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THE CONVENTION ON THE RIGHTS OF DISABLED PERSONS: A REMAINING DILEMMA FOR NEW ZEALAND?

Sylvia Bell, Judy McGregor** and Margaret Wilson****

This article examines New Zealand's ratification of the Convention on the Rights of Persons with Disabilities (the Disability Convention) and questions whether the assumption that New Zealand is treating its disabled people consistently with the requirements of the Convention is warranted. The authors conclude that New Zealand needs to reconsider aspects of the application of its domestic legislative framework before it can claim to be complying with the Convention.

I INTRODUCTION

The Convention on the Rights of Persons with Disabilities (Disability Convention) is expected to play an important part in ensuring disabled people are able to enjoy the same rights as everyone else.¹ It aims to do this by introducing a major change to the way people with disabilities are treated. They are no longer to be viewed as objects of charity but as individuals with rights-based entitlements.

New Zealand played a major role in the development of the Disability Convention. The New Zealand Permanent Representative to the United Nations (UN) in New York acted as the Chair of the Ad Hoc Committee and New Zealand was prominent in promoting the idea of a small group working in partnership with disabled people's organisations to develop the wording of the Convention rather

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1 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008) [Disability Convention].

than relying on a group of experts as suggested by the European Union.² New Zealand was also among the first signatories of the Convention and one of the earliest States to ratify.

The belief that the Convention did not create any extra rights for disabled people was one of the reasons that there was little domestic opposition to its ratification. However, it is debatable whether this is, in fact, the case. Recent experience suggests that New Zealand's performance does not align with the standards in the Disability Convention. This is most obvious in the implications of the change to a social model of disability – rather than the traditional medical model – promoted by the Convention. This article examines whether the implementation of concepts such as equality and reasonable accommodation is consistent with the Disability Convention.

II BACKGROUND TO NEW ZEALAND'S RATIFICATION OF THE CONVENTION

New Zealand has an impressive record of ratifying international human rights instruments and prides itself on being a good international citizen; a view that stems in part from the role it played in promoting the Universal Declaration of Human Rights (UDHR) and its early support of women's suffrage. But while this may have once been the case, the situation is changing and flaws are becoming apparent in how human rights are delivered in New Zealand.³ This is clearest in the area of social and economic rights, particularly New Zealand's continuing refusal to accede to the Optional Protocol (OP) to the International Covenant on Economic Social and Cultural Rights (ICESCR) which, if ratified, would allow individuals to complain directly to the Committee responsible for oversight of the treaty about breaches of the rights in the ICESCR.⁴

The belief that New Zealand has been conscientious in observing the human rights of all its citizens was one of the reasons that it was comparatively late in including disability as a ground of

2 The European proposal was perceived by other states and DPOs as a delaying tactic. For further reading on the NGO role see Hanna Woodburn "Nothing about us without civil society: The role of civil society actors in the formation of the UN Convention on the Rights of Persons with Disabilities" (2013) 7 Political Perspective 75.

3 See generally Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (AUT University, Auckland, 2015), the outcome of a wider project on New Zealand's compliance with United Nations human rights treaties, including analysis of archival material and case law, interviews with stakeholders and participation at United Nations treaty body examinations.

4 This has implications for the ratification of the Optional Protocol to the Disability Convention. It is argued that if the OP to the Disability Convention was ratified before the OP to ICESCR then disabled people would have access to a complaints mechanism about the delivery of social and economic rights that is not available to non-disabled people. However, this argument cannot be supported if the rights in the Convention are a different type of right. See Margaret Wilson, Judy McGregor and Sylvia Bell "The impact of economic and social human rights in New Zealand case law" [2015] 21(1) AJHR 143.

unlawful discrimination in the Human Rights Act 1993 (HRA).⁵ This did not go unnoticed by the disability community which considered it was even further side-lined when the 1993 amendments that added disability to the HRA exempted the public sector from compliance for several years.⁶ The situation was only rectified in 2001 when a further amendment to the HRA extended its protection to all the grounds in the Act. It was perhaps understandable, therefore, that by the late 1990s there was a growing momentum – both domestically and internationally – to progress disability rights in a more tangible way.

In 1999 a Minister for Disability Issues was created and in 2002 an Office for Disability Issues (ODI) was established within the Ministry of Social Development as part of the Labour Government's social policy framework. In 2000, a new Public Health and Disability Act foreshadowed the development of the New Zealand Disability Strategy.⁷ The strategy, which promoted New Zealand as a fully inclusive society, was lauded internationally as socially progressive not only because of its content but for the process by which it was developed, particularly the leadership role taken by disabled people in its development.⁸

In 2001 the UN established an Ad Hoc Committee which met in 2002 and reaffirmed the need for a specific treaty. In May 2003 Cabinet agreed that New Zealand should take an active role in the development of the treaty. By the time of the Committee's second meeting, a subsequent Cabinet paper noted that:⁹

The New Zealand delegation delivered six statements outlining ideas for the content of a convention based on experience with the New Zealand Disability Strategy and advocating for an approach that draws upon the mandatory authority of the human rights covenants. We recommended expanding on the provisions in these existing covenants with explicit recognition of what they mean for disabled people ... [which will] inevitably require social development and affirmative action.

-
- 5 The original Human Rights Commission Act only applied to sex, marital status, religious belief and colour, ethnicity or country of origin.
 - 6 When the HRA was introduced in 1993 with its more comprehensive range of grounds, both the private and public sectors were only required to comply with the grounds that existed before the amendment. Compliance with the so called "new" grounds was limited to the private sector. The need for adequate disability access to public buildings, particularly in Wellington, appears to have been behind the decision to include an exception in the legislation.
 - 7 Ministry of Health *New Zealand Disability Strategy: Making a World of Difference – Whakanui Oranga* (September 2000).
 - 8 Ruth Dyson "Cabinet Social Development Committee: New Zealand's Role in the Development of the United Nations Proposed Convention on the Rights of Disabled People" (17 May 2003) at [7].
 - 9 Ruth Dyson "Cabinet Social Development Committee: Negotiations on a Convention on the Rights of Disabled People" (10 September 2003) at [8].

New Zealand's official position on the scope of the proposed treaty is intriguing given its implementation post-ratification since it clearly anticipated a more innovative approach to the provision of human rights for disabled people. The Cabinet paper also commented that:¹⁰

Many States assert that it is neither necessary nor desirable for the convention to invent new rights or detract from existing rights provided for all people, including disabled people, in existing treaties. Rather, it is proposed that the convention should clarify for States the measures required to ensure disabled people are able to experience existing rights and fundamental freedoms. This entails the explicit recognition and understanding of disability in a rights framework rather than the historically more common welfare framework.

Such a treaty would go further than a statement of the right to equality and non-discrimination recommended by some States (and theoretically provided by the HRA) as it would require a more plenary consideration of the social, cultural, economic, civil and political conditions necessary to ensure the full and diverse population of disabled people could exercise their human rights. The wording of the Cabinet paper recognised that the Disability Convention would require a distinctive approach to implementation that could have consequences for the interpretation of human rights generally.

The Convention is unique in introducing a disability narrative into the human rights framework. While the treaties that predated it were considered to apply equally to people with disabilities, this was not, in fact, the case. Disabled people were marginalised in the human rights agenda precisely because they were offered human rights on the same terms as everyone else. The Disability Convention not only covers both civil and political rights and economic, social and cultural rights but prescribes the content of the rights and the resulting obligations. In doing so it gives substance to what are basically abstract rights by requiring interpretations consistent with the approach mandated by the Convention.¹¹

In 2008 a Canadian academic, Frederic Mégret, floated the idea of the Disability Convention as emblematic of a paradigm shift to the more conventional approach to human rights. He considered that a wider change – which he describes as the "pluralisation of human rights" – was taking place in relation to specific groups such as persons with disability and a new type of "hybrid" right was emerging that was designed to ensure the delivery of those rights in practice. While not explicitly disavowing the more conventional human rights rhetoric, Megret argued that human rights needed to be adapted in the case of some groups to ensure access to rights such as recognition before the law, or the right to marry and have a family, that others took for granted. From this perspective it follows that human rights as presently conceived and delivered need to mutate and change to meet the

¹⁰ At [13].

¹¹ Jean Allain *Treaty Interpretation and the UN Convention on the Rights of Persons with Disabilities* (Disability Action's Centre on Human Rights for People with Disabilities, Belfast, 2009).

requirements of a particular group or condition and specific treaties were necessary to crystallise their experiences.¹² He distinguished the more usual approach to human rights by noting that:¹³

... human rights ... mak[e] a point about *sameness and unity* of human beings. From these ideas are derived those of equality and universality. It is this sameness, this belonging to a unique species, which forms the hard core of human rights normative ambition. Group-specific treaties conversely ... can be seen as at least partly making a point about *difference and pluralism*. Difference and pluralism are obviously in tension with the ideas of equality and universality.

The holistic nature of the Convention also led Andrew Byrnes to argue for the creation of a new type of hybrid right.¹⁴ More recently, historian Samuel Moyn, recognising the changing face of human rights, commented that "human rights cannot be all things to all people" suggesting that a generic approach will not always meet everyone's needs.¹⁵

III NATIONAL INTEREST ANALYSIS

Before ratifying an international treaty a practice has developed in New Zealand of carrying out a National Interest Analysis (NIA) which addresses the reasons for becoming party to the treaty, the implications of doing so and how the treaty will be implemented. As part of the analysis, domestic legislation is examined and changes made if necessary to ensure compliance with the treaty.¹⁶

New Zealand's strong common law tradition has meant for the most part legislative change has been unnecessary to give effect to the international human rights obligations it has assumed.¹⁷ In the case of the Convention, the NIA found that while it was unnecessary to introduce specific legislation, there were 19 statutes where there was a presumption of incapacity in certain situations, six where disability prevented the appointment to statutory boards, and 10 with provisions which used inappropriate language.¹⁸ The changes were considered "minor and technical" and able to be made

12 Frédéric Mégret "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" (2008) 30 Human Rights Quarterly 494.

13 Mégret, above n 12, at 496.

14 Andrew Byrnes (2008) *Monitoring the fulfilment of CRPD Rights in Australia: Issues and Challenges* (paper presented to Queensland Advocacy Inc Human Rights Seminar, Brisbane, 20 August 2008) as cited in Marcia H Roux, Lee Ann Bassar and Melinda Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, Leiden, 2011) at 482, fn 10.

15 Samuel Moyn *The Last Utopia: Human Rights in History* (Belknap Press, Cambridge (Mass), 2010) at 227.

16 If there is a provision in a treaty which a State does not agree with or if the State cannot bring its domestic legislation into line with its international obligations, it may enter a reservation to prevent the application of that article. A reservation cannot be entered if it would undermine the effect of the treaty.

17 Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2008) at 23.

18 Ruth Dyson and Winston Peters "Cabinet External Relations and Defence Committee: Towards ratification of the United Nations Convention on the Rights of Persons with Disabilities" (2007) at [15]–[17].

through an omnibus Bill that would mainly involve the removal of references to an individual's status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.¹⁹ The Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill was passed in 2008 allowing New Zealand to ratify the Convention on 26 September 2008 in time to participate in a Conference of State parties in November of that year.

The push for New Zealand to keep up the momentum of its role in relation to the Convention and ratify as soon as possible meant that the NIA was relatively superficial.²⁰ A Cabinet paper on the analysis prepared by the ODI in 2008 suggests there was no real attempt to address the more subtle implications of the Convention.

It was probably inevitable that the haste to ratify would have certain repercussions. Issues such as access to buildings or reasonable accommodation in education, for example, were considered adequately addressed by existing legislation such as the Building Act 2004 and the Education Act 1989 despite the fact that there had been, and continue to be, ongoing issues with both. In addition suggestions made by the Human Rights Commission (which has responsibility for administering the HRA) and the Ministry of Justice (which has responsibility for the New Zealand Bill of Rights Act 1990 (NZBORA)) in relation to the vexed concept of reasonable accommodation were overlooked. These are already causing the Committee concern about New Zealand's approach.²¹

Subsequent to ratification substitute decision making – in particular capacity and the implications of the Protection of Personal and Property Rights Act 1988 (PPPR Act) – has also emerged as a significant issue in implementing the Convention.²² While there was no specific reference to the PPPR Act in the NIA, one of the Cabinet papers prepared by the Office for Disability Issues and the Ministry of Foreign Affairs and Trade during negotiation of the Convention noted that substitute decision-making did not prohibit the use of personal representatives under the PPPR Act.²³ As the NIA did not identify the PPPR Act as legislation that was potentially inconsistent with the Disability Convention, it invites the inference that the Executive considered that it did not infringe the capacity provisions in art 12 which, it follows, should be interpreted in a Convention compliant manner.

19 Office for Disability Issues *Convention on the Rights of Persons with Disabilities: National Interest Analysis* at [56] et seq.

20 Dyson and Peters, above n 18, at [26].

21 See Committee on the Rights of Persons with Disabilities *List of issues in relation to the initial report of New Zealand CRPD/C/NZL/Q/1* (2014) at [5]

22 At [13].

23 Office for Disability Issues and Ministry of Foreign Affairs and Trade *Towards a Disability Rights Convention* at [25].

IV DEFINITION OF DISABILITY

One issue that is particularly problematic is how disability is defined in New Zealand. The Disability Convention defines disability as:²⁴

... [ing] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

While the Convention does not further define "disability" or "persons with disabilities", the preamble recognises that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". Coverage is not restricted to particular persons; the reference to includes is designed to ensure that the application of the Convention ensures protection to others such as "persons with short-term disabilities or who are perceived to be part of such groups".²⁵

This is a significant shift from the medical model and the welfare approach to disability that had dominated the disability discourse until very recently. The social model of disability views systemic barriers, negative attitudes and exclusion by society (whether purposely or inadvertently) as the main contributory factors to disabling people. While physical, sensory, intellectual, or psychological conditions may cause individual functional limitations or impairments, they do not have to be disabling unless society fails to take account of or include people regardless of their individual differences. It follows that it is society's failure to accommodate the needs of people with disabilities which gives rise to the disadvantage that people with disabilities encounter in their daily lives, not their medical condition.²⁶ Putting it another way, the discrimination that disabled people encounter is a result of socially created occurrences rather than their impairment or disability. It follows that society needs to adapt to the circumstances and realities of persons with disabilities in order to ensure their respect and inclusion; it is society's responsibility to reduce and eliminate the barriers that disable individuals.²⁷

24 Disability Convention, above n 1, art 1.

25 United Nations Enable "Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities: Are the terms "disability" and "persons with disabilities" defined in the Convention?" <www.un.org>.

26 Michael Bach and Lana Kernzer *A new Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, Canada, 2010) cited in Geneva Richardson "Mental Disabilities and the Law: From Substitute to Supported Decision-Making?" (2012) 65 *Current Legal Problems* 333 at 342.

27 Shivaun Quinlivan "The United Nations Convention on the Rights of Persons with Disabilities: an introduction" (2012) 13 *ERA* 71 at 74; and Michael Stein "Disability Human Rights" (2007) 95 *California Law Review* 75 at 86.

The Convention prohibits discrimination and requires ratifying States to adopt "appropriate legislative, administrative and other measures" to implement its provisions.²⁸ In New Zealand, the HRA is thought to address equality and disability discrimination despite the fact that neither the Act nor the NZBORA contain a reference to equality,²⁹ there is no generic obligation to reasonably accommodate and the definition of disability has been interpreted as only applying to long term disability.³⁰

The HRA is not unique in defining disability by reference to its duration. Statistics New Zealand defines disability as "an impairment that has a long-term, limiting effect on a person's ability to carry out day-to-day activities", where long-term is defined as six months or longer,³¹ and the Ministry of Health defines a person with a disability as someone who has been identified as having:³²

... a physical, intellectual or sensory disability (or a combination of these) which:

- is likely to continue for at least 6 months
- limits their ability to function independently, to the extent that ongoing support is required.

Limiting disability in this manner is inconsistent with the social model of disability required by the Convention. People who are temporarily disabled—for example someone in a wheelchair for a few weeks – might not be considered disabled under the medical model because that model only focuses on an individual's underlying condition and the functional limitations of that condition. Under the social model, however, such people face the same barriers as those who may need to rely on a wheelchair throughout their life.

28 Disability Convention, above n 1, art 4(1)(b).

29 Legislation such as the Public Health and Disability Act that may appear more directly engaged with disability issues avoid defining the term focusing rather on the provision of appropriate services.

30 Section 21(1)(h) of the Human Rights Act 1993 defines disability as meaning:

- (i) physical disability or impairment;
- (ii) physical illness;
- (iii) psychiatric illness;
- (iv) intellectual or psychological disability or impairment;
- (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function;
- (vi) reliance on a guide dog, wheelchair or other remedial means; or
- (vii) the presence in the body of organisms capable of causing illness.

31 Statistics New Zealand "Disability Survey" (28 June 2013) <www.stats.govt.nz>.

32 Ministry of Health "Am I eligible for Ministry-funded support services?" (16 February 2016) Disability services <www.health.govt.nz>.

The definition in the HRA figured prominently in *Trevethick v Ministry of Health* a case heard the same year that New Zealand ratified the Convention.³³ Ms Trevethick had multiple sclerosis and required a specially modified car to accommodate her wheel chair. She paid for the modification herself since she did not meet the necessary criteria for financial assistance from the Ministry. The Court accepted that if her condition had been the result of an accident she would have had access to greater financial support through accident compensation legislation. In order to bring her complaint under the HRA, Ms Trevethick claimed that the Accident Compensation Act itself was discriminatory. The High Court considered, however, that despite what it described as the exhaustive definition of disability in the HRA, there was still room for argument as to what constituted a disability for the purposes of the HRA referring in support to an earlier case in which the Court had observed that:³⁴

the question is not whether the covenants conflict with the Human Rights Act nor whether they should effectively override the Act. Rather it relates to the extent to which the provisions of the Human Rights Act can be interpreted so as to more comprehensively adopt or implement applicable international standards.

This suggests that interpretation of the Disability Convention could in future influence how disability is read in the HRA. As there is no specific temporal limitation in the wording in the HRA an interpretation that is consistent with the social model of disability and accommodates both short and long term disabilities is possible. In order to be Convention compliant, disability for the purposes of all public policy and legislation requires an interpretation that is consistent with the social model of disability and does not exclude people with a disability that does not last for at least six months.

V INTERPRETATION OF THE CONVENTION

Issues such as reasonable accommodation, capacity, accessibility and involuntary treatment are fundamental to the Convention but how they are interpreted remains contestable and available guidance is both limited and reasonably general.

The following section explores those four concepts and how they are applied in New Zealand to see whether they are used consistently with the Convention or if they reflect traditional approaches that are no longer suitable in light of New Zealand's commitment to the Convention.

33 *Trevethick v Ministry of Health* [2008] NZAR 454 (HC).

34 *BHP New Zealand Steel Ltd v O'Dea* (1997) 4 HRNZ 456 (HC) at 471.

A Reasonable Accommodation

Article 2 defines disability discrimination as including denial of reasonable accommodation which is in turn described as:

necessary and appropriate modification ... not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The Convention clearly anticipates that people with disabilities will be accommodated so that they can enjoy the same rights as others, and enjoins States to take appropriate steps to ensure that this occurs. However, it is silent on how this will be achieved in practice.

An example of what the HRA requires by way of reasonable accommodation can be found in the sections relating to access to public places, vehicles and facilities in Part 2 of the Act. Section 43(2) states that a person is not required to provide special services or facilities to enable people with disabilities to gain access to or use any place or vehicle if it would not be reasonable to require them.

Before ratification the Ministry of Justice sought an opinion from Crown Law on whether the reasonable accommodation provisions in Part 2 of the HRA were consistent with Convention requirements.³⁵ Crown Law advised that the provisions of Part 2 were inconsistent with the requirements of the Convention. In particular, the prohibition on the need to provide reasonable accommodation did not accord with the positive onus in the Convention leading to a risk that Part 2 would be applied in a way that could place New Zealand in breach of its obligations under the Convention. The opinion also expressed doubt that ratification of the Convention would increase the prospect of a claimant successfully arguing that Part 2 was consistent with the Convention.³⁶ Despite this advice only relatively minor changes relating to reasonable accommodation were made to Part 2 of the HRA and a general obligation to accommodate was not introduced to the Act.

Rather than imposing an obligation to accommodate, the HRA creates a defence of reasonable accommodation and a comparatively low threshold needs to be surmounted to rely on it. This is significant given the role that reasonable accommodation plays in the definition of disability discrimination. For example, there is an ongoing issue about the adequacy of education provided for children with special needs. While this was recognised before ratification the HRA only allows educational facilities to refuse admission to students with disabilities if it is not reasonable for the

35 Part 1A of the HRA decides whether a matter is discriminatory by reference to the test in the New Zealand Bill of Rights Act (NZBORA). Prima facie discrimination will be permissible if it satisfies s 5 of NZBORA – namely if the difference can be justified as reasonable in a free and democratic society.

36 Crown Law opinion to Bill of Rights team in Ministry of Justice *Convention on rights of persons with disabilities – consistency of the reasonable accommodation provisions in the Human Rights Act 1993* (JUS043/739, 7 May 2008).

school to provide them; the alternative was to impose an obligation to accommodate students with disabilities and make the necessary and appropriate modifications.

Smith v Air New Zealand Ltd provides a further illustration of how the relatively low threshold can impact in practice.³⁷ Ms Smith has a respiratory condition which means she required extra oxygen when she travels by air. She had to organise and pay for her own oxygen on domestic flights and for extra oxygen on international flights. She argued this was discriminatory and that the airline had an obligation to accommodate her needs when she flew. The Human Rights Review Tribunal found that while Air New Zealand treated her less favourably by reason of her disability, there was no breach of the HRA because the airline could not reasonably be expected to provide the service without imposing more onerous terms. The case eventually went to the Court of Appeal which agreed that there was discrimination but that the standard to accommodate was one of reasonableness, not undue hardship.

Although recognising the importance of the Convention, the Court noted that there were dangers in relying on it too much, quoting *Purvis v New South Wales*:³⁸

No matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the [Human Rights] Act per se. Rather [it] has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting the Act imposes an obligation to provide accommodation for the disabled.

It was probably predictable that following the first examination of New Zealand's implementation of the Convention, the Committee recommended consideration be given to amending the HRA to include a definition of reasonable accommodation that better complied with the Convention. It also recommended the development of guidelines on the application of reasonable accommodation.³⁹

B Article 12: The Right to Equal Recognition before the Law

Article 12 requires State parties to reaffirm that people with disabilities have the right to recognition as persons before the law in the same way as everyone else, that they enjoy the same legal capacity, and to commit to providing the support they may require to exercise their legal capacity. The article is considered one of the most important of the Convention because without it many of the

37 *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171.

38 At [29], quoting *Purvis v New South Wales* [2003] HCA 62, (2003) 217 CLR 92 at [104].

39 The Government's response to the Independent Monitoring Mechanism Reports of 2012–2014 was that this was being progressed. The first step will be the development of reasonable accommodation guidelines in employment by the Ministry of Social Development. Further guidelines on reasonable accommodation will be considered during the regular update of the Disability Action Plan and will build on those for employment.

other rights – such as the guarantee of free and informed consent,⁴⁰ the right to marry,⁴¹ and the right to political participation⁴² – are rendered meaningless. The problem is how capacity is defined and applied in practice and where to draw the line when some form of substitute decision-making is required. More often than not it is simply asserted that art 12 encapsulates the concept of supported decision-making without further elaboration. While it is clear that a paradigm shift in how capacity and decision-making have been viewed historically is now necessary in light of the Convention; this is complicated by the lack of agreement on how capacity should be interpreted.⁴³

In 2014 the Committee issued a draft General Comment on art 12.⁴⁴ One of the incentives for developing the Comment were the initial reports of different State parties which had been reviewed by the Committee up to that point which displayed a misunderstanding of the scope of the obligations under art 12. In particular, the failure to recognise that the human rights-based model of disability required a shift from a substitute decision-making paradigm to one based on supported decision-making.⁴⁵

The Comment reflects an interpretation that is consistent with the approach of other UN bodies such as the Committee on the Elimination of Discrimination Against Women (CEDAW) which view capacity as the ability to hold rights and duties and to exercise them. The Comment also distinguishes between mental and legal capacity, describing mental capacity as differing from person to person

40 Disability Convention, above n 1, art 25.

41 Article 23.

42 Article 29.

43 Even official UN translations of the term "legal capacity" in Article 12(2) are inconsistent and conflate the capacity to act and the capacity for rights: International Disability Caucus *Communication on the Translation of Legal Capacity* (19 October 2006).

44 Committee on the Rights of Persons with Disabilities *General Comment No. 1 (2014) – Article 12: Equal recognition before the law* CRPD/C/GC/1 (2014). General comments are statements issued by the Treaty Bodies on a specific article or general issue which are designed to clarify the scope and meaning of provisions in a particular treaty and help in implementation. They are considered the definitive legal interpretation of the application of the treaties and can be a useful tool for the Courts in deciding the meaning of statutory provisions which have their origins in the international treaties: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [3.6.21].

45 Committee on the Rights of Persons with Disabilities, above n 44, at [3].

depending on a variety of factors, some of which may be environmental and social,⁴⁶ and explicitly stating that mental and legal capacity should not be conflated.⁴⁷ The Comment stated:⁴⁸

Legal capacity is an inherent right accorded to all people, including persons with disabilities. ... it consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law. ... The second is legal agency to act on those rights and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities. ... Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognized for the right to legal capacity [for persons with disabilities] to be fulfilled; they cannot be separated.

The Comment also established that absence or impaired decision making is not a reason for denying a person their right to exercise legal capacity. Article 12 requires support be provided to exercise that capacity if necessary and States must refrain from taking measures that have the effect of denying people legal capacity.⁴⁹ However, the Comment is equivocal about the type of support that should be made available, noting only that it may vary from person to person. It also suggests that substitute decision-making regimes, and mechanisms that deny legal capacity and discriminate in purpose or effect against persons with disabilities, should be abolished.⁵⁰

However, there will be some people for whom supported decision-making is simply not an option and no amount of support will allow them to make or communicate a decision. There will always be a need for some measure of protection for particularly vulnerable people who might otherwise be exploited in various ways. In such cases some form of substitute decision-making is inevitable. This was recognised by the Working Group on the Convention by the inclusion of safeguards in art 12 to prevent the misuse of supported decision-making. Explicit mention of substitute decision-making was considered unnecessary because the requirements for the provision of support proportionate to the person's needs could encompass the whole range of support from highest to lowest.⁵¹

One of the Committee's recommendations following the second report by the Independent Monitoring Mechanism (IMM) under art 33 was that New Zealand should take immediate action to revise laws that involved substitute decision-making by introducing a range of measures which

46 At [13].

47 At [15].

48 At [14].

49 At [17].

50 At [60(a)].

51 Office for Disability Issues "New Zealand's View of a Convention on the Rights of Disabled People (28 November 2003).

respected a person's autonomy, will and preferences and conformed fully with art 12.⁵² As noted earlier the most relevant legislation in New Zealand in this regard is the PPPR Act which provides for guardianship of adult people and is based on an assumption of capacity and the extent to which it dictates a person's ability to make decisions about their welfare and property.

Since its inception the PPPR Act has been promoted as ensuring that a person who is subject to the Act has the same legal rights and capacities as a person of full age and capacity. But, while much of the Act is consistent with the obligations under the Convention, it includes broad discretionary powers which allow the Family Court to grant Welfare Guardianship orders and make decisions on behalf a person with some sort of disability. Such powers have the potential to be applied inconsistently with the Convention if, in interpreting the PPPR Act, the Courts do not properly engage with the obligations and discretions conferred. It may have been this that the Committee picked up on in its concluding observations.

While the Committee's comments may appear to indicate a lack of understanding of the aim and purpose of the Act, the legislation itself cannot be faulted. It is the way it is applied – both by the judiciary and those who are conferred statutory powers – that remains an issue. In this context the recommendation by the IMM that further research be undertaken, to determine whether the provisions in the PPPR Act relating to substitute decision-making are understood and applied, is opportune.⁵³

C Involuntary Treatment

The issue of capacity is also integral to the question of involuntary treatment and when – and under what circumstances – some sort of substitute decision-making is permissible in relation to medical treatment. The issue is often raised in relation to mental disorder, particularly the application of the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("MH (CAT) Act").

One of the Committee's Concluding Observations on New Zealand's first report related to the lack of human rights principles in the MH (CAT) Act and recommended that the Act was amended to comply with the Convention. It also called on New Zealand to take the necessary measures to ensure that no one was detained against his or her will in a medical facility on the basis of actual or perceived disability and mental health services were provided with the free and informed consent of the person in accordance with the Convention.

The Convention does not specifically refer to involuntary treatment. It needs to be read in through other articles such as: art 14, which protects the right to liberty of the person; art 17, which states that

52 In New Zealand the Independent Monitoring Mechanism set up under Article 33 provides for a tripartite arrangement consisting of the Human Rights Commission, the Office of the Ombudsmen and the Convention Coalition made up of six disability NGOs.

53 Independent Monitoring Mechanism *Making Disability Rights Real: Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, July 2012 – December 2013* (Human Rights Commission, June 2014) at 8.

every person with disabilities has the right to respect for his or her physical and mental integrity on an equal basis with others; art 25(d), which provides that health professionals must provide the same quality of care as to others, including on the basis of free and informed consent; and art 12.

As with the PPPR Act it is debatable whether the MH (CAT) Act is inconsistent with the Convention. The MH (CAT) Act sets out the circumstances and conditions under which people may be subjected to compulsory psychiatric treatment. It also sets out their rights. When an analysis of the Act was commissioned before ratification to identify any inconsistencies with the Convention, the reviewer concluded that most provisions of the MH (CAT) Act were not inconsistent with the Convention.⁵⁴ The concept of release from compulsory status – as interpreted by the Court of Appeal in *Waitemata Health v Attorney-General*⁵⁵ – did, however, suggest that the Act could be used to support arbitrary detention (contrary to art 14) and there was an argument that certain provisions in Part 5 (relating to compulsory treatment which required a patient to accept treatment directed by the Responsible Clinician) amount to unjustified limits on the right to healthcare on the basis of free and informed consent (art 25). The author also found that there was reason to be concerned about the frequency of independent reviews of a patient's continued compulsory status, particularly if the patient was subject to detention, although conceding that this fell short of amounting to arbitrary detention as envisaged in art 14 of the Convention.

The analysis was based on a conventional interpretation of the law and mental disorder but there is a growing body of opinion which considers that mental health legislation by its very nature is discriminatory and separate mental health legislation is outdated and inappropriate.⁵⁶ It is argued that to be more consistent with the Convention some type of capacity based law that is "de-linked" from disability and which only allows coercive psychiatric treatment to be administered to patients who genuinely lack decision-making capacity, is warranted. This does not mean that involuntary treatment is not permissible but rather that the criteria which permit it must be non-discriminatory and "disability-neutral". When one aspect of involuntary treatment is the presence of mental illness or mental disorder (itself a form of disability), unacceptable discrimination is introduced because the criteria for treatment cannot be said to be disability neutral.⁵⁷ On this reading the definition of mental

54 Andrew Butler *Review of the Mental Health (Compulsory Assessment and Treatment Act 1992 for Inconsistencies with the New Zealand Bill of Rights Act 1990* (2007).

55 *Waitemata Health v Attorney-General* [2001] NZFLR, (2001) 21 FRNZ 216 (CA).

56 See for example George Szmukler, Rowena Daw and Felicity Callard "Mental Health Law and the UN Convention on the rights of persons with disabilities" (2014) 37 Int J Law Psychiatry 245; Richardson, above n 26; Bernadette McSherry (ed) *Rethinking Rights-Based Mental Health Laws* (Hart, Oxford, 2010); and Tina Minkowitz, "The United Nations Convention of the Rights of Persons with Disabilities and the Right to be Free from Non-Consensual Psychiatric Treatment" (2007) 34 Syracuse J Intl L & Com 405.

57 Office of the High Commissioner for Human Rights *Dignity and Justice for Detainees Week: Persons with Disabilities* (Information Note No 4, 2008).

disorder in the New Zealand legislation could be said to be Convention non-compliant. However, the Committee's apparent acceptance of the legislation – albeit with certain changes – suggests that some form of separate mental health law is permissible.

The Government has consistently argued that New Zealand mental health law is not inconsistent with the Convention because it only provides for compulsory assessment and treatment in exceptional circumstances where a person presents a high level of risk; is subject to judicial authorisation and continuing scrutiny; provides for independent representation and rights of review and complaint for the person concerned as well as court-ordered assessment and treatment and does not negate the need for clinicians to obtain informed consent if possible at each stage of assessment and for all treatment.⁵⁸ While such comments suggest that there is unlikely to be a significant review of the MH (CAT) Act within the next few years in response to the Committee's recommendations, the recognition that capacity is increasingly playing a central role in mental health decision making could lead to change.

D Accessibility: Article 9

Accessibility is one of the key underlying principles of the Convention and a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities. It is necessary if persons with disabilities are to live independently and participate fully and equally in society.

The General Comment on accessibility states that it should be viewed as a disability-specific reaffirmation of the social aspect of the right of access, not only in the context of equality and non-discrimination, but as a way of investing in society and as an integral part of the sustainable development agenda.⁵⁹ The Comment goes on to say:⁶⁰

It is helpful to mainstream accessibility standards that prescribe various areas that have to be accessible, such as the physical environment in laws on construction and planning, transportation in laws on public aerial, railway, road and water transport, information and communication, and services open to the public. However, accessibility should be encompassed in general and specific laws on equal opportunities, equality and participation in the context of the prohibition of disability-based discrimination. Denial of access should be clearly defined as a prohibited act of discrimination.

...

When reviewing their accessibility legislation, States parties must consider and, where necessary, amend their laws to prohibit discrimination on the basis of disability.

58 See relevant provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

59 Committee on the Rights of Persons with Disabilities *General comment No. 2 (2014) – Article 9: Accessibility* CRPD/C/GC/2 (2014) at [1].

60 At [29] and [31].

There are a number of inconsistencies in New Zealand's approach to accessibility. While legislation such as the Building Act 2004 and the Building Code make it mandatory to include access for disabled people when new buildings are constructed or existing ones renovated, they only apply to public buildings exempting small factories and industrial premises which employ less than 10 people. The lack of application to private homes also impacts significantly on the ability of disabled people to live an independent life and be included in the community as required by art 19. To further complicate matters, the HRA (which the General Comment suggests is the type of legislation which should address the matter of disability discrimination) contains specific exceptions for access to public places and facilities. These include making it legal to not provide special services or facilities to enable a person with a disability to gain access to, or to use any place or vehicle, if it would not be reasonable to require it.⁶¹ It also exempts the Building Act itself.⁶² Together with the fact that any necessary upgrade can be set aside if the cost imposed on the building owner outweighs the potential advantages for disabled people, this suggests that it will be sometime before New Zealand can claim to be a fully accessible society.⁶³ This last matter has become a significant issue in the current rebuilding of transport and infrastructure of earthquake devastated Christchurch.

E Regression

One of the most frequent concerns about a State's performance under the human rights treaties – particularly the treaties relating to social and economic rights – is the possibility of regression and the resulting implications for the obligations a State has committed itself to. A recent action of the Government provides a good illustration of this in the context of the Disability Convention.

Article 19 recognises the right to live independently and be included in the community. This involves people with disabilities having the opportunity to choose where and with whom they live in the same way as everyone else; and to be able to access support services in the home and community services equally. In 2012 the New Zealand Court of Appeal affirmed that the Ministry of Health's policy of not paying family members to provide necessary support services for their adult disabled children discriminated on the grounds of family status.⁶⁴ The Government did not appeal the decision considering that the issue could be resolved by introducing a policy to remove the discrimination.

The new policy allows relatives who care for persons aged 18 years or older to be paid for disability support services but not spouses looking after each other or parents caring for disabled children. The payment rate for family carers is the minimum wage (which is less than externally contracted carers receive for doing the same work). In addition, while the nine families who were the

61 Human Rights Act 1993, s 43(2).

62 Section 43(3).

63 See Independent Monitoring Mechanism, above n 53, at 8.

64 *Atkinson v Ministry of Health* [2012] NZCA 184.

original parties to the successful litigation were paid under a confidential settlement, others who had hoped to join the action or were waiting for the decision in order to initiate a complaint because they were caring for disabled family members, can now only do so under the new policy—which specifically excludes people caring for disabled adult children.

While relying on a policy for such purposes is not unusual, the Government went too far. No one can seek judicial review of the policy and the Human Rights Commission (and therefore the Human Rights Review Tribunal) cannot even look at the policy to decide whether or not it is unlawfully discriminatory because of section 70E(2) which stipulates that:

no complaint based in whole or in part on a specified allegation [that the policy unlawfully discriminates] may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation [that the policy unlawfully discriminates] may be commenced or continued in any court or tribunal.

The change was made by an amendment to the New Zealand Public Health and Disability Act passed under urgency in a single day with no select committee involvement even though the Attorney General had certified that the Bill breached the New Zealand Bill of Rights as it infringed the right to judicial review and could not be justified in a free and democratic society. Although the justification for introducing the legislation was the possibility of a blow out in costs, this fear does not appear to have been realised.⁶⁵

The effect of the legislation is not only to deprive New Zealanders of the right to complain to the Human Rights Commission about a discriminatory policy (as well as excluding the possibility of judicial review) but also to undermine the right of disabled people to equal recognition before the law and to choose whom they wished to care for them—which, in turn, impacts on their right to live in the community on an equal basis with everyone else.

The decision to amend the Public Health and Disability Act in 2013 must be seen as a retrograde step. Domestically it has attracted condemnation from academics, civil society and the Human Rights Commission. It has been criticised internationally during the Universal Periodic Review (UPR) process and by the Disability Committee when New Zealand reported under the Convention. As the Committee put it in their concluding observations:⁶⁶

... there appears to be a lack of choice and of a range of supports to ensure that persons with disabilities can freely and by themselves choose to live included in the community ...

⁶⁵ The financial information on which the Bill was based was redacted from the accompanying explanatory notes.

⁶⁶ Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of New Zealand* CRPD/C/NZL/CO/1 (2014) at [39].

The Committee recommended that community support should be made available to allow disabled people to exercise and control of where they live⁶⁷ and that New Zealand should reconsider the implications of the legislation to ensure that all family members who are carers are paid on the same basis as other carers and to reinstitute the ability to complain about discriminatory family care policies.⁶⁸

VI CONCLUSION

Whether the Convention has led to the creation of new rights or hybrid rights, or simply reinforces the rights found in the more conventional human rights treaties is still a matter of conjecture. What this analysis demonstrates, however, is that the traditional approach to interpreting many of the concepts fundamental to the Convention needs to change.

Given the centrality of reasonable accommodation to the definition of disability in the Convention it is no longer possible to avoid accommodating the requirements of disabled people when it is inconvenient. While fiscal reasons will continue to be a relevant consideration, they should not provide an easy option to avoid complying with the HRA.⁶⁹ This may need to involve a rethink of the Act itself – particularly the need for a general obligation to accommodate the needs of disabled people in the absence of an equality provision in either the HRA or the NZBORA. Similar issues are raised by the right to equal recognition before the law, although they may be more easily resolved with a change in attitude and improved understanding and a move away from the paternalism that figures in much decision-making relating to disabled people. While involuntary treatment is in one sense a more refined aspect of capacity, genuine issues are raised by the existence of separate legislation to deal with mental disability.

The social model of disability promoted by the Convention reflects an egalitarian approach to disability that places responsibility for ensuring disabled people are treated the same as everyone else, rather than limiting their opportunities because of a medical condition. Despite good intentions, New Zealand's approach is presently out of alignment with the Convention and undermines its commitment to the disability community. Rights mutate and change as populations become more diverse and increasingly vocal about their rights. To ensure human rights are available equally and without

67 At [40].

68 At [10].

69 In Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights* E/C12/GC/20 (2009), the CESCR noted at [13] that:

... there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

discrimination to disabled people requires a significant rethink in how those rights are presently provided – both in legislation and by those who administer the laws. Most importantly, decisions about compliance need to involve disabled people themselves. Disabled people have invested a good deal of faith in the Convention and what it will deliver. The recognition of their rights in a meaningful way – possibly for the first time – has empowered them and it would be unfortunate if they were disenfranchised by issues that are essentially surmountable. There needs to be genuine acceptance and recognition of the slogan of the disabled community since the 1980s: Nothing about us without us.