

## Preamble and Purposes

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

Archie Kaiser, Dianne Pothier, Barbara LeGay, Gerry Post, Sheila Wildeman

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.

## **Accessibility Bill – Notes in Advance of Law Amendments (Wildeman)**

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

Accessibility legislation is an essential 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 – including the right to equal access to employment and to publicly available goods and services such as education, health care, and housing.

### **B. Principles for strong, effective accessibility legislation** – Accessibility legislation should:

- BE GROUNDED IN CLEAR PURPOSES GROUNDED IN HUMAN RIGHTS PRINCIPLES, STATING A COMMITMENT TO ELIMINATE BARRIERS AND ACHIEVE ACCESSIBILITY – See the attached purposes / preamble
- SUPPORT INDEPENDENT, INCLUSIVE ENTITIES RESPONSIBLE FOR IDENTIFYING, RAISING AWARENESS ABOUT, AND ELIMINATING BARRIERS
- PROVIDE FOR INDEPENDENT AND EFFECTIVE ENFORCEMENT - including measures for receiving and resolving complaints, and the possibility of appeal to an independent tribunal (on the Ontario model)
- BUILD IN TRANSPARENCY relating to monitoring, public reporting and accountability measures

*Nova Scotia's proposed bill fails to adequately protect these principles.*

### **I. 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 must be part of the eventual analysis but should not be imposed as a counterweight that in this statement is weaker than human rights principles relating to undue hardship.*

#### **b. Purpose statement**

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;
- (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.

**Government should explicitly integrate fundamental human rights principles into the Act (in particular, in the preamble / purposes section, which is vital for informing interpretation as well as guiding the development of accessibility standards).**

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.

The principles stated should include fundamental human rights protections guaranteed in the CRPD on 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),

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

**Recommendation 1: 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. [See attached purposes / preamble draft]**

**Recommendation 2: 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. These guarantees provide the motivation for as well as standards for evaluation of accessibility measures. [See attached purposes / preamble draft]**

**Recommendation 3: Make it clear in the purpose statement that the Act applies to public and private sector entities.**

## **II. 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.*

#### **i. Responsible Minister**

Government's stated commitment to shift responsibility from the Minister of Community Services as the responsible Minister for this regime to the Minister of Justice is a positive one and should be implemented.

#### **ii. 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.”

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.**

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 4: 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 5: The board assigned responsibility to identify new accessibility standards, and to review standards, should be given more autonomy under the Act and protected from Ministerial interference.**

**Recommendation 6: The statute should mandate that board members receive remuneration, as is the case with standards development committee members.**

## 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 7: 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 8: 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 9: 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.**