**Aotearoa New Zealand’s Proposed Accessibility Legislation: An Initial Critique**

Olivia Kelly on behalf of Auckland Disability Law – May 2022

1. Currently, NZ has no stand-alone accessibility legislation. There is no coherent or systematic process for progress towards removal of barriers and increased accessibility.
2. Currently, the law does not impose widespread positive duties to provide reasonable accommodations. Any accessibility duties at law are piecemeal and often voluntary. In some sectors, requirements are unenforceable or not enforced in practice.
3. Currently, the law allows an individual to make a complaint where reasonable accommodations have not been provided. Disability discrimination complaints can be made to the Human Rights Commission (HRC) under the Human Rights Act 1993 (HRA). Complaints are often resolved confidentially through mediation, preventing systemic change. Where a complaint proceeds to the judicial level, this is time-consuming and potentially expensive for the complainant. This process puts an undue burden on disabled people to address barriers themselves, breaching the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
4. After NZ introduced the HRA, NZ ratified the CRPD in 2008. The CRPD puts the onus of removal of barriers on the State. States must identify and remove existing barriers, and take appropriate measures to ensure accessibility into the future.
5. In NZ, several measures followed ratification of the CRPD: an updated New Zealand Disability Strategy, the Disability Action Plan, and the Accessibility Charter. But more work is needed.
6. In recent years, the Access Alliance has researched and campaigned for new accessibility legislation. It proposed thirteen principles for new laws with enforcement mechanisms. The authors of the ‘Making New Zealand Accessible’ report also see the need for legislation to give accessibility progress the force of law and allow for appropriate and consistent coverage.
7. In October 2021, the Government announced comprehensive reforms that aimed to deliver “transformative changes for disabled people”. The Government acknowledged that the current approach to accessibility has been unsuccessful. The changes include the introduction of accessibility-specific legislation, tentatively titled ‘The Accessibility for New Zealanders Bill’. After consultation, the Government intends to draft the Bill, then bring it to Parliament in July 2022.
8. While there is not yet a draft Bill to critique, we can ascertain the Government’s intentions for the new law by looking at documents released as part of its announcement, including the Regulatory Impact Statement (RIS). The Government sees this law as a first step, not a full solution.
9. In the RIS, the Government considers four models, which fall on a spectrum from the status quo (Option 1) to a full regulatory regime with enforceable accessibility standards and a regulator with powers to inspect, mediate, serve infringement notices, and set and enforce penalties (Option 4). But the Government rejected this, claiming it would be complex, limited, expensive, inflexible, and duplicate existing law.
10. The Government chose Option 3. This would set up a leadership structure of a new Accessibility Governance Board (AGB), the Minister for Disability, and a Chief Executive. The AGB would be 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 proposed solutions for removal. Its role would be to advise on strategic direction, identify barriers, work with the Minister to address barriers, and review and monitor accessibility progress.
11. Option 3 also sets up a framework to prevent, identify, and remove barriers. For each systemic barrier, research defines the scope of the problem. Solutions are formulated with experts and people with experience of the barrier. Recommendations are then made to decision-makers.
12. Option 3 reflects the Government’s preference to take a non-prescriptive approach. While the powers of the AGB are not determined, it would have no powers of regulation (rule-making) or enforcement. Instead of powers to require standards and the use of enforcement mechanisms to punish, the leadership can only make recommendations.

**Discussion**

1. The Government’s proposed law is a step towards greater accessibility. The issue is whether the legislation lacks real force and real effect. It is questionable whether the proposed law is likely to meet the expectations of disabled people. The powers of the AGB are limited. With no regulatory (rule-making) mechanism and no complaint functions or dispute resolution processes, the proposed law differs from the preferences of some of the disability community.
2. Changes to the proposed law could be made during drafting or at Select Committee. A three-year review process for the law is proposed in the Cabinet Paper. After three years, the Government and disabled people will assess whether meaningful progress has been made.
3. Increased enforceability or regulatory mechanisms would require a philosophical shift from the Government. One option is that the Government could reconsider its entire approach, including its rejection of Option Four in the RIS, but this may be unlikely.
4. Another alternative is for the Government’s proposed model to be strengthened. Below, we propose strengthened powers for the AGB, aspects of which are already proposed in some form. The AGB would no longer be simply a component of the leadership decision making process, but a senior partner with additional powers. Making the framework more robust and the AGB more effective would further the Government meeting its CRPD obligations.
5. With increased powers, the Government might need to re-examine how the leadership structure operates.
6. **Powers of investigation:** Part of the role of the AGB is to assist with the identification of systemic barriers. The extent of the AGB’s power to identify and investigate barriers is unclear. We consider that a proactive power of investigation is required. The AGB could be given the ability to undertake its own investigations. The AGB would need appropriate resourcing and powers, such as powers to demand information.
7. **Disabled people should be able to notify the AGB of complaints:** Investigations could also be undertaken as a result of individual complaints and notifications. Individuals should be able to alert the AGB to barriers through a formal notification process. The AGB would then analyse where systemic issues arise from the individual complaint.
8. **The power to set standards:** There is no power for the AGB to develop standards for entities to follow. Standards would not have to be the default option, but could be simply one of the available tools. Standards could be non-enforceable, enforceable, or mixed. Non-enforceable standards could become enforceable over a period of time, allowing the entities subject to the standards sufficient time to prepare. Standards may encourage entities to engage with the framework. The framework as currently envisaged requires only that ‘recommendations’ for solutions be made to decision makers. Decision makers could ignore or reject recommendations without obvious consequences. With a power to set standards and timelines for enforceability, decision makers may take recommendations more seriously. As an option, the final say over timeframes and enforceability could sit with the Minister.
9. **Complaints and dispute resolution functions**: Any dispute resolution process under the new law would need to complement the 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. The legislation could allow the AGB to deal with and resolve disputes in a variety of ways, including referrals and settlements. This would encourage resolution of complaints at a low level. It would begin to address the current gap in resolution of complaints about systemic barriers and would feed into the framework process.
10. **Greater powers for Monitoring and System Learning:** The current framework incorporates a monitoring process, feeding into a system learning function. Both elements would be assisted by a power to request information.
11. **Enforcement:** As the framework only allows for recommendations, there is nothing to enforce. If the AGB has a power to make mandatory standards, enforcement functions would also be required. Breaches could follow an AGB 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.

(We have used the term “disabled people” in this paper as this is consistent with the language used in the New Zealand Disability Strategy. We recognise that people have other preferences in describing disability. We apologise for any offence.)