



May 2, 2019

**Submission to
the Accessibility Secretariat, ISSD, ESDC
on Regulatory Concepts for Administrative
and Monetary Penalties Regulations,
Pursuant to Bill C-81, *An Act to ensure a
barrier-free Canada***

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INTRODUCTION

ARCH thanks the Accessibility Secretariat for this opportunity to participate in the pre-consultation to the development of technical regulations on administrative and monetary penalties, pursuant to Bill C-81, *An Act to ensure a barrier-free Canada*.

ARCH has actively participated in the legislative process surrounding Bill C-81. In particular, ARCH made written and oral submissions to the House of Commons and the Senate recommending amendments to strengthen Bill C-81. ARCH attended the two pre-consultation conference calls held by the Accessibility Secretariat regarding the development of technical regulations.

Bill C-81 has not yet been proclaimed. The Bill is presently before the Senate, which may adopt amendments to it. Given the ongoing legislative process and the time constraints inherent in the pre-consultation to the technical regulations, ARCH's submission provides brief comments on the proposed regulatory concepts.

COMMENTS

Include Substantive Equality

ARCH submits that substantive equality is an important concept which must be included in the approach to regulatory development. Substantive equality should be thought of not as a stand-alone regulatory principle, but rather as an overarching objective for the entire legislative and regulatory scheme set out in Bill C-81. Indeed, the Bill itself requires this, since its Preamble, Purpose and Principles sections state that the goal of the legislation is the achievement of substantive equality for persons with disabilities in certain areas within federal jurisdiction.

Substantive equality is an important legal concept, which has been recognized by the Supreme Court of Canada and is part of the legal framework established by provincial and federal human rights statutes, the *Canadian Charter of Rights and Freedoms*, and Canada's international obligations under the *Convention on the Rights of Persons with Disabilities*. A useful description of substantive equality can be found in the Law Commission of Ontario's *A Framework for the Law as it Affects Persons with Disabilities*.¹ This framework is grounded in substantive equality as an underlying value or goal. The Law Commission describes substantive equality as follows:

¹ Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*. (Toronto: September 2012), available online: <https://www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf>

Substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in society. It incorporates but is not limited to non-discrimination, meaning that no distinctions are imposed upon disadvantaged persons that, in purpose or effect, withhold or restrict access to opportunities, benefits or protection from the law, or impose burdens, obligations, or disadvantages that are not imposed on others. It also means, however, that persons with disabilities are not defined by the barriers they face, but are recognized as members of society who are able to make contributions and have obligations, as do other members. Substantive equality is about intangible concepts such as dignity and worth, but also about concrete opportunities to participate, have needs taken into account and have society and its structures and organizations develop in a way that does not treat persons with disabilities as outside mainstream society.²

Substantive equality also recognizes that persons with disabilities are diverse and that persons with disabilities experience much higher rates of poverty and exclusion from work than persons without disabilities. Therefore, efforts to achieve substantive equality must address barriers that result from intersectional discrimination and poverty.

As an overarching objective, substantive equality should be applied to the development of regulations in 2 concrete ways:

- First, it should influence the interpretation and meaning assigned to the regulatory principles that have been identified. Below, we suggest how this can be done with respect to criteria for classifying violations, penalties and compliance agreements.
- Second, once the regulatory scheme has been developed, it should be evaluated to determine whether it advances the overarching objective of substantive equality for persons with disabilities.

It is important to explicitly include substantive equality as an overarching objective for this and future regulations. Identifying it explicitly in the regulatory concepts will help to ensure that the concept will be applied during the development and application of the regulations.

² *Ibid* at p 65.

Criteria for Classifying Violations

Bill C-81 requires violations to be classified as minor, serious or very serious. In the documents provided for the pre-consultation, the Accessibility Secretariat identified 4 principles for criteria that will be used to classify violations: nature of the violation, level of harm, impact to vital services, and public interest.

How can substantive equality be applied to the interpretation and meaning assigned to these principles?

Each of the identified principles should be interpreted with reference to the experiences of persons with disabilities and the impact the violation will have on their substantive equality.

For example, the identified principle “level of harm” should be interpreted to mean actual or potential harm to persons with disabilities achieving substantive equality: does the violation actually or potentially create or reinforce an existing barrier to accessibility? Will it actually or potentially require persons with disabilities to take additional steps, monetary or otherwise? Does the violation actually or potentially impact people with disabilities in relation to their experiences of poverty and/or intersectional discrimination? This interpretation of harm will yield a different finding than if harm was interpreted with reference to the general public and the impact of the violation on the general public. Interpreting level of harm with reference to substantive equality for persons with disabilities will help to uncover the ways that the violation fails to achieve the overall goal of the legislative and regulatory scheme.

Similarly, the identified principle “impact to vital services” should be interpreted to mean services that are vital for persons with disabilities achieving substantive equality.

Applying the criteria for classify violations in accordance with substantive equality will require extensive training of those responsible for conducting these compliance functions. They will need training to ensure they have sufficient awareness and understanding of the experiences of disability communities, the particular barriers encountered by various disability communities, and barriers that result from poverty and intersectional discrimination. ARCH recognizes that this kind of training may not fall within the limited scope of these technical regulations. Nevertheless, it is important to consider what training will be needed to implement the regulations effectively.

Penalties

The Accessibility Secretariat has identified size of the organization as one of the principles to be considered when determining the penalty range for a violation.

Commitment to rectify the violation is another important principle that should be considered when fixing the amount of the penalty for a violation. Rectifying the violation is an important thing an organization can do to achieve the purpose of the legislation and advance substantive equality for persons with disabilities. An organization's commitment to rectify the violation can be measured by determining how proactive the organization has been in developing an action plan for addressing the violation, and whether the action plan sets out specific and measurable actions for bringing the organization into compliance.

Compliance Agreements

Compliance agreements have the potential to be important tools for achieving compliance and furthering substantive equality for persons with disabilities.

To do this effectively, compliance agreements must include an action plan that the organization agrees to implement to remedy the violation. The action plan would specify corrective measures the organization will take, timelines within which those measures will be implemented, specific ways in which implementation will be measured and tracked, and would identify persons within the organization responsible for implementing the action plan. Action plans should also set out measures the organization will take to prevent future instances of non-compliance. These components should be clearly set out in regulations.