



Paper Three: Accelerating Accessibility - Domains and Standards

Date: 28 February 2020

Report no: REP/20/2/079

Security level: In Confidence

Priority: Medium

Action Sought

Hon Carmel Sepuloni

Note and indicate preference for approach to the setting of domains

Contact for telephone discussion

Name	Position	Telephone	1st Contact
Shaun McMaster	Policy Manager	s9(2)(a)	1st Contact

Report prepared Darryn Kouoi, Policy Analyst, Disability Policy

Minister's office comments

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to (specify)

Comments

Indicated preference for 4c.
Agreed to rec 6.

Date received from MSD

28 FEB 2020

Date returned to MSD

02 MAR 2020



Report

Date: 28 February 2020

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Disability Issues

Paper Three: Accelerating Accessibility - Domains and Standards

Purpose of the report

- 1 This report provides advice on the identification, application, and development of accessibility domains and standards as part of a framework to accelerate accessibility in New Zealand. It is the third report in the series of four reports on accelerating accessibility.

Executive summary

- 2 The United Nations Convention on the Rights of Persons with Disabilities sets out obligations relating to domains and standards. These include:
 - measures required for the identification, prevention and removal of barriers in areas that affect disabled people and their ability to participate in society
 - the development of mandatory enforceable standards on accessibility.
- 3 We have identified and analysed a number of approaches in comparable international jurisdictions, specifically relating to the identification, application, and development of accessibility domains and standards¹. Accessibility standards, when adopted as part of an accessibility framework, support systemic change.
- 4 An accessibility framework for New Zealand could set some domains from the outset for standards, but also provide flexibility for the identification and setting of other domains over time as progress is made.
- 5 Decisions relating to standards will be needed on the following aspects. These points are discussed in this report.
 - a) how standards should apply in the New Zealand context
 - b) the process and entity for creating and developing standards
 - c) when and how standards should be progressively rolled out
 - d) the relationship between standards and reasonable accommodation.
- 6 Comparable international jurisdictions have different approaches to developing and implementing accessibility standards. A key element of the standards creation


¹ Domains are subject areas, such as transportation, that standards on accessibility will be about. E.g. a standard on accessibility in public transport. A standard will specify requirements that must be met in order to achieve sufficient accessibility.

process involves the inclusion of disabled people, Māori and others as co-design partners.

Recommended actions

It is recommended that you:

1. **Note** that current standards on accessibility in New Zealand are insufficient to support a coordinated and systemic approach to accelerating accessibility and achieve progressive realisation of accessibility over time
2. **Note** that we have used learnings from comparable international jurisdictions to inform the approach in determining the settings for accessibility domains and standards in the New Zealand
3. **Note** that Ministry of Social Development officials recommend a flexible approach to the identification of accessibility domains that provides for some domains to be specified at the outset (for example, domains in line with domains in the Convention on the Rights of Persons with Disabilities), with the ability to identify other domains over time
4. **Indicate** your preference to identifying and introducing domains:
 - a. provide for domains at the outset; or Yes/No
 - b. provide for the ability to designate and prioritise domains progressively over time; or Yes/No
 - c. a mixed approach that specifies a few domains at the outset with flexibility to designate and prioritise further domains as progress is made. Yes/No
5. **Note** that if domains are to be set at the outset as part of the accessibility framework, we will provide advice on which domains need to be identified as part of drafting the April 2020 Cabinet report back
6. **Agree** to seek Cabinet agreement for Ministry of Social Development officials to work with other agencies to provide further advice on a work programme for the identification and development of future domains and standards, including exploring approaches to standard development. Agree/Disagree



Julia Bergman
General Manager
Disability, Seniors and International Policy

Agree/Disagree
28/02/2020
Date



Hon Carmel Sepuloni
Minister for Disability Issues

2/3/2020
Date

Background and context

- 7 This is the third report in the series of four reports on Accelerating Accessibility in Aotearoa. This report should be read in conjunction with paper two (problem, objectives and system framework) and paper four (institutional arrangements).
- 8 Accessibility domains and standards are a key element within a proposed accessibility framework for New Zealand (NZ).
- 9 As outlined in paper two, most existing accessibility standards in NZ are voluntary and are limited in their reach and enforceability. Disabled people have reported major areas of non-accessibility, and non-compliance with voluntary standards.
- 10 The Access Alliance has also noted that there has been a lack of accessibility standards or requirements for organisations to meet and a lack of penalties for non-compliance.
- 11 Although there is a scarcity in the data on accessibility and its impacts in NZ, it is clear the system is fragmented, and disabled people experience accessibility barriers. These barriers are highly likely to be a contributor to the poor outcomes experienced by disabled people, when compared to other population groups.
- 12 The United Nations Convention on the Rights of Persons with Disabilities (CRPD) calls for minimum enforceable standards for accessibility. Article 9 of the CRPD sets out a number of obligations, including the development, promulgation and monitoring of the implementation of minimum standards and guidelines for accessibility.
- 13 The Committee on the Rights of Person with Disabilities (Committee) has noted the importance of incorporating accessibility standards into regulatory systems, while ensuring these standards are mandatory.
- 14 While actions must be taken to provide for the “mandatory application of accessibility standards and for sanctions, including fines, for those who fail to apply them” under the CRPD, we consider that a workable and effective accessibility framework needs to contain a combination of both voluntary and mandatory standards in order to achieve flexibility.
- 15 To give effect to accessibility standards and the accessibility framework generally, institutional arrangements are required (for standards-making, enforcement and monitoring purposes). Advice on this is provided in paper four.

Article 9 of the United Nations Convention on the Rights of Persons with Disabilities

- 16 The CRPD provides for the identification, prevention and removal of barriers in several areas.
- 17 Article 9(1) of the CRPD imposes obligations on countries to take appropriate measures to ensure disabled people have equal access in a number of different areas.
- 18 Based on the wording in the CRPD, the domains can be consolidated into the following:
 - physical environment
 - transportation
 - information
 - public services and facilities.
- 19 Internationally, jurisdictions have either focused on specific domains of accessibility in accessibility legislation (e.g. Ontario, Nova Scotia), or provided for the prevention of discrimination in key areas of life (e.g. Australia, United Kingdom). Nevertheless, the focus is on the domains provided in the CRPD.

- 20 In determining the overall make-up of the accessibility framework for NZ, decisions relating to domains will be needed on whether:
- a. to provide for domains at the outset
 - b. to provide for the ability to designate and prioritise domains progressively over time
 - c. to take a mixed approach – i.e. specify a few domains at the outset, with flexibility to identify and set further domains as progress is made.
- 21 As discussed below, in our view the most effective approach to setting domains is likely to be Option C.

Comparable international jurisdictions have set out accessibility domains in legislation

- 22 Overseas jurisdictions with a similar legal heritage and framework to NZ, such as Australia, Canada and the United Kingdom, have determined different accessibility domains in legislation, whether they have accessibility-specific legislation, disability-specific legislation, or, like NZ, consolidated rights legislation. While there are small differences in what the domains look like, there is significant overlap in coverage.
- 23 Each jurisdiction's legislation specifies which accessibility domains require standards to be developed.
- 24 A number of Canadian provinces have accessibility-specific legislation that identifies and lists accessibility domains within it. In Ontario, for example, the focus of the Accessibility for Ontarians with Disabilities Act 2005 (AODA) is on the following five accessibility domains:
- customer service
 - information and communications
 - employment
 - transportation
 - design of public spaces (built environment).
- 25 A similar approach to Ontario is seen in Nova Scotia, where an objective of the Accessibility Act 2017 is to prevent and remove barriers in:
- goods and services
 - information and communication
 - transportation
 - employment
 - the built environment
 - education.
- 26 Australia's Disability Discrimination Act 1992 (DDA), which is disability-specific legislation, aims to eliminate discrimination against disabled people in the areas of:
- employment
 - accommodation (residential or business)
 - education
 - provision of goods, services and facilities
 - interests in land
 - access to premises, clubs and sport.
- 27 The United Kingdom (UK) takes a different approach. Like NZ, it does not have one clear piece of accessibility legislation, but has a consolidated framework of rights

legislation, which aims to protect people with particular characteristics from discrimination, including disabled people. The Equality Act 2010 (EA) imposes an explicit positive duty to make “reasonable adjustments” for disabled people in the following areas:

- the built environment (premises)
- services and public functions
- employers
- education
- partnerships

28 The EA and its schedules set out detailed standards and detailed exemptions which apply to each of these areas.

To ensure flexibility, there are benefits to allowing accessibility domains to be identified and introduced as progress is made

29 The Accessible Canada Act 2019 (ACA) in Federal Canada sets out several domains at the outset. However, it has in-built flexibility to enable the Government to identify domains to prioritise in the future.

30 The domains currently listed in the ACA for which standards are to be created are:

- employment
- the built environment
- information and communication technologies
- communication (other than information and communication technologies)
- the procurement of goods, services and facilities
- design and delivery of programs and services
- transportation.

31 In addition to these domains, the ACA provides the Governor-General with the ability to designate areas as he or she sees fit, i.e. set other domains as progress is made.

32 The flexibility to create new standards, as well as to regularly review established standards, is essential to ensuring the success of an accessibility system. The approach in Federal Canada avoids domains and standards being “fixed” in accessibility legislation. For example, it is expected that going forward technology will impact accessibility standards for information and communication. This was reflected in the 2019 Review into the AODA, which noted that Ontario’s Information and Communications standards were ineffective in keeping up with rapidly changing technology.

33 For NZ, feedback from stakeholder consultation in 2019 showed that the following eight domains should inform the development of the next phase of the accessibility work programme:

- housing
- transportation
- physical environment
- social and civic participation
- employment
- education
- information and communication
- services to the public (including health)

- 34 If you wish to enshrine domains in legislation, further work is needed to identify which domains should be included. This could be, for example, the domains outlined in the CRPD. Federal Canada's approach to identifying and setting domains should be considered in decisions going forward in this work area, since it provides for built-in flexibility for future domains to be set as progress is made.
- 35 MSD officials' preference is the mixed approach (similar to the Federal Canada), which specifies a few domains at the outset and has the flexibility to identify and set further domains as progress is made.

There are a number of advantages in having defined accessibility standards

- 36 Domains, guidelines, rules, action plans, and standards (voluntary and mandatory) are all types of measures that can be used. Each plays an invaluable role in ensuring the viability of an accessibility system
- 37 The advantages of having defined standards are that they:
- set minimum requirements on accessibility that must be met
 - give tangible effect to the accessibility system, so organisations are clear on what they need to do to become accessible, and individuals have clarity on what to expect
 - create a common understanding on how meeting standards can improve accessibility
 - support system-wide change, e.g. through the sharing of learnings through experience (this likely falls within the role of whichever institutional mechanisms implements change)
 - can provide a platform for involvement by those with lived experience, Māori and others.

Evidence in international jurisdictions suggests that accessibility standards have a role in helping with systemic change

- 38 There is evidence that standards remove the need for special negotiations by disabled people to have their accessibility needs met, meaning the provision of accessibility measures can be automatic. Over time, this will likely achieve systemic change.
- 39 Comparable accessibility regimes in various international jurisdictions have demonstrated that an accessibility framework that sets standards can only create systemic change if there are mechanisms to enforce the standards, in cases where compliance is an issue.
- 40 The following two methods for the enforcement of accessibility standards have emerged from those international jurisdictions:
- an individual faults-based complaints approach
 - legal orders and penalties imposed on regulated parties for non-compliance.
- 41 In Australia, individuals are required to bring a claim to the Australian Human Rights Commission (Australian HRC), in circumstances where they believe they have been subjected to disability discrimination, which includes an alleged breach of the standards.
- 42 In the UK, the Equality and Human Rights Commission (EHRC) may assist individuals with their disability discrimination complaints.
- 43 The approach in Ontario involves legal orders being imposed on regulated entities that fail to comply with a standard. The Accessibility Directorate of Ontario (ADO), as the enforcement agency, has the initial burden of establishing that a regulated party failed to comply with their obligations. The burden then shifts to the organisation to demonstrate compliance with the standard, or that a relevant exemption applied.

- 44 A discussion on the form of institutional arrangements for enforcement purposes is contained in paper four.

Accessibility standards will not, however, address the needs of every person

- 45 Whilst accessibility standards (when adopted as part of an accessibility framework) are likely to contribute to improved economic and social outcomes for disabled people and for society more broadly, accessibility standards alone are unlikely to cater to the needs of every disabled person.
- 46 The nature of accessibility standards are anticipatory, meaning that they are not triggered by an individual request. Accessibility standards are intended to overhaul the environment in general and to ensure the transformation of social structures in a progressive manner². The implementation of accessibility standards does not serve to ensure access to rights of all disabled people.
- 47 The state must still provide for personal supports and accommodations. These include supports from the Ministry of Social Development, Accident Compensation Corporation, and the Ministry of Health.
- 48 Reasonable accommodation is needed in certain cases to specifically address accommodations that need to be tailored to the individual (even in cases where accessibility standards already exist). This is because the needs and requirements of each disabled person vary, and what constitutes reasonable accommodation of an individual's needs may extend beyond the scope of what is required under an accessibility standard.

Learnings from comparable international jurisdictions suggest that the standards within an accessibility framework should be flexible and adaptive

- 49 While consideration should be given to the development of mandatory accessibility standards, as outlined in the CRPD, learnings from international approaches suggest that there are benefits for standards to have the flexibility to respond to the different needs of obligated parties in the various domains.
- 50 The approaches implemented in the UK and Ontario have shown that imposing rigid and strict obligations can lead to confusion around what regulated parties are actually expected to do in order to meet accessibility standards. This has had a detrimental effect on the obligated parties' ability to implement and comply with standards.
- 51 A key learning from the Ontario accessibility framework is that it is vital that the accessibility system allows obligated parties to adopt efficient or innovative approaches to meeting their obligations.
- 52 Allowing obligated parties to adopt innovative approaches to meet their accessibility obligations is also evident in Australia. Although accessibility is incorporated in Australia as part of a non-discrimination system as opposed to a standalone legislative standards system, there are key learnings that can be applied to the NZ context, especially if a legislative standards system is proposed.
- 53 In the Australian jurisdiction, standards are created in a way that preserves flexibility by allowing organisations to develop alternative ways of meeting standards, as long as the desired outcome is met. This approach suggests that standards should not provide for a single solution to compliance. Rather, there should be a variety of solutions to satisfy potential requirements and meet the desired outcome.

² 'Of rights and obligations: the birth of accessibility' – The International Journal of Human Rights (13 August 2019), Andrea Broderick, page 11.

- 54 Depending on the domain, there is also scope for the content of standards to vary. Evidence in Australia suggests that domains such as transport and the built environment lend themselves well to prescription and measurements, whereas areas such as employment and education require a more procedural and outcomes-based approach.
- 55 Further work is needed to determine the most appropriate approach to setting and implementing standards that allows for flexibility. Australia's progressive approach to its standards has been shown to be effective and should be considered in the NZ context as well.

Standards support accessibility by helping organisations identify their responsibilities and the actions needed, but guidance is needed to support regulated parties in understanding their obligations

- 56 Compliance with accessibility standards can be difficult, especially when there is a complex regime of accessibility standards and inadequate support for obligated parties. For example, parties in Ontario have had problems understanding their obligations because standards were often not clear or specific enough about what is required to provide for accessibility, and what exactly compliance with the standards requires. Organisations were left to interpret standards on their own, often got it wrong and made decisions that led to less accessibility for everyone.
- 57 Further, it also left organisations in Ontario to rely on guesswork, or to seek advice from lawyers and consultants to understand the compliance requirements.
- 58 The 2019 Review of the AODA outlined that the ADO needed to consider practical, non-regulatory initiatives to support standards. This would involve issuing clear, extensive and in-depth guidelines for interpreting accessibility standards, so that it becomes easier to apply them to real-world conditions.
- 59 There were suggestions for the Ontario Government to establish a resource centre where organisations could seek advice. Alternatively, having a network of community hubs offering tools, resources and training to support accessibility was also seen as beneficial. Examples of organisations in Australia providing these services include the Association of Consultants in Access Australia and Assistive Technology Australia. There are also a number of organisations in New Zealand (as outlined in paper two) that already provide these services.
- 60 The AHRC can, under the DDA, issue guidelines to organisations to help them understand their rights, and comply with their responsibilities and obligations under the DDA and associated standards.
- 61 A decision is needed in determining the right level of support to provide to regulated parties in NZ, in order to assist them in meeting their obligations. The insight from Ontario (provided by the 2019 Review of the AODA) and Australia provides a useful starting point for NZ to consider in relation to guidance.

Consultation and co-design with disabled people and regulated parties is vital in the development of accessibility standards

- 62 Article 4(3) of the CRPD outlines that accessibility standards must be developed in consultation with disabled people, to enable them to play a full part in the development, implementation, and monitoring of accessibility standards.
- 63 For many international jurisdictions (e.g. Ontario and Nova Scotia), developing standards in collaboration with disabled people, the affected sectors, industry experts and government, lie at the core of the relevant accessibility legislation. This ensures the standards that are created meet the needs of disabled people and the capacity of obligated parties.
- 64 In Australia, the Review of the Australian DDA 2004 noted that disabled people (as well as businesses and government representatives) felt that little attention was given to their concerns during the standards development process, and that this led

to standards that compromised their needs. A similar experience was found in Ontario where disabled people often felt that no one was listening to them.

Comparable international jurisdictions have various bodies that develop accessibility standards

- 65 Depending on the preferred approach to accelerating accessibility in NZ, a legislative function and power may be needed for accessibility standard-making to develop, coordinate, promulgate, revise, amend, interpret and produce standards.
- 66 Australia's DDA enables disability standards to be created under the Act by the Attorney-General. The Attorney-General is informed by advice from the government department responsible for administering the particular standard (e.g. the Department of Education with respect to the Education Disability Standards). The Australian Human Rights Commission may also advise the Attorney-General on the development of standards.
- 67 Under the AODA in Ontario, the Minister assigned to administer the AODA sets terms of reference and establishes Standards Development Committees (SDCs), to develop standards to be considered for adoption as regulations. These SDCs include disabled people and their representatives, representatives of industries and sectors, and classes of organisations to which the standards are to apply to. The Accessibility Standards Advisory Council also advises the Minister on the process and progress of standards development.
- 68 Standards for disability in the UK may arise through "reasonable adjustments" under the Equality Act. "Reasonable adjustments" are defined as modifications that must be made if it is foreseeable that policies, practices, and procedures will pose barriers to disabled people. Standards for disability access may also be developed through regulations created under the Equality Act.
- 69 For Federal Canada, the ACA states that the Canadian Accessibility Standards Committee would form technical committees (comprising disabled people, technical experts and representatives from sectors/organisations) to develop standards.

Accessibility standards could be created through working groups using co-design principles

- 70 Learnings from international jurisdictions indicate the need to establish mechanisms to develop and implement standards. These mechanisms could potentially include the implementation of a Secretariat, committees, or working groups to create standards.
- 71 Based on the models in overseas jurisdictions, members of the working groups should include, as a minimum:
 - disabled people
 - Māori (the level of representation could vary depending on the domain)
 - technical and legal experts
 - government officials
 - representatives from the sectors and organisations that would have to meet the standards.
- 72 Depending on the domain that standards are being created for, there may be representation from other groups such as seniors, carers, and community interest groups.
- 73 One option for accessibility standard making in NZ is a Ministerial appointed group with representation from disabled people, Māori, industry and other subject matter experts. We envisage such a group would have a mandate beyond standard-making, with the ability to develop proposals and recommendations for accessibility, ranging from process and operational changes, through to reviewing existing standards or creating new standards. We also expect these groups would provide recommendations in line with NZ's Disability Strategy and follow the established

'twin-track' approach. Advice from these groups would also need the approval of responsible Ministers for the relevant domain, to ensure consistency and agreement across portfolios.

- 74 In NZ, there are several examples of approaches to the establishment and operation of standard-making groups we can consider.
- 75 Standards New Zealand sits within the Ministry of Business, Innovation and Employment (MBIE) and specialises in the development of new standards and the revision of existing standards, with a wide range of public and private organisations. Standards New Zealand invites organisations that represent the views of a large, usually national, group with a common interest in the area being addressed by the standards solution to nominate a representative for the committee. Nominating organisations may be regulators, professional bodies, research agencies, manufacturers, end users, or others with an interest in the subject.
- 76 Other legislative examples include provision in legislation for Ministerial appointed groups, as in the Gas Industry Act 1958³ and the Alcoholism and Drug Addiction Act 1966. Accessibility standards could have similarities to standards made under the Resource Management Act 1991 (RMA). The RMA is an example of how legislation can require consultation with working groups. The National Environmental Standards made under the RMA must also be complied with nationally, meaning each regional, city or district council must enforce the same standard. In some circumstances, where specified, councils can impose stricter or more lenient standards.
- 77 Alternatively, groups can be established outside of legislation with members of any group being paid in line with the Cabinet Fees Framework, for example, the Welfare Expert Advisory Group.
- 78 It is assumed that any group established will need to collaborate with Standards New Zealand in the review of existing standards or creation of new ones. Further work is needed on the role Standards New Zealand can play in accelerating accessibility in New Zealand and/or establishing other bodies to develop recommendations for accessibility in specific domains.
- 79 We have had initial discussions with MBIE and other agencies (including PCO and DIA) and there is potential to use the Better Rules–Better Outcomes initiative to test an approach to accessibility standard- making. The Better Rules–Better Outcomes approach involves a multidisciplinary team, containing experts in policy, legal, business rules, drafting, and service design working together to develop policies and rules. We could further explore with MBIE the feasibility of testing the approach through this initiative and seek Cabinet agreement to progress.
- 80 Future work is needed to identify the institutional requirements required.

A staged (phased-in) approach to accessibility standards is essential to a workable accessibility framework

- 81 A progressive realisation approach, in the context of accessibility standards, would achieve stakeholder buy-in and ultimately lead to a system in which organisations can effectively implement and comply with the standards.
- 82 The majority of New Zealanders are employed in small and medium-sized enterprises (SMEs). Organisations such as these may face difficulties in finding appropriate resources to meet obligations set by the standards. Some overseas jurisdictions have mitigated for this by exempting small businesses from accessibility obligations. Alternatively, another option is the adoption of a phased approach to compliance. For example, accessibility requirements and obligations could firstly apply to government

³ Section 8 (1) (2) and (3) refers

agencies, then in a few years' time to medium-sized businesses, and then finally to small businesses.

- 83 In Ontario, there is a phased-in approach (with rolling implementation dates) to compliance with standards based on organisation type (public or private). However, the use of deadlines and timeframes has brought a number of challenges, and considerable pressure on organisations to achieve accessibility outcomes.

Next steps

- 84 MSD officials are interested in discussing this report, along with the other three reports in this series, with you at the Disability Issues Agency meeting on 2 March 2020.

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