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Draft Report on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities

1. The New Zealand Law Society ("**Society**") appreciates the opportunity to comment on the draft report on New Zealand's implementation of the United Nations Convention on the Rights of Persons with Disabilities ("**Convention**") prepared by the Office for Disability Issues ("**Report**").
2. As you are aware, the Society monitors the New Zealand Government's adherence to international covenants, with a particular emphasis on those covenants or parts thereof that deal with civil and political rights. As such, we make the following comments on the Report for your consideration.
3. The Society notes that the Report refers to a number of positive developments in the protection of the rights of persons with disability. The purpose of this letter is to identify areas of the Report that could benefit from further information.

Defining disability

4. The Convention reflects a shift that has taken place in the way disability and persons with disabilities are seen. Historically, disability has been considered to be a personal condition residing in the individual. The focus is no longer on what is wrong with the individual. Instead, disability is recognised as the consequence of interaction by the individual with an environment that does not accommodate that individual's differences, and limits or impedes the individual's participation in society.
5. The Report notes at paragraph 34 that the definition of disability under the Human Rights Act 1993 ("**Human Rights Act**") has been the subject of consideration by the courts. The courts have found that definition to be an exhaustive list of what constitutes a disability. The Society presumes that the Report is referring to the decision in *Trevethick v Ministry of Health* (which is discussed in the Report at paragraph 29).
6. The ultimate readers of the Report would benefit from an explanation as to what steps, if any, were taken by Government in light of the decision and in particular whether any consideration was given to whether the definition of disability in the Human Rights Act needed to be amended after *Trevethick* so as to align with the definition under the Convention. The Society does not have a view one way or the other on the issue.

Reference to case law

7. Key cases in recent times include: *Smith v Air New Zealand* (2008) 8 HRNZ 639 (HC) (pending appeal to the Court of Appeal, which has reserved its decision); *Trevethick v Ministry of Health* (2008) 8 HRNZ 485 (HC); [2008] NZCA 397; *IDEA Services Limited v Ministry of Health* NZHRRT 043/09 (pending judgment by the Human Rights Review Tribunal, which has reserved its decision); and *Atkinson v Attorney-General* [2010] NZHRRT 1 (8 January 2010) (pending appeal to the High Court, which has reserved its decision).
8. In relation to *Smith*, the Society makes the following comments:
 - (a) The description of the case at paragraph 45 of the Report would benefit from additional information. In particular, that paragraph should state that: the decision is currently under appeal to the Court of Appeal; the High Court decision used an approach to comparator groups that has been controversial; and that the High Court decision represents a departure from the Canadian approach to reasonable accommodation, such that the threshold in New Zealand for what will be considered “onerous” is much lower here than in Canada.
 - (b) It is surprising that *Smith* is not mentioned in relation to Article 9 - Accessibility (paragraph 87 and following), given the factual context in that case and the government’s obvious interest as evidenced by the Attorney-General’s intervention. We recommend comment be added.
9. In relation to *Trevethick*, the Society makes the following comments:
 - (a) The description of the case at paragraph 29 of the Report would benefit from additional information. For example, the ultimate issues and decision should be clearly spelt out and that paragraph should state that an application for special leave to appeal was refused by the Court of Appeal.
 - (b) Following on from the introductory comments at paragraph 6 above, the Report should consider how this case was received within Government, particularly bearing in mind the sympathy that was expressed by the Human Rights Review Tribunal in relation to the position the plaintiff found herself in (see paragraph of 3 of the Tribunal’s decision).
10. In relation to *IDEA Services* (which relates to funding of day services for intellectually disabled persons aged 65 and over), the Society makes the following comments:
 - (a) We note that *IDEA Services* is not mentioned at all in the Report.
 - (b) Paragraph 185 of the report could be improved by referring to *IDEA Services*, and in particular to the fact that in the context of the litigation the Ministry of Health acknowledged that there was a funding and service “gap” such that many persons aged 65 and over do not receive funding for day services. The effect of that “gap” is that it limits the ability of persons aged 65 and over to access their communities.
11. In relation to *Atkinson*, the Society makes the following comments:
 - (a) It is surprising that there is no direct mention of *Atkinson*, despite its obvious relevance.
 - (b) Paragraph 186 of the Report should refer to *Atkinson*, and in particular to the fact that the Human Rights Review Tribunal has ruled that a Ministry of Health rule preventing resident family members from receiving payment for provision of disability support

services to their disabled family member when non-family members would be eligible to be considered to be paid for such provision is unjustified discrimination on the ground of family status contrary to section 19 of the New Zealand Bill of Rights Act 1990 (“Bill of Rights Act”). Alongside seven plaintiff parents there were two adult plaintiff children who argued the right to have the person of their choice undertake their paid disability support services. The decision of the Human Rights Review Tribunal is currently under appeal to the High Court, which heard the appeal in September 2010 and reserved its decision. The decision and the appeal are crucial information that should be in the Report.

Legislation

12. The Report notes at paragraph 24 that before New Zealand ratified the Convention, it reviewed all of its legislation to ensure its consistency with the Convention. Paragraph 24 could be improved by making reference to legislation which has been enacted since New Zealand ratified the Convention and which has raised issues in relation to disability protections.
13. For example, the Eden Park Trust Amendment Bill 2009 received an adverse Attorney-General report under section 7 of the Bill of Rights Act because it permitted disability discrimination that could not be justified in terms of section 5 of the Bill of Rights Act. The Attorney-General raised two concerns in relation to the Eden Park Trust Amendment Bill. First, the use of being “mentally disordered” within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 as a proxy for competence constituted unjustified discrimination. Second, the use of an order under the Protection of Personal Property Rights Act 1988 (“PPRA”) as a proxy for competence also constituted unjustified discrimination. The Society notes that it is positive that at a later stage in the legislative process the reference to the Mental Health (Compulsory Assessment and Treatment) Act 1992 was deleted. However, the Attorney-General’s concern in respect of the Protection of Personal Property Rights Act 1988 was not addressed, such that the Eden Park Trust Amendment Act 2009 uses an order under the PPRA as a proxy for competence, and thus contains provisions that constitute unjustified discrimination. In the Society’s view, this kind of information needs to be in the Report.
14. The Report at paragraph 25 notes that disabled people are using the mechanisms under the Human Rights Act and the Bill of Rights Act and other Acts to challenge discrimination. In the Society’s view, paragraph 25 could be improved by cross-referencing Table 8 of the Annex, and also by including statistics which indicate the use of the mechanisms by disabled people in comparison to the use by people alleging discrimination on a different prohibited ground.
15. In relation to the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Report notes (at paragraph 24) that the Act “needed more attention” and (at paragraph 152) that “the safeguards in legislation do not at times have sufficient effect”. The Report does not state what Government is doing to address these concerns. In the Society’s view, the Report would benefit from information on that matter. If Government has not done, or does not have plans to do, work on the issue that should be made plain and an explanation provided as to why.

Informed consent

16. The issue of informed consent is raised in various places in the Report. For example, at paragraph 172 the Report makes reference to the issue of informed consent in the context of sterilisation. The issue of informed consent is a complex one, and one on which the Government through the Report should actively seek the views of the United Nations Committee.

Optional Protocol

17. There is a notable absence of any discussion in respect of the Optional Protocol to the Convention. In particular, there is no discussion about whether Government intends to sign the Optional Protocol. Paragraph 318 would be an ideal part of the Report in which to provide an indication as to the Government's intention.

Accessibility

18. In addition to the comment made at paragraph 8 of this letter, the Society makes the following comments in relation to accessibility:
 - (a) Paragraph 104 of the Report states that in 2010 the Human Rights Commission will be reviewing the extent to which the recommendations made in its 2005 report have been implemented. A report detailing such a review has been published and the contents of the review in relation to disability should be contained within it. Accordingly, paragraph 104 will need to be amended to reflect that.
 - (b) The discussion of accessibility suggests that there has been a focus on accessibility to services provided by government. The Report would benefit from a discussion of the extent to which initiatives have been undertaken to ensure that the private sector provides accessibility to its services.

Health

19. An underlying issue in the *Trevethick* case was that care provided by ACC was perceived to be better than care provided by the Ministry of Health. The Report would benefit from an update as to whether Government is taking any steps to address this perceived difference.

Other matters

20. Paragraph 37 of the Report refers to the Ministerial Committee on Disability Issues, which was established in 2009. In the Society's view, the Report could be improved by specifying the particular initiatives undertaken by the Ministerial Committee on Disability Issues.

The Society trusts that these comments are of assistance.

This submission has been prepared by the Society's Human Rights and Privacy Committee. If you have any queries regarding this submission, please contact Julie Smith, the Committee Secretary, by telephone (04) 463 2967 or email julie.smith@lawsociety.org.nz.

Yours sincerely



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