Aotearoa New Zealand's Proposed Accessibility Legislation: An Initial Critique

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Executive Summary

Framed as an early critique, this paper provides an overview of the proposed accessibility legislation for Aotearoa New Zealand. The legislation is currently being drafted and is due to be introduced to Parliament in July 2022. This considered critique is based on information currently in the public domain. The existing legislative approach does not provide a coherent or systematic process for progress towards removal of barriers and increased accessibility. International obligations and a push by disabled people for greater accessibility has resulted in a change of approach from the Government. Part of this transformation is proposed accessibility legislation. The structure of the legislation reflects the Government's non-prescriptive philosophical approach to accessibility progress. The legislation sets up a governance board and a framework for the identification and removal of barriers. Although certainly a first step, it is questionable whether the proposed legislation is likely to meet the expectations of disabled people. The powers of the governance board are limited, and the framework lacks a regulatory mechanism. There is also no power of investigation, dispute resolution function and enforcement pathway. Changes to the proposed law could be made during the drafting phase prior to its introduction to the House in July 2022, or at the Select Committee stage.

1. Introductory Notes

We have used the terminology of "disabled people" in this paper as this is consistent with the language used in the New Zealand Disability Strategy, but we recognise that many people have other preferences in describing disability. We apologise for any offence caused by this terminology.

The use of 'barriers' in this paper is consistent with the description in the Government's Regulatory Impact Statement (RIS) on accessibility, in relating to "all key areas of life, such as the built environment, transportation, information, services, education and

[1] Auckland Disability Law (ADL) is a Community Law Centre that provides free legal services to disabled people associated with their disability related legal issues. ADL is the only specialist disability law community law centre in Aotearoa New Zealand.

health."[2] We acknowledge that this scope does not encompass all barriers experienced by disabled people, and do not wish to minimise those barriers outside this description. These barriers are, however, likely to fall within the jurisdiction of accessibility legislation.

2. Background

In October 2021, the Government announced comprehensive reforms that aimed to deliver "transformative changes for disabled people".[3] Part of this raft of changes included the introduction of accessibility-specific legislation, tentatively titled 'The Accessibility for New Zealanders Bill'.

This was a culmination of years-long lobbying efforts by disabled people for an accessibility law. It reflected an acknowledgement that the current approach to accessibility in Aotearoa New Zealand was unsuccessful and had not provided an effective pathway for accessibility.

3. Current system

Aotearoa New Zealand currently has no stand-alone accessibility legislation. The current accessibility 'system' has two strands: the standards/rules, and remedies/complaint mechanisms. Both can be used as mechanisms to remove barriers but are problematic for several reasons.

Accessibility requirements within the law are piecemeal and often voluntary. They are scattered across primary and secondary legislation, policies, and guidelines. Some sectors, such as the built environment and transportation, have specific standards that apply, albeit these may be unenforceable or simply not enforced in practice. Other sectors remain poorly addressed. The Government has described the current system as, "fragmented, slow, hard to measure, and hasn't led to the credible policy, system design and service delivery needed to achieve an accessible society."[4]

The second strand of the current system is the ability to undertake a complaint to a relevant body. For example, removal of a barrier may be attempted by making a disability discrimination complaint to the Human Rights Commission (HRC) under the Human Rights Act 1993 (HRA). Complaints are often resolved in confidential mediated settlements as part of the process set out in the HRA. It should be acknowledged that

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[2] Ministry of Social Development, *Regulatory Impact Statement: Accelerating Accessibility* (RIS) (1 October 2021), at 3

[3] New Zealand Government. (2021). *Government delivered transformative changes for disabled people.* https://www.beehive.govt.nz/release/government-delivers-transformative-changes-disabled-people

[4] Cabinet Paper. *Accelerating Accessibility in New Zealand* (29 September 2021) at 1

this process has proved effective at resolving some cases of discrimination for individuals. However, while a mediated settlement may remove a barrier for the individual involved, it disincentivises systemic change. It also puts an undue burden on disabled people to address barriers. This is in direct contravention of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which clearly requires the removal of barriers to be undertaken by the state, rather than individuals.[5]

Very few disability discrimination complaints are enforced by judicial action of the Human Rights Review Tribunal (HRRT).[6] The HRRT is effectively an enforcement mechanism for the HRA, able to make remedial orders to address the barrier.[7] HRRT action can only be commenced if a mediated settlement is not achieved at the 'gateway' HRC. This process is time-consuming, potentially expensive, and rare. Again, this disincentivises systemic change and progress is glacial.

A further potential HRA provision for the removal of barriers is the concept of 'reasonable accommodation'. Although not explicitly defined as such in the HRA, the courts have interpreted relevant sections within the HRA as being reasonable accommodation provisions.[8] The sections, however, do not impose a 'positive duty' to provide reasonable accommodation, only that a denial of reasonable accommodation may lead to a disability discrimination complaint.

A reasonable accommodation complaint is also an action that applies primarily to individuals. A series of reasonable accommodation measures for individuals – particularly if these must be enforced through complaints under the HRA - is not an appropriate replacement for widespread or systemic accessibility measures.

The disability discrimination and provisions under the HRA have therefore shown themselves to be ineffective at addressing accessibility for disabled people. They do not provide a coherent or systematic process for progress towards removal of barriers and increased accessibility.

4. Developments

The 1993 HRA preceded several major developments in disability rights and accessibility, primarily the CRPD which NZ ratified in 2008. The CRPD is based on the social model of disability and puts the onus of removal of barriers on the State, rather than individuals. Specifically, Article 9 clearly sets out an obligation on States Parties

[5] Convention of the Rights of Persons with Disabilities (CRPD), article 9

[6] A s 21(1)(h) search of the NZLII Human Rights Review Tribunal database produces two case results in the 5 years 2016-2021. http://www.nzlii.org/

[7] Human Rights Act 1993, s 92I

[8] Smith v Air New Zealand Ltd [2011] NZCA 20

to take action to ensure that persons with disabilities are afforded equal access within a number of domains.[9]

The CRPD makes it clear that States must work to ensure accessibility into the future. There is also the obligation, however, to identify and remove *existing* barriers. This applies not only to the public sector, but also to the private sector in some circumstances.

Article 9 does not specifically require that this process be undertaken through legislation. It requires parties to take "appropriate measures" to ensure accessibility.

In Aotearoa New Zealand a variety of disability-related measures followed ratification of the CRPD, including the updated New Zealand Disability Strategy,[10] the iterations of the Disability Action Plan,[11] and the Accessibility Charter.[12] Although these documents provided direction for accessibility measures in the public sector,[13] they did not provide an enforceable pathway for the removal of barriers. Although a start, arguably they did not constitute "appropriate measures" toward accessibility as required by Article 9.

It was clear therefore, that the current system did not provide for the removal of barriers to accessibility and was inconsistent with accessibility obligations imposed by the CRPD. The Government acknowledged the effect of this in the Regulatory Impact Statement (RIS) that accompanied the October announcement, "Compared to non-disabled people, disabled people face disproportionately greater barriers to accessing products, devices, services, or environments. There continues to be major areas of inaccessibility and uneven compliance with voluntary accessibility standards."[14]

In response to the lack of progress in accessibility, the Access Alliance undertook research and campaign work to lobby for new accessibility legislation. The Alliance contended that legislation should be the primary driver of accessibility and would be based on thirteen principles. These principles included application of the legislation, accountability, regulatory powers, and enforcement. The Act would be, "more than window dressing" and would have, "effective enforcement mechanisms which lead to real effect".[15]

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[9] CRPD, article 9

[10] Office for Disability Issues. (2016). *New Zealand Disability Strategy 2016-2026*. Ministry of Social Development

[11] (most recent) Office for Disability Issues. (2019). *Disability Action Plan 2019-2023*. Ministry of Social Development

[12] Ministry of Social Development. (2018). *Accessibility Charter.*

[13] https://msd.govt.nz/about-msd-and-our-work/work-programmes/accessibility/index.html

[14] RIS (n 2) at 13

[15] Access Alliance(n.d.) *The Accessibility Act*. https://www.accessalliance.org.nz/the_accessibility_act

In 2018 the Government committed to, "exploring the feasibility of using legislation to provide for standards and codes for accessibility."[16]

A case for legislation as the appropriate tool was made in the 'Making New Zealand Accessible' report by Warren Forster, Tom Barraclough and Curtis Barnes.[17] This clearly outlined the need for a method to create standards, allowing appropriate and consistent coverage of the relevant domains. The authors emphasised the importance of giving accessibility 'progress' the force of law, rather than allowing it to languish in the policy sphere. Legislation also allowed for enforceability, meaning accessibility requirements could not be minimised, avoided, or ignored.

The authors proposed a new law, setting out a framework for the identification, recording and removal of barriers, including the responsibility for the removal of these barriers.[18] The legislation would include a system for an independent regulator to develop accessibility standards for barrier removal, including measurement and review mechanisms. Finally, the law would provide the regulator with dispute resolution, enforceability, and compliance powers.

5. Proposed legislation

In October 2021, the Government announced the creation of accessibility-specific legislation, tentatively titled "The Accessibility for New Zealanders Bill". After consultation, the Government intends to draft the Bill with the aim of introducing it to Parliament in July 2022.

It is important to emphasise that there is currently no draft legislation to critique, and there are few documents from which to glean the Government's intention as to the content of the legislation. The initial documents that provide guidance include the September Cabinet Paper and the Regulatory Impact Statement (RIS), both released as part of the October 2021 announcement package.[19]

Both establish clear boundaries and constraints on the proposed legislation, however. Firstly, the Government has ruled out "rights-based legislation".[20] The new legislation will not focus on individual remedies, as there is already a framework in place, albeit with the limitations noted above. These limitations to the HRA system will not be

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[16] Cabinet Paper (n 4) at 3

[17] Forster, W., Barraclough, T., & Barnes, C. (2021) *Making New Zealand Accessible: A Design for Effective Disability Legislation*. https://www.lawfoundation.org.nz/wp-content/uploads/2021/09/2019.46.14.Making-Aotearoa-New-Zealand-Accessible-Report-30-Sep-2021.pdf

[18] Ibid at 30

[19] Cabinet Paper (n 4)

[20] RIS (n 2) at 25

addressed as part of the accessibility work. It does ensure that the disability discrimination HRA complaint mechanism remains in place.[21]

The Government is also clear that the new legislation should not be seen as the single solution to accessibility issues. It should work alongside, "complementary measures, such as education, awareness raising, and targeted training, that can together address the broader issues resulting from a lack of accessibility."[22] Consistent with the Government's constrained approach to the legislation, it is seen as a first step, rather than a full solution.

In the RIS, the Government considers four models of regulatory intervention, starting with the status-quo, progressing on a spectrum to a full regulatory regime. This full regulatory regime is outlined in Option Four. It allows for an independent regulatory regime, including the creation of enforceable accessibility standards, with an accessibility regulator and access to the judicial system. Along with the ability to create standards, the new regulator would have the power to, "carry out inspections, provide mediation services, serve infringement notices, and set and enforce penalties for non-compliance."[23] This model echoes many of the standard creation, notification, monitoring, investigation, dispute resolution, enforcement, reporting, and review mechanisms in the 'Making New Zealand Accessible' report.

Option Four was rejected, despite being the preferred option of the Access Alliance.[24]

The Government claims the Option Four system would be too complex, having a high degree of crossover with existing legislation, thereby duplicating functions. Further, it would be limited, not covering all necessary domains. It would be inflexible, and difficult to future-proof. It would also be expensive and take a long time to implement. Finally, it claims that this type of regime, as evidenced in the Ontario model, simply engenders compliance rather than addressing wider behavioural change.[25]

The Government instead chose Option Three. This allows for the creation of, "A leadership model, structure and process for change… [setting out] key principles, functions, roles and accountability mechanisms, to ensure that barriers are progressively identified, prevented and removed over time".[26]

The first component of Option Three is the leadership structure. The Government intends that the leadership, as envisaged in the legislation, is shared across a new

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[21] RIS (n 2) at 7

[22] RIS (n 2) at 3

[23] RIS (n 2) at 30

[24] RIS (n 2) at 4

[25] RIS (n 2) at 31

[26] RIS (n 2) at 27

Accessibility Governance Board (AGB), the Minister for Disability, and a Chief Executive.[27]

The AGB is described as "independent", although not an Independent Crown Entity similar to the Human Rights Commission, or the Commerce Commission. The Independent Crown Entity option was specifically rejected due to concerns about 'silo' working, lack of mandate, time to set up, and expense. It is instead a ministerially appointed advisory board, made up of disabled people. The AGB is intended to provide an "independent voice" to the Minister on barriers and the proposed solutions for removal.[28]

The powers of the AGB are not yet fully determined and are subject to consultation. The initial leadership functions of the AGB in the RIS includes advice on strategic direction, identification of barriers, working with the Minister to address barriers, and reviewing and monitoring accessibility progress.[29]

Limited consultation with specific groups has been undertaken since the release of the RIS. The consultation dealt with elements of the Board, including proposed name, membership, appointment mechanisms, and accountability to the disability community.[30]

It is clear therefore, that the AGB is part of a 3-part leadership structure, has limited independence, and limited powers. Consistent with the Government's non-prescriptive approach, the Board has no powers of regulation or enforcement.

The second major component of the legislation is the creation of an accessibility framework. The aim of the framework is to prevent, identify and remove barriers across domains. Although still subject to a co-design process, some elements of the framework are clear. The framework will contain monitoring and evaluation functions, with consistent methodologies to allow the AGB to measure progress.

within the recent consultation document, a general outline of the framework is proposed.[31] The process starts with the identification of a systemic barrier. The scope of the barrier is defined through research. Solutions are formulated using appropriate experts and people with experience of the barrier. Recommendations are then made to decision makers. The final step is an ongoing monitoring process to ensure progress and to learn from anything that does not work as intended.

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[27] Titles for the Ministry, Minister and the Board are yet to be finalised.

[28] RIS (n 2) at 38

[29] RIS (n 2) at 53

[30] New Zealand Disability Support Network. (2021) Feedback on the *Accelerating Accessibility Discussion Paper – Questions*. https://nzdsn.org.nz/wp-content/uploads/2022/01/20220131-NZDSN-Feedback-on-Accelerating-Accessibility-Discussion-Paper-December-2021.pdf

[31] Ibid at 3

Again, consistent with the legislation's non-prescriptive approach, as currently envisaged the framework requires only recommendations to be made to decision makers. It does not require, for example, enforceable standards to be created, or any enforcement mechanisms should recommendations not be taken up.

There is reference in the Cabinet Paper to provide within the framework the ability to assess whether, "current, regulations, standards and enforcement regimes are fit for purpose and [to ensure] new regulatory systems are developed where necessary."[32] It seems likely from the subsequent consultation, however, that the power to make new regulatory systems will be recommendatory only.

The risk of this framework has been acknowledged in the Cabinet Paper in that it, "relies heavily on transparency through reporting and monitoring to incentivise compliance with the new system and build in 'teeth' over time."[33]

6. Discussion

It is clear, therefore, that the proposed legislation contains a philosophy of non-prescription for accessibility. The lack of standard-setting or other regulatory or enforcement mechanisms highlights this approach. The legislation also lacks complaint and dispute resolution functions (it should be noted that the complaint and dispute resolution functions under the HRA remain in place).

This approach differs from that preferred within some sectors of the disability community. For example, it is in direct contrast with the Access Alliance's principles for the legislation. Principle 10 requires a regulatory power with regular review. Principle 9 requires the ability to complain about breaches of the legislation. Overall, the legislation must be, "underpinned by effective enforcement mechanisms which lead to real effect."[34]

Further, the Government itself acknowledged the risk of the framework as not being seen to go, "far enough or [bring] about the fundamental change they expect to rebalance the inclusion and participation of disabled people."[35]

A three-year review process for the legislation is proposed in the Cabinet Paper. That review point will allow the Government and disabled people to assess whether "meaningful progress" has been made.[36]

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[32] Cabinet Paper (n 4) at 5

[33] Cabinet Paper (n 4) at 13

[34] Access Alliance (n 11)

[35] Cabinet Paper (n 4) at 13

[36] Cabinet Paper (n 4) at 11

The legislative drafting process allows for changes to be made prior to the introduction of a Bill to Parliament. The subsequent Select Committee process also provides an opportunity for amendment.

Any increased enforceability or regulatory mechanisms would, however, require a philosophical shift from the Government in the way it views the accessibility legislation. This would require a complete reconsideration by Government of its entire approach, including its rejection of Option Four in the RIS. A similar option was persuasively outlined in the 'Making New Zealand Accessible' report. This model proposed an independent regulator, a system to create enforceable standards for the removal of barriers, and a dispute resolution mechanism. The Government could revisit this model, with real efforts to address the obstacles it cited in its rejection of Option Four.

This may be an unlikely possibility. An alternative is for the Government's proposed model to be strengthened, without raising the Option Four concerns (complexity, inflexibility, expense, time). The AGB would require greater powers and increased independence. There are long-standing examples in existing legislation, as discussed below.

The proposed powers can be divided into distinct elements, aspects of which are already proposed in some form for the AGB. These elements include powers of investigation, notification, standard setting, complaint mechanism, dispute resolution, monitoring, system learning, and enforcement.

With increased powers, it is likely that the AGB would require a different structure, rather than simply an advisory board. The Government initially rejected the option of an independent Crown Entity. The structure issue would require re-examination to address the Government's concerns about the operation of the leadership system. The Government has the time to consider this prior to the drafting of the legislation, and up to and including the Select Committee process.

6.1 Powers of Investigation

The Government considers that within the framework, part of the role of the AGB is to assist with the identification of systemic barriers. At this stage the extent of the AGB's power to identify and investigate barriers is unclear. It seems, however, that in order to undertake this effectively, a proactive power of investigation is required.

The ability to investigate is central to many agencies in existing law. The AGB could be given the ability to undertake its own investigations into systems and domains. These investigations could be conducted on its own initiative, similar to the power held by the Health and Disability Commissioner and the Privacy Commissioner.[37] Investigations could also be commenced as a result of notifications (see below).

The AGB would need to be appropriately resourced and authorised to undertake investigations. Although unlikely to be required in most circumstances, this may

[37] Health and Disability Commissioner Act 1994, s 14(1)(e) and Privacy Acy 2020, s 17(1)(i)

require specific powers to request information. Again, this is similar to powers held by the existing Commissioners.[38] Information sharing abilities across the state sector may also be required.

6. 2 Notification

Investigations could also be undertaken as a result of individual complaints and notifications. Although the Government envisages the removal of systemic barriers, it is nonetheless important that individuals can alert the AGB to barriers through a formal notification process. There would need to be a robust analysis method to allow for identification of systemic issues from individual notifications.

Notifications could be accepted throughout the framework process, from initial identification of barriers through to the final monitoring of outcomes.

6.3 Standard setting

The power to develop standards is a key omission from the proposed framework, consistent with the Government's non-prescriptive approach. The proposed framework in the consultation process has no reference to the power to develop standards.[39] There is reference to the framework being able to recommend that, "new regulatory systems are developed where necessary."[40] This has not translated into a power to set standards through secondary legislation, or indeed a general regulatory function for the AGB.

A clear power for the AGB to develop standards could be incorporated in a way that would address the Government's concerns about prescription. Standards would not have to be the default option within a domain but could be simply one of the available tools. Standards would not be an appropriate option for every domain, addressing the Government's concerns about inflexibility and duplication.

The AGB could be given the power to carry out robust investigation and consultation processes that lead to development of standards, depending on the specific requirements of the domain in which the barrier exists. Standards could be one of a suite of measures to address barriers, and could be non-enforceable, enforceable, or mixed.

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[38] Privacy Act 2020, s 87 and Health and Disability Commissioner Act 1994, s62

[39] NZDSN (n 25) at 3

[40] Cabinet Paper (n 4) at 5

The various considerations for level of enforceability were well canvassed in the 'Making New Zealand Accessible' report.[41] These issues would be considered as part of the AGB's research and development process.

Non-enforceable standards could become enforceable over a period of time, allowing the entities subject to the standards sufficient time to prepare.[42]

Standards as an option may encourage entities to engage with the framework in a way that other options may not. The framework as currently envisaged requires only that 'recommendations' for solutions be made to decision makers.[43] The system seems to rely on the entities then doing the 'right thing' after being presented with a solution. Decision makers could ignore or reject recommendations without obvious consequences. With the ability to set standards and timelines for enforceability built into the framework, decision makers may take recommendations more seriously.

The power to develop standards could sit with the AGB, but the final decision over timeframes and enforceability could reside with the Minister. This is consistent with the leadership of accessibility progress spread across the AGB, Minister, and Chief Executive. The AGB's power would therefore remain recommendatory, but with built-in transparency.

Standards – even as one possible tool - would ensure that the framework has a measure of regulation that the Access Alliance seeks.[44]

6.4 Complaint Mechanism and Dispute Resolution

Complaints and dispute resolution functions are clear omissions from the proposed legislation. This is despite the Government's acknowledgement that the existing HRA system for disputes is, "time-consuming and unlikely to lead to systemic change".[45] The disability discrimination and reasonable accommodation complaints mechanism will remain for individual complainants. Any dispute resolution process under the new legislation would need to complement this existing human rights process.

Receipt of complaints about systemic barriers and non-adherence to barrier removal could be incorporated into the role of the AGB. Dispute resolution of these complaints could be a further power for the AGB.

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[41] Forster (n 13) at 96.

[42] For example, the long lead-in times for the Residential Tenancies (Healthy Homes Standards) Regulations 2019

[43] NZDSN (n 25) at 3

[44] Access Alliance (n 11)

[45] Cabinet Paper (n 4) at 3

The legislation could allow the Board to deal with and resolve disputes in a variety of ways. Existing legislation provides examples of both a referral system for complaints[46] and a settlement function.[47] Complaints and dispute resolution options would also act as notifications, providing valuable information to contribute to the framework. There could be a 'stop' function on a complaint until it was dealt with by the framework system.

Careful consideration would have to be given to next steps if the outcome from the AGB dispute resolution process was unsuccessful. If recourse to the HRRT was made available, for example, remedies would have to be designed to ensure that the work under the framework was not constrained by Tribunal orders.

This mechanism would encourage resolution of complaints at a relatively low level. It would begin to address the current gap in resolution of complaints about systemic barriers and would feed into the framework process. Over time, as the envisaged framework addresses barriers, the complaint mechanism and dispute resolution service may be utilised less often.

6.5 Monitoring and System Learning

The current framework appears to incorporate a monitoring process, feeding into a system learning function. As above, both elements would be assisted by a power to request information.

6.6 Enforcement

As currently envisaged, there are no enforcement requirements in the proposed legislation. Because the framework only allows for recommendations to decision makers, there is essentially nothing to enforce.

As above, a power to design standards may be required. If made mandatory, standards would require enforcement functions to be built into the system. Breaches could follow the Board's complaint and dispute resolution process. Lack of resolution via this process could open access to the judicial system.

The AGB process could act as a 'gateway' for enforcement action in the courts, similar to the Privacy Commissioner and Health and Disability Commissioner systems. These systems also incorporate the use of an independent Director's office to take cases to tribunals. A similar office could undertake the same function in this system, ensuring the AGB remained at arm's length from direct enforcement action.

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[46] Health and Disability Commissioner Act 1994, s 34

[47] Privacy Act 2020, s 77

7. Summary

This paper acknowledges that the Government's proposed accessibility legislation is a step towards greater accessibility. It provides a framework and leadership structure for the identification and removal of barriers. The issue is, however, whether the legislation is robust enough, or whether it lacks "real force and real effect".[48]

The discussion points outlined above would change the role of the AGB. The AGB would no longer be simply a component of the leadership decision making process, but a senior partner with additional powers. Arguably, as the AGB will be led and operated by disabled people it is the appropriate body to hold these functions.

Making the framework more robust and the AGB more effective would further the Government meeting its CRPD obligations to take 'appropriate measures' to ensure disable people have equal access to all areas of life.

[48] Access Alliance (n 11), Principle 13