



## Consideration of New Zealand's initial report under Article 35 of the Convention on the Rights of Persons with Disabilities

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### Response to List of issues

*New Zealand Human Rights Commission | Te Kāhui Tika Tangata*

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The New Zealand Human Rights Commission | Te Kāhui Tika Tangata (**Commission**) is an independent national human rights institution with 'A' status accreditation. It derives its statutory mandate from the Human Rights Act 1993.

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**22 August 2014**

## Introduction

1. The New Zealand Human Rights Commission (“Commission”) derives its statutory mandate from the Human Rights Act 1993 (“HRA”). The long title to the HRA states that the Commission’s role is to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights. The Commission has “A” status accreditation from the International Co-ordinating Committee of National Human Rights Institutions.
2. The Commission appreciates the opportunity to provide information to the Committee on the Rights of Persons with Disabilities (“Committee”) in response to the List of issues (“LOI”) on New Zealand’s initial report under the Convention on the Rights of Persons with Disabilities (“CRPD”).
3. The New Zealand government established an Independent Monitoring Mechanism (“IMM”) in 2011 to fulfil the requirements of Article 33 of the CRPD. The IMM consists of three independent partners: the Ombudsman, the Commission and the Convention Coalition.<sup>1</sup>
4. In 2013 the Commission, both independently and as a member of the IMM, made submissions to the United Nations Human Rights Council in relation to New Zealand’s second Universal Periodic Review (“UPR”). In its submission the IMM highlighted ongoing concerns in relation to data collection, education, reasonable accommodation and accessibility.<sup>2</sup> Attached as Appendix 1 is a copy of the IMM submission to the UPR.
5. In August 2014 the IMM released its second report on the implementation of the CRPD in New Zealand. Attached as Appendix 2 is a copy of the Summary version of the IMM’S second report on the implementation of the CRPD in New Zealand.
6. The report identifies five key areas where, despite some progress, more work is required in order to promote the greater realisation of the rights set out in the Convention. These five key areas are:
  - data
  - accessibility
  - building a people driven system
  - violence and abuse

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<sup>1</sup>The Convention Coalition is made up of seven national Disabled People’s Organisations.

<sup>2</sup> Copies of the Commission and IMM submissions to the UPR can be found here:

<http://www.hrc.co.nz/international-human-rights-new/upr-1314-nzs-second-universal-periodic-review/>

- education.
7. In addition to these five key areas a number of specific matters of concern were identified including the need for urgent attention to stop disabled New Zealanders with intellectual/learning disabilities dying up to 23 years before the rest of the population. More than 10 years ago, a National Health Committee report criticised significant health disparities for people with intellectual/ learning disabilities. However, there is little evidence of any progress to address this systemic health abuse. Life expectancy of people with intellectual/learning disabilities remains considerably less than the rest of the population. The Commission welcomes the government's focus on improving health outcomes for disabled people in the 2014-18 Disability Action Plan.
  8. The government responded to the LOI in June this year. The Commission has reviewed the government's response. This paper seeks to clarify a number of matters raised in the government's response. In addition it highlights some additional challenges which did not form part of the issues raised in the government's response.

## **List of issues in relation to the initial report of New Zealand**

### **A. Purpose and general obligations (arts 1 – 4)**

#### **Purpose (art.1)**

#### ***OP CRPD***

9. In 2012 the Court of Appeal affirmed that the policy of not paying family carers to provide disability support services to disabled family members constituted unjustifiable discrimination on the basis of family status. In direct response to this decision the government passed the New Zealand Public Health and Disability Amendment Act under urgency<sup>3</sup> on 17 May 2013. The Act effectively ousts the Commission's jurisdiction and removes any potential domestic remedy for unlawful discrimination relating to family care policy.<sup>4</sup> The passage of the Act from introduction to enactment in 24 hours with no opportunity for Select Committee Review, a heavily redacted Regulatory Impact Statement and a report from the Attorney General that the Bill breached BORA was greeted with despondency and despair by disabled people.<sup>5</sup>

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<sup>3</sup> Meaning that despite there being significant human rights implications, neither the Commission nor the public were able to make submissions on the Bill.

<sup>4</sup> It stops people from bringing unlawful discrimination complaints about a family care policy to the Commission. Nor will any proceedings be able to be commenced or continued in any court in relation to discrimination.

<sup>5</sup> In August 2013 the Disabled Person's Assembly ("DPA") launched a petition to repeal the *New Zealand Public Health and Disability Amendment Act 2013*.

10. In light of such developments the Optional Protocol to the CRPD has particular significance, both symbolically and practically, for disabled people in New Zealand. The Commission notes that the government has stated, in its reply to the LOI, that it has begun the treaty examination process with a view to acceding to the Optional Protocol. The Commission welcomes this commitment.

#### **General Obligations (Article 4)**

11. Over the past 12 – 18 months there has been a significant shift in the way in which the government engages with disabled people around decisions that affect them. The government's response to the LOI accurately reflects these developments.
12. The Commission commends the government for its commitment to developing an approach to engagement with Disabled Peoples Organisations (“DPOs”) founded on partnership, transparency and respect. Such an approach presents significant opportunities for disabled people to inform and enhance government priority setting, policy development and practice. The Commission is particularly encouraged that the principles of engagement agreed between DPOs and the Chief Executive's group will be progressively embedded across all government agencies from June 2014.
13. The govt notes in its response that targeted funding for IMM partners continues. However, targeted funding for the Commission to perform its IMM role has been discontinued. The Commission is now required to undertake its functions in relation to the IMM within pre existing baseline funding.

#### **B. Specific Rights**

##### **Equality and non-discrimination (art. 5)**

##### *Discrimination complaints data*

14. The Commission is mandated under the HRA to receive complaints of discrimination on the grounds of disability. Complaints can either relate to discrimination in the private sector (Part 2 of the HRA) or to discrimination in the public sector (Part 1A of the HRA).
15. The primary function of the Commission in relation to complaints is to facilitate the resolution of disputes in the most efficient, informal, and cost effective manner. The HRA envisages a variety of ways in which the Commission can assist in resolving a complaint. This includes the provision of information, mediation or other assistance. The Commission does not make a determination as to the merits of a complaint, nor does it provide – or recommend – specific remedies. Rather it acts as a facilitator to resolve matters that come before it.

16. In the period 1 July 2013 to 30 June 2014 there were 402 complaints made to the Commission alleging unlawful discrimination on the grounds of disability. One hundred and eighty one were from females and 185 from males.<sup>6</sup>

*Summary of complaints disaggregated by area*

Area	Total	Female	Male
Employment	85	50	21
Accommodation	13	6	7
Provision of goods and services	72	30	30

17. Of the 402 complaints received 73% were resolved or partly resolved through the Commission's disputes resolution process.

*How complaints were resolved*

Assistance or information to self-resolve	Mediation	Unable to be resolved through Disputes resolution process	Withdrawn or outside jurisdiction	Still open
61%	12%	4%	16%	7%

*New Zealand Public Health and Disability Amendment Act 2013*

18. As noted above the New Zealand Public Health and Disability Amendment Act effectively removed any potential domestic legal remedy for unlawful discrimination relating to the government's family care policy. The Commission has consistently urged the Government to repeal this legislation. In August 2013 the Disabled Person's Assembly ("DPA") launched a petition to repeal the Act. On 22 July this year the petition was presented to Green Party Member of Parliament, Catherine Delahunty.<sup>7</sup>

<sup>6</sup> Some of these complaints are still open and the records on personal statistics may not have been completed. In addition it should be noted that providing information about gender is voluntary and in some cases there is no opportunity to obtain this personal information. The collection rate for gender statistics is approximately 91%.

<sup>7</sup> <http://www.dpa.org.nz/news>

*Section 52 of the Human Rights Act 1993*

19. Section 52 of the HRA effectively creates a requirement of reasonable accommodation in relation to the provision of facilities and services. In 2008 the Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill was passed to enable ratification of the CRPD. Through this process no amendments were made to section 52 of the HRA.
20. Section 52 provides for an individual proportionality analysis - on a case by case basis - with a focus on the type of accommodation requested against the requisite burden of the individual. On this basis it was considered that section 52 complied with the CRPD.
21. In *Smith v Air New Zealand Ltd*<sup>8</sup> the Court of Appeal considered the definition of “reasonable accommodation” in article 2 of the Convention and confirmed that section 52 was consistent with that definition. The Commission agrees with this assessment.
22. However, in practice a lack of understanding of the need for reasonable accommodation and the lack of competence to apply the principles of reasonable accommodation remains an issue and is at the heart of many complaints and enquiries in both the public and private sector. This is due, in part, to the absence of a clear overarching definition of reasonable accommodation in the HRA. The Commission believes that the interests of disabled people would be better served if the HRA contained a general obligation to accommodate disability and a definition of reasonable accommodation.
23. The government has noted that the Ministry of Justice is currently developing guidance on reasonable accommodation for public activities. The Commission is concerned that there has been little progress on this work.

**Women with Disabilities (art. 6)**

*Programmes designed to support women with disabilities in employment, combating violence and other aspects of life*

24. In its response to the LOI, the government has provided a comprehensive list of programmes aimed at supporting women and girls with disabilities. However, it should be noted that only one project included in the “It’s Not OK” and “Think Differently” programme is tailored to disabled women. No programme is tailored to disabled girls. The “Voice Against Violence” work is limited to Girl Guiding. There is potential for this type of initiative to be rolled out across all schools (primary and secondary) and joined up with the national Bullying Prevention and Family Violence Prevention work.

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<sup>8</sup> [2011] NZCA 20

25. The government has not provided any assessment of the extent to which the programmes it has identified are successful in improving the realisation of rights for disabled women and girls. The failure to provide this assessment is due, at least in part, to the distinct absence of disaggregated data on the human rights outcomes of disabled women and men.
26. The Families Commission has recently established a Social Policy Evaluation and Research Unit to provide high quality independent monitoring and evaluation on how effective various programmes and initiatives are across the social sector. This presents a unique opportunity to assess whether government initiatives aimed at supporting disabled women and girls are working and enabling good lives for this sector of society. The Commission would welcome a commitment from the government to ensure that the Social Policy Evaluation and Research Unit's work specifically include the experiences of disabled women and girls.

### **Children with Disabilities (art. 7)**

27. New Zealand has policies in place to support disabled children. However, the extent to which these entitlements are enabling children and young people to have the best opportunity to reach their potential is unclear. There is insufficient data on disabled children to make this assessment.
28. The IMM has noted in its second report on the implementation of the CRPD in New Zealand that:

*There are a number of current projects contributing to reform of the disability support system...It is critical that these initiatives are available for disabled children as early as possible.*

29. The Commission agrees and would welcome a commitment from government to ensure all disability support projects and programmes are accessible to children as early as possible and preferably in the community.

### *Gateway Assessments*

30. As noted by the government in its response to the LOI, Gateway Assessments are now conducted on every child or young person entering state care. Referrals are then made to health and education services to address any needs identified. However, there are very few mechanisms available to ensure the safety of disabled children and young people in state care<sup>9</sup> (especially those who experience intellectual/learning impairments, and behavioural and/or psychological challenges).

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<sup>9</sup> Including foster care, youth detention facilities, and child and adolescent mental health facilities in particular.

31. There is an assumption that once 'vulnerable children' are transitioned from family care, into state care, they will be safe. However, there is substantial evidence of ongoing abuses in state care. This form of violence is not central to the national violence prevention programme and it's not adequately picked up elsewhere. There needs to be a connection between gateway assessments and the particular vulnerabilities of disabled children entering state care - who are already 3-4 times more likely to have been abused or neglected than non-disabled children - to prevent compounding abuses over their state 'care' life course and beyond.

*Vocational support services to school leavers*

32. While the Vocational support service is available to those who have a significant level of physical, intellectual or sensory impairment, there is no similar provision for school leavers with severe mental illness and/or drug and alcohol abuse.

**Accessibility (art. 9)**

*The Building Act 2004 and the Building Code*

33. The Building Act 2004 ("Building Act") is a regulatory framework, a licensing regime and a set of standards for building in New Zealand. Its purpose includes setting standards to ensure that buildings contribute appropriately to the health, independence and wellbeing of the people who use them.
34. The principles of the Building Act include the need to provide "reasonable and adequate provision" for disabled people to "enter and carry out normal activities and processes" within the building. This principle must be taken into account when performing functions or duties imposed under the Act.
35. Section 118 of the Building Act requires that all new public buildings must make reasonable and adequate provision to enable disabled people to visit or work in that building, and to carry out normal activities and processes, within these buildings. Section 112 of the Building Act relates to alterations to existing buildings. It requires that a building consent only be granted where a territorial authority is satisfied that the building will comply as nearly as is reasonably practicable with the building code provisions for means of escape from fire and access and facilities for disabled people.
36. Nonetheless buildings continue to be built, facilities developed and public spaces designed that do not comply with universal design principles.<sup>10</sup> It is apparent from the IMM's monitoring that the problem is caused by a number of factors including inadequate standards implementing the legal requirements, a lack of awareness and

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<sup>10</sup> Human Rights Commission, *Better Design and Buildings for Everyone: Disabled Peoples Rights and the Built Environment*. Auckland 2012.

commitment to universal design and inconsistent professional competence in designing accessible facilities.

37. In 2013 the government introduced the Building (Earthquake – prone Buildings) Amendment Bill. This Bill includes provision for buildings to be exempted from current building requirements to upgrade disability access and fire access when undergoing earthquake strengthening. The rationale for this is that the cost of implementing the upgrade provisions can operate as an impediment to owners strengthening their buildings, particularly for old or historic buildings. While the Commission acknowledges the need to ensure that New Zealanders are not at undue risk of harm from earthquake prone buildings, it does not believe that the correct balance in realisation of human rights is achieved by the Bill. Furthermore the Commission considers that should the Bill pass into law, it will represent a significant retrogressive step in terms of compliance with article 9 of the CRPD.
38. In December 2013 the government announced a review into building access for disabled people which was due to report back by the end of June 2014. At the time of writing the outcome from the review had not been released.

#### **Situations of risk and humanitarian emergency (art.11)**

##### ***Consultation with Disabled people***

39. The Earthquake Commission (“EQC”) has developed a programme for prioritising repairs for vulnerable claimants. However concerns have been raised around the appropriateness of inclusion criteria, processes for identifying those who meet the criteria, and the standards of service delivery to prioritised claimants. Some of these concerns could have been mitigated by better and more thorough engagement with DPOs and other community groups. This would have ensured that the rights of disabled people in the residential rebuild are afforded appropriate recognition and protection.

#### **Equal Recognition before the law (art. 12)**

##### ***The Protection of Personal and Property Rights Act 1988***

40. When New Zealand ratified the CRPD the Protection of Personal and Property Rights Act 1988 (“PPPR Act”) was considered to be compliant and no amendments were made. One of the cabinet papers prepared by the Office of Disability Issues and the Ministry of Foreign Affairs and Trade during the negotiation of the Convention did however, note (in relation to legal capacity and personal representation) that supported decision making did not prohibit the use of personal representatives under the PPPR Act.<sup>11</sup>

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<sup>11</sup> Office of Disability Issues and Ministry of Foreign Affairs and Trade *Towards a Disability Rights Convention* at [25]

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41. Section 5 of the PPPR Act sets out a general presumption of competence (although referring to “capacity” in the body of the section). The jurisdictional hurdles that need to be overcome before a Welfare Guardianship order is made require the subject person to wholly lack the capacity to make and communicate decisions about aspects of their personal care and welfare, as well as understand the implications of those decisions. The appointment of a Welfare Guardian must also be the only satisfactory way of ensuring that appropriate decisions are made relating to those areas where capacity is lacking.
42. The PPPR Act also envisages that any measures relating to the exercise of legal capacity be proportional and tailored to their circumstances. The wording of s 12(2) makes it clear that even though capacity must be “wholly” lacking, it need not be global since it refers to “... any particular aspect or particular aspects of ... personal care and welfare”. It follows that a person may well lack the capacity to make decisions in some areas but retain the ability to do so in others. As Inglis J noted:

*It is enough for the purposes of the subsection to identify particular and specific areas in which decisions on personal care and welfare are required and the patient “wholly” lacks the capacity to make such decisions.*<sup>12</sup>

43. In fact many of the provisions of the PPPR Act clearly reflect the requirements of Article 12 of the CRPD.<sup>13</sup>

<b>ARTICLE 12</b>	<b>PPPR ACT</b>
12.1 Right to recognition as a person before the law	S 5 Presumption of competence/ capacity
12.2 Equal legal capacity	S 4 Everyone presumed to have legal capacity
12.3 Provision of support to exercise legal capacity	S 8(b) Primary objective of court to enable or encourage person to exercise & develop such capacity as they have
12.4 Safeguards to prevent abuse in	S 6 Court must be convinced a person lacks capacity before making an order under Act

<sup>12</sup> Supra fn 40 at 449

<sup>13</sup> Some commentators consider that the legislation could be clearer and contain more comprehensive statements of principle, see, Bill Atkin & Anna-Marie Skellern “Adults with Incapacity: The Protection of Personal and Property Rights Act” in John Dawson & Kris Gledhill (ed.s) *New Zealand’s Mental Health Act in Practice* (Victoria University Press, Wellington, 2013) at 352

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exercising legal capacity	S 8 Primary objectives of the court – least restrictive intervention S 12(2) High jurisdictional threshold before a welfare guardianship order can be considered
12.4 Respect will and preferences of the person	S 12(7) Court to ascertain the wishes of the subject person when deciding welfare guardianship; S 18(4)(c) Requirement to consult with subject person
12.4 Free of conflict of interest and undue influence	S 12(5)(c) Requirement that there should be no conflict of interest when appointment made
12.4 Safeguards proportional and tailored to individual's needs	S 9(2) Need to consider type of order given objectives in S 8 – including ensuring the least restrictive option is adopted S 10 – provides a variety of orders that can be tailored to meet the individual's needs
12.4 Subject to regular review	S 10 (3) Review of personal orders S 12(8) Welfare guardianship order to be reviewed every 3 years
12.5 Right to control finances & property	Part 5 – s 28. In making property orders primary objectives are to make the least restrictive intervention in the person's affairs & encourage them to exercise and develop the competence to manage their own property

44. While the terms of the PPPR Act are arguably consistent with the obligations under the Disability Convention, it does include broad discretionary powers which allow the Family Court to empower a Welfare Guardian with similarly broad discretions over a disabled person. The breadth of these discretions is balanced in the Act by the front-end safeguard of, first, a presumption of competence and, second, the theoretically high jurisdictional threshold of total incapacity. At the back-end are the safeguards of regular review and a requirement of proportionality. Within those parameters, the PPPR Act authorises a welfare guardian's decisions to be substituted for those of the person found to be lacking capacity.
45. The Commission believes that these wide discretionary powers have the potential to be applied inconsistently with the Convention if the Courts do not properly engage with New Zealand's obligations under the CRPD when interpreting the PPPR Act and the

discretions it confers.

46. The concept of the least restrictive intervention is a central objective under the PPPR Act. It has been suggested that it only comes into play once jurisdiction has been established and to apply it otherwise would unduly limit the application of the Act.<sup>14</sup> That is, it will govern the mode of exercise of jurisdiction, once that is established, rather than limiting the circumstances in which jurisdiction arises.<sup>15</sup> The rationale for this is that if it is relied on to assess preliminary jurisdiction then it would limit the Act to “all but the most compelling cases of incapacity.” Such an interpretation is arguably at odds with the requirement, as set out in the Committee’s General Comment on Article 12, that the exercise of legal capacity and more intensive forms of support should be based on the individual’s preferences not on what is perceived objectively as being in their best interests.
47. Given the continued lack of clarity as to whether the provisions of the PPPR are applied in a manner consistent with supported decision making principles, the Commission welcomes the government’s commitment, in the Disability Action Plan 2014 -2018, to prioritising work on ensuring disabled people can exercise their legal capacity.

### **Access to justice (art.13)**

#### ***New Zealand Sign Language***

48. Despite many recent government initiatives across the justice sector, concerns remain about inconsistent access to New Zealand Sign Language (“NZLS”) interpreters in some courts due, in part, to a lack of qualified NZLS interpreters. It is unclear whether the progressive introduction of Video Remote Interpreting (“VRI”) across government has done anything to mitigate this issue.
49. In September 2013, the Commission released *A New Era in the Right to Sign*<sup>16</sup>, a comprehensive report into New Zealand Sign Language. One of the Commission’s recommendations was to:

#### ***That the Ministry for Business, Innovation and Employment:***

*[Develop] reporting mechanisms for measuring uptake of video remote interpreting (VRI), in consultation with other government agencies, to enable government agencies to make comparisons between usage of VRI and face-to-face interpreter services*<sup>17</sup>.

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<sup>14</sup> *Hutt Valley District Health Board v MJP* [2012] NZFLR 485 (FC), as per Moss J.

<sup>15</sup> Above n 44 at [16]

<sup>16</sup> <http://www.hrc.co.nz/wp-content/uploads/2013/09/A-New-Era-in-the-Right-to-Sign-for-web.pdf>

<sup>17</sup> *Ibid.*

50. The Commission notes that it is essential that VRI complements rather than replaces face-to-face interpreting, which will often continue to be the most appropriate and accessible service for deaf people.

### **Liberty and Security of the person (art.14)**

#### ***Mental Health (Compulsory Assessment and Treatment) Act 1992***

51. The number of people subject to both community and inpatient compulsory treatment is growing both absolutely and as a proportion of the population. Of particular concern is that New Zealand's use of community treatment orders is amongst the highest in the world.<sup>18</sup>

#### ***Seclusion in the treatment of patients***

52. Although there has been an improvement in the philosophy of care in many mental health facilities the Ombudsman has identified some facilities where controlling practices are still in place. Specifically two forensic units were identified in 2012/2013 where a blanket policy was applied of locking patients in their bedrooms overnight.
53. The Office of the Director of Mental Health's annual report provides the following data in relation to seclusion in 2012<sup>19</sup>

*Between 1 January and 31 December 2102 ... 1101 patients ... experienced at least one seclusion event. Sixty-six per cent of secluded patients were male and 34 percent were female ... A total of 60 young people were secluded in the country's specialist facilities for children and young people....*

*...Māori are more likely to be secluded than people from other ethnic groups...*

54. Annual seclusion rates have been progressively dropping since a reduction policy was introduced in 2009. The Office of the Director of Mental Health annual report shows that the total number of seclusion hours has decreased nationally by 36 percent between 2009 and 2012.<sup>20</sup> However some district health boards ("DHB") are continuing to use seclusion at much higher rates than the rest of the country. Māori are significantly more likely than non-Māori to experience seclusion. In 2012 of the 882 people (aged 20 to 64) secluded in adult services, 32 percent were Māori.<sup>21</sup>

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<sup>18</sup> O'Brien AJ. *Community treatment orders in New Zealand: regional variability and international comparisons*, Australas Psychiatry (2014).

<sup>19</sup> Ministry of Health (2013) *2012 Annual Report, Office of the Director of Mental Health*

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

55. The Ministry of Health has advised that it will undertake discussions with these DHB's. It has also advised that it is currently reviewing its seclusion guidelines.

### **Freedom from violence and abuse (art. 16)**

56. Work continues to ensure government funded domestic and anti-violence programmes in New Zealand are provided in a way that supports disabled people and caters for their needs. The government in its response to the LOI has highlighted some of the key recent developments.
57. A recent study focusing on violence against disabled people highlighted the hidden nature of much abuse directed against disabled people within the community. In addition to the physical, emotional and sexual abuse experienced by non-disabled people, "locked in" and "silencing" violence is often specifically directed at disabled people.
58. The report noted that it was reasonable to interpret the Domestic Violence Act 1995 as generally excluding people in employer/employee relationships, such as care workers, from the definition of a domestic relationship. The author continued:<sup>22</sup>

*As such, it is not clear whether the Act adequately protects disabled people experiencing abuse in home-care/live-in support situations. There appears to be an uncertainty about the legal protection available to disabled people experiencing such abuse, and particularly emotional and psychological abuse.*

59. To date, there has only been limited acknowledgement of historic abuse and violence against disabled people that occurred in social welfare homes and institutions for people with learning disability or mental illness. Part of ensuring the safety and wellbeing of disabled people today and tomorrow is to ensure that these mistakes are made visible and that lessons are learned.<sup>23</sup> The Commission encourages the government to acknowledge historic abuse and the ongoing detrimental impact it has had on the lives of disabled people who were under state care. It is important that an apology accompany this acknowledgement.

### ***Sterilisation***

60. As the government has noted in its response to the LOI, the consent of an intellectually disabled girl under the age of 18 is not required before sterilisation can be performed. The Care of Children Act 2004<sup>24</sup> provides that a minor's guardians together with the

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<sup>22</sup> *The Hidden Abuse of Disabled People Residing in the Community: An Exploratory Study*, Roguski, M (18 June 2013) <http://www.communityresearch.org.nz/wp-content/uploads/formidable/Final-Tairawhiti-Voice-report-18-June-2013.pdf>.

<sup>23</sup> *Ibid*, p 49.

<sup>24</sup> Care of Children Act 2004 s36(1)

appropriate medical professionals have the authority to decide which medical treatments they will receive and the High Court has observed that court authorisation in a case of sterilisation is not required.<sup>25</sup> This is in stark contrast to similar jurisdictions, such as Australia, where a court order is required. The Commission is unaware of any government work programme to review or amend the current framework.

### **Respect for home and the family (art. 23)**

#### ***Adoption Act***

61. The Adoption Act 1955 (“AA”) is one of the oldest statutes in New Zealand with ongoing application. It was enacted at a time when societal structures and mores were very different from today. The AA relies on a number of grounds of prohibited discrimination to regulate the adoption process.
62. Over the years the courts have made attempts to construe the AA in such a way as to align it with contemporary civil life. Executive government and Crown Entities such as the Law Commission have also reviewed the AA. The theme that consistently emerges from these court decisions and reviews is that at least some of the discrimination contained in the AA is unjustified and a barrier to ensuring justice in individual cases.
63. As stated by the government in its response to the LOI section 3 of the AA places no restriction on the right of a person to make an application to adopt a child because of disability. It is to the courts to determine what may be in the best interests of a child in an individual case.
64. However, section 8 of the AA subjects disabled birth parents to differential treatment based on their disability. Section 8(1) (b) enables consent to an adoption order to be dispensed with if the court is satisfied that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child; the unfitness is likely to continue indefinitely; and reasonable notice of the application for an adoption order has been given to the parent or guardian. This is in stark contrast to all other parents who are assessed on the basis of their behaviour. In the Commission’s view section 8(1) (b) is outdated, redundant and discriminatory.
65. In 2013 *Adoption Action*<sup>26</sup> applied to the Human Rights Review Tribunal for a declaration that the AA and the Adult Adoption Information Act 1985 (“AIA”) are inconsistent with the anti-discrimination provisions in the New Zealand Bill of Rights Act 1990 and therefore contravene Part 1A of the HRA. It was claimed that the AA and AAI discriminate against certain classes of persons on a number of grounds including disability, referring in particular to s 8(1) (b). The Commission intervened in these

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<sup>25</sup> *Re X* [1991] 2 NZLR 365 (HC)

<sup>26</sup> *Adoption Action* is an incorporated society whose members include persons who have had personal experience of adoption whether as relinquishing parents, adopted persons or actual or potential adoptive parents.

proceedings. At the time of writing the decision of the Tribunal had not been handed down.

## **Education (art. 24)**

### ***Bullying***

66. In 2013 the government convened a cross-sector Bullying Prevention Advisory Group (“BPAG”). BPAG has produced a guide for schools to help prevent bullying and to provide practical advice on what to do when bullying occurs. The Commission is part of BPAG along with other accountability mechanisms such the Children’s Commissioner, Ombudsman and Education Review Office. The BPAG is currently developing an overall plan to prevent bullying. Suggestions that the plan focus only on disabled students and GLBTI student were rejected, at the Commission’s suggestion because in the Commission’s view changing the attitudes of non-disabled and non-GLBTI students was critical to improving inclusion of disabled and GLBTI students. It was agreed that there will be a focus on disabled and GLBTI students but the whole school culture needed to be addressed at the same time.
67. The Ministry of Education’s *Positive Behaviour for Learning*<sup>27</sup> initiative represents a major step towards ensuring that New Zealand schools are safe, positive and inclusive. It moves away from seeing individual students as a “problem” and towards proactively changing the environment around them to support positive behaviour. However, less than half the schools in New Zealand are engaged in the initiative.

## **Participation in cultural life, recreation, leisure and sport (art.30)**

### ***Captioning***

68. Captioned movie screening began in New Zealand in 2003. In addition funding for captioning on television has doubled in the last 10 years. However, despite these positive developments there remain very limited opportunities for blind, visually impaired, Deaf and hearing impaired people to consume television, cinema, DVDs, and the internet in accessible formats.
69. Currently 19 television channels have some level of captioning. However, a survey of free-to air television indicates that only 23 % of non-repeated programming is captioned.<sup>28</sup> There clearly remains a need for a comprehensive approach to the accessibility of broadcasting.

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<sup>27</sup><http://www.minedu.govt.nz/NZEducation/EducationPolicies/SpecialEducation/OurWorkProgramme/PositiveBehaviourForLearning/About.aspx>

<sup>28</sup> Captioning Working Group (2013) *Captioning in New Zealand – A Breakdown in the Number of Captioning Hours over TV1, TV2 and TV3*. Research conducted by the Captioning Working Group, November 2013.

**Appendix 1: IMM submission to the UPR 2013/2014**

**18<sup>th</sup> SESSION OF THE HUMAN RIGHTS COUNCIL**  
**UNIVERSAL PERIODIC REVIEW**

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**Making disability rights real**  
**Whakatūturū ngā Tika Hauātanga**

*Submission of the Independent Monitoring Mechanism of the  
Convention on the Rights of Persons with Disabilities*

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The Independent Monitoring Mechanism (IMM) for the implementation of the Convention on Rights of Persons with Disabilities (CRPD) was established by the New Zealand Government in 2011 to fulfil the requirements of Article 33 of the CRPD. The IMM consists of three independent partners: the Ombudsman, the Human Rights Commission and the Convention Coalition. The Convention Coalition is made up of seven national Disabled People's Organisations (DPOs) with provision for more DPOs to join the coalition

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**17 June 2013**

## **Introduction**

1. The IMM produced its first Annual Report in December 2013. The Convention Coalition has also produced two monitoring reports focussing on the perceptions of disabled people of the fulfilment of their rights. This submission is based on these three reports available at:

<http://www.hrc.co.nz/disabled-people/convention-on-the-rights-of-persons-with-disabilities/making-disability-rights-real>

<http://www.dpa.org.nz/other-publications>

2. The IMM recommends that all of the recommendations from its Annual Report for 2012 be considered for incorporation in cross-government Disability Action Plan. The following updates the information in the Annual Report and provides further commentary on the issues.

## **Nothing about us without us**

3. The CRPD requires that disabled people be actively involved in decision making processes that concern them through their representative organisations.<sup>29</sup> The establishment of the IMM and the role given to the Convention Coalition reflects this requirement. However, the IMM is concerned that in other areas of Government activity, the principle has not been established as a habitual way of working.
4. New Zealand struggles to consistently provide effective support services to disabled people. A large part of the failure is due to the lack of governance involvement by disabled people and their families. The Social Services Select Committee Inquiry into the Quality of Care and Service Provision for People with Disabilities, which was established after many incidents of abuse, neglect and deaths in care, reported in 2008. It identified concerns about the quality, training and availability of staff looking after people with disabilities with complex needs and raised questions about the Government's management and funding of the disability sector. Since then there have been a number of promising initiatives and trials around enabling good lives, increasing the housing options available to disabled people, and improving the way Ministry of Health supports are delivered. But progress has been slow in implementing the enquiry's recommendations. At time of writing, after several new instances of abuse, neglect and criminal assault in residential care facilities, the government has launched yet another inquiry into the way disabled people are being treated.
5. The passing of the New Zealand Public Health and Disability Amendment Act 2013 (NZPHDAA) is further cause for concern. The need for the Act arose out of longstanding legal action by a group of families including adult children with disabilities. The Court of Appeal, in *Ministry of Health v Peter Atkinson* in 2012 affirmed the right of parents to be paid as caregivers where the Ministry of Health has assessed a disabled person requires paid care.<sup>30</sup> In response the Act limits the circumstances in which family members can be paid, the category of family member that can be paid (e.g. parents but not spouses) and imposes a payment system with a lesser pay rate for family than is offered to non-family members using a different delivery system. The Government has closed off further legal action on this issue by declaring that no further complaints can be made regarding the payment, or otherwise, of family members as care givers.<sup>31</sup> The IMM sees both the payment regime and the removal of the rights of appeal to the courts as highly undesirable. Rather than fixing a previous inequality the IMM is concerned that the Act regularises a further inequality for disabled people and their families.

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<sup>29</sup> Article 4 (3) CRPD

<sup>30</sup> [2012] NZCA 184

<sup>31</sup> Section 70E NZPHDAA

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New Zealand's Second Universal Periodic Review.**

6. Providing disabled people (and others) with an avenue of last resort for making complaints when all other domestic avenues have failed would further reinforce that the Government is serious about respecting the rights of disabled people. The IMM understands that the Government is investigating what steps need to be taken to make it possible to ratify the Optional Protocol to the CRPD. The IMM sees this as a high priority.

7. **Recommendations:**

- a **That the government urgently reconsider the New Zealand Public Health and Disability Amendment Bill Act and in particular repeal those sections that limit further legal action and limit the circumstances in which family members can be paid and the categories of family member that can be paid.**
- b **That all areas in the Government's Disability Action Plan have a clear co-governance process that is adhered to.**
- c **That the Government ratifies the Optional Protocol to the Convention on the Rights of Persons with Disabilities.**

**Statistics and outcomes data**

8. The fulfilment of the IMM's role of monitoring, evaluating, reporting, advocating and advising on the implementation of the CRPD in New Zealand is heavily dependant on the availability of reliable data and statistics that track the achievement of disabled people's rights compared to those of non-disabled people. The IMM 2013 Annual Report attempted to establish a base line of achievement across key indicators in each of the rights areas. In most key areas reliable data was not available.

9. The Household Disability Survey provides the only reliable data in a range of areas such as employment, educational achievement, unfulfilled needs and difficulties using transport. The next Disability Survey will be administered in July 2013 with results beginning to be available in 2014. A review of the Disability Survey after the last iteration in 2006 has resulted in a more outcomes based survey that will provide better quality data. Statistics New Zealand, the government agency primarily responsible for gathering national level statistics, has indicated a willingness to include the measurement of disabled people's rights in regular review's of its surveys and other measures. Further work is required to ensure a comprehensive suit is statistics is available.

10. **Recommendations:**

- a **Statistics New Zealand ensures that key outcomes data for all New Zealanders are collected in a way that makes it possible to compare the outcomes for disabled and non-disabled people.**
- b **Statistics New Zealand develops comparable data sets, by December 2014, for education achievement, work force participation and living independently and being included in the community.**

## Accessibility

11. Accessibility is central to achieving other rights such as employment, education and freedom of expression. The two areas the IMM believes needs urgent attention are access to buildings and the built environment and access to official information.
12. New Zealand law requires that buildings be built or altered to meet the needs of disabled people and that disabled people have the same access to services and facilities as non-disabled people. Nonetheless buildings continue to be built, facilities developed and public spaces designed that do not comply with universal design principles.<sup>32</sup> It is apparent from the IMM's monitoring that the problem is caused by a number of factors including inadequate standards implementing the legal requirements, a lack of awareness and commitment to universal design and inconsistent professional competence in designing accessible facilities.
13. The rebuilding of Christchurch after the devastating earthquakes of 2010-11 provides the ideal opportunity to develop the most accessible city in the world. Some progress and commitments have been made, especially with the development of public sector facilities and housing. Commitment and awareness by the private sector is not consistent, with some examples of poor design.
14. The New Zealand Government has undertaken to make all websites associated with core government departments accessible, has produced a timetable for making this happen and is developing tools and professional development programmes to assist with this. The IMM welcomes this initiative and would encourage it to be applied to the wider state sector including Crown agencies, territorial authorities and district health boards.
15. The IMM also believes further consideration needs to be given to making information more accessible in other modes and formats. For example New Zealand Sign Language (NZSL) has been an official language of New Zealand since 2006. Very few government agencies have clear policies about when information should be available in NZSL or when professional NZSL interpreter services should be available.
16. **Recommendations:**
  - a **That the access codes and regulations applying to building and the built environment be reviewed and made mandatory by 2014.**
  - b **That all government agencies ensure that their own websites and the websites of government funded initiatives for which they are responsible comply with the Government Web Standards.**

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<sup>32</sup> Human Rights Commission, *Better Design and Buildings for Everyone: Disabled Peoples Rights and the Built Environment*. Auckland 2012.

## **Education**

17. New Zealand law requires that disabled students have the same access to education as non-disabled students in state schools. Despite this, of complaints to the Human Rights Commission about a government agency, about a third are about education. Complaints to the Commission are dominated by concerns about a lack of reasonable accommodation, unfair expulsions, exclusions and stand downs, bullying and funding issues.
18. The IMM welcomes the Government's requirement that all schools demonstrate inclusive practice by the end of 2014. While there have been some useful reforms it is difficult to see how the current suite of policies and programmes will result in fully inclusive schools.
19. One measure of the success of inclusive schools is educational achievement. Educational achievement is measured in a number of ways including national standards for primary schools, National Certificate of Educational Achievement pass rates at secondary school and international comparative studies. None of these allow a comparison of outcomes between disabled and non-disabled students.
20. Another way of measuring inclusive schools is via the incidence of bullying, harassment and other violence in schools. The work of all three partners to the IMM suggests that bullying at school is a particular issue for disabled students

## **21. Recommendations**

- a That the Ministry of Education establishes an enforceable right to inclusive education.**
- b That the Ministry of Education implements a whole of school anti-bullying programmes that ensure that schools are safe and nurturing places for disabled students.**

## **Reasonable Accommodation**

22. A lack of understanding of the need for reasonable accommodation and the lack of competence to apply the principles of reasonable accommodation to specific situations is at the heart of many complaints and enquiries in both the public and private sector. The IMM 2013 Annual Report identified only a few examples of government agencies that demonstrated by their actions a clear understanding of need for and application of reasonable accommodation.
23. A particularly concerning example of the failure to provide reasonable accommodation is the failure of the health system to provide for the health needs of people with an intellectual/learning impairment. A National Health Committee report in 2003 found that the health status of people with intellectual/learning impairments was worse than the average population across many indicators, including life expectancy.<sup>33</sup> A Ministry of Health report in 2012 confirmed the poor outcomes.<sup>34</sup> In 2009 the Government informed the United Nations in its first UPR report that a

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<sup>33</sup> National Health Committee (2003) *To Have an Ordinary Life: Kia Whai Oranga Noa*. Wellington: National Advisory Committee on Health and Disability

<sup>34</sup> Ministry Of Health (2011) *Health Indicators for New Zealanders with Intellectual Disability*. Wellington: Ministry of Health.

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work plan was in place to address this issue. To date, some district health boards have plans in place, but overall there has been minimal progress.

**24. Recommendations:**

- a That the Ministry of Justice develop guidance on the requirements and application of reasonable accommodation and the protections under the Bill of Rights Act.**
  
- b That the Ministry of Health develops and implements a plan to improve the health and wellbeing of people with intellectual/learning disabilities.**

**Appendix 2: IMM's second report on the implementation of the CRPD in  
New Zealand**

Making disability rights real

Whakatūturu ngā tika Hauātanga

## Summary Report

Second Report of the Independent Monitoring  
Mechanism of the Convention on the Rights of  
Persons with Disabilities

Aotearoa | New Zealand

July 2012 – December 2013

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council;  
New Zealand's Second Universal Periodic Review.**

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June 2014

ISBN: 978-0-478-35662-5 (print)

978-0-478-35663-2 (online)

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## Introduction

**Manaaki whenua, manaaki tangata, haere whakamua.  
Care for the land, care for the people, go forward.**

Human rights in New Zealand have bicultural origins, a Tangata Whenua whakapapa that sits alongside tauwi (settler) beliefs about the importance of human dignity and rights. The Treaty of Waitangi was the promise of these two peoples to manaaki, to take the best possible care of each other. It is about us all, in all our diversity.

For Māori, mana tangata (the dignity and rights of people) and mana whenua (the customary rights and connections between people, generations, and land) are intertwined and central to tikanga (culture and practice). This intrinsic value of all people and the importance of freedom, justice and peace are also central to many other cultures and belief systems around the world.

New Zealand has often helped lead the way in promoting these principles and in taking steps to protect the rights and wellbeing of all its citizens. Following the Second World War, New Zealand played an important role in the drafting of the Universal Declaration of Human Rights (UDHR). The declaration recognises the inherent dignity and “equal and inalienable rights of all members of the human family”.

New Zealand has adopted many other important international human rights standards including the United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention or the Convention). Many New Zealanders were instrumental in the development and introduction of this Convention. As a country we now have an obligation to ensure that the purpose of the Disability Convention is fully realised. This is necessary so that all citizens with disabilities are able to fully enjoy their human rights and fundamental freedoms on an equal basis with other members of the community.

Developments such as the increasing engagement between Disabled People's Organisations (DPOs) and government agencies are to be applauded. Moves towards the introduction of people driven service models are also encouraging. However, there is still a long way to go and some changes are occurring too slowly.

The second report of the Disability Convention Independent Monitoring Mechanism (IMM) details some of the experiences disabled people in New Zealand encounter each day. It highlights barriers that prevent the full realisation of the rights set out in the Disability Convention. The report also recommends steps that need to be taken to better respect, protect and fulfil those rights. The five key overarching issues the IMM has identified during the current reporting period are:

- 1 data
- 2 accessibility

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- 3 building a people driven system
- 4 violence and abuse
- 5 education.

The first part of the report also highlights four more specific matters of concern. These include the passing of the New Zealand Public Health and Disability Amendment Act 2013. This legislation means people are no longer able to pursue complaints of unlawful discrimination in relation to the Government's family care policy. The other three issues are the reliance on substituted decision-making, serious health outcomes for disabled people and the impact of sections of the Children Young Persons and Their Families Act 1989 on the rights of disabled children. The IMM partners trust the report will act as a powerful catalyst for change that will lead to further improvements in the daily lives of people with disabilities.

This summary version describes the Disability Convention monitoring process and sets out the IMM's conclusions and its key recommendations. It also lists all the recommendations contained in the full report.

This summary and the full report are available to download from the Human Rights Commission's website at: [www.hrc.co.nz/makingdisabilityrightsreal](http://www.hrc.co.nz/makingdisabilityrightsreal)

## The Disability Convention and the Independent Monitoring Mechanism

New Zealand signed the Disability Convention on 30 March 2007 and ratified it on 26 September 2008. Its introduction followed decades of work to change attitudes and approaches towards people with disabilities. Instead of considering people with disabilities as "objects" of charity, requiring medical treatment and social protection, disabled people are viewed as "subjects" with rights. This recognises the right of disabled people to make free and informed decisions about their own lives.

The Convention is a human rights instrument with an explicit social development dimension. It reaffirms that all people, living with all types of disabilities, must enjoy the full range of human rights and fundamental freedoms. The Convention describes in practical terms how the rights of disabled people can be achieved.

Six months after New Zealand signed the Disability Convention, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP). New Zealand expressed its support for UNDRIP in April 2010. While the declaration itself is not binding, many of the provisions reflect obligations set out in ratified conventions or covenants. The Disability Convention shares some common underlying human rights principles with both the Treaty of Waitangi and UNDRIP. These include the importance of partnership, autonomy, close consultation and full and effective participation.

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Article 33 of the Disability Convention requires an independent mechanism to be established to promote, protect and monitor implementation of the Convention. The partnership approach underpinning the Disability Convention is reflected in the structure of New Zealand's IMM. It comprises the Human Rights Commission (the Commission), the Ombudsman and the New Zealand Convention Coalition Monitoring Group (the Convention Coalition).

The Commission and the Ombudsman are established by statute and have roles and responsibilities in relation to discrimination, human rights, access to information and public accountability. The Convention Coalition comprises eight DPOs and provides an important voice for disabled people. The DPOs who make up the coalition are:

- 1 Blind Citizens New Zealand
- 2 Balance New Zealand
- 3 Deaf Aotearoa New Zealand
- 4 Deafblind (NZ) Incorporated
- 5 Disabled Persons Assembly (New Zealand) Inc
- 6 Ngā Hau e Whā
- 7 Ngāti Kāpo o Aotearoa Inc
- 8 People First New Zealand Inc.

This arrangement reflects Article 4(3) of the Disability Convention. This provides that all decision-making processes relating to disabled people shall actively involve them through their representative organisations.

The IMM's first report *Making Disability Rights Real* covered the five years to 30 June 2012, with emphasis on the final year. It is available in accessible formats and can be downloaded from: [www.hrc.co.nz/makingdisabilityrightsreal](http://www.hrc.co.nz/makingdisabilityrightsreal)

This second report covers the period from 1 July 2012 to 31 December 2013.

## The approach

In its first report published in December 2012, the IMM focused on developing a baseline picture of the state of disabled people's rights in New Zealand. The report contained seven key recommendations, pulling together the main priorities from a full list of 44 recommendations. It recommended that the Ministerial Committee on Disability Issues should ensure that action on those recommendations was completed by the end of 2014.

The second report assesses what progress has been made since June 2012.

This summary report highlights and discusses some key issues identified by the IMM during the reporting period, including its priority recommendations.

## Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council; New Zealand's Second Universal Periodic Review.

As recognised in the first report, monitoring the Disability Convention presents some unique challenges. These include the breadth of issues covered by the Convention and the lack of disability data and research in important areas. In addition, environmental and attitudinal barriers hinder disabled people's full participation in society on an equal basis with others. Collectively, these factors can make the effective measurement and assessment of progress difficult.

The IMM intends to continue working with government agencies to provide guidance, increase knowledge and to assist in the realisation of rights. The IMM will also speak out independently when issues relating to the Disability Convention arise.

## Key issues

The IMM has identified five broad areas that require particular attention in order to promote greater realisation of the rights set out in the Disability Convention. While promising progress has been achieved in some of these areas during this latest reporting period, much more work is still required. These five key areas are:

- 1 data
- 2 accessibility
- 3 building a people driven system
- 4 violence and abuse
- 5 education.

## Data

The dearth of statistics and information relating to disabled people in New Zealand was noted in the first IMM report. But there is a continued absence of quality data based on consistent definitions across a range of indicators. This makes it difficult to obtain an accurate view of many issues that have an impact on the lives of disabled people. It also hinders the measurement of progress and the recognition of improvements that have been made.

Statistics New Zealand expects to release the 2013 *Disability Survey* results in mid-2014. These should provide further valuable information about the experiences of disabled people, their needs and the barriers they encounter. However, ongoing work is required in this area to ensure that robust, timely and useful data are regularly collected across a range of sectors. This data can then be used to make practical changes that will improve the daily experiences of people with disabilities.

## Accessibility

Accessibility is one of the fundamental principles on which the Disability Convention is based. It encompasses the right to access the physical environment, transportation, information and communication, and services. It is important that these multiple components of accessibility are recognised because they are essential for disabled people to live independent and full lives.

## **Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council; New Zealand's Second Universal Periodic Review.**

The IMM is concerned that the legal requirement to take reasonable steps to accommodate the rights of disabled people in a variety of situations and settings is not well understood.

The Disability Access Review was announced on 20 October 2013. It will be undertaken jointly by the Ministry of Business, Innovation and Employment and the Office for Disability Issues. The review will consider whether the current building regulatory system meets the needs of people with disabilities. This is an important step towards improving the physical accessibility of buildings.

However, the IMM is concerned that proposals in the Building (Earthquake-prone Buildings) Amendment Bill may undermine current accessibility requirements when upgrading buildings. This proposed legislation will provide councils with the ability to grant exemptions for earthquake-prone buildings in some circumstances.

### **Building a people-driven system**

Building a people driven system is essential to ensuring that disabled people live with dignity. Although this is a broad concept, it is particularly important when decisions are made regarding access to disability assistance and support services.

All supports and services must be provided in a manner that promotes individual autonomy and choice for disabled people to the greatest extent possible. People driven means: "I direct what happens to me". Service provision should not be driven by the needs of multiple agencies but by disabled people themselves and their families.

The implementation of a comprehensive people driven model must remain a priority for the Government. The IMM recognises that there has been progress in this area since the last report and that building a people driven system can take time. Significant changes cannot occur overnight. However, the IMM remains concerned that the roll-out of policies and practice is too slow. Many current projects do not include representatives from DPOs; neither do they have disabled people or their family members in leadership roles.

### **Violence and abuse**

Violence, neglect and abuse directed at disabled people are ongoing concerns. They can occur in people's homes, places of work and education, and in residential settings. Abuse of this kind can be hard to detect and disabled persons are particularly at risk of ongoing and sustained abuse over extended periods of time. Abuse can take many different forms, including emotional, psychological, physical or sexual abuse. Financial abuse is also an emerging issue of concern, particularly for older disabled people. The IMM uses the term "abuse" to cover all the types of abuse referred to above, as well as instances of neglect.

There is increasing awareness of the prevalence of violence and abuse within society generally. However, the specific forms of abuse disabled people face require particular attention. These include situations where people may have limited ability to verbalise or communicate what is happening to them, or where they may be reliant on the abuser for day-to-day support and assistance.

## **Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council; New Zealand's Second Universal Periodic Review.**

Further work is required to prevent abuse against disabled people in all environments. If abuse does occur, there need to be systems in place to detect it quickly and to respond effectively and in a manner appropriate to the needs of the disabled person concerned.

### **Education**

The IMM supports initiatives that have been taken to make schools more inclusive. Since the last monitoring report, the Education Review Office (ERO) has undertaken a number of evaluations and surveys. These indicate that good progress has been made towards schools and early childhood centres becoming more inclusive. However, the IMM shares ERO's concern about the way schools report on their inclusiveness. This reporting focuses predominantly on activities and strategies and much less on the outcomes that are achieved for disabled students. The IHC has questioned the methodology used by ERO and the statistical significance of some of its findings.

Exclusion, isolation and bullying remain significant issues for children and youth. Education-related complaints continue to make up a large proportion of disability complaints to the Human Rights Commission. It is essential more work is done to ensure that disabled children are able to fully realise their education rights, and that this occurs in partnership with DPOs.

The IMM remains concerned that there is a gap between the legal right to education and the ability to ensure that this right is realised at a practical level for individual students. There is still no enforceable right to inclusive education in New Zealand.

### **Other matters of concern**

In addition to the key general issues that have been identified, there are a number of other specific matters of concern that have arisen during the last reporting period. These are discussed in more detail in the full report and are summarised briefly below.

#### **Reliance on substituted decision-making**

Respect for individual autonomy, including the freedom to make one's own choices, is one of the underpinning principles in the Disability Convention. In those limited circumstances where a disabled person cannot make an independent decision, a supported decision-making process should be used. This contrasts with substituted decision-making where decisions made by others are imposed on disabled people. Further work is required to ensure that the right to equal recognition before the law (Article 12) is realised for all disabled people and in all circumstances, and that practical supports are provided in order to achieve this.

#### **Removal of remedies for unlawful discrimination in relation to family caregivers**

The introduction of the New Zealand Public Health and Disability Amendment Act 2013 effectively removed any potential domestic legal remedy for unlawful discrimination relating to the Government's family care policy. The IMM urges the Government to repeal this legislation and to properly acknowledge the right of disabled people to choose a family member to be their caregiver. In addition, these arrangements need to be funded on the same basis as those provided by people

who are not family members. Without such flexibility, disabled people risk being denied the most appropriate form of care.

## **Serious health outcomes**

There has been clear evidence, for a long period of time, that there are significant disparities in health outcomes and life expectancy between disabled people and non-disabled people. These are particularly striking for people with learning/intellectual disabilities. The IMM urges the Government to give immediate attention to this important issue.

## **Right to family life**

Sections of the Children, Young Persons and Their Families Act 1989 undermine disabled children's right to a family life and discriminate against them because of their disability. The IMM recommends that these provisions be repealed so that children with a disability have the same rights as other children when an out of home care arrangement is being considered.

# Key recommendations

The key recommendations from the IMM for the current period largely replicate those from 2011/12. This reflects the importance of these key issues and the fact that ongoing work is required in these areas, even though some progress has been made. The IMM recommends:

- A That the Government continue to jointly develop the Disability Action Plan with DPOs (including disabled people, children and their families) and commit to its full implementation.
- B That Statistics New Zealand, in partnership with DPOs, lead a programme of work to ensure that key outcome and prevalence data are collected in a way that makes it possible to compare outcomes for disabled and non-disabled people. This work should include a common definition of disability and involve consultation with key stakeholders, government and international agencies.
- C That the Government integrate accessibility and universal design across all its work by:
  - 1 improving access to the built environment including through the review of NZS 4121:2001
  - 2 improving access to transportation services for disabled people, including development of national accessibility design standards for all aspects of public land transport
  - 3 providing accessible communications services, including websites, throughout all government agencies.
- D That the Department of Corrections and Ministry of Health work together, in consultation with the IMM, to ensure:

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- 1 the requirements of prisoners with disabilities are reasonably accommodated and
  - 2 best practice in the detention and treatment of people with an intellectual/learning disability or a mental illness.
- E That the Government:
- 1 establish an enforceable right to inclusive education
  - 2 implement a whole of school anti-bullying programme to ensure that schools are safe and nurturing places for disabled students
  - 3 establish initiatives that promote the value of difference and affirm the identify of disabled students.
- F That the Government develop a range of initiatives to ensure that:
- 1 disabled people have the same protection from domestic and other forms of violence as non-disabled people and
  - 2 agencies identify and appropriately respond to abuse, neglect and violence directed at disabled people.
- G That the Government urgently address the specific matters of concern identified by the IMM in the introductory section of this report, by:
- 1 repealing the New Zealand Public Health and Disability Amendment Act 2013, particularly those sections which remove remedies for unlawful discrimination in relation to complaints by caregivers who are family members and limit when family members can be paid
  - 2 reviewing relevant laws, in particular mental health legislation, to ensure that the principles of supported decision-making are appropriately reflected and applied in accordance with Article 12 of the Disability Convention
  - 3 addressing significant disparities in health outcomes between disabled people and non-disabled people, particularly for people with an intellectual or learning disability
  - 4 amending the Children, Young Persons and Their Families Act to ensure that disabled children have the same rights as other children when an out of home care arrangement is being considered, and have legal representation and protection when decisions are being made in relation to these matters.
- H That the Government provide the IMM with a progress report, as at the end of 2014, on implementing the recommendations of the IMM's 2011/12 report.

## Monitoring programme for the next period

The next 12 months will be a crucial period for monitoring compliance with the Disability Convention, including progress against the IMM's recommendations. The release of the 2013 *Disability Survey* data from mid-2014 onwards will provide much needed information that should assist better monitoring and assessment.

Implementation of the Disability Convention will be in the spotlight during September 2014. This is when the New Zealand Government's first periodic report is due to be considered by the United Nations Committee on the Rights of Persons with Disabilities.

Key priorities that the IMM intends to monitor over the next reporting period are:

- 1 opportunities for disabled people's voices to impact on policy decisions about their lives
- 2 supported decision-making
- 3 issues relating to vulnerable children with disabilities, particularly those at risk of being parted from their families
- 4 reporting the experiences of Māori and Pacific disabled people
- 5 preventing violence, abuse and neglect within residential services, homes and public places
- 6 considering the compounding challenges experienced by people with disabilities as they age
- 7 accessibility of information, including government web standards
- 8 guidance provided by the Disability Convention in relation to bio-ethical issues such as pre-natal testing
- 9 support for people with experience of mental illness in prisons and other places of detention.

## Recommendations in the body of the report

The full report tracks progress in meeting the obligations set out in various articles of the Disability Convention and recommends further actions needed. Those recommendations are listed below:

### **Recommendation 1**

That the Government continue to jointly develop the Disability Action Plan with DPOs (including disabled people, children and their families) and commit to its full implementation.

### **Recommendation 2**

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council; New Zealand's Second Universal Periodic Review.**

That the Ministry of Justice and the Office for Disability Issues jointly develop guidance on the requirements and application of reasonable accommodation and the associated provisions of the Human Rights Act and New Zealand Bill of Rights Act, in consultation with DPOs and the IMM.

**Recommendation 3**

That Statistics New Zealand make it a high priority to:

- 1 produce a report from the 2013 *Disability Survey* comparing the human rights outcomes of disabled women and men with non-disabled women and men
- 2 where possible, make data tables available from the 2013 *Disability Survey* so that data users are able to compare the human rights outcomes of disabled men and women with non-disabled men and women.

**Recommendation 4**

That the Families Commission and DPOs jointly develop standards and best practices for ensuring that research and evaluation in the social sector includes the experiences of disabled women and men.

**Recommendation 5**

That routine collection and reporting of meaningful indicators and data about the experiences of children with disabilities continue to be improved, in partnership with DPOs.

**Recommendation 6**

That the review of NZS 4121:2001, announced by the Ministers for Building and Construction and for Disability Issues, also consider whether the standard should be made mandatory and cover residential housing.

**Recommendation 7**

That the Ministry of Transport develop national accessibility design standards for all aspects of public land transport.

**Recommendation 8**

That high priority be given to the perspectives of DPOs, disabled people, and their families in relation to policy development on the right to life and bioethical issues which have a high impact on disabled people and/or public perceptions about disability.

**Recommendation 9**

That the Government expedite a review of the three month time limit set out in legislation for lodging a claim with the Earthquake Commission.

**Recommendation 10**

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council; New Zealand's Second Universal Periodic Review.**

That the Law Commission undertake a review of the Mental Health (Compulsory Assessment and Treatment) Act, with a particular focus on compliance with articles 12 and 13 of the Disability Convention.

**Recommendation 11**

That research be undertaken by the Office for Disability Issues to determine whether the provisions of the Protection of Personal and Property Rights Act that relate to supported decision-making are well understood and applied by welfare guardians and property managers appointed under the Act.

**Recommendation 12**

That the Department of Corrections take steps to identify any gaps in the current care and facilities provided for prisoners with disabilities.

**Recommendation 13**

That the Government develop a range of initiatives to ensure that:

- 1 disabled people have the same protection from domestic and other forms of violence as non-disabled people and
- 2 agencies identify and appropriately respond to abuse and violence directed at disabled people, including by:
  - a ensuring all government-funded domestic and anti-violence programmes include material about disabled people
  - b investigating whether legislative reform is required to extend the range of protections and support available
  - c considering ways to increase awareness of abuse experienced by disabled people and mechanisms to address it. This would include extending the *It's Not OK* campaign to residential facilities and providing sustainable funding for DPOs working in this area and
  - d training staff within police, courts, service providers and DPOs about the protection and support needs of disabled people.

**Recommendation 14**

That the Government review all disability support systems to ensure that they reflect the whole of life, strengths-based approach recommended by the Social Services Select Committee Inquiry and incorporated into *Enabling Good Lives*.

**Recommendation 15**

That the Government urgently reconsider the New Zealand Public Health and Disability Amendment Act 2013 and repeal those sections that limit further legal action and limit the circumstances in which family members can be paid and the categories of family members that can be paid.

**Recommendation 16**

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council;  
New Zealand's Second Universal Periodic Review.**

That all applicants for pre-qualification for Social Housing Fund grants be required to undertake to provide accessible housing using the Lifemark Design Standards (or an alternative certification process with at least as robust standards).

**Recommendation 17**

That all government agencies ensure their own and government funded initiatives, for which they are responsible, comply with the Government web standards for accessibility and other accessible information and communication requirements.

**Recommendation 18**

That the Government web standards become mandatory for all territorial authorities, district health boards, other Crown entities and organisations receiving substantial government funding.

**Recommendation 19**

That all state sector agencies develop internal guidelines for communication with disabled people, including making information available in accessible formats.

**Recommendation 20**

That the Ministry of Justice review the Adoption Act, with particular consideration given to whether section 8 complies with the Disability Convention.

**Recommendation 21**

That as part of the Government's work in relation to vulnerable children, sections 141, 142, and 144(2) of the Children, Young Persons and Their Families Act are repealed to ensure that disabled children have the same rights as other children when an out of home placement is being considered.

**Recommendation 22**

That the Government further extend NGO-led intensive wraparound support programs for disabled children, in partnership with DPOs.

**Recommendation 23**

That the Government establish an enforceable right to inclusive education.

**Recommendation 24**

That the Ministry of Education implement whole of school anti-bullying programmes that ensure that schools are safe and nurturing places for disabled students.

**Recommendation 25**

That the Ministry of Education establish initiatives that promote the value of difference and affirm the identity of disabled students.

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council;  
New Zealand's Second Universal Periodic Review.**

That the Ministry of Health work with people with intellectual/learning disabilities and their organisations to establish a comprehensive health monitoring and improvement programme.

**Recommendation 27**

That the Chief Executives Group on Disability Issues, in conjunction with DPOs:

- 1 promote initiatives to increase the employment of people with disabilities in the public service and
- 2 further develop mechanisms and resources to ensure that reasonable accommodations for the employment of disabled people are understood and implemented in the public service.

**Recommendation 28**

That the Ministry of Business, Innovation and Employment, working with the Disability Employment Forum, conduct a full review of the minimum wage exemption permits system by 31 December 2014, to ensure it reflects the best approach to employment rights for disabled people.

**Recommendation 29**

That the Ministry of Social Development:

- 1 enable the disability allowance to be used more flexibly, including to cover housing costs and
- 2 consider and report on the appropriateness of increasing the accommodation supplement for Christchurch to be commensurate with Auckland and Wellington.

**Recommendation 30**

That the Electoral Commission ensure that the next general election in 2014 is conducted in a way that allows independent and secret voting for all eligible voters.

**Recommendation 31**

That the Department of Internal Affairs' working party set up to trial online voting in the 2016 local authority elections adopt accessibility as a key success measure for the trial.

**Recommendation 32**

That funding is provided for party political broadcasts and televised debates for the 2014 general election to be available in New Zealand Sign Language and captioned.

**Recommendation 33**

That the requirements of all democratically elected members to government boards and public authorities are reasonably accommodated to support them to carry out their duties.

**Recommendation 34**

**Submission of the New Zealand Human Rights Commission to the 18<sup>th</sup> session of the Human Rights Council;  
New Zealand's Second Universal Periodic Review.**

That the Ministry of Culture and Heritage develop an industry-wide voluntary code of practice for broadcasting accessibility in consultation with broadcasters and consumers, taking into account international good practice.

**Recommendation 35**

That NZ On Air develop a comprehensive policy on the accessibility of programmes that it funds or supports, in cooperation with broadcasters and consumers, to clarify accessibility objectives and targets.

**Recommendation 36**

That Statistics New Zealand, in partnership with DPOs, leads a programme of work to ensure that key outcome and prevalence data are collected in a way that makes it possible to compare outcomes for disabled and non-disabled people. This work should include a common definition of disability and involve consultation with key stakeholders, government and international agencies.

**Recommendation 37**

That the Government implement recommendations from the United Nations treaty bodies related to disabled people, including recommendations on employment and adequate standard of living.

**Recommendation 38**

That the Government ratify the Optional Protocol to the Disability Convention.