

THE NEW ZEALAND HUMAN RIGHTS COMMISSION

**SESSION 5: PERCEPTIONS OF NATIONAL
INSTITUTIONS AND DISABILITY SECTOR ON THE
NATURE AND ELEMENTS OF THE NEW CONVENTION**

*Presented by:
Commissioner Robyn Hunt*

*Asia Pacific Forum and British Council Workshop on Disability and Human Rights
New Delhi 26 – 29 May 2003*

Paper presented 29 May 2003

Session 5: Aim: To draw out perceptions of national institutions and disability sector on the nature and elements of the new Convention

(a) The rights to be covered

Overarching principles

- Fundamental human right for people with disabilities is the basic right of any human to exist
- Disability is a human rights issue, not a welfare or development issue
- Principles of dignity/self-determination:
 - People with disabilities should have opportunities equal to those of other citizens;
 - Principles of non-discrimination, reasonable accommodation and social inclusion;
 - The main obstacle is discrimination not impairment;
 - Physical and attitudinal barriers cause serious discrimination and social exclusion;
 - Reasonable accommodation of disability is required by states and the private sector;
 - A society of inclusion benefits all;
 - States need to firmly base their policies on principle of social inclusion, to enable full participation and promote access by people with disabilities;
 - Promotion of personal development and fulfillment
 - States obligations to guarantee the exercise and enjoyment of rights
 - Public/private sector action
 - Principle of progressivity
 - Some things non-negotiable
 - Raise rights awareness
 - Particular attention should be given to:
 - Women with disabilities
 - Children with disabilities
 - Disabled people in developing countries
 - Disabled people in remote and rural areas
 - People with multiple disabilities
 - Indigenous people with disabilities
 - Disability definition
 - What individuals have are impairments. They may be physical, sensory, neurological, psychiatric, intellectual or other impairments. Impairments may be temporary/permanent/assumed/perceived/p

ast/associate (ie. comprehensive and inclusive – see NZ HRA defn, at www.hrc.co.nz)

- Importance of inclusiveness of all categories of impairment
- Disability relates to the interaction between the person with the impairment and the social and physical environment.
- Disability is the process which happens 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. Discrimination can and does result from these processes.

Civil Rights

- Right to life
 - Denial of necessities of life
 - Prohibition of eugenics laws
- Protection against Torture and other ill treatment;
 - Sexual and medical exploitation and other abuses
 - Slavery, servitude and forced labour
- Rights to justice
 - Equality before the law
 - Due process
 - Immigration/asylum laws discriminate against people with disabilities
 - Denial of effective remedies
 - Access to justice
- Integrity of person
 - Decisions about medical treatment
 - Recognition as a person before the law
- Privacy/family rights
- Liberty
 - Denial of independent living/institutionalization
- Freedom of expression
 - People with disabilities excluded from mainstream communication adversely impacting freedom of thought conscience and religion as well as freedom of speech and expression.
 - Denial of language (e.g. sign) discriminates against deaf people.
- Citizenship/right to join political parties/vote
 - Access to voting;
 - The problem of voting exclusion for institutionalized people

- Participation in public life

Social, Economic and Cultural Rights

- Right to education
 - Denial of access; or
 - Segregated/inadequate access e.g. deaf and/or blind children denied right to education in sign language/Braille
- Right to work
 - Non discrimination rights in employment
 - Reasonable accommodation
 - Need for adequate vocational training
 - (Where compelled to) sheltered workshops preclude right to free choice of employment and may lack employment protections
- Right to Health
 - Access to health care
 - Sexual/reproductive rights
 - HIV/disability
 - Freedom from involuntary medical treatment
- Right to adequate standard of living
 - Poverty
 - Housing
 - Food
 - Clothing
 - Rehabilitation and habilitation
 - Services
 - Choices
 - Social security
- Access rights
 - Built environment
 - Transportation
 - Communications (all)
 - Access to information and documentation
 - Access to the Information society {internet, web design, egovt}
 - Access to all systems of society: ATMs, timetables
 - Right to technical assistance and technological support
 - Obligation on states parties to build inclusive systems
- Right to culture, recreation and sport
 - Access rights (effective denial of participation)

- Elements of culture not valued (sign language/Braille)
- Stigmatised by false images which create prejudice and suspicion
- Right to project image free of prejudice and stereotypes

Third generation rights

- Ending systemic human rights violations that cause disability
- Right to peace
- Right to development
- Right to international cooperation
- Right to legal aid

(B) Share jurisprudence to illustrate how existing norms have been interpreted to secure rights of people with disabilities and how these could be further developed in the new Convention

This is understood to refer to domestic outcomes to secure rights for people with disabilities and how these could be further developed in the new Convention.

(1) Stagecoach complaint. In 1995 the Commission received complaints that Stagecoach was buying new buses that were not wheelchair accessible. The matter was dealt with on an interim basis only by the Tribunal. That ensured that the balance of the new bus order (26 buses) was wheelchair accessible, pending further litigation to settle exactly what the Human Rights Act required in this regard. However the further court proceedings that were contemplated never took place, so the bus company's obligations were never settled in law. Since the matter was settled out of court it is understood that Stagecoach has bought further accessible buses (although it is also understood that inaccessible buses have also been purchased). Much time was spent debating whether there was a reasonable obligation to provide an accessible service or not. The new Convention could assist in resolving such disputes by providing for access rights for people with disabilities to transportation.

(2) Telecommunications relay service (TRS) complainet. In 1995 the Commission received complaints that a major telecommunications provider was discriminating against deaf and hearing impaired people by not providing a TRS. There were then negotiations and discussions from 1995 until 2001 without any resolution. The matter has since been resolved after the Commission reported to the Prime Minister and a political decision was then made that telecommunications carriers were to provide a TRS. One issue that was never agreed between the complainant and the respondent was whether there was a legal obligation on the provider to provide a TRS. The new Convention

could assist in resolving such disputes by providing for access rights to communications and to the information society.

(3) Captioning. In 2001 the Commission received a complaint in relation to the lack of captioning for movie releases. The matter is being discussed presently with film industry distributors and exhibitors. Again, a matter at issue is the nature and extent of any legal obligation on the industry to provide captioning. The new Convention could assist by clarifying access rights to information and to all systems of society.

(C) Illustrate substantive provisions that could redefine norms of social justice, well-being, citizenship and human rights

Social justice

Principles of equality/social justice

- People with disabilities should have opportunities equal to those of other citizens. Ideally this leads to equality of outcomes.

Elimination of discrimination is a key principle. To achieve equality of opportunity there must be provision for reasonable accommodation and other positive steps to eliminate discrimination.

Wellbeing

Principles of non-discrimination, reasonable accommodation and social inclusion;

- Access to voting;
- (remove) voting exclusion for institutionalized people
- access to full participation in public life

Human Rights

- The right to be is the basic human right for people with disabilities
- See principles in [A] above.

(D) The scheme to organize substantive elements in the new Convention

Options are to cover in separate parts, cf CEDAW,

- Overarching principles (e.g. Disability a question of human rights not welfare or development issue, fundamental right to be, definitions of discrimination, of disability, reasonable accommodation, affirmative action, inclusion progressivity)

- Economic social and cultural rights (as in [A] above)
- Civil and political rights (as in [B] above)
- Follow-up implementation and monitoring

(Additional) Please highlight cases of good jurisprudence domestic as well as under international jurisdictions apart from the suggested elements

Domestic outcomes (mediated):

- In 1997 representatives of people with disabilities complained that a tertiary institution had moved a department of study from a fully accessible building to premises that made access difficult for students with disabilities. It was said that the move, without adequate consultation, subjected students with disabilities to detriment for a number of reasons, including that a higher proportion of students with disabilities were enrolled in that department. The matter was mediated successfully and the institution agreed to
 - Adopt action plan for students with disabilities; provide an accessible vehicle to transport students with disabilities to the department's new buildings; make a written apology and joint press statement; introduce disability awareness training in staff development courses.

This outcome set a benchmark in relation to access issues. It also contributed to permanent government funding in this area.

- In 1999 the complainants went to enroll their five year old boy who is allergic to bee stings. They were required to sign a disclaimer indemnifying the school from any liability connected with their son's allergy. The complainants refused to sign alleging that staff had indicated they were not willing to administer medication to the child in the event of a bee sting. The school refused to enroll the child. The complaint was resolved. Teaching staff underwent some training and agreed to administer medication if this proved necessary. The disclaimer form was amended in a way that was acceptable to the complainants, they signed it and the child was enrolled at the school.
- In 2000 a person who uses a wheelchair complained that EFTPOS machines at a national fast food service chain were not accessible to her as they were too high for her to reach. The company explained that it was replacing the technology complained about with new units as they became available (which had a keypad attached to a flexible cord). The company that over the next 12 months it expected to have changed all the

units in all its stores nationwide. The Complaints Division decided not to investigate the complaint further.

Recent international cases

- The Employment Appeals Tribunal (EAT) in the UK held that a woman employee who was dismissed after a year's absence due to depression, was discriminated against because of her disability¹. The EAT said that the employer was at fault for not turning its mind to any workplace adjustments to accommodate her disability (although it was said neither the employee nor her physician *were decisive* on any workplace adjustments that were required)
- In 2002 the Ohio State Supreme Court awarded a former McDonalds employee \$5m USD for discrimination. The long serving employee advised McDonalds of being HIV-positive and was as a consequence removed from management issues and told he would have to go back to the counter selling hamburgers for the rest of his career.
- Also see cases mentioned in Quinn/Degener study (referred to by Ms Mohit in her presentation on Wednesday)

Concluding comments

There is a lack of case law in New Zealand on this subject, but with recent structural changes to the Human Rights Act, more litigation is likely to go to the Human Rights Review Tribunal.

¹ *Cosgrove v Caesar & Howie [2001] IRLR 653*