

The Law Amendments Committee of the Nova Scotia Legislature: March 2, 2017

Committee Meeting to Consider Bill No. 59

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The Lived Reality of Persons with Disabilities in Canada

- “the history of disabled persons in Canada is largely one of **exclusion and marginalization**..... excluded from the labour force, denied access to opportunities for social interaction and advancement, subject to invidious **stereotyping and relegated to institutions**” (*Eldridge, SCC*)
- “One in seven Canadians aged 15 years or older reported a disability” in 2012 (Stats. Can., “A profile of persons with disabilities ... 2012”)
- **There is no competition among persons who have different disabilities.** An Accessibility Act must embrace a broad definition of disability and **people often experience concurrent disabilities.**
 - “three out of four adults with disabilities reported more than one type of disability” (Statistics Canada, “A profile of persons with disabilities ... 2012”)
- “**chronic poverty is an everyday reality for people**” with disabilities (CMHA, March 26, 2015)
 - Persons with disabilities “remain more likely to be living in poverty across the working years” (CCD, Dec. 2, 2014)
- Poverty is associated with **lesser or non-participation in the labour force and inadequate benefits** in terms of income, housing, education and employment supports.

A Focus on Persons with Mental Illness and/or an Intellectual Disability

- “The mentally ill have historically been the subjects of **abuse, neglect, and discrimination** in our society.” (*Swain, SCC*)
- “Some **20%** of Canada’s population lives with a mental illness.” (MHCC)
- Approximately **30% of people diagnosed with a mental health disorder also have a substance use disorder**
- Among persons with **intellectual disabilities, estimates are that 38% also have a psychiatric condition and/or a behaviour problem**
- Both persons with mental health problems and those with intellectual disabilities experience a higher prevalence of **physical health problems, stigma and discrimination, social exclusion and impoverishment, and lower life expectancy**
 - **Stigma and discrimination** make people’s difficulties worse, impeding recovery, **heightening “social isolation, poor housing, unemployment and poverty.”** (Mental Health Foundation, 2017)
- Bill 59, as it stands, leans towards the “built environment” (See ss. 29-31). While this coverage is essential for persons, for example, with mobility or sensory impairments, the **Bill should be more explicitly expansive** so as to reach other areas of exclusion, such as the employment, education, housing and political spheres.
 - The definition of disability in s. 3(h) is already broad enough, although it needs some refinement (see p. 7).
 - Similarly, the definition of barriers is reasonably comprehensive, requiring only minor modifications (see p. 7).
- A strong **Accessibility Act can help to change the experience of people with disabilities** in Nova Scotia and reverse some of these dynamics
 - The new *Act* must ensure that it **attacks all barriers** experienced by persons with **any disability** or combination thereof.

Emerging Perspectives on Disability: the New Dominance of the Social or Disability Model

- Canada is **moving from** seeing disability exclusively using a **medical model**, wherein disability has been seen as a health problem, where the **individual needs to be fixed or cured, viewed as a tragedy, to be pitied.**
- **Disability** is no longer being viewed as an individual pathology, but rather the **result of the interaction between people who have impairments and an environment that is filled with physical, attitudinal, communication and social barriers:**
- There has been a **global move towards the social or disability model**, represented by the **Convention on the Rights of Persons with Disabilities (CRPD)**: Canada has embraced this “important shift toward a human dignity approach to admissibility and away from a charity and medical model approach.” (Government of Canada, on the ratification of the *Convention*, March 11, 2010)
- This paradigm shift demands that persons with disability are **no longer viewed as “ ‘objects’ of charity, medical treatment and social protection; rather as ‘subjects’ with rights who are capable of claiming those rights in making decisions for their lives based on their free and informed consent as well as being active members of society”** (UN Enable)

MEDICAL MODEL	SOCIAL MODEL
<ol style="list-style-type: none"> 1. Disability is a deficiency or abnormality. 2. Being disabled is negative. 3. Disability resides in the individual. 4. The remedy for disability-related problems is cure or normalization of the individual 5. The agent of remedy is the professional. 	<ol style="list-style-type: none"> 1. Disability is a difference. 2. Being disabled, in itself, is neutral. 3. Disability derives from interaction between the individual and society 4. The remedy for disability related problems are a change in the interaction between the individual and society. 5. The agent of remedy can be the individual, an advocate, or anyone who affects the arrangements between the individual and society. (Carol Gill, Institute of Disability Research)

The Significance of the Convention on the Rights of Persons with Disabilities (CRPD)

- The CRPD reflects a **new world consensus** on the nature of disability and how people with disabilities should be treated in society, adopting the disability or social model
- The CRPD imposes a **wide range of obligations on the States Parties**, including federal and provincial governments (Article 4 (1) and 5)
- The CRPD requires the **participation by persons with disabilities** in the formulation, implementation, and monitoring of law, policy and services.
- The CRPD **links protections of individual rights and broader entitlements to positive rights**, such as the right to: live in the community; health; work; an adequate standard of living; participation in political, public and cultural rights.

The Importance of the Preamble and Purpose Statement to a New Accessibility Act

- A **preamble** recites “the circumstances and considerations that gave rise to the need for legislation or the ‘mischief’ the legislation is designed to cure” and is “an important **source of legislative values and assumptions**” (*Sullivan on the Construction of Statutes, Sixth Edition, 2014*)
- An explicit **statement of purpose** by the Legislature is authoritative, setting out what “the **legislation is meant to implement or the objectives that is meant to achieve**”, establishing “a **general framework** within which administrative and legislative powers are conferred to achieve particular goals or to give effect of particular policies” (Sullivan)

Preamble and Purposes

An Act Respecting Accessibility in Nova Scotia
Draft Preamble and Purpose [with references]

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December 19, 2016

Whereas persons with disabilities in Nova Scotia continue to face attitudinal and environmental barriers in their participation as equal members of society and violations of their human rights; [See CRPD, Preamble (e), (k)]

And Whereas achieving accessibility will improve the health, independence and well-being of persons disabled by barriers; [Accessibility for Manitobans Act, preamble]

And Whereas barriers create considerable costs to persons disabled by those barriers, their families and friends, and to communities and the economy; [Accessibility for Manitobans Act, preamble]

And Whereas, under the United Nations Convention on the Rights of Persons with Disabilities, Canada and Nova Scotia are obliged to take all appropriate legislative, administrative and other measures to implement the rights recognized in the Convention; [See CRPD, Article 4(1)]

And Whereas the Canadian Charter of Rights and Freedoms guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based (*inter alia*) on mental or physical disability; [See Charter, s. 15 (1)]

And Whereas the Nova Scotia Human Rights Act recognizes that the Government of Nova Scotia, as well as all public agencies and all persons in the Province, have the responsibility to ensure that every individual is afforded an equal opportunity to enjoy a full and productive life; [See NS HRA, s. 2(e)]

And Whereas the Government of Nova Scotia needs to take a leadership role in advancing the collective responsibility to achieve a barrier-free Nova Scotia through the elimination of existing barriers to inclusion and the prohibition of the creation of new barriers to inclusion

And Whereas persons with disabilities disproportionately live in conditions of poverty; [See CRPD, Preamble (t)]

And Whereas persons with disabilities who are subject to multiple or aggravated forms of discrimination based on other grounds of discrimination face compound barriers; [See CRPD, Preamble (p)]

And Whereas the promotion of the full enjoyment by persons with disabilities of their human rights and of their full participation will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty; [See CRPD, Preamble(p)]

Therefore be it enacted by the Governor and Assembly as follows:

1 This Act may be cited as the Accessibility Act.

2 The purpose of this Act is:

- (a) to affirm the right of persons with disabilities to full and equal participation and inclusion in all aspects of Nova Scotia society, by ensuring province-wide accessibility for, but not limited to, the following areas of focus: legal, medical/health, education, employment and labour market opportunities, political involvement, housing, public transportation, information and communication, public spaces, customer and client services, positive attitudes through increased public awareness, recreation, and spiritual activities;
- (b) to achieve accessibility for persons with disabilities on an equal basis with others to the physical, social, economic, political and cultural environment, to health and education and to information and communication, to enable persons with disabilities to fully enjoy all human rights and fundamental freedoms; [CRPD, Preamble (v)]
- (c) to establish clear, progressive, mandatory and date-specific standards with respect to the removal and elimination of barriers and the adoption of measures to foster full and equal participation and inclusion in all aspects of Nova Scotia society;
- (d) to actively involve persons disabled by barriers in the decision-making processes regarding accessibility standards;
- (e) to provide independent and effective monitoring and enforcement of accessibility standards.

A Few Comments on Specific Sections of Bill 59

Should Bill No. 59 Be Amended or Should the Legislature Start Afresh?

- It will probably be clearer and easier to **start over again**.
 - Bill 59, and the lessons learned as it has been scrutinized by the public and the Members, can inform a new drafting process.
- As parts of Bill 59 might resurface in a new Bill, some comments are offered below.

The Definitions

- The definition of **disability in section 3 (1) (h)**, which parallels the concepts of the CRPD, could be **improved**:
 - By more closely mirroring the *CRPD* (Article 1), it could say:
 - “disability” refers to a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder the full and effective participation in society of persons with disabilities on an equal basis with others.
 - **by providing examples**, such as was done in the Ontario statute, in section 2.
- Similarly, the definition of **barrier in s. 2(1)(c) could be revamped to stipulate**:
 - “barrier means any attitudinal and environmental barrier that hinders the full and effective participation in society by persons with disabilities, including: socioeconomic barriers; physical barriers; legislative, policy or administrative barriers; communications and information barriers; technological barriers; justice system barriers; mobility barriers.
- In s. 2(k), the “Minister” responsible is the Minister of Community Services. **As a human rights promoting statute, any accessibility law should be administered by the Minister of Justice.**

The Duties of the Minister, s.7, and also under the Enforcement Provisions, ss.45-62

- Section 7 should be strengthened, to include an obligation to see that the legislation is **enforced**, as part of the obligations of States Parties under the CRPD “to ensure and promote the full realization of all human rights and fundamental freedoms.” (Article 4 (1))
- Enforcement is discussed in sections 45 to 62, but there are serious questions to be asked about whether any enforcement should be done by persons who are, under section 45, appointed by the Minister, rather than by persons who have **greater independence**.
- Similarly, anyone subject to an order under section 51, may ask for a **Ministerial review**. This may not be an optimal review procedure, given the Minister’s political role. There may well be **role conflicts for the Minister of Justice and Attorney General** in that he or she has both a role as the Minister responsible for the administration of justice, law enforcement and the *Human Rights Act* and as a member of Cabinet, has political duties. A new *Accessibility Act* should **minimize the risks of these roles colliding**.
- Appeals under Bill 59, s. 58 are to initiate before the Supreme Court of NS; **a better avenue would be an independent Accessibility Act appellate tribunal with the further possibility of judicial review or appeal**.
- The **duties** of the Minister on the whole in the section should be re-examined to see whether the **economic, social and cultural rights** enshrined in the Convention are adequately covered here and in the statute in general.

The Accessibility Directorate, s.10

- Part of the role of the Accessibility Directorate includes implementation and addressing “broader disability related initiatives”, which suggest respectively that the Directorate should have a role in **enforcement** and in **monitoring the full range of rights under the CRPD**, including the **economic, social and cultural rights**. This should be explicit.

The Accessibility Advisory Board, s.13

- The statute could be **explicit** about the nature of “the skills and assets the Minister considers necessary” for appointments to the Board. (s. 13(1)(a)).
- **The Board should be explicitly charged with the responsibility of monitoring the extent to which the Accessibility Act conforms with the Convention on the Rights of Persons with Disabilities.**
- Given the importance of the Board in advising and making recommendations, its **annual report** under section 16 should be **made to the Legislature directly, not merely to the Minister.**
- Under s. 18, the Minister may “establish **standard development committees** to assist the Board”, whereas this **should be a required feature** of standard development, to ensure the deep involvement of persons with disabilities in setting forth the applicable standards, given their expertise.
- Under section 22 (2) (a), an accessibility standard must include “**an economic impact assessment.**” **This should be deleted:** economic factors inform assessments of reasonable accommodation and undue hardship, parts of every analysis of discrimination.
- **Moreover, there should be a required assessment of the human rights promoting impact of either adopting, changing or rejecting any standard.**
- Under section 25, the standard recommendations are submitted “to the Minister”, which seems to deny the public the opportunity for immediate scrutiny. **The standards and recommendations** are to be made “**publicly available.**” Under s. 33, but this should happen **sooner**, particularly as the Minister is not obliged to accept any recommendations, under section 26.
- In general, the development of standards should be conducted by the Board in a manner which **enables the public to participate from start to finish.**
- Any accessibility standard should be **mandatorily reassessed on a specified regular basis**, to ensure that it continues to live up to best practice guidelines, particularly as may be implemented in other jurisdictions.
- **Accessibility standards** under s. 29 apply to individuals and organizations, but **provincial and municipal governments should be added**, making it clear, as under s. 5, that the “Act binds Her Majesty in right of the Province.”
- There are **periodic reviews** under s. 64 of the Act as a whole, but these should not take the place of individual accessibility standards. The overall review of the Act should also come **sooner** than the Bill presently provides for, 4 years initially and 5 thereafter.