



Fault lines:

Human rights in
New Zealand

Judy McGregor, Sylvia Bell and Margaret Wilson

Acknowledgements:

The New Zealand Law Foundation funded the three year research project and we are enormously grateful for their financial and moral support. We would like to thank the stakeholders who contributed to the research and to those experts who read individual chapters and provided feedback. We appreciate the work of Kyle Stutter of the New Zealand Human Rights Commission and Kirsty Whitby in the School of Social Sciences and Public Policy at AUT for money matters. Millie Wall patiently formatted the report and designed the cover. Heidi Jones and Anne-Marie Laure provided valuable research in the early stages of the project. Sir Geoffrey Palmer undertook the overall peer review and John Harvey proof read the report several times. Any errors of fact or grammatical imperfections are ours alone and will be corrected in web-based versions of the report.

Contact details: judy.mcgregor@aut.ac.nz

 sbell@aut.ac.nz

 mwilson@waikato.ac.nz

Chapter Seven The Convention on the Rights of Persons with Disabilities (CPRD)

7 Background

The Convention on the Rights of Persons with Disabilities (CPRD) is the most modern of the international human rights treaties and the first of the 21st century. It was adopted by the UN General Assembly on 13 December 2006, and is unique in a number of ways. It introduces a “disability narrative into the human rights framework”³⁶⁷ and provides an “unprecedented opportunity for the United Nations to engage in activities that promote the rights and dignity of persons with disabilities”.³⁶⁸ It marks a turning point for the enjoyment of human rights of persons with disabilities³⁶⁹ following decades of neglect and marginalisation within the human rights agenda, and is based on the social model of disability rather than on individual and personalised pathology.³⁷⁰ It is also notable for the unprecedented level of civil society participation and advocacy involved in the drive for a separate treaty. The development of the Convention was described as “ground-breaking advocacy”³⁷¹ in the spirit of the international disability slogan of “nothing about us without us”. New Zealand signed the CPRD on 30 March 2007.

New Zealand played a significant role in the evolution of the Convention, particularly through the involvement of representatives of disabled peoples’ organisations (DPOs) and Ambassador Don MacKay, Permanent Representative of New Zealand to the United Nations in Geneva, who served as Chair of the Ad Hoc Committee on the Rights of Persons with Disabilities during its final two years and the last session of the negotiations.

The United Nations has characterised people with disabilities as the world’s largest minority. It is estimated that more than 10 per cent of the world’s population, or 650 million people, live with a disability.

The Convention describes the rights of people with disabilities under international law and sets out a code of implementation for governments,³⁷² similar to other human rights treaties. One commentator describes the CPRD as clarifying the position of people with disabilities in international law.³⁷³ However, another scholar questions whether the Convention is merely making it clear that existing human rights should, and do, apply to people with disabilities, or whether it creates new rights that are specific to people with disabilities.³⁷⁴ He suggests that the Convention

³⁶⁷ Janet Lord, (2013) “Screened out of existence: the Convention on the Rights of Persons with Disabilities and Selective Screening Practices” *International Journal of Disability, Community and Rehabilitation*, 12(2), <http://www.ijdcrc.ca/Vol12-02/articles/lord.shtml>

³⁶⁸ Sha Zukang, (2007) “Promoting the Convention on the Rights of Persons with Disabilities: The Role of DESA”. *International Rehabilitation Review*, 56(1), 11.

³⁶⁹ Louise Arbour, (2007) “The Role of the OHCHR in Promoting the UN Convention on the Rights of Persons with Disabilities”. *International Rehabilitation Review*, 56(1), 12

³⁷⁰ Paula Pinto, (2011). “Monitoring Human Rights: A Holistic Approach” in Marcia Rioux, Lee Ann Bassar and Melinda Jones (eds.) *Critical Perspectives on Human Rights and Disability Law*. Leiden, Martinus Nijhoff Publishers at 451-477.

³⁷¹ Maria Reina and Stefan Tromel, S. (2007) “A Unified Disability Community: the Key to Effective Implementation of the Convention”. *International Rehabilitation Review*, 56(1), 9

³⁷² Don MacKay, (2007) “The Convention on the Rights of Persons with Disabilities: A Benchmark for Action”. *International Rehabilitation Review*, 56(1), 2-4.

³⁷³ Melinda Jones, (2011). “Inclusion, social inclusion and participation.” in Rioux, M. et al (eds.) above at pp 57-82.

³⁷⁴ Frederic Megret, F. (2008) “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” *Human Rights Quarterly*, 30(2), 494-516

does a number of things such as affirming the applicability of existing human rights; reformulating existing human rights; extending a number of existing rights; and it “also comes very close to creating new rights....specific to persons with disabilities.”³⁷⁵ Other commentators suggest that the Convention does not “intentionally create new rights”³⁷⁶ while Byrnes argues that because it is a comprehensive and integral treaty the CRPD does in fact create new hybrid rights.³⁷⁷

The CRPD is wide-ranging covering accessibility, awareness-raising to combat stereotypes, living independently, personal mobility, habilitation and rehabilitation, statistics and data collection as well as health, employment and education and articles for children with disabilities and women with disabilities. The right to life is a separate article.

Accessibility, inclusiveness and changing societal attitudes are recurring themes and the Convention reflects a shift in thinking from viewing disability in terms of social welfare to a human rights paradigm. As a signatory of the Convention, New Zealand has committed itself to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise”.³⁷⁸ A former chair of the UN Committee on the Rights of Persons with Disabilities, Ron McCallum, notes that it is equally important to appreciate that people with disabilities can also rely on the human rights provisions contained in other UN treaties as well as in many other supra-national covenants, charters and treaties.³⁷⁹

The CRPD differs from other human rights treaties in a number of ways. First, there is a difference in detail, with 30 substantive articles, many far more explicit than corresponding articles in other population-based treaties. For example, Article 27-Work and Employment - has 11 sub clauses. Second, the enlarged scope is coupled with a more detailed articulation within the convention articles themselves, what one scholar calls “substantial extra semantic texture to certain rights”³⁸⁰ and reflects a maturing of definitions of contentious human rights concepts such as “reasonable accommodation”. This could have implications for future treaty-based jurisprudence. For example, Article Two defines “reasonable accommodation” as both a positive and negative duty with its denial constituting discrimination.

Third, it introduces a new range of monitoring mechanisms, including national implementation and monitoring by State parties through the establishment of a framework of an independent mechanisms with a specific role for civil society (Article 33).

A fourth element that distinguishes the CRPD, is the depth of the involvement of disabled people, the affected population group, in its drafting. On 30 November 2001, the Mexican President made a speech to the United Nations General Assembly introducing the idea of a new convention. He said: “*It would be impossible to make this world more just if we allow the exclusion of the most vulnerable groups.*” This prompted the OHCHR to review international human rights treaties, standards and

³⁷⁵ at 498

³⁷⁶ Rioux et al., above n 373 at 482.

³⁷⁷ Andrew Byrnes, (2008). *Monitoring the fulfilment of CRPD Rights in Australia: Issues and challenges*. Transcript from the Queensland Advocacy Inc. Human Rights Seminar 20 August 2008. Online <http://www.qai.or.au/content/online-library-documentscfm?ID=69>.

³⁷⁸ Article 4. Convention on the Rights of Persons with Disabilities.

³⁷⁹ Ron McCallum in Rioux et al, above n 373

³⁸⁰ McCallum, above at 503

mechanisms in relation to disability. The resulting Quinn-Degener report recommended strengthening current mechanisms and developing a separate convention.³⁸¹

The international consensus that the existing human rights system had neither promoted nor protected the rights of people with disabilities was reflected in the United Nations High Commissioner for Human Rights, Louise Arbour's comment to the UN committee negotiating the new Convention in 2006:³⁸²

There is also no doubt that the existing standards and mechanisms have in fact, failed to provide adequate protection in the specific case of persons with disabilities. It is clearly time for the United Nations to remedy this shortcoming.

While world leaders by 2005 recognised the need to finalise a convention, DPOs and others were frustrated by both the pace of progress of realisation of civil, political, economic, social and cultural rights for people with disabilities and the failure of governments to apply existing instruments in any specific or targeted way to implement them practically for people with disabilities. This frustration, coupled with the opportunity provided by the development of a new convention in and of itself, generated new forms of disability advocacy at international and national levels which led to an "unprecedented involvement of DPOs in crafting the CRPD".³⁸³ The International Disability Caucus (IDC) which represented people with disabilities on the Ad Hoc Committee drafting the new treaty coordinated about 80 global, regional and national DPOs and related NGOs from across regions including different disability groups.³⁸⁴

Legitimised by its broad constituency, DPO leadership and consensual agenda, IDC's advocacy included a broad range of tactics, from developing an alternative Draft Convention to making a unified intervention on each issue during the plenary sessions.

The level of involvement of DPOs meant that the final text of the Convention represented real life experiences of people with disabilities and led to a new level of civil society politicisation about expectations for the Convention's implementation.

7.1 The New Zealand context

New Zealand signed the CRPD on 30 March 2007 but ratification of the Optional Protocol is "under consideration".³⁸⁵ The Government has told the UN that it expects to provide an update on New Zealand's implementation of the Optional Protocol in 2015.³⁸⁶

By the late 1990s there was a growing momentum in New Zealand to progress disability rights. In 1999 a Minister for Disability Issues was created and in 2002 a mechanism - the Office for Disability Issues (ODI) within the Ministry of Social Development - was established as part of the fifth Labour Government's social policy framework. In 2000 a new Public Health and Disability Act foreshadowed the development of the *New Zealand Disability Strategy: Making a World of Difference*:

³⁸¹ Gerard Quinn & Theresia Degener, (2002). *Human Rights and Disability*. New York and Geneva, United Nations.

³⁸² Quoted in Mackay, above n 372

³⁸³ McKay above at 9.

³⁸⁴ At 9.

³⁸⁵ New Zealand Ministry of Foreign Affairs and Trade (2008) *New Zealand Handbook on International Human Rights*. Wellington (2008) at 245.

³⁸⁶ Office of the High Commissioner for Human Rights (2014) *Committee on the Rights of Persons with Disabilities considers initial report of New Zealand*. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15042&la> Accessed on 27/11/2014.

Whakanui Oranga. The strategy was regarded internationally as socially progressive both in its content and in the process of its development. A Strategy Reference Group, co-chaired by the Director of ODI and Robyn Hunt, a disabled person who later became a Human Rights Commissioner, took the draft to the disability sector for consultation. A central theme of the strategy was the idea of New Zealand as fully inclusive society. The leadership role taken by representatives of disabled people in the development of the strategy and the expertise and experience gained as a result, transferred into the development of CRPD.

The role of civil society in the development of the CRPD, particularly by DPO representatives, is significant in New Zealand's human rights history. It is, however, a story that has not yet received appropriate public or political recognition. The UN had established an Ad Hoc Committee in December 2001 which first met in 2002 and reaffirmed the need for a new treaty. In May 2003 Cabinet agreed that New Zealand take an active role in the development of the CRPD. A Cabinet paper at the time of the Committee's second meeting in June said that:³⁸⁷

The inclusion of non-official representatives contributed breadth and special knowledge to the delegation. This breadth of expertise ensured that New Zealand played an influential role. 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 and it was acknowledged that this would inevitably require social development and affirmative action.

The Cabinet paper also outlined New Zealand's contribution to a process for developing CRPD which promoted the full and active participation of disabled people in partnership with State parties. The European Union had put forward a proposal to establish an "experts" group to work on the convention text but this was opposed by other States and perceived by civil society as a delaying tactic. New Zealand proposed an alternative inter-sessional arrangement comprising a small group of government representatives and DPOs working in partnership which gained widespread support as the preferred process after intense lobbying.

New Zealand's official position on the scope of the proposed Convention is intriguing given its approach to implementation post ratification. New Zealand said:³⁸⁸

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 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.

The Cabinet paper stated that a comprehensive treaty would go further than a statement of the right to equality and non-discrimination recommended by some States and provided in the New Zealand Human Rights Act 1993. It involved consideration of the social, cultural, economic, civil

³⁸⁷ Ruth Dyson, (2003) *Cabinet Social Development Committee. Negotiations on a Convention on the Rights of Disabled People*. (CAB Min (03) 17/5)

³⁸⁸ At [13]

and political conditions necessary to ensure the full and diverse population of disabled people were able to exercise their universal human rights.

The Minister for Disability Issues, Hon Ruth Dyson, then sought Cabinet consideration for the support for DPOs in the convention development and asked for a transparent funding pool to resource the activity in 2003. This meant that disabled people were able to be part of negotiating teams outside of government influence in the CRPD process. Gary Williams, Chief Executive of the Disabled Persons Assembly, and Robyn Hunt were actively involved in this process. New Zealander Robert Martin, who was Vice-President of Inclusion International, a self-advocacy group, also spoke at the United Nations during the development of the CRPD.

Reporting on ongoing engagement in the CRPD development, the Minister of Foreign Affairs and Trade, Phil Goff, and the Minister for Disability Issues, Ruth Dyson, said that New Zealand was able to support the main thrust of the draft Convention under negotiation although there were a few issues that were inconsistent with existing legislation or required clarification. These related to forced interventions, the rights of disabled people illegally in New Zealand and remedies for breaches of rights.³⁸⁹

New Zealand was one of 27 States represented on the Working Group, which included 12 international non-governmental organisations representing disabled people and one representative of national human rights institutions. The group met in January 2004 and was chaired by the New Zealand Permanent Representative to the UN in New York. The Ministers observed that “*New Zealand efforts and its views on the scope and substance of the Convention have been highly regarded.*”³⁹⁰ The broad approach to the negotiations had been to promote partnerships between the government and non-governmental organisations in national and international negotiations and promote outcomes consistent with the New Zealand Disability Strategy, domestic legislation and international human rights instruments.

There were eight meetings of the Ad Hoc Committee between 2002 and 2006. The United Nations General Assembly adopted the Convention by consensus on 13 December 2006.

The Cabinet paper authorising New Zealand’s signing of the CRPD urged the attendance of a high level delegation when the Convention first opened for signing on 30 March 2007 as a “continuation of our leadership role” and to send a strong signal to other States.³⁹¹ It was claimed that “New Zealand modelled participation by disabled people by including in every delegation to the United Nations at least two representatives of the disability sector. Funding was provided by government for disability sector representatives to attend meetings in New York.”³⁹²

In 2007 New Zealand won the prestigious Franklin Delano Roosevelt International Disability Award which the Minister for Disability Issues, Ruth Dyson, said acknowledged both the New Zealand Disability Strategy and “in shaping and negotiating the intent of the UNCRPD over a

³⁸⁹ Phil Goff and Ruth Dyson, (2004) *Cabinet Social Development Committee. Progress in Negotiating a Disability Rights Convention.* (CAB Min (04) 40/5).

³⁹⁰ At [9]

³⁹¹ Ruth Dyson and Winston Peters, (2007) *Cabinet Social Development Committee. Signature of the Convention on the Rights for persons with Disabilities.*

³⁹² at 3, [22]

number of years”.³⁹³ Civil society representatives also saw the award as a result of their efforts and role in developing the Convention.³⁹⁴ The Disabled Persons Assembly NZ said that “*we were recognised internationally for this work (influential in creation of CRPD) in 2007 by jointly winning the Franklin Roosevelt Award.*” The DPA was awarded a US \$50,000 grant as part of the award given to an outstanding non-governmental disability organisation selected by the winning country. DPA’s application, one of 24, was supported by People First and CCS Disability Action.³⁹⁵

Given its reluctance to enter reservations, New Zealand aims to ensure that its domestic legislation is compliant before ratification.³⁹⁶ After signing the CRPD the Government carried out a National Interest Analysis (‘NIA’). The NIA found that it was not necessary to introduce specific legislation but 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.³⁹⁷ The changes were considered “minor and technical” and able to be effected through an omnibus Bill that principally involved removing statutory references to an individual’s status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.³⁹⁸

Subsequent to ratification, substitute decision making – and in particular capacity and the implications of the Protection of Personal and Property Rights Act 1988 (PPPR Act) - has emerged as a significant issue in Convention compliance. 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 the negotiation of the Convention noted that substitute decision-making did not prohibit the use of personal representatives under the PPPR Act.³⁹⁹ However, as the PPPR Act was not listed in the NIA as a law 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 Article 12 which should therefore be interpreted in a Convention compliant manner.

The NIA was relatively superficial as there was a push for New Zealand to ratify as soon as possible given its role in promoting the Convention.⁴⁰⁰ A cabinet paper on the NIA prepared by the ODI in 2008 suggests there was no real attempt to address the more subtle implications of the Convention. Issues such as access to buildings or reasonable accommodation in education were considered to be 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.

³⁹³ Ruth Dyson (3 December, 2007). *NZ wins Roosevelt International Disability Award*. Press Release. <http://www.beehive.govt.nz/release/nz-wins-roosevelt-international-disability-award>. Accessed 1/12/2014.

³⁹⁴ Disabled Persons Assembly NZ. *Our achievements*. Accessed at <http://dpa.org.nz> on 1/12/2014.

³⁹⁵ Ruth Dyson (4 April, 2008) “NZ disability group awarded \$US 50,000 grant.” New Zealand Government Press Release. [Scoop.co.nz](http://scoop.co.nz). Accessed on 1/12/2014.

³⁹⁶ 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 provision from applying to it. A reservation cannot be entered if it would undermine the effect of the treaty.

³⁹⁷ Ruth Dyson and Winston Peters (2007) Cabinet External Relations and Defence Committee. *Towards ratification of the United Nations Convention on the Rights of Persons with Disabilities at* 3 [15][16][17]

³⁹⁸ Office for Disability Issues *Convention on the Rights of Persons with Disabilities: National Interest Analysis at* [56 et seq]

³⁹⁹ Office for Disability Issues and Ministry of Foreign Affairs and Trade *Towards a Disability Rights Convention at* [25]

⁴⁰⁰ Cab paper: *Towards ratification of the United Nations Convention on the Rights of Persons with Disabilities* September 2007 at [26]

New Zealand passed the Disability (United Nations Convention on the Rights of Persons with Disabilities) Act in 2008 to effect the necessary changes allowing New Zealand to ratify the Convention on 26 September 2008 in time for New Zealand to participate in a Conference of State parties in November of that year.

The ebb and flow of political will that so strongly characterises New Zealand's commitment to human rights is especially evident in progress for disabled people. Without strong Ministerial leadership from the first Minister for Disability Issues, Hon. Ruth Dyson, and her successor, Hon. Tariana Turia, it is unlikely that New Zealand would have played such a pivotal role in the development of the CRPD. Ministerial backing was required for the funding of representatives of the disability community for travel to New York and Hon Dyson was a formidable champion of disability rights. Once the CRPD had been signed, Hon Turia quickly established the institutional framework for implementing the CRPD and showed that she was both a passionate advocate for change within government departments and equally dismissive of bureaucratic stonewalling.⁴⁰¹

The increasing salience of the implementation of human rights for disabled people is demonstrated by the increasing number of New Zealanders who report that they are limited in their daily activities by a range of impairments. The New Zealand Disability Survey from Statistics New Zealand in June 2013 identified 1.1 million people representing 24 per cent of the population as disabled. This was an increase from 20 per cent in 2001 involving 11 per cent of children and 27 per cent of adults.⁴⁰²

7.1.1 Article 33

Article 33, National implementation and monitoring, is a mechanism that has been described as “unique in an international human rights instrument” that “triangulates between executive efficiency, independent scrutiny and voice.”⁴⁰³ It purports to distinguish between national implementation and monitoring and is intended to link the norms of the CRPD and international treaty law with domestic progress and change for people with disabilities. The Asia Pacific Forum (APF) states that Article 33 was included in the CRPD largely as a result of the contributions of national human rights institutions (NHRIs), together with representatives of people with disabilities and this was a “first” in human rights instruments.⁴⁰⁴

This is much more specific than the general obligations clauses contained in previous human rights instruments, which require States to use “all appropriate means, including particularly the adoption of legislative measures” (ICESCR) or to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” (ICCPR).

The APF said the recognition of the importance of a national monitoring mechanism in addition to the combination of domestic legislative measures and international monitoring was important.⁴⁰⁵

⁴⁰¹ Personal observation by one of the authors, who was a NZ Human Rights Commissioner with joint responsibility for disability rights when the IMM was established, at the first IMM meeting with the Ministerial Advisory Group.

⁴⁰² Statistics New Zealand (2014) New Zealand Disability Survey 2013. Retrieved from <http://www.stats.govt.nz/~media/Statistics/Browse%20for%20stats/DisabilitySurvey/HOTP2013/DisabilitySurvey2013HOTP.pdf>

⁴⁰³ Gerard Quinn, (2007). Article 33: A catalyst for domestic change. *International Rehabilitation Review*, 56(1), 34-36. Retrieved from http://www.unicef.org/RI_Review_2007_Dec_web.pdf

⁴⁰⁴ Asia Pacific Forum (2007) Annual Conference: Disability Issues Paper, Sydney Australia 24-27 September 2007.

⁴⁰⁵ At 4.

The express incorporation of this insight into a major human rights instrument is both a necessary response to the specific issues raised by disability, and a welcome precedent for the development and implementation of human rights law more generally.

Under Article 33(1) States Parties are expected to designate one or more focal points within government for matters relating to the implementation of the Convention and establish or designate a coordination mechanism within government to facilitate related action in different sectors and at different levels. One of the main problems identified by commentators was the ‘silo effect’ of individual public service departments operating individually and variably. Article 33(1) “locked onto the existing institutional architecture of change by engaging implementation bodies and seeking their co-ordination”.⁴⁰⁶

Under Article 33(2) States Parties are expected to establish and maintain a framework, including one or more independent mechanisms, to promote, protect and monitor implementation of the Convention “tak[ing] into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.” The principles are the Paris Principles relating to the Status of National Human Rights Institutions adopted by the United Nations General Assembly in 1993 and which form a framework against which NHRIs such as the NZHRC are accredited.⁴⁰⁷

The Office of the United Nations High Commissioner for Human Rights produced a thematic study on the structure and role of national mechanisms which identified three key requirements.⁴⁰⁸ These were the inclusion of independent mechanisms, a framework capable to carrying out the mandate to promote, protect and monitor and the involvement and full participation of civil society in the monitoring process. The study also defined promotion, protection and monitoring. Promotion included a broad range of activities from awareness-raising to a more strategic engagement in the promotion of the implementation of the Convention and included activities such as scrutiny of existing legislation and draft bills to ensure consistency with CRPD and provision of technical advice to public authorities and other agencies in applying the Convention.⁴⁰⁹ Protection covered a wide range of activities such as the investigation and examination of individual and group complaints, court cases, inquiries and issuing reports.⁴¹⁰ Monitoring the implementation of CRPD ranged from developing indicators and benchmarks to monitor implementation, estimating progress or regression over time to monitoring human rights violations through the complaints filed by alleged victims of discrimination with NHRIs, other agencies and quasi-judicial or judicial complaints mechanisms.⁴¹¹

Article 33(3) states that, “Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.” Gerard Quinn

⁴⁰⁶ At 36.

⁴⁰⁷ The NZHRC is an A-accredited NHRI.

⁴⁰⁸ Human Rights Council, Thirteenth session, Agenda item 2, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and monitoring of the Convention on the Rights of Persons with Disabilities: Summary*, A/HRC/13/29, 22 December 2009.

⁴⁰⁹ At [64]

⁴¹⁰ At [66]

⁴¹¹ At [67]-[68]

suggests that the majority of treaty monitoring bodies would look with disfavour on States that do not involve civil society in the drafting of their periodic reports.⁴¹²

This goes further. It explicitly requires such engagement with respect to national 'monitoring' which is quite crucial in keeping a domestic dynamic of reform going. As such it reflects a general requirement with respect to the consultation of persons with disabilities in Article 4 (3).

A paper for the ODI in 2008 provided three options for consideration on how New Zealand could meet the obligations of Article 33⁴¹³ noting that because New Zealand was an early adopter of CRPD there were few precedents for guidance. Two of the options preferred the ODI as the designated focal point within central government to provide leadership and monitoring of the New Zealand Disability Strategy and take responsibility for the New Zealand Government's reporting obligations under Article 35 of the Convention. Option Two also proposed that ODI take on the coordination role and decide best how to involve people with disabilities and civil society. In Option Three, however, the Ministry of Justice was to be designated as the central government focal point and fulfil the international reporting requirements, while the Ministry of Health would assume leadership and monitoring of the Disabilities Strategy.

Options for implementing Article 33(2) in terms of promoting, protecting and monitoring, ranged from a new Disabilities Commission established as an independent crown entity to a Disabilities Commissioner situated within the NZHRC.

Article 33(3) explicitly refers to the participation of civil society and people with disabilities. DPOs were consulted about the development of options to implement Article 33. The options paper stated:⁴¹⁴

It would be hard to overstate the concern that the DPOs have about the knowledge needed, ability and as importantly the willingness of agencies to form an active partnership with DPOs. This concern was raised without exception by all DPOs. This partnership needs to be radically different from the model that has been employed for consultation with civil society in New Zealand until now in regard to the Disability Strategy..... The current monitoring of other UN human rights conventions (e.g. the ICCPR, ICESCR, CRC) is not considered by any DPO as a possible framework for monitoring the Convention.

The Options Paper said the central government agencies canvassed with civil society options within government from the Ministry of Health, the Ministry of Social Development (MSD), the ODI which reports into the MSD, and the Ministry of Justice. Preferences were split. To fulfil Article 33 (2) the DPOs preferred the role was shared between the NZHRC and the Office of the Ombudsmen. An issues paper by the Asia Pacific Forum also contemplated a shared function with NHRIs and others. It said:⁴¹⁵

Article 33(2) does not simply contemplate designation of a single mechanism (such as an NHRI) for monitoring, protection and promotion of implementation. Although establishment

⁴¹² Quinn, above n 411 at 36.

⁴¹³ Petra Butler, (2008). *Report on the Implementation Options of Article 33 United Nation Convention on the Rights of Persons with Disabilities*.

⁴¹⁴ At 15

⁴¹⁵ At 7

or designation of a mechanism or mechanisms is called for, this is set within a broader requirement to establish a framework for promotion, protection and monitoring.

Subsequent European scholarship suggests that “NHRIs should not be blindly designated independent mechanisms” and that often it will be advantageous if the role and responsibilities are shared.⁴¹⁶

In the end New Zealand opted for a different option with one novel feature. Hon Tariana Turia, the Minister for Disability Issues outlined in a Cabinet paper how New Zealand would meet its obligations under Article 33.⁴¹⁷ Unsurprisingly, she proposed that the ODI be identified as the government focal point, because it had the “mandate, skills and acceptance among disabled peoples’ organisations to lead a whole-of-government approach to implementing the Convention”.⁴¹⁸ However, she suggested that the relatively newly created Ministerial Committee on Disability Issues be designated as the co-ordinating mechanism, because “*co-ordination at Ministerial level will demonstrate New Zealand’s continued commitment to taking a leadership role.*”

A Ministerial Committee on Disability Issues had been agreed to by Cabinet in February 2009 as part of the Government’s response to the Social Services Select Committee’s report on its inquiry into the quality of care and services provision for people with disabilities. Cabinet had tasked the Committee with determining the priority and timeframes for implementing the Government response and improving effectiveness of government agencies’ implementation of the New Zealand Disability Strategy. Its aim was to improve the leadership, co-ordination and accountability of government as it affected disabled people.⁴¹⁹ Expanding its mandate would provide a forum where all participants, Government and non-Government, with a Convention role could meet to discuss “progress, priorities, and the linkage with action plans.”⁴²⁰ The mandate of the existing public service Chief Executives’ Group on Disability Issues would also be extended offering the “opportunity for a positive and collaborative approach at governance and implementation levels.”⁴²¹ In the Cabinet paper Minister Turia said that the establishment of a committee that can “work with the independent participants offers the potential to develop a fully collaborative framework in keeping with the intent of the Convention”.⁴²²

The NZHRC was to have a broad role across all three elements of promotion, protection and monitoring in accordance with its existing functions in the human rights area, under Article 33(2). It was proposed that:⁴²³

The Office of the Ombudsmen will have a more confined role in the areas of protection and monitoring, to the extent that these roles can be achieved throughout the Ombudsmen’s existing functions to investigate the administrative conduct of agencies in the State sector.

⁴¹⁶ Gauthier de Beco, (2011) “Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions” *Netherlands Quarterly of Human Rights*. 29 (1) 84-106 at 106.

⁴¹⁷ Office for the Minister of Disability Issues (2010) *Framework to promote, Protect and Monitor Implementation of the Convention on the Rights of Persons with Disabilities*. Cabinet Social Policy Committee.

⁴¹⁸ At [4]

⁴¹⁹ At [15]

⁴²⁰ At [16]

⁴²¹ At [19]

⁴²² At [8]

⁴²³ At [4]

A group of DPOs that had been involved in the CRPD drafting, signing and ratification process, called the Convention Coalition that had been formed as a governance-level steering group by six major NGOs provided the civil society component of Article 33. The groups were the Disabled Persons Assembly (DPA), the Association of Blind Citizens, People First, Deaf Aotearoa, Ngati Kapo and Nga Hau E Wha (a network of organisations of people with experience of mental illness.) The mental health group, Balance New Zealand, and Deafblind (NZ) Incorporated were added later.

The proposed framework therefore “provide[d] for three independent and equal partners-the Human Rights Commission, the Office of the Ombudsmen and the Convention Coalition-working in full collaboration with government to ensure that the Convention is monitored in a manner that will have the confidence of disabled people and the New Zealand public.”⁴²⁴

The Cabinet minute also identified what the three groups would do. The NZHRC would lead an ongoing programme to identify areas where disabled people are vulnerable to abuse or denial of their rights and it would advocate for solutions and remedies by government agencies or the private sector. It would also develop a “strong, formal and visible domestic role” promoting and protecting the implementation of the Convention and advocating for disability rights.⁴²⁵

The principal focus of the Office of the Ombudsmen would be monitoring the performance of the wider State sector in implementing the Convention “through the own-motion investigation function, making recommendations and publishing reports as appropriate.”⁴²⁶ The Office was to be given explicit recognition in its existing mandate to investigate State sector administrative conduct in relation to disabled people.⁴²⁷

The Convention Coalition would lead disabled peoples’ work on monitoring and was “committed to ensuring that the Treaty of Waitangi is upheld and reflected in its activities.”⁴²⁸ The importance of sharing its monitoring work with regional and global disability communities was also recognised. The Convention Coalition provided an “ethical mechanism for disabled peoples’ input into the monitoring of disability rights as spelled out in the Convention”.⁴²⁹

The Independent Monitoring Mechanism (IMM) has reported twice since its establishment. The first report covered the five years until June 30, 2012 and the second the period from July 2012-to 31 December 2013.⁴³⁰ The first report focussed on developing a baseline profile of the rights of disabled people in New Zealand and contained seven key recommendations. It urged the Ministerial Committee on Disability Issues to ensure that action on the recommendations was completed by the end of 2014. The Minister responded by stating that the hard-hitting conclusions were just what the Government had asked for when it set up the independent organisations to

⁴²⁴ At [5]

⁴²⁵ At [27]

⁴²⁶ At [34]

⁴²⁷ At [35]

⁴²⁸ At [39]

⁴²⁹ At [40]

⁴³⁰ *Making disability rights real Whakatuturu 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. New Zealand Human Rights Commission, Ombudsman, New Zealand Convention Coalition.

undertake monitoring. Government would be carefully considering “these suggestions” in the coming year as it further developed and implemented the Disability Action Plan.⁴³¹

The second report returns to many of the themes in the first report with five broad areas requiring particular attention. These were:

- data and the absence of statistics and information relating to disabled people;
- accessibility to services, transport, communication and the physical environment;
- building a people-driven system;
- violence, neglect and abuse directed at disabled people;
- education, including the absence of an enforceable right to inclusive education, the way in which schools report on inclusiveness and exclusion, isolation and bullying.

Other matters of concern were also identified during the most recent reporting period. They were reliance on substituted decision-making and Article 12 of CRPD, the right to equal recognition before the law; the significant health disparities and life expectancy issues for disabled people particularly those with learning/intellectual disabilities and discrimination against disabled children in relation to out of home care arrangements under certain sections of the Children, Young Persons and their Families Act 1989. The report also urged the Government to repeal the New Zealand Public Health and Disability Amendment Act 2013 that effectively removed any potential domestic legal remedy for unlawful discrimination relating to the Government’s family care policy. Specific key recommendations identified which public service departments and government agencies were responsible for action.⁴³²

The IMM asked “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.”⁴³³ To date there has been no official government response to either of the IMM reports, other than carefully considering the “suggestions” of the first report. Ombudsman Ron Paterson in an interview for this research said:

I think if the Government didn’t respond, then the IMM would be left in the position of having to make the same points again, presumably more loudly, in the next report in another two years.

The absence of an official response suggests that while the IMM is a unique monitoring mechanism, the Government can treat it as a discretionary internal mechanism choosing when and if it wishes to respond. It both funds the monitoring mechanism, appoints and constitutes it, and can equally disregard it if it so wishes. However, it cannot ignore accountability by way of international treaty body reporting in quite the same way as with other treaties without incurring international disapproval. Ombudsman Ron Paterson said:

We’re very good at producing beautiful reports but we have to ask whether that is the most effective way of making change and holding people to account. I think we are identifying the need to better target issues. Our role is monitoring, not implementation, and as a monitor then

⁴³¹ Newsletter from the Office for Disability Issues (14 December, 2012) “Making Disability Rights Real”. We understand that a response can be expected by April 2015

⁴³² At 10, 11.

⁴³³ At 11.

you need to have some clear stakes in the ground so you can say 'this is how it was in 2014, and New Zealand has to do a better job.

It is too early to judge the effectiveness of the IMM as a process and in terms of outcomes. In addition to the issue of accountability, there is also a sense of “insiders” and “outsiders” within the disability community around the composition of the Convention Coalition of DPOs. This is recognised by the Disability Commissioner, Paul Gibson, while acknowledging the value of the CRPD reporting process as a whole. *“There has been tension between DPOs and other organisations involving disabled people at the other ends of the community that are not in the inner circle.”* While there was still some way to go, the CRPD provides an opportunity to build consensus in the community, as well as a framework for the government response and action on disability issues, he said. Convention Coalition chair, Mary Schnackenberg said ideally the coalition needs more Pacific involvement, additional Māori representation, youth participation and representation of wheelchair users.

As the IMM and CRPD reporting matures it may be necessary for the UN to develop guidelines and advice around Article 33 and specifically, the monitoring role. What does “monitoring” mean and against what indicators and benchmarks should State parties be measured?

7.1.2 Treaty body reporting

New Zealand submitted its initial report on 31 March 2011.⁴³⁴ In its overview New Zealand noted the shift in policy over several decades from exclusion and care outside of mainstream society to an inclusive social model of disability with monitoring as the default option and supplementary support services for disabled people as required.⁴³⁵ The Disability Strategy had advanced this vision and the principles reflected in the strategy aligned with those in the Convention. New Zealand also claimed the existing statutory framework was “sound and comprehensive” citing the NZBORA and the HRA in addition to other specific legislation.⁴³⁶ The report emphasised Government’s engagement with disabled people as members of the New Zealand delegation for the CRPD negotiations, and a standing disability sector reference group comprised of more than 70 disabled people, family members, advocates and providers.⁴³⁷

The report also noted continuing challenges with disabled people who were disadvantaged and experiencing poorer outcomes in health, education and employment and that these challenges were often greater for women, Māori and Pacific people. Other barriers included social discrimination and attitudinal barriers, as well as physical and environmental barriers which were exacerbated in rural areas. The limited range of data available about disabled people and the need for increased cultural sensitivity and different cultural frameworks were also identified.

During its consideration of New Zealand’s report Committee members’ questions covered a wide range of issues relating to violence, education, the provisions and limits of reasonable accommodation, digital hate speech and how the Canterbury earthquakes and rebuilding was impacting on people with disabilities. Ombudsman Ron Paterson said that the process of the constructive dialogue seemed quite unfocussed with every committee member:

⁴³⁴ Committee on the Rights of Persons with Disabilities (2013) *Implementation of the Convention on the Rights of Persons with Disabilities. Initial reports submitted by States parties under article 35 of the Convention. New Zealand* (31 March 2011). CRPD/C/NZ/1.

⁴³⁵ At [1]

⁴³⁶ At [4]

⁴³⁷ At [5(b)]

...keen to be pulling their weight so their questions were all over the map. There would be five rapid fire questions from one committee member and then you'd switch to another committee member.

Groups of Articles were taken at one time. Many of the replies given were very general although the Committee specifically asked whether the Government was going to repeal the Public Health and Disability Amendment Act with New Zealand indicating it did not intend to repeal the controversial legislation.

Paul Gibson, the Disability Rights Commissioner of the NZHRC, who attended the country examination said that because of New Zealand's history of involvement with the CRPD development, there was a "huge level of expectation from the committee."⁴³⁸

Observers said the committee was more engaged with New Zealand than what it usually is with most countries. But it also might have been that we were the first country up during a two or three week session, so there was more energy at the start. But because of what we did during the development of the convention, there was greater engagement, greater expectation.

As a Human Rights Commissioner he was invited to be part of the Government's presentation and part of the delegation, but also able to act independently. He believes that if he had a longer opportunity to speak he could have been of more value to the Committee. He said there was a range of different responses across government departments reflecting a range of knowledge and expertise of disability issues.

Mr Gibson said he would characterise much of the government's engagement as authentic and genuine but that there was some "spin and omissions" partly because of lack of expertise. As a result, the Concluding Observations were kinder to the government on certain issues but also harder in several areas because the government representatives did not know of some of the work which was being undertaken domestically which could have led to a more positive response to specific questions. Occasionally some of the New Zealand rhetoric grated on the CRPD committee, he said. One member asked a question about the numbers of young disabled people in aged care facilities. The response was that while until a few years ago there were approximately 600 in aged care facilities, now only approximately were. While the New Zealand representatives had a sense of achievement in the reduced number, there was a rumble around the room that a more desirable outcome would be for younger disabled people to be able to choose where to live, rather than being "put" somewhere.

The composition of the government delegation, given New Zealand's history of supporting active involvement from disabled people, was also of interest to the committee. He said there was an expectation of lived experience within government delegations these days.

Country rapporteur, Ronald McCallum, in his concluding remarks said that New Zealand had a good record in implementing the Convention. He said the dialogue was part of an international process long term and that while Government had expectations, so, too, did disability organisations.

⁴³⁸ Interview for this research with Paul Gibson, Disability Rights Commissioner of the New Zealand Human Rights Commission.

In its Concluding Observations on New Zealand's initial report the Committee welcomed the Disability Strategy and the accompanying Action Plan 2014-2018, sign language developments, media and cinema captioning and increased entry into universities and other tertiary institutions. Improvements in voting arrangements were noted and New Zealand was commended for establishing an IMM to fulfil the requirements of Article 33.

The Committee did, however, recommend that New Zealand ratify the Optional Protocol as soon as possible, reconsider its decision not to repeal the Public Health and Disability Act 2013 and consider amending the Human Rights Act 1993 to include a definition of reasonable accommodation that conformed with Article 2 of CRPD.

In relation to accessibility (Article 9) the Committee recommended that New Zealand enact measures to ensure that all public buildings, as well as public web pages, were made accessible to people with disabilities and that consideration be given to making all new future private houses fully accessible. The Committee also recommended that the exemption for factories and industrial premises employing less than five people be discontinued.

Other significant recommendations included:

- Replacement of substituted decision-making with supported decision-making in relation to Article 12 allowing informed consent to medical treatment, access to justice, marriage and work.
- Amendment of the Mental Health (Compulsory Assessment and Treatment) Act 1992 to ensure all mental health services are provided on the basis of free and informed consent; and all necessary legislative, administrative and judicial measures taken immediately to ensure no one is detained against their will in a medical facility on the basis of disability.
- Elimination of the use of seclusion and restraints in medical facilities
- Enactment of legislation prohibiting the use of sterilisation on boys and girls with disabilities, and on adults with disabilities, in the absence of their prior, fully informed and free consent.
- Repeal of s. 8 of the Adoption Act 1955 and amendment laws to ensure people with disabilities were treated on an equal basis with other parents with respect to adoption.
- Establishment of an enforceable right to inclusive education and implementation of anti-bullying programmes for people with disabilities.
- Re-examination of legislation to ensure that children with disabilities had the same safeguards as other children when they are placed in out-of-home care.
- Strengthen measures to improve health outcomes for disabled Māori and Pacific.
- Increase employment levels of people with disabilities and examine alternatives to minimum wage exemption permits for the employment of people with disabilities.
- Provision of a report from the Disability Survey 2013 that compared human rights outcomes of disabled and non-disabled men and women.
- Publication of disaggregated data by government departments, crown entities and local authorities in their annual reports.

The Committee urged New Zealand to send the Concluding Observations 'for consideration and action' to MPs, the Government, relevant ministries, local authorities, and members of relevant

professional groups such as education, medical and legal professionals, as well as the media, “using modern social communication strategies.”⁴³⁹

Disabled women were also a focus of the Concluding Observations of the Committee on the Elimination of All Forms of Discrimination against Women following New Zealand’s seventh periodic report. The Committee recommended to the State party that within two years it provide written information on steps taken to implement two specific recommendations including data and information on disabled women.⁴⁴⁰

A prominent women’s NGO that has consistently been involved in treaty body reporting, Pacific Women’s Watch (New Zealand) provided information to the UN Committee highlighting a number of concerns for disabled women including the lack of coverage in domestic violence legislation for all disabled women, the limited funding for prevention of violence against disabled women, health care discrimination, difficulties in access to education, complexities of the welfare system and forced sterilisation of disabled girls without consent.⁴⁴¹ Two other issues raised by the NGO were New Zealand’s slow response to urgings to sign the Optional Protocol and the fact that a single Commissioner was responsible for Health and Disability with no separation despite distinctly different scenarios.⁴⁴²

7.2 Fundamental concepts

Although a number of the UN Committee’s recommendations involve concepts such as reasonable accommodation, capacity and involuntary treatment that are fundamental to the Convention there is no uniform agreement on their correct interpretation. It remains an issue whether the Committee’s recommendations reflect a realistic understanding of the situation domestically in light of some of the Concluding Observations, particularly in relation to capacity where New Zealand has ground breaking legislation in the form of the PPPR Act since it was introduced in the 1980s.

7.2.1 Reasonable accommodation

Reasonable accommodation is central to the Convention as Article 2 defines disability discrimination as including denial of reasonable accommodation. It is described further as:

...necessary and appropriate modifications 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, requiring States to take appropriate steps to ensure that this occurs. However, it is silent on how this will be achieved in practice.

Before ratifying the Convention some changes were made to Part 2 of the HRA involving reasonable accommodation but they did not include a general obligation to accommodate. The

⁴³⁹ Concluding Observation at [73]

⁴⁴⁰ Committee on the Elimination of All Forms of Discrimination against Women (2012) *Concluding Observations of the Committee on the Elimination of Discrimination against Women. New Zealand CEDAW/C/NZ/CO/7*

⁴⁴¹ Pacific Women’s Watch (New Zealand) (2014) *Non-Governmental Organisation Alternative Interim Report, Status of Women, Comments to the UN CEDAW Monitoring Committee on progress by the New Zealand Government with respect to their implementation of CEDAW recommendations 36 and 38*, July 2012.

⁴⁴² At 3.

HRA creates a defence (with a comparatively low threshold). This is significant given the inclusion of reasonable accommodation in the definition of disability discrimination. For example, there is an ongoing issue about access to education for disabled children. This was recognised before ratification but changes were not made to all the relevant sections in the HRA and the legislation still only allows for educational facilities to refuse admission to students with disabilities if it is not reasonable for the school to provide them, rather than imposing a positive obligation to accommodate students with disabilities.

The difficulty is when a person will be considered to have been accommodated and the implications of adopting such a low threshold. A good example is the case of *Smith v Air New Zealand Ltd*.⁴⁴³ Ms Smith had a condition which meant she required extra oxygen when she flew. She had to organise and pay for her own oxygen on domestic flights and for extra oxygen on international flights. The Tribunal found that Air New Zealand had treated her less favourably by reason of her disability but there was no breach of the HRA because the airline could not reasonably be expected to provide the service without requiring more onerous terms. The case eventually reached the Court of Appeal which found that there was discrimination but 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 placing too much reliance on it commenting at para [104] that:

...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 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 apply 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.

Given such an approach, it was probably predictable that 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 that guidelines were developed on the application of reasonable accommodation – a matter that the Ministry of Justice has been working on for some time.

7.2.2 Article 12 – legal capacity

Article 12 - the right to equal recognition before the law - requires States 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. It is considered one of the most important articles of the Convention because without it many of the other rights - such as the guarantee of free and informed consent,⁴⁴⁴ the right to marry⁴⁴⁵ and the right to political participation⁴⁴⁶ - are effectively rendered meaningless. The problem is how capacity should be interpreted and applied in practice and where to draw the line when some form of substitute decision-making is required.

⁴⁴³ [2011] 2 NZLR 171

⁴⁴⁴ *United Nations Convention on the Rights of Persons with Disabilities* GA RES/61/106 LXI A/RES/61/106 (2006), art 25

⁴⁴⁵ Article 23

⁴⁴⁶ Article 29

More often than not it is simply asserted that Article 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. The Committee issued a draft General Comment on Article 12 in 2014.⁴⁴⁷ One of the incentives for developing the Comment was that the initial reports of different State parties reviewed by the Committee at that point reflected a general misunderstanding of the scope of the obligations under Article 12 - including failing to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one based on supported decision-making.⁴⁴⁸

The Comment distinguishes between mental and legal capacity, adopting an interpretation that is consistent with the approach of other UN bodies such as the CEDAW committee - namely, the ability to hold rights and duties and to exercise them. It describes mental capacity as differing from person to person depending on a variety of factors some of which may be environmental and social⁴⁴⁹ and explicitly states that mental and legal capacity should not be conflated. Absence or impaired decision making is not a reason for denying a person their right to exercise legal capacity. Article 12 states that:

Legal capacity is an inherent right accorded to all people including people with disabilities. As noted, it consists of two strands. The first is the legal standing to have rights, to be recognised as a person before the law. ..The second is the legal agency to act on those rights, and to have those actions recognised 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 these strands of legal capacity must be recognised for the right to legal capacity for persons with disabilities to be fulfilled; they cannot be separated.

Article 12 requires support be provided to exercise that capacity (if necessary).⁴⁵⁰ States must both refrain from taking measures that have the effect of denying people legal capacity while ensuring that they have the necessary support to make decisions which involve exercising that capacity. The Comment is equivocal about the type of support that should be made available, noting 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.⁴⁵¹

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. In such cases some form of substitute decision-making is almost inevitable. This was recognised by the Working Group on the Convention by the inclusion of safeguards in Article 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 would encompass the whole range of support from highest to lowest.⁴⁵² There will always be

⁴⁴⁷ General Comment No.1 (2014) Article 12 – Equal Recognition before the Law, adopted by the UN Committee on 14/4/2014 (CRPD/C/GC/1)

⁴⁴⁸ At [3]

⁴⁴⁹ At [12]

⁴⁵⁰ At [13]

⁴⁵¹ At [46(a)]

⁴⁵² UN Enable Contribution by New Zealand at www.un.org/esa/socdev/rights/wgcontrib-NewZealand.htm

a need for some measure of protection for particularly vulnerable people who might otherwise be exploited in various ways.

One of the Committee's recommendations following the second report by the IMM was that New Zealand should take immediate action to revise laws that involved substitute decision-making by introducing a range of measures which respected a person's autonomy, will and preferences and conformed fully with Article 12.

The most relevant legislation in this context is the Protection of Personal and Property Rights Act 1988 (PPPR Act) which provides for guardianship of adult people. It 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. The Act has been touted since its inception as legislation designed to ensure that a person who is subject to the Act has the same legal rights and capacities as any other person⁴⁵³ but while much of the PPPR 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 the Courts do not properly engage with the obligations and discretions conferred in interpreting the Act and it may have been this that the Committee picked up on when it made its concluding observations.

The Committee's comments appear to indicate a lack of understanding of the aim and purpose of the Act since the legislation itself cannot be faulted. It is the way it is applied – both by the judiciary and those who are conferred with statutory powers – that has some way to go. In this context the recommendation by the IMM – that further research be undertaken by the ODI to determine whether the provisions in the PPPR Act relating to substitute decision-making are understood and applied, is timely.

7.2.3 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. The issue is most 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 related to the lack of human rights principles in the MH (CAT) Act, and recommended that the Act be amended to comply with the Convention. It also called on New Zealand take the necessary measures to ensure that no one was detained against their will in any medical facility on the basis of actual or perceived disability and that 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 including Article 14 which protects the right to liberty of the person; Article 17 which states that every person with disabilities has the right to respect for his or her physical and mental integrity on an equal basis with others; Article 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 Article 12 itself.

⁴⁵³ See Appendix 7

As with the PPPR Act it is a moot point whether the MH (CAT) Act is inconsistent with the Convention. The MH (CAT) Act sets out the circumstances in which, and the conditions under which, people may be subjected to compulsory psychiatric treatment. It also sets out the rights of those people. When an analysis of the Act was commissioned before ratification to identify any inconsistencies with the Convention,⁴⁵⁴ the reviewer concluded that most provisions of the MH(CAT)Act were not inconsistent with the Convention although the concept of release from compulsory status - as interpreted by the Court of Appeal in *Waitemata Health v Attorney-General*⁴⁵⁵ - raised concerns that the Act could be used to sanction arbitrary detention (contrary to Article 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). He 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 this fell short of amounting to arbitrary detention as envisaged in Article 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.⁴⁵⁶ To be more consistent with the Convention some type of capacity based law that is “de-linked” from disability and which only allowed coercive psychiatric treatment to be administered to patients who genuinely lacked decision-making capacity, was warranted. This does not mean that involuntary treatment is not permissible but rather that criteria which allow it must be non-discriminatory and “disability-neutral”. When one aspect of the necessary criteria for involuntary treatment is the presence of mental illness or mental disorder (itself a form of disability), unacceptable discrimination is introduced.⁴⁵⁷ On this reading, the New Zealand legislation could be said to be non-Convention compliant. However, it could also be argued that the Committee's apparent acceptance of the legislation with certain changes means that some form of separate mental health law is permissible.

The Government has consistently argued that New Zealand law 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. If this is correct then there is unlikely to be a significant review of the MH (CAT) Act within the next few years despite the Committee's recommendations.

7.3 Legislative change

Despite issues such as the lack of an obligation to accommodate, agreement on what is meant by capacity and problems relating to compulsory treatment, there has been little positive legislative change as a result of the Convention. This cannot be explained simply by the comparative newness

⁴⁵⁴ Andrew Butler, *A Report for Mental Health Commission on consistency of the Mental Health Act and the CRPD*

⁴⁵⁵ (2001) 21 FRNZ 216, [2001] NZFLR

⁴⁵⁶ See, for example, George Szumukler, Rowena Daw & Felicity Callard, “Mental Health Law and the UN Convention on the rights of persons with disabilities” *Int. J. Law Psychiatry*, May 2014; 37(3): 245; Bernadette McSherry (ed) *Rethinking Rights-Based Mental Health Laws* (2010)

⁴⁵⁷ Office of the High Commissioner for Human Rights ‘*Persons with Disabilities’ Dignity and Justice for Detainees Week*, Information Note No.4 (2008) available at www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_4.pdf.

of the Treaty itself since there have already been two significant legislative moves that are seen as regressive by the disability community.

The first relates to the statutory recognition of a fulltime disability commissioner and the proposed Human Rights Amendment Bill which had a second reading but failed to make the cut for legislative passage before the 2014 general election. Civil society groups have expressed concerns that the proposed legislation enjoys neither cross party support nor civil society endorsement and appears to have been largely driven by officials.⁴⁵⁸ Ironically the Amendment Bill's general policy statement of the Explanatory Note states that the purpose of the Bill is to enable the establishment of the position of a full-time Disability Rights Commissioner, although the proposed legislation does not do this. There is nothing in the amendment that creates a Disability Rights Commissioner, similar to jurisdictions such as Australia and as intended by the spirit of New Zealand's ratification of the CRPD. Instead section 6(1)(A) of the proposed amendment bill simply states that:

There must be a Commissioner, other than the Chief Commissioner, appointed to lead the work of the Commission in each of the following priority areas: (a) disability rights ...

Perhaps more concerning is the amendment to the Public Health and Disability Act (PDH Act). In 2012 the Court of Appeal affirmed that the policy of not paying family members to provide the necessary support services to their disabled adult children constituted unjustifiable discrimination on the basis of family status. The Government's response was to push through Part 4A to the PHD Act under urgency, reversing the Court's decision and preventing complaints of unlawful discrimination being made to the Human Rights Commission on certain grounds including disability and age. The Committee recommended the repeal of the amendment but, as noted above, the Government is resisting the call claiming funding will continue to be provided consistently with Part 4 A.

The PHD Act contravenes the CRPD in two ways. Firstly, the right of disabled persons to be treated equally found in Article 5 since, as the Court found, the policy is inherently discriminatory, and it infringes Article 19, the right to live independently and to the independent choice of living arrangements. Secondly it ousts the jurisdiction of the NZHRC in relation to a group which is considered one of society's most disadvantaged. This is a significant regression.

7.4 Use of human rights norms in policy and practice

The Disability Strategy is designed to provide guidance for government policy and services that impact on people with disabilities. Among other things it aims to improve attitudes towards people with disabilities, remove environmental barriers experienced by people with disabilities (such as making transport, housing and workplaces accessible) and create a disability support system that is focused on the individual. Although the Government has claimed significant levels of activity in implementing policy and practice in certain areas,⁴⁵⁹ people with disabilities and their families consider that progress is too slow. Four challenges in particular have been identified:

- society's attitudes to persons with disabilities;
- absence of a national implementation plan and linked funding;
- size and status of the Office of Disability Issues;

⁴⁵⁸ CEDAW Coalition of New Zealand NGOs submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill, 2014.

⁴⁵⁹ New Zealand Submission to the 2nd Conference of States Parties to the Convention on the Rights of Persons with Disabilities at para [24]

- embedding knowledge about disability issues and responsiveness to persons with disabilities in government agencies.

To some extent it is difficult to assess the success of the disability strategy in policy implementation given the absence of one overarching law addressing Convention rights. In the Concluding Observations the Committee commended New Zealand on the Disability Strategy and the more recent Disability Action Plan for 2014-2018 but also criticised discrete aspects of the government's performance - such as assisting women with disabilities to obtain employment and education and combatting domestic violence – recommending they be strengthened.

7.5 Use of CRPD in judicial proceedings

Although the CRPD is a relatively recent treaty, it has already figured in a number of decisions - possibly reflecting the increasing recognition and understanding of the treaty body system among practitioners and the relative lack of domestic jurisprudence in the area of disability.

The first case in which there was an attempt to rely on the Convention predated ratification and related to the interpretation of disability. *Trevethick v Ministry of Health (No.2)*⁴⁶⁰ involved a complaint about the different funding available to people who have an accident and those with degenerative diseases. In order to claim discrimination, the plaintiff had to bring her complaint within the definition of disability in the HRA. To do so the definition had to be construed as including the “cause” of disability. To support her argument the plaintiff referred to the Convention and comment that describes disability as an evolving concept that is no longer premised on a medical model emphasising a person's medical condition but one that addresses the person's interaction with their environment. The argument was unsuccessful, the Tribunal (and subsequently the High Court and Court of Appeal) holding that allowing the plaintiff's argument would involve an interpretation of the HRA that Parliament had not contemplated. The Tribunal did, however, pave the way for future reference on the influence of the international material, when it noted that:⁴⁶¹

...the definition of disability in the New Zealand legislation should be interpreted in a broad and purposive way, having regard to the objects of the HRA, and that any interpretation exercise needs to be approached with an eye to the international and domestic context of the legislation.

The facts of *Smith v Air New Zealand Ltd* have already been outlined in the context of reasonable accommodation. Both the appellant and the Human Rights Commission, which had intervened in the case, cited the Convention as an indication that an appropriate level of accommodation was necessary to meet the requirements of the Convention and relied on the background history to ratification. Although the Court of Appeal considered that the legislative history was consistent with the approach preferred by the Court, it also noted that “there were dangers in drawing too much from this sort of material in the present context”.⁴⁶²

Finally, in *Ministry of Health v Atkinson*,⁴⁶³ the case relating to the decision not to pay family members caring for their adult disabled children, the Court referred to the Convention as an indication of what was envisaged in the long title to the HRA, linking it to the preamble and the requirement

⁴⁶⁰ (2007) 9 HRNZ 1

⁴⁶¹ At [33]

⁴⁶² At [26]

⁴⁶³ [2012] NZCA 184, [2012] 3 NZLR 456

that persons with disabilities and their families “should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities”. It went on to cite a number of articles in support and emphasising article 23.5 which provides that:⁴⁶⁴

State Parties, shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and, failing that, within the community in a family setting.

Although it did not state explicitly that the CRPD influenced its decision, the Court stressed the importance of context in identifying the application of key concepts in the HRA particularly when a policy was alleged to be discriminatory, noting that the funding in this case “provided an opportunity for some disabled people to manage the personal support services they require in the way they believe meets their needs best”⁴⁶⁵ – an approach that is consistent with the requirements of the CRPD.

There are also several cases in which counsel drew the Court’s attention to the Convention and while there was no specific reference in the decision, there is some suggestion that the submissions were taken into account in reaching the final outcome. Identifying any future influence of the Convention in relation to capacity is likely to be particularly difficult in the context of the PPPR and MH (CAT) Acts since they are Family Court proceedings and not open to the public.

It is worth noting, too, that there has been a significant change overall in judicial attitudes to international treaty commitments over recent years. This can be attributed to a number of things including the growth of the “global village”, the great increase in the development of international human rights standards and obligations, the development of libraries and legal information sources, changes in legal education and major differences in the experience of lawyers in private and government practice and on the bench.⁴⁶⁶ This change can be expected to be reflected in application of the Convention in future legal proceedings particularly in light of the oft quoted dictum that where the wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations.

7.6 The role of civil society

Civil society has two distinct roles in relation to CRPD, unlike other treaty bodies. DPOs have a traditional advocacy role, both in relation to government implementation and to UN committees on the nature of the recommendations that could be made to the State party. Lobbying is central to this form of DPO advocacy. It has been most evident, for example, in DPO activity in advocating the human rights issues for disabled people following the Christchurch earthquakes.

As described in greater detail above, DPOs have a formal monitoring role through the Convention Coalition in relation to Article 33. In this role the Convention Coalition, under the terms of its contract with the Government, has been told it must not advocate but only to report on the voice and experience of disabled people. The Chair of the New Zealand Convention Coalition Monitoring Group, Mary Schnackenberg, states:

⁴⁶⁴ At [42]

⁴⁶⁵ At [17]

⁴⁶⁶ Ken Keith, “Roles of the Courts in giving effect to International Human Rights – with some History” (1999) 29 VUWLR 27 at 43

We can have findings, we're allowed to pull things together to point in the right direction, but we're not allowed to say 'and this information says that you, the government, should do X'. So no advocacy.

Since 2010 the Convention Coalition has received government funding for research that reflects the voices of disabled people using a methodology developed by Disability Rights Promotion International (DRPI). The methodology is based on interviews carried out by disabled people designed to reflect the lived experience of disabled people through consultation workshops and surveys. Transcription and analysis is primarily undertaken by disabled people as a way of building their capacity of disabled people in research and monitoring. The findings of the research are also subject to consultation with disabled people and their organisations.

In the first report in 2010 the Convention Coalition identified four significant areas of concern: social participation, bureaucratic barriers, access to work and reasonable accommodation and getting out and about. The report also identified bureaucratic barriers noting:⁴⁶⁷

...bureaucratic expediency is often used as a rationale for disablement. People are acting in a rational manner and following the rules but the net effect of the rules is clearly discriminatory. The most obvious example of this is disabled people having to demonstrate year after year that they still have their lifelong impairments. The cumulative effect of this is that time and money is wasted proving the obvious.

In 2012 six areas were identified: social inclusion, health, employment, access to disability related services and supports; barriers to making complaints and lack of disability awareness. Key findings included the concept of cumulative discrimination.

...discrimination in one area can also adversely affect a person's experience in other areas. Lack of access to transport and disability support services has a direct impact on access to employment. Exclusion from employment has implications for accessing health services and social inclusion. Being unable to access quality health care may in itself be a barrier to making complaints. Taking into account all of these flow-on effects, the whole is far greater than the sum of the parts.

The report noted that the implementation of the Disability Strategy and the CRPD was somewhat disorganised with each government department developing their own implementation plans, and lacking consistency or coherence. The 2012 report was a more mature document and identified specific articles of the CRPD which needed to be implemented by the Government.⁴⁶⁸

Two other pieces of research have been undertaken by the Convention Coalition Monitoring group - one on youth in relation to Article 7 of the CRPD on disabled children's rights and the other on the media's responsibilities to portray people with disabilities in a positive manner as identified in Article 8.

A total of 27 young people aged between 16-25 years were interviewed in the youth monitoring project. The report concluded that if the ability to live an 'ordinary life' was a yardstick for people

⁴⁶⁷ New Zealand Convention Coalition (2010) *Disability Rights in Aotearoa New Zealand: A Report on the Human Rights of Disabled People in Aotearoa New Zealand* at 66.

⁴⁶⁸ It also noted one of the weaknesses of the DRPI research methodology as it only captured the stories of those disabled people who can give consent: New Zealand Convention Coalition (2012) *Disability Rights in Aotearoa New Zealand 2012: A systematic monitoring report on the human rights of disabled people in Aotearoa New Zealand* at 98.

aged between 16-25 years, then an ordinary life included being part of a peer group; developing independence from family; developing romantic attachments and preparing for, and taking on, employment. The lack of opportunities common to many disabled young people included the lack of accessible or age appropriate housing, isolation and exclusion within the school system and intimidation and bullying at school and beyond.

The media monitoring research involved content analysis, consultation with 12 media representatives via conversation, and consultation with disabled people via survey and meetings. Its recommendations included the provision of disability rights awareness to journalists; ensuring the accessibility of all media complaints mechanisms; better portrayal of disabled people; more recruitment of disabled staff and the appointment of suitably qualified disabled people to statutory bodies regulating and delivering broadcasting.

7.7 The role of the NHRI

The NZHRC has a continuing commitment to the rights of disabled people that was evident both prior to, and after, the ratification of the CRPD. The NZHRC's annual reports shows that disability is the principal ground of complaints of discrimination under s 21 of the HRA. In 2013-2014 30.2% of inquiries and complaints of unlawful discrimination made to the Commission, 455 were on the grounds of disability.⁴⁶⁹ This equalled all of the race-related grounds aggregated together including the large number of traditional complaints about racial disharmony which tend to inflate race inquiries and complaints. Of the 49 decisions by the Office of Human Rights Proceedings made under the grounds of potential unlawful discrimination of the Human Rights Act 1993, 22 were on the grounds of disability, far ahead of the next ground of family status with seven.⁴⁷⁰

The Commission and its associated Office of Human Rights Proceedings have been involved in significant human rights cases on behalf of disabled people, including *Spencer v Ministry of Health*, a case in which the Commission intervened in the High Court, representing people who had complained about the Ministry's policy of not paying family members to care for their disabled adult children.⁴⁷¹

Half of the national human rights inquiries undertaken by the Commission in the last ten years have focussed on disability issues - one on the accessibility of public transport for disabled people and a more limited inquiry into New Zealand Sign Language. The Commission also took a significant leadership role in international events involving NHRIs around the development of the CRPD, and encouraging New Zealand's early ratification of the Convention.

This does not mean that the Commission is always seen by the disability community as its most logical or effective champion, primarily because of the absence of a fulltime disability commissioner that enjoys the same statutory status as the Race Relations Commissioner and the Equal Employment Opportunities Commissioner; the competition for resources for disability issues within the Commission; and the variable nature of human rights leadership which is expressed on a day-to-day basis in the setting of priorities for advocacy, policy analysis and litigation. A distinction can be made between how DPOs have seen recent disability rights commissioners as strong and effective representatives of disabled people and the Commission itself as the

⁴⁶⁹ New Zealand Human Rights Commission (2014) *Annual Report*, p. 28. Retrieved from <http://www.hrc.co.nz/wp-content/uploads/2012/06/AnnualReport2014-webpdf.pdf>

⁴⁷⁰ At 31.

⁴⁷¹ At 32.

institutional machinery for the fulfilment of the human rights of disabled people which has to cover a spectrum of human rights issues. The Commission is seen as both an ally and also, at times, a source of frustration.

For several years since the establishment of the IMM the Commission has been reporting on its performance under Article 33. In 2014 it listed the output as the provision of an “annual report to Parliament in collaboration with the other two parties in the Disability Convention monitoring mechanism - the Disability Convention Coalition and the Ombudsman”. The performance measures were soft, for example the production of the report met quality measures of thoroughness and “is valuable in its recommendations for government action as assessed by the parties to the independent monitoring mechanism.”

The Commission’s annual report stated that the “quantity measure” had been met and that there was 100 per cent agreement by parties to the IMM with the content of the annual report and with its thoroughness and value. However, the annual report also notes that following advice from the Office of the Minister for Disability Issues, “the report was not required to be tabled in Parliament, and the IMM partners agreed to launch the report at a public event in Christchurch in early August 2014.”⁴⁷² The lack of parliamentary scrutiny of the 38 recommendations including the need for better disaggregated data, accessibility issues for disabled people, building a people driven system, and issues of violence and abuse and education, is worrying given the promise of an independent monitoring mechanism, the unique feature of the CRPD, and the Commission’s function as an NHRI.

The NZHRC’s role in promotion, advocacy and protection of the rights of disabled people is hampered significantly by the lack of reliable data allowing comparison between disabled people and others. The absence of a concerted effort within the public service in particular to provide high quality and easily accessible disaggregated data about disabled people restricts the ability to provide evidence-based advocacy and policy formation. Nowhere is this more evident in the difficulty the Commission has had over a number of years in providing business case data to supplement rights-based arguments about resource prioritisation.

7.8 Conclusion

From the existing literature, archival material, analysis of New Zealand’s initial CRPD report, and from interviews undertaken it is possible to make several observations. First, there are positive flow on effects from the CRPD’s development and ratification.

The CRPD had greater salience to many people with disabilities as a charter for a better life than many other UN human rights treaties that focus on specific population groups. The most marginal people in the world now have a detailed set of human rights to own that they can daily compare with their lived experience. The high expectations of CRPD by people with disabilities to actually deliver them more inclusive lives and equal opportunities, is referred to by all of the experts interviewed on the effect of the CRPD. Paul Gibson states:

The disability community has set its aspirations, its future pathway around this convention, perhaps in a way that differs from the ways that other communities see their respective

⁴⁷² At 58.

conventions (women and CEDAW; ethnic communities and CERD). So expectations are quite high and a lot of energy has gone in from DPOs into the shadow reporting process.

Mary Schnackenberg states:

...what's very helpful is that you don't have to read the convention from start to finish, it is not like the Bible. But whenever you dip in there's a part of the article that sings to you, and it is much easier than trying to dredge your way through legislation, regulations, interpretations, and court decisions.

The formation of the Independent Monitoring Mechanism (IMM), commented on favourably by the UN Committee in 2014, and the involvement of DPOs as a partner in the IMM with the Office of the Ombudsmen and the NZHRC is of considerable significance in terms of progressing disability rights. It is evident from the reports produced that the research and monitoring capacity of DPOs engaged in the Convention Coalition has been greatly enhanced by the DRPI methodology, despite its limitations. Increasing numbers of disabled people are involved in data gathering and analysis. Disabled people themselves are also experiencing the challenges of effective, evidence-led research into issues and of monitoring of implementation by the State party and other stakeholders.

The IMM and the institutional framework appears to have also helped partially thaw relationships between DPOs and government officials. Progressing the human rights of disabled people has been hindered for years by variable policy responses and/or indifference to disability consciousness and issues across some ministries. However, this appears to be changing. Mary Schnackenberg said that in July 2013 at a meeting with the Chief Executives' Group on Disability Issues, Convention Coalition member Rachel Noble said that disabled people had been talking to public servants for the past 30 years about the major issues and had not been listened to. The Chief Executive of the Ministry of Social Development, Brendan Boyle, responded by establishing working groups between government officials and the DPO network to develop the Disability Action Plan 2014-2018. The involvement of disabled people in this way has led to increased confidence that the Disability Action Plan will be a better model than the strategy that preceded it. In addition, the current strategic leadership of the Office for Disability Issues, is strong, she said.

Involvement in the IMM is, though, not without contradictions, ambiguities and frustrations. The enforced distinction between reporting findings only, and advocacy in which lobbying, publicity, and activism play an integral part, insisted on by the Government as part of its funding arrangements, is an artificial separation. The 2010 and 2012 reports contained recommendations which surely constitute a form of advocacy or would do so if disabled people other than the DPOs represented on the Convention Coalition took them up. Equally the absence of an official response to the annual monitoring reports and the continuing invisibility of the IMM recommendations in parliamentary scrutiny is a missed opportunity to generate political and public debate.

If the three partners of the IMM can devise valid monitoring protocols, indicators and effectively publicise them both domestically and internationally, it could deliver on its promise to be a catalyst for change and be a welcome precedent for monitoring implementation of human rights treaties generally. However, the possibility of dilution by the State party through non-responses to reports and recommendations or through funding cuts to any of the three partners - but specifically to DPOs - is a potential risk to the IMM's effectiveness.

Elsewhere, there is evidence that the promise of CRPD is not matched by the reality of implementation. First, the concept of regression. Ombudsman Ron Paterson said that New Zealand's reporting in Geneva took place against a backdrop of an almost palpable sense of anger from disabled people about the Public Health and Disability Amendment Act. The legislation is a significant risk in relation to New Zealand's implementation of CRPD.

This came through very clearly from civil society, the risk is an enormous loss of trust because the passage of the Public Health and Disability Amendment Bill has created enormous distrust within the disability community, and that, despite some good progress in other areas, is like a major road block and it has taken on a symbolic force.

Mary Schnackenberg uses the term “graffiti legislation, because that’s what you do when you don’t want people to see you bung it through under urgency.”

I actually think of all the pieces of legislation that have occurred in New Zealand, that rates as the worst because it basically tells me I don’t count, I don’t matter. I need to be very open with the Minister and government and tell them all the good work has been undone by that legislation.

Second, strong ministerial leadership around development of the treaty and establishment of mechanisms to ratify it, has not translated into an equivalent, broader political momentum. As Paul Gibson notes, “the changes in the last 15 years or so have been driven by one or two passionate individuals at Cabinet level who have taken on board the issues. It hasn’t been owned by the whole of Cabinet or the whole of Parliament”. He goes further to suggest that Parliament has yet to understand the fundamental shift which underpinned CRPD, from a medical model to a social model of disability. “Even the word ‘social’ has limited connotations because the new model is about human rights, civil, political, economic and cultural not just social and some are hung up on the social aspect”. Mary Schnackenberg notes that there is a sense she had when she attended the Ministerial Committee on Disability Issues that “it is perfunctory. It is the thing they have to do. It lasts 45 minutes. We talk to each other but there is no real engagement.”

The complexity of disability issues is also a feature in the pace and scope of implementation, said Paul Gibson:

The resistance to change, the barriers...it’s about complexity, it’s about ignorance, it’s about lack of information, it’s about complacency. And the more we can share the information, expose decision-makers to new thinking about what is possible, not just reaction to how things are now, we can make change.

Third, somewhat surprisingly given New Zealand’s ability to claim ownership of its human rights heritage in other areas, the story of its role in the development of CRPD has not entered general public consciousness. This ‘under celebration’ in itself, inhibits public clamour for, or support of, progressive change. Matt Frost, then a policy and information researcher for CCS Disability Action in Wellington, wrote:

...why are we not celebrating this as a core part of our national identity and our national story, as being a good international citizen? There was very little media coverage around the Convention and its signing.....The underwhelming reaction perhaps says something about our ambivalence towards our attitude to disability and disabled people.