Rights Review Tribunal without going through the Part 3 mediation process, as similar conciliatory processes have proved ineffective in improving accessibility in comparative jurisdictions.

Core elements of ANZA

45. Based on its research, the Alliance considers that the ANZA should include the following core elements:
- a. A clear and bold purpose to achieve a barrier free New Zealand by a deadline that the Act prescribes. The deadline should be as soon as reasonably possible with interim steps to full implementation beginning immediately.
 - b. Ensure that New Zealand fully complies with the CRPD.
 - c. Regulate public life, goods and services, the built environment, the digital environment, transport, and employment.
 - d. Establish clear definitions of disability, barriers, accessibility and reasonable accommodation.
 - e. Create mandatory standards.
 - f. Create a robust enforceability and reporting mechanism.
 - g. Ensure that nothing in the Act should reduce accessibility requirements under any other law.
 - h. Ensure that all laws and policies are consistent with the Act.

Recommendations

46. The Alliance recommends that the Minister for Disability Issues:

- a. **Notes** the financial benefit of ensuring that disabled people are able to fully participate in all areas of life, as set out at paragraphs 34, 35 and 36.
- b. **Notes** that the Alliance's research and consultation to date has shown that the current legal and policy framework in New Zealand is not sufficient to ensure a fully accessible society where disabled people can fully participate on an equal basis with others.
- c. **Agrees** in principle, subject to further work, that the ANZA is needed and should be progressed within the current Government's term of office.
- d. **Agrees** to ongoing consultation and engagement on the development of the Accessibility for New Zealanders Act.
- e. **Notes** that the Alliance will seek funding to draft a model Accessibility Act so that it can be tested by stakeholders.