

12 July 2018

Submission from New Zealand's Independent Monitoring Mechanism to inform New Zealand's 3rd Universal Periodic Review by the Human Rights Council.

An Independent Monitoring Mechanism (IMM) was established by the New Zealand Government in 2010 to fulfil obligations under Article 33 (National implementation and monitoring) of the Convention on the Rights of Persons with Disabilities (CRPD). It is made up of the Human Rights Commission, the Office of the Ombudsman and the Disabled People's Organisations' Coalition (DPOs).

The DPO Coalition comprises Association of Blind Citizens of New Zealand, Blind Citizens New Zealand, Balance New Zealand, Deaf Aotearoa New Zealand, Disabled Persons Assembly (New Zealand) Kāpō Māori Aotearoa, and People First New Zealand. DPOs are membership organisations of disabled people, primarily governed by disabled people. The CRPD describes key roles for DPOs, specifically Articles 4.3 and 33, which obliges Government to closely consult with and actively involve disabled people through their representative organisations (DPOs), and to fully participate in promoting, protecting and monitoring the CRPD. The DPO Coalition works with Government (and others) to make the CRPD rights real for disabled people.

The Human Rights Commission (Commission) which is part of the IMM derives its statutory mandate from the Human Rights Act 1993 ('HRA'). One of the primary functions of the Commission is to promote and protect the full and equal enjoyment of human rights by disabled people.

The Ombudsmen are Officers of Parliament. Each Ombudsman is appointed by the Governor-General on the recommendation of Parliament. They are responsible to Parliament and independent of the Government. The Ombudsmen investigate, review and inspect the conduct of public sector agencies and provide advice and guidance, to ensure people are treated fairly in New Zealand.

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Introduction

1. The IMM welcomes the opportunity to provide a submission to the Human Rights Council Committee (HRC Committee) for New Zealand's 3rd Universal Periodic Review (UPR).

Summary of Recommendations

The IMM recommends that the Government:

- 1) collect data related to the root causes of disabled Maori and Pasifika being overrepresented in poor socio-economic outcomes and to deliver programs and initiatives to address those disparities.
- 2) require all public-sector agencies to collect disaggregated data relating to disabled people in their service delivery populations.
- 3) build the principles of inclusive education and an enforceable right to inclusive education into all levels of the education system; from the legislation, to the training of teachers, to on the job support and guidance, to work planning and budgeting for the school year by School Boards.
- 4) continue to collect disaggregated data relating to disability and employment and adopt meaningful strategies and programmes to address poor employment outcomes for disabled people.
- 5) implement all the recommendations in the *'Thinking outside the Box: A review of seclusion and restraint practices in New Zealand'* report.
- 6) ensure all public-sector agencies act in accordance with the Web Accessibility Standards and that they have signed up to the Ministry of Social Development's Accessibility Charter.
- 7) ensure that universal design principles and accessibility are built into social housing stock
- 8) take urgent steps to repeal the discriminatory provisions of Part 4A of the New Zealand Public Health and Disability Act 2000

Priority Areas for Disability in New Zealand

2. In summary, the IMM submits there are 7 critical areas for the human rights realisation of disabled people that the State needs to improve upon. In addition, the IMM has identified the implementation of fair family caregiver payment policies as requiring urgent action from the State Party.

3. The IMM has been communicating with the Committee on the Rights of Persons with Disabilities (the CRPD Committee) as New Zealand prepares for its second periodic review.
4. At the time of submitting, the IMM considers the most pressing disability topics for New Zealand to be poor outcomes for Māori and Pasifika, data, education, employment, seclusion and restraint, accessible information and communication and housing. A copy of the IMM's 30 November 2017 submission to the CRPD Committee can be found [here](#).

Māori and Pasifika

5. Māori and Pasifika disabled people are over-represented in poor socio-economic outcomes (across all the identified priorities) in comparison to other ethnic groups (and as a proportion of the population). Disabled people are also more likely to experience worse outcomes than non-disabled people when measured against the same indicators. When ethnicity and disability intersect in this context, disabled Māori are particularly at risk of experiencing poor or adverse social and health-related outcomes.
6. All agencies to collect better quality disaggregated data to understand the root causes of these disparities and to design effective programs and responses to them.

Recommendation 1

The Government to collect data that will assist in the identification of the root causes of disabled Māori and Pasifika being overrepresented in poor socio-economic outcomes and support the targeted delivery of programs and initiatives aimed at addressing those disparities.

Data

7. There are large gaps in disaggregated disability data in New Zealand. These gaps occur across all priority issues for disabled people and are compounded by the lack of a commonly accepted definition of 'disability' by public and private interests. The absence of data has a negative impact on the ability of service providers to target services for disabled people. There have been some pleasing developments in terms of the State beginning to mainstream the Washington Group Short Set of Questions and the setting up of a, Data, Evidence and Information Working Group.¹ However, there is a need for all decision makers to continue to prioritize the gathering of consistent data sets of disaggregated disability information.

Recommendation 2

The Government to require all public-sector agencies to collect disaggregated data relating to disabled people in their service delivery populations.

¹ The set of questions can be seen at <http://www.washingtongroup-disability.com/washington-group-question-sets/short-set-of-disability-questions/>

Education

8. Engagement with education is one of the most critical protective factors and indicators of a life course. The New Zealand education system is not fully inclusive.
9. Currently the Education Act 1989 provides for a general right to education under section 3 of that Act.
10. Section 8 of the Education Act 1989 provides that “people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at State schools as people who do not”. These provisions do not explicitly reference the right to inclusive education per Article 24 of the CRPD. They have not been amended since New Zealand ratified the CRPD.
11. Advocating for an enforceable right to inclusive education for students with disabilities has been a priority for the IMM. The IMM has advocated for some time that the Education Act 1989 is updated to explicitly include reference to the right to inclusive education in line with the CRPD.
12. In 2014, the CRPD Committee recommended that the Government update the legislation to “establish an enforceable right to inclusive education” (para 50).
13. In 2016, the IMM released a report ‘*Article 24, The Right to an Inclusive Education*’ on the progress being made in New Zealand (based on current data) toward the realisation of the right to an inclusive education as set out in Article 24 of the CRPD.²
14. Section 3 of the Education Act 1989 protects the right of any person (with a disability or without) to enrol and receive education at any school, while section 8(1) affirms equal rights to primary and secondary school students who have ‘*special educational needs*’. However, the current legislative framework does not specifically incorporate inclusive education or reasonable accommodation principles.
15. In practice, many aspects of the education system in New Zealand lack consistent working knowledge of what an inclusive education system is and how it functions. Disabled people are at a high risk of being bullied. There is a lack of data as to what students require, what supports students are/are not getting and the supports they need to thrive. Recently it was discovered that disabled children were being held in seclusion-like conditions in several schools. This led to the practice of seclusion being explicitly outlawed in an updated version of the Education Act 1989.³

² IMM Report ‘Article 24: the Right to an Inclusive Education’ June 2016 at <http://www.ombudsman.parliament.nz/resources-and-publications/documents/article-24-the-right-to-an-inclusive-education>

³ See the Education Act 1989 at <http://www.legislation.govt.nz/act/public/1989/0080/latest/DLM175959.html>

16. The Government needs to gather comprehensive data and evidence in order to fully understand what is required to ensure the right to an inclusive education is realised for disabled people.

Recommendation 3

The Government to build the principles of inclusive education and an enforceable right to inclusive education into all levels of the education system; from the legislation, to the training of teachers, to on the job support and guidance, to work planning and budgeting for the school year by School Boards.

Employment

17. Disabled people are less likely to be employed than the general population or other minorities. In the June 2017 quarter, disabled people were more likely to be unemployed and their average weekly incomes were just over half those of non-disabled people.⁴
18. In the June 2017 quarter, 42.3 per cent of disabled youth aged 15–24 years were not in employment, education, or training (NEET). This was more than four times the NEET rate of non-disabled 15–24-year-olds (10.0 percent).⁵
19. NEET is made up of those who are:
- a. unemployed – not in education
 - b. not in the labour force – not in education and caregiving
 - c. not in the labour force – not in education and not caregiving.
20. The group that contributed the most to the higher NEET rate for disabled youth were those not in the labour force, not in education, and not caregiving (35.8 percent⁶). Employment for disabled people is often limited by opportunity and people's attitudes rather than impairment.
21. There is a need for a comprehensive strategic response by the State to the issue of employment of disabled people.

⁴ See http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatisticsDisability_MRJun17qtr.aspx

⁵ <https://www.stats.govt.nz/information-releases/labour-market-statistics-september-2017-quarter>

⁶ http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatisticsDisabilityJun17qtr_YouthMR4.aspx

Recommendation 4

That the Government continue to collect disaggregated data relating to disability and employment and adopt meaningful strategies and programmes to address poor employment outcomes for disabled people.

Seclusion and Restraint

22. The Chief Ombudsman published his Report '*A Question of Restraint*' into the use of tie-down beds in the New Zealand Prison Service in March 2017.⁷ The report found that the general management of at-risk prisoners in New Zealand was substandard and detrimental.
23. In 2017, the Commission published '*Thinking outside the Box: A review of seclusion and restraint practices in New Zealand*'⁸ which made a number of recommendations for agencies employing seclusion and restraint in New Zealand.
24. Night Safety Procedures are used in health and disability places of detention and are the practice of locking a patient in their room during the night. It is a restrictive practice.
25. It is not clear whether the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is fully compliant with the CRPD, particularly with respect to its enabling provisions relating to compulsory care and seclusion.
26. In 2016, the New Zealand media reported on two cases of children being put in seclusion rooms at school. Seclusion at schools has since been made unlawful. The Chief Ombudsman recently published the outcome of an investigation into incidents of seclusion at two specific schools.⁹
27. In 2017, the Ministry of Education issued updated guidance on managing behaviour including the use of restraint.¹⁰ The IMM is interested to follow the progress of schools under this new regime.

⁷ 'A question of restraint - Care and management for prisoners considered to be at risk of suicide and self-harm' 1 March 2017, see <http://www.ombudsman.parliament.nz/resources-and-publications/documents/a-question-of-restraint>

⁸ 'Thinking outside the Box: A review of seclusion and restraint practices in New Zealand' Dr Sharon Shalev 27 April 2017 see <http://www.seclusionandrestraint.co.nz/>

⁹ <http://www.ombudsman.parliament.nz/newsroom/item/opinion-on-ruru-school-seclusion-complaint>

¹⁰ See the Ministry of Education's 'Guidelines for registered schools in New Zealand on the use of physical restraint updated September 2017 at <https://www.education.govt.nz/assets/Documents/School/Managing-and-supporting-students/Guidance-for-New-Zealand-Schools-on-Behaviour-Mgmt-to-Minimise-Physical-....pdf>

Recommendation 5

That the Government implement all the recommendations in the *‘Thinking outside the Box: A review of seclusion and restraint practises in New Zealand’* report.

Accessibility of Government Information and communication

- 28.** Accessibility for disabled people, particularly with regards to Government information and communication, continues to be an issue.
- 29.** In 2013, the New Zealand Government published its Web Accessibility Standard 1.0. The Standard took a phased approach to public sector organisations making their web pages and web applications accessible. The implementation schedule for the Standard stated that all externally-facing webpages must comply with the Standard by 1 July 2017 and that every webpage created, redesigned or redeveloped from 01 July 2014 must comply with the Standard:

Assessment and reporting

Organisations must be prepared, when notified, to assess and report within a reasonable timeframe on their conformance with the Standard. The assessment methodology and reporting mechanism will be communicated to organisations at the time of notification.

In the case that an organisation does not fully meet the Standard, it will be required to manage any risk associated with that lack of conformance by performing a risk assessment and submitting a plan to address, over time, those areas of non-conformance.¹¹

- 30.** Disabled people and their organisations report that public sector organisations’ webpages are not fully compliant with the standard. In order to ascertain the level of compliance and action required to reach compliance two things are required:
- a. Organisations need to be notified according to the Web Access Standard guidance and asked to report on compliance.
 - b. Organisations found not to be fully compliant need to carry out risk assessments and draft plans to demonstrate how they will reach conformance.

Recommendation 6

That the Government ensure all public-sector agencies act in accordance with the Web Accessibility Standards.

¹¹ Accessed 29 August 2017: <https://webtoolkit.govt.nz/guidance/about-the-standards/about-the-web-accessibility-standard/#assessment-and-reporting>

Housing

31. There appears to be a lack of accessible housing in New Zealand.¹² This includes owner-occupied housing, housing in the private rental sector, state housing (housing stock of Housing New Zealand Corporation), and social housing.
32. A recent report¹³ released by the Salvation Army concluded New Zealand needs to build about 2,000 more social houses per year over the next decade to adequately respond to unmet demand. According to the report, disabled people make up a large proportion of long-term social housing tenants.
33. The Ministry of Health offers Housing Modification Grants but only to the owners of houses or if the owner agrees to the modification; so, unless a disabled person can persuade their landlord to apply for a grant then houses in the private rental market are very unlikely to be modified for a disabled person. There is poor data on the number of modified or accessible houses, and the waiting time for modified state or community housing.

Recommendation 7

That the Government ensure that universal design principles and accessibility are built into social housing stock.

Implementation of fair family caregiver payment policies

34. The *Atkinson v Ministry of Health* case¹⁴ concerned individuals who provide care for dependant disabled family members. This litigation culminated in 2012 with the New Zealand Court of Appeal's judgment that the Ministry of Health's policy of not paying family carers for care provided to dependent adult disabled family members constituted unlawful discrimination on the grounds of family status. The response of the then Government to this decision was for Parliament to pass laws from introduction to passage into law in just 24 hours under budget related urgency.
35. The legislation that was enacted was Part 4A of the New Zealand Public Health and Disability Act 2000. Part 4A introduced Funded Family Care ("FFC") which provides for payment for family caregivers subject to certain criteria. However, Part 4A also sought to prevent further retrospective discrimination claims being made by family caregivers and prohibited any person from bringing any discrimination claim against the new FFC policy on the grounds of

¹² For example, 'Lifemark', a company which offers advice to designers and builders on how to ensure homes are usable by people of different ages and abilities, reports that less than 2% of New Zealand's current housing stock is accessible.

¹³ Alan Johnson for the Salvation Army, 'Taking Stock: the Demand for Social Housing in New Zealand' August 2017 at <https://www.salvationarmy.org.nz/article/taking-stock>

¹⁴ Ministry of Health v Atkinson [2012] NZCA 184; [2012] 3 NZLR 456.

disability, family status and age. The Court of Appeal has since observed that the passage and content of Part 4A can be regarded as being contrary to constitutional law and convention.¹⁵

36. In a recent 2018 judgement, the Court of Appeal noted its unease at the complexity of the statutory instruments governing funding eligibility for disability support services, describing them as “impenetrable”. The Court further commented that they hoped that, in the future, the Ministry would streamline its funding processes to make them accessible for disabled people and their families, and to enable disputes over funding eligibility to be settled without litigation.¹⁶

37. The new Government is yet to issue any formal statement regarding its position on Part 4A of the New Zealand Public Health and Disability Act 2000.

Recommendation 8

That the Government take urgent steps to repeal the discriminatory provisions of Part 4A of the New Zealand Public Health and Disability Act 2000.

Conclusion

38. The IMM is happy to provide any further information that the HRC Committee may find relevant. It is worth reiterating, that in all priority areas, multiple discrimination can mean that the disproportionate burden of a failure to realise rights can fall on Māori, migrants, women and children.

¹⁵ Attorney-General v Spencer [2015] NZCA 143, [2015] 3 NZLR 449

¹⁶ Chamberlain v Minister of Health [2018] NZCA 8, para 90.