

# MAKING NEW ZEALAND ACCESSIBLE: A DESIGN FOR EFFECTIVE ACCESSIBILITY LEGISLATION

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## **Foreword**

Our research team set out to design legislation that would be effective in identifying and removing barriers that cause disabling experiences for so many of our people. We recognise that this is a once in a generation opportunity for our law and policy makers to develop a regulatory system to bring about this change. Our thanks go to the New Zealand Law Foundation for providing funding and ongoing support for this important work.

We tried to understand the United Nations Convention on the Rights of Persons with Disabilities, the ambitions of the Access Alliance and Te Tiriti o Waitangi to create a legislative framework that would work within New Zealand's particular legal system. We recognise that we don't have access to the information, expertise and resourcing available to government.

This report also aims to assist disabled people, political leaders, and future decision makers to understand how a system could be designed to provide accessible, equitable and effective change.

This report provides a starting point for co-designing the future accessibility system in a way that is most likely to remove known and emerging barriers faced by disabled people and others. It sets out the organisational structures that could be developed to create this. To make this system work, it will need disabled people, iwi groups, businesses, governments, and non-government organisations to collaborate to bring about this change.

While some deviation from the key features incorporated in our system is inevitable, any deviations from the key features of the system as we have framed it should take into account the reasons we give for why the system should be designed in that way.

We have set out the specifics of the system as much as we can. We hope it is helpful for people wishing to develop legislation now and continue to be useful for future advocates of accessibility legislation for New Zealand.

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# EXECUTIVE SUMMARY

This report provides advice and guidelines for designing a legislative framework that will accelerate Aotearoa New Zealand towards an accessible future. The framework should be given effect through legislation.<sup>1</sup> We believe legislation designed in the way we articulate in this report creates the best chance for a sustained reduction in the sort of everyday barriers that people face.<sup>2</sup> It will also amplify the voices of people with lived experience of disability.

This report proposes a legislative framework that will enable disabled people<sup>3</sup> in New Zealand to enjoy access to the breadth of society on an equal basis with others. That legislative framework must enable disabled people who face accessibility barriers regularly to play a key role in identifying and removing them.

The legislative framework should:

- Assign functions, powers, and responsibilities to a single dedicated institution and make that institution accountable for achieving the purpose of the legislation.
- Set out a process for consultation and research by the relevant institution, to be followed by the formulation of standards.
- Set out a process whereby enforceable and non-enforceable standards are developed through identification of accessibility barriers, in consultation with people with access needs and with affected stakeholders who will bear responsibility for removal of the barriers, such as representative business groups, public sector representatives and others.
- Adopt a focus on systemic learning and improvement throughout the various elements of the system, including notification procedures, reporting, periodic review, information-gathering, research and an internal complaints process.
- Be set against the background that New Zealanders have a right not to be excluded from aspects of society on the basis of temporary or permanent impairment.

This will be a wide-reaching, transformative legal and policy programme that touches upon nearly every aspect of New Zealand society. It reflects the fact that all New Zealanders will, at some point in their lives, face impairments that lead them to be excluded from the same access that others expect to enjoy.

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<sup>1</sup> As defined by the Legislation Act 2012: “means any Act, Imperial enactment, Imperial subordinate legislation, regulations, or legislative instrument”.

<sup>2</sup> See Legislation Guidelines: 2018 edition at chapter 1.

<sup>3</sup> We recognise that there are different views in disability communities around whether to use “disabled people” or “persons with disabilities” and how to describe persons with impairments”. Where possible, we have used the term disabled people as we understand this is the term supported by many disabled people. We apologise for any offence caused by this approach.

The legislative framework is designed around the principle of progressive realisation. Transformative change cannot happen overnight. Further, the creation of an accessible Aotearoa will require ongoing change, and that change involves cost. People responsible for bearing that cost must be given a voice, but against the background of a clear Parliamentary directive that accessibility barriers will be progressively removed over time.

Public awareness and education will be essential for maintaining an overall focus on the positive vision this legislation seeks to bring about, rather than the near-term changes it will require. Further, systemic monitoring, data collection and review must be incorporated at all stages, so that positive progress can be celebrated and points of improvement identified.

As far as possible, this report sets out the key design elements of that legislative framework. It is intended to help reduce the remaining policy and legal work required by government, and to enable people who will be affected in various ways by that legislative framework to be heard.

Our proposed statutory framework allows for the way we define, identify and remove accessibility barriers to develop over time. We have incorporated the principle of “progressive realisation” into the overall scheme. Progressive realisation is a concept that relates to economic, social and cultural rights under international human rights treaties and creates an “obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their available resources.”<sup>4</sup>

We propose a legislative system that includes an Act, for example an Accessible Aotearoa Act, and secondary legislation for example accessibility standards. When we refer to legislation and legislative system we are referring to both primary and secondary legislation. When we refer to Act, we mean the primary legislation and when we refer to standards or “accessibility standards” we are referring to the secondary legislation.

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<sup>4</sup> At 13: <<https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>>. Reflected in article 4(2) of the Convention on the Rights of Persons with Disabilities.

# CHAPTER 1

## INTRODUCTION

Every person has or will have impairments that affect their participation in society at some point. There is no such thing as a “normal person”. As we age or suffer injury or illness, we will all have different levels of ability. Impairments may or may not cause distress and inconvenience to people with those impairments, but impairments are a feature of human diversity. Depending on the environment at the time, “impairments” can be strengths. “Impairments” can be a vital part of a person’s identity, community and culture.

We conduct our lives in **environments** which contain a variety of features. Some of these features are naturally occurring, like gravity, weather and geography. Other features are built or designed by us, often to overcome those naturally occurring things. When we design these environments, we give them certain features. Some of these features operate to exclude people with **impairments**, and those features are **barriers** to the full and effective participation of people with impairments. In particular, barriers prevent people with impairments from enjoying the basic human rights that others enjoy, like freedoms to access information, of movement, of association and of expression.

Impairments should not necessarily be seen as negative. We should not aim to create a society where nobody is impaired. But we can create a society without barriers, or take steps to limit the effect of those barriers on people with impairments. We should not accept the presence of barriers that exclude people with impairments from fully and effectively participating in society on an equal basis with others.

To allow all of us to participate within society in the same way as others may require different things. It may require the removal of negative environmental features that go unnoticed by some people but are serious barriers to others. It may require that the positive features we build be designed or re-designed in a way that makes them useful to users with diverse bodies and abilities. Accessibility is a powerful lens through which to view society: upon reflection, most features within our environments can be made more user-friendly in this way, from roads to websites and everything in between. Barriers exist throughout New Zealand society in lots of different environments. Generally, these are split into “domains”, and those domains are a good way of illustrating how widespread and pervasive barriers are and how they operate to make full and effective participation in society impossible. Some domains commonly used include:

- Buildings and places,
- Information,
- Technology and digital environments,
- Housing,
- Public facilities,
- Footpaths, roads and crossings,

- Services and supports,
- Public transport.

When we start thinking about society like this it soon becomes clear that there are very few barriers which are genuinely insurmountable. Most can be removed or overcome with enough planning, effort, and resources. The pre-requisite for these things is only having the social and political will to make it happen and a system for doing so systematically. Establishing this system has been a lifelong labour for many people. To capitalise on this work, it is essential to design a system that is effective in bringing about the necessary changes. This system will have processes for identifying barriers, removing them, and ensuring that new barriers are not produced in the future.

There are very good reasons for adopting accessibility legislation and these have been demonstrated by the work of the Access Alliance, the signing and ratification of the United Nations Convention on the Rights of People with Disabilities and the Optional Protocol to that Convention, the New Zealand Convention Coalition and then the Disabled People's Organisations Coalition, and other advocacy by people with disabilities. We see our role as being to set out, as clearly as possible, how that legislation would work in New Zealand, and to welcome comments from people with disabilities and others about how that legislation would affect them.

## Purpose of report

This report considers the key elements that any accessibility legislative system will need to include to have the best chance of success. The right system would help remove barriers and thereby progressively make New Zealand accessible for all people.

The case has been made for why citizens should have legally enforceable rights to an accessible Aotearoa New Zealand. There are a range of instruments approved by the New Zealand Government that agree upon the importance of accessibility as a policy goal at the heart of New Zealand's legal and social systems. The challenge now is determining how best to implement that vision. One of the most important decisions is who will lead, develop, and coordinate the various steps starting with education and moving through the entire spectrum of developing standards and ending with enforcement.

We aim to contribute by providing advice and guidance that frame how a legislative system could operate in a New Zealand context. From our perspective, our report will be helpful if it achieves the following purpose, as drawn from the legislation guidelines:

Achieving the policy objective should drive the design of the legislation and all the detailed decisions made when drafting. Therefore, the broad underlying objective (the policy it is implementing or the reason for it) should be clearly defined before substantive work begins and clearly discernible in the legislation and policy documents (including the Cabinet policy papers and the departmental disclosure statement).

While it is not necessary to determine every detail of the policy at the beginning, it is highly desirable to settle as much policy detail as possible prior to writing drafting instructions and undertaking consultation on the proposed legislation. Providing more policy detail will enable others to properly assess the effects of the proposal and the ultimate legislation.

## Notes from the authors

### *Accessibility of this report*

For this report to be effective it must analyse complex subjects and use some specific language. We regret that the language and subject matter of this report may not be accessible to everybody.

Where possible, we have attempted to use plain and accessible language. We are also available to discuss our recommendations in person, and we recommend that the government commission accessible translations and summaries of this report to be made available in various forms.

### *A note on words, language and labels*

We are conscious that it is easy to speak about disability rights and the lives and experiences of disabled people in unintended ways that are hurtful, or which perpetuate ableist thinking, or stereotypes or cause disabling experiences. We have made every effort to avoid the use of such language in this report. If we use any hurtful language, then we apologise.

Our intention is not to lead the discussion about accessibility legislation for New Zealand, but to support the leadership of people with disabilities over that discussion both now and in the decades to come as this legislative system evolves. That means that the key concepts of our legislative design will be difficult to rearrange, although we have based them on the UNCRPD as much as possible. The terminology used in the Act should reflect the way that people with disabilities wish to self-identify. In particular, we emphasise that the following labels or words used in our legislative design should be subject to consultation with people with disabilities to ensure legislation does not perpetuate discriminatory attitudes and behaviours:

- Impairment;
- People with disabilities, disabled people;
- Disabling experiences;
- Barriers.

We have intentionally avoided suggesting definitions for disability, accessibility and other terms, because those things must remain flexible over time. We proposed a system that enables people to define these terms themselves today and allows these terms to evolve to reflect the experiences of our people over time so that our next generations of disability community leaders have the tools they need to continue to bring about positive change.

We do not believe that Courts or Governments should be given the legal authority to say who is or is not disabled, or “disabled enough”.

### *Scope of the proposed framework*

The research team received input from various stakeholders who noted that it was desirable to take a wider view of what accessibility legislation in New Zealand should achieve. These include accessibility for parents with young children, or language accessibility for people who speak English as a second language.

We greatly appreciated this input and support the full and effective participation of such groups, but the scope of this research is to help develop a regulatory system that is specifically aimed at identifying and removing barriers related to disabled people in line with the work of the UNCRPD. The preamble to the UNCRPD recalls a range of human rights instruments such as the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and others. But States Parties note:

*[Concern] that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world ...*

The proposed system and its orientation to universal design would undoubtedly improve accessibility for all New Zealanders, however we wish to be clear that our work is focused on a system that enhances accessibility for people with disabilities to enjoy fundamental human rights. Nonetheless, the system we have proposed does not exclude participation of others in particular domains that are relevant to wider experiences of exclusion in order to design an inclusive system.

The framework would enable disabled people to enforce their rights to have barriers identified and then removed. Because it will also bind people, and create obligations on people and organisations without impairments, it is intended to facilitate input by people who may have legal or financial responsibility for removing those barriers.

### *The importance of further consultation with stakeholders*

A legislative project of this size and importance should not be produced by one group in isolation. Meaningful input from others is a vital and intentional next step in the policy process. This report cannot perform all the work of government, and it cannot replace the voices of disabled people who face daily exclusion from society. It also cannot forecast the effects of this legislative framework on wider New Zealand health, social and economic systems or the impact on people who must comply with it. Instead, it sets out a framework in order to enable those groups to reach agreement or disagreement on the way that legislation should be drafted and how it would eventually operate. The legislation itself also enables for affected stakeholders to try to reach agreement on how barriers should be removed.

Before it is put to Cabinet, best practice according to the Legislation Guidelines requires that the legislative accessibility framework be put up for consultation in two ways. The first is with government and the second is with the public.

“It is important to consult with all relevant departments and resolve any inter-agency differences in respect of the proposed legislation before seeking Cabinet approval for both the policy papers and draft bill.”<sup>5</sup>

We note that a range of government policy instruments have enabled Government institutions to be informed of their accessibility obligations and to anticipate government work on accessibility. Beyond these, we recommend that at minimum the following groups be included in any government consultation plan:

- disabled people
- Māori and in particular disabled Māori
- Disabled Persons’ Organisations
- Domain-specific commercial entities likely to incur obligations and costs as a result of the legislative framework, for example representative businesses and commercial organisations
- Civil and human rights advocacy groups
- Labour unions and employment advocacy organisations
- Legal experts across various anticipated domains
- Technical experts and technologists
- Previous participants in development of policy instruments

The framework approach we propose is not an end point. It is intended to facilitate an ongoing process of identification and removal of barriers in consultation and partnership with affected stakeholders. We recognise that legislation has a role to play in this and we have made recommendations as to how this could operate. We must also recognise that much of this is difficult to legislate for and some cannot be legislated for. In this way, the consultation and partnership that is being developed now is just the beginning and it will not end with legislation.

### *Related work by the researchers*

Here is a selection of the work and interests of the report’s authors, to ensure transparency and to enable our work to be critically analysed in light of our experience.

- Warren Forster is the New Zealand Law Foundation International Research Fellow for 2017. He has looked widely at systems for various impairments as part of his work to rethink and build an effective system for New Zealander’s to reducing disabling experiences through the provision of person-directed supports, accommodations and healthcare in a model based upon the original vision for the ACC scheme.

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<sup>5</sup> Guidelines at 2.4.

- In 2013 and 2014, Warren Forster and Tom Barraclough were part of a team that delivered a shadow report to the United Nations concerning how the New Zealand Accident Compensation discriminated against New Zealanders on the basis of cause of disability.
- Warren Forster, Tom Barraclough, and Curtis Barnes were part of a team that conducted major research into the legal operation of the New Zealand Accident Compensation scheme through the University of Otago Legal Issues Centre. They demonstrated that injured people in New Zealand face four types of practical barrier to accessing justice under the Scheme.
- In 2017 and 2018, Warren Forster and Tom Barraclough were involved in the Disability Matters conference at Otago University and produced a summary of the conference.
- Warren Forster, Tom Barraclough and Curtis Barnes are also individually and collectively involved in other research projects related to systems that provide access to justice including how we use legal information (Judgments as Data (2020)), how technology can assist in the development of the law (Legislation as Code in New Zealand (2021)) and how people with neurodevelopmental impairment experience the justice system (research ongoing).
- Warren Forster is a director of Talk – Meet – Resolve which is dispute resolution service. Tom Barraclough is contracted as an independent complaints investigator for this company.
- Tom Barraclough and Curtis Barnes are directors of Brainbox which is an independent research and policy company focusing on emerging technologies and the law.
- Warren Forster is the director of The Know Company Limited the provide research and consultancy services.

### *Process of preparing this report*

The process of preparing this report has involved the following:

- In 2017, initial proposals for the project were offered to the Access Alliance and other stakeholders for high-level consideration, to establish the need for further research.
- The scope for a policy solution was then developed through a process of consultation and comparative analysis of overseas legislative approaches to achieving accessibility. Based on this, a preferred statutory framework approach was identified.
- The particulars of the framework were developed over several months through a process of discussion and literature analysis.
- During this time, the research team also conducted ongoing consultation with stakeholders and with the Ministry of Social Development, offering advice for shaping an effective accessibility legislative solution.
- In 2020, a draft was provided to officials in the Ministry of Social Development and the Access Alliance and consultation was undertaken.

## **Legislative design and advisory committee guidelines**

New Zealand has Legislation Guidelines produced by a specialist committee with a mandate of prompting quality legislation.<sup>6</sup> This committee produces a guideline to assist with this purpose. The Guidelines are intended to help officials ask the right questions and they have been used to help us as researchers consider the same questions. They set out three fundamental objectives for high quality legislation: that it be fit for purpose; constitutionally sound; and accessible for users. As such, the legislative framework must strive to achieve these objectives.

These core objectives are mutually reinforcing. If citizens cannot find the legislation that applies to them or if that legislation cannot be understood, then both the efficacy of the legislation and the rule of law itself are undermined. If legislation is vague about the obligations it imposes or leaves too much to people's discretion, it will create confusion and inconsistency. This places significant costs on those who are regulated. This also causes constitutional concern about the lack of legal clarity over rights and obligations.

These objectives also need to be balanced. For example, to enable legislation to be sufficiently flexible (and so fit for purpose for the future), Parliament may delegate the power to make secondary legislation to the Executive. But too much delegation of significant policy matters will undermine certainty and the legitimacy of legislation. The extent of delegation that is appropriate always needs to be judged according to the particular context and safeguards should be included to address risks posed ...

This report recommends that Government draft and adopt primary legislation. Accepting that this may prove challenging, wherever possible, the report is structured to provide information in response to the criteria suggested by the New Zealand Legislation Guidelines.<sup>7</sup> By addressing some of the key issues that arise in the accessibility context, we aim to accelerate the development of accessibility legislation. The Guidelines are published by the Legislation Design and Advisory Committee ("LDAC") and described on the LDAC website like this:

The Legislation Design and Advisory Committee is responsible for the Legislation Guidelines (2018 edition) which are a guide to making good legislation.

The Guidelines have been adopted by Cabinet<sup>8</sup> as the government's key point of reference for assessing whether draft legislation is consistent with accepted legal and constitutional principles.

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<sup>6</sup> <http://www.lac.org.nz/>

<sup>7</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/>

<sup>8</sup><https://dpmc.govt.nz/publications/co-18-1-legislation-guidelines-cabinet-requirements-and-expectations>

They are a valuable resource for public officials and government lawyers and provide advice and direction about the process of developing legislation and the need for new laws to maintain consistency with basic legal principles.

The LDAC gives the following advice on working with LDAC:<sup>9</sup>

LDAC encourages departments to [discuss legislative design issues] early in the development of policy and legislation, before policy development is too advanced or actions, such as policy decisions or announcements, are made that are difficult to reverse. LDAC may review bills after introduction through its external advisers; however, by this stage it is often too late to address significant design issues. As a result, select committee time will be used to address issues that might otherwise have been avoided.

LDAC assesses legislative proposals and new bills against these Guidelines. It may also comment on any matter relating to a legislative proposal or Bill that it considers appropriate in the interests of encouraging high quality legislation.

A Cabinet Office circular issued 20 July 2018 states:<sup>10</sup>

The Legislation Guidelines set out guidance on matters of legislative design and quality, and on matters fundamental to the rule of law in New Zealand. The guidelines are a key part of government efforts to promote quality legislation and transparency about the exercise of law-making power. They are designed to be used from early in the policy development process.

## Important contextual information for New Zealand

### *Te Tiriti o Waitangi*

The text of Te Tiriti o Waitangi provides for autonomy, protection of taonga, equal citizenship and rangatiratanga<sup>11</sup>. The Crown has obligations to Māori including in relation to protection, partnership, active participation and ultimately equity of outcomes. Not only must the accessibility system respect and reflect Te Tiriti, the process of developing it must reflect the experiences and draw upon the leadership of Māori. It is critical that engagement and co-design reflects the Crown's obligations.

We know that tāngata whaikaha Māori experience disability in ways that can amplify exclusion from social and other systems due to the intergenerational and ongoing impacts of colonisation and intersectionality of discrimination. There is a pressing obligation to progress the cause of accessibility in New Zealand. There are differing world views centred around disability and giving individuals status whereas Te Tiriti is centred

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<sup>9</sup><http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/what-is-the-legislation-design-and-advisory-committee/>

<sup>10</sup><https://dpmc.govt.nz/publications/co-18-1-legislation-guidelines-cabinet-requirements-and-expectations-at-para-2>.

<sup>11</sup> Ani Mikaere Colonising Myths – Maori Realities: He Rukuruku Whakaaro (Huia (NZ) Ltd, Wellington, 2013) at 160.

around people and their whānau, hapu and iwi based on Te Ao Māori values and principles. It is a fact that many tāngata whaikaha Māori and whānau hauā Māori view of disability is different to other world views. Te Ao Māori views disability as a part of personhood and disability does not define the person. We recognise that there are different views amongst Māori disabled and we note the work to lead discussion on reframing disability models using the concept of whānau hauā.<sup>12</sup>

### *Advocacy by people with disabilities and their allies*

For decades, people with disabilities have been advocating for the right to access and participate in the community and in social and political systems.

Within New Zealand, the Access Alliance has made a major contribution to the cause of accessibility legislation. The Access Alliance is “a group of Disabled People’s Organisations, Disability Service Providers, and Disability Advocacy Organisations. [The Alliance] want[s] all New Zealanders to work together to create a fully accessible New Zealand, where people with access needs can participate to their full potential as citizens and consumers.”<sup>13</sup>

The Access Alliance has generated a broad set of principles and a policy agenda that has received support from a wide range of social groups, as well as senior leaders in policy systems. Organisations like the Access Alliance and others have built political consensus for the development and enactment of accessibility legislation through the Parliamentary Champions of Accessibility Legislation.<sup>14</sup> The Access Alliance website states:

We know we can remove these accessibility hurdles sooner and smarter - that's why we've formed The Access Alliance, to lead change.

When we talk about access and accessibility, we are referring to our ability to engage with, use, participate in, and belong to, the world around us.

The Access Alliance proposes that the New Zealand Government introduce legislation (The Accessibility for New Zealanders Act), to ensure people with disabilities can fully participate in their communities and ensure the New Zealand economy and society can benefit from disabled people’s contributions.

Our current human rights legislation does not give organisations or businesses 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.

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<sup>12</sup> Hickey, H. and Wilson, D. *Whānau Hauā: Reframing Disability from an Indigenous Perspective* MAI Journal 2017 Vol 6 Iss 1.

<sup>13</sup> [https://www.accessalliance.org.nz/members\\_directory](https://www.accessalliance.org.nz/members_directory)

<sup>14</sup> <https://www.accessalliance.org.nz/pca>

Existing laws on “discrimination,” “equality before law,” and “reasonable accommodation” do not provide sufficient guidance to public and private sector organisations on how to design a website, provide employment, or deliver goods and services which enable people with disabilities and society to fully benefit.

The legislation will establish minimum, industry-specific national standards for accessibility for New Zealanders with disabilities. These minimum standards will apply to all areas of New Zealand life and the economy. It will set compliance standards and administrative requirements to enable national standards, and associated penalties for non-compliance, to be developed, implemented and enforced.

### *The UN Convention on the Rights of People with Disabilities*

The United Nations Convention on the Rights of People with Disabilities (“UNCRPD”) sets out the rights of people with disabilities. “Accessibility” is among these rights. The United Nations (UN) Committee on the Rights of Persons with Disabilities’ General Comment no 2 on Accessibility states that:<sup>15</sup>

Article 9 of the Convention clearly enshrines accessibility as the precondition for persons with disabilities to live independently, participate fully and equally in society, and have unrestricted enjoyment of all their human rights and fundamental freedoms on an equal basis with others.

At para 14:

the notion of equality in international law has also changed over the past decades, with the conceptual shift from formal equality to substantive equality having an impact on the duties of States parties. States’ obligation to provide accessibility is an essential part of the new duty to respect, protect and fulfil equality rights. Accessibility should therefore be considered in the context of the right to access from the specific perspective of disability. The right to access for persons with disabilities is ensured through strict implementation of accessibility standards. Barriers to access to existing objects, facilities, goods and services aimed at or open to the public shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility.

At para 28:

States parties are obliged to adopt, promulgate and monitor national accessibility standards. If no relevant legislation is in place, adopting a suitable legal framework is the first step. States parties should undertake a comprehensive review of the laws on accessibility in order to identify, monitor and address gaps in legislation and implementation. … Legislation should incorporate and be based on the principle of universal design, as required by the Convention (art. 4, para. 1

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<sup>15</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility.

(f)). It should provide for the mandatory application of accessibility standards and for sanctions, including fines, for those who fail to apply them.

At para 15:

The strict application of universal design to all new goods, products, facilities, technologies and services should ensure full, equal and unrestricted access for all potential consumers, including persons with disabilities, in a way that takes full account of their inherent dignity and diversity. It should contribute to the creation of an unrestricted chain of movement for an individual from one space to another, including movement inside particular spaces, with no barriers. Persons with disabilities and other users should be able to move in barrier-free streets, enter accessible low-floor vehicles, access information and communication, and enter and move inside universally designed buildings, using technical aids and live assistance where necessary.

New Zealand has ratified the United Nations Convention on the Right of People with Disabilities. As a party to the UN Convention, New Zealand now is required to bring accessibility standards into our system.

The concluding observations by the Committee on the Rights of Persons with Disabilities in 2014 have put the New Zealand Government on notice about its accessibility obligations under the Convention. In its concluding observations on the initial report of New Zealand, it said this:<sup>16</sup>

#### Accessibility (art. 9)

The Committee notes the review into access to building for people with disabilities which the Government commissioned in late 2013. This review is now being evaluated by a reference group.

The Committee recommends that the State party enact measures to ensure that all public buildings, as well as public web pages providing services for all, are made accessible to persons with disabilities, and recommends that consideration be given to ensuring that new future private houses are made fully accessible. The Committee also recommends that the exemption of factories and industrial premises where fewer than 10 people are employed, from the accessibility requirements of the Building Act 2004 and the Building Code, be discontinued.

The Committee prepared a list of issues for the New Zealand Government's second report. The list of issues said this about article 9 of the Convention on accessibility:<sup>17</sup>

#### 9. Please provide information about:

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<sup>16</sup> UN CRPD/C/NZL/CO/1, 31 October 2014

<sup>17</sup> UN CRPD/C/NZL/QPR/2-3, 23 March 2018

- (a) Measures taken to ensure that all public buildings are made fully accessible and that such buildings are independently audited and verified;
- (b) Progress in the implementation of the Building Act 2004 and Building Code for all factories and industrial premises, including those where fewer than 10 people are employed, which are currently exempted under the Act and the Code;
- (c) Measures taken for the provision of universal access to safe, inclusive, and accessible, green and public spaces for persons with disabilities in line with Goal 11.7 of the Sustainable Development Goals, and considering barriers faced by women, children and older persons with disabilities;
- (d) Steps to ensure that the wide application of the concept of universal design is endorsed by authorities at all levels of public service provision;
- (e) The number of wheelchair-accessible buses and taxis;
- (f) Measures taken to ensure that electronic ticketing systems for public transport and journey/travel/timetable information is accessible

The Government's response to the list of issues includes the following points:<sup>18</sup>

- "In 2018, Cabinet agreed to "commence the design of an approach to achieve a fully accessible NZ, in collaboration with stakeholders". This will include developing a common understanding of what "fully accessible" looks like and exploring the feasibility of using legislation to provide for standards and codes for accessibility. A report back to Cabinet is due in June 2019."<sup>19</sup>
- "The launch of an Accessibility Charter which is a commitment for Government to make public information and services more accessible for disabled people."<sup>20</sup>
- Further points on accessibility of information, housing, dispute resolution processes, buildings, web accessibility, assistive technologies, procurement, voting, parliamentary services, sport and sports facilities, museums, broadcasting, historic and heritage places, statistics and census policy.

In recent assessments of Australia, the United Nations Committee on the Rights of Persons with Disabilities recommended in its concluding observations that

In the light of article 9 of the Convention and its general comment No. 2 (2014) on accessibility, the Committee recommends that the State party, taking into account goal 9 and targets 11.2 and 11.7 of the Sustainable Development Goals...take the necessary legislative and policy measures... to implement the full range of accessibility obligations under the Convention.<sup>21</sup>

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<sup>18</sup> UN CRPD/C/NZL/2-3, 11 October 2019

<sup>19</sup> Ibid, page 3.

<sup>20</sup> Ibid, page 3.

<sup>21</sup> UNCRPD/C/AUS/CO/2-3, 15 October 2019 at paragraph 18.

The assessment of Canada by the United Nations Committee on the Rights of persons with disabilities recommended:<sup>22</sup>

The Committee, in line with its general comment No. 2 (2014) on accessibility, recommends that the State party:

(a) Review current accessibility legislation and plans at the federal, provincial and territorial levels to ensure that they address all features of accessibility, in particular the physical environment, transportation (including civil aviation) and information and communication, including information and communications technologies and systems, and that they comprise mechanisms to monitor and regularly evaluate compliance with accessibility standards ...and (e) Bear in mind its obligations under article 9 of the Convention while implementing Sustainable Development Goals 9 and 11 (targets 11.2 and 11.7).

A report by the New Zealand Convention Coalition Monitoring Group interviewed people for its report in 2015 on “Participation and Poverty” and found there were extensive accessibility barriers across a range of environments that undermined people’s ability to full and effectively participate in society.<sup>23</sup>

### *The UN Declaration on the Rights of Indigenous Persons*

Indigenous disability rights are recognised through the United Nations Declaration on the Rights of Indigenous Persons. The advisory note from 2019 recommended that a declaration plan be developed that included participation of indigenous persons with disabilities.<sup>24</sup>

This has been reflected in the action plan requiring Māori disabled to be front in centre in realising the UN Declaration on the Rights of Indigenous Persons.<sup>25</sup> This works calls for the implementation of existing strategies (for example Whāia Te Ao Mārama) and legislative change (for example the inclusion of equitable outcomes for Māori as a legislative goal (for example, in section 3(1)(b) of the New Zealand Public Health and Disability Act 2000)) and calls for priority to be given to tāngata whaikaha Māori to address inequality.<sup>26</sup> Developing accessibility legislation provides an another important opportunity to prioritise the role of tāngata whaikaha Māori in addressing inequality by removing barriers.

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<sup>22</sup> UNCRPD/C/CAN/CO/1, 8 May 2017 at paragraph 22.

<sup>23</sup> Article 33 Convention Coalition Monitoring Group “Disability Rights in Aotearoa New Zealand: Participation & Poverty” (2015): <https://www.odi.govt.nz/united-nations-convention-on-the-rights-of-persons-with-disabilities/nzs-monitoring-framework/monitoring-reports-and-responses/reports-from-convention-coalition/#P>

<sup>24</sup> Expert Mechanism on the Rights of Indigenous Peoples “Country Engagement Mission (8-13 April 2019) New Zealand, Advisory Note” (14 July 2019) . T

<sup>25</sup> He Puapau: Report of the Working Group on a plan to realise the UN Declaration on the Rights of Indigenous People in Aotearoa New Zealand (2019).

<sup>26</sup> Ibid, at 88.

## *Whāia Te Ao Mārama*

The Convention requirements and Te Tiriti obligations are brought together through Whāia Te Ao Mārama 2018 to 2022: The Māori Disability Action Plan.<sup>27</sup> This records that tāngata whaikaha would like to:

- i) participate in the Māori world (Te Ao Māori)
- ii) live in a world that is non-disabling
- iii) have leadership, choice and control over their disability supports
- iv) be supported to thrive, flourish and live the life they want.

The strategy records:

A significant change in this plan is that it introduces tāngata whaikaha as the term to describe a Māori person with a disability. Tāngata whaikaha describes two or more Māori people with a disability. The term tāngata whaikaha shares the optimism and future focus of Whāia Te Ao Mārama: whaikaha means ‘to have ability’ or ‘to be enabled’.

Tāngata whaikaha means people who are determined to do well, or is certainly a goal that they reach for. It fits nicely with the goals and aims of people with disabilities who are determined in some way to do well and create opportunities for themselves as opposed to being labelled, as in the past.

*Maaka Tibble, founding member of the Māori Disability Leadership Group, 2016*

Whāia Te Ao Mārama is focused on tāngata whaikaha having more choice and control over their supports and their lives. It recognises the importance of whānau as a source of strength, support, security and identity and that each whānau is different with a unique set of aspirations. It is important to support whānau so they are in the best position to support the tāngata whaikaha who is a whānau member.

## *Disability Strategy and Disability Action Plan*

The Disability Strategy and Disability Action Plan are two documents that complement each other. They are intended to be produced in close consultation with people with disabilities. They are produced as a responsibility of the Minister for Disability Issues under s 8 of the New Zealand Public Health and Disability Act 2000.<sup>28</sup> The Disability Action Plan 2019–2023 (Action Plan) aims to deliver the eight outcomes in the New Zealand Disability Strategy 2016–2026 (Disability Strategy).<sup>29</sup> Outcome 5 of the current New Zealand Disability Strategy relates to accessibility.<sup>30</sup>

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<sup>27</sup><https://www.health.govt.nz/publication/whaia-te-ao-marama-2018-2022-Māori-disability-action-plan>

<sup>28</sup> New Zealand Public Health and Disability Act 2000, s 8(2)-(5).

<sup>29</sup> <https://www.odi.govt.nz/disability-action-plan-2/>

<sup>30</sup> <https://www.odi.govt.nz/nz-disability-strategy/outcome-5-accessibility/>

Outcome 5 of the current New Zealand Disability Strategy relates to accessibility. The outcome describes “What our future looks like” with respect to accessibility and says:

We have access to warm, safe and affordable housing that meets our needs and enables us to make choices about where we go to school or work and to fully participate as members of our families, whānau and communities.

We can get from one place to another easily and safely, for example from home to school, work or to a friend’s house. We can also access all public buildings, spaces and facilities with dignity and on an equal basis with others.

We feel safe taking public transport to get around and are treated well when we do so. Our needs are also appropriately considered when planning for new transport services. Private transport services are responsive to and inclusive of us. For those of us who need it, there is access to specific transport options that are affordable, readily available and easy to use.

Information and communications are easy for us to access in formats and languages that are right for us, including in our country’s official languages of Te Reo Māori and New Zealand Sign Language. This helps us to be independent because we do not have to rely on other people. We use technology on the same basis as everyone else; those of us who need specific technology solutions will have access to these in a way that is innovative, progressive and helps to eliminate barriers. The evolving opportunities presented by new technology helps us to achieve our goals.

Our accessible communities are free of barriers (for example, access to shops, banks, entertainment, churches, parks, and so on), which enables us to participate and contribute on an equal basis with non-disabled people.

One action towards this outcome has been the production of a guide by Barrier Free NZ on “Designing buildings for access and usability” in cooperation with others and through consultation with the disability community.

There are a range of other actions which indicate the scope of access issues and the Government’s overall commitment to action in these areas, including:

- Increase accessibility of government information
- Understand the journey through the justice sector
- Investigate opportunities for technology
- Develop framework for understanding costs of disability
- Implement transport stocktake recommendations
- Implement the accessibility plan – public buildings
- Understand the impact of disability housing needs

### *The Accessibility Charter*

The accessibility charter was launched by the Ministry of Social Development on 15 February 2018. The Hon Carmel Sepuloni, the Minister for Social Development “said that

she expected that all government agencies will sign the Charter". As at 30 June 2020, 38 of the 39 government agencies had signed the Charter.<sup>31</sup>

The Minister said in a media statement dated 3 December 2018:

The Accessibility Guide gives the state sector guidance on how to increase accessibility to information using inclusive language and design, and alternate formats such as New Zealand Sign Language, Easy Read, and Braille.

The guide will be used by Government agencies that have signed up to the Government's Accessibility Charter, which ensures that communication, services and information provided by state sector agencies is available to everyone.

...

"Accessibility to housing, transport, information, and communications allows disabled people to work, have a home, participate in their communities, get an education, use public transport and be informed.

"As Disability Issues Minister I know there is still more work to be done in this space and I am working with government Ministers and the disability sector to understand ways we can make progress."

The Office for Disability Issues sits within the Ministry of Social Development as a government agency responsible for giving effect to government policy.

## Why is legislation the right tool for this policy?

Outcome 5 of the current New Zealand Disability Strategy relates to accessibility.

Building on the background recommendations of the UNCRPD, the Access Alliance and others, we believe that to achieve the policy objective, legislation is required for the following reasons:<sup>32</sup>

1. Development of standards must follow a consistent method that can be improved as each domain is covered.
2. Consultation requires coordination and central organisation in order to be targeted, consistent and efficient. We recommend a standard on consultation be considered as a priority for development.
3. There is a wide range of affected stakeholders who must be heard. Standards will involve limitations on the rights and obligations of New Zealand citizens and businesses, which obliges the opportunity for democratic participation in the development of those standards.
4. Accessibility requirements can often be read down as a matter of interpretation, and legislative enactment would create a clear directive from Parliament as to its

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<sup>31</sup> Minister Sepuloni, 30 June 2020.

<sup>32</sup> Cabinet Manual para 7.23; Legislation Guidelines, Chapter 2, part 3.

intent, and sufficient interpretive material to ensure the policy intent of the legislation is given effect through statutory interpretation.

5. Democratic oversight is required because the subject matter relates to rights protected under international human rights instruments, for which the Government will be held accountable by international bodies like the United Nations.
6. The policy objective of the Act is to bring removal of accessibility barriers out of the policy space where they are voluntary into a domain governed by the rule of law. The current situation involves creation of voluntary accessibility standards, and that has not been sufficient to make Aotearoa accessible.
7. There must be consequences for a failure to comply with obligations: while we propose that standards be non-enforceable for a period while they are developed and tested with the community, the consequence of failure to comply with the standards will be that the standards become enforceable. This creates an immediate incentive on businesses and others to comply even with non-enforceable standards, due to the ability to monitor the situation and then make them enforceable if sufficient evidence emerges of systemic non-compliance.
8. To the extent that existing legislation operates to remove accessibility barriers, it is diffused across the statute book, and often does not have an explicit purpose of improving the accessibility of New Zealand. This means that even if some aspects of accessibility can be enforced by affected individuals or groups through the judicial system, these provisions risk being “read down” or limited by various “reasonable” limits that are a necessary part of non-discrimination regimes.
9. The various elements of the system must be set in a way that makes them independent of political and electoral cycles to enable long term planning over decades, and to ensure that the way the parts of the system interact can be shaped into enduring institutional practices.
10. Recognising accessibility rights as a matter of law could create far-reaching impacts for New Zealand’s legal, economic and social systems. For that reason, it is important that Parliament, the Executive, and the Judiciary be given clear guidance as to the kinds of actions that are anticipated and provided for, and the kinds of actions that are not intended to be incorporated. For example, this Act could require significant changes to electoral processes. What are the kinds of changes that Parliament anticipates and accepts, and the kinds of changes that might be unintended or undesirable?

# CHAPTER 2

## OVERVIEW OF POLICY OBJECTIVE AND PURPOSE

### Summary

In this chapter we set out the **key policy objective of accessibility legislation**: a legal framework for enabling New Zealanders with impairments to develop and enforce standards that require identifiable people and institutions to remove barriers to their participation in society.

We then set out the **purpose of the legislation**: to create a legal framework that can balance the various interests of the groups involved in order to create enduring and sustainable progressive realisation of the human rights of people with disabilities and impairments.

We then explain **our legislative design**: a framework model with processes for consultation, development of standards, enforcement of standards, and an accountable institution for facilitating that process.

Relevant questions from the Legislation Guidelines include:<sup>33</sup>

1. Is the policy objective and purpose of the legislation clearly defined?
2. Do all the provisions of the proposed legislation clearly relate to the policy objective and purpose of the proposed legislation?
3. Is legislation the most appropriate way to achieve the policy objective?
4. Has there been appropriate consultation within the government?
5. Has effective consultation with the public occurred?

### Problem definition

The 2013 New Zealand Disability Survey estimated that 24% of New Zealanders were disabled.<sup>34</sup> New Zealanders living with impairment face barriers that affect many aspects of everyday life. Encountering these barriers are a large part of the unwanted disabling experiences that many of our people must tolerate, find work-arounds for, or otherwise be excluded from aspects of society that others enjoy freely. Often there is no effective way for those living with disabilities to bring such barriers to the attention of decision

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<sup>33</sup> Chapter 2, Legislation Guidelines.

<sup>34</sup> <https://www.health.govt.nz/our-work/populations/Māori-health/tatau-kahukura-Māori-health-statistics/nga-mana-hauora-tutuhu-health-status-indicators/disability>. See also <<https://www.odi.govt.nz/home/about-disability/key-facts-about-disability-in-new-zealand/>>

makers, and no way to ensure that these barriers are removed. Finding a systemic solution for this problem is long overdue.

The problem of inaccessibility exists beyond the physical environment:<sup>35</sup>

Since accessibility is often viewed narrowly, as accessibility to the built environment (which is significant, but only one aspect of access for persons with disabilities), States parties should strive systematically and continuously to raise awareness about accessibility among all relevant stakeholders. The all-encompassing nature of accessibility should be addressed, providing for access to the physical environment, transportation, information and communication, and services.

A General Comment on accessibility by the Committee on the CRPD distinguishes between “accessibility” and “reasonable accommodation”:<sup>36</sup>

Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. Accessibility standards must be broad and standardized. In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access. In such cases, reasonable accommodation may apply.

Currently, the main mechanisms for drawing attention to discrimination and failure to remove barriers in individual cases are under the Human Rights Act 1993<sup>37</sup> and through a series of voluntary standards. Unfortunately, these mechanisms lack a coherent system focus and have proven highly impractical and ineffective in making Aotearoa New Zealand accessible. Taking legal action under the Human Rights Act is slow and very burdensome on individual people with disabilities. Voluntary standards are difficult to enforce in a situation where there is disagreement about whether they apply, or what they require. Human Rights standards around reasonable accommodation currently delegate too much responsibility onto judicial or executive bodies to determine what is “reasonable”. This means those bodies do not have enough certainty or guidance on what is reasonable in the circumstances.

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<sup>35</sup> General comment No. 2 (2014) Article 9: Accessibility, para 35.

<sup>36</sup> General comment No. 2 (2014) Article 9: Accessibility, para 25.

<sup>37</sup> Complaints about discrimination on the grounds of disability made up 29% of complaints to the Human Rights Commission in 2018/2019 and 34% of complaints in 2017/2018.

The reality is that voluntary standards and the Human Rights Act approach are generally ineffective at system-wide and systematic identification and removal of barriers. In other words, they have not solved the problem of inaccessibility, and are unlikely to do so.

## Policy objective

**The core policy objective of the legislation** is a legal framework for enabling New Zealanders with impairments to develop and enforce standards that require identifiable people and institutions to remove barriers to their participation in society.

The policy objective of the Act should be informed by the following principles:

- Effectiveness
- Progressive realisation, including robust timelines and measurable timeliness
- Consultation and inclusion
- Accessibility of processes and legislation
- Systemic improvement and measurement
- Social model and human rights model of disability
- Systemic improvement and measurement
- Respect for civil and human rights
- Equality

The legislative framework should create an effective system of law, policy, institutions and processes that performs the following functions:

1. enables barriers to an accessible Aotearoa to be identified and recorded;
2. raises awareness of how barriers produce disabling experiences for disabled people;
3. encourages the prevention and removal of barriers once they have been identified;
4. gives clarity on how barriers can be removed and who is responsible for removing them;
5. through an accessible process, develops and implements accessibility standards, which provide detailed guidance on how barriers will be identified and removed;
6. integrates applicable accessibility standards into the activities of all persons in Aotearoa New Zealand;
7. ensures people are consulted in the development of accessibility standards and informed about their rights, duties and responsibilities; and
8. provides access to justice and choice and control for people who experience disability as a result of accessibility barriers; and
9. makes use of all available data to measure operation of the system.

## System boundaries and interactions

Like any system, the boundaries between the future accessibility system and the existing systems for providing personal accommodation, supports, and reasonable accommodations need to be carefully considered.

These systems for providing health, income support, habilitation and rehabilitation, and personal accommodations and supports are themselves fragmented between (amongst others) the accident compensation system, the social welfare system and the health system. Transformation of these is currently the subject of research focusing on the creation of a single system that applies regardless of cause of impairment (this research will be launched in late 2021).

Similarly, the system for enforcing non-discrimination and providing reasonable accommodation between individuals (and also between people and organisations) is currently administered by the Human Rights Commission and the Human Rights Review Tribunal.

These boundaries are not static and will likely change over time as the accessibility system matures. Boundaries should be considered both as part of the ensuing policy work on developing accessibility legislation and during periodic reviews of the legislative system that will occur over time. As people make notifications about barriers in accordance with this system, it will be operationally expedient to dismiss or ignore people's disabling experiences if these fall on the wrong side of a boundary line. We encourage data to be kept in order to inform reforms in years to come.

Key boundary questions include the interaction between the accessibility system and:

- Culture (the norms, values, ideas and behaviours of people and organisations)
- Social systems, including personal accommodations and social supports.
- Anti-discrimination and reasonable accommodation systems.

We must recognise that it is difficult to legislate cultural change, however cultural change can be fostered, and change achieved over time. We also recognise that boundaries within health and social systems are not static. There has significant work undertaken over the past decade in the disability space which is referred to as "system transformation." One example of this is Mana Whaikaha, has been co-designed with some disabled people and whānau, and others in the disability sector. It is based on the Enabling Good Lives vision and principles and aims to:

- provide disabled people and whānau with more flexible support options
- give disabled people and whānau greater decision making over their support and lives,
- improve outcomes for disabled people and whānau and,
- create a cost-effective disability support system.

## **Statutory interpretation**

Ultimately, the question of interpretation is one for Parliament and the Courts of New Zealand. When lawyers and courts are giving meaning to words, they often talk about what was “Parliament’s intent”. They are trying to establish what Parliament was intending when it made the law. To ensure that the statute is effective, we recommend that key terms are defined. This means that the legislation will include a series of words to help people and the courts clearly understand what Parliament meant when it made the law.

We note that the legal protections for disability rights can be “read down” or read restrictively. This means that when a court is doing its job of deciding what Parliament meant when Parliament put words into legislation, the court chooses a meaning which is more limited than what some disabled people think it should mean. In effect, this may prevent the legislation from achieving the full policy intent.

It is important to also note that the statute will be read as a whole, including by reference to other statutes, in order to infer Parliamentary intent. This will inform Courts and others in the way they understand what areas of society are intended to be covered by the statute. For example, one boundary issue to consider is the relationship between this Act and other decision-making systems for example under the Protection of Personal and Property Rights Act 1988 and any forthcoming legislation that provides for substituted decision making to provide choice and control for disabled people. A court would likely examine both statutes in a situation where it was called upon to answer whether matters of choice and control were intended to be covered by this Act or the other Act, or both. This boundary issue requires attention from drafters and policy people. There could be an implied exclusion of some areas of society from the scope of this Act as a result of reading this statute and statute book as a whole (i.e., in terms of historic state sexual abuse, this statute could be used to compel an accessible process, but not to create compensation remedy for historic sexual abuse).

The Legislation Guidelines point to the Parliamentary Privilege Act 2014 at s 4 as an example of including a specific section that directs readers how to interpret the Act in light of its (s 3) “main purposes” and “subsidiary purposes … to help it to achieve its main purposes…”:

### **4      Interpretation of this Act**

- (1)     This Act must be interpreted in a way that—
  - (a)    promotes its main and subsidiary purposes; and
  - (b)    promotes the principle of comity …; and
  - (c)    ensures privileges, immunities, and powers of the House of Representatives, its committees, and its members are exercisable for the purpose stated in section 7.
- (2)     Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.

This kind of purpose clause using accessible language could be used to shape subsequent statutory interpretation and make Parliament's intent clear.

## KEY CONCEPTS TO REFLECT IN LEGISLATION

The legislation must be designed around some key concepts which form the building blocks of the legislative scheme. The interactions between these building blocks, and the systems for giving effect to them, create the rules and obligations that will be imposed on people subject to the legislation. Some concepts should not be defined in legislation because they are intended to be flexible, or they are difficult to conclusively define. Concepts that are addressed within the legislation's wording will inform the way that the words of the legislation are interpreted by Courts, Government and the public.

The key concepts collated here are subsequently explained in this section:

- The Social Model of Disability, including barriers, impairments, and disabling experiences
- Environments
- Domains
- A barrier
- Identification of a barrier
- Removal of a barrier
- Accessible (or accessibility)
- Enforceable and non-enforceable standards
- Principle of universal design
- Disabling experience
- Impairment
- Language and communication
- Public / Private
- Decision-making (by entity and by Ministers)
- Public education and awareness
- Notification (to specific individuals or groups)
- Publication (of materials to the community at large, ie standards)
- Accessibility standard
- Inclusion

Below we provide definitions and summaries for these key concepts.

*The Social Model of Disability: Barriers and impairments interact to cause disability experience*

The Convention on the Rights of Persons with Disabilities adopts a social model of disability. The preamble to the Convention includes the following paragraph (e):

“(e) Recognizing that disability is an evolving concept and that **disability results from** the interaction between **persons with impairments** and attitudinal and

environmental **barriers** that hinders their **full and effective participation in society on an equal basis with others**,<sup>38</sup>

A central purpose of the Convention is that, despite a range of human rights instruments and undertakings by States, people with disabilities (or people with impairments) still experience exclusion from society *because of* their impairments, and this is unjustifiable. Member states (including New Zealand) agreed that they were:

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

Article 1 of the Convention states its purpose:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The social model of disability given force in international law through the Convention therefore emphasises that a person with impairments experiences disability because of barriers that interact with their impairments, and have the effect of excluding those people from full and effective participation in society on an equal basis with others. The Convention therefore creates some crucial concepts which we adopt as the core building blocks for our legislative design:

- People have **impairments**;
- There are **barriers** in the environment and in society;
- **Disabling experiences** exclude people from full and effective participation in society on an equal basis with others. These can be caused by barriers or how systems are structured to provide personal supports and accommodations, or by discrimination.
- This legislative model is focused on disabling experiences that **result from the interaction** between barriers and peoples' impairments, and this exclusive experience is something which it is desirable to reduce.

We have considered whether the word “impairment” is consistent with the overall policy of our legislative design. The use of a concept of “impairment” may make some people uncomfortable. The word “impairment” may imply that a person is being measured against an abstract standard of what is “normal”, which is ableist and results in discriminatory attitudes. Further, the word impairment may imply that the way that someone’s body works is inherently negative or dysfunctional. We do not intend to import that negative association into this legislative framework. We adopt the terminology in use in the Convention: impairment. It may be that, after consultation, New Zealanders can

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<sup>38</sup> Preamble to the CRPD at para (e).

identify a better word than impairment, which reflects the way that human beings are all “impaired” in one way or another at some time in their lives, and that this variety of function and ability can be a desirable and advantageous feature of human diversity.

### *Environments*

Accessibility is all about disabled people being able to access various environments, whether physical, digital or social. For the purposes of guiding the design of the legislation, an environment is somewhere where a person exists (or a space they wish to occupy). Environments contain different features. Some of these features can be barriers which disable people. Including the concept of an environment in the legislative scheme is important for considering what disabled people are being excluded from, and what is causing them to be excluded. Further, the concept of “an environment” is necessary to enable policymakers and affected people to be able to carve various environments up into domains, which create conceptual and organisational categories for designing and implementing accessibility standards. Importantly, many domains can exist in a single environment and most domains exist across multiple environments

### *Domains*

Domains are subsets within wider environments. They are useful organising concepts that enable related features within an environment to be considered together. For the purposes of this framework, a “domain” could include the built environment, a digital environment, the provision of public information, and any other area prescribed by regulation. Frequently, existing accessibility standards are framed in relation to particular domains: for example, web accessibility standards,<sup>39</sup> or public transportation accessibility plans,<sup>40</sup> or the government accessibility charter.<sup>41</sup>

These domains contain related features which interact in obvious or less obvious ways. Individuals engage with these features to achieve predictable goals. For example, “transportation” is a domain that contains a range of features like vehicles, information, rule sets, and physical networks like roads and walkways. People interact with these features to move from place to place.

Multiple domains may interact within a single environment. For instance, a person with a mobility impairment may be excluded from public transport because of digital barriers that inhibit access to relevant information, or physical barriers that exclude them from accessing or operating a vehicle.

We recognise that there is scope to consider what qualifies as an accessibility domain. Leaving this scope open and undefined within the legislation will allow different domains to be established over time. This in turn accommodates future social and technological

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<sup>39</sup> See for example: <https://www.digital.govt.nz/standards-and-guidance/design-and-ux/accessibility/>

<sup>40</sup> See for example: [https://at.govt.nz/media/1981544/item-101-attachment-1-accessibility-action-plan\\_.pdf](https://at.govt.nz/media/1981544/item-101-attachment-1-accessibility-action-plan_.pdf)

<sup>41</sup> See for example: <https://www.accessibilitycharter.org>

developments which may not be anticipated by prescribed domains. For this reason, we do not believe that the legislation should prescribe a list of domains.

Domains can also be used to point to areas that are overlooked. The General Comment on article 9 notes that:<sup>42</sup>

Disability laws often fail to include ICT in their definition of accessibility, and disability rights laws concerned with non-discriminatory access in areas such as procurement, employment and education often fail to include access to ICT and the many goods and services central to modern society that are offered through ICT.

Any legislation will have to take care not to set various domains of accessibility in a way that prevents their application to situations as they arise. Careful drafting decisions must be made to preserve the intended policy of the legislation, which is to flexibly allow the articulation of new standards in various domains in relation to technological and social developments.

An enactment applies to circumstances as they arise (see section 6 of the Interpretation Act 1999): If possible legislation should be “future-proofed” by ensuring that it is flexible enough to properly address foreseeable developments in technology or society generally.<sup>43</sup>

Here are some examples of domains that are often used, and could also be used in standard development. To be clear, we do not recommend that these be specified in the legislation and if a political decision is made to do so, there must be careful consideration of how this might limit or facilitate the overall legislative purpose and explicitly address how a single environment for example a person’s home may involve many overlapping domains (housing, customer service, digital information systems, communications, building compliance), and a single domain (for example consultation, customer service or digital information systems) may cut across many different environments.

- Housing
- Procurement
- Employment
- Transportation
- Digital and information systems
- Broadcasting and communication
- Educational
- Attitudinal
- Hospitality
- Retail
- Customer service
- Political and democratic processes

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<sup>42</sup> At para 28.

<sup>43</sup> Legislation Guidelines chapter 13 part 1.

- Access to justice processes
- Supported decision-making
- Health systems
- Social support systems and social welfare
- Building compliance
- Consultation
- Justice systems including court processes and non-court processes

Legislation cannot tell New Zealanders how to set these domains, or how to prioritise these domains when it comes to the standard development process. There are also important questions of effectiveness and efficiency that require input from across New Zealand society. Relevant policy considerations include:

1. What is the most effective way to organise or “carve up” the various areas of society that create accessibility barriers? For example, how do people organise various aspects of their life (home, work, social, health), which areas have the strongest overlap in terms of responsible government agencies, or relevant legislation or policy standards, such that effort can be organised effectively from a policy perspective? Which areas are already sufficiently formalised so that creating an enforceable or non-enforceable standard will happen as quickly as possible?
2. Which domains currently operate to create the greatest exclusionary effect on people with disabilities?
3. Which domains present the opportunity for the greatest impact in the shortest period within existing resource constraints?
4. Who gets to decide these things and what process must they follow? Ideally, the legislation would guide this process.

### *A barrier*

A barrier is a negative feature of an environment. For the purposes of the legislation, the reason that the feature is negative is because it interacts with a person’s impairments to prevent that person from full and effective participation in society.<sup>44</sup> A barrier should be defined in the statute in a way that permits the legislation to adapt to new barriers and circumstances as they arise.<sup>45</sup>

Anything can be a barrier, so long as it is negative in the way described. Some barriers will be the direct result of decisions in the way an environment has been designed, built, or delivered. Others will be natural barriers arising in un-built environments. When it comes to procurement and design, the principle of universal design will be relevant.

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<sup>44</sup> This is based upon the UNCRPD definition and the definitions set out in the Canadian Federal legislation and others without the specific domains being mentioned.

<sup>45</sup> Interpretation Act 1999, s 6: “An enactment applies to circumstances as they arise”.

### *Principle of universal design*

Universal design means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. Universal design shall not exclude assistive devices for groups of persons with disabilities where this is needed.

Removal of barriers through standards will include “designing away” barriers before they can operate to exclude or disable people. Universal design is a critical tool in achieving the overall long-term vision of the Act.

### *Identification of a barrier*

People within various environments may encounter barriers during their day-to-day lives which they may or may not report to decisionmakers. Decisionmakers identify barriers from the reports of users, or from a process of consultation, planning, and careful analysis.

In order to create standards that remove barriers, those barriers first must be identified. The Act will need to create a process for barriers to be identified and recorded, both before and after standards are developed. Barriers will have to be identified at an appropriate level of generality: for example, a barrier could be a particular absence of kerb-cuts on a person’s street; or it could be a nationwide absence of kerb cuts in some places. The process by which barriers are made known to the community and to the regulator is through an “identification” process set out in the Act, consistent with the standard development and monitoring processes.

### *Removal of a barrier*

Once identification of a barrier has occurred, a process for removing the barrier should be engaged.

A barrier can be said to be removed either when the feature is taken out of the environment, or when positive features are added to the environment that nullify it. For the purposes of this legislation, the reason that such features are positive is because they facilitate fuller and more effective participation of a person within society.

“Removal of a barrier” should not be confused with mitigating the effects of a barrier for an individual. Removing the effects of a barrier for an individual in a particular case is reasonable accommodation, and sits within a human rights and non-discrimination framework.

### *Accessible*

In the widest sense, something is accessible if it is without barriers.

Procedurally, something is accessible when it complies with a standard.

Of course, it is possible that any standard that is developed to ensure a given domain is accessible in the widest sense may not achieve that goal. In that case, the standard

would only be accessible in a procedural sense, and not a practical one. It would need to be revisited and revised.

This concept allows for the people with disabilities to control the relationship between the barrier and the disabling experience. The social model of disability is that human decisions result in environments which are incompatible with impairments. For example, decisions about design of environments are usually made non-disabled people in mind. The result is that the environment often contains physical or cognitive features which are difficult for disabled people to navigate. These features amount to barriers, and the result is that the environment is inaccessible to some people.

### *Accessibility standard*

A standard is a set of objectives, policies, methods, principles and rules that describe what must be done to be compliant with the Act and who is responsible for doing it.<sup>46</sup> We consider that the definition of accessibility standard should be a limiting definition for example:

A standard made under this act.<sup>47</sup>

These standards are the primary legislative tools used to reduce barriers. These standards require significant flexibility, but at minimum must address:

- What identified barrier(s) they are intended to reduce or how they intend to reduce the disability experienced as a result of the barrier.
- Whether they are enforceable or non-enforceable, and in what respects.
- Who is subject to the standard, including government and non-government actors.
- Timetable for application (when do they apply and to whom) and how will they become enforceable.
- How any costs of implementation will be met (or funding arrangements).
- How compliance with the accessibility standard will be enforced.
- How the effectiveness of the accessibility standard will be measured.
- When that accessibility standard will be reviewed.

It is expected that much of this will be set out in the legislative framework. However, by requiring these issues to be addressed in the specific standards development process, it provides the necessary flexibility to enable standards to be applied to particular domains with their unique existing legislative and policy settings.

It is also important that legislative standards are not seen as a “one-off” solution. Standards will change over time both proactively in response to changes in environments and as barriers continue to emerge within the relevant domains. For example, technology standards change quickly as new developments arise. If regulations are made specifying an international standard be complied with, by the time they have been through the

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<sup>46</sup> Compare ss 58C, Resource Management Act 1991.

<sup>47</sup> See for example the provincial accessibility legislation in Ontario, Manitoba and Nova Scotia.

process, they might be out-dated. Similarly, if a standard was developed around employment, it hypothetically could start with accessibility to workplaces, then over time that standard may be reviewed and expanded to other things, like access to employment and equality of remuneration. We consider that requiring review of the standard will assist with maintaining momentum and progressive realisation.

### *Enforceable and non-enforceable standards*

Terminology like “voluntary” or “binding or non-binding” implies a choice about whether to comply that is inconsistent with the purpose and principles of the Act. Instead, we prefer an emphasis on enforceability: all standards may, when there has been enough consultation and testing of them, become enforceable. Standards that are non-enforceable will be that way because of a deliberate policy decision to do with the overall effectiveness of the Act, not because Accessibility is a matter of choice.

### *Disabling experience*

Disabling experiences are the experiences of persons with impairment when impeded from full and effective participation in society on an equal basis with others.<sup>48</sup>

Some disabling experiences are caused by barriers, for example when a barrier contributes to the impediment. Other disabling experiences are caused by systemic or individual discrimination, or by the failure of the state to provide personal accommodations and supports.

It is important to understand that an accessibility system as it is currently conceptualised addresses the barrier issue but does not address the personal accommodation and supports issue, or the discrimination and the failure to provide reasonable accommodations issues.

### *Impairment*

Impairment includes what are currently categorised as physical, mental, sensory, communication, developmental or age-related impairment.

Impairment must be expansively defined and must move away from the existing systems which require impairment to fit into an outdated “box” as a prerequisite to accessing government systems.

We recommend that an extending definition is adopted in the legislation so that impairment includes:<sup>49</sup>

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<sup>48</sup> Taken from preamble to Convention at (e) and modified beyond “disability”. Note that this is much wider than accessibility.

<sup>49</sup> We note that there are different uses of terms by the United Nations Committee on the Rights of Persons with Disabilities and the New Zealand legal system. Other possible descriptive terms include “mental”, “intellectual”, “neurodiverse” and others.

Physical, sensory, psychosocial, learning, neurodevelopmental, communication and age-related impairments.

Many systems define “disability” by relation to the type of impairment.<sup>50</sup> We have concluded that it is not appropriate for us to define disability. We consider that the impairment itself should be included as a key idea because of its relationship to the identification of barriers. Including a definition of impairment enables barriers to be identified. It also allows emphasis to be placed on the way that barriers interact with impairments to cause disabling experiences, without creating boundaries or separations between groups of people with impairments that have the effect of defining “disability”. Disability, according to the Convention, is an evolving concept. This legislative model must allow for this evolution to occur in the decades to come.

We have included communication impairments within this concept. We note that the broadness of this term might allow language-related matters unrelated to impairments to be brought into the impairment definition. Our intention is that, at least initially, the Act is directed to impairments holistically understood, consistent with the framing of the CRPD. A communication impairment would not be caught by the definition in the Act unless it related to a bodily feature or function, for example, so it would exclude people who speak English as a second language from being considered “impaired” and therefore from experiencing “disability” because of their language.<sup>51</sup>

Communication includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.<sup>52</sup>

The idea is that language as it related to communication impairment is included within the accessibility system and language includes spoken and signed languages and other forms of non-spoken languages.<sup>53</sup>

#### *Public / Private – or Government/non-government*

Accessibility standards must account for private entities and individuals and cannot be restricted to government or public agencies only. Each accessibility standard must have concepts available to it in the primary legislation to enable that standard to be applied in a targeted and selective way to particular groups or individuals, or to everyone.

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<sup>50</sup> See for example the provincial accessibility legislation in Ontario, Nova Scotia, and the Canadian federal legislation.

<sup>51</sup> It does not follow that people who speak English as second language (for example refugees) are excluded from this process. We expect that the independent body will draw on wider users of systems who experience barriers when considering standards in relevant domains. In the same way young parents experience barriers related to the needs of their children. When relevant barriers are being considered, it is sensible to include consultation with all affected groups.

<sup>52</sup> UNCRPD, art 2.

<sup>53</sup> Taken from the text of the UNCRPD.

Some options we can think of to enable this targeting exercise include:

- Public or private
- Government (for example the 39 government agencies) or non-government
- The characteristics of the organisation (for example if the organisation is fulfilling a public function, power or duty)<sup>54</sup>

We recommend that a range of definitions be adopted in the primary legislation that could then apply to the standards as they are developed. This will minimise disagreement in the standards development process and ensure consistency across standards. We suggest this is done through a statutory framework requiring this to be addressed during the standard development process.

One example would be whether all websites hosted in New Zealand are required to be accessible, or whether all government websites would be required to be accessible, or whether all websites of organisations that fulfil a public power or function are required to be accessible regardless of whether the website is hosted in New Zealand or not.

Another example includes accessible buildings or bathrooms. A standard might require all public places to be accessible or all private houses, or alternatively in all government buildings and then in all public places and then over time particular new private dwellings.

#### *Independent Body and Regulator*

One of the key policy decisions to be made is what institutional structure will operate this accessibility system. We recommend that an independent regulator rather than a department or ministry is formed, however we recognise that there will be different views on the institutional structure.

- We use the term independent body (or independent public body) to describe the fact that it is independent from the Government. We use this term when independence is critical. This could be an independent commissioner (for example a Disability Commissioner or an Accessibility Commissioner) or it could be an independent body that also acts as a regulator.
- We use the term Regulator to refer to the function of the organisation which it regulates. An example of this is WorkSafe.

We recognise that the independent body could also be a regulator because this organisation would be both independent from the Government and fulfil the functions and powers of a Regulator. We have proceeded in this report on the basis that there will be a single independent body that also acts as a regulator.

We also recognise that an independent disability commissioner could be established to work alongside an accessibility regulator. They could administer the notification process at Chapter 6, co-ordinate the interfaces between the barrier removal system and the non-

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<sup>54</sup> For example, the test in the New Zealand Bill of Rights Act 1990 at s 3

discrimination system and the state run personal supports, accommodations and healthcare system. In this way, an independent disability commissioner would have overall responsibility for removing disabling experiences and interfacing with the three systems to do so.

#### *Decision-making (by entity and by Ministers)*

There are a number of decisions that must be made by the legislative system. These can be separated into two categories of decisions.

At a system level, these decisions include a programme for the development of the accessibility standards, the existence and emergence of barriers, and the substantive accessibility standards to remove barriers. We recommend that these system level decisions be made by an independent body following a process of consultation. These decisions will not be subject to statutory process of dispute resolution and appeal set out in the Act, however standard public and administrative law will apply to these.

The regulator will also need to make decisions about whether accessibility standards are being breached in individual cases, and if so to ensure compliance through a system of infringement notices and penalties. These individual decisions of the regulator in relation to regulatory compliance are subject to a statutory process of dispute resolution, independent oversight by a court and appeals on questions of law.

#### *Public education and awareness*

We recognise that a large requirement of developing social licence and building compliance will be through public education and awareness raising. We consider that this should be part of the functions of the independent body.

People must feel empowered to notify about disabling experiences and help identify barriers, rather than be required to identify non-compliance with enforceable accessibility standards.

#### *Publication of accessibility standards*

During the accessibility standards development process, and afterwards, there must be publication of draft standards and finalised accessibility standards. The normal process requires these to be gazetted. We recommend that publication be made in accessible formats and as widely as possible.

#### *Notification by individuals or organisations*

The process of identifying the existence of barriers is primarily reliant on people notifying the independent body of disabling experiences within various environments.

It is critical to the success of this accessibility legislation that people with lived experience be given a central role in this notification process both individually or through Disabled Persons Organisations.

Once notified, the independent body will consider:

Whether barriers exist within the environment.

Whether there are existing accessibility standards that apply to that environment and if so, whether those accessibility standards are being complied with.

Whether accessibility standards are in the process of development and if so, whether the accessibility standards, once implemented, would remove the barrier.

Whether the disabling experience caused by the barrier remains after the standards have been complied with.

The notification process must itself be designed to be accessible and inclusive. We envisage a range of notification processes from the use of apps which could record the issue, its location and a photo of the issue, through to a phone or a translation service. The focus must be on maximising the notification of barriers in order to allow system learning to be developed.

## **Concepts that should not be defined in this legislation, but inform the policy**

There are a range of crucial disability concepts that inform the design of this legislation, and should be accounted for in its overall policy objectives, but should not be defined specifically in the legislation itself.

- Disability
- Accessibility
- Access, access by, access for
- Equality
- Inclusion
- Choice and control Access to justice

### *Disability*

Disability is a complex idea, interpreted differently by a variety of people and stakeholders. It is not within the scope of our research to define “disability” – we do not feel well-placed to do so, and we believe it is not necessary to the success of the project. If it is decided that “disability” must be defined in order to implement a legislative framework, we consider that persons with disabilities are best placed to lead these conversations.

Instead, we use the concept of a “disabling experience”, to recognise the social model of disability. This acknowledges that frequently it is the undesired disabling experience that people want to design away, and not the “disability” itself. We believe that an appropriate legislative system can achieve this to a significant degree.

## *Accessibility*

There are different views amongst stakeholders regarding the term “accessibility”. The UN acknowledges this confusion.<sup>55</sup> There are many different ways people understand the ideas of “accessibility”, “access to” certain things, or “equality”.

We note that much accessibility legislation throughout the world has developed in a piecemeal fashion. In our opinion, this has contributed to confusion.

Most legislative models enacted in the Canadian Provinces are modelled on Ontario’s system. This was developed independently between 1994 and 2004 (prior to the development of the UNCRPD). The approach was ground-breaking. It speaks to the idea of “accessibility” with a different voice to that of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). One important difference is that the UNCRPD not only provides for “accessibility” but also “access to” things, for things to be provided on an “equal basis with others”, and “equality”.

This can be demonstrated by the example of “employment”. The “accessibility” requirement in the UNCRPD relates to workplaces. Nonetheless, creating “accessibility” for workplaces does not provide employment in and of itself, because “access to” the things required to get a job, for example education and vocational training, must also be provided to increase the likelihood of employment. Personal accommodations and supports can also be required for example powered wheelchairs or sign language interpreters. The next step is actual employment. The journey towards equality would be nearing its end when remuneration for that work was on an equal basis with others.

Legislating for ‘equality’ and developing legislative standards which require ‘equality’ by a target date (e.g. equality by 2030) are unlikely to be effective unless these legislative standards identify the barriers that exist at each of these steps and allow a way for these to be removed while preventing new barriers from being developed.

Similarly, legislating for “accessibility” in a narrow sense (as defined by the UNCRPD at Article 9) would allow for standards to be developed to achieve accessibility in a limited sense within a timeframe. We do not think that this will be effective in ensuring the wider goals of the UNCRPD (access to, access for and equality) are met.

For the legislation, we prefer not to define accessibility however we note our preferred conceptualisation for accessibility is based on the absence of barriers or being barrier-free. Something will be “accessible” when there are minimal barriers between users and that which they wish to use. By extension, the process of pursuing “accessibility” is a process of removing existing barriers, and ensuring that new barriers do not come into existence.

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<sup>55</sup> See Francesco Seatzu “Article 9 [Accessibility]” in V de Fina, R Cera, G Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (Springer International Publishing Switzerland, 2017) at p 338 et seq.

There is an important legal question about how the enactment of accessibility legislation might come to influence the interpretation of “accessibility” or “access” requirements in other legislation. This will have to be carefully considered during the standards development process. For example, the Electronic Transactions Act 2002 uses the word “accessible” in provisions such as s 28(b). An argument could be made that: s 28(b) uses the word “accessible” must be read consistently with NZ’s international obligations (CRPD); that New Zealand has a legislative regime for accessibility that sets out what the NZ government says people must do to comply with its international obligations; and that therefore the word “accessible” must be given a meaning consistent with that Act where possible. The effect of that argument could be that the legal requirement to “provide or produce” something in paper form is not met by holding it in digital form if “the information is [not] readily accessible so as to be usable for subsequent reference.

#### *“Access”, “access by”, “access for”, and “accessibility”*

The United Nations Convention on the Rights of Persons with Disabilities defines accessibility at article 9. It also contains numerous references to “accessible”,<sup>56</sup> “accessibility”,<sup>57</sup> “access to”,<sup>58</sup> and other “access”,<sup>59</sup> including “access by” and “access for”.

We consider that by taking the approach of focusing on identifying and removing barriers rather than differences in language between accessibility and access to, over time, the system will move from Accessibility at article 9 to access to the rights throughout the convention towards equality.

#### *Equality*

For the purposes of this framework, equality means to have access to those things that will give a person opportunity to participate in society on an equal basis with others.

We do not consider that defining equality in legislation or prescribing this as a purpose or an end state of legislative enactment will be effective. By allowing barriers to be identified and removed over time, the proposed accessibility system will allow progressive realisation of the UNCRPD goals and other goals including significant steps towards equality.

#### *Inclusion*

Inclusion means living, learning and participating fully in the community.<sup>60</sup>

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<sup>56</sup> Articles 2, 4(h), 9, 21, 27, 29, 30, 32.

<sup>57</sup> Preamble at (v), articles 3(f), 31.

<sup>58</sup> Articles 12, 13, 19, 23, 27, 30, 32.

<sup>59</sup> Articles 20, 21, 24, 25, 28.

<sup>60</sup> This is taken from the British Columbia definition (as a principle) and modified to reflect the UNCRPD articles 19, 24 and 26.

We recognise that others have tried to define inclusion and some general comments from the United Nations Committee on the Rights of Persons with Disabilities refer to inclusion.<sup>61</sup>

Inclusion cannot be done through removing barriers alone. Instead it is one of the outcomes of removing barriers and also providing personal supports and accommodations and an effective anti-discrimination system. We acknowledge that it is important as once barriers have been identified, solutions to remove these barriers have to be designed and one of the helpful principles to universal design will often be inclusion.

In the end, we must acknowledge that true inclusion is a social outcome, and this concept is difficult to legislate for. We consider care must be taken when considering defining “inclusion”, and attempting to enforce it in legislation.

### *Choice and control and Access to justice*

We recognise the growing momentum amongst the disability community and the corresponding response from government towards replacing substituted decision making with supported decision making and choice and control for person with impairments in order to reduce their disabling experiences.

We considered carefully whether the enforcement provisions in this legislative model could be designed in such a way as to provide mechanisms for people who experience barriers to enforce accessibility standards. We were concerned that the burden of enforcement would fall on individuals and groups and cause them to be in conflict with others. Instead we consider that the notification power should be designed in a way that removes that burden and places it on the independent body, but then requires the views of people who are experiencing barriers to be taken into account by the independent body required to enforce the standards.

We further recognise that the proposed accessibility legislative system does not provide for access to justice for individuals to enforce a right to “accessibility” and could be criticised as being inconsistent with the requirements to provide effective access to justice. We carefully considered this and instead of providing for this in our model, believe the best course of action would be to allow for an individual enforcement system to be followed through the Human Rights Commission and Human Rights Review Tribunal process in individual cases. This potential remedy would be available in cases where there is both a breach of an accessibility standard and discrimination that has an effect which is actionable under that process. We recognise that significant reform of the Human Rights Review Tribunal system is required to ensure it is accessible and effective.

We note at Chapter 6 the development of the new Government Centre for Dispute Resolution Standards which will improve access to justice, and note “accessibility” is one of those new standards for dispute resolution systems in New Zealand.

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<sup>61</sup> See for example General Comment 5 from the United Nations Committee on the Rights of Persons with Disabilities on Article 19.

# **CHAPTER 3**

## **HOW THIS LEGISLATION WOULD RELATE TO EXISTING LAW AND POLICY SYSTEMS**

This Chapter asks how accessibility legislation would fit with existing law and policy instruments.

The answer is complex. The new legislation would have to interact with many existing laws and policies. We provide guidance on how to go through step by step and work out what law exists and how it should interact with the new system.

We think government should be responsible for leading this work. We also think that much detail will be worked out when it comes to the process of establishing domains and developing individual accessibility standards.

People with disabilities will have a central role in developing these accessibility standards. People with disabilities will be able to point to the ways that existing things like the New Zealand Disability Strategy or building standards do or do not work for them. The key is for accessibility legislation to be designed to enable the way it interacts with other laws and policies to be determined carefully with a chance for everybody, including government, to be heard.

We also note that the result may be perceived to be complex and that the end state of this process will be the creation of a series of accessibility standards which could be criticised as being too complex to be fully understood. We recognise it is not reasonable to expect that people will know whether particular standards are or are not being met. It is for this reason that the notification process simply requires a disabling experience or an encounter with a barrier to be notified to the independent body. It is then for that body to consider how these fit within the standards system and how those barriers can be removed. The reason this is important is that over time, we are aiming for a system which will identify and remove barriers and reduce disabling experiences rather than achieve compliance with accessibility standards and ignore all other disabling experiences that do not breach these standards.

### **Legislation Guidelines on fit with existing law**

Chapter 3 of the Legislation Guidelines notes that, “Almost all new legislation will deal with matters that are governed to some extent by other legislation.”<sup>62</sup> Careful consideration of how this proposed legislation will fit with existing legal and policy

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<sup>62</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-3/>

instruments is essential in order to ensure that the overall policy and purpose of the Act is achieved.

... A failure to properly address existing legislation or the common law may make the law difficult to understand in its full context or lead to uncertainty or errors. Those problems may, in turn, lead to higher rates of non-compliance, litigation, or remedial legislation.

The guidelines call for policymakers and lawmakers to give attention to how new legislation will fit with other, overarching legislation. For example, the Interpretation Act 1999 and the NZBORA. Other statutes apply generally, but in relation to specific subject matter, such as the Search and Surveillance Act 2012 and the Official Information Act 1982.

Further, there will be existing legislation that is directly affected by or connected to the new legislation. There may also be a need to consider the common law, as well as previous judicial analyses of statutory provisions connected to the purpose of the proposed accessibility legislation.

Notably, accessibility considerations feature in this part of the guidelines:<sup>63</sup>

A key factor to consider is accessibility. If multiple amendments will cause the resulting law to be so complex it becomes difficult to understand, replacing the legislation should be preferred. Complexity can arise through grafting new policies onto existing frameworks so that the overall coherence of the legislation is lost. On the other hand, accessibility should be balanced against any disadvantage in disrupting settled understandings of the law.

#### *Notable questions from the guidelines:*

Relevant questions from the guidelines include:

1. Has all relevant existing legislation been identified and considered?
2. Are any conflicts or interactions between new legislation and existing legislation addressed?
3. Are any matters addressed by the new legislation covered by existing legislation?
4. Have all relevant common law rules and principles and tikanga been identified and considered?
5. Have any interactions between the common law and the new legislation been identified and addressed?
6. Does the common law already satisfactorily address those matters that the new legislation is proposing to address?
7. Are there any precedents in existing legislation?

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<sup>63</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-3/> at part 1.

## **Overview of this chapter**

The existing legal and policy instruments that will interact with the new accessibility legislation affect the following broad areas: accessibility; disability; reasonable accommodations and non-discrimination; and individualised state provision of accommodations and social supports.

This chapter sets out a framework to contribute to more detailed policy work on the way that the new legislation would fit with existing regulatory systems.

## **Four kinds of interactions between this Act and other legal and policy instruments**

We foresee four key kinds of interactions between this legislation and other acts, which we outline in this chapter. Interactions between the accessibility legislation and existing legislation will influence the design of accessibility standards. They should also influence the way domains are set and prioritised, including whether relevant standards will be enforceable immediately, or only after a period to enable voluntary compliance.

The guidelines note that duplication of machinery under other Acts can undermine the success of the overall policy:

Where a provision in existing legislation satisfactorily addresses an issue, it is preferable not to repeat that provision in new legislation. This kind of duplication often results in unintended differences, especially where legislation is amended over time or where the legislation is intended to address a different policy objective.<sup>64</sup>

The accessibility legislation may duplicate machinery or substance of existing legal and policy instruments in the following ways, which require careful attention.

1. **The Accessibility Act will structure the way that policy is set:** it will create priorities and work plans for ongoing programmes of work and consultation. This may duplicate legal and policy instruments that already structure policy-setting. One example of this might be the way that the New Zealand Public Health and Disability Act requires that a Disability Strategy be set, or the way that Crown Entities are required to engage with Government policy. The Accessibility Act will require the regulator to set priorities for the development of accessibility standards and to control the standard development process.
2. **The Accessibility Act will set policy** in ways that must be adhered to by others within government. For example, the Act may lead to the creation of standards for universal design and procurement in government. This may duplicate existing

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<sup>64</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-3/> at part 3.

legal and policy instruments such as the Disability Strategy itself, which sets government priorities in relation to the disability sector.

3. **The Accessibility Act will interact with systems that are complementary to the Accessibility system.** There are a range of legal and policy instruments that touch upon areas of the law that are complementary to the overall accessibility system, for example, in relation to supported decision making, the social welfare system, criminal law and the system of human rights and non-discrimination in relation to reasonable accommodation.
4. **The Accessibility Act will regulate some areas of society that are already regulated,** for example, it will cover particular areas of New Zealand society in particular domains like transport, health, education, physical access and safety of buildings, access to justice, accessibility of footpaths, and housing. There are a range of legal and policy instruments that already touch upon those policy areas. For example, the Building Act and the Building Code require standard 4121 to be followed when buildings are built.

In practice, a single piece of legislation may fall into all four of these broad categories, which should not be seen as exclusive.

## **(1) Existing legal and policy instruments that structure policy-setting by decision-makers**

The Accessibility Act would control the way that people in government set policy in important ways. For example, it would require the creation of “domains” of accessibility that shape the development of “standards” that tell people what they can or cannot do. These domains would be prioritised by the regulatory body under the Act.<sup>65</sup>

The regulator may also have consultation requirements on it, or others in government may also be required to consult with the regulator. In these important ways, the actual process whereby government and others decide what government will do and what it will try to achieve using regulation will be shaped by the Accessibility Act.

Here are some examples of key legal and policy instruments that structure policy-setting by decision-makers that will interact with the accessibility legislation and should be carefully considered. They will limit the way the accessibility system can work and may also be limited by the new accessibility system.

### *New Zealand Public Health and Disability Act 2000*

The New Zealand Disability Strategy is produced as a requirement of s 8 of the New Zealand Public Health and Disability Act 2000. One limitation of the Disability Strategy is that it only creates a “framework for the Government’s overall direction of the disability

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<sup>65</sup> We recognise that there is an argument that this should be a political decision to be made by a Minister, however we consider that the programme of work to develop accessibility standards should be determined by the regulatory body after consultation (including with relevant Ministers).

sector” with respect to “disability support services”.<sup>66</sup> This leaves progress on accessibility, as one element of an overall disability strategy, as a matter of policy to Executive government, rather than creating enforceable obligations between people with disabilities and people responsible for removing barriers. The strategy can be amended or replaced at any time (s 8(2)). Section 8(3) gives the Minister a broad discretion within an overall requirement to “consult any organisations and individuals that the Minister considers appropriate.” This could be made more specific to provide greater direction to the Minister and officials about the kinds of organisations and individuals to be consulted. There are reporting requirements placed on the Minister through subs (4) and (5) to make yearly reports on progress in implementing the strategy, which must be made publicly available and be presented to the House of Representatives. The way that the Disability Strategy sets an “overall direction” for the disability sector is similar to the way that the regulator under this Act would set an overall direction for the identification and removal of barriers and the development of enforceable and non-enforceable accessibility standards.

### *Cabinet manual*

The Cabinet Manual<sup>67</sup> “is the primary authority on the conduct of Cabinet government in New Zealand. It documents Cabinet’s procedure and provides authoritative guidance for Ministers, their offices, and those working within government.”<sup>68</sup> “Cabinet is the central decision-making body of executive government.”<sup>69</sup>

The Cabinet manual provides a broad range of principled guidance on matters that will be relevant to how the Accessibility Legislation operates. Points of note include:

- how regulations are made, including scrutiny of them, and how they should be publicised, which will be relevant to the development and publication of accessibility standards.
- Consultation obligations on various matters.
- The roles and responsibilities of ministers, including directions to support whole of government approaches.
- The application of the Official Information Act 1982, the Privacy Act 2020 and the Ombudsmen Act 1975 and legislation around public records, which are crucial constraints on the way that Ministers, and other executive bodies will administer the Accessibility System.

### *Privacy Act 2020*

The Privacy Act 2020 governs the rights of individuals in relation to agencies collecting personal information about them. The Privacy Act is referred to throughout the Cabinet Manual. It limits the way that the Accessibility standards might require personal information to be collected, used and disclosed in relation to notifications about whether

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<sup>66</sup> New Zealand Public Health and Disability Act 2000, section 8(2).

<sup>67</sup> Cabinet Manual 2017 <[www.dpmc.govt.nz/cabinet-manual](http://www.dpmc.govt.nz/cabinet-manual)>.

<sup>68</sup> Preface to Cabinet Manual p xv.

<sup>69</sup> Para 5.2, Cabinet Manual.

a standard has been breached. It will also require the regulator to consult with the privacy commissioner in certain circumstances. The privacy principles apply to “actions”, which include a failure to act as well as any policy or practice that might be taken by the regulator or by others responsible for enforcing standards, or people who seek to comply with the standards through collection, use or disclosure of personal information.

### *Public Finance Act 1989*

The Public Finance Act governs the use of public financial resources. It is “not the only Act that establishes requirements for the use of public resources” and works together with the Public Sector Act, the Public Audit Act 2001, the Crown Entities Act 2004 and the State-Owned Enterprises Act 1986. The Accessibility System will require the use of public funds in order to function. It may also require the appropriation of public funds in order to assist people in New Zealand to comply with accessibility standards. Further, to the extent that the Act deals with matters of procurement by government entities, it may interact with parallel or competing obligations under public finance legislation. Broadly, the Public Finance Act: provides parliamentary authorisation for Government expenditure and financial management; establishes lines of responsibility for management of public resources; sets principles for responsible financial management; specifies reporting obligations; and other related matters.

### *Replacing the State Sector Act 1988 with the Public Service Act 2020*

During this research project, the State Sector Act 1988 was subject to consultation and was replaced with the Public Service Act 2020.<sup>70</sup> The purpose of the State Sector Act was to promote and uphold a state sector system that is politically neutral, a good employer, fosters a culture of stewardship, and operates in the collective interests of government as a whole. Broadly, it requires state sector agencies to answer to their own Minister and to only give effect to the priorities set for that agency. The new Public Sector Act will interact with the way that the Accessibility legislation is enforced. For example, accessibility standards will apply to public sector organisations. Further, public sector organisations and crown entities will be crucial to the overall standards development process. Public sector entities will also be responsible for conducting the remaining policy work on the accessibility legislation. One perceived limitation of the state sector legislation was that it limited the ability of state sector entities to take collaborative approaches between agencies. “The current organisation of our Public Service into agencies that operate as separate firms works well for many tasks. However, it has struggled to respond effectively to complex issues that cross agency boundaries.”<sup>71</sup>

It will be important to consider how the Accessibility legislation might benefit from the use of new public service structures that enable shared funding and collaboration on policy work that sits across a broad range of areas, like the accessibility legislation would.

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<sup>70</sup> See <<https://ssc.govt.nz/resources/consultation-state-sector-act-reform/>>

<sup>71</sup> <<https://ssc.govt.nz/our-work/reforms/public-service-reforms-factsheets/?e5920=5938-factsheet-6-organisations-of-the-public-service>>

### *Crown Entities Act*

The Crown Entities Act 2004 creates a regime for setting the rights, powers and responsibilities of various kinds of “crown entities”. The legislation guidelines suggest that it is best to use one of these forms of entities if a new public body is to be created in order to generate clarity about how the entity should operate. The form of the proposed independent body will be discussed in detail in chapter four. The Crown Entities Act is likely to indicate the kind of powers and obligations that the regulator will have under the Accessibility Act. These will in turn limit the way the regulator can go about achieving the purpose of the legislation. The Crown Entities Act will also create obligations of disclosure and reporting and can include greater or lesser requirements for a crown entity to give effect to directions from executive government about giving effect to government policy, and therefore have implications for the regulator’s independence.

### *Legislation Act and regulation disallowance*

The Legislation Act 2012 will determine how the accessibility standards are published and drafted. It will also enable particular accessibility standards to be “disallowed” by the House of Representatives. The Legislation Act 2012 has replaced and reformed various previous pieces of law that govern how legislation is created, administered and published. One of its purposes is “to bring together in this Act the main provisions of New Zealand legislation that relate to the drafting, publication, and reprinting of legislation, and the disallowing and confirming of instruments”.<sup>72</sup> It now includes the provisions that operated to exert oversight by the House of Representatives over regulation-setting and disallowance. It has been recently amended to include publication of some subordinate legislation in order to meet international transparency obligations (s 3(ea)) and would likely relate to publication obligations around accessibility standards. Importantly, s 3(e) also states that its purpose is “to make New Zealand statute law more accessible, readable, and easier to understand by facilitating the progressive and systematic revision of the New Zealand statute book ...”. Parts 2A and 3 set obligations for publication of subordinate legislation and how it can be disallowed by the House of Representatives. There are various grounds upon which the Regulations Review Committee might draw an accessibility standard “to the special attention of” the House of Representatives to be disallowed, including that a standard:<sup>73</sup>

- (a) is not in accordance with the general objects and intent of the enactment under which it is made;
- (b) trespasses unduly on personal rights and liberties;
- (c) appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made;

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<sup>72</sup> Legislation Act 2012, s 3(a).

<sup>73</sup> Standing Orders 319(2).

- (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- (e) excludes the jurisdiction of the courts without explicit authorisation in the enactment under which it is made;
- (f) contains matter more appropriate for parliamentary enactment;
- (g) is retrospective where this is not expressly authorised by the enactment under which it is made;
- (h) was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments;
- (i) for any other reason concerning its form or purport, calls for elucidation.

The Legislation Act 2012 therefore will have an important function in shaping the way the accessibility standards operate. It is particularly important therefore that the primary legislation allows for property rights to be affected by accessibility standards for example it allows limits to be placed on design of houses or redesign of bathrooms in order for them to be accessible.

## **(2) Existing legal and policy instruments that set policy**

### *The New Zealand Disability Strategy*

Outcome 5 of the current New Zealand Disability Strategy relates to accessibility.<sup>74</sup> The outcome describes “What our future looks like” with respect to accessibility and says:

We have access to warm, safe and affordable housing that meets our needs and enables us to make choices about where we go to school or work and to fully participate as members of our families, whānau and communities.

We can get from one place to another easily and safely, for example from home to school, work or to a friend’s house. We can also access all public buildings, spaces and facilities with dignity and on an equal basis with others.

We feel safe taking public transport to get around and are treated well when we do so. Our needs are also appropriately considered when planning for new transport services. Private transport services are responsive to and inclusive of us. For those of us who need it, there is access to specific transport options that are affordable, readily available and easy to use.

Information and communications are easy for us to access in formats and languages that are right for us, including in our country’s official languages of Te Reo Māori and New Zealand Sign Language. This helps us to be independent because we do not have to rely on other people. We use technology on the same

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<sup>74</sup> <https://www.odi.govt.nz/nz-disability-strategy/outcome-5-accessibility/>

basis as everyone else; those of us who need specific technology solutions will have access to these in a way that is innovative, progressive and helps to eliminate barriers. The evolving opportunities presented by new technology helps us to achieve our goals.

Our accessible communities are free of barriers (for example, access to shops, banks, entertainment, churches, parks, and so on), which enables us to participate and contribute on an equal basis with non-disabled people.

One action towards this outcome has been the production of a guide by Barrier Free NZ on “Designing buildings for access and usability” in cooperation with others and through consultation with the disability community.<sup>75</sup>

There are a range of other actions which indicate the scope of access issues and the Government’s overall commitment to action in these areas, including:

- Increase accessibility of government information
- Understand the journey through the justice sector
- Investigate opportunities for technology
- Develop framework for understanding costs of disability
- Implement transport stocktake recommendations
- Implement the accessibility plan – public buildings
- Understand the impact of accessible housing needs

#### *The Accessibility Charter*

The Accessibility Charter states that organisations “will continue to actively champion accessibility within our leadership teams so that providing accessible information to the public is considered business as usual” and that “having compliance with accessibility standards and requirements [must be] a high priority deliverable from vendors we deal with”. Organisations commit to the statement that “Accessibility is a high priority for all our work.” We will discuss this further below when addressing existing policy instruments.

### **(3) Existing legal and policy instruments on complementary policy areas**

#### *Human Rights Act 1993 and non-discrimination*

New Zealand’s Human Rights Legislation has been in place for around three decades.<sup>76</sup> The 1980’s saw a wave of anti-discrimination legislation in comparable jurisdictions.<sup>77</sup> The New Zealand legislation focused on anti-discrimination in the disability field was the Human Rights Act. It sets out “prohibited grounds of discrimination” which include

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<sup>75</sup> <https://www.building.govt.nz/building-code-compliance/d-access/accessible-buildings/about/>

<sup>76</sup> New Zealand Bill of Rights Act 1990, Human Rights Act 1993.

<sup>77</sup> This included Australia, the United Kingdom, Canadian (provincial and federal), and the United States.

disability.<sup>78</sup> Like comparable legislation, it then provides for a number of exceptions. These exceptions largely allow continuing discrimination on the basis that it is not “reasonable” to do something, provide something or take particular steps.<sup>79</sup>

These limits on discrimination can be described as creating a regime requiring the provision of “reasonable accommodations”. Beyond this standard, discrimination is allowed, as it is not prohibited by legislation. New Zealand is not alone in this approach. This type of reasonable or justifiable test is seen in human rights frameworks or legislation in comparable jurisdictions including Australia<sup>80</sup>, and the United Kingdom<sup>81</sup>. Exactly how this anti-discrimination legislation interplays with legislative standards will be discussed further below.

It must be acknowledged that legal systems have seen considerable innovation in moving accessibility forward through discrimination regimes. The perception of what is “reasonable” can change over time and by prescribing this test in legislation, it allows cases to be taken on a case-by-case basis to determine what is and what is not reasonable. Nonetheless, it is clear that the anti-discrimination approach to improving accessibility has significant limits. Anti-discrimination processes say individual rights holders have the right not to be “discriminated” against – this may not be present in the many situations that a barrier to accessibility has been encountered. The person must then undertake a long and expensive legal process with significant risks<sup>82</sup> to enforce individual rights against discrimination.

A defence to any claim of discrimination is that it is unreasonable to take the action. This is inherently arguable and difficult to prove. Often the evidence is focused on whether an accessibility request (or accommodation) is reasonable or unreasonable in an individual case.

Reasonable accommodations are necessary and appropriate modifications and adjustments to ensure persons with disabilities the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.<sup>83</sup> They should not impose a disproportionate or undue burden. They should be used only where needed.

There is an existing system for providing reasonable accommodation in New Zealand. This involves the Human Rights Act and enforcement of rights by individuals against the

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<sup>78</sup> Human Rights Act 1993, s 21(1)(h).

<sup>79</sup> Human Rights Act 1993, ss 29, 39, 41, 52, 56, 60.

<sup>80</sup> Disability Discrimination Act.

<sup>81</sup> Disability Discrimination Act 1995, now replaced by the Equality Act 2010 c.f. s 20.

<sup>82</sup> Respondents in HRRT often seek costs against applicants seeking to enforce their rights and these can amount to significantly more than any damages that are awarded even if successful, waiting times for cases to be heard can be several years and then several years for decisions to be issued.

<sup>83</sup> Article 2, UNCRPD, see the Independent Monitoring Mechanism’s guide to reasonable accommodation.

[https://www.hrc.co.nz/files/7814/4848/7923/imm\\_reasonable\\_accommodation\\_guide.pdf](https://www.hrc.co.nz/files/7814/4848/7923/imm_reasonable_accommodation_guide.pdf)

organisation which has not provided reasonable accommodation. The Human Rights Commission followed by the Human Rights Review Tribunal process does not provide effective access to justice for New Zealanders. Despite its current ineffectiveness, it must be recognised that there will be a relationship between the Human Rights Act processes and the Accessibility system.

#### *Social welfare and support systems (Personal accommodations and supports)*

Personal accommodations and supports are modifications and adjustments where needed for individual cases to ensure participation in society on an equal basis with others.

Personal accommodations and supports are also important in addition to developing accessibility standards. These are not designed to be included in the proposed system but sit alongside the accessibility system. The relationship between “personal accommodations and supports” and an accessibility system will change over time.

These apply in the absence of or in addition to an “accessibility standard” and reflect the provisions through state systems currently administered by the Accident Compensation system and the Ministry of Social Development system and the Health (disability) systems.

In practice, a functioning boundary between the accessibility system and the future system for administering personalised supports and accommodations must be established. Whilst it must be recognised that barriers can exist within personal accommodations and supports systems, these systems provide support to people and are in that sense separate from the “accessibility system”.

The fact that a person has needs related to accessibility (for example transport), and that these are provided through personal accommodations and supports, will help identify barriers. Of course, the relationship between the implementation of the accessibility standard and the personal accommodation and support needs to be carefully managed. This relationship is likely to change over time as our society becomes more “accessible”.

## **(4) Existing legal and policy instruments on the same subject matter as the Act**

Currently, the full and effective participation in society by disabled through a process of removing barriers is predominantly done on a patchwork basis and often at individual level. There are a mixture of voluntary and non-enforceable standards, enforceable standards that are seldom enforced, or policy guides that are not specific enough to be enforced by individuals or easily complied with. Further, there is no single accountable agency responsible for identifying situations of non-compliance and dealing with them. Both voluntary and enforceable standards do not fit well together. The patchwork nature of these standards makes them inaccessible in the sense described by the purpose of the Legislation Act 2012: they are not rationalised or arranged logically as a body of law

and policy; there may be inconsistencies or overlaps; some standards may be obsolete or redundant; and there may inconsistency in location, expression, style and format.

We have not been able to comprehensively review this patchwork of standards. We also do not think that any list we create would be complete. That is because there are a range of other legal and policy instruments that, in effect, require somebody to identify and remove a barrier to participation by disabled people. Frequently, these other legal and policy instruments just don't work properly, or they may not have been consciously directed to the full and effective participation of people with disabilities. For many of them, the main issue may be only that they lack an effective enforcement or participation mechanism to enable a responsible agency or an interested individual to require the instrument is enforced. When this research project began, one option that was considered was to better co-ordinate existing regulatory functions. This was discounted at the time by disabled people, the Access Alliance, the Minister and Cabinet in favour of a framework legislative model that had been proposed in the initial discussion paper (see Appendix 3).

This section therefore sets out a framework for further policy work and research, and explains our thinking by reference to some examples.

### *DIA web accessibility standards*

Digital.govt.nz hosts “standards and guidance” for digital services and is administered by the Department of Internal Affairs. The NZ Government Web Standards include an accessibility standard. It adopts WCAG 2.1 released by the World Wide Web Consortium (W3C). The New Zealand Government was “the first in the world to formally adopt WCAG 2.0 in 2010”.<sup>84</sup> The New Zealand Web Accessibility Standard 1.1 applies to “every Public service department and non-public service department in the State Services” as a result of a direction by a Cabinet Minute (Cab Min (03) 41/2B) and applies to both public facing and internally facing websites. Upon notification, each agency must be prepared to assess and report on conformance with the standard and to prepare a risk assessment and management plan in the case of any non-conformance. The guidelines effectively state that web pages must meet WCAG 2.1 at Level AA, subject to exceptions set out in those standards. These standards do not apply to private organisations. The standards themselves do not set out a system of notification or complaints that individuals can pursue to have barriers removed.

### *The Accessibility Charter*

The Accessibility Charter is an important initiative testament to the leadership of DPOs. Hon Carmel Sepuloni, the Minister for Social Development, said this in a media statement dated 3 December 2018:

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<sup>84</sup> <https://www.digital.govt.nz/standards-and-guidance/nz-government-web-standards/new-web-standards-for-july-2019/>

The Accessibility Guide gives the state sector guidance on how to increase accessibility to information using inclusive language and design, and alternate formats such as New Zealand Sign Language, Easy Read, and Braille.

The guide will be used by Government agencies that have signed up to the Government's Accessibility Charter, which ensures that communication, services and information provided by state sector agencies is available to everyone.

...

"Accessibility to housing, transport, information, and communications allows disabled people to work, have a home, participate in their communities, get an education, use public transport and be informed.

"As Disability Issues Minister I know there is still more work to be done in this space and I am working with government Ministers and the disability sector to understand ways we can make progress."

The Accessibility charter only relates to government organisations and is not directly enforceable by individuals. It commits to making accessibility "a high priority for all our work". It involves primarily access to web information and other kinds of information and the need to respond positively to situations where individuals draw attention to accessibility barriers, as well as adopting a flexible approach to interacting with the public.

#### *Standards New Zealand: NZS 4121:2001 including the Building Act, Building Code and associated instruments*

The Building Act 1994 creates a scheme whereby certain kinds of building work require the consent of a consent authority, territorial authority or regional authority. It includes a complaints and enforcement regime of sorts in relation to these actors. The Building Code already involves significant incursions into private markets (for example, building practitioners and limitations on how buildings are constructed).

The Building Act includes specific reference to people with disabilities and access requirements (although not "accessibility"). Standard 4121:2001 exists and can be changed, adopted, or incorporated by reference into accessibility standards. It is already incorporated by reference into the Building Act. It was developed by a range of civil society groups, including groups of people with disabilities. Standard 4121 is a good example of the level of detail that can be specified in an accessibility standard. Disability is defined in the act as going beyond just mobility issues and includes sensory disabilities for example among other things.

Oversight of the Building Act occurs mainly under Chief Executive and Minister. The Building Act contains a regime whereby people can seek and make determinations about particular construction methods that will make construction compliant with the Code. The determinations regime is an interesting one that could be adopted for use under the Accessibility system, in the sense that applicants can seek to have a particular solution declared compliant with the Act, the code, or a standard. This allows a body of precedent to be built up in a manner that could facilitate systematic removal of barriers.

Determination no 2003/9 relates to “access and facilities for people with disabilities in a new motel”.

The standard and the Act are focussed narrowly on accessibility in areas to which members of public are likely to be admitted. It contains some drafting that permits a high degree of interpretation and contextual assessment: for example “may be expected”. It is not clear from the Act or the standard how it is to be enforced by people with disabilities and at what stage it is to be enforced against builders, building owners, etc.

### *The Local Government Act 2002*

The purpose of the Local Government Act is to promote the accountability of local authorities to their communities that recognises the diversity of New Zealand communities.<sup>85</sup> There are a range of provisions that would require local government to have particular regard to the needs of disabled people, including the way that its actions in effect create barriers to their full and effective participation in society. The Act is not drafted specifically to acknowledge this requirement, but read as a whole, it clearly contemplates a democratic process that could include identifying and removing barriers. To be clear, we are not arguing that it works effectively to do this. Here are some examples of the way that the Act touches upon the subject matter of the Accessibility Act, which must be considered against the background of findings in the Household Disability survey that 1 in 4 people has some kind of long-term disability:

- Local authorities have some responsibility under the Act for transport networks and infrastructure, which are two domains where barriers can operate to exclude people with disabilities.
- Local authorities are subject to electoral processes, which to have legitimacy, must enable full and effective participation. Further, s 82 sets out “principles of consultation” that include having clear information, “reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons”, “a reasonable opportunity to present [their] views to the local authority in a manner and format that is appropriate to the preference and needs of those persons”.
- The Act deploys a concept of “significance” (s 5), which is defined in relation to “any issue, proposal, decision” and refers to the degree of importance of that issue, its impact on and likely consequences for “any persons who are likely to be particularly affected by, or interested in, the issue proposal, decision or matter”.
- Section 76AA requires local authorities to have a “significance and engagement policy” to ensure that it consults adequately on matters of significance.
- In any situation where the Act requires something to be made publicly available, Section 5(3) requires a local authority to take reasonable steps to ensure the document “is accessible to the general public in a manner appropriate to the purpose” of the document .

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<sup>85</sup> Local Government Act 2002, s 3.

- A local authority must comply with principles at s 14, including to conduct business “in an open, transparent, and democratically accountable manner”, to “make itself aware of, and … have regard to, the views of all of its communities”, to take account of “the diversity of the community” and “the interests of future as well as current communities”.
- Local authorities are responsible for administration, in part, of parts of the Building Act 2004, the Resource Management 1991, and the Land Transport Act 1998.
- Territorial authorities can make bylaws for “protecting, promoting and maintaining public health and safety” (s 145), and barriers to full and effective participation exist because of a view that disabled people cannot safely participate.

The Local Government Act deals in substance with some of the matters contemplated by the Accessibility Act, although that says nothing about whether it is operating effectively to ensure the needs of people with impairments are taken into account, or that there is any coherent strategy for the removal of barriers as this Act would generate. Local and territorial authorities are likely to be key stakeholders in standards development and compliance.

### *The Official Information Act 1982*

The OIA plays a crucial democratic role in ensuring access to information about how government conducts its business so that its actions can be critically analysed. Because the OIA deals in “access” to official information, it has clear relevance to barriers to people with impairments’ ability to fully and effectively participate in democratic society. It is notable that the Office of the Ombudsman has official status as part of the independent monitoring mechanism for New Zealand to the Convention on the Rights of Persons with Disabilities and also monitors the application of the OIA. Here are some examples of situations where “access” requirements are included in the Act and could be interpreted to deal with accessibility barriers:

- Section 16 of the Act deals with situations where official information is held in a “document”. “Document” is defined expansively as being “in any form” in s 2. Information in the document can be “made available” in various ways, including by “making arrangements for the person to hear or view an audio or video recording” or to “furnish oral information about” the document’s contents, or by “giving an excerpt or summary of the contents”. It can be made available in electronic form and by electronic means. It requires departments and Ministers of the Crown to “make the information available in the way preferred by the person requesting it” and to give reasons if it “is not provided in the way preferred by the person requesting it”.
- Sections 20-24 deal with “right[s] of access” to certain kinds of information. Reasons for refusal must be given if access is to be withheld.

Standards will have to interact with the way that the OIA determines access to information in some way.

### *The Privacy Act 2020*

The Privacy Act repeatedly uses the terms “access”, “accessible” and other variants of those words. It governs individual access to personal information, and it also deals with processes and policies for controlling the use, collection, storage and disclosure of such information. The core concept of the Privacy Act is in principle 6, that an individual must be entitled to confirmation of whether an agency holds information about that individual, and to have “access to that information”. The right of access is linked to the right to be told of an individual’s ability to request correction of that information in principle 7. Further provisions of note include:

- Section 96V requires information sharing agreements to be made “accessible, free of charge, on the internet site where a copy of the agreement is accessible”.
- Sections 27-29 set out reasons for refusing “access” to personal information, or declining requests to disclose information, and section 30 states that refusal is not permitted for any other reason.
- Section 42 mimics the OIA’s scheme of creating various means by which information held in a document can be “made available”, including by an excerpt or summary, oral information about its contents, or by playing an audio-visual recording. Similarly, sub (2) and (3) require information to be made ‘available’ in the way preferred by the individual requesting it.
- Section 38 of the Act requires every agency to “give reasonable assistance” to someone who “wishes to make an information privacy request”.
- Section 46 of the Act enables the Commissioner to issue codes of practice that can “modify the application of any 1 or more of the information privacy principles by prescribing standards”, or “prescribe how any 1 or more of the information privacy principles are to be applied, or are to be complied with.” They can apply to “any specified information or class or classes of information”, “any specified agency or class or classes of agencies”, any specified class of activity, and any specified industry, profession or calling, or classes thereof. While sub 50 limits the impact of codes in relation to principles 6 and 7, the prohibition is against “limitation or restriction” of the circumstances an individual can rely on those principles. A code of practice is a disallowable instrument under the legislation Act 2012.

The Privacy Act creates a system of complaints that can be the subject of decisions by the Privacy Commissioner. Complaints about declining access under principle 6 can be the subject of claims for damages in the Human Rights Review Tribunal with significant damages payable.

### *Public transport accessibility plans at local authority level*

Existing voluntary standards do play a role, however we believe they should be incorporated through the concept of “non-enforceable standards” addressed later in this report. In essence, to build rapid progress, voluntary standards should be developed as quickly as possible, with data collected on compliance, with a view to their subsequent conversion into enforceable standards. Non-enforceable standards under the

accessibility system should not be seen as voluntary: they are required and expected, and after a given period, if they do not ameliorate accessibility barriers, then they may become enforceable. Voluntary standards often involve industries or groups developing and voluntarily meeting standards. They can play an important role where there are likely to be delays in creating enforceable standards. For example where it might take 8-10 years to develop five standards<sup>86</sup> and have them approved through the legislative standards process. In this time, some barriers could be removed/designed away through a voluntary approach. They are particularly useful when standards will change quickly (developing technology), standards will not be made for more than a specified number of years (for example 5 years) or where the industry is supportive and ready to take action (for example dispute resolution providers might be able to agree on standards, or internet/phone companies).

### *Legislation that removes barriers*

There is a wide range of legislation that creates a framework that may, in some part, substantively achieve a similar purpose to the core policy objective of this Act. For example, the following enactments will, in substance, deal with the creation or removal of barriers that have the effect of excluding disabled people from full and effective participation in society. Much of the work done to develop the accessibility standards under the Act will need to consider how existing law and policy instruments fit together. They will need to consider how, in relation to identifiable environments, those environments might be conceptualised into domains that most effectively and efficiently coordinate the identification and removal of barriers using new or existing bodies and processes.

It has been outside the scope of this project to exhaustively analyse all the enactments we identify. Instead, we list the enactments we have been able to identify here and suggest a methodology by which policy makers can assess how far they overlap with the subject matter of the new Act.

The key research questions for further analysis are:

1. Does the instrument explicitly use the word “accessible” or “accessibility” or similar?
2. Does the instrument touch upon the core subject matter of key concepts in the Act, particularly the way that barriers can exclude disabled people from full and effective participation in society?
  - a) If so, where does the relevant legal or policy instrument fit best?
    - i) A reasonable accommodation and non-discrimination framework? (A civil framework for disputes between individuals about a failure to provide reasonable accommodations from one person to another to mitigate the impact of accessibility barriers).
    - ii) A social and personal supports framework? (A framework for the public relationship between the state and individuals, for example through social

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<sup>86</sup> See for example analysis in the review of the Manitoban Provincial System in 2018, p 20.

- welfare systems, health systems, provision of aids and appliances, and steps by the state to mitigate the impact of barriers.)
- iii) An accessibility framework. (The deliberate and proactive removal of barriers to the full and effective participation of people with disabilities in society, independently of the need for provision of individualised accommodations and supports.)
3. If the answer to questions 1 or 2 is “yes”:
    - a) is there any mechanism for the public or disabled people to have input into how those barriers are identified or removed?
    - b) Are there any mechanisms for people with disabled people to use to enforce the removal of those barriers if they are not removed?

The word “accessible” returns 627 results on the New Zealand Legislation website.<sup>87</sup> We suggest the following Acts require further investigation and analysis according to the framework above for consideration of how they will interact with the accessibility standards and for consideration of consequential amendments:

- Civil Aviation Act 1990 in relation to accessibility of air transport.
- Legislation relating to Courts and Tribunals and access to justice, including for example the Disputes Tribunal Act 1988, the District Courts Act 2016, and others.
- Walking Access Act 2008
- Education Act 1989.
- Immigration Act 2009.
- Employment Relations Act 2000
- Election Access Fund Act 2020
- Electoral Act 1993
- Health Act 1956
- Heritage New Zealand Pouhere Taonga Act 2014 in relation to restrictions on the built environment
- Resource Management Act 1991 in relation to approvals for resource consent and land use controls.
- Building Act 1994
- Fire and Emergency New Zealand Act 2017
- Housing Act 1955
- Land Transport Act 1998
- Land Transport Management Act 2003
- New Zealand Sign Language Act 2006
- Te Ture mō Te Reo Māori 2016
- Local Government Act 2002
- Local Government Official Information and Meetings Act 1987
- Ombudsmen Act 1975

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<sup>87</sup> Also returns results for “access” and variants:

<[http://legislation.govt.nz/act/results.aspx?search=ad\\_act\\_accessible\\_\\_\\_\\_\\_25\\_ac%40bn%40rn%40dn%40apub%40aloc%40apri%40apro%40aimp%40bgov%40bloc%40bpri%40bmem%40rpub%40rimp\\_ac%40ainf%40anif%40bcur%40rinf%40rnif\\_h\\_ew\\_se&p=1](http://legislation.govt.nz/act/results.aspx?search=ad_act_accessible_____25_ac%40bn%40rn%40dn%40apub%40aloc%40apri%40apro%40aimp%40bgov%40bloc%40bpri%40bmem%40rpub%40rimp_ac%40ainf%40anif%40bcur%40rinf%40rnif_h_ew_se&p=1)>

- Public Records Act 2005
- Residential Tenancies Act 1986
- Social Security Act 2018
- National Parks Act 1980
- Conservation Act 1987
- Reserves Act 1977

## LEGISLATIVE PRECEDENTS

Internationally there are a number of examples of Accessibility Legislation. The majority of these are in Canada and include provincial and federal legislation. It is notable that rather than follow these systems, one province (British Columbia) is reconsidering how best to approach this. Other systems include Israel and Norway. The United States of America also has a series of statutes that cover some domains and Australia has standards within its Human Rights Legislation. Common elements of international accessibility systems include:

- a. Defined domains for standards to remove specified barriers
- b. A Ministerial decision on the order of the standards development
- c. Standards development process run through a government department
- d. All standards are compulsory
- e. There are exemptions from compliance with standards
- f. Reporting processes (often self-reporting)
- g. Enforcement process run by a government department
- h. Appeals process
- i. Review processes at set time intervals to review the system

There are common themes to issues that are repeatedly reported across different systems:

- a. The scheme is administered from within a government department
- b. The standards development process limits the involvement of persons with lived experience (often to one panel set by a Minister)
- c. There are issues with consultation with and implementation in relation to indigenous persons
- d. The reporting process for organisation's compliance (often self reporting) does not work and excludes persons with lived experience
- e. Progress is slow because standards are developed consecutively and take between 1.5 and 2 years for each standard – they are seen as having to be “perfect” before they become standards.
- f. The system of investigation and enforcement includes search without warrant of private property and criminal offences.
- g. The pecuniary penalties for non-compliance are low and rarely used (with some exceptions for example the Canadian federal system).

- h. The exceptions regime means that barrier often remain in large parts of society
- i. Even if technical compliance with standards is in place, in practice the result is not “accessibility” or barrier removal or full participation on an equal basis with others.
- j. The accessibility system does not comply with the UNCRPD in its design or operation.
- k. Evolution within the system is difficult (for example new standards, modifying standards, innovation) and there is a failure to provide for an effective accessible notification and complaints system to inform system learning and resolve disputes about the systems operation.
- l. Conflation of the roles and functions of the non-discrimination and “reasonable accommodations” system with the accessibility systems.

As set out in the legislative guidelines:

new legislation must not copy New Zealand or overseas precedents without first considering whether the precedent will be efficient and effective having regard to the circumstances of the new legislation.

We have considered the usefulness of overseas models and decided adopting these in their entirety will not be likely to result in an effective and efficient New Zealand system. The approach proposed in this report is different from the overseas models because we propose:

- a. A system that is designed in a way that meets New Zealand’s obligations under the Convention on the Rights of Persons with Disabilities and Te Tiriti o Waitangi.
- b. An independent body to act as the regulator.
- c. A system for notification of disabling experiences to:
  - i. help the regulator to identify barriers,
  - ii. understand when standards are not being met (and when enforcement is required),
  - iii. whether further standards would reduce disabling experiences, and
  - iv. provide a continuous cycle of system learning.
- d. A system for the identification, development and implementation of multiple standards and the evolution of standards from non-enforceable to enforceable.
- e. Requirements for consultation in the development phase of standards, and on an ongoing basis including in review of standards.
- f. Maintaining the separate system for providing reasonable accommodations and non-discrimination and allowing for complaints alleging discrimination to proceed through the Human Rights Commission.
- g. A process for enforcement through education and accountability mechanisms including infringement offences and a complaints system

regarding administrative and procedural issues arising from the accessibility system.

- h. A disputes resolution system including a consensus-based model and access to the courts to hear disputes arising from the system and determine applications by the regulator to impose pecuniary penalties.

We consider that a legislative model that draws from international legislative approaches and incorporates these changes is most likely to be effective in removing barrier in Aotearoa New Zealand in the decades to come.

## **CONSTITUTIONAL ISSUES, TREATY OF WAITANGI AND NZBORA**

### **The role of legislation**

Legislation is the most powerful and coercive form of law that the government can use to control the behaviour of people in New Zealand. Legislation can create and extinguish legal rights and create justice systems to enforce these. Legislation can also create injustices, for example where it is poorly drafted or its consequences have not been properly thought through. If we do not think carefully, people might find themselves, for example, in a situation where one law requires them to act one way, but another law will punish them for following the first law.

If we are going to argue that accessibility rights should be protected by legislation, we need to have a good idea of how legislation works within the wider legal system as shaped by New Zealand's constitution. New Zealand's legal system creates a separation of powers and roles between:

- The Executive, which is the core of the elected government we vote for<sup>88</sup>, and includes Cabinet and Crown Ministers and other government organisations who follow the instructions of Ministers of the Crown. The Executive is responsible for deciding what the government will do with all its powers and which laws should be developed. They control, for example, what laws will be sent to Parliamentary Counsel, who are responsible for writing the Bills that become law.
- The Legislature, which includes Parliament and the MPs from parties who don't form the government. These MPs keep the government in check using the House of Representatives through debates and powers to obtain information from the Executive. Parliament, including the Queen, has the final right of approval over legislation, and legislation that doesn't have the approval of the Queen and Parliament has no force. Parliament has control over what words the law will use,

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<sup>88</sup> Assuming voting processes don't incorporate barriers that exclude people with impairments from full and effective participation in electoral processes.

and is responsible for revising Bills produced by Parliamentary Counsel as a result of instructions by the Executive.

- The judiciary, or judges, hear arguments in Courts about what the law means and whether the evidence shows that something happened. The Judiciary has responsibility for taking the words of laws as they are and deciding how they apply to the case in front of them. They do this very carefully, but ultimately, it is the judiciary who decide what a piece of legislation means, and therefore what it does.

When lawyers and others are trying to understand what the words in legislation mean, they will consider various parts of this whole process to work out what Parliament intended to achieve when they used the words they did. The ultimate meaning of the Accessibility Legislation, no matter what words are used, will be determined through this process.

If laws have been poorly thought through from a constitutional perspective, it can lead to the need for judges to interpret the law in ways that make them meet minimum constitutional principles or to preserve important rights.

Because legislation can be used in harmful ways, there are restrictions on how different parts of the government can create, use, apply or enforce the law. These are set out in a number of legal and other instruments that together form New Zealand's constitution.

When it comes to arguing that we should have Accessibility Legislation, we therefore have to briefly consider relevant constitutional principles that need to be considered. These are important because, for example, they stand in the way of having a single bit of legislation that simply says "Everything must be accessible", without further defining what we mean by "everything" and what we mean by "accessible", and carefully deciding who will decide whether the law is being complied with and what evidence is required, for example, to prove that something is not accessible.

### *Delegated legislation*

Our suggested legislative design also relies heavily on "delegated legislation". This is legislation that has been created by using powers incorporated in other legislation. There are very good reasons for imposing strict controls on this power to create more legislation without going back to Parliament first for its approval.

### *Te Tiriti o Waitangi*

Te Tiriti is New Zealand's foundational document and it represents a partnership between Māori and the Crown. The Crown refers to the Queen and her representatives, including Parliament and the Executive. Te Tiriti is an essential instrument to consider when it comes to creating Accessibility legislation and the standards underlying the Act.

## **Legislation guidelines**

The legislation guidelines state the relevance of this chapter in the following way:

Fundamental constitutional principles and values in New Zealand law and practice run so deep that the courts will often draw on them when interpreting legislation or otherwise deciding cases. If new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny by Parliament, the public, and often the courts.

A range of enactments provide guidance about constitutional principles to be adhered to including:

- Te Tiriti o Waitangi
- The Constitution Act 1986
- The New Zealand Bill of Rights Act 1990 (“NZBORA”)
- The Public Finance Act 1989
- Standing Orders of the House of Representatives
- The Cabinet Manual

It is also worth considering the constitutional role of the public service as reflected in the State Sector Act 1988 and the Public Finance Act 1989, as well as the extent to which various Crown Entities under the Crown Entities Act 2004 are subject to government control.

### *Relevant considerations from the guidelines*

The legislation guidelines set out a range of considerations to consider from a constitutional perspective. We believe the following are relevant and should be considered carefully.

- Fundamental constitutional principles and the rule of law
- The spirit and principles of Te Tiriti o Waitangi
- The principle of legality – the dignity of the individual and the presumption in favour of liberty
- Respect for property
- Natural justice
- Access to the Courts
- Presumption against retrospectivity
- International obligations
- The clear statement principle

### *Application to Crown*

The Act should bind the Crown as should the standards made under it.

The starting point is that the Crown should be bound by an Act and secondary legislation made under it, unless the application of a particular Act to the Crown would impair the efficient functioning of government.<sup>89</sup>

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<sup>89</sup><http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-relevant-to-all-legislation/chapter-11/>

“Cabinet Office Circular CO (02) 4[1] identifies the following factors to take into account when assessing whether or not it is appropriate to bind the Crown:”

- whether any operations or activities relating to the special functions of the Government would be hindered by making the Crown subject to the Act (such activities may be differentiated from those in which the Government operates in the same way as a private person);
- whether applying the Act to the Crown would, in light of the special role of the Crown, create any burden on the Crown over and above those on private people; and
- the financial costs of making the Crown subject to the Act.

The Accessibility standards will need to apply in some way or other to vital democratic areas of government, including judicial buildings, electoral processes, Parliamentary premises and processes. Some of these will inevitably touch upon obligations of the Crown to remove barriers against the full and effective participation of disabled people.

### *New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Right Act (“NZBORA”) was passed “to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and to affirm New Zealand’s commitment to the international Covenant on Civil and Political rights”.

It includes a complex set of provisions that determine how the Executive, Parliament and the Judiciary can or cannot limit fundamental rights and freedoms in New Zealand. It also covers any “person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.” The NZBORA will play a crucial role in limiting the way that the Accessibility Act influences the rights and freedoms of people in New Zealand.

Importantly, courts in New Zealand cannot “strike down” legislation: no court can “hold any provision of [an] enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or decline to apply a provision of the enactment” solely on the basis that the provision is inconsistent with the NZBORA. The rights and freedoms in the NZBORA can be limited, but “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. This places an obligation on anyone seeking to limit a right under the NZBORA to show how it can be justified in a free and democratic society: importantly, that does not mean that all limitations are unjustifiable. Some rights and freedoms may be justifiably limited by the Accessibility Act.

The power and importance of the judiciary and the importance of statutory interpretation is illustrated by section 6 of the NZBORA. Section 6 states that “wherever [legislation] can be given a meaning that is consistent with the rights and freedoms contained in [the NZBORA], that meaning shall be preferred to any other meaning”. Accordingly, the power of interpretation by the Courts can mean the difference between a law that limits fundamental rights and freedoms, and a law that is interpreted so as to avoid limiting those rights and freedoms.

It is also important to note that Part 2 of the NZBORA refers to specific civil and political rights: the NZBORA does not import every human right in existence. The rights protected are carefully defined. We see the following rights as having some relevance to the Accessibility Act and merit further consideration because of the way that barriers can exclude disabled people from full and effective enjoyment of those rights:

- Section 12, Electoral rights, including the right to equal suffrage and secret ballot.
- Section 13, Freedom of thought, conscience and religion, including the right to adopt and hold opinions without interference.
- Section 14, Freedom of expression, including the freedom to seek, receive and import information and opinions of any kind in any form.
- Section 15, Manifestation of religion and belief, including to manifest religion or belief individually or in community with others, and either in public or in private.
- Section 16, the right to freedom of peaceful assembly.
- Section 17, the right to freedom of association.
- Section 18, the right to Freedom of movement, including to enter or leave New Zealand, freedom of movement within New Zealand.
- Section 19, Freedom from discrimination, including the right against discrimination on the grounds set out in the Human Rights Act 1993, which include disability.
- Section 20, Rights of minorities, including to enjoy the culture, practices and religions and languages of that minority, not just in relation to disabled people (who may not be a minority), but in relation to cultures within the disability community for example the deaf community or disabled Māori community.
- Section 21, Unreasonable search and seizure, including the right to be secure against unreasonable search or seizure in relation to the person, property, and correspondence, which is also linked to the human right to privacy by some scholars.<sup>90</sup>
- Section 22, Liberty of the person against arbitrary arrest or detention (acknowledging that this right tends toward criminal processes).
- Sections 23 and 24, including rights of persons detained or charged, specifically to be provided with prompt and understandable information about the reasons for detention or charging, as well as adequate time and facilities to prepare a defence and receive legal assistance, and access to interpretation services.
- Section 27, the Right to justice, including to the observance of natural justice principles where any public authority or tribunal will exercise a power to determine that person's rights, obligations or interests, the right to access judicial review, and the right to bring civil proceedings against the Crown.

It is important to recall the guidance from the Committee on the CRPD, that accessibility is a pre-condition to the exercise of other fundamental human rights. To the extent that the Accessibility Act were to limit the rights of New Zealanders without impairments, or

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<sup>90</sup> See Petra Butler “The Case for a Right to Privacy in the New Zealand Bill of Rights Act” (2013) 11 NZJPIL 213 at 219-220.

those not immediately caught by the Act's benefits, those limitations have to be balanced against the way that persisting barriers to full and effective participation limit the human rights of disabled people.

Frequently, New Zealanders are denied full and effective participation in society and the full realisation of their basic rights under the NZBORA because of barriers in various environments. We recognise and acknowledge that others have recognised the impact of failure to have access to these rights and to other features of society frequently lead to impacts on the right to life (section 8) and the right against torture, or cruel, degrading, or disproportionately severe treatment (section 9). The NZBORA provides for a balancing exercise<sup>91</sup> meaning the rights in that act may be subject to reasonable limitations prescribed by law that can be demonstrably justified in a free and democratic society. We consider that this should be retained.

### *Property rights*

Property rights are mentioned as a constitutional consideration in the legislation guidelines.<sup>92</sup>

The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated).

The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991).

The legislative and policy processes leading to passage of the Act will need to enable people to be heard on the way that accessibility standards will affect their ability to deal with their own property, especially private homes. Importantly, placing restrictions on the use of private property is not the same as taking it. It is important to consider that, in relation to private homes for example, the Building Code already imposes significant limitations on what people can do with their homes in the name of public safety and other goals. On that basis, it is untenable to argue that the Accessibility Act would be an unjustifiable intrusion on the right of people to deal with their private property solely because it imposes obligations on private home owners. Instead, the focus should be on whether the Act's restrictions on the use of private property are proportionate, and that has to be considered against the overall purpose of the Act. This is a matter for public discussion and debate, but that debate should not proceed on the basis that private property overrules all other policy considerations, or that property rights have a special status in relation to other human rights.

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<sup>91</sup> New Zealand Bill of Rights Act, s 5.

<sup>92</sup> Chapter 4 part 4.

### *Presumption of compliance with international obligations*

The Convention on the Rights of Persons with Disabilities creates international obligations on the New Zealand Government. According to the legislation guidelines, this has constitutional significance in the following way: “There is a presumption that New Zealand will act in accordance with its international obligations, and that legislation will comply with those obligations”.<sup>93</sup> The Guidelines set out a range of ways in which the CRPD could be given effect through the legislation and this is a specialised matter for Parliamentary Counsel.

International obligations can also be relevant to judicial interpretation of the legislation when it is in force.

### *Access to the Courts*

The vision of removing barriers will not be achieved with the creation of legal obligations. Anything short of this will not be effective in making New Zealand barrier free. One result of rendering accessibility standards as legal obligations is that they will require a dispute resolution system and a formal legal system.

The legislation guidelines state:

The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified, and will generally be given a restrictive interpretation by the courts. ... This principle does not prohibit a mandatory requirement to attempt a resolution by alternative dispute resolution (ADR) or review processes before bringing court proceedings in appropriate cases.

New Zealand has a history of unjustifiably excluding access to the Courts when it comes to the rights of people with disabilities and this has been the subject of comment by the Committee on the CRPD.<sup>94</sup> The legislation must provide a means for disabled people to ensure the legislation is lawfully interpreted and applied. As the Court of Appeal said in *Chamberlain*<sup>95</sup>:

New Zealand is a party to the Convention on the Rights of Persons with Disabilities and its Optional Protocol. Our interpretation of all relevant legal and policy instruments must account for New Zealand’s international obligations.

Equally, however, it is not only disabled people seeking to develop or enforce standards through the regulator who will require access to the courts. Section 27 of the NZBORA applies to people with rights under the standards as well as people who have obligations. A wide range of people and institutions in New Zealand will have new legal obligations under the Accessibility Act. They are also entitled to access to the courts in order to have the basic legality of any obligation on them assessed. This is addressed in Chapter 6.

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<sup>93</sup> Chapter 4, part 9.

<sup>94</sup> Concluding observations on the initial report of New Zealand, 31 October 2014, article 13.

<sup>95</sup> *Chamberlain v Minister of Health* [2018] NZCA 8; [2018] 2 NZLR 771 (7 February 2018)

# **CHAPTER 4**

## **THE REGULATORY BODY, ITS FUNCTIONS AND POWERS, AND CONSULTATION PROCESSES**

### **Overview of chapter**

How should the accessibility system be organised? Who should be accountable for making sure it works? How will that entity make sure that all relevant perspectives are collected and considered?

We have concluded that the accessibility system should be given effect through two key bodies:

1. A regulator fulfilling an executive function.
2. A court fulfilling a judicial function.

In this chapter, we set out the functions and powers that the regulator should have. We leave discussion of the judicial functions to chapter 6, where we discuss compliance, monitoring and enforcement in the accessibility system.

The functions and powers for the regulator should be set by statute. Further, there should be detailed consultation obligations on the regulator that affect the way it carries out its business, but especially in relation to:

- The development of standards; and
- Key decisions about how the system will work.

The regulator should be responsible for administering the framework around standards development, monitoring and enforcement, even if specific domain standards may integrate to a high degree with other regulatory systems, or even delegate decision-making power to other bodies.

In this Chapter we justify and explain our conclusions on the following points.

- There should be one regulatory body responsible for achieving the purpose of the Act, with the key functions and powers required to make the system work.
- The regulator will be responsible for a range of complex consultation processes with other regulators, with government, with people with disabilities, and with other stakeholders in the system.
- The consultation process should be, to a large degree, prescribed in regulation to allow for predictability, consistency, and iterative development of positive organisational culture and practice.

## Functions and powers of the regulator

When new statutory functions and powers are created, it is helpful for Parliament to say who is going to fulfil those functions and exercise those powers. It can give these powers to existing bodies or create new ones. In this way, the day-to-day business of government is conducted through a range of public bodies.

We believe any public body responsible for administering the legislation should have the following functions, and require associated powers to fulfil those functions, as well as having obligations to use those powers consistently with the purpose of the Act:

1. Accountability for achieving purpose of the Act
2. Accountability to the public as a public body for its operations (ie, Official Information and Privacy Act obligations, reporting obligations)
3. Power to impose obligations on natural and legal persons through standard development.
4. Powers to manage standards development process.
5. Powers to initiate publication of standards.
6. Ability to advocate on its own behalf against central government.
7. Power to advise and report on legislative and policy proposals that may have implications for accessibility.
8. Power to receive notifications about non-compliance with standards and conduct investigations.
9. Power to administer a system of infringement offences and pecuniary penalties.
10. Power to collect information and data.
11. Power to facilitate consultation outside of standards development.
12. Power to commission and lead public awareness and education campaigns.
13. Power to commission or fund research.
14. Reporting obligations on the overall management and performance of the system.
15. Power to manage resourcing for these purposes.

The public entity will draw some of these powers from the Accessibility Legislation and other powers from its status as a public entity (for example, under the Crown Entities Act or similar).

### *Guidance from Legislation Guidelines on creating a new statutory power*

The legislation guidelines raise a series of questions about the creation of new statutory powers.

- Is a new statutory power required?
- Who should hold the new power?
- Will the new power be delegable?
- Is the power no wider than is required to achieve the policy objective and purpose of the legislation?
- What is the power and how will it be exercised?

- What safeguards are provided in the legislation?

Applying these to accessibility legislation, Parliament will need to create a range of statutory powers and corresponding duties and obligations in order for the legislation to be effective. Some of these powers include:

- to consult on standards development.
- to consult on prioritisation in the standards development programme.
- to consult on day-to-day operation of the entity.
- to identify barriers.
- to receive complaints or notifications about barriers and their effects.
- to publish reports.
- to investigate.
- to enter into binding enforceable undertakings with regard to regulated persons and compliance with standards.

## Choosing an institutional structure

To deliver the proposed legislative framework for accessibility, it may be necessary to establish a new body – particularly if new functions are created and there is no appropriate existing body that can perform those functions. Different organisational forms will have distinct governance and reporting requirements. They will also have different relationships with the Executive and different relationships and obligations in respect of government policy.<sup>96</sup>

*Relevant questions from legislation guidelines:<sup>97</sup>*

- Is a new public body required?
- Is legislation required to create a new public body?
- What form should a new public body take?
- Will the new public body be a tribunal?
- Will the public body be subject to certain key Acts that hold government bodies accountable?

It must be noted that in one sense, New Zealand has had regulatory system without a regulator for decades. We have had numerous pieces of legislation and public sector agencies. This has not worked in accelerating accessibility. Simply co-ordinating this better is unlikely to be effective.

*There should be a new public body that acts as regulator*

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<sup>96</sup> Legislation Guidelines, Chapter 20.

<sup>97</sup> Chapter 20.

The primary reason for a new institution is because of the complex relationship it would be required to have with government and with other regulators, and the perceived independence of the body from broader political and policy considerations.

Legislation will be required to give the public body specific functions and powers, and to create legal limits on the significant powers it will have. The entity must have consultation obligations and there should be a high degree of prescriptiveness in how these are set out, to enable people with disabilities and others to assert minimum procedural rights without requiring constant reference to the Courts in order to rely on the criteria set out in common law. We think the public body must have independence from government policy agendas to give the public confidence in its long term strategic signals and to enable investment by the private sector. Further, the incorporation of accessibility as a basic lens through which to vet all legislation and policy will require free and frank advice and assessment from the regulator to executive government. Much off the structure and accountability of the body will be able to be drawn from existing structures, and we believe an independent crown entity under the Crown Entities Act 2004 is the most appropriate structure, and all the usual accountability statutes such as the Privacy Act 2020, Official Information Act 1982 and others should apply.

The regulator's overall task in administering the Act is significant and important because accessibility is a fundamental precondition to the most basic exercise of human rights by people with disabilities. If things are not accessible then human rights cannot be exercised by disabled people. Any failure of the accessibility system could have a number of negative effects for example:

- restricting people in their homes (if they can find homes without barriers at all),
- depriving people of participation in democratic and judicial processes,
- excluding people from employment and education, and
- denying people access to the economy in ways that simply cannot be demonstrably justified in a free and democratic society, especially one that has ratified the Convention on the Rights of People with Disabilities.

Further, the power to identify barriers, consult with affected stakeholders, and then administer and enforce delegated legislation that crosses such a wide cross section of society is also something that must be treated with the utmost constitutional gravity, not simply tacked on to an existing government entity.

The alternative to having a dedicated regulator with final accountability and the adequate functions and powers to discharge its responsibilities is to have a fragmented system governed by policy and discretion rather than law. That is what we have now and it has not been sufficient. In practice, in order to discharge its functions, the regulator will be required to interact with a wide range of other government agencies. In this way, it is unlikely to be able to act unilaterally on most policy decisions.

It should be clear where New Zealanders should turn if they are dissatisfied with the operation of the accessibility system. Any institution should also be able to create

processes to directly incorporate people with lived experience of disability into its everyday processes and leadership and for bodies of experience to be built up over time.

There will also be resourcing requirements to achieve implementation of the Act and to coordinate consultation processes: we believe this may most effectively be achieved through the oversight of a single specialist organisation.

Accessibility will also be a long-term policy goal: the creation of a dedicated regulator will create certainty and stability in the system to enable businesses and others to plan for the future and justify investment in the removal of barriers and universal design at the outset of projects. The regulator will also need to build domain specific expertise and be able to access policy advice from a range of agencies.

It will be a matter for political decision-makers and official advice as to whether a new institution is created for this purpose, or whether an existing institution can be given accountability for the legislative framework.<sup>98</sup> It is likely that the institution will have a regulatory function, with obligations of monitoring, compliance and enforcement, guidance, licensing or approval, transparency, and accountability.<sup>99</sup>

If policy-makers prefer not to create a dedicated regulatory body, then they must carefully explain how the functions and powers can be discharged by an existing body, or a network of existing bodies, in a way that will give people in New Zealand confidence in the independence and integrity of its operations, as well as a clear point of accountability if the system is not functioning as it should be.

There is a policy decision to be made about how far the public body (or bodies) responsible for the accessibility legislation must act independently of government policy. Likely institutional forms include an autonomous crown entity, or an independent crown entity.

The answers to many of these questions depend heavily on the functions, powers and obligations we argue are required to give effect to the Accessibility legislation. For that reason, we will now shift to discussing the statutory functions, powers and obligations of the public body we say should administer the scheme.

#### *There must be separation of judicial from executive functions and powers*

At the highest level of generality, accessibility legislation would create two mechanisms:

- A system for identifying barriers and creating standards for the removal of barriers, including where standards have not been complied with and where future standards are required.

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<sup>98</sup> See Chapter 20 “Creating a new public body”, Legislation Guidelines: 2018 edition. <<http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/new-powers-and-entities/chapter-20/>>

<sup>99</sup> See Legislation Guidelines: 2018 at chapter 22.3.

- A process for taking remedial action in situations where standards are not followed. This could be a court (for example the district court or environment court).

These two mechanisms should not be exclusively controlled by the same public body and require judicial oversight. We recommend that two public bodies interact in a separation of powers arrangement:

1. A **regulator** that sets standards, administers and manages the rule-setting within the system, and is responsible for identifying areas where those standards are not followed at first instance, broadly corresponding to an **executive government function**.
2. A **court** or similar body with a **judicial function** responsible for establishing matters of fact and law arising from findings that a standard has been breached, operating according to the principles of natural justice and with corresponding powers in relation to remedial action to ensure standards are met.

The primary relationship in our system is that between the regulator and the regulated. The system is not intended to resolve disputes between individuals: that must be left to the reasonable accommodation and non-discrimination system.

Importantly, this structure does not mean the role of persons with lived experience is excluded from the enforcement system, nor that a person has no remedy against someone who has breached accessibility standards. Instead, it means that persons with disabilities and their organisations have well articulated and legally defined roles in the accessibility system: to identify barriers; to be part of the development of standards; to be consulted by the regulator; and to raise issues where barriers are not being removed or when new barriers are emerging. The policy intent is that the burden of enforcing the accessibility standards using legal processes is removed from individuals, systematised, placed on the state and appropriately resourced. The system cannot be effective if high numbers of situations of non-compliance are transformed into fully fledged legal disputes. In particular we emphasise that the regulator should be largely staffed by people with lived experience of disability.

Where an individual does wish to take action against another individual or organisation, they can do this through the reasonable accommodation and non-discrimination systems, which will in turn be influenced toward a higher degree of compliance by the minimum expectations stated in the accessibility standards. It is also important to recognise that compliance in a regulatory system is not only about legal mechanisms: there are other important means of incentivising compliance, including by public education, public advocacy in news media and through representative bodies, publicising cases of non-compliance, and through the provision of grants and subsidies to support compliance.

#### *Summary of relevant functions and powers for judicial function*

The organisation charged with determining whether standards have been breached and imposing remedies and enforcing them:

1. To receive evidence and submissions and obtain evidence of its own accord including if relevant from persons with disabilities or their organisations (an investigative approach)
2. To refer issues to the regulator for investigation when appropriate.
3. To comply with the principles of natural justice
4. To make findings of fact and law
5. To impose a remedy on regulated persons and enforce that remedy.
6. To enforce undertaking entered into with the regulator
7. To issue fines to persons when appropriate.

This will be addressed in detail below in Chapter 6 however it is noted here to allow consideration of the next steps with this in mind.

## **Resourcing**

It should be frankly acknowledged that the cost of such a regulatory system will be significant, but that can only be one factor to be balanced against others, including the way that fundamental human rights are being limited by the presence of accessibility barriers.

Our system design is intended to account for the principle of progressive realisation, which acknowledges that access to social and economic rights must be assessed against the wider socio-economic situation in New Zealand. Our system accounts for this in the following ways:

- Standard development can be prioritised by the regulator to generate maximum benefit for minimum effort, in the sense that it would be possible to generate momentum quickly through the adoption of non-enforceable standards on areas already well covered by accessibility standards.
- Making Aotearoa accessible will generate economic activity as well as enabling large numbers of people to participate in New Zealand’s society and economy who might have previously been excluded. This will have consequential effects for those people’s families and communities, who can benefit from their skills and experience, as well as their independence.
- There is scope for the standards to complement and augment existing regulatory systems. For example, we do not suggest that the whole system of building inspections or local government should be rebuilt from the ground up: some of the regulator’s functions may be able to be delegated or shared with existing institutions.
- Generating clarity for stakeholders will enable people to adopt principles of universal design at the outset, which will generate efficiencies later on.
- The system will enable a monetary value to be assigned to the lived experience of disabled people, both through their participation in the activities of the regulator, and as advisors to people with obligations under the accessibility system. This too will contribute to remedying inequities in access to employment,

disabled people wish to seek employment in accessibility policy and compliance industries.

Another important point to note is the way that many of the domains which are likely to be covered by accessibility standards are already engaged by regulatory systems that influence the way that activity in those domains occurs: for example, in the name of safety and other policy factors, the building sector already has certain restrictions that must be complied with. The Accessibility system is not a matter of creating new regulation where none existed before: it is a matter of making existing regulation work better to prevent the exclusion of a significant sector of the New Zealand population.

What we have seen internationally is the gradual development of static enforceable standards one at a time over every few years in accordance with a programme set by a Minister. We consider that this approach is unlikely to be effective in the New Zealand context. Instead the most effective approach will be to develop standards concurrently. We recognise that this will require more resources early, however consider this will be most effective to generate momentum and accelerate accessibility.

*Is any existing body capable of properly performing the necessary functions?*

The functions required by the Act would be sophisticated and wide-ranging. There are several existing institutional structures to be considered for their capabilities: the Human Rights Commission, the Minister for Disability Issues, the Office for Disability Issues, the Ministry of Social Development, and the Ministry of Business, Innovation and Employment. We recommend each of these become important partners for the regulator however we do not consider that any of these existing bodies are capable of properly performing the necessary functions of the regulator.

The Human Rights Commission has system-wide responsibilities under non-discrimination legislation and may be asked to investigate the entity managing the accessibility system if it is alleged that the regulator is discriminatory or failed to provide reasonable accommodations. The Commission's role is important in relation to individual complaints of breaches of the Human Rights Act and complaints of discrimination or failure to provide reasonable accommodations. Whilst this process is complementary to the accessibility system in that it is aiming to reduce disabling experiences, we consider they should be administered separately to ensure that the process of removing barriers through a regulatory system does not suffer from mission creep into providing individual remedies. While we recognise that both accessibility standards and reasonable accommodation are required to give effect to the Convention and article 9, the way they do that legally and from a policy perspective is very different.

We consider that the government organisations responsible for providing services should not be tasked with being the regulator. There is no Ministry for Disability in New Zealand. There is an Office for Disability Issues within the Ministry of Social Development to support a Minister for Disability Issues and a similar "Disability Services" with Ministry of Health. Consideration could be given to one or more of these agencies exercising the functions and powers, however international experience suggests that this is unlikely to be effective. If a service is being provided in a manner that creates barriers that exclude

people from accessing that service on an equal basis with others, then that would be a matter for the Accessibility system and despite good intentions and pockets of good practice, these organisations continue to create significant ongoing barriers, and they lack the independence, expertise and leadership required to fulfil the roles of creating and coordinating the regulatory system. There is an approach within Government of using existing organisations rather than create new ones. This must be balanced by the need for effectiveness and efficiency. Ultimately, an accessibility system left to the Ministry of Social Development will fail to deliver the transformational change and will eventually fail.

Finally, the Ministry for Business, Immigration and Employment must be considered. This could be beneficial as it would assist in bringing business on board with accessibility, however for the same reasons as have become apparent overseas in the accessibility systems, there is a widely held view that the accessibility system should sit outside a government department or ministry. This is similar to the experience in New Zealand with WorkSafe and the Health and Disability Commissioner where independent organisations have been established to provide regulatory functions.

#### *What form should a new public body take?*

The entity should have the status of an independent crown entity under the Crown Entities Act because it must have independence from Ministers to preserve public confidence in the body. We note that government departments will also be subject to the accessibility standards and there may be a perceived conflict in how standards are set if they will impose significant financial obligations on public service departments.

#### *Governance arrangements for new Crown Entity*

The governance arrangements for the new entity must be carefully developed to ensure that these embrace leadership of disabled persons (included disabled Māori), ensure diversity in governance and build capacity.

We recommend that once the relevant decisions have been made and before the legislation is drafted, further policy work and consultation is undertaken within the wider disability community to consider this governance structure. This work must also consider governance arrangements which are consistent with Te Ao Māori and the Te Tiriti o Waitangi.

## **Accountability to New Zealanders**

#### *Will the entity be subject to certain key pieces of accountability legislation?*

Yes. “All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).”

#### *Legal accountability*

The institution must be accountable to New Zealanders with impairments as well as others who are bound by the standards and other provisions of the Act. For example, people with disabilities must have a legal means of influencing the entity's conduct when it is unlawful or inconsistent with the purpose of the Act. At the same time, for stakeholders without impairments to have confidence in the system, there must be a mechanism to enable those stakeholders to be heard for similar reason.

#### *Political accountability*

In the absence of legal accountability mechanisms, stakeholders will turn to political or democratic accountability mechanisms. That is legitimate, but risks damaging public trust and confidence in the system and the entity's stewardship of it.

## **Data collection and systemic learning**

The entity will have obligations for monitoring the performance of the accessibility system and itself be subject to performance monitoring by ordinary policy processes. We go into greater detail on this in the concluding chapters to this report.

## **CONSULTATION BY INDEPENDENT BODY**

### **Importance of consultation to overall scheme**

The legislation guidelines describe the following benefits of consulting the public and affected stakeholders on significant decisions:<sup>100</sup>

- “It increases the transparent and inclusive nature of decisions, which improves their legitimacy.
- It improves the quality of decisions by ensuring that decision makers consider the perspectives of those affected by them.
- It helps promote public understanding and acceptance of the decision (and so is likely to improve compliance).
- It enables those to whom the legislation or policy decision will apply to plan and adjust systems or processes appropriately.”

#### *Distinguishing consultation from: data collection and monitoring; and natural justice*

Consultation must not be confused with processes of investigation of notifications about barriers. It also must not be confused with the broader data collection and monitoring functions of the regulator. Consultation involves meaningful engagement with people with disabilities to test the conclusions that the regulator draws from such data and how

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<sup>100</sup> Chapter 19.

it exercises the powers it has to act on that data. Further, consultation must be distinguished from the natural justice processes required where the regulator may make a breach finding in relation to a standard.

### *Importance of consultation under the UNCRPD*

The implementation of the UNCRPD deliberately puts consultation with persons with disabilities at the forefront of decision making. This reflects both the history of failing to ask persons with disabilities and the catch cry of their movement “nothing about us without us”. A key shift under the UNCRPD is the transition to a human rights-based approach to disability, rather than a charitable approach. Historically, people with disabilities have been perceived as objects of charity and this deprives them of agency to question or criticise the way social supports are provided. To leave the requirement to consult up to good administrative practice risks perpetuating this model rather than consulting people with disabilities as rights-holding citizens, who are empowered to hold public entities to account using the rule of law and legal processes.

There is a substantial risk that, if the requirement to consult is not given significant form by the legislation, the voices of disabled people who have disabling experiences caused by accessibility barriers will not be heard or given adequate weight at crucial strategic junctures, including the requirements the standards set. For example, the standards could be completed and published in a way that fails to meet the needs of people with disabilities or others. That would undermine the impact of the legislation for years to come.

### *Relevant questions under the legislation guidelines:*

- Should the legislation include requirements to consult?
- Who should be required to be consulted?
- What aspects of the consultation process should be prescribed?
- What should be the consequences of failing to consult?

## **Should the legislation include requirements to consult?**

The Legislation Guidelines suggest a requirement to consult in legislation may be necessary to:<sup>101</sup>

- “provide additional assurance and certainty to people affected by a decision that their views can be presented. This may be important in securing support for the legislation or in addressing concerns about the delegation of decision-making powers. If there are conflicting perspectives, it may be important to ensure that they are given a clear opportunity to be included;
- set clear processes around what is required for consultation (to give certainty to decision makers and clarity to stakeholders);

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<sup>101</sup> Chapter 19, part 1.

- ensure consistency of consultation practice for similar decisions (particularly where there are multiple decision-makers and consistency of expectations and practice is important); or
- address concerns that consultation obligations from other sources (such as the common law or Cabinet Manual) are inaccessible to many people or do not apply.”

Notably, the guidelines also set out the following limitations of including a requirement to consult in legislation:<sup>102</sup>

- “Including procedural requirements in legislation always risks reducing flexibility to tailor requirements to circumstances and potentially creates more complex legislation.”
- Depending on the significance of the decision, consultation may add too much cost to the process.
- If a decision is to be made urgently, consultation would create inappropriate delay.
- Meaningful consultation could expose information that should remain confidential.

*The legislation should include a requirement to consult and aspects of this consultation process should be prescribed*

We acknowledge that consultation often occurs in government without explicit consultation requirements being enacted in legislation. We think the legislation should make the requirement explicit, and include minimum expectations and procedural rights to avoid the need for recourse to the Courts to resolve any issues.

The Accessibility system requires a degree of consultative procedure and practice in four ways:<sup>103</sup>

1. In the programme of development of accessibility standards (the order and priority of standards development).
2. In relation to development of each of the accessibility standards.
3. In relation to notification of disabling experiences, the enforcement of the standards and broader monitoring of the removal of barriers.
4. In relation to the day-to-day administration of the system.

A wide range of people will be affected by the Accessibility legislation in complex ways that may not be obvious to decision-makers who do not have the same lived experience, either of impairments, or of the requirements of various private and public entities that

<sup>102</sup> See chapter 19 part 1.

<sup>103</sup> Legislation guideines chapter 19 describe two “main cases” for consultation in decision-making: “administrative type decisions that set or implement some government policy”; and “decisions to make secondary legislation”.

will be subject to accessibility standards. Consultation is likely to be important to secure support for the legislative model, the standards and their implementation.

We believe it is vital there are clear, accessible requirements set out to inform disabled people and people subject to accessibility standards what input they are entitled to have into standards development.

The entity will be required to reach conclusions on which domains should be prioritised and how these domains should be set. That will require the input of people already operating within systems that create or remove barriers for disabled people.

The standard making process will have to occur repeatedly over time in relation to each domain. For that reason, there is benefit to having clear legislative requirements about the consultation process to be followed. That will contribute to consistency benefits, including consistency of expectations by stakeholders. It will also enable a body of interpretive practice to be built up around these consultation requirements.

Fundamentally, setting out consultation requirements in legislation also makes them more accessible. A standard for consultation may be a suitable starting point to create non-enforceable standards as it will provide the opportunity to focus attention on developing and implementing best practice consultation.

## **Who should be required to be consulted?**

The Guidelines make the following points:<sup>104</sup>

- The question of who should be consulted must be led by the requirements of the policy: here, the policy of the Act in relation to accessibility and removal of barriers through the creation of standards, monitoring, enforcement and data collection.
- Consultation requirements should capture the key people or organisations likely to be interested in or affected by a decision.
- Consultation processes should be sufficiently certain without unnecessarily restricting the requirements or being too inflexible to cater for change (in organisations, interested parties, or others.)
- Naming particular individuals or organisations will create the most certainty about who must be consulted, however the legislation will have a long time-span, and individuals and organisations may change over time, making the legislation obsolete.
- The legislation can describe people or institutions by categorisation, or by their representative nature. This will create a delegation of sorts to the people responsible for deciding whether someone or something meets that description.
- “Catch-all”s can be used, but create a higher degree of judgement to be exercised. There are risks of being over-inclusive and under-inclusive.

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<sup>104</sup> Chapter 19, part 2.

The Act will need to enable input by a wide range of stakeholders. As important as actually being heard is the sense by stakeholders that they have had the opportunity to make themselves heard, particularly where complex policy decisions are being made with real consequences across a wide range of domains. We do not think that the regulator should exclude anybody from having their say, although there will be a careful balance to be struck between the wide range of stakeholders and what minimum expectations they can have about the consultation process.

## **What aspects of the consultation process should be prescribed?**

The legislation guidelines make the following points:<sup>105</sup>

- Specific aspects of the consultation process should be prescribed if certainty is needed on the scope or timing of the obligation to consult.
- If detail is not prescribed in legislation, the principles outlined in the common law will fill in the detail. This has benefits for flexibility. “If there is a duty to consult, the common law provides the details of how consultation should be conducted where the legislation itself is silent on that detail.”
- A prescriptive process can ensure consistent consultation practice across multiple decisions or decision-makers.
- A prescriptive process can provide certainty to decision-makers and affected people about the process that should be followed.
- A prescriptive process can provide assurance to decision makers about the limits of their obligation to consult.

The guidelines suggest that the following can be specified in legislation:

- The timing of the consultation obligation within the overall decision-making process.
- The way in which notice of the consultation opportunity should be given.
- The information that must be given to parties to inform them about the area subject to consultation.

The policy goal should be that consultation processes are clear, accessible and reliable, and will also improve iteratively over time. We think that this lends itself to a high degree of prescription in the legislation. The high degree of prescription must be weighed against the risk that this leads to an overly technical focus. People with disabilities will have experiences they can share of what consultation processes work well across government. While access to the Courts must always be a backstop, it would be

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<sup>105</sup> Chapter 19, part 3.

unfortunate if this occurred too often, as well as creating access to justice barriers which may undermine disabled peoples' power within the accessibility system.

We believe there must be a power to end consultation after reasonable and accessible opportunity has been provided, consistent with the principle that timeliness is also important for progressive realisation, and that deadlines are an important tool for avoiding organisational inertia. Deadlines can be an accessibility barrier: for example, disabled people may find it difficult to comply with consultation time requirements if not provided with adequate support.

There are many great examples of disabled people engaging in democratic and legal process. To do so barriers to consultation must be removed. If disabled people find it difficult to comply with requirements (for example deadlines or submissions) then the consultation system itself must be accessible to avoid creating an interminable consultation process.

The Office for Disability Issues, Disabled Persons Organisations and other social support institutions will play a critical role in providing support to disabled people to engage in consultation. We note that it is likely that Disabled Persons Organisation's engagement will be more effective if support and resourcing for consultation is provided. For this reason, we recommend that a capacity building and resourcing exercise be implemented alongside consultation. At the same time, there may be incentives on large institutional players to delay consultation processes in order to water down accessibility standards or to delay the point at which they become enforceable.

We consider that a consensus-based process is more likely to be successful in removing barriers, however we recognise that sometimes this is not possible. For this reason, consultation not consensus must be set out in the legislation. It would be a failure of the system if the standards development process was stalled because a decision-maker would not implement the accessibility standard until consensus was reached.

## **What should be the consequences of failing to consult?**

Creating a consultation obligation in legislation will open the relevant decision-maker to judicial review. This means that if a person or organisation believes the decision-maker failed to consult as required they could take it to court. The court could look at it and if the court agreed that the consultation did not meet the requirements, they could tell the decision-maker to do it again and follow the courts directions on how to consult.

We believe this is consistent with the overall human rights-based model of disability under the UNCRPD and the broader principle of access to the courts, the principle of legality, the clear statement principle, and the principle of natural justice.<sup>106</sup> The jurisdiction of the courts should not be excluded in this area and that would be a significant departure from constitutional principles.

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<sup>106</sup> See discussion of constitutional considerations above.

Depending on the legal status of the accessibility standards, a failure to adequately consult could result in an investigation by Parliament's Regulations Review Committee, with the consequence that a standard be disallowed. This could be an important and welcome democratic check on accessibility standards by affected parties, but like judicial review, this process may also create an inequality of arms between traditionally powerful groups and excluded groups. For example, a consortium of businesses or a politician could use the regulations review committee to undermine a standard if they perceive the standards to be against their interests or to disproportionately affect property rights or individual freedoms, consistent with standing order 319.

Issues with inequality of access to courts and parliamentary processes must be considered as part of the development of standards for access to justice and access to parliamentary processes.

### *Should there be a validating provision?*

“Sometimes, consultation provisions in legislation contain a provision stating that a failure to comply with the requirement to consult before making a decision does not affect the validity of that decision. The purpose of this protection is to save a decision from an attack on its validity due to a minor or technical error in the course of a genuine consultation process (perhaps because a particular person missed out on being consulted or some minor information was not communicated). It does not generally protect against a deliberate decision not to consult in the face of a statutory obligation. Also, it does not save the decision if the lack of consultation means that relevant considerations were not taken into account or irrelevant considerations were taken into account.

However, this type of concern can often be addressed in other ways, for example, by clearly specifying the consultation process or by giving the decision maker some discretion as to how far to go in determining which members of a group need to be consulted. A validating provision may still be appropriate to ensure that minor or technical failures do not affect the validity of the decision. However, the scope of the validating provision should be clear.”<sup>107</sup>

We think including a validating provision creates risks. Careful procedural justice is essential. The validating provision must be weighed against our conclusion on the regulator’s ability to impose a deadline on consultation processes in the interests of timeliness.

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<sup>107</sup> Chapter 19, part 4.

# CHAPTER 5

## ACCESSIBILITY STANDARDS

### Overview of chapter

The primary function of the Accessibility Legislation will be to create a system that structures the development of **accessibility standards**. The legislation must set out a process for development, drafting, publication and enforcement of these standards. It must also give an indication as to who is responsible for the overall integrity of the process of standard development. In relation to each standard developed, it must also say who it will apply to, what rights and obligations they have, and what the consequences will be if they depart from these rights and obligations. People with disabilities must be included at all stages in the leadership of standard development, monitoring and enforcement.

Implementing accessibility standards will require widespread change. However, they provide a mechanism to remove barriers across the breadth of New Zealand society. Law of this kind must identify areas where rapid progress can be made, and areas that will take longer for practical and democratic reasons. Accessibility standards should be developed and implemented in a way that strikes a balance between the overdue need for legal intervention and the constitutional principle against enforcing costly change too rapidly. To avoid unnecessary delay the process can begin with non-enforceable standards, which can have significant cultural and political effect immediately. Those standards will then be tested and monitored, before giving way to enforceable standards in appropriate cases.

#### *Guidance from the legislation guidelines*

It is our opinion that the development of accessibility standards represents the most common vision for a fully accessible Aotearoa with legally enforceable requirements. These standards are where the rules ‘get into’ the system. The legislation guidelines direct attention to this question as follows:<sup>108</sup>

A key design question is “where the rules get set” in the system. The detail of what is required to comply with legislation may be set in the Act itself (through prescriptive requirements), delegated to regulators or other bodies (to be decided through administrative or legislative tools), or be left for individual actors to decide (if the legislation sets only open-ended principles or outcomes leaving a discretion as to how to comply). These choices have implications for certainty compared to flexibility, risk tolerance, and who ultimately decides what is required to comply.

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<sup>108</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

## Role of standards in accessibility system

In its general comment on accessibility, the Committee on the CRPD describes the role of standards in relation to accessibility, as opposed to the role of reasonable accommodation. We reproduce it here because it articulates the distinction concisely.<sup>109</sup>

“Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. [...]

Accessibility standards must be broad and standardized. In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access. In such cases, reasonable accommodation may apply.

The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context. Here, accessibility standards can be an indicator, but may not be taken as prescriptive. Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation.

Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard.”

The key function of standards are:

- To identify people who have rights and obligations to remove barriers;
- To help those people understand what they need to do to be compliant;
- To agree on key indicators for assessing whether those standards are effective or not; and
- to state the consequences if they are not compliant.

On that basis, standards should be made legislative instruments capable of being disallowed by s 38 of the Legislation Act. Standards will have “significant legislative

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<sup>109</sup> Para 25-26.

effect”<sup>110</sup> as defined in the Legislation Act 2012. Section 39 states that an instrument has “significant legislative effect” if it: creates, alters, or removes right or obligations; and determines or alters the content of the law applying to the public or a class of the public. There are important constitutional reasons for this that are desirable for the overall functioning of the system and the mediation of rights and interests between people with obligations to remove barriers, the rights of the regulator to enforce barrier removal, and the rights of individuals to bring complaints to the regulator.

There should be three categories of standards:

1. Enforceable standards; and
2. Non-enforceable standards.
3. A mixed standard that is partially enforceable and partially non-enforceable.

### *Non-enforceable standards*

Non-enforceable standards are intended to allow gradual adoption of accessibility requirements while also allowing immediate application. Non-enforceable standards will be drafted with the intention that they become enforceable after a process of consultation, testing and monitoring.

We acknowledge that calls for accessibility legislation have been made on the basis that existing voluntary standards are ineffective at making Aotearoa accessible. We agree that non-enforceable standards will not be enough. However, non-enforceable standards do serve a purpose by enabling rapid transition toward a clear set of expectations around accessibility that can be tested and monitored. The clear signal from the Act is that, once non-enforceable standards are set, if they do not achieve compliance by voluntary removal of barriers, then they will become enforceable.

Another benefit of formalising non-enforceable standards under the Act is that they will be collated in a way that makes them more accessible, as understood in the purpose of the Legislation Act 2012, because they are held in one place with a clear framework around them.

If all standards were required to be enforceable, they would have significant legislative effect, and this would require significant consultation. There could be significant delay in their development, drafting and implementation. By contrast, if non-enforceable standards are given formal recognition, then this enables them to become applicable immediately and have influence, even if they won’t all be immediately enforceable. Nevertheless, nobody ultimately responsible for removing a barrier will be able to convincingly argue they did not know what their obligations were.

Non-enforceable standards present a way for systemic data collection to take place. This information can be organised and enable the case to be made for a rapid transition to enforceable standards at an appropriate time.

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<sup>110</sup> Legislation Act 2012, s 39.

The suggestion that non-enforceable standards may become enforceable also presents a powerful incentive for duty holders to voluntarily comply to the greatest extent possible. In the same way as digital giants like Facebook have adopted their own community guidelines that are more stringent than legislation in many respects to stave off formal regulation, many businesses will voluntarily adopt the requirements of the non-enforceable standards for reasons other than strict enforcement, including positive public reputation.

Disability rights advocates know from experience that just because the law exists, that does not mean it will be enforced. Enforceability should not be the only measure of success of the accessibility legislation. Another approach discussed below is a mixed approach where non-enforceable standards will become enforceable in the future, so there can be no suggestion that anyone has been caught by surprise at the point they are legally binding.

The standards should be drafted with a level of precision such that they can be given legal status as enforceable standards with as few amendments as possible: ideally, a simple Order in Council would be enough to make standards enforceable. Their status as non-enforceable standards will also demonstrate to various stakeholders that the standards are workable and practical, as well as giving those stakeholders a grace period within which to identify issues with their drafting and scope.

### *Enforceable standards*

Enforceable standards should attract the status of secondary legislation. They will need to have this status in order to be legally enforceable and to lead to the kinds of compliance consequences necessary to bring about an accessible Aotearoa.

The Regulations Review Committee Digest<sup>111</sup> makes the following helpful points about delegated legislation:

“... Parliament is, however, not the only institution that produces legislation. Parliament may delegate the power to make laws to another body or individual. Laws made pursuant to such a power are known as delegated legislation.” (p 2).

“It is a well-established principle that statutes should set out the substantive policy of a law, while regulations may provide the detail necessary for the implementation of that law, without, for example, purporting to levy taxes, amend Acts of Parliament or have retrospective effect.” (p 2)

“Regulations are also commonly used where the area of law concerned needs to be updated or replaced regularly.<sup>10</sup> Regulations therefore deal with a vast array of subject matter, often in a detailed or technical manner. For instance, regulations may, amongst other things, provide for the issuing of licences or permits, govern

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<sup>111</sup> Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, Wellington, 2016).

the use of harbours and reserves, set levels of fees for government services, and establish laws relating to aviation and transport.” (p 2)

“Delegated legislation can overcome Parliament’s ‘limitation of aptitude’ to deal with technical matters. This included “detailed technical knowledge, for example, of trademarks, designs, diseases, poisons, legal procedure and so on, upon which the Minister can and does consult experts”.<sup>14</sup> Using regulations to pass laws on such matters has two advantages. First, regulations can be amended relatively quickly when compared to an Act of Parliament. This allows rapid movements in technical development and knowledge to be provided for in the law. Secondly, it overcomes the problem of having Acts overburdened with provisions dealing with matters of great complexity and detail.” (p 3)

“Delegation of law-making is usually justified for the following reasons”, which we believe equally apply to the technicality, pace and flexibility expected of accessibility standards:

- the pressure of parliamentary time;
- the technicality of the subject matter;
- any unforeseen contingencies that may arise during the introduction of large and complex schemes of reform;
- the need for flexibility;
- an opportunity for experiment; and
- emergency conditions requiring speedy or instant action.

As delegated legislation, enforceable accessibility standards could be struck down as being ultra vires. This means a court could determine the law has no legal effect. This is an important check on the significant and wide-ranging effects that the Accessibility standards will have.

Further, the standards would have to be presented to the House of Representatives for its approval.

Regulations could also be disallowed under the Legislation Act 2012 and scrutinised by the regulations review committee. Current standing order 319(2) sets out a range of grounds which can justify review of regulations which should generate public trust and confidence in the interaction between Accessibility Standards and civil liberties, including that the standard (or regulation):

- is not in accordance with the general objects and intentions of the statute under which it is made
- trespasses unduly on personal rights and liberties
- appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made
- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal
- excludes the jurisdiction of the courts without explicit authorisation in the enabling statute

- contains matter more appropriate for parliamentary enactment
- is retrospective where this is not expressly authorised by the empowering statute
- was not made in compliance with particular notice and consultation procedures prescribed by statute
- for any other reason concerning its form or purport, calls for elucidation.

A further benefit of having accessibility standards subject to this parliamentary committee is that it gives both people with disabilities and people subject to duties under the standards the ability to have the lawfulness of a standard reviewed through democratic and political procedures by directly lobbying Members of Parliament. Oversight of standards will therefore not be limited solely to legal procedures under the judicial branch of government, which can create or suffer from access to justice (and accessibility) barriers.

#### *A standard that is partially enforceable and partially non-enforceable*

There is significant benefit of having a single standard over a domain. We envisage during the standards development process, it is likely that some domains may be identified where it would assist the removal of barriers for part of the standard to be enforceable and some parts non-enforceable. There may be a number of reasons why this approach is taken, for example several overseas jurisdictions require government to comply with some standards first before requiring compliance by the large private sector organisations and then smaller private sector organisations. Others could allow for the transition of a standard from non-enforceable to enforceable as compliance rates meet certain thresholds for example once 70% of businesses in a sector comply with a standard. Finally, whilst rare, there may be situation that arise where the non-enforceable part of a standard is designed to remain non-enforceable.

We recommend that mixed standards should be included as part of the tool kit available in the standards development process for use in situations where a mixed approach is likely to assist in removing barriers within a domain. Any elements that are non-enforceable should be subject to review as part of the review of that standard to consider its effectiveness in removing barriers.

## **Standard development process**

The key research questions for further analysis (set out above at page 65) must be answered. This essentially acts as a stocktake of the existing accessibility system in New Zealand and will allow for a systemic approach by the regulator.

Developing standards will be the most important part of the system, but is likely to be a complex and intensive process. The process for each standard will require input from a broad range of stakeholders. Ultimate accountability for their timely and effective development will rest with the regulator.

The development process must be informed by people with disabilities and their advocates, including disabled Māori and in close consultation with the wider community.

In some domains, standards may already be well developed prior to the enactment of the proposed legislation. For example, in the case of web accessibility standards. In that case, the transition to enforceable standards can occur more rapidly. Other areas, such as standards for accessibility of private homes, may entail more complex policy and social issues. These can be left for careful development over time.

Non-enforceable standards recognise the balancing act between the pace of change and the existing regulatory situation in New Zealand. This balancing process must weigh factors such as:

- the policy objective of the accessibility system (and the individual accessibility standard),
- constitutional principles which set out how our parliamentary, executive and judicial system must operate,
- legal principles that set out how to interpret and give effect to our laws, and
- legal rights of people and organisations.

Here are the steps we believe must be followed in the development of accessibility standards:

1. Following a consultation process, the regulator makes decisions about:
  - a) Setting domains for accessibility standards.
  - b) Prioritising those domains for action.
  - c) If enforceable standards are going to be the starting point for the standard then agreement from the Minister, Ministers or Cabinet will be required.
2. The regulator, in relation to each domain, embarks on a consultative process of standard development following a **standard-development process**. That process includes the following.
  - a) Identification of relevant stakeholders.
  - b) Identification of existing law and policy instruments.
  - c) Identification of accessibility barriers that have the effect of excluding disabled people from social and other systems.
  - d) Providing an accessible opportunity to comment and be heard.
  - e) Formulating agreement upon methods of removing those barriers.
  - f) Drafting the standard with the assistance of drafters.
  - g) Stating the standard's effect, including
    - i) which provisions of it are **enforceable** or **non-enforceable**,
    - ii) at what point in time the standard comes into force,
    - iii) what the effect of non-compliance with the standard will be,
    - iv) how system-wide compliance with the standard will be measured, and
    - v) at what point compliance with the standard will next be assessed.
  - h) Consideration of how the costs of implementation will be met.
3. A standard is published and supplemented by public education and awareness campaigns, including grants and subsidies where appropriate.

### *Standard development on areas already covered by accessibility standards*

We suggest beginning with domains that are already the subject of greater examination and consultation. For example, digital and virtual accessibility. Alternatively, initial focus may be given to domains with the least developed pre-existing consultation. In any event, existing standards have limited application and will likely need to be improved. Prioritisation should be decided based on consultation and recommendation by people with disabilities and Māori.

One example of an area that has already been investigated from an accessibility perspective is public transport. The Chief Executives' Group on Disability Issues endorsed the recommendations of a report entitled "The Accessibility of Public Transport for those with a Disability" in March 2016, jointly authored by NZTA and the Ministry of Transport.<sup>112</sup> It is an accessible journey stocktake undertaken as part of the Disability Action Plan 2014/2018. It followed the "Accessible Journey report" from 2005. The stocktake relates in part to "reasonable accommodation", but could equally be used to inform the development of accessibility standards on public transport. Feedback noted: "Some participants at the [accessibility] workshop [held as part of the stocktake] expressed frustration regarding guidelines, produced by the Transport Agency, related to the accessibility of public transport services and facilities. There was a view that the status of guidelines as non-legal requirements meant they were not filtering down into actual improvements on the ground." (p 8)

Another example is Standard NZS 4121:2001, which is connected with the Building Act 2004 and the Building Code. "The purpose of the standard is to provide guidance for those who are responsible for making buildings and facilities accessible to and fully usable by people who have disabilities."<sup>113</sup> It "provides a universal basis for the necessary dimensions and space needed to ensure that the structure and layout of both public and private accommodation and their other elements, facilities and features are accessible to and usable by people with disabilities." The standard is a helpful illustration of how detailed an accessibility standard could be. The standard must be read in concert with ss 117-120 of the Building Act as it relates to access to buildings by persons with disabilities. Section 118 of the Building Act only imposes access requirements to buildings with public admission, and provision is only required for people with disabilities who may be expected to visit or work in that building. Section 119(1)(a) of the Building Act refers to the standard directly and this reference can be amended or substituted for another standard by Order in Council upon the recommendation of the Minister. Because the standard is already comprehensively developed and has been available for some time, there is likely to be a good body of existing experience on: how to apply the standard; difficulties in applying the standard; limitations of the standard's application; limitations of the standard itself; and ways to improve the standard.

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<sup>112</sup> Reference from

<https://drive.google.com/drive/u/1/folders/1pjZCWJtQAMaAkFLD0xsox5W6Ed6dMq->

<sup>113</sup> Page 7 of the standard: <<https://www.standards.govt.nz/assets/Publication-files/NZS4121-2001.pdf>>

We have referred to DIA's Web Accessibility standards above, and these might also provide a good starting point for the adoption of non-enforceable or enforceable standards.

## **Decision Maker in Relation to Standards**

We recommend that the statute sets out a range of decision-making processes depending upon the type of standard and the implications of developing and implementing it. This will ensure appropriate oversight and the flexibility required to accelerate accessibility.

### *Decisions made by the Regulator*

The regulator must be able to develop and make decisions in relation to non-enforceable standards. This will allow the type of approach used by the Government Centre for Dispute Resolution in developing the Principles and Standards around Dispute Resolution. It will also allow standards to be developed in a timely manner across multiple areas. It is expected that most standards would start their life through this process.

### *Decisions made by a single Minister*

The second level of standards set out in the legislation should relate to standards which are enforceable. This would be straightforward regulation making power for secondary legislation and would allow the Minister responsible for Accessibility to make decision on Accessibility Standards. It is envisaged that where new government funds are required to implement the accessibility standards, the Minister can follow the existing processes to do this. It is expected that this process would be used from time to time and it is likely to be a critical part of the process of making standards enforceable.

### *Decisions made by more than one Minister*

The third level of standards relate to joint decision making with a Minister who is responsible for the subject area of the standards (for example Housing Minister, Transport Minister or the Minister for the Digital Economy). The Public Sector Act provides a framework for this approach involving more than one Minister. This is particularly important for clarifying enforcement processes and any boundaries between overlapping regulatory systems.

### *Decisions made by Cabinet*

The highest level of standards would effectively require a Cabinet level decision. There are several things which may arise during the standards development process that mean Cabinet level decision may be required. These include when reform of primary legislation is required to remove barriers, or when there are significant cost implications to remove specific barriers, or when the accessibility domain cuts across multiple Ministerial portfolios. It would be expected that cabinet level decisions on standards would be comparatively rare.

## Guidance from legislation guidelines

Three particular Chapters of the Legislation Guidelines (chapters 14, 15, 16) offer guidance on the use of secondary legislation. Here, we answer those questions at a high level, on the basis that the accessibility standards will have the status of secondary legislation to the accessibility act as primary legislation.

The subject matter of the accessibility standards is appropriate for secondary legislation. It is highly detailed and may need to change regularly in line with developments in society and technology. The primary legislation will set clear parameters to ensure that secondary legislation remains within appropriate constitutional boundaries.

The power to make secondary legislation covers a broad purpose (the removal of barriers in environments on a domain-by-domain basis), but each standard will, as a matter of pragmatism, be tightly confined. For example, standards for each domain will only relate to that domain. When standards are being developed, there are a range of tools which could also be included in the standards to help everyone understand what they mean. We envisage the use of:

- purpose statements (for example the purpose of this standard is to remove barriers from public transport in order to allow all New Zealanders to participate fully in their communities).
- policy statements (for example, bus companies in New Zealand must develop policies to comply with this standard).
- Objectives
- Other drafting tools that will mean standards are not limited to strict rules.

When necessary and appropriate, enforcement against those standards would still be done by commonly accepted means, like the use of a regulator whose jurisdiction is constrained by statute. Because of the wide-ranging implications of the standards, and their potential impact on other spheres of government, we can understand that a Crown Minister will need some oversight and involvement in standard setting.

Regulation making powers are held by Ministers. Normally the Minister is exercising powers under a statute in an existing domain, for example telecommunications or transportation. There is a decision to be made about whether existing statutes are amended to allow for accessibility standards to be made by a Minister in each envisaged domain after consultation with the Minister responsible for the accessibility system, or whether the power is given to one Minister under the Accessibility Act who is required to consult with Ministers in each domain as standards are developed. The proposed process for setting out the decision maker for different levels of standards allows for this to occur.

It must be remembered that not all “domains” will be identified before the accessibility legislation is enacted. Some may only be identified in 15 years time. A process where primary legislation is required to be drafted and passed prior to standards being prepared by a Minister and passed into law should be avoided if possible. Although it is not clear

exactly where the power to make secondary legislation should sit and this is ultimately a policy decision that must be made, the regulator under the accessibility system will play a crucial role and must have residual functions and powers in relation to standard setting. (including clarifying enforcement processes and any boundaries between overlapping regulatory systems). These should be focused on non-enforceable standards with an escalation pathway towards enforceability if required. One additional safeguard that could be developed is an annual report to Parliament on areas where further enforceable standards are required.

These issues will require further policy discussion and consultation with affected people. There should be an acceptable distance between the accessibility standards and the process used to set and enforce them on the one hand, with the core of executive government on the other.

This decision on whether the regulation making power should sit under the Accessibility Act or other existing domain specific legislation should be guided by consideration of which approach is more likely to be effective at identifying and removal barriers and preventing the development of further barriers. The purpose of the accessibility legislation is to remove accessibility from being just one consideration among many which can be overlooked by government. The legislation must make accessibility for disabled people a key consideration across a wide range of public and private decisions.

The secondary legislation should be subject to all the usual safeguards, in particular, the ability for both judicial and legislative oversight through legal challenge in the Courts and through the regulations disallowance process in the Legislation Act 2012. The standards should be drafted and published according to democratic principles. We cannot foresee any need for the standards to have retrospective effect: they would not undo or invalidate building consents or other decisions that were valid at the time they were made. We do not foresee any need for the power to make secondary legislation to be sub-delegated further, unless an arrangement were to be adopted whereby the Minister delegates the power to the regulator, in which case we would expect this to be reflected in the primary legislation.

The secondary legislation should be compliant with the New Zealand Bill of Rights Act (“NZBORA”). We envisage the decision-maker around the secondary legislation (whether the regulator or the Minister) should be required to consider the rights in the NZBORA. In the case of the regulator, it is likely that they would be caught by s 3 of the NZBORA in any event in the exercise of a statutory power to make regulations. Any limitation of rights in the NZBORA would have to be balanced against the impact of accessibility barriers in excluding a large proportion of New Zealand society from enjoying full and effective participation in society on an equal basis with others.

The secondary legislation (the standards) is not intended to modify the primary legislation. “Commencement” is the legal word to describe when a law starts to apply. The commencement of the various standards will be complex because commencement will need to reflect the distinction between enforceable and non-enforceable standards. Secondary legislation may authorise incorporation by reference: for example, the web

accessibility standards hosted by the Department of Internal Affairs incorporate the W3C standard on web accessibility; similarly, the building code incorporates standard 4121 around accessibility of the built environment. Where there is a good body of existing standards or principles, the accessibility standards should not be prevented from incorporating these by reference, although it may be preferable in most cases for the standards to incorporate the wording in those external standards, rather than incorporating it wholesale.

The standards will require classes of people and activities to be dealt with in a nuanced manner. That may include the ability to exempt people from accessibility standards in justified cases, although powers of exemption would risk undermining the overall policy of the legislative scheme. People with disabilities should be consulted on whether there can be any legitimate exemptions made to the standards, however we note that the period of transition from development, to non-enforceability to enforceability should provide ample time for individuals and organisations to become familiar with their obligations and make plans for their progressive implementation. Our preference is timetabled compliance for example a series of timeframes whereby different individuals or organisations have to comply (perhaps linked to review of the standards) rather than widespread permanent exemptions. This will mean that the standard sets out a timetable explaining which organisations have to comply with particular standards (or parts of standards) and over what timeframe. This will make it easier for everyone to know what they need to do and when so that they can plan to ensure that they comply with the standards in time. At minimum, a maturity improvement framework must be developed. This is proving effective in the disputes resolution system.

## **Publishing standards**

The Legislation Act 2012 sets out requirements for publishing legislation and subordinate legislation. We see no reason why these should not apply to the accessibility standards. There may be some modification required in order to reflect the non-enforceability of some standards, however legislation frequently includes material that is not directly enforceable, so the standards are not unusual in this regard.

## **Transition from non-enforceable to enforceable standards**

The standards themselves should be drafted by Parliamentary Counsel or those with specialised drafting skill. They should be published in the form of a notice or similar that can, at a later date, be updated and given legal force with minimal amendment. The purpose of the non-enforceable period for some standards will be to demonstrate that they are workable. Several innovative options for using technology to improve accessibility have been developed in recent years and careful consideration should be given to using a better rules approach to this work.

### *Potential model to adopt*

We are conscious that the Resource Management Act 1991 is frequently criticised, but we suggest certain provisions could form a good legislative precedent to model how standards transition from non-enforceable to enforceable status.

We refer to ss 43A, 43B, 58C, 62, 67, 68, 86 to 86G. Essentially, the RMA creates a hierarchy of planning instruments that begin with centralised control, and are then developed by communities to take account of specific issues. That policy material is given effect through specific documents that can have the legal effect of a regulation. Those regulations are influential at a policy level, but they are not enforceable until they have been through a process of public notification and consultation. This process could be modified to enable the development of accessibility standards.

## **Drafting standards**

### *Suggested process*

We suggest the following process be followed in developing the standards.

- Domains should be identified. The key question is: what is the most effective way to conceptually define key areas within particular environments, such that standard development can proceed pragmatically, effectively and in a timely manner?
- Domains should be prioritised. People with disabilities, including disabled Māori, must be consulted on what domains should be strategically prioritised first so as to make the greatest contribution to the full and effective participation of disabled people.
- Within each domain, barriers must be identified and recorded. People with disabilities and people with expertise in disability research (including researchers with lived experience of disability) should be consulted on the best methodologies to adopt in order to learn from the lived experience of disabled people.
- Consultation must occur to identify practical ways that barriers can be removed. Alternatively, the standards could simply require that an identifiable barrier be removed and leave the method open. It will be important at this stage that the standards are not rendered impossible to comply with by requiring the removal of barriers in ways that are unachievable. Further, there will be a need for careful attention to the interaction between the accessibility legislation, and other methods of supporting full and effective participation through concepts of reasonable accommodation and social support. Equally, there should be a way of ensuring that work properly sitting with the accessibility legislation is not shifted unjustifiably onto these complementary systems.
- As part of standards development, there should be suggestions and agreement on indicators and metrics that will allow the regulator to be satisfied that barriers

have been removed. There should also be discussion about how data to satisfy these indicators and metrics will be collected and at what point the data will be reviewed. We expect that many of these metrics will rely on proactive attempts to gather the experiences of people with disabilities, as well as reactive logging of complaints and notifications to the regulator.

- The standards will need to contemplate who is responsible for taking action to remove the barrier, and what consequences will flow if the barrier is not removed. The standards should be used to consider how education programmes, training by people with disabilities, and financial support for duty-holders can be used to incentivise compliance. We expand upon this aspect of the standards in the next chapter.

# **CHAPTER 6**

## **NOTIFICATIONS, MONITORING, INVESTIGATIONS, ENFORCEMENT AND SYSTEM LEARNING**

### **Overview**

This chapter is about how to implement the standards and bring the wider system into effect so that barriers can be removed and disabling experiences can be progressively reduced and where possible removed.

A key reason for calling for accessibility legislation is that there is a need for accessibility standards to be enforceable. The numerous voluntary standards produced by a range of public and private bodies have been insufficient to ensure the systematic removal of barriers across New Zealand society. Overall, a crucial design factor for the accessibility legislation must be that it is actually effective in bringing about change. To do this, we need to monitor the system to understand how it is affecting peoples' experiences.

"Enforcement", however, should not be understood narrowly. The primary means of enforcing the Act will not always be a matter of a Court or tribunal, or a government agency, compelling someone to do something under the threat of punishment. The Accessibility Act must embrace a wider range of methods than that to achieve the overall purpose of the Act. The scale and breadth of accessibility barriers means that change will not occur if direct legal enforcement is the only option available. International experience has shown that the option for enforceability is required to increase effectiveness of the barrier removal process.

When it comes to enforcement, it is also necessary to consider what kinds of enforcement will be dealt with under this Act, and what kinds of enforcement will be left to the complementary legal systems that deal with social supports, and reasonable accommodation and non-discrimination. Each of these systems has its own limitations and also involves access to justice barriers: accessibility standards may contribute to make these systems more accessible, but they will not replace those systems.

- While standards will apply generally in order to remove barriers in various domains, there will still be a need for reasonable accommodation in some circumstances for individuals with impairments. This will require use of the regime under the Human Rights Act 1993.
- If someone is being deprived of their right to choice and control over their lives, then enforcement may be a matter for supported decision-making regimes that are currently in development.
- If someone faces barriers in their employment, then enforcement may be a matter of pursuing legal action under the Employment Relations Act 2000.

- Social support, including access to aids and accommodations, will still be a feature of the health and social systems, even though mobility for wheelchair users is enhanced by better accessibility in the built environment.

The job of the regulator will be to monitor how these systems may include barriers, to record those barriers, and to take responsibility for accessibility standards which progressively remove the impact of those barriers on disabled people who find it impossible to use those systems.

But, we emphasise that in appropriate cases, the regulator will take direct enforcement action in a court to compel people to remove barriers in line with accessibility standards. There will be penalties for failure to comply. As a matter of pragmatism and access to justice, this kind of hard enforcement can only sit at the sharpest end of the enforcement spectrum.

## **The Government Centre for Dispute Resolution Standards**

We have included here the recently developed standards from the Government Centre for Dispute Resolution. Whilst we understand that the system we have recommended does not start with the creation of disputes, understanding these standards will give context for dispute prevention and system learning.

It is inevitable that despite the best efforts of everyone involved, implementing this system will lead to disagreements. Some of these will lead to disputes. When designing these processes, careful attention must be given to these standards to ensure the operation of the regulatory system complies.

We recommend that the design of the system for notifications, monitoring, investigations, enforcement and system learning would benefit from being designed in accordance with these standards, regardless of where in that system a formal dispute evolves. These could also be considered as a series of design principles over a wider regulatory system. There are five principles and nine standards. These are the standards:

### **Standard 1 – Consistent with Te Tiriti o Waitangi/Treaty of Waitangi**

Dispute resolution schemes demonstrate a commitment to Te Tiriti o Waitangi/Treaty of Waitangi and the Treaty principles (including partnership, active protection and participation). Schemes design and deliver culturally responsive dispute resolution for all users. This includes recognition of Te Ao Māori and use of tikanga and te reo Māori in the design, resourcing and delivery of dispute resolution processes.

### **Standard 2 – Accessible to all potential users**

Dispute resolution schemes are accessible, visible and affordable for all people who may need to use them. Dispute resolution schemes proactively identify and respond to the diverse needs of people, whānau, and communities.

### **Standard 3 – Impartial**

Dispute resolution schemes are impartial. Appropriate actions are taken to maintain impartiality and mitigate the impacts where impartiality could be compromised or there is a perceived lack of impartiality.

### **Standard 4 – Independent**

Dispute resolution schemes are independent. Appropriate actions are taken to maintain independence and mitigate the impacts where independence could be compromised or there is a perceived lack of independence.

### **Standard 5 – Information about parties and disputes is used appropriately**

Where confidentiality applies, any exceptions are clearly communicated to all parties and participants in the dispute resolution process. Subject to relevant privacy and confidentiality rules, schemes can collect and gather information about dispute resolution processes and outcomes to support transparency, accountability and system improvement.

### **Standard 6 – Timely**

Dispute resolution processes are provided as quickly and efficiently as possible given the nature of the dispute and the process used. Timely resolution does not compromise the quality of decision-making or dispute resolution processes.

### **Standard 7 – Promote early resolution and support the prevention of future disputes**

Dispute resolution schemes promote the resolution of disputes at the earliest opportunity or at the lowest level. Dispute resolution schemes support the prevention of future disputes through information, education and the distribution of actionable insights to appropriate organisations, agencies and/or regulators.

### **Standard 8 – Properly resourced to carry out the service**

The dispute resolution scheme has the appropriate funding, skills and capabilities needed to deliver dispute resolution services that are accessible, culturally responsive, timely and effective.

### **Standard 9 – Accountable through monitoring and data stewardship**

The dispute resolution system collects data and information that can be used to analyse the effectiveness of services and improve performance of both the dispute resolution system and the regulatory systems in which dispute resolution schemes operate.

The Government Centre for Dispute Resolution has worked with the sector to develop these standards into a self-assessment tool and a maturity improvement framework. This includes specific capabilities in relation to each standard. Work is underway to develop collaboration in the dispute resolution sector to improve maturity. This is a useful model for the development and implementation of standards.

## **Summary of Notifications, Monitoring, Investigations and Enforcement Mechanisms**

In situations where the notification process (or the independent body's monitoring process) identifies that an accessibility standard applies to the environment in which the barrier existed, then it is necessary to consider whether an accessibility standard has been complied with.

It is important to understand levels and patterns of compliance with the accessibility standards, regardless of whether this is enforceable or not. The reason is that non-compliance with non-enforceable standards is important information to collect as part of the barrier removal process. It is also critical that creating this understanding is done in the most effective, efficient manner possible.

“Enforcement” should be understood as engaging a range of soft and hard regulatory options, that can be deployed depending on context on a standard-by-standard basis, or within standards as a whole. This must be the one focus of the regulator’s operation.

“Another key question is whether the State needs to enforce the legislation and, if so, what tools are needed for enforcement. There are key trade-offs between criminal and civil tools and other softer compliance methods, which need to be considered alongside questions about who will enforce the legislation.”<sup>114</sup>

Enforcement and compliance should also not be seen as only being through disincentives or punishments: we believe grants, education, and support will be crucial for proactive removal of barriers.

It is intended that the Act would provide a wide suite of regulatory options in pursuit of the overall goal of systematic barrier removal. The accessibility act should be drafted to anticipate the use of the following enforcement mechanisms:

- Incentives, including grants and subsidies.
- Monitoring, including data collection, receiving complaints, and conducting research and investigations, with the end goal of producing bodies of evidence to inform standards development and accountability.
- Publicity and transparency, including publication of findings reached through monitoring, and public education programmes about how the accessibility system works and how to comply with accessibility standards.
- Consultation, including the obligation to consider the views of stakeholders and people likely to be affected by accessibility standards.
- Compliance and enforcement, including investigation and making findings on complaints about non-compliance with enforceable standards, or referring findings to other bodies for prosecution. There must also be financial and other penalties for non-compliance, as well as the ability to compel people to comply with accessibility standards.

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<sup>114</sup> <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

- Rights of appeal, judicial review, complaints to the Ombudsman and other oversight bodies like the Privacy Commissioner, and Parliamentary oversight through the Regulations Review Committee to assess the lawfulness of the standards and of decisions made by the regulator and others.

## The Notification Process

The first step in monitoring or enforcement at a system level is designing an easy, accessible process for identifying the existence of barriers. We prefer this approach to a “complaints” process focused on alleged breaches of standards (regardless of whether this complaint is to an independent body or a body allegedly in “breach” of standards). We also prefer this to a process of self-reporting of compliance by individual organisations. The reason is that a person centric approach to an accessibility system is likely to be most effective if the system is informed by people identifying their disabling experiences and then the system responding to these. Emphasis on notification rather than compliance also avoids any incentive to find faults with the “complaint” that has been lodged, and any associated justification of failing to record the notification.

The primary focus of the notification process is for the independent body to understand where people have disabling experiences and to consider how barriers exist within environments in order to take action to remove those barriers.

It follows that the independent body’s knowledge of the existence of barriers is primarily reliant on people notifying the independent body of **disabling experiences** within various **environments**. It is critical to the success of this accessibility legislation that people with lived experience be given a central role in this notification process both individually or through Disabled Persons’ Organisations.

To be effective, this requires a system which allows a person to notify in many different ways and we expect these to include through social media messaging, phone calls, apps, by email, letter and in person. We expect that there will be significant duplication of notifications of barriers however we consider that this should be encouraged not discouraged so that a sense of scale of the disabling experiences can be considered. The focus must be on maximising the notification of barriers in order to allow system learning to be developed.

We do not wish to prevent proactive organisations from receiving notifications directly from persons with disabling experiences and acknowledge some organisations may wish to do this. This will assist those organisations with innovation and implementation of standards. Nonetheless, if organisations are to implement internal processes for accessibility, then we recommend that this be done in way that embraces transparency and that system level data is collected. For example, the person who had the disabling experience could elect to notify the independent body in order to allow capture of this data or the organisation to whom it was reported could then report to the independent body data about themes and volumes of notifications. Further policy work will be required

to operationalise the notification processes in a manner which ensures accuracy for system learning purposes.

*What happens once the notification has been made?*

Once notified, the independent body will consider a number of questions for example:

1. What barriers exist within the environment?
2. Whether there are existing accessibility standards (or other earlier standards) that apply to that environment and if so, whether those accessibility standards are being complied with?
3. Whether relevant accessibility standards are in the process of development and if so, whether the accessibility standards, once implemented, would remove the barrier?
4. Whether the disabling experience caused by the barrier remains after the existing or developing accessibility standards have been complied with?

The effective use of data created through the notification process is critical to the success of the accessibility legislation. It is not intended that every notification result in an investigation, but it is important that the notification process is designed in a way that people and Disabled Persons' Organisations are heard and can tell their story about their experiences. By focusing on the experience and not whether or not there has been a breach the person will not be put into an adversarial relationship with an organisation in order to make findings about the legitimacy or otherwise of their experience. It is essential that the notification process be co-designed with disabled people, including Māori.

*Is the disabling experience caused by a barrier within an environment?*

The first step is to consider the environment in which the disabling experience occurred and to identify barriers that exist and contributed to that experience. This may be obvious to the person making the notification, but there will also be cases where more than one barrier exists, or a combination of hidden barriers are causing the disabling experience.

We note that in the course of following the steps above, it is likely that significant and important knowledge will be developed about disabling experiences. This knowledge will go wider than disabling experiences caused entirely by barriers and will include experiences of discrimination (which are subject to the Human Rights Act process) and due to failures of the state to provide personal accommodations and support. It's important that as these situations arise, mechanisms are developed to share knowledge, information and data across these three systems. It must also ensure that the appropriate processes to address these are accessible. Furthermore, the independent body receiving these notifications from the public must liaise closely with other agencies to ensure that issues which have been identified actually are addressed over time. This co-ordination and liaison function should be set out in primary legislation.

As the various systems mature, consideration could be given to joint process (for example conciliation) to ensure that boundaries within systems do not result in a barrier to being heard.

## **Do existing accessibility standards apply and are they being complied with?**

This second question is the main focus of the compliance and enforcement regime. This aspect of the role of the independent body is the part of the proposed system which is most similar to the Canadian provincial systems based on the Ontario model.

In considering this question, the independent body can be informed by the views of the person notifying them, however will need to reach its own conclusion. To do so, the independent body may need to conduct its own investigation and make findings that the regulated organisation is in breach of particular standards. Enforcement action may then follow.

## **Are relevant standards being developed and if so, would these remove the barrier?**

This question aims to inform the development of the standards and to identify gaps in the accessibility standards. This question is not subject to a monitoring, compliance and enforcement system but is instead aimed at informing the programme of development of accessibility standards.

This aspect of the role of the independent body is central to the proposed framework model of accessibility legislation where the experience of people in society is fed back into the design of standards. It is likely that some standards will take years to develop and it is important that up to date experiences are included in that development process. These are likely to provide cases studies which can be used to test whether proposed standards are effective in removing barriers.

## **Does the experience caused by the barrier remain after the current or developing standards have been complied with?**

The long-term success of the proposed accessibility legislative regime in removing barriers will depend upon its ability to evolve. One significant advantage of the framework approach of the proposed legislative model compared to some of the international examples is it allows for an active and responsive legislative system that can respond to emerging barriers and new technologies rather than simply provide for a series of static accessibility standards. The purpose of requiring the independent body to answer this question is to inform the future programme of accessibility standard development and to identify situations where disabling experience cannot be removed through an accessibility standards process.

The primary benefit to the accessibility system of answering this question is that it allows for identification of areas where further domains of accessibility standards are required or where existing standards need to be amended. We consider that over time, this inquiry will lead to a more effective system of standards. The independent body can then undertake and commission work to understand how these future areas can be addressed and then the consultation process to develop standards to remove these barriers can begin. This will be assisted by the independent reviews of the accessibility system and specific barriers which are discussed below.

Some disabling experiences will remain, despite the evolution of and enforcement of standards. What is then required is consideration regarding what are the most appropriate policy mechanisms to remove these. We recognise that this policy work may best be done in collaboration with other agencies, for example the Human Rights Commission. It may be that discrimination remains a major cause of disabling experiences and these cannot be addressed through a barrier removal process, or it may be that research identifies discrimination is largely caused by attitudinal barriers leading to collaboration between the discrimination system and the barrier removal system.

## **Where barriers intersect: conflicts between removing barriers**

We must remember that in addition to barrier removal through the accessibility processes set out in this report, there are at least two other ways to remove disabling experiences: first through person centric state administered system of accommodations and supports. The second through the provision of reasonable accommodations.

We recognise that as the accessibility system is developed there are likely to be situations arise when barriers intersect between groups of people with different impairments. These may result in situations where a proposal to remove a barrier conflicts with removing other barriers or creates new disabling experiences for others. In these situations, it is important to remember that this legislative model for accessibility sits within a wider framework of reducing disabling experiences.

Personal supports and accommodations (provided by the state) and reasonable accommodations (required of all organizations) also have an important role to play in reducing disabling experiences. When removing one barrier that has been identified either leaves a barrier for another group of people or it will create a new barrier for others we recommend that the first step is to undertake research and redesign the domain in order to remove barriers for all. If this is unsuccessful then consideration should be given to a hierarchy of removing disabling experiences.

The next two steps in that hierarchy will look to personal accommodations and supports and then to reasonable accommodations. This will require development of options for providing personal supports and accommodations to remove barriers for one or more groups. If this is not possible, then we recommend consideration be given as to whether reasonable accommodations can be provided and expressly state what the reasonable accommodations are in particular circumstances.

## **The Monitoring Process**

In addition to the notification regime, the independent body would also benefit from a monitoring function. This would allow it to build relationships with organisations who may

then voluntarily provide information to the independent body to assist it with its functions. This would prove particularly useful as organisations develop accessibility officer roles and policies around implementing accessibility standards. For example Local and Regional governments may develop procurement policies for buses and other public transport and could share these with the independent body as part of its monitoring process.

## **Guidance by Regulator**

There is an important policy question about of the role of the independent body in providing guidance to organisations to assist with the standards implementation process.

We recommend that the primary legislation provides for the regulator to make determinations on how it will interpret its primary statute and the accessibility standards. For avoidance of doubt, we consider that this is not determinative, in that such advice may turn out to be unlawful and it is subject to both judicial review and the courts and appeals process as it applies to individual cases.

For the avoidance of doubt, in preparing its guidance, the regulator should be required to consult and the normal administrative law principles will apply.

The consequences of relying on this advice will need to be considered, for example we do not think it would be appropriate for organisations to be subject to an infringement offences regime or pecuniary penalties when they relied in good faith on guidance from the regulator.

## **Enforcement from different perspectives**

Overall accountability for the effectiveness of the system must sit with the regulator, as the agent of the State Party who has signed the Convention and are required by internationally law to progressively realise New Zealand's obligations.

As part of standards development, the regulator will also need to engage with other regulatory agencies, including local authorities, crown ministries, other crown entities like the Privacy Commissioner and the Ombudsman, monitoring mechanisms like the Independent Monitoring Mechanism.

Enforcement of accessibility standards and other requirements under the Act can occur along several different axes:

- Enforcement by person with impairment, by notifying the regulator about instances of non-compliance with a standard.
- Enforcement by representative group of disabled people, including by notifications to the regulator or logging instances of non-compliance.
- By the regulator of its own motion where situations of non-compliance become apparent.

- By the regulator in response to a notification.
- By participants to the standard development process about situations where consultation is not proceeding in line with the requirements in the Act.
- The regulator itself will be subject to complaints about reasonable accommodation under the Human Rights Act 1993.

It will be important for the regulator and the disability community to understand why organisations are not complying with standards as this will assist in determining which enforcement action is most likely to be effective.

In the following pages, we will detail the enforcement system. Before we do so, we will explain the recommended roles of different people and organisations within the system. Different people using the accessibility system can take steps to ensure the progressive realisation of the vision of an Accessible Aotearoa.

### *Disabled People*

Disabled people can enforce the accessibility system by:

- Public advocacy and education, including use of media
- Use of data and research and reporting on compliance and presence of barriers
- Direct engagement and negotiation with other party
- Judicial review of regulator's compliance with Act
- Engagement with consultation processes
- Engagement with standard development
- Training programmes
- Private enterprise on compliance with standards
- Notifications to regulator about non-compliance with standard
- Internal complaint regarding regulators process
- Lobbying MPs and regulations review committee
- Receiving grants and subsidies from regulator or from government to remove barriers
- Use of ADR
- Complaint to other regulator
- Enforcement through complementary legal and policy systems (ie Ombudsman, Privacy Commissioner, Human Rights Commissioner)
- Complaint to regulator about regulator's conduct
- Appeal complaint about regulator's conduct to tribunal

Disabled people will not be able to take the following enforcement actions:

- Appeal against decision of court or regulator about non-compliance with standard
- Infringement offences
- Pecuniary penalties
- Enforceable undertakings
- Powers of search and investigation

### *People with obligations under the standards*

People and organisations who have obligations under the accessibility standards can enforce the accessibility system by:

- Public advocacy and education, including use of media
- Use of data and research and reporting on compliance and presence of barriers
- Direct engagement and negotiation with other party
- Judicial review of regulator's compliance with Act
- Engagement with consultation processes
- Engagement with standard development
- Training programmes
- Private enterprise on compliance with standards
- Notifications to regulator about non-compliance with standard
- Internal complaint regarding regulators process
- Appeal against decision of court or regulator about non-compliance with standard
- Lobbying MPs and regulations review committee
- Receiving grants and subsidies from regulator or from government to remove barriers
- Use of ADR
- Complaints to other regulators
- Enforcement through complementary legal and policy systems (ie Ombudsman, Privacy Commissioner, Human Rights Commissioner)
- Complain to regulator about regulator's administration, processes or conduct
- Appeal complaint about regulator's conduct to tribunal

People with obligations under the standards will not be able to take the following enforcement actions:

- Infringement offences
- Pecuniary penalties
- Imposing enforceable undertakings
- Using powers of search and investigation

### *The regulator*

The regulator can enforce compliance with the accessibility standards by:

- Public advocacy and education, including use of media
- Use of data and research and reporting on compliance and presence of barriers
- Direct engagement and negotiation with other party
- Engagement with consultation processes
- Engagement with standard development
- Training programmes
- Appeal against decision of court about non-compliance with standard
- Imposing infringement offences
- apply to the court to impose pecuniary penalties

- Use of ADR
- Imposing enforceable undertakings
- Complaint to other regulator
- Powers of search and investigation

The regulator will not be able to take the following enforcement actions:

- Judicial review of regulator's compliance with Act
- Private enterprise on compliance with standards
- Notifications to regulator about non-compliance with standard
- Internal complaint regarding regulators process
- Lobbying MPs and regulations review committee
- Receiving grants and subsidies from regulator or from government to remove barriers

## **Compliance without using the regulator's formal “enforcement” tools**

### *Non-enforceable standards*

Non-enforceable standards are intended to facilitate compliance through self-regulation and cooperation. There is an incentive on organisations that may become subject to enforceable accessibility standards to comply with non-enforceable standards in order to assure regulators and the community that they are committed to accessibility. There is a significant incentive on industry bodies to lead compliance with standards.

### *Human Rights Commission Processes*

The rights of individuals will still be protected where a non-enforceable standard is breached causing harm or loss because of the retention of the non-discrimination Human Rights regime. Failure to comply with a non-enforceable standard will still be a powerful indicator of what standard of accommodation is reasonable, even though the standard itself might not be enforceable.

We should not be taken to be arguing that the Human Rights Act complaints process is without its flaws: there are significant and fundamental access to justice barriers in that process. The Accessibility legislation is necessary because of the reasonable accommodation concept's inability to facilitate system learning, or to apply more broadly beyond the scope of an immediate civil dispute between two individuals. The following from the legislation guidelines sums up the situation well:<sup>115</sup>

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<sup>115</sup> Chapter 22.1.

“... in many contexts, the private enforcement of legal rights and obligations will be insufficient. For example, the damages from a civil action may be an insufficient deterrent. This may be because loss is not an adequate measure of the harm caused by the conduct (eg, because the harm done is diffused) or because civil suits are not a realistic likelihood (eg, because of the costs of bringing private actions or insufficient private benefit in doing so), or both. If the law will not reliably be enforced, then this can cause the regime to fail, which is worse than having no regulation at all.

In addition, if the context is complex, a wider range of compliance methods and more proactive approach may be needed. For example, a regime may involve education, guidance, licensing, authorisation, or approval functions. In this case, consideration should be given to the regulatory options needed for compliance and also to the role of a regulator, which could be the administering department or a specific entity (often a Crown entity—see Chapter 20).”

Accessibility legislation provides the broader compliance context and proactive approach necessary because of the limitations of the non-discrimination regime at provoking system change and wider removal of accessibility barriers.

## **If government enforcement is required, what are the most appropriate regulatory tools?**

The accessibility system operates primarily to mediate the relationship between the regulator and the regulated person (ie, the duty holder). The accessibility system has a peripheral effect on disputes between individuals by influencing the existing civil and human rights dispute resolution system. For example, it may be that the Human Rights Review Tribunal considers it is reasonable to comply with accessibility standards and therefore the definition of reasonable accommodation evolves.

One of the most effective regulatory tools in the system will be the coordination and consultation processes for which the regulator is accountable to do this, it must collect data and information that can be used to analyse the effectiveness its regulatory function and improve the regulatory system in which it operates.

The regulator would be expected to understand why people are non-compliant in situations of non-compliance, and to develop means of public assistance and education to assist organisations to become compliant, including through a system of subsidies and grants.

The legislation will be enforced through a system of complaints, infringement offences, and pecuniary penalties. Infringement offences and pecuniary penalties will be subject to judicial oversight through the tribunal.

## Enforcement of enforceable standards

We recognise that the focus in this system is consensus-based approach to implementing accessibility however international experience is that enforcement tools are necessary to accelerate accessibility. Therefore, we must consider how enforcement of enforceable standards will occur when required. If enforcement is required, there are two primary mechanisms which apply here:

- infringement offence regime for low level breaches where these can be determined and enforced by the regulator (with appropriate challenges to the courts) and
- a pecuniary penalty regime for high level or repeated breaches where the regulator has to apply to the court to determine these. The amounts for pecuniary penalties are significantly higher than infringement offences.

There are different paths for these and each will be discussed separately.

### *Infringement offences regime*

Rather than a criminal offence regime, we recommend a system of infringement offences as the preferred option.

The purpose of infringement offences is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. Infringement offences prevent the courts from being overburdened with a high volume of relatively straightforward and low-level offences. Without them, the law may otherwise not be enforced because it is unlikely a prosecution would be in the public interest. The criminal courts will generally become involved only if the infringement fee is not paid or if the recipient of the infringement notice challenges it.<sup>116</sup>

The Act should confer a power to create infringement offences by regulation for breach of enforceable accessibility standards.<sup>117</sup> Notably, enactments that already touch upon accessibility barriers (and provide mechanisms for their removal) include infringement schemes such as the Local Government Act 2002, the Land Transport Act 1998, the Resource Management Act 1991, the Building Act 2004, and (what was then) the Health and Safety in Employment Act 1992. A similar regime should be pursued under the Accessibility Act. This would allow for infringement offences to be tailored to the subject matter of each standard and consultation to take place on a proportional level of penalty to be applied for particular kinds of breaches.

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<sup>116</sup> Chapter 25, Legislation guidelines.

<sup>117</sup> Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005). The report lists a range of enactments that establish infringement schemes at appendix 1 to its report covering subjects such as litter, dog control, gambling, hazardous substances, local government bylaws, railways, radiocommunications.

The maximum fine for an infringement notice should be set following consultation with the community and with government departments.

Infringement offences are said to be appropriate if:<sup>118</sup>

- “the conduct represents a minor contravention of the law;
- large numbers of strict or absolute liability offences are committed in high volumes on a regular basis;
- the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer;
- a fixed penalty can achieve a proportionate deterrent effect because contraventions of the particular prohibition are reasonably uniform in nature (if individual culpability can vary widely, the conduct is unlikely to be suitable to be dealt with by infringement offence); ...”

The Act would establish the infringement offence scheme, the maximum fine under the infringement system (the must be separated from the higher penalties under the pecuniary penalty system), empower the regulator to issue infringement notices, and clarify whether the regulator would recover the funds obtained from infringement offence fees or whether these will be paid into general crown revenue. If the regulator recovered funds for use by the regulator from infringement offences, then this could lead to public perception of “revenue gathering”, which may undermine confidence in the standards and the regulator’s monitoring and enforcement behaviour.

The guidelines note that it is “standard practice for the Act to authorise details of the specific infringement regime to be provided for in secondary legislation”, in this case, the standards themselves, including: the specific act or omission constituting the infringement offence, the penalty levels for each infringement, and the form of the notice and reminder notice to be issued.

We see no reason to depart from the Legislation Guidelines recommendation that s 21 of the Summary Proceedings Act 1957 be applied, although there should be a consensus based first step available. This will allow the consensus-based process to develop expertise in the subject matter of the Act and the interaction between the different accessibility standards and with other primary legislation. The Ministry of Justice has issued a set of guidelines for new infringement schemes that sets out “Cabinet’s expectation for the design and operation of new infringement schemes”.<sup>119</sup> We considered a tribunal approach but we note that placing infringement offences within a tribunal’s jurisdiction (as opposed to a criminal court’s) may be inappropriate if infringements against enforceable standards will include the following:<sup>120</sup> a warrant to

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<sup>118</sup> Legislation guidelines 25.1.

<sup>119</sup><https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>

<sup>120</sup> As referred to in MOJ guidelines at para 18:

<https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>

seize and sell property to pay fines; an attachment order, to deduct payment of outstanding fines over a set period from the defendant's income; and/or a deduction notice to deduct payment from the defendant's bank account. Further, non-payment of fines can lead to the issuing of a warrant of commitment, sentencing to home detention or community detention, community work, or other enforcement action. Infringement offences should not lead to sentences of imprisonment.

While infringement offences are typically associated with low-level criminal behaviour, we do not think too much weight should be put on this association, either by people who say it is too heavy-handed or that it is not heavy-handed enough. The New Zealand Law Commission discussed whether infringements should be associated with criminal or civil law. It concluded:

257 ... in addressing the question of whether infringements should be removed from the criminal process, the fundamental question is simply what process would be the most effective to serve the desired purpose.

258 There is no straightforward answer to this. Often, a mix of different processes will be best suited to the purpose. For example, in principle it seems perfectly sensible to postulate that a particular offence should in the first instance be dealt with administratively through the imposition of an infringement notice; that in the event of a denial of liability, the determination of liability for the offence should occur through a hearing relying on the rules of criminal procedure; that a conviction should not attach to any finding of guilt (because the stigma associated with the conviction is not required); and that the civil debt enforcement procedures should be used to collect the fee imposed either administratively or by the court.

259 Whether each of these processes is appropriate should simply be determined by reference to effectiveness; the attachment of a particular label (whether "criminal", "civil", "administrative" or "regulatory") does not in itself provide assistance in answering the question. The least intrusive process to achieve the purpose should be the guiding principle to determine which process to adopt in relation to a particular offence.

If a challenge is made to an infringement notice or offence, then ideally it should go through a consensus based process, although we acknowledge this could present difficulties given the historically<sup>121</sup> criminal nature of the infringement offence and the view that you cannot contract out of the criminal law. The New Zealand Law Commission found:<sup>122</sup>

The infringement offence procedure itself is less reflective of the criminal process. First, the process is essentially an administrative one and is not commenced by court proceedings. In the vast majority of cases, where the defendant wishes to raise a matter with respect to the issue of an infringement notice, it is dealt with by the prosecuting authority. Although the defendant has the right to have the

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<sup>121</sup> Law commission report at 236.

<sup>122</sup> At para 237.

case dealt with by the court, that right is exercised in only a small minority of cases. Secondly, no conviction attaches to an infringement offence. Even where the matter is heard by the court at the request of the defendant, no conviction is entered. The essence of the criminal sanction is thus absent. Thirdly, though the infringement offence procedure is used for a significant number of traffic offences and a small number of minor criminal offences, it has increasingly been used in respect of bylaw and regulatory breaches; areas that are not traditionally regarded as being within the province of the criminal law.

[Footnotes omitted]

### *Pecuniary penalties*

For situations where infringement offences are insufficient, a pecuniary penalty may be more appropriate. Pecuniary penalties are “non-criminal monetary penalties imposed by a court in civil proceedings” as opposed to infringement offences which have been discussed above.

The court could determine pecuniary penalties upon an application by the regulator. “To date, pecuniary penalties have usually been imposed as part of regulatory regimes targeting commercial behaviour in a particular industry. They may be an alternative to a strict liability criminal offence in cases where civil enforcement is more appropriate than criminal enforcement.”<sup>123</sup> A pecuniary penalty regime will require the regulator to be adequately resourced to implement the penalties. This would be consistent with our vision of a regulator as a statutory body with investigatory and prosecutorial responsibility for the Accessibility regime.

The liability for and amount of a pecuniary penalty would be imposed by the tribunal, not the regulator. This allows for transparent processes, and accounting for aggravating or mitigating circumstances. A range of defences could be specified, including those set out in the guidelines at 26.4:

- “the contravention was necessary (for example, to save or protect life or health, or prevent serious damage to property);
- the contravention was beyond the person’s control and could not reasonably have been foreseen, and the person could not reasonably have taken steps to prevent it occurring;
- the person did not know, and could not reasonably have known, of the contravention;
- the contravention was a mistake or occurred without the person’s knowledge;
- the contravention was due to reasonable reliance on information supplied by another person; and

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<sup>123</sup> Legislation guidelines 26.1.

- the contravention was due to the default of another person, which was beyond the first person's control, and that first person took precautions to avoid the contravention.”

The accessibility legislation would need to guide a court how to determine the amount of the penalty. Relevant considerations could include:<sup>124</sup>

- “the nature and extent of the breach;
- The consequences of the breach;
- any financial gain made, or loss avoided, from the breach;
- the level of calculation involved in the breach; and
- the circumstances in which the breach took place.”

There is a risk that having parallel remedies under an infringement offence, a pecuniary penalty, and the Human Rights Act track could create a perception of double recovery, or double jeopardy.

We think that these risks can be sufficiently managed by separating the remedy for the individual in relation to the discrimination from the enforcement by the regulator of a standard for infringement offences and pecuniary penalties. Any further issues can be addressed through judicial discretion, by legislative guidance to the regulator, and by the differing conceptual foundations for each of these remedies.

We recommend that the maximum level for pecuniary penalties be set high to allow for effective use of this regime in appropriate cases.

#### *Enforceable undertakings*

An undertaking is a form of legally binding agreement that something will be done. An enforceable undertaking is an agreement to do something with a written understanding that the agreement to do something could be enforced against that person or organisation through a court process.

At all stages, it should be possible for a non-compliant individual or agency to avoid or mitigate a penalty or fine by giving an enforceable undertaking to bring the relevant subject matter into compliance with the accessibility standard. This is consistent with the overall intention and purpose of the Accessibility regime. If any person has suffered loss or harm because of a failure to comply with an accessibility standard, a remedy will be available to them through the non-discrimination process under the Human Rights Act 1993.

## **Criminal offences and associated issues**

We do not immediately see a need for the legislation to create new criminal offences, but that question should be put to relevant stakeholders during consultation on the

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<sup>124</sup> Chapter 26.6 guidelines.

legislation. We think it is highly likely that the kinds of serious harm to people anticipated by the criminal law in an accessibility context will already be covered. The Accessibility Act will inform the judiciary's interpretation of the standard of conduct expected by people in relation to accessibility barriers that may cause significant harm. It will be necessary for the Government to consider whether related harm should attract a criminal penalty, but it is highly likely that existing criminal offences will already apply in situations where serious harm results.

### *People should be consulted on the creation of criminal offences*

People with disabilities, including disabled Māori, must be consulted for their views and their lived experiences of how harm can be caused by the wilful or intentional decision to create or fail to remove accessibility barriers, including:<sup>125</sup>

- causing physical or emotional harm,
- serious harm to the environment, threats to law and order, fraud, bribery or corruption, or substantial damage to property rights or the economy.
- Causing significant harm to the individual or public interests if continuing unchecked, such that public opinion would support the use of the criminal law,
- Moral blameworthiness having regard to the intention of the accused and the harm that may result
- That harm to public or private interests resulting from the conduct is foreseeable and avoidable (ie, it involves an element of intent, premeditation, dishonesty or recklessness).

Based on these insights, the legislation can cover areas not already covered, if required. Many of these kinds of harm will be engaged by the exclusionary effects of accessibility barriers, but we think the ubiquity of such barriers and the consequences of criminal proceedings make criminal offences inappropriate in most cases where a standard is breached. Instead, we prefer the use of infringement offences, which are recognised by the guidelines as being “a subset of criminal offences that do not result in criminal convictions” (chapter 25).

### *Search Powers*

It is generally necessary for a criminal offence to exist in order to enable statutory search and surveillance powers to be invoked unless the statute specifies the power.<sup>126</sup> Regardless of whether criminal offences are created, investigative powers must be conferred on the regulator within appropriate legal limits. We do not consider that powers of search and seizure are necessary to create an effective enforcement regime however

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<sup>125</sup> Taken from 24.1, Legislation Guidelines.

<sup>126</sup> Search and Surveillance Act 2012, s 6, we note for completeness that certain civil orders (for example Anton Pillar orders) could have the same effect however we do not recommend reliance on these processes. Notably, the Building Act 2004 s 207I deals with a power to enter a household unit, either by consent or under warrant and a similar regime could be used to empower the regulator.

we recognise that there may be a range of views on this topic and after consultation, a policy decision could be made that search warrants are required.

If the policy decision is made that search warrant provisions are required and it is considered that the existing criminal law regime does not provide for a suitable offence, there are two possible routes. The first is to create a search warrant regime in relation to this act<sup>127</sup> which is the route taken in many overseas jurisdictions when enacting accessibility legislation.<sup>128</sup> and the second is to create an offence in the statute, punishable by 3 months imprisonment or a fine in order to provide access to the powers in the Search and Surveillance Act 2012.

Any process for search warrants must be included in the primary legislation and be must be limited to enforceable accessibility standards. It is important to note that any process may risk breaching s 21 of the New Zealand Bill of Rights Act in a way that involves the state's intrusion into reasonable expectations of privacy.<sup>129</sup>

#### *Rights of entry and search without warrants*

We also recognise that it is possible to enact provisions to allow entry onto premises without warrants<sup>130</sup>. We recognise that entry with consent is allowed in the New Zealand context<sup>131</sup> however consider going further to allow rights of entry without consent of warrant should be approached with caution as there is a risk of eroding public trust and confidence in the accessibility system.

## **How will these legislative enforcement tools be implemented?**

There are two levels at which the system of enforcement operates. The first is through a regulator and the second is through a judicial system. For public trust and confidence in the system, and for compliance with established constitutional principle, there must be judicial oversight over any enforcement action taken by the regulator and any complaint against the regulator's process, and appeal against any finding by the court.

#### *The regulator*

The regulatory system should operate in the manner set out above through a notification process in relation to disabling experiences and potential breaches of standards, investigations of infringement offences in relation to breaches of enforceable accessibility standards, and pecuniary penalties.

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<sup>127</sup> See for example Health and Safety at Work Act 2015 at s 173.

<sup>128</sup> See for example Ontario at s 20, Manitoba at s 26.

<sup>129</sup> *Lorigan v R* [2012] NZCA 264 at [22], see legislative guidelines at 105.

<sup>130</sup> See for example Manitoba at s 24(2).

<sup>131</sup> See Search and Surveillance Act 2012, Part 4, subpart 2, s 91 – 96.

Once the regulator decides to investigate, the principles of natural justice will apply. This means that it must notify the regulated organisation that it is investigating, provide them with the relevant information about the potential breach of standard and set out how the next steps in the investigation will proceed. In operationalising this system, careful consideration must be given to transparency and the potential impact on relationships that may occur as a result of informing the regulated party of the notification and whether this is necessary to effectively investigate the breach of the standards. Care must be taken to balance the risk of discrimination and further disabling experiences against the principles of natural justice.

We think the overall policy focus on system improvement, including public education and awareness, means that the inclusion of an evaluative alternative dispute resolution process (like conciliation)<sup>132</sup> is desirable. Limitations on that process should be that:

- any confidentiality or privacy provision to protect the rights of the parties should not extend to making the nature of the problem and the means taken to resolve it inscrutable to the regulator and the public. This is because dispute resolution systems still provides valuable insights for system monitoring and system improvement and allow accountability and transparency.
- any alternative dispute resolution must be conducted within the legal framework set by the Act and by the standards. This suggests a tendency toward conciliation rather than mediation. Any final agreement should contain public provisions that explain the nature of the issue between the parties and how it is resolved in light of the requirements of the Act and the standards.

Enforceable undertakings should provide a means of achieving compliance in situations of non-compliance with a low-level conciliation-based dispute resolution process focused on achieving compliance. We recommend that this process be built into the regulator's system so that it can effectively provide learning in that system in a way that allows early dispute resolution and dispute prevention.

Once the regulator has made a decision on the substance of compliance with the enforceable standards this decision will be capable of review by the court.

The regulator can also make an application to the court for it to impose a pecuniary penalty. This application can be done before or after a decision has been made on a breach of an enforceable standard.

### *The Court*

For cases which are not resolved through the regulator's dispute resolution process, either because the person disagrees with the decision of the regulator or the dispute cannot be resolved through the regulator's dispute resolution process, there must be an opportunity for the regulated person to access the court.

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<sup>132</sup> Guidelines at 29.2.

This is the organisation charged with enforcing the standards by determining whether standards have been breached, and if so, imposing remedies. It will also be charged with hearing applications from the regulator to impose pecuniary penalties against persons and organisations. Making this process accessible will require the court to:

1. comply with the principles of natural justice
2. take an investigative approach
3. receive evidence and submissions from the regulated person and the regulator
4. obtain evidence of its own accord including if relevant, from persons with disabilities or Disabled Persons' Organisations
5. make findings of fact and law
6. impose outcomes on regulated persons and enforce these
7. enforce undertakings entered into with the regulator (enforceable undertakings)
8. issue pecuniary penalties to persons when appropriate.
9. refer issues to the regulator for investigation when appropriate.
10. refer questions of law to the High Court for determination.

We do not see any need to create a new civil remedy or criminal offences outside of these, so long as sufficient powers of investigation are available to the regulator and the orders of the court would be enforceable as per decisions of the District Court. Judicial review must remain available both in relation to the regulator and the court.

#### *Precedent with the regulator and the court*

A key policy principle of the system is that the system should learn from previous complaints and disputes. This is consistent with the Government Centre for Dispute Resolution standards (Standards, 5, 7 and 9). Applying a “precedent” is the legal term for how a court treats earlier similar decisions or similar cases from a tribunal or a court. The first question is whether the court of first instance should be bound by its own decisions. Another question is how decisions by the regulator can be made transparent and comprehensible to enable a body of institutional practice to be built up over time. Although the question of precedent is a difficult one. We recommend that there should not be any statutory intervention in the way that “precedent” is approached.

There is a risk that publication of decisions and decision-making criteria will expose the regulator to judicial review. That is not bad necessarily bad, although it will privilege the rights of litigants with access to legal counsel and resources over others. One possibility is that a provision like s 133(5) of the Accident Compensation Act is introduced when it comes to decisions about the application of standards, however there would need to be careful delineation between matters for the court and matters for judicial review. A vexed issue in the ACC system is the way that judicial review jurisdictions and the review jurisdiction in the Act interact and that approach should not be replicated here without careful attention and consultation.

## **Complaints about the Regulator's processes and resolution of these disputes**

We recognise that how any legislative system is administered will not be satisfactory to all. We consider there is also an opportunity for disputes to arise that relate to how the regulator administers the system. These must be separated from the model set out above for resolving substantive disputes about compliance with the standards, which will occur mainly between the regulator and the regulated party subject to the standard.

We note that allegations of discrimination or failure to provide reasonable accommodations can be made to the Human Rights Commission against the independent body. We do not consider that privative provisions should be in place to restrict access to the courts and we recognise that administrative law remedies, for example judicial review, are often inaccessible to many people and organisations. For this reason we have considered whether it would assist in the administration of the system to include a complaints process and a dispute resolution model in relation to this process within the statutory regime to encourage system learning.

We recommend a complaints procedure and a dispute resolution service be developed to assist resolution of any complaints based on administrative and procedural grounds but not substantive grounds in relation to breaches of standards.

It is also important to note that the regulator will be subject to a range of other accountability mechanisms, including judicial review, parliamentary processes, the Official Information Act, the Office of the Ombudsman, and advocacy and publicity in the media.

We have largely avoided the language of complaints in favour of notifications about accessibility barriers, however complaints about the processes adopted by the regulator would in effect be an ordinary complaints process. This would be required generally because of the regulator's status as a government agency with statutory powers.

## **Appeals to the High Court and further**

Appeals against the court's findings should be to the High Court by way of a de novo appeal. We do not support the use of a rehearing procedure and there should be a second hearing of the evidence in case of an appeal (a de novo appeal).

We anticipate the use of strategic litigation in the system and a court would have to be able to consider whether a standard complied with the framework set in the Act.

Appeal rights with leave should continue to the Court of Appeal and Supreme Court on questions of law in accordance with the Senior Courts Act 2016.

The regulations review committee would be able to consider the legality of a standard at the point it becomes enforceable.

## **Independent Periodic Review**

There must be scheduled reviews of both the legislative scheme and the individual standards informed by people's experiences and done in consultation with persons with disabilities and Māori.

### *Review of the entire accessibility legislative scheme*

This legislation is important, and from time to time, we must consider whether it is working and how it is working. For this reason, we consider the effectiveness and efficiency of the legislative scheme and peoples experiences within the scheme must be periodically reviewed. We recommend this occur not less than every ten years and not more often than every five years. This should be a comprehensive review by an independent person or group of persons with understanding of accessibility systems.

There are three possible approaches to this review. Firstly, an extensive part of the Act which sets out and addresses the form of this review, how it will be conducted, by whom and how various parties will participate and be funded. A second option is that this review be set as a legislative requirement and have the status of a government inquiry established by s 6(3) of the Inquiries Act 2013. Finally, a third approach could be a non-statutory ministerial inquiry however we consider the procedural issues set out in the legislation and the public importance of this legislative scheme means a more independent statutory process should be preferred and adopted.

The data created through the notification and the regulator's internal complaints processes should be published at least six months prior to the beginning of the review process in order to allow informed submissions on issues as they arise.

We consider that a legislative timeframe be set where this review is conducted over a period of no more than 12 months, recommendations made to the Minister or to Parliament and the Government (or Minister) must be required to respond within a specified timeframe (for example 6 months from publication). We consider this will ensure that the reviews remain current and a cycle of improvement, transparency and accountability is developed.

### *Review of particular accessibility standards*

Each individual accessibility standard should also be subject to a review process. We recommend that this be included in each standard. We consider that individual standard reviews should be undertaken in a four-step process led by the independent body. This process should include:

1. Publication of data in relation to that standard including notifications of barriers, breaches, infringement notices, penalties and the outcomes of any dispute resolution processes in relation to that standard.
2. Research into the effectiveness of the standard in removing the barriers from the environment.

3. Consultation on proposed amendments (if any) to the standard.
4. If required, referral back to the standards development process.

We recommend that the Act should require publication of the relevant information and set out a timeframe for the review of individual standards to be set out in each standard and this timeframe be no less than 2 years and no more than 10 years.

It is envisaged that there will be significant variation in the appropriate timeframes depending on the domain, for example standards involving technology may be reviewed more often than those involving construction.

*Reporting and review by expert committee*

It is also important to recognise that the United Nations Committee on the Rights of Persons with Disabilities is required to review New Zealand's compliance with the Convention on the Rights of Persons with Disabilities in accordance with reporting cycles. We consider that this will provide the Government and Civil Society good opportunities to receive feedback on the effectiveness of the proposed accessibility legislation in identifying and removing barriers.

# CHAPTER 7

## CONCLUSION

In this report we have set out one approach of how to develop accessibility legislation. We have recommended the creation of:

- An independent Crown Entity responsible for consultation, standard development, and standard enforcement, with ancillary powers of research, education and publication.
- An independent court process responsible for overseeing the regulator including in relation to decisions on infringements of enforceable standards.
- The creation of standards through co-design, some of which will be enforceable, some of which will be non-enforceable, but which may become enforceable at a later date.
- A process whereby all relevant stakeholders can be engaged in agreement upon a set of standards that have the overall effect of removing barriers in a systematic way from a wide range of domains in New Zealand society.
- A system for implementing the standards.
- A system of periodic review, whereby standards are revised and amended and the overall operation of the legislative model is assessed.

This research project is unusual as it has seen significant collaboration with government and other stakeholders. This means that before the final report has been produced, Cabinet has already approved the proposed legislative framework model to act as the preferred legislative model to progressively realise accessibility. We understand that cabinet has also discussed the core policy of the act including a regulator, standards and progressive realisation.

In this report, we have set out one way that this legislative model could be organised and implemented. We recognise that significant work is required to progress this legislation:

- Consultation within and outside government on core policy
- Regulatory impact statement<sup>133</sup>
- Consequential amendments to other enactments

We further encourage the government to consider the remaining policy questions set out in this report and to engage with disabled persons organisations, the Access Alliance and other stakeholders about their views on the proposed legislative model. Further work is also required to better understand, improve and implement other systems for removing disabling experiences.

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<sup>133</sup> Cabinet manual, para 7.26.

We encourage disabled people, their organisations and other stakeholders to consider the ideas included in this report and decide how they want their accessibility legislation to work. We hope that our research will assist in moving towards legislation that works to identify and remove barriers and to prevent future barriers from being developed.

## **APPENDIX 1: PLAIN ENGLISH SUMMARY**

# Let's make Aotearoa New Zealand accessible for all

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Designing an effective legislative framework for accessibility

# This document summarises our proposal to make Aotearoa New Zealand accessible

We have written a report that proposes a legal framework to make New Zealand accessible for and remove barriers that create disabling experiences. A quarter of New Zealanders experience disability, and everyone will have an impairment at some point.

This document proposes:

- having disabled people play a key role in identifying and removing barriers
- giving people who may have to remove barriers a chance to comment
- giving disabled people and those who would need to comply with the framework a chance to discuss how the law should work.

We want to get rid of disabling experiences, not get rid of disability. There is nothing wrong with disability or being disabled — disability can be a strong and positive part of someone's identity.

Discuss our proposal with your whānau and friends, and consider if you support it.

## We use the term ‘disabled people’

After consultation, we have decided to say ‘disabled people’, rather than ‘people with disabilities’. We realise not everyone will agree with our decision, but let’s focus on what we are trying to do, rather than the words.

## Barriers create disabling experiences — this needs to change

Disabled people must tolerate barriers or fight to have them removed. Barriers can be natural or created. They stop disabled people from enjoying the basic human rights that others enjoy, like movement, association, and expression; and access to information.

New Zealand must remove barriers. For example, the United Nations Convention on the Rights of People with Disabilities states that accessibility is a right, and society must allow disabled people to participate fully in society. New Zealand also has a Disability Strategy and a Disability Action Plan that aim to remove accessibility barriers.

Yet in interviews carried out between 2015 and 2020, disabled people confirmed that barriers are still widespread.

Unfortunately, disabled people in New Zealand often have no effective way to report barriers or get them removed. No one agency identifies and deals with non-compliance.

## We propose a legislative framework to remove barriers

To remove accessibility barriers, we propose a legislative framework that includes an Act, a regulator, a tribunal, accessibility standards, and a way to notify the regulator of barriers. The framework would meet New Zealand's obligations under the Te Tiriti o Waitangi and the Convention on the Rights of Persons with Disabilities.

These are some reasons New Zealand needs a legislative framework.

- People must have a chance to speak up, because accessibility standards would limit the rights of citizens and businesses.
- Current accessibility standards are often open to interpretation.
- Existing laws are spread across different legislation and not designed to remove barriers.
- The framework needs to be consistent no matter who is in government.
- New Zealand needs to clearly anticipate the wide legal, economic, and social impacts that accessibility laws could have.

The framework will address barriers and set accessibility standards.

<b>Address barriers</b>	<ul style="list-style-type: none"><li>• Identify and record barriers, raise awareness of how barriers create disabling experiences</li><li>• Prevent and remove barriers when they have been identified</li><li>• Enable justice, choice, and control if people have disabling experiences because of barriers</li></ul>
<b>Set accessibility standards</b>	<ul style="list-style-type: none"><li>• Consult on developing standards and tell people of their rights, duties, and responsibilities</li><li>• Develop and implement accessibility standards</li><li>• Clarify how barriers can be removed and by who</li><li>• Normalise accessibility standards in New Zealand</li><li>• Measure how the system is working</li></ul>

## An independent regulator that is responsible for standards

The regulator would develop and monitor standards, and resolve disputes.

We suggest creating a new crown entity or commissioner as the regulator. The regulator would be independent from political and policy matters, similar to WorkSafe and the Health and Disability Commissioner. The regulator's independence would reassure the public that the strategies are for the long term, and give the private sector confidence to invest in changes.

The regulator would enforce standards in ways such as:  
educating the public

- advocating for accessibility
- issuing infringement notices
- resolving cases of non-compliance
- giving grants and subsidies to support compliance
- asking the courts to determine large financial penalties.

## A judicial system that enforces standards

If matters could not be resolved through the regulator's dispute resolution process, people who have been told they must meet standards can challenge this. The judicial process would work out if standards have been breached, and resolve issues about the regulator. It would also determine fines when organisations do not make changes to meet the standards.

## Standards that are broad, standardised, and considered

Developing standards involves:

- identifying and prioritising which areas to address
- identifying stakeholders
- identifying accessibility barriers
- providing an accessible opportunity for stakeholders to comment and be heard
- agreeing on how to remove barriers
- drafting the standard (including when it comes into force, if it's enforceable, what to do if someone does not comply, and when it will be reviewed)
- considering how to meet the costs of implementation.

## Standards may be non-enforceable or enforceable, and changes will be gradual

New Zealand needs to develop and implement accessibility standards in a way that balances the need for laws with the right speed of change. To avoid unnecessary delay, New Zealand could start with non-enforceable standards, which can make a significant difference immediately.

**Non-enforceable standards** could be applied immediately or gradually. They could become enforceable after consultation, testing, and monitoring. Non-enforceable standards have the following advantages.

They can be implemented quickly.

- They signal intent — those responsible for removing a barrier cannot convincingly argue they did not know what their obligations were.
- They can be monitored systematically. The information collected can be used when the regulator considers making them enforceable.
- They give people an incentive to comply, since people know the standards may become enforceable.

**Enforceable standards** are more similar to laws because they must be followed. They require significant consultation, which could significantly delay their development, drafting, and implementation.

**Mixed standards** are standards that are partly enforceable and partly non-enforceable. They could be useful in removing barriers gradually. For example, standards could be enforceable for the government first, then for large private sector organisations, and finally for smaller private sector organisations.

## An easy system to notify the regulator of disabling experiences

We propose a notification system to tell the regulator about disabling experiences.

This system would let the regulator consider the following.

- What are the barriers?
- Are there already accessibility standards? Are they being complied with?
- Would the disabling experience remain if the standards are complied with?

## You would be able to notify the regulator if you have a disabling experience

Anyone would be able to notify the regulator — you would not have to know the standards or whether something meets a standard.

We suggest different ways to notify, for example on social media, by email or phone, or in person.

The notification system is not a complaints system. You would still be able to complain about individual situations when you have experienced discrimination. For example, you could go to the Human Rights Commission.

## Our proposal lets you participate in removing barriers

Our proposal offers disabled people many chances to participate. For example:

- speaking up during consultation or review and supporting people involved in making standards
- staffing the regulator's office mostly with people who have experienced disability
- involving disabled people in designing the notification process
- notifying the regulator of disabling experiences.

Stakeholders who have to remove barriers, such as representative business groups and public sector representatives, could contribute during consultation and review.

## APPENDIX 2: OUTLINE: HOW THE LEGISLATION WOULD WORK

The Act should operate through the creation of two main public entities: a **regulator** and a **tribunal**. It would interface with two other wider systems: a system of **personalised supports and accommodations** (the social welfare, ACC and health systems); and a civil system of **non-discrimination and reasonable accommodation** under the Human Rights Act 1993.

The core purpose of the Act is:

- to identify systemic barriers that cause disabled people to be denied their right to full and effective participation in society;
- to ensure those barriers are progressively removed through a graduated system of enforceable and non-enforceable accessibility standards;
- to make a central regulator accountable for the operation and management of the system, and require that regulator to consult effectively; and
- to monitor the operation of the system to ensure that the Act is meaningfully removing barriers in a way that achieves its purpose; and
- to impose consequences for non-compliance with enforceable standards and to ensure that non-compliance with non-enforceable standards is investigated and overcome.

The following process describes how the overall policy objective of the Act will be achieved.

### *Setting standards*

5. Following a consultation process, the regulator makes decisions about:
  - a) Setting domains for accessibility standards.
  - b) Prioritising those domains for action.
6. The regulator, in relation to each domain, embarks on a consultative process of standard development following a **standard-development process**. That process includes the following.
  - a) Identification of relevant stakeholders.
  - b) Identification of existing law and policy instruments.
  - c) Identification of accessibility barriers that have the effect of excluding disabled people from social and other systems.
  - d) Providing an accessible opportunity to comment and be heard.
  - e) Formulating agreement upon methods of removing those barriers.
  - f) Drafting the standard with the assistance of drafters.
  - g) Stating the standard's effect, including
    - i) which provisions of it are **enforceable** or **non-enforceable**,
    - ii) at what point in time the standard comes into force,

- iii) what the effect of non-compliance with the standard will be,
  - iv) how system-wide compliance with the standard will be measured, and
  - v) at what point compliance with the standard will next be assessed.
- h) Consideration of how the costs of implementation will be met.
7. A standard is published and supplemented by public education and awareness campaigns, including grants and subsidies where appropriate.

*Standard implementation, monitoring and enforcement*

8. Data collection about compliance with the standard ensues. Any situation of non-compliance with the standard is subject to a **notification procedure** managed by the regulator. Notification of barriers (which may include allegations of non-compliance with standards) can be made by any person and the processes for making notifications must be co-designed and accessible.
  - a) Situations of non-compliance with an enforceable standard will be subject to a notification procedure by people facing exclusion, or by their representative organisations.
    - i) The regulator can undertake investigations
    - ii) The regulator can use a number of tools including making decisions that enforceable standards have been breached, and decisions on infringement offences and whether to apply to the court to determine pecuniary penalties.
    - iii) The person or organisation subject to statutory decisions of the regulator may apply to the court if required. This will be based upon a model dispute resolution process including early resolution through a conciliation process.
    - iv) The regulator and the person subject to a finding of non-compliance may subsequently proceed through appellate processes to the courts. The regulator will take account of the views of those making the notification before deciding whether or not to appeal.
  - b) Situations of non-compliance with a non-enforceable standard will be followed up with remedial action, investigation, public assistance and education, and system learning, including research about why the standard is not being complied with.
  - c) Notifications of barriers will be logged (regardless of whether a breach of an enforceable or a non-enforceable standard is found) in order to create a dataset that informs the regulator and the public about the extent to which the standard are being complied with, and the extent to which it is resulting in the removal of accessibility barriers.

- d) A complaints process for administrative and procedural issues relating to the regulator followed by a dispute resolution process and judicial review to the High Court.

### *System learning and improvement*

- 9. From time to time, non-enforceable standards are reviewed and subject to consultation again. Situations of widespread non-compliance, or situations of widespread compliance, may both be subject to a process that renders non-enforceable standards enforceable. Enforceable standards will be subject to periodic reviews following a statutory timeframe. Both enforceable and non-enforceable standards may be amended following due process.
- 10. Data collection ensues along with enforcement proceedings where there are breaches of enforceable standards. Remaining, emerging, or new barriers are identified from the data. The system recursively and iteratively evolves over time to the point where identified barriers are progressively and systematically removed through a mixture of enforceable and non-enforceable standards.

### *Interface with wider systems*

Accessibility legislation is not enough to protect the human rights of people with disabilities. Other important human rights would need to be protected by existing legislation, including legislation around supported decision-making, criminal legislation, health and safety legislation, and employment legislation, which all contribute to provide basic human rights protections for people with disabilities to ensure their full and effective participation in society on an equal basis with others. The interactions between these systems will require co-ordination and a suggested approach is addressed below at chapter 6.

The Accessibility system interfaces with the social welfare and support system, and the non-discrimination system in the following way.

- 11. Where a person faces an accessibility barrier, they can seek reasonable accommodation. A failure to provide reasonable accommodation will continue to be discrimination under the Human Rights Act 1993. Reasonable accommodations must be provided over and above the requirements of an accessibility standard. Both enforceable and non-enforceable standards will inform the interpretation of what is a reasonable accommodation in the circumstances by setting a minimum floor for non-discrimination. Through this mechanism, any failure to comply with a standard can lead to an individual complaint to the Human Rights Commission and potentially the Human Rights Review Tribunal and remedy obtained under s 92I of the Human Rights Act 1993, including damages under s 92M for pecuniary loss, loss of a benefit, and humiliation, loss of dignity and injury to feelings.

12. In many situations, the existence of a standard will not be enough to fully enable a person's participation in society on an equal basis with others. The existing system of personalised supports and accommodations in the health, social welfare and disability systems will continue to operate in a supplementary way to the broader accessibility system.

# **APPENDIX 3: DISCUSSION PAPER NOVEMBER 2019**

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## **DISCUSSION PAPER**

**“Accessibility Legislation for Aotearoa New Zealand”**

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**November 2019**

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# PURPOSE

This paper has been produced as part of an independent legal research project funded by the New Zealand Law Foundation. Its purpose is to facilitate progress by providing background information and options. It is intended to be a starting point for further conversation with the full range of relevant stakeholders, including the community of persons with disabilities and their representative organisations.

# EXECUTIVE SUMMARY

This document:

- Sets out key questions that have informed our suggested model, which must be asked and answered by Government (in consultation with people with disabilities) at the Policy level before proceeding to legislative drafting.
- Sets out further questions requiring decisions from Policymakers in consultation with the community.
- Provides further detail on legal and policy considerations relevant to answering those questions that must be taken into account at the policy-development and consultation stages.
- Sets out a legislative model which the researchers argue is likely to be most successful at achieving accessibility for New Zealanders.

For the greatest chance of policy success, policy development must proactively ask and answer the following questions:

1. What is the most effective legislative model to adopt given the policy of the legislation?
2. What kind of institutional structure should be deployed to give effect to and monitor the legislative model adopted? How will people with disabilities interact with the accessibility system?
3. How will people without current access needs or other stakeholders/organisations interact with the system?

At the outset, we note that any policy proposal adopted will be illegitimate legally and socially if it does not engage in meaningful consultation with people with disabilities and consciously anticipate leadership roles for people with lived experience. This proposal is put forward from the perspective of the researchers to support people with disabilities and others to scrutinise this proposal in advocating for a model that suits them best as individuals and as a group with diverse access requirements.

We suggest that an effective accessibility system incorporates the following elements.

- The purpose of the legislation needs to be focused on effective implementation of equality standards over time.

- The legislation should create mechanisms for change at the system level, including preventative action to avoid the need for individual complaints. The legislation should also ensure access to individual justice and complaints mechanisms where required.
- The legislation must include strong, human rights compliant definitions for concepts of disability, accessibility, reasonable accommodation and supported decision making.
- There must be a coherent conceptual relationship in the legislation between the right to accessibility, the right to reasonable accommodation and the right to choice and control in the form of supported decision-making.
- The legislation must enable people with disabilities to take affirmative leadership action to prevent access barriers arising, and therefore extend beyond the reactive discrimination and reasonable accommodation complaints processes open to individuals governed by the Human Rights Act.

We therefore recommend

- A framework model that incorporates delegated and decentralised decision-making and consultation processes that determine accessibility standards. This should be accompanied by amendments to existing statutes that touch on accessibility.
- The creation of a new independent body that is empowered to develop (through a co-design process with all stakeholders) and enforce accessibility standards.
- The independent body will also guide the implementation of those standards, monitor compliance, coordinate awareness-raising and education, collect data, advocate for systemic change, and navigate individual complaints through an easily accessible, efficient and effective system.
- Structural independence is as important as impartiality. The independent body must be CRPD-compliant itself. People with lived experience will be involved in all aspects of decision making at every level.

A system design based on the above will be developed by the researchers to be tested with the Access Alliance, Disabled Persons Organisations and the wider community.

# 1. DESIGNING ACCESSIBILITY LEGISLATION

This paper is drafted on the basis that the legal and social justification for accessibility legislation has been comprehensively justified by international human rights jurisprudence, domestic legal developments, and the advocacy work done by the disability community. We have proceeded on the basis that legislation is necessary and there is multiparty agreement of that. We believe that the justification for reform is beyond serious argument. The next step is to move to specifics: how will the reform be implemented and what specific obligations will follow? That is the focus of our research.

Despite that, the questions raised in this paper and the factors influencing our proposed answers to them are shaped by the following, and should be accounted for in the policy development process.

Accessibility-related issues affect a wide range of New Zealanders, as noted in a cabinet paper on the subject, including elderly people and caregivers of young children. All New Zealanders will face accessibility issues at some point in their lives and this has effects on those individuals and their communities. Accessibility barriers unjustifiably affect New Zealanders with disabilities to a significant degree and the disability community, including the Access Alliance group, has been the leading voice on the need for reform.

Out of all complaints brought to the Human Rights Commission, discrimination based on grounds of disability ranks the second highest, only after race, comprising 34% of all complaints.

The past decade has seen a social movement to make Aotearoa New Zealand accessible. This has resulted in political consensus supporting the idea to develop a legislative accessibility framework.

Alongside the social movement is a growing body of international human rights law and jurisprudence placing obligations on Governments to take action to improve accessibility.

New Zealand has ratified 7 of the 9 core international human rights treaties. These treaties impose binding legal obligations on New Zealand relating to accessibility. In particular the Convention on the Rights of Persons with Disabilities (CRPD) enshrines accessibility as a prerequisite to the realisation of other rights for people with disabilities.

Article 9 of the CRPD stipulates that,

“to enable persons with disabilities to live independently and participate fully in all aspects of life, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”.

This occurs in the context of general obligations in the Convention to provide “reasonable accommodation” (i.e. modifications to meet the needs of persons with disabilities) and encourage “universal design” (i.e. items and processes that can be used by those with and without disabilities).

New Zealand was reviewed by the Committee on the Rights of Persons with Disabilities in 2014. The Committee’s comments in relation to New Zealand’s compliance with Article 9 were limited. Since then the Committee’s jurisprudence has developed and its approach to accessibility has become more nuanced. In its General Comment on Article 9, the Committee has stated that:

“States parties are obliged to adopt, promulgate and monitor national accessibility standards. If no relevant legislation is in place, adopting a suitable legal framework is the first step.”

The CRPD Committee in its general comment on Article 9 also noted:

The all-encompassing nature of accessibility should be addressed, providing for access to the physical environment, transportation, information and communication, and services. Awareness-raising should also stress the fact that the duty to observe accessibility standards applies equally to the public and to the private sector.

At a domestic level in 2018 the Court of Appeal considered the application of the CRPD to New Zealand policy and legislation in *Chamberlain v Ministry of Health*.<sup>134</sup> The Court of Appeal concluded at [31] that:<sup>135</sup>

New Zealand is a party to the Convention on the Rights of Persons with Disabilities and its Optional Protocol. Our interpretation of all relevant legal and policy instruments must account for New Zealand’s international obligations.

The Court stated that:

“the Ministry must take into account New Zealand’s obligations deriving from the Convention and reinforced by the Strategy to ensure “the importance of belonging to and participating in our community to reduce social isolation”, to be achieved through the provision of “high quality, available and accessible” services.”<sup>136</sup>

These binding international obligations are not enforceable by people through New Zealand’s legal system unless they are incorporated into domestic law. In the absence of such incorporation these obligations can only provide interpretative guidance to the courts. We believe it is preferable for Parliament to make the extent of its commitment to accessibility clear in legislation in a way that is subject to democratic discussion rather

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<sup>134</sup> [2018] NZCA 8

<sup>135</sup> Ibid at [31] – [32].

<sup>136</sup> Ibid at [76]

than allowing it to develop in a piecemeal way through individual action in the courts, which is unpredictable and places an undue burden on individuals.

Law has a central role in making New Zealand accessible but there are many things that law cannot do effectively. It is difficult to draft law to the level of prescription anticipated by a right to accessibility that would cover such a wide area of New Zealand society. Law can also be slow to change and requires processes that remove power from people with disabilities to stipulate what their access requirements are.

We believe a highly effective role that law can play is to provide minimum expectations of accessibility policies and standards which are developed with the community. These standards can be supplemented by reasonable accommodation mechanisms that account for unique individual situations not anticipated by accessibility standards.

Government must ensure that the development, enactment and implementation of the law is done in a way which recognises the need to bring New Zealand and all New Zealanders to an agreed understanding of what the right to accessibility requires in specific circumstances.

There are a range of existing systems in New Zealand that touch on accessibility. These are significant and touch on all levels of government including central, regional and local governments and District Health Boards. The implementation of a new legislative scheme should provide a common framework for discussion and co-ordinated action with each of these, as well as with existing and new businesses.

## **2. POLICY DEVELOPMENT**

Legislation should only be used when necessary to achieve a clearly defined purpose.<sup>137</sup> The purpose should be defined early and robustly tested.

The outcome sought by implementation of this legislation is, in its broadest sense, to create an accessible Aotearoa New Zealand. That outcome is similar to, but not the same as, the purpose of the legislation drafted to bring about that outcome. Policy advisors and legislative drafters have to find a way of defining what accessibility means and the precise obligations placed on identified individuals and agencies. Even with the best of intentions, overly broad legislative drafting is likely to be read down in the courts and by people subject to the law if legislation places obligations on individuals that conflict with social or economic imperatives or other human rights.

Any legislation must include a clear and understandable definition of what “accessibility” means. It must also clearly identify what rights and obligations sit with which actors.

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<sup>137</sup> Legislation Guidelines 2018, Legislative Advisory Committee.

## 2.1 Defining accessibility

The concept of accessibility has long been associated with human rights. In particular it has been used as a tool to assess the extent to which economic, social and cultural rights (such as health and education) are being realised. The concept has been defined as requiring the following:

1. Non-discrimination – must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.
2. Physical accessibility – has to be within safe physical reach, either by attendance at some reasonably convenient geographic location or via modern technology (e.g. access to a "distance learning" programme);
3. Economic accessibility – has to be affordable to all.

It is important to note that these rights are subject to the concept of *progressive realisation*. This means that a state is required to take appropriate measures towards the realisation of these rights over time to the maximum of their available resources. In other words, accessibility of economic, social and cultural rights is to be achieved over time progressively, and that this shall influence interpretation of whether state action or inaction has been reasonable or not. However, the non-discrimination component of accessibility is an immediate obligation on the state.

Article 9 of the CRPD stipulates that:

"to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas".

The list in article 9 is not exhaustive and article 9 is not the only reference to accessibility in the Convention. Explicit reference is also found in Articles 12,13, 19, 20, 21 and 31 and 32 (Implementation provisions). Accessibility is also included as one of 8 general principles (article 3(f)) and in the Preamble.

Viewed holistically, accessibility should be considered as a precondition to being able to realise other rights on an equal basis with others. In other words, accessibility is necessary to achieve substantive equality. Looking at it in this way we can distil 5 core elements of the right, namely:

- Removal of discrimination.
- Physical accessibility of goods, facilities and services.
- Economic accessibility of goods, facilities and services.
- Information and communication accessibility.

- Legal and procedural accessibility.

A definition relying solely on the domains identified would limit the application of any legislative accessibility framework, and prevent the progressive realisation of rights over time. A preferable approach would be to adopt a broad and purposeful definition that can adapt over time. This would also allow a framework to be developed which is CRPD-compliant as a whole, not just focused on Article 9.

## **2.2 Defining reasonable accommodation**

It is important to understand the differences between reasonable accommodation and accessibility, and how the two concepts may interact. In short, accessibility is the baseline of equal service, and accommodation is the second step to take when accessibility alone is not enough.

Accessibility is what we should expect to be ready for persons with disability without asking or planning ahead. The idea is that it could be provided by following an (as yet undeveloped) easy to implement set of standards and practices that make "adaptation" in each case unnecessary. People can benefit from accessibility without announcing or explaining their disabilities. Accommodation is for adaptations that cannot be reasonably anticipated or standardised. They are different for each individual. Although people should expect there to be a general willingness to accommodate them wherever they go, it may be unrealistic to expect actual, specific accommodations unless and until they have identified and asked for them. They do have to announce, and may have to explain their disabilities in order to get accommodations.

Reasonable accommodation is an important part of any accessibility framework in terms of responding to and eliminating discrimination. However, it will not of itself improve accessibility through systemic change. A subsequent paper assessing lessons learned from comparable jurisdictions will consider this point in more detail.

## **2.3 Scheme design and legislative model**

There are a number of options for scheme design. These require four key decisions to be made:

1. A decision on legislative model for the accessibility system. What is the role of the law in achieving accessibility in relation to other policy mechanisms? How should the legislative scheme reflect this?
2. A decision on institutional structure to implement and enforce the accessibility system, including the leadership role of persons with lived experience. Who will

be accountable for what? What accountability will that institution have to people with disabilities and others?

3. A decision on how persons with lived experience will interact with the system at an individual and system level. How will the system be used by people with disabilities to remedy accessibility barriers and prevent accessibility barriers from impacting the rights of individuals?
4. How will central government, regional government, local government and business and other organisations interact with the system, initially and over time?

The following pages of the discussion document are focused on a discussion of scheme design and legislative models.

### **3. POTENTIAL LEGISLATIVE MODEL AND COMPONENTS**

This section will set out options for legislative models in a New Zealand context and analyse these options against the considerations, and make recommendations on the choice of structure.

#### *Considerations for legislative model*

A policy decision must be made by Government about which legislative model is to be developed. The key considerations for this decision include:

- Progressive realisation (development and implementation over time).
- Timeliness in development of the legislation and its enactment.
- Empowerment and capacity building of persons with lived experience.
- Awareness raising.
- Likelihood of building consensus and ease of implementation.
- Administration of the model
- How the relationship between human rights protection, other human rights and individual property rights can be managed.

#### *Options for legislative model*

There are three main legislative models (which are not mutually exclusive):

1. **Amend existing legislation:** minor amendments to all current legislation that touches on accessibility.
2. **A “contained code” model:** a new enactment that is an “all in the box” solution. Examples include the Accident Compensation Act 2001 and the Residential Tenancy Act 1986.

3. **A framework-setting model:** legislation is enacted that includes procedures for setting high level policy statements and prescribed procedures for determining and implementing that policy across a range of areas (examples include the Resource Management Act 1991 and the Health and Safety at Work Act 2015).

#### *Legislative model analysis*

The following analysis takes physical accessibility as an example, but should not be taken to limit accessibility to that domain. The right to accessibility requires a focus on achieving substantive equality over time and includes other domains such as information accessibility and to participate in democratic processes, as explained above. Other enactments that would need to be considered would include the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, the Privacy Act 1993, and others.

### **3.1 Amend existing legislation**

There are many existing pieces of legislation that touch on accessibility rights to some extent.

The current human rights framework in New Zealand is primarily governed by the Human Rights Act 1993 (HRA) and the New Zealand Bill of Rights Act 1990. The HRA establishes the Human Rights Commission and is the primary way to resolve complaints of unlawful discrimination. The complaints process is based on mediation to achieve individual solutions. However, this does not generate publicity and due to confidentiality does not create precedent. This limits the ability of this process to facilitate systemic improvements over time. Furthermore, the advocacy role of the Commission, although in theory capable of covering accessibility, is without teeth and is limited in its impact to the extent of the commitment of individuals and officials involved in a particular piece of work to progress it.

Coupled with the reactive nature of the legislation, the discrimination provisions that relate to access for disabled people are subject to broad reasonableness exceptions. There is little statutory guidance to tailor this assessment of “reasonableness” in individual cases which can mean human rights are balanced or limited inconsistently with the right to accessibility.

The HRA could be amended to impose a positive duty on employers and providers of public facilities or services to be accessible. This would need to be an absolute duty not a requirement to make accommodations. A defence would still need to be available for exceptional circumstances and it would be up to the courts to determine the parameters of that defence.

There are some additional issues that would need to be considered:

- Access to Justice – the process would need an efficient, accessible and user-friendly model to resolve complaints and inform systemic improvements. The current mediation model fails to do this and is focused

on accommodations to an otherwise inaccessible environment, not accessibility. Even with amendments, maintaining a reasonable accommodation approach necessitates reliance on the courts.<sup>138</sup>

- Role of disabled people and DPOs in the process. How can independent monitoring mechanisms be given a role?
- Enforcement – the advocacy role needs teeth. This could be done in a number of ways including the development of binding standards and monitoring, enforcing them, reporting to Parliament etc. Each of these approaches have their benefits and drawbacks.

Other examples of legislation that touches on accessibility that could be amended are the Building Act 2004 and the Local Government Act 2002 (LGA). The LGA has a focus on “four well-beings”<sup>139</sup> and is grounded in consultation processes. While Māori are specifically referred to in decision making and consultation provisions, disabled people are not. This could be rectified by minor amendments. However, this would not provide any enforceable duty in relation to accessibility.

The Building Act 2004 and associated Building Code (including Accessibility Standards) could be amended to provide for stronger accessibility requirements. This is something that the disability community has called for over many years. The fact that such changes haven’t been made is one reason for preferring a framework approach that allows for non-legislative amendments. The Building Act’s purpose is already directed to safety and wellbeing of individuals and accessibility is a fundamental feature of this purpose. There are some questions that need to be resolved before considering such amendments:

- To what extent and on what basis can accessibility requirements be imposed on private property?
- Do all buildings need to be accessible or be able to be made accessible?
- Is there a different standard for public housing, rental housing and private ownership?

The Building Act regime also fails to provide an accessible enforcement mechanism. This will need to be addressed, although its determinations regime could be modified to generate systemic improvements in accessibility modification requirements.

The design and implementation of this model of legislation is likely to take at least 12 months after the required decisions have been made.

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<sup>138</sup> Note discrimination complaints processes under the HRA should not be replaced by any new process but supplemented by them.

<sup>139</sup> Social, economic, environmental and cultural.

### **3.2. “Contained code” model**

A contained code model provides a degree of legislative certainty and accordingly cost certainty. However, unlike a framework model it is an inflexible model that does not allow for developments over time when for example technologies develop or societal values change. It would also depend heavily on a purposive definition of concepts such as “accessibility” that risks thwarting the policy intent of the legislation.

Such a model also tends to lend itself to litigation for resolving complaints which is burdensome on individuals and is slow at responding to systemic issues. The design and implementation of this model of legislation is likely to take between 3 and 5 years.

### **3.3. A framework setting model**

A framework setting model allows standards to be developed over time with participation from the community, DPOs and disabled people. The Resource Management Act 1991 (RMA) is an example of a framework setting model. It is New Zealand’s planning and development and resource allocation statute:

- The RMA deals with wellbeing of communities in a holistic sense (social, economic, cultural).
- The RMA has a hierarchy of planning instruments that allow for input by communities at various levels: these include policy statements and plans with rules which must be followed by local government authorities.
- The RMA includes human rights considerations, even if they are not explicitly described as being human rights considerations.
- The RMA has a declaratory judgment function to clarify questions of law or interpretation.

Such frameworks are generally seen as a way of implementing “standards” based approaches. They generally do not do well at creating enforcement regimes in relation to individual rights. Consideration needs to be given as to how a framework setting model will interact with existing non-discrimination regimes and whether separate, additional complaints mechanisms may be required within the model – particularly in relation to identifying and addressing systemic issues.

The design and implementation of this model of legislation is likely to take at least 18 months after the required decisions have been made.

### **3.4 Conclusion – Legislative model analysis**

We understand that simply amending existing legislation is likely to be the timeliest option. However, we are concerned that this may not achieve the stated purpose of a fully accessible Aotearoa New Zealand.

Our position is that a Framework model is the preferred option. If amendments to existing legislation were also made it could account for the factors raised in this paper that should be used to assess the effectiveness and human-rights compliance of any legislation. A framework would give clear statutory guidance to a wide range of agencies, individuals and businesses about the extent of their accessibility requirements, while giving those agencies an opportunity to participate with others in the community on what those obligations are. This would be supplemented by an enhanced individual disputes regime to ensure compliance with standards, and a reasonable accommodation mechanism under the Human Rights Commission or a new entity.

We therefore consider that a combination of the first and third model would be preferred, i.e. the framework setting model accompanied by amendments to existing legislation.

## **4. INSTITUTIONAL STRUCTURE**

The key question in this part is what kind of institutional structure should be deployed to give effect to and monitor the legislative model adopted. This is informed by how people with lived experience of disability interact with the accessibility system.

### **4.1 Required elements**

A policy decision is required about the institutional structure to implement the elements necessary for the system to work, accounting for the following elements:

- ensuring co-design and on-going participation,
- effectiveness of the system,
- efficiency of the system,
- creating positive experiences for people interacting with the system,
- independence from Government, and
- development of capacity, institutional knowledge, and system learning.

### **4.2 Options for institutional structure**

There are several possible institutional structures: a court, an existing institution, an existing government department and a new institution.

*Courts – “make law and individuals can go to court”*

A court-based system would enable complaints to be litigated and questions of law clarified. Whilst this is an important part of the system and must remain to

ensure access to justice, it does not come without its problems. It is costly and time consuming. While legal decisions may be made, the resolution an individual requires may not be a remedy provided. We have seen overseas that in most cases litigation has not proven the appropriate mechanism for individuals with access issues.<sup>140</sup> In Israel, for example social media has proven to be an effective tool for people with disabilities to enforce the law and raise awareness to accessibility. Posts on Facebook or Twitter, exposing the discrimination and barriers, which they encounter in their everyday lives, receive wide attention from the public and traditional media, often leading to changes by service providers.

A system relying solely on courts may also lack the ability to conduct ongoing monitoring and reporting, and to address systemic issues in a timely manner.

#### *Existing institutions – e.g. the Human Rights Commission*

An existing institution could take up the role of implementing the system. The most obvious choice would be expanding the mandate of the Human Rights Commission. However, the Commission is New Zealand's human rights watch dog and it monitors compliance with New Zealand's international human rights obligations. Part of this role would be for it to monitor the activities of the accessibility implementation agency and advocate for change/improvement where needed. This creates conflicting interests, which risks independence and impartiality in decision-making. An independent office within the Commission similar to the OHRP is also an option, but this would not resolve issues of perceived lack of independence and impartiality.

The Office of the Ombudsman is another option. However, this would go well beyond their existing purpose and mandate and careful consideration would need to be given to whether it would be appropriate to expand the Ombudsman's public administrative functions to such an extent.

In both cases particular attention would need to be given to the role of the Independent Monitoring Mechanism (IMM) and its interaction with the accessibility functions of the institution which are separate and distinct of their functions as members of the IMM.

#### *Existing government department*

In some jurisdictions an existing government department has been the preferred option. This, however, has significant risks as it can result in limited buy in from the community due to lack of independence (answerable to the Minister), conflicts of interest and inevitable balancing of government priorities. We have also seen that the accessibility functions are often under resourced and merely seen as an extension of the existing department's functions rendering the body vulnerable and without teeth.

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<sup>140</sup> We do note that it has resolved some key issues such as access to ATMs in the USA.

### *A new institution*

A new independent institution could be developed. The attractive thing about this option is that it could be designed specifically to meet the purpose of the framework.

Key elements would include:

- An independent and impartial body to develop standards, monitor implementation, coordinate awareness raising and education, collect data and advocate for systemic change, and navigate individual complaints through an easily accessible, efficient and effective system.
- Structural independence is as important as impartiality. The independent body must also be CRPD compliant itself – meaning people with lived experience are involved in all aspects of decision making at every level.
- The independent body should be empowered to develop (through a co design process with all stakeholders) and enforce accessibility standards

A process could be developed to deal efficiently with individual complaints, using technology, apps, navigation services, etc. Data would be captured and inform reporting and addressing of systemic issues.

Access to the courts and to the Human Rights Commission process for discrimination complaints would remain available and be complementary to the new process.

## **4.3 Analysis of institutional structures**

After analysing these four options against the criteria, we consider that the preferred approach is a new institution. It must be independent of the Government as it will be required to resolve issues with the executive and the various agencies and ministries.

We consider that the institutional structure should allow for access to the Courts to resolve questions of fact and law however we do not consider that this is required in every case. For this reason, we propose a structure that provides for a multifactorial conception of access to justice to be developed.

Persons with lived experience need to be at the heart of the new institution and be involved at all levels of decision making.

There are a number of overlapping considerations with the above which will need to be considered more fully with DPOs and disabled people:

- Ensuring choice and control for persons with disabilities
- Ensuring access to justice for persons with disabilities
- Effectiveness of system in resolving individual issues
- Effectiveness of system in identifying and resolving systemic issues

- Efficiency of system in resolving individual and systemic issues
- Improving the experience of persons with disabilities through this process.

#### *4.4 Institutional structure conclusion*

We consider that a new institutional structure is required.

## **5. INTERACTING WITH THE SYSTEM**

The key question in this part is how will people without current access needs or other stakeholders/organisations interact with the system?

### **5.1 Considerations**

There are a number of considerations

- Effectiveness of system in resolving individual issues
- Effectiveness of system in identifying and resolving systemic issues
- Efficiency of system in resolving individual and systemic issues
- Likelihood of development and promotion of goodwill and progressive realisation of the goal of a fully accessible Aotearoa New Zealand

### **5.2 Options**

There are a number of options for how the system will be brought to life. The relationship between individual cases and system issues, and the effectiveness of different models for implementing change must be considered carefully. These are several options for how organisations in New Zealand interact with the system.

The decisions on how people interact with the accessibility system will also influence institutional structure and legislative frameworks.

*Low Level Obligations:*

“Placing a requirement to respond to accessibility issues on a case by case basis.”

Have a system where it’s about the individual persons and organisation (i.e., Air NZ is only about Air NZ, not air travel generally or the responsibilities of a transport provider). In each case it’s only about the relationship between the “parties” in a traditional legal sense. This relies on individuals raising issues with the organisation and the organisations responding as issues arise. It is up to each organisation as to how the respond. This approach would see those people with accessibility obligations interacting with the system when individual cases arise.

The disadvantage of this approach is that system learning is limited and as issues arise in individual cases, it is more difficult to implement solutions widely.

#### *Mid-level Obligations:*

##### *Organisations have a point of contact (Privacy Officer).*

The next level of obligations upon stakeholders is to require organisations of particular size/structure/nationwide/government to nominate an Accessibility Officer (c.f. Privacy Officer, Health and Safety) to act as a point of contact and develop an accessibility policy. This would learn from the way Privacy and Health and Safety considerations have been integrated into organisations. The advantage of this approach would be that as issues arise and solutions are developed, they can be more easily implemented across and between sectors through networks that will be created.

#### *High Level Obligations:*

##### *“Make everyone report (Ontario model).”*

The most onerous system is the compulsory reporting model developed and utilised in Ontario. It requires proactive reporting from organisations. The intent was to encourage organisations to take responsibility and for market pressure to assist in creating change. However, the reporting requirement has been ineffective. Several reviews have raised significant issues with this approach and it has undermined the goodwill that some businesses had towards making things accessible. There are also issues with focusing on accessibility once every reporting cycle rather than it being part of business as usual.

Requiring compulsory reporting may not increase accessibility in and of itself and is likely to undermine goodwill. It is recommended that this approach be treated with caution.

#### *New system approach:*

##### *“New institution aggregates data and reports.”*

The final option we have considered is to task the new institution with the role of interacting with stakeholders.

This approach would see the new institution aggregate issues from individual cases to a system level. Once an accessibility issue was identified, a decision would be made as to the level at which the issue would be addressed. For example, this might be addressed at an individual level or at an organisation level (through an accessibility officer) or at an industry/sector level through an industry body. Any such institution must have functions and powers to educate, audit and hold people to account.

This approach will allow for the use of technology as the accessibility system is implemented into Aotearoa New Zealand.

## **5.3 Preliminary analysis**

Our preliminary view is developing that the final option of the new institution is likely to best achieve accessibility in Aotearoa New Zealand over time. It will allow a systems approach informed by individual experiences.

## **6. CONCLUSION**

Any legislative proposal must be measured – at least – against the factors raised in this paper. Nothing can be progressed without consultation with people with disabilities or others who face accessibility barriers.

We have considered the following questions:

1. What is the most effective legislative model to adopt given the policy of the legislation?
2. What kind of institutional structure should be deployed to give effect to and monitor the legislative model adopted and this includes how will people with disabilities interact with the accessibility system?
3. How will people without current access needs or other stakeholders/organisations interact with the system?

We are likely to recommend:

- A framework model that incorporates delegated and decentralised decision-making and consultation processes that determine accessibility standards. This can be accompanied by amendments to existing statutes that touch on accessibility.
- The creation of an independent body that is empowered to develop (through a co-design process with all stakeholders) and enforce accessibility standards.
- The independent body will also guide the implementation of those standards, monitor compliance, coordinate awareness-raising and education, collect data, advocate for systemic change, and navigate individual complaints through an easily accessible, efficient and effective system.
- Structural independence is as important as impartiality. The independent body must be CRPD-compliant itself. People with lived experience will be involved in all aspects of decision making at every level.