

Rights for the Disabled: A New Zealand Contribution to International Human Rights

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Abstract

Since the promulgation of the *Universal Declaration of Human Rights* and its concomitant treaties (ICCPR, ICESCR), the United Nations human rights treaty work has focused on identifying new groups, who deserve special protection. In the last few years New Zealand has taken the lead in formulating rights for disabled people. In reviewing the contribution of New Zealand in this area, the present paper highlights some of the ways in which New Zealand's domestic understanding of these rights contributes to the international scene. The paper also examines the degree to which this work formulates new rights or simply extends existing rights. This study should lead to a closer appreciation of how new rights covenants can be formulated.

Keywords: human rights, disabled persons, new rights, New Zealand, United Nations

1.1 Introduction

The present paper focuses on New Zealand's contribution to formulating an international convention on the rights of persons with disabilities. It firstly acknowledges the significant role New Zealand has played in this field, and then gives a summary of existing international norms in this area. The paper then introduces the draft convention and examines it on the basis of the guidelines submitted by the New Zealand government, paying special attention to those articles that are of notable significance. Finally the paper addresses the question as to what extent the draft convention creates new rights.

1.2 New Zealand, the Rights of the Disabled and the United Nations

The *New Zealand Human Rights Act 1993* gave protection to people with disability in New Zealand from “discrimination in employment, education and training, accommodation and the provision of goods and services,”¹ as a result of which the National Human Rights Commission was able to deal with cases of disability discrimination. The result is that disability has become the third major source of complaints, after race and ethnic relations.² However, while both of the later are covered by specific international treaties, disability is not covered by any legally binding treaty. In 2002 the Office of the High Commissioner for Human Rights recommended that a separate convention on the rights of disabled persons be drawn up. Already, on 19 December 2001, the General Assembly of the United Nations had set up an Ad Hoc Committee to discuss the rights of the disabled, which first met 29 July to 9 August 2002. In its second session (16-27 June 2003)

¹ *New Zealand Handbook*, 125.

² *Human Rights in New Zealand Today*, Ch 5, 12. That there are complaints about disability shows that New Zealand has problems in this area, but it is also evidence of the fact that people feel things can be changed. This paper will not address the situation of the disabled in New Zealand except in so far as it seeks to learn from the norms formulated in New Zealand that are then carried over into the drafting of an international instrument.

the Committee decided to establish a Working Group to prepare a draft convention.³

The Chair of the Working Group, which met 5-16 January 2004, was Don MacKay, New Zealand's Permanent Representative to the United Nations. He was also the co-ordinator of the fourth, fifth and sixth sessions of the Ad Hoc Committee (23 Aug – 3 Sept 2004; 24 Jan- 4 Feb 2005; 1-12 Aug 2005). On 21 April 2005 he was elected as the chair of the committee drafting the new convention.⁴ As chair of the Working Group he compiled an easy-to-read English version of the draft, which was circulated along with the original draft.⁵ Hence it is quite clear that New Zealand has invested a lot in the new convention.

1.3 New Zealand: Domestic Protection of the Disabled

New Zealand's willingness to promote the rights of the disabled on the international stage is a reflection of its domestic advance in this field. In 2000 a Minister for Disability Issues was appointed and, in the same year, a New Zealand Public Health and Disability Act was passed, to come into force on 1 January 2001. In April 2001 the first New Zealand Disability Strategy was released, which sets out fifteen objectives and requires all government departments to report on how well they are implementing these goals each year. In 2002 the Office for Disability Issues was established within the Ministry of Social Development. One recent development is the proposal to make sign language one of the official languages of New Zealand (New Zealand Sign Language Bill)⁶.

³ For a summary of the Ad Hoc Committee's working sessions see *United Nations Enable* website at www.un.org/esa/socdev/enable/rights/adhoccom.htm. (5 July 2005)

⁴ New Zealand Beehive news agency 21 April 2005 available at www.beehive.govt.nz/Print/PrintDocument.aspx?DocumentID=22784 (2 June 2005).

⁵ The version in simplified English is dated 18 May 2004 and is available at www.un.org/esa/socdev/enablerights/ahcwgrrereportez.htm (2 June 2005).

⁶ For the current status of this Bill, see <http://www.odi.govt.nz/whats-happening/work-programmes/nzsl.html>. The Committee reviewing the Bill was due to present its findings in parliament at the end of June 2005, whereon the government can make changes and proceed to send it through the parliamentary process.

1.4 New Zealand's Disabled People

Thanks to a New Zealand Household Disability Survey carried out in 2001 and published in November 2004, it is possible to form some idea as to who qualifies for disabled status in the country. The report notes that 20% of the population live with at least one disability and many of those may have more than one. Below is a brief presentation in tabular form of some of the key findings.⁷ The figures show that disability increases with age and is also higher among Māori and among the poor and less well-educated. The second largest group after the Māori who should be considered are Pacific peoples, but here the report notes that Pacific peoples tend to deal with disabled people within their families and hence they are more invisible and perhaps less well-catered for.

Item	Group of Persons	%	Figures
Type of Disability	Physical	68%	
	Mental	22%	
	-Severe	5%	
	-Moderate	5%	
	-Mild	12%	
Gender of Disabled	Women	20%	384,900
	Men	20%	358,900
Age of Disabled	0-14	11%	
	15-44	13%	
	45-64	25%	
	65-	54%	
Disabled Māori	Māori 0-14	15%	
	Non-Māori 0-14	11%	
	Māori 45-64	33%	
	Non-Māori 45-64	25%	
	Māori 65-	61%	
	Non-Māori 65-	54%	
No Formal Education	Disabled	39%	
	Non-disabled	24%	
Income less than NZ\$15,000	Disabled	56%	
	Non-disabled	40%	
Adults not in paid employment	Disabled	60%	
	Non-disabled	30%	

Source: *Human Rights in New Zealand Today*, Ch 5, p. 11

Note: Information contained in this table gives an approximate guide only.

⁷ See *Human Rights in New Zealand Today*, Ch 5.

Indeed, invisibility is singled out as a key barrier to disabled New Zealanders, hence a major task of the government is to remove the stigma that is attached to disabled persons and enable them to be accepted, as one person reported during the consultation process:

I'm never really seen as a full human being, with dignity and with a right to be who I am. People look at me and turn away or feel sad for me. I experience those discriminatory attitudes everyday. Yet, I am proud of who I am and I wouldn't want to be any different.⁸

2.1 Existing Norms Governing the Rights of Disabled People

Disabled people already figure in various United Nations documents. However, many of these are simply statements of intent and carry no guarantee that they will be implemented. Disability also figures in one of the Covenants, which has binding force, and although this does not cover all disabled people, at least it offers some protection to one group.

The Covenants in question is the *Convention on the Rights of the Child* (1989) [CRC]. Article 23 of the Covenant is the only clear statement in current international law on the rights of disabled people.⁹ It covers both mental and physical disability and, while hoping for the full integration of a disabled child into the community, acknowledges that special help may be required.

Declarations are far more numerous as the following list shows:

1969 UN Declaration on Social Progress & Development

1971 UN Declaration on the Rights of Mentally Retarded Persons

1975 UN Declaration on the Rights of Disabled Persons

1993 Vienna Declaration & Programme of Action

1995 Beijing Declaration & Platform for Action

1996 Istanbul Declaration on Human Settlements

This list simply shows that it is increasingly fashionable to include a reference

⁸ *Human Rights in New Zealand Today*, Ch 5, 13.

⁹ Please refer to Article 23 full text.

to disabled persons when considering rights issues.

2.2 UN Ideals

A more specific attempt to address to the rights of the disabled was taken in 1983 when the UN launched a Decade of Disabled People (1983-1992), which began with a *World Programme for Action*. In the course of this, according to the *New Zealand Handbook on International Human Rights*, the focus has moved “from a previous ideology which sought to assist people with disabilities to adjust to ‘normal’ lives” to one “which aims to empower them and facilitate equal opportunities for all.”¹⁰ The Decade ended with the drafting of the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities (Dec 1993).¹¹ These 22 Rules fall into three parts: preconditions for equal participation, targets for equal participation, and implementation. A Special Rapporteur of the Commission for Social Development on Disability monitors the implementation of these Rules.

The first part includes four rules: Awareness-raising, Medical care, Rehabilitation and Support services. The second part covers eight topics: Accessibility, Education, Employment, Income maintenance and social security, Family life and personal integrity, Culture, Recreation and sports, and Religion. The third part contains the remaining ten rules, covering Information and research, Policy-making and planning, Legislation, Economic policies, Coordination of work, Organizations of persons with disabilities, Personnel training, National monitoring and evaluation of disability programmes in the implementation of the Rules, Technical and economic cooperation, and International cooperation. It is generally accepted that these Rules contain a nearly perfect blueprint for norms that could help the disabled enjoy their rights. However, one major drawback is that

¹⁰ *New Zealand Handbook*, 126.

¹¹ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96, 85th Plenary Meeting 20 December 1993 at www1.umn.edu/humanrts/instreet/disabilitystandards.html (5 July 2005).

no country is able to fully implement them. Moreover, the lack of a proper reporting system means that there is no adequate information regarding their implementation even when it does take place.

Hence it was felt necessary to draw together what already existed in the documentation into a simple, comprehensive and realistic document that could be open for signature and hence could be properly supervised.

3.1 The Draft Convention

The Draft Convention follows the basic outline of the *Universal Declaration of Human Rights* and subsequent Treaties. It does, however, have a few features, some of which are common to more recent Treaties and some of which are specific to this treaty. Whereas the UDHR launched right into the subject of rights in the first article, the Disabled Convention opens with six articles covering more general topics: Purpose, General Principles, Definitions, General Obligations, Positive Discrimination, and Statistics. Of these items, the third and sixth are the most controversial. Some people would hold that there is no need for a separate article of definitions. When it is necessary to define a word it should be done in the article in question. On statistics there is even more debate especially as it runs the risk of infringing on privacy. A note to this article points out that its inclusion follows Rule 13 of the Standard Rules.¹²

The following 18 articles of the convention set out the basic rights. Under Civil Rights, we can include articles 7-15: non-discrimination, life, law, liberty, consent, freedom from abuse, freedom of expression, privacy, independence from and participation in the community. Of these items, article 8 on the right to life is considered by some countries as unnecessary in as much as disabled persons do not suffer from challenges to their right to life. Looking at the discussions on this article, though, it would seem that it is intended to draw attention to the victims of armed conflict, which can often lead to ordinary citizens becoming disabled.

¹² Please refer to Rule 13.

Articles 11 and 12 are not clearly distinguished in the original draft, and the above distinction of consent (11) and freedom from abuse (12) is one proposed by New Zealand. It will be discussed further.

Article 16 on children takes up Article 23 of the CRC. Whether it is necessary to repeat an already established legal norm, and one that has been ratified by most States, is a matter for discussion. Article 17 on education follows on from this even though its scope is broader than children alone.

There is one article on political rights (18), three on social rights (19-21), two on economic rights (22-23) and one on cultural rights (24). Of these the most interesting are articles 19 and 20 on accessibility and mobility, since these are two issues that are clearly of specific interest to physically disabled persons. Some States would like to introduce a text based on Rule 12 on Religion into the article on culture. The Convention ends with an article on monitoring (25). Again here there are a number of proposals for expanding this section by importing Rule 22 of the Standard Rules on international monitoring and other issues of international cooperation.

Apart from the inclusion of topics that are clearly necessary for disabled persons (articles 19 and 20) and quite different from other conventions in this respect, the Convention has chosen to exclude most of the possibly more controversial Rules from its draft, except for that on the gathering of data. Whether this item will survive into the final draft remains to be seen. It is, however, unlikely that the proposed incorporation of the Rule on religion will be acted upon.

3.2 New Zealand's Proposals regarding the Draft Convention

Though the Convention has been drafted by a team led by a New Zealander, the New Zealand government has, nonetheless, expressed its own views.¹³ These strike one as full of common sense and show a basic grasp of what the Convention

¹³ Fourth Session (Aug-Sept 2004) Proposals to the Draft Text at <http://www.un.org/esa/socdev/enable/rights/ahc4nz.htm>.

is about. In fact they are aimed more at supporting the current text and preventing it from being unduly overburdened, than at introducing new material. The “six general observations” offered in the paper are valuable guides to appreciating the nature of an international covenant. Hence, in what follows, I shall first consider some general issues and then take these observations as guidelines and use them to comment on the drafting process.

3.3 Attitude to the Disabled

The first key notion regarding is disability that the New Zealand government has been particularly concerned to stress is that disability is not a medical problem of individuals, but the result of what happens when certain persons create a world that in practice excludes others. The disability arises as a factor in the relationship to society in general:

Disability is seen as a result of how society treats its citizens.¹⁴

This new way of definition is described as a ‘social’ model, in contrast to the ‘medical’ model. The *New Zealand Disability Strategy* (NZDS) describes disability as a process that occurs when ‘one group of people create barriers by designing a world only for their way of living, taking no account of the impairments other people have’ (Minister for Disability Issues, 2001: 7). ‘Impairments’ include physical, sensory, neurological, psychiatric, intellectual and any other impairment, and encompass people with permanent, intermittent, temporary and perceived impairments. This definition of disability contrasts with the ‘medical’ model, which locates disability within the individual and ignores the relationship between the individual with impairment and society.¹⁵

This idea exists already in the introduction to the Standard Rules and it is taken up in a number of suggestions for the Draft Convention. The introduction reads:

That new concept [of disability] indicated the close connection between the

¹⁴ *Human Rights in New Zealand Today*, Ch 5, 1.

¹⁵ *Human Rights in New Zealand Today*, Ch 5, 1.

limitation experienced by individuals with disabilities, the design and structure of their environments and the attitude of the general population.

In the drafting of the new convention the idea is found in a number of formulations. That of Lebanon is quite clear:

Disability is an interactive process between the personal and functional situation of the individual and his/her social, physical and cultural environment. (n bis)¹⁶

Australia makes a similar suggestion with rather obscure technical terms:

Recognising the importance of a profound shift, as indicated in the United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities, away from an understanding of disability solely as an individual pathology and towards one that recognizes the disabling impact of inaccessible social structures and processes on persons with impairments. (e bis)

China and South Korea put the idea into their definition of disability:

“Disability” means a functional status of human individual, which is the outcome of the interaction between the individual and the society and environment, manifested as physical, sensory, mental, intellectual impairment that limits the capacity to perform daily life and social participation and which can be aggravated by the economic and social environment. (Art 3.3)

Kenya adds a temporal qualification to this, and puts it under the definition of “person with a disability”:

Define a person with a disability as an individual whose capacity to lead an inclusive life in the community of his/her choice is limited by the cumulative

¹⁶ Compilation of proposed revisions and amendments made by the members of the Ad Hoc Committee to the draft text presented by the Working Group as a basis for negotiations by Member States and Observers in the Ad Hoc Committee (as of 26 August 2004) available at www.un.org/esa/socdev/enable/rights/compilation26august.doc (5 July 2005). Subsequent references to positions adopted by particular states all refer to the same document unless otherwise indicated.

impact of physical, political, economic, social and cultural environments and personal factors that arise from physical, sensory, psycho-social, neurological, medical, intellectual or other conditions that may be permanent, temporary, intermittent, perceived or imputed. (Art 3 Kenya (d))

The problem with including such detailed definitions is that in seeking to be all inclusive, they run the risk of being exclusive too. A detailed definition gives no room for new meanings develop. Hence, it would seem better to let this way of thinking influence the general way in which the principles are expounded, rather than include it as a specific provision. A legal Convention can only prescribe legally enforceable actions, it cannot prescribe ways in which terms are to be understood.

3.4 General Observations

(1) The level of detail and style of the draft Convention should mirror that of existing human rights treaties

New Zealand hopes to steer a middle course between the detailed and near-perfect Rules, which no one can live up to, and failure to give specific consideration to the rights of disabled persons as such. It thus wishes to exclude detailed comments and political aspirations that can never be enforced or carried out in a way that is susceptible to monitoring. For instance, Costa Rica proposes that:

Deaf and deaf blind persons have the right to receive education in their own groups and to become bilingual in sign language in their national spoken and written languages. (Art 17.4)

The *New Zealand Sign Language Bill* gives official recognition to Deaf People's language, but even this progressive Bill does not grant a right to become bilingual. New Zealand is also concerned about monitoring respect for the rights of the disabled, but objects to the requirement for a national code of ethics in the Convention:

Ensure that a code of ethics for public and private health care, which

promotes quality care, openness and respect for the human rights, dignity and autonomy of persons with disabilities, is put in place nationally, and ensure that the services and conditions of public and private health care and rehabilitation facilities and institutions are well monitored. (Art 21 (i))

New Zealand and Canada would both like to remove this demand, whilst Australia suggests softening it by changing the initial “ensure” to “endeavour to”. The Australian demand is reasonable, but it then creates what amounts to a political aspiration of little practical use.

Verbose and detailed amendments such as the following by South Korea regarding conditions governing the deprivation of freedom of disabled persons, are surely also what the New Zealand delegation would like to see excluded:

The degree of the violation of freedom against persons with disabilities should not exceed the general standard and proper provision of conveniences such as the measure for ensuring a meeting with the guardian, assistive tools and due medical service should be properly secured. (Art 10.2 (a) Republic of Korea)

Regarding the style of the treaty, Dr Fort F. T. Liao draws attention to two points: firstly, the draft treaty reflects the trend represented by the Covenant on the Rights of the Child to both oppose discrimination and to value the disabled as the subject of rights; secondly, the treaty continues the precedent set by United Nations treaties in general of addressing its strictures to States Parties.¹⁷ The first point is clear from many articles in the draft which deal with discrimination and from the fact that certain articles are couched in positive terms such as 14.1 which opens with the words “Persons with disabilities... shall not be subjected to ... interference with their privacy.” The second point indicates that States have the obligation to ensure compliance. Moreover, in many cases it is up to States to provide the means to help the disabled.

(2) The draft Convention should avoid redundancy and overlap

¹⁷ Comments given by Dr Liao on 20 November 2005 at the Conference on “Understanding Contemporary New Zealand Politics,” Taipei, Taiwan University Faculty of Social Sciences.

A Convention should be simple in style and contain its ideas clearly in separate paragraphs. If not, it will be difficult to legally enforce them. For example, New Zealand proposes including a reference to the expertise and leadership of persons with disabilities in affairs related to them in the initial series of General Obligations (Art 4.2) and avoid repeating a similar theme in Article 5.

Part 2 of Article 4 of the draft currently reads:

In the development and implementation of policies and legislation to implement this Convention, States Parties shall do so in close consultation with, and include the active involvement of, persons with disabilities and their representative organizations.

And section (d) of Part 2 of Article 5 reads:

Working in partnership with persons with disabilities and their representative organizations in all measures taken to give effect to the obligations contained in this article.

The New Zealand version combines these two to read as follows:

In the **planning**, development and implementation **and evaluation** of *policies standards and guidelines to give effect to the provisions of the Convention and legislation to implement this Convention*, States parties shall do so in *close consultation with, and include the active involvement of* **partnership with**, persons with disabilities and their representative organizations, **recognizing the expertise of persons with disabilities and the leadership they can provide in all affairs concerning them.** (words in *italics* deleted in the New Zealand version; words in **bold** added).

The first change is from *policies* to **standards and guidelines**. This change is a move from a political programme to legal norms. The New Zealand amendment also covers the planning and evaluation of these norms. The second change is from *close consultation with, and include the active involvement of* to **partnership with**. Here it is a case of using one simple and more expressive word ‘partnership’ instead of the cumbersome and rather vague, also demeaning ‘consultation’ and ‘involvement.’ The New Zealand text gives the disabled people an equal role in drawing up relevant laws. Indeed, the final addition would

also have the potential to give them the leadership in this process. Hence, here a tidying up of the language is also a promotion of the rights of the disabled themselves.

Under this heading, the New Zealand proposal also asks that the Convention deal with all disabled persons as one group and not start to single out particular groups, as articles covering groups may give the impression that the general range of rights of the disabled do not apply to that group, only the selected items mentioned in the relevant article. Of course, this objection could be met by repeating the general list but this “risks duplication and internal inconsistency.”¹⁸

As it stands the Draft has only one such article, on the rights of children (Article 16), which, as we have seen, is a repetition of an article of the CRC. However, South Korea also proposed a long article on Women with Disabilities (15 bis)¹⁹. In fact the issue of gender is already mentioned in the Preamble (n)²⁰. At this point Venezuela wished to add to ‘gender’ a further paragraph on ‘women and girls’ (n bis Venezuela)²¹. The EU and Mexico take this as an opportunity to list the various forms of injury and abuse that disabled women are prone to suffer (n ter)²². Korea draws all these various suggestions into its own article, which stresses the need for separate reference to women with disabilities in all laws and surveys.

The New Zealand delegation is not unconcerned about the special needs of women and children but is concerned that a treaty on disability should start legislating on issues already covered by existing treaties. The more complicated

¹⁸ New Zealand does not, however, object to the mention of children. As one of my correspondents, Huhana of Waikato University, makes clear: if children get a mention, why not also mention indigenous people, who tend to suffer even more from disabilities.

¹⁹ Please read full text of proposed article 15 bis: Women with Disabilities.

²⁰ *Emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities.

²¹ Recognizing that women and girls with disabilities are often subject to multiple discrimination and therefore suffer particular disadvantages.

²² Recognizing that persons with disabilities, in particular women and girls, are at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse

the document becomes, the more difficult it is to ratify, let alone implement.

(3) The draft Convention should reflect the existing doctrine of progressive realisation of economic, social and cultural rights

(4) The draft Convention should not extend the doctrine of progressive realisation to civil and political rights

The Convention should in no way water down already existing rights. According to current international law, civil and political rights admit of no dilution, whereas the implementation of social, economic and cultural rights does depend on state resources. The New Zealand position is that if this distinction must be spelled out, then it could be done so as in Article 4 of the CRC:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

In fact China proposes to adopt the second sentence of this Article with exactly the same wording to Draft article 4.1. The original draft simply referred to the full realisation of all human rights and fundamental freedoms.

Under the second of the above two headings (item no. 4), the New Zealand government also warns against the creation of new rights. This is an important topic as a number of suggested variants do in fact lay down the norms for new rights. Indeed the original draft also tends in places to make new norms.

Draft Article 4.1 calls on States to ensure that all individuals “within their jurisdiction” may enjoy the rights set out. This phrase was taken from article 2 of the CRC.²³ Canada proposes removing it and the Draft itself also adds a note

²³ States Parties shall respect and ensure the rights set forth in the present Convention to each child **within their jurisdiction** without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

asking for further review. The reason is that it could give disabled non-citizens (refugees or migrants, for instance) rights that would not be enjoyed by non-disabled non-citizens.

Article 6 on data collection creates an obligation on States that does not exist in any other treaty. Whether, this is actually a new right, or simply a new obligation on States, is not entirely clear. Indeed, it may well clash with the right to privacy.

The right to property is one of the least well-documented rights in international human rights law. The Universal Declaration (Art 17) balances the socialist notion of collective property and the capitalist notion of individual property in a phrase that is a masterpiece of obscurity:

Everyone has the right to own property alone as well as in association with others.

The UDHR adds the further comment:

No one shall be arbitrarily deprived of his property.

In the Draft Convention, the latter comment is retained in gender-neutral language (9 (f)), but the former expands the scope of property to include “financial affairs, bank loans, mortgages and other forms of financial credit”. Since the Draft uses a plural form in the interests of gender neutrality, it is less clear how it stands on the issue of individual or collective ownership. However, the fact that the words “in association with others” are not included lends weight to a possible individual reading of the clause:

The equal right of persons with disabilities to own or inherit property... (9 (e))

The EU, whilst accepting 9 (e), wants 9 (f) removed and Canada suggests that the Article confine itself to granting the right to “administer” property, rather than own it. Clearly, there is some concern that the Draft is making new norms with regard to property.

The Draft also makes access to television a human right for the disabled, even though this right does not exist elsewhere. Here New Zealand asks that

such specific items not be included:

Draft 24 (c): Enjoy access to television programmes, films, theatre and other cultural activities, in all accessible formats, including captioning and sign language.

New Zealand version: Have the opportunity to participate in all cultural, artistic and sporting activities of their choice at local, regional, national and international levels.

The revised version also removes the infelicitous “access... in accessible formats.”²⁴

The clearest case in which a revision seeks to create a new right is that by Kenya and Uganda to include Rule 12 of the Standard Rules as a right to religion (Art. 24.3 bis). The Rule read:

States will encourage measures for equal participation by persons with disabilities in the religious life of their communities.

States should encourage, in consultation with religious authorities, measures to eliminate discrimination and make religious activities accessible to persons with disabilities.

States should encourage the distribution of information on disability matters

²⁴ The Sixth Session of the Drafting Committee adopted the following version of this article:
(a) Encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
(b) ensure that persons with disabilities have an opportunity to organise develop and participate in disability specific sporting and recreational activities and encourage the provision of appropriate instruction, training and resources in support that is available to other participants;
(c) ensure that persons with disabilities have access to sporting and recreational and tourism venues , and that persons with disabilities have equal access to participating in sporting activities within the education system;
(cbis) children with disabilities have equal access to participation in play, recreation, and leisure and sporting activities, including those in the school system;
(d) ensure that persons with disabilities have access to services from those involved in the organisation of recreational, tourism, leisure and sporting activities.
From this it is clear that specific reference to television has been dropped, whilst New Zealand’s own proposal of specifying local, national and international sports has been replaced by the more general “at all levels”.

to religious institutions and organizations. States should also encourage religious authorities to include information on disability policies in the training for religious professions, as well as in religious education programmes.

They should also encourage the accessibility of religious literature to persons with sensory impairments.

States and/or religious organizations should consult with organizations of persons with disabilities when developing measures for equal participation in religious activities.

The East African proposal reads:

States Parties recognize the fundamental right of persons with disabilities to practise a religion of their choice and shall take all appropriate measures to ensure that persons with disabilities:

- a. Enjoy the opportunity to develop their spirituality and practise their faith;
- b. Have access to houses of worship, shrines and sites of religious importance;
- c. Can belong to a community of believers and participate fully in the life of the congregation and in the rites, ceremonies and sacraments that are part of worship;
- d. Have access to appropriate religious education and receive instruction in the format that best suits their needs;
- e. Will be protected from religious abuse, exploitation and coercion.

It is clear that while Rule 12 puts the onus on States to encourage religious organisations to show concern for disabled persons, Article 24.3 bis scarcely mentions the role of the organisations, but vastly expands the rights of the disabled persons themselves. Indeed, this proposal would fit better in a Convention on the Right to a Religion than in the context of the rights of the disabled.

(5) The draft Convention should be consistent with other core human rights treaties

Human rights language, like all language, evolves with time, yet New Zealand argues that the language of the Convention should not depart widely from accepted terminology. Some changes are necessary. For instance, the term ‘correspondence’ referring to letter writing is inappropriate in the age of e-mail or

mobile phones, which are particularly helpful for some disabled persons, and hence it is suggested that ‘communications’ be used instead.

Other neologisms are “universal design” and “reasonable accommodation.” Both these terms have to do with making buildings and objects such that disabled persons can live in them or use them without encountering unnecessary obstacles. Article 7.4 of the draft Convention reads:

In order to secure the right to equality for persons with disabilities, States Parties undertake to take all appropriate steps, including by legislation, to provide reasonable accommodation,²⁵ defined as necessary and appropriate modification and adjustments to guarantee to persons with disabilities the

²⁵ The Ad Hoc Committee may wish to consider the following points when considering the term “reasonable accommodation”:

The Working Group considered that there was a need for a concept such as “reasonable accommodation” in the Convention in order to secure compliance with the principle of non-discrimination.

There was widespread agreement in the Working Group on the need to keep the notion both general and flexible in order to ensure that it could be readily adapted to different sectors (e.g., employment, education, etc.) and in order to respect the diversity of legal traditions.

There was also general agreement that the process of determining what amounted to a “reasonable accommodation” should be both *individualized* (in the sense that it should consciously address the individual’s specific need for accommodation) and *interactive* as between the individual and the relevant entity concerned. It was understood that an entity should not be allowed to compel an individual to accept any particular “reasonable accommodation”. It was also felt, however, that in situations where a range of “reasonable accommodations” was available — each of which was, by definition, reasonable — an individual did not have the right to choose the one that he or she preferred.

There was general agreement that the availability of State funding should limit the use of “disproportionate burden” as a reason by employers and service providers not to provide reasonable accommodation.

Some members of the Working Group supported the proposition that a failure to “reasonably accommodate” should in itself constitute discrimination; some of those members highlighted General Comment No. 5 of the Committee on Economic, Social and Cultural Rights as supporting this view.

Other members of the Working Group considered that the Convention should not dictate the manner by which the concept of “reasonable accommodation” should be achieved or framed under relevant domestic legislation. Specifically, they took the view that it was inappropriate for an international legal instrument designed primarily to engage State responsibility to frame a failure to “reasonably accommodate” on the part of private entities as a violation of the non-discrimination principle.

enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.

As can be seen from the footnote, there was discussion over how “reasonable” should be interpreted. The basic concern is that accommodation be accessible for disabled persons. If it is not changes should be made to increase accessibility. In some cases it may be prohibitively expensive to change old buildings and hence any change might be then considered “unreasonable.” It was also recommended that a definition of “reasonable accommodation” be included in Article 3 among the list of definitions.

Article 3 also includes a proposal to define the terms “universal design” and “inclusive design.” South Africa suggested the following definition of the first of these terms:

“Universal design” is a worldwide concept, which promotes a holistic design such that all products, environments and communications are to designed to consider and provide for the needs of the widest possible array of users. It is considered as a design for all, as an inclusive design and also as a lifespan design.

The idea is that all objects should be made taking into account the needs of disabled people. The South African definition also adds a timescale, hoping that objects are made to last a lifetime. That is an excellent idea, though it is unlikely to be included in the convention as it would apply to a wider range of needs than those of disabled persons alone.

Whilst these are examples of valuable new terms, there are also cases where new terminology should be removed. For instance, New Zealand recommends removing the term “augmentative” when talking about communications:

Article 13 (c) Educating persons with disabilities to use alternative and *augmentative* communication modes.

Exactly what augmentative communication modes are, I have no idea. More serious, are cases in which the Convention tries to define rights that have not yet been defined for the non-disabled. One case in point is found in the article on

marriage. This contains a suggestion that would seem to give disabled people rights not yet recognised in international law:

Article 14 (a) That persons with disabilities are not denied the equal opportunity to experience their sexuality, have sexual and other intimate relationships, and experience parenthood.

Despite the inclusion of “equal opportunities,” it should be noted that no other treaty grants the right to “experience sexuality” nor does any other treaty grant the right to “experience parenthood” outside the marriage context. It looks as if the drafters were trying to include versions of homosexuality and homosexual parenting that are still under discussion.

While trying to avoid creating new terminology or provoking conflicts with existing rights, New Zealand nonetheless acknowledges that the convention must go further than existing treaties in protecting the rights of the disabled. Considered with respect to format, the convention is remarkable for the number of introductory articles, spelling out the precise meaning of terms in the convention. The treaty on Migrant Workers already contained a section on defining to whom the treaty applies, but the expansion of these preliminary articles in this convention is even more marked.

Part of the problem of defining rights for the disabled, can be seen from Article 8 on the right to life. That the disabled have a right to life is beyond dispute, but it is more open to question as to how far their right to life differs from that of other persons. As various proposals make clear, the main threats to the right occur in the context of armed conflict and war. Yet, as a note to the draft indicates, one possibility would be to have a separate article on the rights of disabled persons in times of armed conflict, which would then, perhaps, obviate the need for an article on the right to life.

Another way in which the convention seeks to make advances is in the area of monitoring. This will be discussed further in the seventh session of the Ad Hoc committee, which will meet in January 2006. The Chairman of the committee, the New Zealander Don McKinnon, made three points on this topic in his summary of

discussions of the sixth session.²⁶ Firstly he noted that everyone agreed on the need for effective monitoring mechanisms. Secondly, he stated that “there was agreement that the monitoring provisions of this convention should be at least as good, and preferably better, than those of other treaties.” Thirdly, he stressed the involvement of disabled persons themselves in the monitoring process. This is a point that the New Zealand delegation has constantly reiterated: “Thirdly, there was general support for the involvement and full participation of civil society, both persons with disabilities and their representative organizations, in all levels of the monitoring process.”

More detail on the possible methods of monitoring is not yet available. Note 112 on the draft sets out the reason for this:

The Working Group did not have time to consider the issue of international monitoring of the draft Convention. Some members of the Working Group indicated, however, that international monitoring was an issue of considerable importance to them. Other members, however, had reservations in this respect.

Hence discussion and information on this topic will not be available until after the 6th Committee meeting in January 2006.

(6) The draft Convention should focus on issues and rights that have particular relevance to disabled people

The above discussion on the right to life is also indicative of the sixth principle initiated by New Zealand. In asking that the convention contain only those rights specially relevant to the disabled, New Zealand provides two criteria for establishing what such rights are:

The right in question is not currently honoured for many disabled people;

Honouring the right requires taking special measures for disabled people.

To illustrate the first criterion, we can take Article 24, which has a provision

²⁶ See Website www.un.org/esa/socdev/enable/rights/ahc6reporte.htm at Article 25.

for deaf people granting their language a special status:

24.3 Persons who are deaf shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity.

Within New Zealand there is a Bill to grant Sign language the status of a national language, which would be the sort of thing intended by this section of the article. Here we can see a clear case of honouring a right that is as yet not recognised in most jurisdictions.

The second criterion is well illustrated by the case of elections. Disabled people may need special help in order to exercise their right to vote in elections. One remedy is to take special measures to give them access to polling stations; another might be to encourage postal voting. Hence Article 18 suggests ways in which this could be done:

ensuring that voting procedures and facilities:

- (i) Are appropriate, accessible and easy to understand;
- (ii) Protect the right of citizens with disabilities to vote by secret ballot; and
- (iii) Allow, where necessary, the provision of assistance in voting to citizens with disabilities.

One important point made in the New Zealand guidelines is that articles should not cover too many issues. Hence, at the fourth session of the Ad Hoc Committee, New Zealand put forward a proposal covering articles 11, 12 and 15 that would make each specific to a particular area. New Zealand's revised article 11 contains clauses from 11.2, 12.2, 21 (j) and 21 (k). In the original draft, Article 11 had two items: section one dealt with freedom from torture, whilst section two dealt with consent to medical intervention and protection from forced institutionalisation. In New Zealand's revision the article would focus on free and informed consent to interventions. Whilst acknowledging that some states still use forced institutionalisation, the article would set out norms to control this.

As a result Article 12 would also be tidied up. At present 12.2 also mentions forced institutionalisation. This would be moved to article 11 so that each article is confined to one topic. Repetitive bits of article 12 would be removed and the

rather long introduction describing the potential risk disabled persons suffer would be moved to the preamble. This would result in an article that focused clearly on freedom from violence and abuse. Finally, article 15 would be remodelled to underline that the disabled have liberty to choose where they live.

4.1 Creation of New Rights

The Convention is at pains to avoid the creation of new rights, or provide the disabled with rights that non-disabled persons have not yet achieved. Nonetheless, in some cases contemporary language easily leads to an accretion of rights, such as the “right to sexual experience” that may well have to be removed if the Convention is to be acceptable. Yet, acknowledging rights for the disabled in itself could transform a society.

Traditionally it may be thought, for instance, that consideration of the rights of the disabled in a shop would lead to ensuring wheelchair access to the shop, perhaps labelling for the visually impaired. However, a wheelchair-bound person may find it much easier to shop by internet and have goods delivered. In this case modern technology can not only be more useful for the disabled, it can even transform the way in which shops operate. While most commodities have not yet experienced this kind of revolution, there is no doubt that the buying and selling of books is one case in which internet sales are taking over from shop-door sales. This is surely of benefit to disabled persons. If the disabled were given the right to demand such sales techniques, then shops could only profitably install them if they were available for all customers. Hence recognition of the special rights of the disabled in this case of shopping could lead to granting similar rights to non-disabled persons. Would this be a new right?

If so, how do new rights emerge? At least in the context of this convention, one important notion is how rights are formulated. They could arise by a fundamental rethinking of the basic principles of human rights. They could also arise by a filling-in of the gaps that emerge. To some extent the various conventions since the ICCPR and ICESCR may be seen as filling the gaps for

different sectors of people: women, migrant workers, children, the disabled. However, there is one important feature of the present convention that says something more about the way in which rights emerge. Disability is now seen not as a medical condition affecting an individual, but as a matter of interaction between people and environments. It is in this social sphere that disability emerges as a potential problem.

If we extrapolate from this instance, we may say that new rights will emerge in the interface between persons and the society that they live in. As the society varies, so too the ways of interaction vary and hence new areas of rights become possible. Rights are claims made by persons in society that have official recognition in the law as the embodiment of social norms. They suppose responsibilities of those same persons within the society and elicit responsibility from the society. Hence rights are not born in a vacuum. They express social relationships. As society and persons interact in new ways it becomes necessary not so much as to proclaim new rights as rather to define new rights. The claim to privacy, for instance, means one thing in a traditional rural society where it could be infringed by someone peeping through the window, and another thing in a technical society where it could be infringed by electronic surveillance of computer usage. Significant social change will thus result in the need to define the same right in a more comprehensive manner.

When social change increases the power of the state or other actors to intervene, it may also be necessary to safeguard rights in a new way and hence establish more complex forms of rights and responsibilities. For instance, the post-1945 emergence of migration of workers often without their families has led to the need to define the rights of migrant workers and their families as opposed to simple workers as such. Yet, social change can also lead to the emergence of new categories of neglected persons in as much as groups or nations are left behind by technological progress.

A further source of new rights could come about from closer study of the human family and the realisation that exclusion affects certain groups more than others no matter what level of social change takes place. In the last two decades

we could mention four such groups: indigenous people, children, the disabled and the aged. Initially indigenous people were classified along with minority peoples, but then it was realised that they have a distinctive prior attachment to their land or traditions that is not necessarily the case of minority peoples. Hence it was seen necessary to define their rights separately. Children also emerged as a group apart with the realisation that, while some of their rights are the same as those of adults, there are also rights proper to children and responsibilities proper to a society with children. The disabled have emerged as a new category since it is clear that in many cases their needs are neglected even in societies that pride themselves on human rights awareness.

The aged are a more difficult group to define. That may sound like a strange statement for age is a matter of time and surely could be calculated with the same accuracy as childhood is. Yet, in fact the aged are by no means a homogenous group. In some ways they are already covered by existing human rights instruments. For instance, aged workers come under provisions governing pensions and retirement. Aged and disabled will come under the new convention. Indeed, one reason why the needs of the disabled are becoming more predominant is simply that there are more aged people in society, of whom an increasing proportion are disabled. In many cases disability grows with age. Hence a convention for the disabled already covers many of the things that the aged need as well. Whether the non-disabled, non-retiree, male (there being no convention for men as such) aged person will require a special convention perhaps remains to be seen.

Whilst I have portrayed the above four groups as gaining distinction following reflection on the diversity of human beings, it nonetheless seems to me that the essential reasons governing the need for new conventions to cover new sets of rights does not primarily come from the distinctiveness of these four groups within the human family, but rather from the interactions of person and society. Indigenous people's relationship to land and traditional culture needs protection only because society at large has to make space for their mode of relationship in community and with the world that is distinct from that of non-indigenous persons.

The same applies for children, the disabled and, perhaps, the elderly.

4.2 Conclusion

Hence I would conclude that the example of the rights of the disabled suggests that the formulation and definition of new rights is required when the fabric of society at large reacts in new ways with the persons who compose the society. It is sensitivity to this area that will entail whether the formulation of rights for a particular group is required. Similarly, in drawing up the rights for the group in question, attention must be paid to all the possible interactions and thus providing the broadest possible coverage. Finally, it is important that persons concerned by a given treaty should take full part in its compilation and monitoring, both directly and through representative organisations. This means that the documents discussed will have to be made available in a format that is intelligible to the concerned group.

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殘傷者的權利——紐西蘭對國際人權的貢獻

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摘 要

聯合國公布『世界人權宣言』及其所屬之公約，即『公民政治權利國際公約』與『經濟社會文化權利國際公約』之後，將人權公約工作集中於保護弱勢族群、或易受害之團體。最近幾年中，紐西蘭領導國際社會設計『殘傷者權利公約』，因此本文先列出目前國際社會對殘傷者保護之措施，以及參考紐國內部對殘傷者權利的政策，才注重目前正在整理中的殘傷者權利公約草案，以及紐國對本草案的投入。文章亦探討是否本公約設立新人權或只擴大原來之人權，因而想了解新公約如何產生。

關鍵詞：人權、殘傷者、新權利、紐西蘭、聯合國