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Please direct your reply to:

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November 29, 2019

Attn: Honourable Shane Simpson
Minister of Social Development and Poverty Reduction
engageaccessibility@gov.bc.ca

Dear Honourable Shane Simpson,

Re: *Accessibility through Legislation – Formal Submission*

Thank you for this opportunity to make submissions with respect to the Accessibility through Legislation Consultation.

Community Legal Assistance Society (“CLAS”) is a non-profit charitable society established in 1971 with a mandate to provide free legal services to British Columbians who are marginalized in society. CLAS promotes access to justice by providing a range of direct legal services to people with disabilities. CLAS strives to ensure that laws and services respect and promote the dignity, equality, and human rights of people with disabilities through litigation, law reform activities, and public legal education.

CLAS lawyers and advocates have represented persons with disabilities at a range of provincial administrative tribunals, including the Mental Health Review Board, the *Criminal Code* Review Board, the Human Rights Tribunal, the Residential Tenancy Branch, and the Workers’ Compensation Appeal Tribunal. CLAS lawyers have also provided representation to persons with disabilities at all levels of court in British Columbia. As a result, through its work, CLAS has unique insights into the barriers that persons with disabilities face as they encounter legal systems, both involving courts and administrative tribunals.

CLAS supports the provincial government’s efforts to develop accessibility legislation, and makes this submission to the Accessibility through Legislation Consultation to highlight issues that CLAS has observed, stemming from its own experiences working with persons with disabilities.

1. What is most important to you about accessibility legislation for BC?

Consistency with the BC Human Rights Code

Accessibility legislation must reinforce and strengthen existing rights of persons with disabilities in BC – as such, it must not diminish these rights as found within the *BC Human Rights Code*, R.S.B.C. 1996, c. 210 and as interpreted by the BC Human Rights Tribunal.

Definition of disability recognizes the social model of disability

CLAS submits that the definition of “disability” in the accessibility legislation should be broad, inclusive, and consistent with the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”). It is important to incorporate the social model of disability in the definition of disability that the accessibility legislation will use, which recognizes that it is the interactions with attitudinal and environmental barriers which hinder a person’s full and equal participation in society.

Accessibility for those with mental disabilities must be included in the definition, purposes, and framework

It is critical to ensure the inclusion of mental disabilities in not just the definition, but also the purposes, and framework of the accessibility legislation. While the identification, removal, and prevention of physical disability accessibility issues is vital, too often the analysis of accessibility ends there. Accessibility analysis for people with mental disabilities, such as brain injuries, mental illness, or developmental disabilities, must be incorporated into BC’s accessibility legislation to ensure that people are not excluded from the progress this legislation promises.

Animate and implement the UNCRPD

The principles enshrined in the UNCRPD are fundamental to the development of accessibility legislation. The accessibility legislation should animate and implement the guarantees of the UNCRPD.

Person-centred approach to the law and to systems encountered by persons with disabilities

CLAS has observed that many of its clients with disabilities encounter difficulties addressing their issues where these issues intersect with multiple processes and systems. As the Law Commission of Ontario has observed, “[l]aw is often developed, implemented and analyzed as a

set of separate and largely independent systems.”¹ CLAS supports the Law Commission of Ontario’s recommendation that the law must be treated as person-centred:

A person-centred approach highlights the way in which individuals encounter law – often as a confusing web of fragmented systems – and requires that laws be developed and implemented in a way that respects the full experience of the individuals that will encounter them. This requires law to respond to individuals as whole persons with unique needs and identities, and to take into account the ways in which individuals transition through the life course or between systems.²

As such, accessibility legislation should not only allow for accessibility standards dealing with individual systems in isolation, but should consider how these systems intersect to create barriers for persons with disabilities. This also relates to the barriers CLAS has identified – outlined below – in relation to individuals with disabilities facing issues requiring multiple forums to fully address.

2. What do you think about the suggested model for legislation and scope of legislation? Do you have other ideas for the model for legislation and scope of legislation you would like considered?

Definition of barriers

The definition of barriers in the accessibility legislation should identify “law” as a barrier – this will ensure that barriers created by provincial laws are identified, removed, and prevented.

Protections must be consistent with or greater than existing human rights

The preamble and/or purpose sections should clarify that nothing in the accessibility legislation lessens existing human rights under the *BC Human Rights Code* and the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and that where a conflict arises between the accessibility legislation and another law, the law that provides the greatest accessibility for persons with disabilities will apply.

Consistency with the UNCRPD

The provincial accessibility legislation should be consistent with, and give effect to, the guarantees of the UNCRPD. Articles 12, 13, 19, 21, and 28 are particularly relevant to the work

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*, September 2012 <https://www.lco-cdo.org/wp-content/uploads/2012/12/disabilities-framework.pdf> (“*Framework*”) at p. 5

² *Ibid.*

that CLAS does in representing people with disabilities. As part of this work, CLAS has observed barriers that persons with disabilities face which directly relate to these articles, examples of which are described below.

Article 13 requires states to ensure that persons with disabilities have equal and effective access to justice – this requires provincial courts and tribunals to ensure that they are fully accessible to persons with disabilities, including through their processes and proceedings. This also includes providing consistency between forums, and an accessible means for persons with disabilities to address their issues when these issues fall within the jurisdiction of multiple forums.

For instance, a tenant with a disability may face an issue requiring adjudication by both the Residential Tenancy Branch and the Human Rights Tribunal – coordination may be required between these forums to ensure full accessibility and effective access to justice. Another example relates to enforcement – a person with a disability may have an order from the Human Rights Tribunal in relation to an accommodation issue, but have difficulty enforcing this order when enforcement requires adjudication from another forum. Full accessibility – and effective access to justice – could require coordination between the Human Rights Tribunal and the forum needed to enforce an order issued by the Human Rights Tribunal.

Article 21 requires that states ensure that persons with disabilities have freedom of expression and access to information. Article 28 requires that states provide adequate social protection for persons with disabilities. This means that the provincial government must ensure that its services and procedures for accessing services are fully accessible to persons with disabilities. This could require providing information about services in accessible formats and assistance to navigate information and procedures.

3. What do you think about the suggested purposes and principles for legislation? Do you have other ideas about the purposes and principles that should guide accessibility legislation?

Promoting Autonomy

While all the principles identified have value, the principle of self-determination is particularly fundamental to ensuring that the legislation promotes the identification, removal, and prevention of barriers for people with mental disabilities, who have historically been subject to many incursions on their autonomy.

To further promote the autonomy of people with disabilities, CLAS submits that two additional principles should be included to guide the development and implementation of the legislation:

1. *Presumption of capacity and supports to exercise capacity*

Self-advocates and disability organizations in BC have successfully advocated to codify the presumption of capacity and the right to supports to exercise capacity in several BC statutes. It is important to acknowledge these foundational principles and ensure alignment with other BC legislation by including these principles in the accessibility legislation. For example, the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 codified the following principles:

Guiding principles

2 This Act is to be administered and interpreted in accordance with the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

...

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

Similar principles can be found in other BC legislation, such as the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, ss. 2, 3, 7 and the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3, 8.

Inclusion of the principles of presumption of capacity and the right to supports to make decisions and exercise capacity will also animate and implement the UNCRPD. Article 12 of the UNCRPD guarantees people with disabilities equal recognition before the law and the right to support necessary to exercise that capacity:

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

...

2. *Living independently and community living*

BC has a troubled history of overreliance on institutional settings to support and house people with disabilities, particularly people with mental disabilities. The legacy of institutions like Woodlands still operates in our culture of health and social service provision,³ with the Ministry of Mental Health and Addictions recently announcing that BC has the highest rate of hospitalization due to mental illness and substance use in Canada.⁴ The accessibility legislation is an important opportunity to identify the barriers to full and equal participation in society posed by institutional settings and acknowledge the importance of independent and community-based living in removing and preventing those barriers.

Inclusion of the principles of living independently and community living will also help animate and implement the guarantees of the UN CRPD. Article 19 of the UN CRPD guarantees the right of people with disabilities to live in the community, with choices equal to others, and requires state parties to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.

Incorporating principles from the UNCRPD

CLAS submits that the general principles of the UNCRPD, as set out in Article 3, should be explicitly incorporated into the guiding purposes of the accessibility legislation to support Canada's ratification of the UNCRPD. These include critical guiding principles, such as non-discrimination and respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.

4. What do you think about the suggested approach to timelines for accessibility legislation? Do you have other ideas about the development of accessibility standards for timelines for accessibility standards?

Concrete timelines should be established, with firm dates for achieving specific targets.

³ The Need to Know, Woodlands School Report: An Administrative Review, prepared by Dulcie McCallum, submitted to the Ministry of Children and Family Development (2001) at 23.

⁴ "A Pathway to Hope: A roadmap for making mental health and addictions care better for people in British Columbia", Ministry of Mental Health and Addictions, June 26, 2019.

5. What do you think about the suggested approach to governance for accessibility legislation? Do you have other ideas about governance for accessibility legislation?

Accessibility Commissioner must be independent from government

If an Accessibility Commissioner is created, it should be independent officer that reports directly to the BC Legislative Assembly. The Commissioner's role should also coordinate with existing bodies with mandates to address accessibility, including the BC Human Rights Tribunal, and the BC Human Rights Commissioner.

Standards do not lessen existing human rights

Any accessibility standards created pursuant to the accessibility legislation must ensure that accessibility standards do not diminish, but only serve to enhance, existing accessibility and accommodation law and policy developed pursuant to the BC *Human Rights Code* and/or the *Charter*.

6. What do you think about having reviews of accessibility legislation? If you support legislative reviews, how often should they occur?

Accessibility reviews are necessary

The accessibility legislation should require accessibility reviews – these reviews should occur every four years to coincide with Canada's reporting obligations under the UNCRPD.

7. What other initiatives or actions would you recommend to promote a culture of accessibility? How else can accessibility legislation support cultural change and vice-versa?

Equality between mental and physical disabilities

Funding distribution should be careful to ensure that there is equality in funding organizations that primarily promote accessibility and services to persons with mental disabilities and organizations that primarily promote accessibility and services to people with physical disabilities.

Consider histories of organizations granted funding

Funding distribution should ensure that organizations granted funding have established histories of animating and working towards the principles of the UNCRPD and the new accessibility legislation.

Government should ensure its processes are accessible

The provincial government should lead by example in promoting a culture of accessibility – this means reviewing its own processes, within Ministries, to ensure that the services it provides are fully accessible.

Thank you once again for the opportunity to provide feedback through this important consultation.

Yours truly,

Community Legal Assistance Society

A handwritten signature in black ink, appearing to read 'L. Johnston' and 'A. Vulimiri'.

Laura Johnston and Amita Vulimiri
Lawyers