

An Overview of the *Accessibility for Manitobans Act*: Ambitions and Achievements in Antidiscrimination and Citizen Participation

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I. Introduction

The *Accessibility for Manitobans Act*¹ (AMA) came into force in December 2013. Manitoba is the second Canadian province to enact accessibility standards legislation. The first province was Ontario which enacted the *Ontarians with Disabilities Act* (ODA) in 2001, and later the more fortified and enforceable *Accessibility for Ontarians with Disabilities Act, 2005* (AODA). In this brief article, we provide an overview of the *Accessibility for Manitobans Act*, highlighting its purpose, philosophical and social goals; the process for developing the standards; and enforcement and compliance. Throughout, we provide commentary on the statute from the perspective of its effectiveness as a means for protecting persons with disabilities from discrimination, and the statute's efficacy as a consultation tool for citizen participation. We argue that the AMA's structure illustrates some of the fault lines in the theoretical literature regarding the social model of disability. Increased attention to the experience of impairment coupled with a more robust understanding of disability discrimination would assist the legislation to achieve its overall goal of removing accessibility barriers. These findings may be useful for the design of future accessibility legislation in Canada or elsewhere.

II. Purpose, Philosophical and Social Goals of the AMA

The *Accessibility for Manitobans Act* aims to achieve accessibility by preventing and removing barriers that disable people in five areas of society: employment; accommodation; the built environment (including physical structures and transportation infrastructure); the delivery and receipt of goods, services and information; and any prescribed activity or undertaking.² The primary tools for doing this are consultation with persons with disabilities and other affected stakeholders, leading to the development of accessibility standards and public sector accessibility plans.

The legislation was prompted by advocacy on the part of the disability community which largely felt that a law setting out accessibility standards would provide more systemic change and enable

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¹ *Accessibility for Manitobans Act*, SM 2013 c 40, CCSM c A1.7 [AMA].

² *Ibid* at ss 2(1).

persons with disabilities to achieve greater accessibility on the ground.³ Accessibility legislation serves as a complement to the already existing complaint-driven system established under the *Manitoba Human Rights Code*.⁴ The political move to adopt accessibility legislation in Manitoba was also motivated by a recognition that Manitoba's disability rate is higher than the national average, and that with an aging population, the incidence of disability in Manitoba would be increasing.⁵ Finally, as noted by the responsible minister at first reading of the bill, the legislation would serve to improve the independence and social inclusion of Manitobans where they live, learn, work and play.⁶ The purpose of the Act and its political impetus are similar to those in the province of Ontario where disability access legislation has also been enacted.⁷

Alongside its stated purpose, the AMA has several underlying philosophical and social goals. By “philosophical goals”, we refer to the foundational aspirations of the statute. The AMA contains human rights-based aspirations of equality, placed within a more traditional administrative regulatory framework. One sees these human rights aspirations in the social areas of protection that are prescribed by the AMA. These social areas mirror the areas of protection found in the *Manitoba Human Rights Code*—namely, persons with disabilities should have barriers eradicated with respect to goods, services, facilities, accommodation, employment, buildings, structures, and premises.⁸ Moreover, the language of the statute indicates that persons disabled by barriers have a *right* to those barriers being removed; barrier removal is not to be granted as a matter of charity. This idea is clearly manifest in the preamble of the AMA which indicates that one of the reasons for enacting the statute is to ensure that persons with disabilities achieve equal opportunities, independence and full economic and social integration. Finally, there are references to the various equality rights instruments which the AMA is to complement and with which it should work in tandem: *United Nations Convention on the Rights of Persons with Disabilities*⁹, the *Canadian Charter of Rights and Freedoms*¹⁰ and the *Human Rights Code*¹¹.

³ Karine Levasseur, “Unnecessary Delay: Bill 47, the *Accessibility Advisory Council Act and Amendments to the Government Purchases Act*” (2012) 35 *Manitoba LJ* 1 at 3.

⁴ *The Manitoba Human Rights Code*, SM 1987-88, c 45, CCSM c H175; For a discussion of the challenges of using human rights codes in Canada and the systemic advantages to adopting accessibility legislation, see Laverne Jacobs, “‘Humanizing’ Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada” (2016), in I. Bouhadana, W. Gilles & R. Weaver (eds.), *Citizen Participation and Collaboration in Promoting Open Government* (Carolina Academic Press, 2017) (*Forthcoming*).

⁵ Levasseur, *supra* note 3.

⁶ First reading of Bill 26, *The Accessibility for Manitobans Act*, 2nd Sess, 40th Leg, Manitoba, 2013 (assented to 5 December 2013), SM 2013, c 40, CCSM c A1.7, online:

http://www.gov.mb.ca/legislature/hansard/40th_2nd/vol_29/h29.html.

⁷ For a comprehensive overview of the Ontario government's actions leading up to both the ODA and the AODA, see the “ODA Committee,” online: Ontarians with Disabilities Act <http://www.odacommittee.net/>; see also David Lepofsky, “The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act*” (2004) 15 *NJCL* 125 at 1.

⁸ *Code*, *supra* note 4 at ss 9-18.

⁹ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, United Nations, *Treaty Series*, vol. 2515, p. 3; online: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

¹⁰ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

¹¹ *Code*, *supra* note 4.

With its various embodiments of human rights protection and its connections to equality rights enactments, the AMA implicitly labels inaccessibility an infringement of human rights. From the preamble, it is clear as well that an additional philosophical goal of the AMA is to improve the health, independence and overall well-being of persons with disabilities.¹² We consider these two philosophical goals – removing disabling barriers to ensure the human right of equality, and improving health, independence and well-being – to present a commendable vision of social inclusion of persons with disabilities as equal members of society.

With regard to the “social goals” of the statute, we define the social goals of the Act to be the explicit and implicit guiding principles laid out in the statute for achieving its philosophical goals. The AMA specifies that there are four principles that should be at the base of any efforts to remove barriers. In particular, regard must be had for the principles of access, equality, universal design, and systemic responsibility.¹³ *Access* refers to persons having “barrier-free access to places, events and other functions that are generally available in the community.”¹⁴ *Equality* means that persons should have barrier-free access to those things that will give them “equality of opportunity and outcome.”¹⁵ *Universal design* is the principle that states that access should be provided in a manner that “does not establish or perpetuate differences based on a person’s disability.”¹⁶ And, finally, the principle of *systemic responsibility* states that “in order to achieve accessibility, persons or organizations that are responsible for establishing or perpetuating the barrier bear the responsibility to prevent and remove them.”¹⁷

None of the earlier accessibility legislation in Canada has set out guiding principles such as these within the primary statute.¹⁸ This is a new development within Canadian accessibility legislation. It also seems to be a positive one. The literature on access laws indicates that one of the reasons for their failure in other jurisdictions is that a capitalist market society will emphasize profit over other potential social objectives.¹⁹ By explicitly outlining guiding principles for those subject to the statute, there is a greater chance of countering capitalist tendencies to focus on market-based success as opposed to equal access and social well-being. This is particularly true when it comes to the last principle – systemic responsibility. Placing the responsibility for preventing and removing barriers on the person or organization that has caused or perpetuated them is not

¹² *AMA*, *supra* note 1 at Preamble.

¹³ *AMA*, *supra* note 1 at s 2(2).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ However, there is at least one example of guiding principles within a standard developed as a regulation under the primary statute. In Ontario, the Customer Service Standard which was developed under the AODA sets out guiding principles for delivering customer service to persons with disabilities within the standard. See Ontario’s *Customer Service Regulation*, O Reg 429/07, s 3(2) which indicates that the provider of goods and services must provide them in an integrated fashion unless that is not possible, in a manner that respects the dignity and independence of persons with disabilities, and must provide an equal opportunity to obtain use or benefit from the goods or services.

¹⁹ Brendan Gleeson, *Geographies of Disability* (New York: Routledge, 1999) at 177.

necessarily intuitive in the practice of equality law. Equality law often emphasizes the notion of reasonable accommodation which allows for mitigating the barrier and accommodating the individual with the disability, so long as this process does not cause undue hardship to the responding person or organization.²⁰ The principle of systemic responsibility has the potential to be a much bolder requirement that may force persons and organizations, including workplaces and shops, to prevent and remove barriers, not merely to mitigate and accommodate.

III. The AMA and the Social Model of Disability

The AMA is based on the social model of disability which locates disability within society, as opposed to within the individual. The social model can be defined generally as having “a basic political commitment to improving the lives of disabled people, by promoting social inclusion and removing the barriers [that] oppress.”²¹ The statute uses the expression “persons disabled by barriers” and does not explicitly define “disability.” Instead, the AMA socially constructs disability in many ways, including through the language used to describe the purpose of the legislation. By stating that the purpose of the Act is to “achieve accessibility by preventing and removing barriers that disable people,”²² the AMA infers that disability arises from obstacles that exist within society.

Defining disability as a social construct is significant for several reasons. First, it can be argued that this perspective is a step in the right direction towards greater understanding and acceptance of disability; it presents a more inclusive way of thinking about disability within society. By presenting disability as a widespread experience, more people are inclined to think about it, and to consider disability as an experience (rather than medical condition) that could happen to them. This is significant in so far as it helps to justify the necessity of the AMA and the cost of implementing the accessibility standards in society. Stated simply, if people believe that an issue affects them, they will likely be more inclined to do something about it. Thus, it can be argued that the AMA has an additional philosophical goal of changing the definition of disability from a condition that affects individuals to an experience that can affect everyone, and an additional social goal of changing the way Manitobans think about disability. Disability as a social construct also works well in promoting universal design that is barrier-free, in this way promoting one of the guiding principles of the statute described above.

²⁰ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* 1999 SCC 48, [1999] 3 SCR 3, and *Council of Canadians with Disabilities v VIA Rail Canada Inc* 2007 SCC 15, 1 SCR 650.

²¹ Tom Shakespeare, "The Family of Social Approaches" in *Disability Rights and Wrongs* (New York: Routledge, 2006) at 9, (providing this definition and an overview of the evolution of the social model). See also Michael Oliver, *Politics of Disablement: A Sociological Approach* (Basingstoke: Macmillan, 1990). See also the recent response to critiques of the social model by Michael Oliver, "The Social Model of Disability: Thirty Years On" (2013) 28 *Disability & Society* 1024 [Oliver, "Thirty"].

²² *AMA*, *supra* note 1 at s 2(1).

But, the social model of disability has encountered many challenges in theory and in practice,²³ and there are problems that can arise from using such a widespread, socially constructed definition in this piece of legislation. In a recent reflection on the 30 years since the social model was introduced in the UK, Michael Oliver, who is credited for conceptualizing the social model, suggests that there are two main critiques of it that have arisen.²⁴ Firstly, the social model has been criticized for not paying sufficient attention to the important role that impairment plays in the lives of persons with disabilities. Anita Silvers, for example, notes that being impaired, in pain, weakened and vulnerable are some of the core embodied experiences of many people with disabilities.²⁵ Indeed, difficulties already exist on the ground with respect to how accessibility legislation deals with those who experience episodic disabilities due to their impairments.

Episodic disabilities, such as HIV and arthritis, are characterized by unpredictable and fluctuating periods of medical impairment and wellness.²⁶ In Ontario, the *AODA Employment Standards*²⁷ provide a process for providing accommodation that works well for persons with long-term or short-term stable disabilities, but that has the potential to prove problematic for individuals with episodic disabilities. Under the standards, employers are obligated to create a written process for the development of individualized accommodation plans for employees with disabilities.²⁸ This requirement focuses on procedural matters only. The written process must highlight how an employer can request outside medical expertise, how the employee's privacy will be protected, and the frequency of review of the accommodation plan, etc.. The *AODA Employment Standards* indicate that the accessibility needs and the accommodation plan must be taken into account in performance management. However, the standards do not indicate whether the employee will be involved in developing the process for the performance evaluation that will be used. Therefore, a dedicated employee who works (painfully) from home during a flare up of their episodic disability may not have that work appropriately recognized. A person with episodic disabilities will need to be astute about pushing for an accommodation plan that addresses the issue of performance management at the outset, in order to avoid the need to pursue relief for human rights violations later. There is the potential for this problem to exist under the AMA as well. At the same time, if cognizant of the challenge, disability advocates may

²³ Carol Thomas, "Disability Theory: Key Ideas, Issues and Thinkers" in *Disability Studies Today* (Malden, MA: Polity Press, 2002) at 38-57; Tom Shakespeare, "The Social Model of Disability" in Lennard J Davis (ed), *The Disability Studies Reader*, 4th ed (New York: Routledge, 2013).

²⁴ Oliver, "Thirty" *supra* note 21 at 1025.

²⁵ Anita Silvers, "An Essay on Modeling: The Social Model of Disability" in Christopher D Ralston, and Justin Ho, (eds.), *Philosophical Reflections on Disability* (New York: Springer, 2010), at 19 and 20 [Silvers]. She echoes concerns expressed earlier by scholars such as Sally French. See eg S French, "Disability, Impairment or Something in Between" in J Swain, S French, C Barnes, C Thomas, (eds), *Disabling Barriers, Enabling Environments* (London: Sage, 1993).

²⁶ For a useful description of episodic disabilities that includes definitions and challenges for workers, see Episodic Disabilities Network, "Uncertain Futures': An Episodic Disabilities Discussion Paper" (March, 2016), online: <http://www.hivandrehab.ca/wp-content/uploads/Uncertain-Futures-An-Episodic-Disabilities-Discussion-Paper.pdf>.

²⁷ PART III, Employment Standards, Integrated Accessibility Standards, O. Reg 191/11, ss 20-32 [*AODA Employment Standards*].

²⁸ *Ibid* at s 28.

be able to press for stronger protection of episodic disabilities and, more generally, for the recognition of the needs associated with different types of impairments, through the standard development process on the ground.

In addition to misrecognizing the role of impairment, the social model has faced a second criticism for failing to account for difference and, as a consequence, presenting the disability community as a unitary group.²⁹ Recognizing disability as a uniquely lived experience is crucial to accepting and celebrating diversity, and understanding how accessibility standards can be made in order to accommodate a variety of individuals with diverse needs. In discussing the value of critical disability studies, Simi Linton explains that disability studies offers “a prism through which one can gain a broader understanding of society and human experience, and the significance of human variation.”³⁰ Similarly, within the realm of regulatory theory, Cass Sunstein asserts that “policies and regulations should benefit from the dispersed information of a wide variety of human beings.”³¹ The only way these two ideals can be achieved is to recognize difference and learn from it. Doing so will create a better understanding of disabled individuals’ needs and how the accessibility standards might best be able to meet those needs. Most important, however, is to recognize that the experiences of any individual with a disability, like those of individuals generally, will be integrally bound up with experiences connected to their gender, race, sexual orientation, etc.³² Accessibility legislation is an excellent place to acknowledge this intersectionality as it opens the door to a more authentic, rich and complex recognition of the discriminatory barriers that persons with disabilities face on an everyday basis. Yet, the AMA scarcely acknowledges the existence of discrimination based on intersectional difference and therefore offers little description as to how the accessibility standards may be able to counteract this discrimination. Drafters of accessibility legislation in the future should consider incorporating references to the importance of intersectional discrimination into the primary legislation itself. One place where this can be done is in the preamble where connections

²⁹ Oliver, “Thirty” *supra* note 21 at 1025.

³⁰ Simi Linton, *Claiming Disability: Knowledge and Identity* (New York University Press, 1998) at 118.

³¹ Cass Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: University of Chicago Press, 2014), at 174. But, for critique of Sunstein’s valuing life framework as it applies in the context of disability access standards, see Jacobs *supra* note 4.

³² Ruby Dhand, “Access to Justice for Ethno-Racial Psychiatric Consumer/Survivors in Ontario” (2011) 29 Windsor YB Access to Justice 127; Cameron Crawford, “Disabling Poverty and Enabling Citizenship: Understanding the Poverty and Exclusion of Canadians with Disabilities” Community-University Research Alliance; Council of Canadians with Disabilities and University of Victoria, online: <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/understanding-poverty-exclusion>; John Stapleton, “The “Welfareization” of Disability Incomes in Ontario: What are the factors causing this trend?” Metcalf Foundation, online: <http://metcalffoundation.com/wp-content/uploads/2013/12/Welfareization-of-Disability-Incomes-in-Ontario.pdf>; Amy J Peterson, “Imagining the Possibilities: Qualitative Inquiry at the Intersections of Race, Gender, Disability, and Class” (2012) 25:6 International Journal of Qualitative Studies in Education 801, online: <http://www.tandfonline.com/doi/abs/10.1080/09518398.2011.645513> and West Coast LEAF, “Able Mothers: The Intersection of Parenting, Disability, & the Law, Summary of Findings” (2015), online: <http://www.westcoastleaf.org/wp-content/uploads/2015/01/Able-Mothers-Report-Summary-of-Results.pdf>.

between women with disabilities and poverty, and disability, race and poverty (to name just two examples) could be recognized.

In conclusion, the AMA possesses positive and feasible philosophical and social goals that have the potential to push forward the norms of equality law. It relies on the social model of disability. However, the statute's drafting presents the two most common challenges with the social model of disability: insufficient recognition of the role of impairment in the lives of persons with disabilities, and a weak portrayal of the connection between disability discrimination and intersectional difference. In the next section, we illustrate briefly how even through the development and enforcement phases of the AMA, it will still be difficult for disability advocates to circumvent the weaknesses presented by the drafting of the Act to pursue accessibility standards that address these two challenges.

IV. The AMA's Accessibility Standards – Development and Enforcement

In this final part of the article, we provide a brief survey of the standard development and enforcement mechanisms of the AMA. We use this overview to illustrate that the inattention to impairment and intersectional disability discrimination described earlier are also not addressed in the legislation when it comes to standard development and enforcement. Indeed, the extent to which issues of impairment and intersectional discrimination will be addressed on the ground will depend on large part on who is appointed to the Accessibility Advisory Council (AAC) or the Standard Development Committees. In a similar fashion, the enforcement of the standards relies heavily on governmental discretion. It is only when government officials entrusted with that discretion are most invested in ensuring compliance with the standards that one can be sure of rigorous enforcement of the statute. Examples from Ontario demonstrate that accessibility legislation enforcement can be extremely malleable – with an expansion and contraction of protection for people with disabilities that depends on the priorities of the government of the day.

A. Standard Development Process – Committees and Consultations

i. Committees

We earlier asserted that disability advocates can push for better recognition of impairment on the ground during the standard development process. However, in order to be successful in this endeavour, it will be necessary to have a standard development committee that is amenable to creating standards that support the position.

Accessibility standards are established by regulation.³³ Under Canadian accessibility legislation, the standard development process usually centres on exchanges of views within the standard

³³ In Manitoba, similar to Ontario, The Lieutenant Governor in Council (Cabinet) makes regulations that create accessibility standards which: “a) prescribe the persons or organizations that are subject to the standard and b) set out measures, policies, practices or other requirements for identifying and removing barriers, and preventing barriers from being established, and c) require the persons or organizations that are subject to the standard to implement those measures, policies, practices or other requirements within the time periods specified in the standard.” See *AMA*, *supra* note 1 at ss 6(1), (2).

development committees in which the members are representative of the various stakeholders who will be affected by the ultimate standard.³⁴ The process of developing accessibility regulations in this way represents a form of democratic participation. Fairness is said to exist because different stakeholders are invited to deliberate through to a final resolution. Accessibility legislation in Canada that uses this type of consultative process has been described as “bringing together opposing views in a deliberative democratic battleground with the reality of regulations built on consensus or compromise.”³⁵ In both Ontario and Manitoba, the concept of consensus that has been used in practice has been based on less than full unanimity. In Ontario, consensus was defined as “substantial agreement of members, without persistent opposition, by a process taking into account the views of all members in the resolution of disputes.”³⁶ In Manitoba, perhaps wisely, given the challenges of aiming for consensus, the legislation allows for members of the AAC to submit separate recommendations on accessibility standards if a consensus cannot be achieved.³⁷

Certainly, the advantage of using a stakeholder consultative committee is that persons with disabilities have an opportunity to participate. Stakeholder consultative committees are theoretically well-placed to achieve the more collective philosophical and social goals underlying the statute, such as promoting a definition and understanding of disability as an experience that can affect everyone. However, substantive outcomes may depend greatly on who is appointed to the standard development committee and on the dynamic of the group once it has been formed. Interestingly, there are no requirements in the AMA concerning the representative makeup of the standard development committees. This is unusual. It contrasts starkly with the requirements set out in the same statute for the Accessibility Advisory Council, which is the parent body that appoints the standard development committees.³⁸ The AMA indicates that the AAC must include persons disabled by barriers or representatives from organizations of persons disabled by barriers as well as representatives of activities undertakings sectors etc. that may be subject to the accessibility standards.³⁹ The lack of direction about the makeup of the standard development committees is also very different than the legislation in Ontario which directs the minister to invite persons with disabilities or their representatives, representatives of industry and

³⁴ Jacobs *supra* note 4.

³⁵ Jacobs *supra* note 4 at 1.

³⁶ Taken from s 2 of AODA Customer Service Accessibility Standards Development Committee Terms of Reference, October 14, 2005, online:

<https://web.archive.org/web/20060513201642/http://www.mcass.gov.on.ca/accessibility/en/news/reference/customer-service.htm>.

³⁷ AMA, *supra* note 1 at s 9(5).

³⁸ AMA, *supra* note 1 at s 16. See Manitoba, Customer Service Development Committee, “Initial Recommendations for a Proposed Customer Service Standard to the Minister responsible for Persons with Disabilities” (October 3, 2014), online: http://www.gov.mb.ca/dio/pdf/CSS_report_to_govt.docx. The customer service standard came into effect on November 1, 2015. Full text and information about the regulation may be found online:

<http://www.accessibilitymb.ca/customer-service-standard.html>.

³⁹ AMA, *supra* note 1 at s 15 (2).

government to form part of each standard development committee.⁴⁰ This is not to say that the standard development committees will not be amenable to protecting issues relating to impairment or recognizing intersectionality in disability discrimination. But, given the structure of the statute, it is clear that much depends on the determinations by the AAC and the standard development committees as to what appropriate stakeholder representation and appropriate outcomes on those matters should be.

The process for developing accessibility standards begins when the minister (appointed by the Cabinet to administer the Act)⁴¹ prepares the terms of reference for the proposed accessibility standard.⁴² The terms of reference “must specify the sector or the persons or organizations that may be made subject to the standard.”⁴³ The terms of reference are to “enable the implementation of the measures, policies, practices and other requirements necessary to make significant progress towards achieving accessibility by 2023.”⁴⁴ Once prepared, the minister gives the terms of reference to the AAC while also making them available to the public (i.e. posting on a government website, etc.).⁴⁵

The AAC, after receiving the terms of reference from the minister, makes recommendations regarding; (a) “the accessibility objectives for the activity or undertaking, the sector, the aspect of the built environment, or the person or organizations, to which the standard relates”, and (b) “the measures, policies, practices or other requirements that the council believes should be implemented” which include how, by whom, and when they should be implemented.⁴⁶ In recommending timeframes, the AAC must consider the terms of reference, the nature of the barriers, and technical and economic considerations involved in implementation of standards.⁴⁷

ii. Standard Development and Public Consultations

Consultations with the public constitute an equally significant part of the standard development process. In developing its recommendations to the minister regarding the standards, the AAC is required to consult with the public.⁴⁸ The public is defined broadly to include “[p]ersons disabled by barriers or representatives from organizations of persons disabled by barriers; [r]epresentatives of those engaged in the activity or undertaking, or representatives of the sector or the persons or organizations, that may be subject to the proposed accessibility standard; [o]ther representatives of the government and the boards, commission and agencies of the government that have responsibilities relating to the activity or undertaking, sector or persons or

⁴⁰ *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 11 s 8(4).

⁴¹ *AMA*, *supra* note 1 at s 1.

⁴² *AMA*, *supra* note 1 at s 8(1).

⁴³ *AMA*, *supra* note 1 at s 8(2).

⁴⁴ *AMA*, *supra* note 1 at s 8(4).

⁴⁵ *AMA*, *supra* note 1 at s 8(3).

⁴⁶ *AMA*, *supra* note 1 at s 9(1).

⁴⁷ *AMA*, *supra* note 1 at s 9(2).

⁴⁸ *AMA*, *supra* note 1 at s 9(3).

organizations that may be made subject to the proposed accessibility standard; and [a]ny other persons or organizations that the Minister considers advisable.”⁴⁹ Prior to the consultations, the Committee is normally required to develop a discussion paper and to request feedback. These consultations are conducted through written submissions, and in person or via webcast during the public consultation hearings.⁵⁰ To date, the Customer Service Standard is the only standard for which discussion paper consultations have been completed. The call for submissions and participation was promoted by the Disabilities Issues Office (DIO) and circulated online amongst stakeholders.⁵¹

A proposed accessibility standard is then made by the minister based on the recommendations of the AAC. It is to be made available, along with the recommendations, to the public.⁵² Member of the public have sixty days to submit comments to the AAC. The AAC reviews the comments, prepares amendments based on public feedback makes its recommendations. After making any additional modifications they see fit, the minister recommends the standard to the Lieutenant Governor in Council.⁵³ Once the recommended standard is approved and enacted as a regulation, it becomes law and is enforceable.⁵⁴

⁴⁹ *AMA, ibid.* See also Manitoba, Disabilities Issues Office, *Customer Service Accessibility Standards Development Committee: Terms of Reference* (February 2014) at 3. This requirement of consultation is not repeated in the Employment Standards Development Committee Terms of Reference presumably because a development committee, distinct from the AAC, was created for the creation of employment standards.

⁵⁰ With respect to the Customer Service Standard, an option was also available to contact the Disabilities Issues Office for alternative means of communicating as seen on some stakeholder websites. See Manitoba Federation of Non-Profit Organizations, “Customer Service Standards Development Committee invites your feedback (Disabilities Issues Office)”, (9 May 2014), online: <<http://www.mfnpo.org/news/customer-service-standards-development-committee-invites-your-feedback-disabilities-issues-office/>>; Retail Council of Manitoba, “Manitoba Customer Service Accessibility Standard Consultation Underway,” (8 May 2014), online: <<http://www.retailcouncil.org/advocacy/manitoba-customer-service-accessibility-standard-consultation-underway>>; Telecommunications Employees Association of Manitoba, “Public Consultations re the Accessibility for Manitobans Act,” (15 May 2014), online: <<http://www.teamunion.mb.ca/renderpage.php?cat=news&subcat=current&id=578>>.

⁵¹ The call for submissions could be found on the DIO website, archived at: <https://web.archive.org/web/20140606210112/http://www.gov.mb.ca/dio/>, and also, for example, on the websites of these stakeholders: Retail Council of Manitoba <<http://www.retailcouncil.org/advocacy/manitoba-customer-service-accessibility-standard-consultation-underway>>, Telecommunications Employees Association of Manitoba <<http://www.teamunion.mb.ca/renderpage.php?cat=news&subcat=current&id=578>>, Manitoba Federation of Non-Profit Organizations <<http://www.mfnpo.org/news/customer-service-standards-development-committee-invites-your-feedback-disabilities-issues-office/>>.

⁵² *AMA, supra* note 1 at ss 10(1), (2).

⁵³ *AMA, supra* note 1 at ss 10(3), (4). The synopsis of the standard development process in Manitoba is available at: Manitoba, “How Standards Are Created”, online: <<http://www.accessibilitymb.ca/how-standards-are-created.html>>. It reads:

Steps to create a standard:

- The Accessibility Advisory Council (council) develops a discussion paper that serves as the basis for public consultations.
- The public provides its feedback both in-person and electronically.
- The council uses the public input to prepare a draft standard for the Minister responsible for the AMA (minister).
- The minister considers whether to accept the council’s proposal in whole, in part, or with changes.

In Manitoba, the Customer Service Regulation was the first standard to have been completed.⁵⁵ It was created by the AAC which stood in the place of a standard development committee. This arrangement was made in order to protect the continuity of ideas of the newly formed AAC.⁵⁶ Although the AAC has developed an Accessible Employment Standard Development Committee,⁵⁷ it remains to be seen whether the phenomenon of having the AAC double as a standard development committee will recur in the future. The AAC spent nine months conducting background research, writing a discussion paper, conducting public consultations, and reviewing comments and submissions received on the proposed customer service accessibility standard.⁵⁸ The proposed standard was made available to the public via the Disabilities Issues Office website before the AAC submitted their recommendations to the minister.⁵⁹ The minister then worked with the Council to further review the comments submitted and an amended standard was submitted to Cabinet for approval.⁶⁰

Public consultations during the standard development process are useful for actualizing the philosophical and social goals inherent to the AMA. They offer the potential to discuss and develop, in granular detail, standards that can counter the human rights barriers of inaccessibility and lead to improved health, independence and well-being of persons with disabilities. Consultations can also serve to put in practice the guiding principles laid out in the statute including universal design and systemic responsibility while encouraging a more inclusive understanding of the experience of disability. A further advantage of public consultations is that they offer a potential response to the social model critique that an approach to disability focused on societal barriers overlooks the intersectional nature of disability discrimination. Put another way, public consultations provide an opportunity for individuals with disabilities to bring forward the connections between disability discrimination and discrimination based on additional often immutable personal characteristics. Yet, as we see from the overview of the standard

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- The government's response is posted on the DIO's website for public comment during a 60-day period as required by the AMA.
 - The council reviews the suggested amendments and provides a report for the minister's consideration.
 - The minister makes any final amendments to the proposed standard before it is presented to Cabinet for approval.
 - The standard is enacted as a regulation, and becomes law.

⁵⁴ Manitoba, Disabilities Issues Office, *Introducing the Accessibility for Manitobans Act* at 13.

⁵⁵ The Customer Service Standard came into effect on November 1, 2015. Full text and information about the regulation may be found online: <http://www.accessibilitymb.ca/customer-service-standard.html>

⁵⁶ Manitoba, Customer Service Development Committee, "Initial Recommendations for a Proposed Customer Service Standard to the Minister responsible for Persons with Disabilities" (October 3, 2014), online: http://www.gov.mb.ca/dio/pdf/CSS_report_to_govt.docx.

⁵⁷ "Accessible Employment Standard – next area for standard development," online: <http://www.accessibilitymb.ca/employment-standards.html>.

⁵⁸ Letter from Disabilities Issues Office to Deaf Centre Manitoba Inc. (27 April 2015) re: Government of Manitoba Proposed Customer Service Accessibility Standard, online: <http://www.deafmanitoba.org/2015/04/government-of-manitoba-proposed.html> Disabilities Issues Office.

⁵⁹ Manitoba, Disabilities Issues Office, online: Disabilities Issues Office <http://www.gov.mb.ca/dio/>.

⁶⁰ *Ibid.*

development process, all of these opportunities will require a certain amount of organization on the part of disability advocates to ensure that their messages are brought forward. They will also have to seek opportunities to be appointed to relevant decision-making committees in charge of developing the standards in order for a true chance to make their reasons heard.

iii. Public Consultations, Standard and Statute Review

Reviews of the standards and the statute designed pursuant to them offer additional opportunities for citizen participation to enhance the social inclusion of persons with disabilities.

According to government documents, a review of each accessibility standard will be conducted once every five years from the date of enactment by the AAC.⁶¹ This review will examine how well the standard is being implemented and by whom it is being implemented.⁶² The AAC will use this review to make recommendations to the minister on updating the standard.⁶³ The statute indicates that a similar consultation process should be applied in reviewing the standard as is applied in creating the standard.⁶⁴ This means that stakeholders from within the community of persons disabled by barriers, members of industry and of government will be invited to consult. Involving the public and relying on the dispersed knowledge of citizens in these reviews is one way that the process benefits and ensures a widespread response for improving the regulatory standards.

According to the legislation, a review of the effectiveness of the AMA is to be conducted within four years of it coming into force, and a subsequent review is to be conducted five years after that.⁶⁵ The review must involve consultations “with the public, in particular, with persons disabled by barriers or representatives from organizations of persons disabled by barriers”⁶⁶ Once the comprehensive review is complete, a report is to be submitted that may include recommendations for improving the Act.⁶⁷

It is a particularly interesting and a unique feature of the statute that the review of the statute focuses primarily on consultation with persons with disabilities. This is the one place in the statute where other stakeholders such as businesses and government are not highlighted as required consultees. The step shows an effort on the part of the drafters to ensure that those who are to benefit from the Act have the chance to express their evaluations of how effective the Act is.

⁶¹ *AMA*, *supra* note 1 at s 11. Manitoba, Disabilities Issues Office, *Government Response to Recommendations of the Accessibility Advisory Council for a Made-in-Manitoba Accessibility Act*, by Honourable Jennifer Howard, Minister Responsible for Persons with Disabilities, at 7.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *AMA*, *supra* note 1 at s 11(2).

⁶⁵ *AMA*, *supra* note 1 at ss 39(1), (6).

⁶⁶ *AMA*, *supra* note 1 at s 39(3).

⁶⁷ *AMA*, *supra* note 1 at s 39(4).

V. Enforcement and Compliance

Once a standard has been developed, enforcement will be the true test of its ability to effect social change. At the time of writing, no enforcement activity had yet been taken by the government office responsible for enforcement and compliance in Manitoba.⁶⁸ There have been significant challenges relating to enforcement and compliance in the pioneer province of Ontario. The province of Manitoba and future provinces enacting accessibility legislation will be wise to draw lessons from these challenges. The challenges relate primarily to holding government to its obligation of enforcing the standards once the standards are in place. There is also a second challenge of preventing government from reducing the protections provided under the legislation through its discretionary pockets of power.

The statute organizes enforcement around voluntary compliance followed by government inspections and penalties. Persons or organizations that are subject to the AMA's accessibility standards "must comply with the standard within the time period specified in the standard."⁶⁹ Several accessibility standards can apply simultaneously to a person or organization or to an aspect of the built environment. An accessibility standard may also be general or specific in its application and limited as to time and place.⁷⁰ In terms of conflict, if there is a provision in the Act or the regulations (including the standards) that conflicts with a provision of any other enactment, "the provision of this Act or the regulations prevails unless the other enactment provides a higher level of accessibility for persons disabled by barriers."⁷¹ Presumably, this would apply if there are conflicts between the standards as well.

Inspectors are appointed by the responsible minister. The role of an inspector is to "determine compliance with the AMA or the regulations; verify the accuracy or completeness of information provided or perform any other duty or function that the director or inspector considers necessary or advisable to administer or enforce the Act and the regulations."⁷² Under the AMA, inspectors have wide powers of entry and search even without a warrant.⁷³ This right of entry does not apply to residential dwellings unless the owner or occupant has given consent.⁷⁴ Those in charge of the premises being inspected must assist the inspector by providing whatever they need, and by answering all of the inspector's questions.⁷⁵ If an inspector is denied entry to a premise

⁶⁸ Correspondence with the Manitoba Disability Issues Office, June 3, 2016 (notes on file with authors). At that time, research was being conducted on different enforcement models.

⁶⁹ *AMA*, *supra* note 1 at s 20.

⁷⁰ *AMA*, *supra* note 1 at ss 6(8).

⁷¹ *AMA*, *supra* note 1 at s 21.

⁷² *AMA*, *supra* note 1 at s 24(1). For information on the role and duties of the director, see ss 22(1), (2) and (3).

⁷³ An inspector has the right of entry without a warrant to "any who are subject to the Act or regulations, or any other area where the inspector has reasonable grounds to believe that records or things relevant to the administration or enforcement of this Act or the regulations are kept." See *AMA*, *supra* note 1 at s 24(2).

⁷⁴ *AMA*, *supra* note 1 at s 24(3).

⁷⁵ *AMA*, *supra* note 1 at s 24(5).

subject to the Act or regulations, they can apply for a warrant without notifying those in charge of the location.⁷⁶

An inspector who finds that a standard has been contravened may give a written order requiring the person or organization responsible for the contravention to remedy it. Persons and organizations can request the director to review an inspector's order. The director is a civil servant appointed to take care of the general administration of the AMA, to advise the minister on the AMA's functioning and to perform various other duties assigned by the minister.⁷⁷ The director must receive the review request within 14 days after the order is served or else the order is final. No hearing is required, but the director must allow the person or organization to submit written submissions. The director ultimately decides whether to confirm the inspector's original order, or to revoke or alter it. If the person or organization still feels that the decision is unfair, it can be appealed to the court.⁷⁸ After hearing the appeal, the court may confirm the order or notice, nullify it or alter it in any manner that it considers appropriate.⁷⁹

If a review of the order has not been requested and the director finds that a person or organization has failed to comply with the order, the director may, at their discretion, require the person or organization to pay an administrative penalty in an amount determined in accordance with the regulations.⁸⁰

There is no offence if the person or organization pays the administrative penalty for non-compliance. They may not be charged with an offence in respect of that non-compliance unless it continues after the penalty is paid.⁸¹ With respect to the public's right to know about compliance, the director may issue public reports which disclose details of orders and administrative penalties. Within these public reports, the director is also allowed to disclose personal information.⁸² Personal Information is not defined in the statute but likely has limitations based on the province's access to information and privacy legislation. The more information that is produced publicly about compliance with the Act and enforcement by inspectors and directors, the better it will be for all stakeholders to seek improvements.

Overall, enforcement of the AMA rests significantly on government discretion. It will be at the government's discretion that inspectors are put out to investigate potential issues, that administrative penalties are ordered, and that public reporting of contraventions of the act will be done.. Government discretion fuels any audits that may be made to ensure that accessibility plans

⁷⁶ *AMA*, *supra* note 1 at s 26(2).

⁷⁷ *AMA*, *supra* note 1 at s 22.

⁷⁸ *AMA*, *supra* note 1 at ss 28(1)-(6).

⁷⁹ *AMA*, *supra* note 1 at s 30(6).

⁸⁰ *AMA*, *supra* note 1 at s 29(1). Appeals from the penalty can be made to the court on the grounds that the amount of the administrative penalty was not determined in accordance with the regulations, or the amount of the penalty is not justified in the public interest." *AMA*, *supra* note 1 at ss 30(1)(b) and 30(2)(b).

⁸¹ *AMA*, *supra* note 1 at s 31(4).

⁸² *AMA*, *supra* note 1 at s 32.

and accessibility reports are filed. One lesson that should be learned from Ontario's experience with the AODA is that lack of political will to enforce accessibility standards can effectively obstruct the philosophical and social goals of accessibility standards statute. In Ontario, two years after the first self-reporting due date under the Customer Service regulation, 70% of companies had not filed a report, representing 36,000 businesses across the province. They also had not been audited.⁸³ As of 2016, only four violations have been brought before the responsible tribunal. Even more disturbingly, in June, 2016, the Ontario government reduced the scope of application of the AODA Customer Service Regulation. Private sector organizations no longer need to have their customer service accessibility policy in writing, to provide it in writing to the public on request nor to keep records of employee training on customer service accessibility.⁸⁴ Since auditing is conducted on the strength of papers produced by organizations, this causes a significant barrier to auditing these organizations for their compliance. It will be necessary for Manitoba to avoid the challenges faced in Ontario in order to be successful in enforcement and compliance.

VI. Conclusion

In conclusion, the AMA presents a strong set of philosophical and social goals. Its philosophical goals mark accessibility as a human right, and aim to improve the health, independence and well-being of persons with disabilities. The AMA's social goals rest on promoting the pillars of access, equality, universal design and systemic responsibility – guiding principles which are expressly set out in the statute. These social goals have the promise of positively impacting the development equality law norms within the context of disability discrimination. The statute's philosophical and social goals also aim implicitly to update both the definition of disability, so that it is understood as an experience that affects everyone, and the way Manitobans think about disability, to underscore that it is an experience that could affect any individual. Nonetheless, the AMA could be strengthened with a more robust and explicit understanding of how disability discrimination issues are experienced. There should be a greater recognition of the relevance of embodied impairment on an individual level, and more significant scope for the statute to address intersectionality within disability discrimination. These two challenges replicate the two principal critiques of the social model of disability on which the Act is based. Finally, for the legislation to be successful, issues of compliance and enforcement that require positive uses of discretion on the part of the civil service should be addressed early on.

⁸³ Laurie Monsebraaten, "Ontario vows to enforce accessibility law: Businesses flout requirements to report on how they are meeting needs of customers with disabilities, while enforcement strategy lags" *Toronto Star*, February 20, 2014.

⁸⁴ AODA Alliance, "A Sad Game-Changer for 1.8 Million Ontarians with Disabilities" (June 7, 2016), online: <http://www.aodaalliance.org/strong-effective-aoda/06072016.asp> and Michelle Mcquigge, "New Ontario customer service accessibility rules inadequate, advocacy group says" *City News*, June 6, 2016, online: <http://www.citynews.ca/2016/06/06/broader-accessibility-training-coming-for-staff-at-ontario-companies/>.

