



Recommendations

for Amending Bill C-81, *An Act to ensure a barrier-free Canada*

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This document will be available in French shortly.


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Strengthening Bill C-81

Bill C-81, *An Act to ensure a barrier-free Canada*, is a significant piece of legislation that has the potential to truly advance accessibility and inclusion of persons with disabilities in Canada. ARCH Disability Law Centre makes the following recommendations for strengthening Bill C-81. These recommended amendments are necessary to ensure that the Bill achieves its purpose and potential.

Our recommendations are grounded in the legal research and analysis that ARCH conducted on Bill C-81, the consultations that informed our final report, and ARCH's ongoing work with disability organizations and communities in relation to the Bill. To read ARCH's final report on Bill C-81, go to:

http://archdisabilitylaw.ca/Legal_Analysis_of_Accessible_Canada_Act_Final_Report.

In addition, these recommendations are informed by ARCH's expertise in human rights law, international disability rights law, accessibility laws, and the experiences of the communities of persons with disabilities whom we serve. Many of the recommendations made by the Federal Accessibility Legislation Alliance (FALA), the AODA Alliance, other disability organizations and persons with disabilities complement and enhance the recommendations made by ARCH.

1. Bill C-81 must require government and other bodies to implement key elements: Many sections of the Bill use the permissive language may. The legal effect is to give government and other bodies power to make and enforce accessibility requirements, but not actually require this power to be used. In key provisions, may must be changed to shall, to ensure that accessibility requirements are made and enforced.

- It is critical to change the word may to shall in section 117. Using shall will ensure that the government will make accessibility standards in the areas identified in section 5, and in additional areas. Without a requirement to make accessibility standards into regulations, there is no assurance that the government will do so and therefore no assurance that the law will advance accessibility in Canada.
- It is critical to change the word may to shall in section 4, so that the Governor in Council will designate a Minister responsible for the Act.
- The word may must be changed to shall in section 111(1). This will ensure that the government is required to appoint a Chief Accessibility Officer.

- The word may must be changed to shall in section 16, to ensure that the federal Minister will coordinate accessibility efforts with the provinces and territories.
- The word may must be changed to shall in section 95. This change will ensure that the Accessibility Commissioner *does* investigate all complaints that fall within its purview. There is no justification for the Accessibility Commissioner to decline to investigate if all the criteria described in the Bill are met, since there would be no other legal mechanism available for pursuing the complaint.
- The word may must be changed to shall in section 75(1). This change will ensure that the Accessibility Commissioner makes a compliance order every time there are reasonable grounds to believe that an organization is not complying with the Act.
- The word may must be changed to shall in section 93, to require the Accessibility Commissioner to publicize information about violations of the Act. Publicity together with a modest penalty will create a stronger enforcement and deterrence mechanism.

2. Bill C-81 must designate CASDO as the only body to develop

accessibility standards: The Bill gives powers to more than one body to create accessibility requirements in many areas. The Canadian Transportation Agency (CTA) and the Canadian Radio-television and Telecommunications Commission (CRTC) have powers to enact accessibility standards in certain areas, and the Canadian Accessibility Standards Development Organization (CASDO) has powers to create proposed accessibility standards which the federal government may enact into law. This creates a legally complex scheme. It may be difficult for the public to identify which accessibility requirements apply to which organizations. It risks creating inconsistent accessibility requirements. There are significant concerns that the CTA and CRTC lack the necessary expertise in human rights and accessibility to create robust accessibility standards.¹

Instead, the Bill must be amended to empower CASDO to develop and review all proposed accessibility standards. Those sections of the Bill which provide for the CTA and CRTC to have regulation making powers must be omitted.

This change is necessary to simplify the scheme and enable the public to more readily understand which accessibility requirements apply to which organizations. It will ensure

¹ For more detailed legal and practice analysis on this point, see pages 37-38, 41-42, 47 of ARCH's final report, available at: http://archdisabilitylaw.ca/Legal_Analysis_of_Accessible_Canada_Act_Final_Report.

that accessibility standards are created by persons who have knowledge and expertise in disability, accessibility and human rights. This will produce standards that are as robust and progressive as possible. ARCH recognizes the importance of building upon the subject matter expertise that the CTA and CRTC possess in transportation and telecommunications. Therefore, ARCH recommends that the CASDO committee which develops or reviews accessibility standards in relation to transportation must include representatives from the CTA. Likewise, the CASDO committee which develops or reviews accessibility standards in relation to information and communication technologies must include representatives from the CRTC.

3. Bill C-81 must designate the Accessibility Commissioner as the one body to handle compliance with accessibility standards and adjudication of complaints:

The Bill does not designate one central agency to oversee compliance with accessibility requirements and adjudicate accessibility complaints. Instead, enforcement will be done by multiple agencies, including the Accessibility Commissioner, CRTC, CTA, and the Federal Public Sector Labour Relations and Employment Board. This approach will create confusion and additional, unnecessary barriers to access to justice for persons with disabilities. Multiple bodies adjudicating accessibility complaints will likely result in uneven or unfair enforcement of the Act since different bodies may adopt different or contradictory approaches. Experience demonstrates that the CTA and CRTC may be more likely to treat human rights and accessibility as secondary to technical concerns.² Should this be borne out, it would result in weak adjudication of transportation and telecommunications complaints.

Instead, ARCH recommends that the Bill be amended to centralize compliance oversight and complaint handling within the Accessibility Commissioner. The Accessibility Commissioner should receive all complaints. The CTA and CRTC should not retain powers to receive or adjudicate accessibility complaints under the Bill.

Further, ARCH recommends that the Bill be amended to eliminate duplication in reporting requirements. Part 10 of the Act requires organizations to submit two sets of accessibility plans, feedback processes and progress reports to different agencies. This siloed approach to reporting could cause confusion for regulated entities and the public, and could impede the adoption of a holistic approach to accessibility issues. It would also be unnecessarily taxing on resources in terms of the time required by industry to prepare multiple documents, and by the CRTC, CTA and Accessibility Commissioner's

² For more detailed legal and practice analysis on this point, see pages 41-42, 47, 57-62 of ARCH's final report, available at: http://archdisabilitylaw.ca/Legal_Analysis_of_Accessible_Canada_Act_Final_Report.

staff to review them. Instead, all accessibility reports must be submitted to the Accessibility Commissioner.

4. Bill C-81 must include dates and timelines: The Bill does not include dates or timelines for achieving its purpose of a Canada without barriers, nor does it include dates or timelines for implementing key requirements such as making accessibility standards. Timelines are essential for ensuring that the Bill will advance accessibility in Canada.

- Section 5 must include a specific year or period of time by which a Canada without barriers will be achieved.
- Section 11(1) must include the same year or period of time as section 5.
- The Bill must include timelines by which CASDO must develop accessibility standards in employment, the built environment, information and communication technologies, the procurement of goods and services, the delivery of programs and services, and transportation.
- The Bill must include timelines by which CASDO must review and revise accessibility standards.
- Section 117 must be amended to include a timeline within which the Federal Government will enact accessibility standards into regulations.

5. Bill C-81 must ensure that CASDO, the Accessibility Commissioner and other key positions are sufficiently independent: Independence is critical to allow CASDO and the Accessibility Commissioner to carry out their mandates for developing and revising accessibility standards or overseeing enforcement and compliance with the Bill unencumbered by the political and policy priorities of the government of the day. Without sufficient independence, key accountability measures will be seen as weak.

- Section 17(2) must be amended to state that CASDO is an organization independent or at arms-length from government.
- ARCH adopts the recommendation of the AODA Alliance that section 21(1) must be amended to allow the Minister to issue only non-binding general directions to CASDO.

- The Bill must be amended to provide for fixed-term appointments of CASDO directors, with removal based on a good behaviour or competence standard.
- Section 36 must be amended to provide that CASDO report directly to Parliament, rather than to the Minister.
- ARCH adopts the AODA Alliance's recommendations in relation to measures that must be taken to strengthen representation of persons with disabilities on CASDO.³
- Section 39 must be amended to provide that the Accessibility Commissioner will report to Parliament, not to the Minister. This would provide the Commissioner with a greater degree of independence.

6. Bill C-81 must not allow organizations to be exempted from complying with accessibility requirements: The Bill allows for regulated entities to be exempted from complying with accessibility requirements. There is no principled reason why some organizations should be exempted. Any exemptions will weaken the overall purpose of the Act.

³ The AODA Alliance's recommendations include:

Section 32 of the bill should be amended to require compensation and reasonable expenses for members of CASDO advisory committees, and particularly, for those from the disability community or non-profit and voluntary sectors.

Section 32(1) of the bill should be amended to require the CASDO CEO to consult with the CASDO board when selecting membership of an advisory committee to assist CASDO with developing accessibility standards.

Part 2 of the bill should be amended to:

Require CASDO to consult the public, including people with disabilities, along specified time lines, on which accessibility standards it should create.

Require CASDO to make public, along specified and regular time lines, the accessibility standards it has decided to start to develop, and the work in progress on these standards.

Require CASDO to promptly make public the minutes of CASDO advisory committees and of the CASDO board, which should be required to be kept. These minutes should identify any draft recommendations under consideration, so the public knows exactly what CASDO is considering.

Require CASDO to consult the public, including the disability community, on the contents of accessibility standards it is considering adopting.

More detail on these points is in the AODA Alliance's Brief to Parliament on Bill C-81, September 27, 2018, available at: <https://www.aodaalliance.org/whats-new/please-tell-the-federal-government-if-you-support-the-aoda-alliances-finalized-brief-to-the-parliament-of-canada-that-requests-amendments-to-bill-c-81-the-proposed-accessible-canada-act/>

- Sections 46(1), 55(1), 64(1) and 68(1) must be omitted from the Bill. These sections permit the Minister, the CRTC or the CTA to exempt organizations from complying with requirements to prepare and publish accessibility plans, create feedback processes and develop progress reports.
- Section 117(1)(l) must be omitted from the Bill. This section permits the government to exempt certain organizations or undertakings from producing and publishing accessibility plans, feedback processes and progress reports.
- Section 117(2) must be amended to require the government to provide reasons for proposing the creation of classes of entities, provide information on whether the class will be exempted from any accessibility requirements, make this information public, provide an opportunity for feedback, and consider this feedback before creating the class. If certain classes of organizations are exempt from accessibility requirements, this exemption should be subject to future review to ensure that it is still needed.

7. Bill C-81 must ensure that accessibility requirements do not diminish existing legal rights of persons with disabilities:

- The preamble and purpose sections of Bill C-81 must clarify that nothing in the Act lessens the existing human rights obligations of federally-regulated entities under the *Canadian Human Rights Act*, and that where a conflict arises between the Act and another law, the law that provides the greatest accessibility for persons with disabilities will apply.
- Section 117 must state that nothing in the regulations can reduce or minimize the right to be free from discrimination under the *Canadian Human Rights Act* and the *Charter*.
- Bill C-81 must be amended to require the Canadian Transportation Agency (CTA) to apply the same legal test for discrimination as the Canadian Human Rights Commission and Tribunal. This change is necessary because Bill C-81 will make the CTA the primary forum for adjudicating accessible transportation complaints pursuant to the *Canada Transportation Act*. Without this amendment,

it is likely that many accessible transportation complaints at the CTA will fail or not get the full benefit of a robust human rights legal analysis.⁴

- Bill C-81 must be amended to clarify that compliance with regulations under the *Canada Transportation Act* does not necessarily mean that an “undue barrier” or discriminatory barrier does not exist. Without this amendment, it is likely that transportation organizations who have complied with accessibility standards will not also be required to comply with their legal obligations under the *Canadian Human Rights Act*.⁵

8. Bill C-81 must address barriers created by poverty and

intersectional discrimination: The Bill must do more to address the multiple and intersectional barriers experienced by persons with disabilities in relation to their identities, and by persons with disabilities who live in poverty or on low incomes.

- Section 6 must be amended to include the following additional principles:
 - Persons with disabilities disproportionately live in conditions of poverty.
 - Women and girls with disabilities experience unique and intersecting barriers to accessibility, which must be recognized and addressed.
 - Persons with disabilities are diverse and experience multiple and intersecting barriers, as a result of discrimination on the basis of disability or multiple disabilities, race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, and/or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Multiple and intersectional barriers must be recognized and addressed.
 - Barrier identification, removal and prevention must be done in accordance with principles of inclusive design and universal design.

⁴ For more detailed legal and practice analysis on this point, see pages 41-42, 47, 57-62 of ARCH's final report, available at: http://archdisabilitylaw.ca/Legal_Analysis_of_Accessible_Canada_Act_Final_Report.

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- In accordance with Article 12 of the *Convention on the Rights of Persons with Disabilities*, persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- Part 4 must include an additional provision requiring accessibility plans to relate to the purpose of the Act and to be prepared and implemented in accordance with the principles of the Act. Plans should address how they will contribute to achieving a Canada without barriers by the date specified in the Act. These changes would strengthen the effectiveness of accessibility plans, and help to ensure that barrier identification, prevention and removal addresses issues of intersectionality and poverty.
- Similarly, section 117 must be amended to require that regulations advance the purpose and further the principles of the Act.
- Part 6 must provide that the Accessibility Commissioner will receive anti-racism, anti-oppression and cultural competency training to ensure that the complaint process does not perpetuate systemic discrimination experienced by ethno-racial persons with disabilities or Indigenous persons with disabilities.
- Part 6 must be amended to provide for a participant funding program, which would address barriers to access to justice experienced by persons with disabilities who live in poverty or are on low incomes.
- Section 5 must use language of design and delivery of programs and services. This change is necessary to avoid the foreseeable problem of the substantive objectives or parameters of a program being put in place before thinking about disability, accessibility and inclusion. Accessibility and inclusion must not be after-the-fact considerations.
- ARCH adopts the recommendation made by FALA that the *Preamble* must be amended by changing Canadians to persons in Canada.⁶ This change is necessary to help to ensure that everyone in Canada, regardless of their citizenship status or identification with Canada, benefits from accessibility requirements under the Act.

⁶ More details on this point are available in the Federal Accessibility Legislation Alliance (FALA)'s Recommendations for Improving Bill C-81, the Proposed Accessible Canada Act, October 2018

9. ARCH supports the recommendation made by FALA, Canadian Association of the Deaf and others that Bill C-81 must recognize ASL and Isq as official languages of people who are Deaf in Canada.

10. Bill C-81 must address barriers experienced by Indigenous and First Nations persons with disabilities: The Government of Canada must work with Indigenous communities and First Nations to determine what amendments are required to ensure that the Bill addresses barriers experienced by these communities.

11. ARCH agrees with FALA that it is essential to identify, remove and prevent barriers in relation to communication. The Bill must be clarified to ensure that communication is addressed within each of the areas enumerated in section 5, in a manner that complements existing legal obligations to accommodate persons with disabilities.

12. Bill C-81 must include stronger provisions for reviewing the *Accessible Canada Act* and monitoring the *Convention on the Rights of Persons with Disabilities*:

- Section 131 must be amended to require that the committee conduct its first review 5 years after the date on which the Act is proclaimed into law. This change will prevent the review from being delayed if the regulations are not promptly passed.
- Section 132 must be amended to require the first independent review of the Act to be held in 2025 and every four years thereafter. This will coincide with Canada's reporting obligations under the *Convention on the Rights of Persons with Disabilities (CRPD)*.
- Section 149 must ensure that persons with disabilities participate meaningfully in monitoring the implementation of the *CRPD*. Such participation is required under article 33(3) of the *CRPD*. Section 149 must be amended to require the Canadian Human Rights Commission to monitor in accordance with articles 33(2) and 33(3) of the *CRPD*. Sufficient resources must be provided to the Commission and disability communities to support them to fulfill these roles.

13. Bill C-81 must include stronger definitions of disability and barrier:

- Section 2 must be amended by adding disability includes but is not limited to at the beginning of the definition of disability, and by adding whether the disability is evident or not to the definition of disability. These changes would make the definition of disability broader and more inclusive.
- Section 2 should be amended by adding the word law to the definition of barrier. This change would help to ensure that barriers created by federal laws are identified, removed and prevented.

14. Bill C-81 must require the Minister to progressively realize a barrier-free Canada: Sections 11(2) – 16 must be amended to include additional duties to ensure that the Minister responsible for the Act implements progressive realization of a barrier-free Canada. These additional duties include:

- the Minister shall establish benchmarks for progressively realizing a Canada without barriers;
- the Minister shall establish progressive timelines for meeting these benchmarks;
- the Minister shall regularly assess progress towards meeting these benchmarks. In this respect section 15 should be changed to: Subject to the Statistics Act, the Minister shall collect, analyse, interpret, publish and distribute information in relation to matters relating to accessibility. An additional subsection must be added requiring the Minister to collect, analyse, interpret, publish and distribute information regarding progress being made towards meeting established benchmarks within the time specified in the Act.

15. Bill C-81 must ensure that the process for making complaints to the Accessibility Commissioner is fair:

- Section 95(e) must be amended to make it clear that the one year limitation period to file an accessibility complaint begins from the time the complainant became aware of the act or omission which caused them to suffer a loss. This change will ensure that people are not prevented from filing an accessibility complaint because they were not aware of the organization's failure to comply with the Act occurred more than one year ago.

- Section 103 must be amended to require that the person who reviews a decision not to investigate or to discontinue an investigation of a complaint is not the same person who made the original decision.
- Part 6 must include a section that provides that complainants who request a review of the Accessibility Commissioner's decisions will have an opportunity to make submissions in a manner and form that is accessible to them.