Accessibility Bill – Notes for Law Amendments (Wildeman) - Nov 7, 2016

A. The importance of accessibility legislation - and its harmonization with other human rights protections

Accessibility legislation is potentially an important compliment to other human rights protection mechanisms, which too often place the burden of pressing for deep and systemic social and infrastructural change on individual complainants.

Accessibility legislation, and the standards made pursuant to it, is rooted in and must reinforce the primacy of fundamental human rights[1] – including the right to equal access to employment and to publicly available goods and services such as education, health care, and housing.

Accessibility legislation provides an important mechanism for *monitoring and reporting, both domestically and internationally*, on the achievement of human rights standards, including the socio-economic situation of persons with disabilities as this is reflected in access to such basic goods as housing, health, education, and employment.

B. Seven Principles for strong, effective accessibility legislation – from the Ontario Human Rights Commission, in 2004, in advance of Ontario's accessibility law.

Accessibility legislation should be:

- **Universal** and apply to government, non-government and private sector environments
- **Forward-looking, harmonized** with and building on existing rights and established standards
- **Inclusive** of persons with non-mobility related disabilities
- **Achievable**, retaining and enhancing accessibility planning requirements as essential tools to achieving a barrier free Ontario
- **Clear** implementing mechanisms for the development, application and review of standards for accessibility
- **Strong,** including measures for receiving and resolving complaints, and enforcing the requirements of the Act and
- **Transparent**, including monitoring, public reporting and accountability measures

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[1] Section 4 recognizes the primacy of the Human Rights Act:

> 4 (1) Nothing in this Act or the regulations diminishes the rights and protections offered to persons with disabilities under the Human Rights Act.
>
> (2) Where a provision of this Act or the regulations conflicts with a provision of another enactment, the provision of this Act or the regulations prevails unless the other enactment provides a higher level of accessibility for persons with disabilities.

However, the Act does not specifically advert to the principle of undue hardship.

*Nova Scotia's proposed bill fails to adequately protect these principles. It does not adequately reflect **universality** through clear imposition of responsibilities on both public and private sector entities (in particular, in its purposes section), **harmonization** in reflecting and affirming human rights standards in the purposes section and throughout, **inclusivity** in that there is no clear requirement, for instance, to ensure representation of persons with psychosocial and intellectual disabilities in the bodies responsible for devising accessibility standards - nor is there a requirement to ensure equitable gender, racial, and ethno-cultural representation. Last, the **strength and transparency** of the Act and its enforcement measures leave much to be desired, given the overconcentration of power in the hands of the Minister of Community Services. A principle not included in the above but arguably also essential to any accessibility law is **independence** on the part of the agency responsible for devising, reviewing, and enforcing accessibility standards.*

Government should explicitly integrate **fundamental human rights principles** into the Act (*in particular, in the purposes section, which is vital for informing interpretation as well as guiding the development of accessibility standards*). These principles should include a priority on inclusivity and universal design, a favouring of integration over segregation, an imperative that public funds not be spent in a manner that creates new barriers, as well as an imperative of identifying and removing existing barriers (Ontario Human Rights Commission – 2004 submissions).

In addition, the Act should recognize certain fundamental human rights protections guaranteed in the CRPD which are relevant to accessibility and inclusion, including:

- **Article 13: Access to justice,**
- **Article 19: The right to live in the community, with choices equal to others (and with access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community),**
- **Article 20: Mobility (including facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries),**

Along with other fundamental guarantees including equal access to education, health care, employment, an adequate standard of living, and participation in political and public life.

C. Three key areas of concern

I. Lack of public consultation / education around the final form of this bill

Fundamental human rights principles include a duty of states to engage in meaningful consultation with persons with disabilities on proposed laws and policies affecting their significant interests (e.g., CRPD, Art. 4(3)[2]). This imperative is at the heart of disability rights and inclusion, and applies to governments at the national, provincial, and municipal level.

Lack of meaningful consultation is the most glaring weakness of the proposed bill. While there was consultation in the years prior to government's drafting of the bill, there has been no consultation with persons with disabilities or their representative organizations on the final form proposed for the new law. Significant departures from the recommendations of the Accessibility Advisory Committee have been made in arriving at the bill's proposed form. It is not clear that government has considered, let alone given adequate weight to, the perspectives of disabled persons on the previously undisclosed elements of the bill.

In other words, earlier processes of consultation do not suffice as there are now concrete proposals, both procedural and substantive, requiring evaluation and feedback in order to be accepted as legitimate by all affected – and in particular, by persons with disabilities whose human rights are fundamentally affected.

Recommendation 1: There must be meaningful, well-publicized, public consultation on the bill before it is passed – including a commitment to redraft in light of comments received.

II. Lack of clarity on the purposes and reach of the Act

a. Government's commitment to accessibility

The Whereas clauses state that govt is "committed to establishing progressive timelines for developing and implementing accessibility standards while taking into account the resources required to comply with such standards."
This is a weak statement. Government should state its commitment to achieving accessibility. Resource implications may be part of the eventual analysis but should not be imposed as a mandatory counterweight that in this statement is weaker than human rights principles relating to undue hardship.

b. Purpose statement

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[2] CRPD, s.4(3): "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."

Section 2 states:

> 2 The purpose of this Act is to
>
> (a) ensure that issues related to persons with disabilities are conveyed to and addressed by public sector bodies;
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> (b) ensure that existing measures, policies, practices and other requirements are reviewed with a view to making suggestions to improve accessibility;
>
> (c) provide the framework and authority to create accessibility standards; and
>
> (d) facilitate the implementation and monitoring of and compliance with accessibility standards

This statement is confusing as it gives the impression that the reach of the legislation is restricted to public sector bodies. However, the accessibility standards as contemplated in the Act have the potential to bind private as well as public sector entities.

The purpose section should state a clear commitment to accessibility, and moreover should acknowledge the depth of historical and ongoing disability-based discrimination in Nova Scotia giving rise to the urgency of this bill.

Recommendation 2: Indicate in the whereas / purpose section that the Act seeks to redress and eradicate historical and ongoing discrimination against persons with disabilities in Nova Scotia, resulting in their disproportionate exposure to poverty, marginalization, exclusion, and violence.

Recommendation 3: Ensure that the purposes / whereas statements reflect the primacy of human rights guarantees of equal access to employment, education, health care, housing and to a range of other goods, services, facilities, and opportunities enabling the right to live in the community on equal terms with others. (See above, Section B: CRPD Guarantees) These guarantees provide the motivation for as well as standards for evaluation of accessibility measures.

Recommendation 4: Make it clear in the purpose statement that the Act applies to public and private sector entities.

c. Range of activities covered by the Act

Section 29 states:

> 29 Accessibility standards may apply to individuals or organizations that
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> (a) employ others;

(b) offer accommodation;

(c) own, operate, maintain or control an aspect of the built environment other than a private residence with three or fewer dwelling units;

(d) provide goods, services or information to the public; or

(e) engage in a prescribed activity or undertaking or meet other prescribed requirements.

The Act, as contemplated, has a narrower reach than the NS Human Rights Act. For instance, it leaves out provision of 'facilities" as well as volunteer opportunities. The comparable section of the NSHRA states:

5 (1) No person shall in respect of
(a) the provision of or access to services **or facilities**;
(b) accommodation;
(c) the purchase or sale of property;
(d) employment;
(e) **volunteer public service**;
(f) a publication, broadcast or advertisement;
(g) membership in a professional association, business or trade association, employers' organization or employees' organization,

Recommendation 5: expand the coverage of the Act to include facilities [or consider whether facilities and aspects of the built environment are synomymous], as well as volunteer opportunities.

III. Development and enforcement of accessibility standards

a. Over-concentration of powers in the Minister

Too much of the power and responsibility for developing, proposing, reviewing, and enforcing compliance with accessibility standards rests in the Minister. More transparency and accountability is required in the standards development process, and key powers including powers of developing and enforcing standards should instead be vested in an independent agency.

More specifically, the Act's designating the Minister of Community Services the responsible Minister for this regime ***defies the opinion of the Advisory Committee that Community Services has too long taken a paternalistic stance in relation to persons with disabilities, and retains too much control over the lives of persons with disabilities, to have any legitimacy as the steward of the fundamental human rights protecting statute.***[3] *Persons with disabilities who have acted as advocates for accessibility and*

[3] "[G]iven the long association between people with disabilities and the department of community services and its historical use of the custodial/welfare model of care, some of the feedback received indicated a

other human rights perceive a conflict of interest where Community Services is now the gatekeeper for rights it has long been understood to deny.

i. Devising and proposing accessibility standards

The overconcentration of Ministerial control is illustrated in ss. 13-20: Accessibility Advisory Board (and Standard Development Committees).

The Minister makes recommendations to the G-in-C for the 12 appointments to the Accessibility Advisory Board. Importantly, and laudably, one half the membership of the Board is to be persons with disabilities. (*Arguably, provision should be made to ensure a fair representation of different types of disability, including psychosocial and intellectual as well as physical disabilities, and also to include representation of gender, racial, and cultural diversity*). Members sit for 3 year terms and *may* be reappointed for a second term.

As is common in the development of government policies and standards, the Board has an advisory role only – this in relation to the adoption of new policies and practices, and review of existing measures for compliance with "the purposes of the Act". The Board also advises on setting priorities and timelines for implementation. (s.17)

There is no duty placed on the Minister to make public the Board's advice / recommendations. This is a failure of transparency in the process of devising and proposing accessibility standards.

Other provisions give the Minister further means of asserting *absolute control* over the setting of accessibility standards. The Minister "may, in consultation with the Board," appoint standard development committees "to assist the Board with making recommendations on the content and implementation of accessibility standards." Importantly, and in contrast to Ontario's law, there is no requirement to appoint such committees.

Where standards development committees are appointed, the Minister may moreover *specify their mandates and provide guidelines for their functions* (18(b) and (c)).

Sections 21-44 similarly place accessibility standards under absolute Ministerial control.

Section 21 states that "Where the Minister determines that there is an accessibility issue, the Minister shall prepare terms of reference for an accessibility standard."

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desire and need to break free from this. The feedback also suggested establishing an approach that has the opportunity to achieve a greater impact on reaching accessibility goals. Consequently, the panel is suggesting that the department of community services not be considered as the lead for this legislation." (Access and Fairness for all Nova Scotians (2015) p.12).

The terms of reference are to be given to the Accessibility Advisory Board.

The Board is then to consider the terms of reference and make recommendations which include the following (s.22(2)):

> (a) an economic impact assessment for the standard
> (b) an assessment of how the standard will increase accessibility
> (c) a progressive timeline which takes into account the resources required to comply

It is out of step with human rights commitments to require an economic impact analysis for all proposed accessibility standards -- in particular, where as here the analysis is detached from human rights principles of undue hardship. In any case, any requirement to factor economic impact into the analysis should include consideration of the economic gains of inclusive design and more generally of ensuring meaningful social inclusion of persons with disabilities.

Once the Board has completed the mandated inquiry, including consultation with affected parties, it makes a recommendation to the Minister. Under s.26, the Minister "may" prepare a proposed accessibility standard adopting the recommendations in whole or part. In other words, the Minister may override the expert recommendations of the Board. There is no requirement for reasons for a departure from the proposal.

Section 33 states that the Minister shall make the "proposed accessibility standard" "publicly available". Note that this apparently refers to the standard proposed by the Minister, not the standard as recommended by the Board. This, again, speaks to a fundamental transparency problem which deepens the democratic deficit of this Bill.

Under s.35, the Minister "may", following publication and consultation with the Board, recommend the standard to the Governor-in-Council for its approval as a regulation.

Finally, further confirmation of the Minister's absolute power to control the devising of accessibility standards is found in section 36 which provides:

> 36 The Minister may, by giving written notice to the Board, withdraw the terms of reference for an accessibility standard that has been given to the Board and, where the Minister does so, the Board shall cease its activities in respect of that standard."

Recommendation 6: The Act should be revised to provide a transparent consultative process for devising accessibility standards. This is necessary in order to meaningfully involve persons with disabilities (both those who are on the Board and those who are not) in the democratic process of devising accessibility standards, which affect their significant interests.

Recommendation 7: The board assigned responsibility to identify new accessibility standards, and to review standards, should be given more autonomy under the Act and be protected from Ministerial interference.

ii. Compliance mechanisms

The bill offers important new tools for holding government as well as private sector entities to standards of accessibility and inclusion. These include robust powers of inspection as well as a potential for administrative monetary penalties.

However, there are serious gaps in the compliance mechanisms, which again trace to the degree of Ministerial control over the entire process.

Laudably, the Act *requires* the Minister to appoint "inspectors and other persons to administer compliance with and enforcement of this Act and the regulations." (s.45(1)). Inspectors are given broad powers of entry and inspection of facilities and documents in order to monitor compliance with the Act (ss.46-50). This is a strong indication of government's seriousness in enforcing this regime. (Note: *It is not clear how inspections are likely to be triggered. The Act or regulations should provide for a complaint process as well as a process of regularized inspections*).

Section 51 further empowers inspectors to make compliance orders:

> An inspector who finds that this Act or the regulations are being or have been contravened may issue an order, in the form prescribed, requiring the individual or organization responsible for the contravention to remedy it.

Under section 52 (1), "An individual or organization named in an order made under Section 51 may request the Minister to review the order."

The Minister has the power to confirm, vary or revoke the order. A right of appeal is given to the Supreme Court of NS under s.58.

Section 53 gives the Minister the power to require the payment of a monetary penalty (after the period for appealing a compliance order has passed), should the Minister find that an individual has failed to comply with an order within the period specified in the order. Money from such penalties is to be used to fund accessibility initiatives.

The amount of such penalties is not specified in the Act; it is one of many things left to regulations.

In sum, there are in this section of the Act some important indications of government's seriousness about enforcing accessibility standards. The use of administrative compliance orders and graduated penalties, potentially eventuating in a monetary penalty, is increasing in Nova Scotia – e.g., in the occupational health and safety and environmental standards fields. This suggests a potential to develop and refine best

practices across different regimes. The benefits of not having to pursue court-based prosecutions in order to trigger a monetary penalty are potentially offset, however, by public concerns around fairness and consistency in the imposition of penalties. The latter concerns may be met by the devising of clear guidelines for the graduated imposition of penalties and for assessing the level of monetary penalty.

However, there remains a further, more significant problem with the compliance provisions in the *Accessibility Act*, again linked to the absolute power of the Minister. The Minister is responsible for varying or revoking compliance orders, and for deciding whether to impose a monetary penalty for non-compliance, and in what amount. Once again, this vesting of decision-making responsibility in the Minister suggests undue concentration of politicized oversight and decision-making power.

Particularly given that government services and facilities (and in particular, those governed by community services) are likely to be among those challenged as inaccessible or as failing to enable full inclusion, it is imperative that the Minister not be the determinative authority on enforcement matters including the assignment of monetary penalties. An independent enforcement body (eg, inspectors appointed by the independent commission responsible for developing and recommending standards) is preferable.

Recommendation 8: An independent agency should be vested with the responsibilities of inspection, the making of compliance orders and assessing of penalties, in order to allay concerns about politicization of compliance oversight and enforcement. An appeal from such decisions is best directed to an internal appellate body.

Also in the vein of compliance oversight, a reformed or rewritten Act should vest government with duties to promote awareness of and engage in public education and training about accessibility standards, and to provide incentives for compliance – *potentially including tax incentives as well as reputation / recognition-based incentives.*

This leads to some last comments on:

b. Transparency

There is no requirement in the Act that government publicize its enforcement record and other data on compliance. This is essential to assure the public that standards are being enforced consistently and the objectives of the bill are being taken seriously.

See.s.62: "The Minister **may** issue public reports disclosing details of orders and decisions made and administrative penalties issued under this Act."

Recommendation 9: Section 62 should be replaced by a provision requiring mandatory disclosure of compliance-related activities under the Act.

More generally, and in the vein of public education and awareness-raising, section 63 should be strengthened from its present statement that information about accessibility standards will be made available to the public 'on request'. The materials in question are fundamental to the public's understanding of the shared responsibility of promoting accessibility and inclusion.

Section 63 currently states:

63 The following documents must be provided in an accessible format and at no charge to a person within a reasonable period after the person requests it from the Minister or a public sector body:

(a) in the case of the Minister,

(i) the terms of reference for a proposed accessibility standard,

(ii) the recommendations of the Board,

(iii) a proposed accessibility standard,

(iv) a review conducted under Section 64,

(v) any educational and awareness tools made publicly available,

(vi) a summary report prepared by the Board,

(vii) an accessibility plan; and

(b) in the case of a public sector body, its accessibility plan.

Recommendation 10: Section 63 should be strengthened from its present statement that information about accessibility standards will be made available to the public 'on request'. Instead, a mandate should be placed on government to take measures to ensure accessible communication of, and more generally to promote public awareness of, the standards, proposals and processes relating to accessibility and inclusion under the Act.