



Paper Four: Accelerating accessibility – Institutional Arrangements

Date: 28 February 2020

Report no: REP/20/2/080

Security level: In Confidence

Priority: High

Action Sought

Hon Carmel Sepuloni

Note and Indicate Preferred Option

Contact for telephone discussion

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

Report prepared Amy Hamerton, Principal Policy Analyst

Minister's office comments

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- Withdrawn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

Comments

Agreed to recs 3 and 8.

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 Four: Accelerating Accessibility, Institutional Arrangements

Purpose of the report

- 1 This report, the fourth in a series of four, provides you with advice on the functions and powers and institutional arrangements needed for the effective implementation and administration of the proposed accessibility framework.

Executive summary

- 2 Institutional arrangements will be essential to the effective implementation and administration of the accessibility framework as proposed in paper two. These arrangements could draw on existing arrangements and/or some new arrangements may need to be created.
- 3 To give effect to the accessibility framework, we consider the following powers and functions will be needed:
 - co-ordination and leadership across the system at national and local levels to drive change and consistency in the accessibility system
 - provision of consistent information, training, education and advice for individuals and organisations to help them understand their rights and obligations and tangible and practical ways to achieve accessibility measures
 - standard development and setting – either the review of existing or creation of new standards
 - reporting and monitoring to measure progress toward accessibility and how well the framework is working
 - compliance and enforcement mechanisms to ensure compliance with the legislation and standards.
- 4 While further work is needed to finalise the form of and funding for, we have identified three broad forms the institutional arrangements could take:
 1. **Use existing bodies** with extension of mandate and additional resources as required to implement and administer the accessibility framework.
 2. **Establish a dedicated accessibility body** that could sit within a government agency or as an independent entity.
 3. **Combination of above options** to make use of existing capacity and expertise where it exists and establish new entity/s to fill gaps in capacity and expertise.
- 5 The further work needed would consider the following:
 - how each of the function and power will operate

- the level of interest and capability of existing agencies
 - implications of extending mandate and capacity of agencies to carry out accessibility functions
 - gaps in capability and the nature and scale of resource required to carry out functions and powers
 - legislative implications, e.g. where functions and powers need to sit to be given effect e.g. primary or secondary legislation or Cabinet mandated
 - financial implications
 - interim arrangements.
- 6 The proposed accessibility framework is intended to fit within existing Ministerial delegations, so any accessibility proposals will need to be agreed by the Minister responsible.
- 7 As detailed in paper one, depending on your preferred approach to progress the proposal for the accessibility framework, legislation could be introduced ahead of having institutional arrangements in place. This creates some risk as success of the proposal is congruent to the level of resource available to implement and administer it.
- 8 If you wish to proceed with a proposal to introduce legislation ahead of having institutional arrangements in place, we would undertake detailed work on the arrangements in parallel to drafting of legislation and could seek funding for the arrangements through Budget 2021.
- 9 We recommend that you seek agreement from Cabinet in April 2020 for Ministry of Social Development officials to work with other agencies to progress the work on institutional arrangements.

Recommended actions

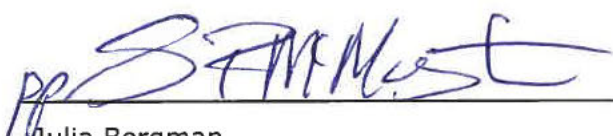
It is recommended that you:

- 1 **Note** that institutional arrangements are key to the success of the implementation and administration of the accessibility framework
- 2 **Note** that a range of functions and powers supported by appropriate institutional arrangements are needed to implement and administer the accessibility framework
- 3 **Agree** in principle to the following functions and powers needed to effectively implement and administer the proposed accessibility framework:
 - co-ordination
 - provision of information, education, training and advice
 - standard development and setting
 - reporting and monitoring
 - compliance and enforcement
- 4 **Note** that institutional arrangements could take the form of three broad options:
 1. use of existing bodies
 2. establish a new accessibility entity (within or independent of government)
 3. a combination of existing bodies and creation of new entities
- 5 **Note** that the proposed accessibility framework is intended to fit within existing Ministerial delegations, so any accessibility proposals will need to be agreed by the Minister responsible

 **Agree/Disagree**

- 6 **Note** that not having institutional arrangements of funding in place prior to the introduction of the proposed framework creates significant risks and could impact the success of the framework
- 7 **Note** that if accessibility legislation was introduced ahead of having institutional arrangements in place and that work to finalise the form of the institutional arrangements would need to occur in parallel with drafting of the Bill and funding could be sought through Budget 2021
- 8 **Agree** that as part of the April 2020 Cabinet report to seek agreement from Cabinet to progress work on the institutional arrangements

Agree / Disagree



Julia Bergman
General Manager
Disability, Seniors and International

28/02/2020
Date



Hon Carmel Sepuloni
Minister for Disability Issues

2/03/2020
Date

Released under the Official Information Act 1982

Background

- 10 This is the fourth report in the series of four reports on Accelerating Accessibility in New Zealand and should be read in conjunction with the first two reports.
- 11 This report focuses on the institutional arrangements needed for the implementation and on-going administration of an accessibility system in New Zealand.

Effective institutional arrangements are essential to the success of an accessibility system

- 12 Vital to the success of accelerating accessibility in New Zealand are institutional arrangements that direct resource and capacity to accessibility and complement the system. The right type of arrangements will ensure the effective implementation, administration and if required the compliance and enforcement of legislation and standards.
- 13 Institutional arrangements can vary from informal to formal, with varying degrees of authority, accountability and responsibility. There are a range of vehicles that could be created to support accelerating accessibility in New Zealand. Before considering the most appropriate vehicle we need to identify the functions and powers needed to support an accessibility system in New Zealand.
- 14 As outlined in paper two, responsibility for accessibility is spread across local and central government agencies and non-government organisations – all with varying roles and responsibilities. This issue leads to a lack of strong leadership and co-ordination across accessibility resulting in slow and ad-hoc change. It does not support systemic change and accelerated accessibility.
- 15 We have heard consistently and during consultation in 2019, about the impact inaccessibility has on disabled people's ability to be included and participate in their communities and society. However, due to problems in the system there is little data and mechanisms to collect data to inform, report and monitor on the problem. Additionally, where there are complaints and enforcement mechanisms these are insufficient to create systemic change and could be strengthened to operate more effectively to create the desired level of change.

There are a range of powers and functions we consider are needed to give effect to an accessibility system

- 16 In New Zealand, some functions and powers exist across different public sector agencies and non-government organisations but lack capacity or effectiveness and or require new functions and powers.
- 17 The types of functions and powers for an accessibility system that includes legislation and standards are discussed in more detail below:
 - co-ordination
 - information, training, education and advice
 - standard setting and development
 - reporting and monitoring
 - compliance and enforcement.

Coordination

- 18 As detailed in paper two, a lack of co-ordination and leadership impacts on progressing toward accessibility in a number of ways. Currently no agency has a dedicated role or the capacity to carry out a co-ordination role at the national and local levels.
- 19 There are pockets of good practice of national coordination and leadership at a senior level that could be built on. For example, at a national level the Accessibility Charter embodies public service chief executives' commitment to provide accessible

information and online tools. As part of this year's Accessibility Charter programme, work to get District Health Boards (DHB) and Local Government agencies on board is underway, starting with four DHBs – Canterbury; Hutt Valley; Wairarapa and Hutt Valley. Selwyn District Council has signed up and discussions with Hamilton and Wellington City Councils and Ashburton District Council are happening.

- 20 We consider that, irrespective of the chosen option to progress this role is needed to improve co-ordination and leadership so a more coordinated approach to accessibility is taken at the national and local level, to support the systemic change needed to accelerate accessibility in New Zealand.

Information, training, education and advice

- 21 The purpose of this role will be to provide consistent accessibility training, education and advice across accessibility areas, to ensure organisations and individuals are aware of their rights and responsibilities and have the tools and knowledge to implement accessibility measures and meet any obligations. Areas of information, training and education could include:

- awareness and understanding of accessibility and disability concepts
- provision of information and tools to help organisations understand and comply with legislation and standards
- clear guidance on what individuals should expect, what their rights are, and where they can seek support and redress if needed
- certification and accessibility rating systems
- training for those with responsibility for monitoring, compliance and enforcement of accessibility, e.g. local enforcement officers
- training for regulated parties such as those in the design and architecture sectors, e.g. working with educational institutes to include or enhance universal design in curricula or certification programme that rates, certifies and showcases accessible buildings.

- 22 As noted in paper two in New Zealand, accessibility training, education and advice is spread across several public sector agencies¹ and non-government organisations². Some agencies focus on specific domains of accessibility such as buildings and housing, or the workplace, while others have a broader and awareness raising focus. Anecdotally we have heard that there is some confusion within organisations as to who is best placed to give guidance, and whether this guidance is in line with best practice or existing standards.

- 23 Having the right knowledge and tools to support organisations to become accessible and understand their responsibilities is a core component of any accessibility system. Like the co-ordination role we consider this function necessary irrespective of the preferred approach to accelerate accessibility in New Zealand.

Standard development and setting

- 24 If decisions are made to progress the preferred accessibility framework, a function and power will be needed for accessibility standard-making to develop, co-ordinate, promulgate, revise, amend, interpret and produce standards.

- 25 Paper three describes in more detail the range of approaches to standard development and setting in other jurisdictions and how it could operate in New Zealand.

¹ E.g. Office for Disability Issues, MSD, Human Rights Commission, MBIE, Office of the Ombudsman.

² E.g., Be Lab, BRANZ, Barrier Free, Access Advisors, CCS, Accessibility Tick.

Reporting and monitoring

- 26 While some reporting and monitoring is undertaken, e.g. the HRC reports on complaints and the Human Rights Review Tribunal publishes decisions, evidence suggests that reporting and monitoring is not as pro-active as it could be or is sufficiently public to drive change.
- 27 Findings from the recent National Local Authority Accessibility Survey [REP/20/1/009] suggests that data collection on accessibility may only be collected following an incident, and infers that local authorities are not proactively collecting accessibility information on a wide range of issues.
- 28 A reporting and monitoring function would build a better evidence base for accessibility and contribute to national and international commitments and obligations such as the Disability Strategy and reporting on the implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
- 29 Areas of focus for reporting and monitoring could include:
 - what progress is being made toward accessibility at a system level
 - reporting on domains of accessibility and aggregation of data to identify areas of success or concern
 - reporting on compliance with standards, complaints and enforcement
 - publicly reporting on organisations that demonstrate good accessibility practice and actions taken to ensure compliance
 - where improvements are needed
 - how New Zealand compares internationally.
- 30 Specifications on reporting and monitoring could be provided for in the accessibility framework legislation, including for example, the nature and vehicle for reporting and frequency of reporting and the role of the Independent Monitoring Mechanism. Reporting could be voluntary or mandatory.
- 31 The Australian³ experience suggests that in New Zealand, voluntary action plans could be a useful reporting mechanism in terms of raising expectations and awareness and promoting compliance, but not necessarily contribute to an improved understanding among employers about the range, type and impact of different disabilities or how to provide workplace adjustments in a cost-effective way.
- 32 The Accessibility for Ontarians with Disabilities Act (AODA) requires organisations to file accessibility reports when directed to do so, confirming compliance with applicable standards. The self-reporting represents the first stage in a progressive enforcement regime that also encompasses inspections (with powers of entry and search warrants), orders, administrative penalties, appeals, and ultimately prosecutions and fines. The self-reporting mechanism under the AODA has been criticised for "reflecting no measurable objectives"⁴. Figures from the Accessibility Directorate of Ontario show that about 38 percent organisations that were required to file compliance reports had done so⁵

³ The Disability Discrimination Act (DDA) provides for organisations to develop action plans for the elimination, as far possible, of disability discrimination in the areas covered by the DDA.

⁴ Mayo Moran, *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act 2004*, November 2014, p. 18.

⁵ Figures as December 2014. Figures found for the last reporting year (2017) showed an increase of about 4,000 reports on the 2014 year.

Compliance and enforcement

- 33 As described in more detail in paper two, the existing HRA complaints process is limited in its impact and there are challenges to compliance across legislation related to accessibility.
- 34 To support the proposed accessibility framework new compliance and enforcement mechanisms will need to be provided for, i.e. ensuring there is compliance with the legislation and standards. A criticism of the AODA by the Accessibility for Ontarians with Disabilities Act Alliance is that it is strong on good intentions but weak on implementation⁶.
- 35 Our work to date has identified two main options for compliance and enforcing accessibility in New Zealand:
1. enforce protection under anti-discrimination laws such as the HRA
 2. enforce standards under accessibility law (either systemically or through individual complaints).
- 36 A strengthened compliance and enforcement function could include powers to create:
- Incentives - financial and non-financial, e.g. awards programme or reduced reporting for parties who demonstrate consistent compliance and good practice
 - Compliance – measures to ensure individuals and public and private organisations comply with legislation, e.g., organisational accessibility action plans and progress reports, or new channels for the public to provide feedback⁷
 - Enforcement – while we recommend the focus (at least initially) is on providing supports and incentives, enforcement measures for cases of non-compliance could include inspections, mediation, publication of compliance and enforcement measures taken, and monetary penalties.
- 37 Canada has a twin-track approach, where a person can complain under human rights laws, or non-compliance with an accessibility standard can be investigated under separate laws. In Ontario, for example, a person can make a complaint to the Human Rights Tribunal of Ontario under the Ontario Human Rights Code, which can include non-compliance with an accessibility standard under the AODA. An individual cannot make a complaint under the AODA for non-compliance with a standard. Instead, the Ministry of Community and Social Services must identify, initiate and enforce compliance.
- 38 We envision that proposed accessibility framework in New Zealand will take a similar twin-track approach to complaints. Taking this approach would not affect an individual's ability to take a complaint under the HRA about discrimination on a subject area. This could be where there a standard has been met but an individual considers they still have been discriminated against or where there is no standard.
- 39 Enforcement measures related accessibility would likely fall under the civil law system. Significant penalties need to be provided for in primary legislation while an empowering provision in primary legislation is needed for the creation of lesser penalties (such as fees and fines) in regulation.
- 40 It is assumed that where there are existing regulatory systems in place, i.e. Building Legislation and Code, the existing system will be the vehicle to address compliance and enforcement issues. The proposed accessibility framework is intended to fit

⁶ Disability Consumer Advocacy Group that works to support the full and effective implementation of accessibility standards in Ontario.

⁷ Access Aware app has been created in partnership with CCS and SaferMe to allow the reporting of mobility parking abuse in real time to enforcement officers, so they can monitor the use and respond to abuse of their parks.

within existing Ministerial delegations, so any accessibility proposals will need to be agreed by the Minister responsible.

- 41 Different regulators across different areas of accessibility could risk conflict or non-alignment between new and existing standards, e.g. inconsistent approaches to enforcement measures. MSD officials will work with the Ministry of Justice and other agencies to look at ways to mitigate inconsistency in the system, and to develop detailed proposals on the nature and levels enforcement measures should take.

Institutional arrangements could take several forms

- 42 We have identified three broad forms institutional arrangements could take:
1. **Use existing bodies** with extension of mandate and additional resources and funding as required to implement and administer the accessibility framework.
 2. **Establish a dedicated accessibility entity** that could sit within a government agency, e.g. MSD or ODI or as an independent entity, and responsible for the range of functions to implement and administer the accessibility system.
 3. **Combination of above options** to make use of existing capacity and expertise where it exists and establish new bodies to fill gaps in capacity and expertise.
- 43 When deciding on the most appropriate institutional arrangements several factors need to be considered:
- what arrangements will give best effect to the chosen accessibility system and its required functions and powers
 - the interest of existing agencies in the function, and their capability to carry out the functions and powers, with or without amendment to their structure or powers
 - meeting of the objectives in a least cost way⁸
 - desired level of independence from government.
- 44 International jurisdictions have varying approaches to institutional arrangements with varying effectiveness. In Ontario, the Accessibility Directorate of Ontario (ADO) within the Ministry of Economic Development and Growth was established under the Ontarians with Disabilities Act 2001 (ODA) to manage the implementation of the ODA. Under the Accessibility for Ontarians with Disabilities Act 2005 (AODA), the ADO's mandate was expanded to include responsibility for administering the AODA, including compliance and enforcement.
- 45 British Columbia has recently concluded public consultation on accessibility legislation (due to be tabled in mid-2020). This legislation includes a proposal for a governance structure comprising an Accessibility Directorate (responsible to oversee progress and provide accessibility information and tools); a Standards Development Board (responsible for development and revision of accessibility standards; and an Accessibility Commissioner (responsible for ensuring compliance and enforcement with accessibility legislation and reporting of compliance and enforcement outcomes).
- 46 An interim arrangement may be required to support the implementation of the proposed framework. A provision could be included in the legislation to enable the responsible Minister to decide on the permanent institutional arrangements, like the Independent Children's Monitor arrangements. The Oranga Tamariki Act 1989 allows

⁸ Legislation Design and Advisory Committee Guidelines state new entities should only be created if no existing body possesses the appropriate governance arrangements or is capable of performing the functions

for a future appointment of an “agency or body” which allows for the appointment of the independent monitor⁹.

- 47 If your preferred option is for a new legislative framework we recommend that agreement is sought from Cabinet to progress work on the institutional arrangements and considers:
- components to sit within each function, e.g. how often and what should the reporting vehicles be
 - further consultation to gauge the level of interest and capability of existing agencies
 - understanding implications of extending mandate and capacity of agencies to carry out accessibility functions or transferring functions to a new entity
 - gaps in capability and the nature and scale of resource required to carry out functions and powers
 - legislative implications, e.g. where functions and powers need to sit to be given effect e.g. primary or secondary legislation or Cabinet mandated
 - costs and financial implications
 - interim arrangements.
- 48 An interim report by the independent legal team funded by the New Zealand Law Foundation is due to be released by June. This report will help inform the work described above.
- 49 As detailed in paper one, while it is feasible, introduction of accessibility legislation ahead of institutional arrangements being in place does create some risk to the accessibility framework. Success and speed of implementation and administration is congruent to the level of resource and funding available.
- 50 If you wish to proceed with a proposal to introduce legislation ahead of having institutional arrangements in place, we would undertake detailed work on the arrangements in parallel to drafting of legislation and could seek funding for the arrangements through Budget 2021.

Next steps

- 51 Discuss the four accelerating accessibility reports with Ministry of Social Development at the Disability Issues Agency meeting on 2 March 2020.

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⁹ Section 447A – Minister to appoint independent persons to monitor compliance with prescribed standard of care.