

ARTICLE

High Hopes, Disappointing Reality: Implementing the Convention on the Rights of Persons with Disabilities When the Going Gets Tough

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This article explores the challenges of implementing the Convention on the Rights of Persons with Disabilities (CRPD) in the context of the Christchurch earthquake rebuild. General United Nations treaty implementation mechanisms and their challenges are discussed, as well as challenges specific to the CRPD. In the context of Christchurch, it is argued that the earthquake rebuild is a prime opportunity to make Christchurch more accessible and inclusive for everyone, however, this opportunity is not being seized upon. This is due to inadequate mandatory building standards and a belief that making buildings accessible costs more and only benefits disabled people. The article identifies two government-funded social change initiatives attempting to change this belief and concludes that a significant shift in New Zealand's human rights culture is necessary for the CRPD to be adequately implemented.

I The CRPD

A *Background to the CRPD and New Zealand's involvement*

The idea of a Convention aimed at promoting and protecting the rights and dignity of persons with disabilities first came about in 2001 when the United Nations General Assembly established an Ad Hoc Committee to consider the issue.¹ The Committee, which included New Zealand Permanent Representative to the United Nations (UN), Don

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1 Don Mackay "Convention on the Rights of Persons with Disabilities and its Optional Protocol" (13 December 2006) United Nations Audiovisual Library of International Law <<http://legal.un.org>>.

Mackay, set up a Working Group to prepare a draft Convention text in 2002.² The Group successfully drafted a Convention text within a year of its creation.³ This text subsequently served as a basis for negotiation, following which a final text was agreed upon in August 2006—the quickest any human rights treaty had ever been negotiated.⁴

After over five years of negotiations, the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 13 December, 2006.⁵ On 30 March, 2007, it opened for signature, and many states (the most for any treaty) signed it immediately on the opening day.⁶ Thus, the twenty-state ratification requirement was quickly reached, and it, along with the Optional Protocol, entered into force on 3 May 2008.⁷

New Zealand sent a delegation of both government and non-government representatives to all negotiation meetings,⁸ demonstrating its apparent commitment, or at least enthusiasm, towards a disability convention. New Zealand was one of the few countries with an established national strategy focused on disability—the New Zealand Disability Strategy 2001—prior to the drafting of the Convention.⁹ At that time, New Zealand was considered world-leading in its promotion of disabled people's rights. In fact, its efforts in developing and implementing the Disability Strategy and shaping and negotiating the CRPD were internationally recognised when it was awarded the Franklin D Roosevelt International Disability Award in 2007.¹⁰ While this was a noteworthy achievement for which New Zealand should be commended, it has seemingly not built on its success to the extent that it could. Rather than gaining strength in the years since, the rights of disabled people have arguably been undermined, particularly after the Canterbury earthquakes of 2010–2011.

B *Contents of the CRPD*

According to art 1, the purpose of the Convention is “to promote, protect, and ensure the full and equal enjoyment of all human rights by persons with disabilities, and to promote respect for their inherent dignity”.¹¹

However, the definition article, art 2, does not define disability despite it being the concept around which the Convention is centred. Rather, art 1 broadly describes what “people with disabilities” includes in terms of “long-term physical, mental, intellectual, and sensory impairments, which in interaction with various barriers, may hinder their full and effective participation...”¹²

2 United Nations “Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities” (3 July 2003) <www.un.org>.

3 Don Mackay, above n 1, at “Procedural History”.

4 United Nations “Convention on the Rights of Persons with Disabilities and Optional Protocol” <www.un.org>.

5 United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD].

6 United Nations “Convention on the Rights of Persons with Disabilities” <www.un.org>.

7 CRPD, above n 5.

8 See Office for Disability Issues “History of the Strategy” <www.odi.govt.nz>.

9 Office for Disability Issues, above n 8.

10 Ruth Dyson “NZ wins Roosevelt International Disability Award” (press release, 3 December 2007).

11 CRPD, above n 5.

12 CRPD, above n 5.

Article 3 outlines the Convention's general principles, while art 4 details states' general obligations. Further, art 4(2) recognises that civil and political rights are to have immediate effect and states are expected to progressively realise social, economic and cultural rights utilising the maximum of its available resources. Finally, art 4(3) obliges states to actively consult with and involve disabled people through disabled person's organisations (DPOs) in the development of legislation and policies to implement the Convention.¹³

The UN states that the Convention simply expresses existing rights in a way that addresses the needs of persons with disabilities as opposed to creating new rights.¹⁴ However, some authors argue that it does create "new rights" in that the CRPD is specific to persons with disabilities.¹⁵ In either respect, it is clear that the Convention is considered a uniquely drafted treaty which has the potential to make a great difference to the lives of disabled people. Due to the unique challenges disabled people face, it appears the CRPD has been drafted in a way which reshapes and overcomes the dichotomies traditionally present in international human rights law and challenges the international legal system in general.

Traditionally, international human rights law has been made up of several dichotomies which "reinforce human rights core assumptions".¹⁶ According to Frederic Megret, there are four distinctions which have been used to construct international human rights norms and which are therefore present in human rights treaties. Such distinctions are between the types of rights (positive vs negative; civil/political vs economic/social/cultural); the rights' main actors (the state vs the individual); the intensity of rights (progressive realisation vs immediate implementation); and the best way to implement them (enacting laws as opposed to enacting policies).¹⁷

Such dichotomies are entrenched in human rights treaties in that the provisions either emphasise one or the other.¹⁸ However, because disabled people face challenges specific to them, the CRPD seems to combine the approaches across these four distinctions. For example, rather than wording rights negatively or positively, the Convention tends to use both—in doing so, it systemically highlights both the negative and positive dimensions of all relevant rights.¹⁹ Similarly, international human rights law traditionally views states as opposed to individuals as owing human rights obligations. However, the Convention Preamble explicitly holds that individuals have a duty to both other individuals and their communities to strive for the promotion of the rights

13 The Convention contains a further 26 substantive provisions in arts 5–30. These include political, civil, economic, social, and cultural rights identical to those contained in the Universal Declaration of Human Rights and its two covenants, but also include unique rights such as the right to Accessibility (art 9), Living Independently and Being Included in the Community (art 19), Personal Mobility (art 21), and Habilitation and Rehabilitation (art 26).

14 United Nations "Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities" <www.un.org>.

15 Aart Hendricks "Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities" (2007) 14 EJHL 273 at 277; and Rosemary Kayess and Phillip French "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) 8 HRL Rev 1 at 32.

16 Frederic Megret "The Disabilities Convention: Towards a Holistic Concept of Rights" (2008) 12 IJHR 261 at 262.

17 At 264.

18 At 262.

19 At 265.

recognised in the International Bill of Rights.²⁰ This recognises that disabled people need assistance and protection from both the State and individuals in their everyday lives.²¹ The fact that the CRPD transcends these distinctions means it produces a unique, considerably more holistic view of human rights and, as Megret argues, provides a unique opportunity to rethink how we conceive human rights as a whole, beyond the dichotomies that have beset it.²² The practical reality of implementing the obligations in the Convention remains to be seen, as no matter how holistic the drafting, it is only useful if its provisions are actually implemented.

To this end, the Government has recently created a new Disability Action Plan 2014–2018 which sets out strategic priorities focused on increasing participation of disabled people in society. This is intended to advance the implementation of both the CRPD and the New Zealand Disability Strategy.²³ The Plan takes a collaborative approach, emphasising action between government agencies, DPOs and other entities, and recognises that such an approach is necessary because many of the barriers disabled people face cut across agencies.²⁴ The Government has put a significant amount of effort into working with seven national DPOs to develop the plan, recognising the value they have to offer as representatives of disabled people.²⁵ This signifies an encouraging shift as historically the Government has generally only engaged with DPOs sporadically. Currently, the groups are working together to develop governance and implementation arrangements, which are obviously key to the Plan’s execution. It will be interesting to see how the Plan develops, how government agencies and DPOs work together to implement the Plan over the next four years, and any effects this has on advancing the implementation of the Convention and the rights it codifies.

C General implementation mechanisms and their challenges

Implementing the CRPD raises several challenges; those general to the implementation of any international treaty and those specific to the CRPD. The Convention does contain a number of obligations in relation to monitoring and implementation, which commentators argue is the most comprehensive national monitoring/implementation provision of any treaty.²⁶ Specifically, art 33 imposes several requirements on states regarding implementation and monitoring. The New Zealand Government has fulfilled these requirements by maintaining the Office for Disability Issues, established in 2002 under the Disability Strategy and by establishing the Ministerial Committee on Disability Issues, which acts as a coordination mechanism.²⁷ In addition, an Independent Monitoring Mechanism (IMM) was established in 2011, made up of the Ombudsman, the

20 At 267.

21 At 267.

22 At 274.

23 Office for Disability Issues “Disability Action Plan 2014–2018” (May 2014) <www.odi.govt.nz>.

24 Office for Disability Issues “Introduction” <www.odi.govt.nz>.

25 Office for Disability Issues “Representative organisations of disabled people” <www.odi.govt.nz>.

26 Michael Stein and Janet Lord “Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential” (2010) 32 Hum Rts Q 689 at 692–694.

27 Office of Disability Issues “About us” <www.odi.govt.nz>.

New Zealand Human Rights Commission, and the Convention Coalition (a group of DPOs which monitor and advocate for the rights of disabled people).²⁸

Each entity has different roles. The Human Rights Commission's focus is on identifying "areas where disabled people are vulnerable to abuse and denial of their rights and advocating for solutions", using the Convention as a framework.²⁹ The Ombudsman, on the other hand, has a more confined role in aspects of protection and monitoring. Its main function is to "monitor the performance of the wider State sector" in implementing the Convention, making recommendations and publishing reports where necessary.³⁰ Finally, the Convention Coalition provides the civil society component. Its main role is to monitor disabled people's rights through regular consultation from which it produces monitoring reports, both on disability rights in general and on specific topics, such as media and youth.³¹

Thus far, the IMM has published two joint reports detailing the state of disability rights in New Zealand, reporting on the progress made since the last report, and making key recommendations.³² Their latest report, entitled "Making Disability Rights Real" was published earlier this year and identified five overarching areas that require attention to "promote greater realisation of the rights set out" in the CRPD.³³ These five key areas are: data, accessibility, building a people driven system, violence and abuse, and education.³⁴ The IMM's recommendations orientate the government's main focuses in relation to implementing the CRPD over the coming years.³⁵

It is also worth mentioning the Government's first periodic report which detailed New Zealand's compliance with the Convention thus far, presented to the Convention Committee in September 2014.³⁶ All states are obliged, by virtue of art 35, to submit reports detailing the measures they have taken to implement the rights enshrined in the Convention, initially within two years of ratifying the Convention and thereafter every four years. The State delegation, made up of both government officials and DPO representatives in New Zealand's most recent visit, meets at the United Nations headquarters in Geneva and presents its report to the Committee.³⁷ The Committee then examines the report with the obligations set out in the Convention in mind, and, drawing on information provided by community groups through shadow reports, makes recommendations for improvement.³⁸ These recommendations are subsequently forwarded to the state in question.³⁹

The recommendations made by the Committee are no doubt intended to address breaches and, in some cases, are very detailed. However, one of the major challenges is

28 Office of Disability Issues "Framework to promote, protect and monitor implementation of the Convention" <www.odi.govt.nz> [Convention Framework].

29 Convention Framework.

30 Convention Framework.

31 Convention Framework.

32 Convention Framework.

33 Human Rights Commission "Making disability rights real" (June 2012) <www.hrc.co.nz> at 6.

34 At 6.

35 At 13.

36 The Committee, established under art 34 of the Convention, is a body of independent experts which monitors the implementation of the Convention by states; essentially its function is that of the IMM, but on an international level. See UN OHCHR "Committee on the Rights of Persons with Disabilities" (2014) <www.ohchr.org>.

37 "Committee on the Rights of Persons with Disabilities", above n 36.

38 CRPD, above n 5, art 36(1).

39 Article 36(1).

that these recommendations are non-binding and, as such, states are not compelled to comply with them.⁴⁰ In turn, this means that states can, and do in some cases, ignore the Committee's recommendations even though they may be breaching their obligations. In other words, human rights treaties, including the CRPD, are not directly enforceable as they do not have any means of compelling the state to improve their behaviour through sanctions or otherwise. As such, the state reporting mechanism is not considered to be particularly effective.⁴¹

This problem of rights without effective remedy is widely recognised as one of the key challenges besetting the UN system, "threatening the integrity of the international human rights legal regime".⁴² It is compounded by a lack of resources on the part of the treaty bodies, as well as a general reluctance to become involved in the "sensitive world of monitoring and implementation".⁴³ The result of this general ineffectiveness, Bayefsky argues, is that ratification has become an end in itself, with many states of the view that it does not carry serious consequences.⁴⁴ In fact, Bayefsky states that the dysfunction of the international system, coupled with a lack of national democratic institutions, has made the "likelihood of national consequences comfortably remote", and is precisely what has caused so many states to ratify treaties.⁴⁵

The other mechanism for enforcement is the Optional Protocol, which New Zealand has not yet ratified (but it has indicated it intends to do so in its most recent state report).⁴⁶ As a side-agreement to the CRPD, the Optional Protocol establishes an individual complaints mechanism for the Convention.⁴⁷ In accordance with art 1, states who have signed the Optional Protocol agree to recognise the Convention Committee's ability to receive and consider communications from or on behalf of individuals or groups who claim to be victims of a violation of the rights protected under the Convention. Once a communication has been received, the Committee examines it and issues "views" as to the admissibility of the communication and whether the state in question has failed to fulfil its obligations under the Convention.⁴⁸ If the communication is found to be admissible and the state is found to be in violation of its Convention obligations, the Committee can make recommendations as to what the state should do to remedy the breach(es).⁴⁹ In accordance with art 5 of the Optional Protocol, the state is then required to submit a written response within six months acknowledging these recommendations, and detailing any action taken in response to such.

It may be thought that unlike the reporting mechanism, the Optional Protocol mechanism may enable a more thorough analysis and address breaches by states more

40 Anne Bayefsky "The U.N. Human Rights Treaties: Facing the Implementation Crisis" (1996) 15 Windsor YB Access Just 189 at 192.

41 At 197.

42 Anne Bayefsky *The UN Human Rights Treaty System: Universality at the Cross Roads* (Kluwer Law International, The Hague, 2001) at i.

43 At 7.

44 At 7.

45 At 8.

46 "Implementation of the Convention on the Rights of Persons with Disabilities: Initial reports submitted by States parties under article 35 of the Convention (New Zealand)" (1 October 2013) United Nations Human Rights <<http://tbinternet.ohchr.org>>.

47 *Final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities A/61/611* (6 December 2006) [*Final report of the Ad Hoc Committee*], art 1.

48 Articles 2 and 5.

49 Article 5.

effectively. However, it has been argued that the results thus far are disappointing.⁵⁰ According to Bayefsky, this is because, first, many states who ratify a treaty do not allow individual complaints.⁵¹ In the case of the CRPD, 56 per cent of state parties (including New Zealand) do not currently allow complaints.⁵² Secondly, even if such complaints are allowed, the process remains largely inaccessible.⁵³ This is partly due to the fact that many people are ignorant of the possibility or are reluctant to bring a complaint, and also because all domestic remedies, including court processes, must have been exhausted before a complaint can be made.⁵⁴ Given the costs and time involved in taking a matter through the domestic court system, this can be an extremely difficult requirement to fulfil, particularly for disabled people and other vulnerable groups who generally lack resources and have difficulty accessing justice. Finally, the ability of the Committee to enforce its views is also an issue.

While a treaty body's views are not considered formally binding, several authors argue that, in effect, they are. Scheinin, for example, argues that the fact the obligations of a treaty are themselves "legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question", means that a finding of a violation by a human rights treaty body is an indication that the state party is under a legal obligation to remedy the situation.⁵⁵ Unfortunately, this is only theoretical; a recent report which sets out information received by the Special Rapporteur for Follow-Up to Views regarding the CRPD Committee, graded Sweden's response to its views in a communication as a C, meaning no action has been taken to implement the Committee's recommendations.⁵⁶ Another example concerns a complaint made against Hungary, wherein in its reply to the Committee's views, Hungary stated that it would improve accessibility as recommended but did not provide an answer as to when and how it would do so.⁵⁷ In light of this, it seems that irrespective of whether the Committee's views are considered "legally binding", it is very difficult to compel states to comply, and is arguably an ineffective mechanism.

It is clear that the system of implementation through state reporting, and the individual complaints mechanism is, as Bayefsky states "riddled with major deficiencies".⁵⁸ In order for the current mechanisms to be used as a successful implementation tool, Bayefsky recommends a number of changes to the treaty body system. Her main recommendation is that treaty bodies need to be consolidated, particularly as there is "substantive overlap of treaty rights and freedoms and inevitable

50 Bayefsky, above n 40, at 197.

51 Bayefsky, above n 42, at 5.

52 See list of signatories and ratifications to the Optional Protocol at "Optional Protocol to the Rights of Persons with Disabilities" (13 December 2006) United Nations <www.un.org>.

53 Bayefsky, above n 40, at 198.

54 *Final report of the Ad Hoc Committee*, above n 47, art 2(d).

55 Martin Scheinin "International Mechanisms and Procedures for Implementation" in Raija Hanski and Markku Suksi (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (2nd ed, Institute for Human Rights, Turku/Åbo (Finland), 1999) 429 at 444.

56 Committee on the Rights of Persons with Disabilities "Interim follow-up report under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted by the Committee on the Rights of Persons with Disabilities at its eleventh session (31 March–11 April 2014)" (22 May 2014) United Nations Human Rights <<http://tbinternet.ohchr.org>> at 2.

57 At 5.

58 Bayefsky, above n 40, at 197.

overlap of reporting and dialogue”.⁵⁹ Rather than having separate treaty bodies which each oversee a different treaty and impose different reporting obligations on states, Bayefsky suggests there be two consolidated treaty bodies. One body would be for state reports and one for communications, both made up of independent, full-time treaty body members with appropriate qualifications.⁶⁰ Consolidating treaty bodies, she argues, would “conform to the overall goal of modern UN reform which seeks to adopt a global approach to the needs of each country”, making the process more integrated and coherent and the application of rights more concrete.⁶¹

However, she does warn that consolidation is not a panacea because the international human rights system will remain “impoverished and irrelevant” to those who need it if UN states refuse to accept the importance of such monitoring bodies comprised of independent experts, and if they remain under-resourced.⁶² Ultimately, as Bayefsky argues, the international implementation mechanisms need to be entirely reorganised and partnerships with actors at the national level strengthened for lasting change to occur.⁶³ This argument is echoed by international lawyer Philip Alston, who in his final report as a UN independent expert on the functioning of treaty bodies, stated that “the present [treaty body] system is unsustainable and significant reforms will be required if the overall regime is to achieve its objectives”.⁶⁴

Recently some measures have been taken to address the challenges plaguing the treaty body system. In April 2014, following a process of consultation and a further two-year long intergovernmental process, the General Assembly adopted a resolution which recognised the need to provide more adequate funding to the treaty bodies.⁶⁵ They also requested that the Secretary General and OHCHR offer more technical assistance to states,⁶⁶ and encouraged the treaty bodies to harmonise their working methods.⁶⁷ This is a move in the right direction, although there is more work to be done. Ultimately, even an entire revamp of the treaty body system, while making compliance more likely, would not guarantee that human rights obligations are complied with to their fullest extent. In the words of Professor Beth Simmons, “[t]reaties alter politics; they do not cause miracles.”⁶⁸ With this in mind, neither the CRPD nor its Optional Protocol can alone compel the Government to fully comply with its obligations.

D *Challenges specific to the CRPD*

Additionally, there are implementation challenges specific to the CRPD. The first relates to the content of the Convention itself. The Convention’s monitoring system has been called “especially innovative”.⁶⁹ Furthermore, the Convention enables the Convention

59 Bayefsky, above n 42, at ii.

60 At 145.

61 At ii.

62 At 8.

63 At 8.

64 Philip Alston *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system* E/CN.4/1997/74 (1997) at [10].

65 *Strengthening and enhancing the effective functioning of the human rights treaty body system* GA Res 68/268, A/Res/68/268 (2014) at 2.

66 At 2.

67 At 3.

68 Beth Simmons *Mobilising for Human Rights: International Law in Domestic Politics* (Cambridge University Press, Cambridge, 2009) at 16.

69 Stein and Lord, above n 26, at 696.

Committee to receive collective complaints,⁷⁰ to use the expertise of DPOs and specialised agencies and organs in the UN,⁷¹ and to use procedures to better manage reporting deadlines.⁷²

However, like other human rights treaties, the CRPD uses “lofty statements of broad principle” which are often difficult to translate into meaningful action.⁷³ The same could be said for New Zealand’s Disability Strategy and the Government’s new Disability Action Plan. Both are centred on creating a fully accessible, inclusive society with objectives such as “ensuring rights for disabled people”⁷⁴ and “promoting access in the community”.⁷⁵ While these are perfectly valid objectives, they are difficult to implement on a practical level due to the fact that they are so general.

To the Government’s credit, it requires the Minister for Disability Issues to report to Parliament annually on the implementation of the Strategy and the Action Plan. The most recent report on the Disability Strategy highlights specific initiatives that demonstrate that these objectives are being met. For example, the 2013 report details three initiatives focusing on disabled people in Christchurch’s rebuild. To some extent, this reporting scheme brings the airy statements down to a more practical level than that of the CRPD.

A specific issue to the CRPD is the broad definition given to disability. While this correctly reflects the fact a wide range of disabilities exist, it also makes the practical application of the CRPD more difficult. This is because, as Lucia Silecchia states, “the needs of people vary a great deal and the efficacy of rights protection varies.”⁷⁶ Silecchia acknowledges that this may have been intentional to keep the focus away from the individual and onto society, as in the opinion of some scholars:⁷⁷

To include a definition would undermine the Convention’s commitment to the social model of disability that places responsibility for eradicating unequal treatment of people with disabilities on society, not on the person with the disability.

That said, the CRPD may be easier to implement if it is recognised that relying on this social model exclusively may not benefit some disabled people as much as others.⁷⁸ For example, it may work well for those with physical impairments advocating for rights of access because it is easy to see how the environment disables someone in that context. However, for people with less visible impairments (such as mental health issues advocating for a more abstract right), the social model may not be as useful. It would be helpful for the Convention Committee to provide some guidance on how to apply the social model to different impairment groups.

70 *Final Report of the Ad Hoc Committee*, above n 47, art 1(1).

71 Articles 4(3) and 38(a).

72 Article 36(2).

73 Lucia Silecchia “The Convention on the Rights of Persons with Disabilities: Reflections on Four Flaws that Tarnish its Promise” (2013) 30 J Contemp Health L & Poly 96 at 108.

74 Ministry of Health “New Zealand Disability Strategy: Making a World of Difference” Office for Disability Issues <www.odi.govt.nz> at 15.

75 Office for Disability Issues, above n 23, at 11.

76 Silecchia, above n 73, at 115.

77 Arlene Kanter “The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law” (2009) 25 GA St U L Rev 527 at 551.

78 Silecchia, above n 73, at 115.

Another challenge affecting effective implementation of the CRPD relates to the complexities involved when undertaking law reform domestically, which is particularly complex because of the multifaceted, fragmented nature of disability legislation.⁷⁹ While in theory New Zealand ensures that its legislation is in line with a treaty before it ratifies it, the legislation and standards guaranteeing the rights set out in the Convention are certainly fragmented. There are the Bill of Rights Act and Human Rights Act guaranteeing civil and political rights and protecting citizens from discrimination, which also apply to disabled people. Then there are disability-specific statutes, such as the Health and Disability Commissioner Act 1994. There are also general pieces of legislation with sections alluding to CRPD rights. Section 155(4) of the Electoral Act 1993, for example, states that a certain proportion of polling booths must be accessible to disabled voters and ss 112 and 118 of the Building Act which set out the compulsory accessibility standard for buildings and facilities through the Building Regulations 1992. However, there is also an optional accessibility standard, known as *4121* (separate from the Building Act) which denotes a much higher level of accessibility. Having disability-related legal standards in so many different pieces of legislation plainly complicates matters and makes the CRPD more difficult to implement generally and in specific cases.

II Case Study: The Christchurch Earthquakes

A *The Christchurch earthquake*

Christchurch's "earthquake journey" started at 4:35am on 4 September 2010, when a 7.1 magnitude earthquake struck near Darfield, 40km west of Christchurch city. This caused widespread damage to buildings and serious injuries to two residents, but did not result in any deaths.⁸⁰ Hundreds of aftershocks followed in the subsequent weeks and months, the biggest and most damaging of which occurred at 12:51pm on 22 February 2011.⁸¹

The earthquake, centred closer to the city than the September event and shallower in depth, caused widespread damage across Christchurch, particularly in the central city and eastern suburbs. This resulted in severe damage to infrastructure across the city and the collapse of a number of buildings, some of which had been weakened by the first earthquake.⁸² Furthermore, in contrast to the first earthquake, many people were killed: 185 in total.⁸³ While the total rebuild cost was originally estimated to be \$15 billion, this ballooned to an estimated \$40 billion which is the equivalent of 20 per cent of New Zealand's GDP. This makes it New Zealand's costliest natural disaster and one of the costliest earthquakes in history worldwide.⁸⁴

Touted as "forever one of New Zealand's darkest days" by Prime Minister Rt Hon John Key,⁸⁵ the earthquake and the destruction it caused to people's homes, livelihoods,

79 Janet Lord and Michael Stein "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities" (2008) 83 WLR 449 at 471.

80 See Christchurch City Libraries "Christchurch and Canterbury earthquakes" <<http://my.christchurchcitylibraries.com>>.

81 "Christchurch and Canterbury earthquakes", above n 80.

82 Eileen McSaveney "The 2011 Christchurch earthquake and other recent earthquakes" (14 October 2014) Te Ara Encyclopedia <www.teara.govt.nz>.

83 "The 2011 earthquake and other recent earthquakes", above n 82.

84 Alan Wood "February quake 'third most expensive'" (30 March 2012) Stuff <www.stuff.co.nz>.

85 3 News "Key: New Zealand's darkest day" (21 February 2012) 3 News <www.3news.co.nz>.

and lives, continues to have a huge impact on many residents four years on. People continue to grieve for perished loved ones and live in damaged homes, and thus stress and anxiety levels continue to increase. This prompted targeted mental health campaigns such as the “All Right?” campaign⁸⁶ and the continuation of extra helplines targeted at those living in Canterbury.⁸⁷ The city and the eastern suburbs remain largely destroyed despite rebuild efforts; dotted with more damaged buildings and empty lots than with intact buildings with functioning facilities. It is clear that the earthquakes were tragic events which have had wide-ranging, long-lasting consequences that will continue for years to come.

On the other hand, the earthquakes have been perceived by some as an opportunity to rebuild Christchurch to be better than before; more environmentally friendly, easier to get around, and with bigger and better public facilities. No group could benefit more from this opportunity than disabled people. By making Christchurch accessible for disabled people, it would be making it accessible for everyone, including the young, parents with pushchairs, and the elderly. The benefits of doing so include increased tourism, an increase in spending which in turn will contribute positively to the economy, and more opportunity to utilise the skills and talents of traditionally marginalised groups.⁸⁸ However, whether it is practical to expect this to happen, and the extent to which this is or is not happening, remains to be seen. This is due to the massive task ahead and time, financial constraints, and differing needs of the disability community to take into account.

B The rebuild process

According to a 2011 report by the Canterbury Employment and Skill Board, the rebuild is estimated to take at least 15 years and require an additional 23,900 additional trades workers as well as a further 12,000 employees to back up the rebuild requirements, including lawyers, accountants and hospitality workers.⁸⁹ At the time of the report, more than 10,000 homes required rebuilding, while a further 105,000 required repairing.⁹⁰ Unsurprisingly, according to 2013 census data, the need for trade workers has caused construction to become the largest industry in greater Christchurch.⁹¹

In terms of the rebuild process, a number of different units focusing on different areas of the rebuild with different plans are involved. The biggest and most notorious of these is the Central City Development Unit (CCDU), which, along with the Canterbury Earthquake Recovery Authority (CERA), and the Christchurch City Council (CCC), developed the Central City Recovery Plan, outlining the future development of central Christchurch.⁹² The Plan contains 16 “anchor projects” mainly relating to the

86 Canterbury District Health Board and Mental Health Foundation of New Zealand “All Right? Campaign” All Right? <www.allright.co.nz>.

87 Ministry of Social Development “Christchurch earthquake support and assistance: Canterbury Support Line” <www.msd.govt.nz>.

88 For example Philip Matthews “Building accessibility lags despite rebuild opportunity” (20 July 2014) Stuff <www.stuff.co.nz>; and Wallace Chapman “Rebuilding Christchurch as an Accessible City” (Podcast, 18 May 2014) Radio Live <<http://podcast.radionz.co.nz>>.

89 Canterbury Employment & Skills Board “Employment Opportunities in Canterbury” (2011) <www.dol.govt.nz> at 34.

90 At 34.

91 Statistics New Zealand “2013 QuickStats about Greater Christchurch” (2013) <www.stats.govt.nz>.

92 CCDU “Christchurch Central Recovery Plan” (2012) <<http://ceraarchive.dpmc.govt.nz>>.

development of transport, retail, health and justice, sports, and cultural facilities, and is based on five key themes.⁹³ One of these is “accessibility” in relation to facilities, public spaces, and transport networks.⁹⁴ The Plan alludes to the concept of accessibility in a disability context in that it states that the accessibility standards in the Building Act 2004 will be considered the minimum as buildings and infrastructure are replaced.⁹⁵ However, in the Plan itself and a subsequent “Accessible City” chapter, it appears to focus on “accessibility” in relation to transport, providing for more transport options, a cycle-friendly city, more bus networks and improved facilities for pedestrians.⁹⁶ It is intended that improving transport will make the city more “accessible” in terms of being easier to get around. While obviously disabled people can, and hopefully will benefit from being able to get in, out and around the city more easily, it is disappointing that CCDU’s plans to rebuild in accordance with the accessibility standards in the Building Code are not discussed in more depth, particularly given that some standards are not compulsory.

C Relevant law and standards

The compulsory accessibility standard is contained in the Building Act and expanded upon in the Building Code. It provides that when a building is being constructed or modified, “reasonable and adequate provision” in terms of access, parking, and sanitary facilities must be made for persons with disabilities.⁹⁷ It has been held that “reasonable and adequate access” must be assessed against the performance requirements set out in Clause D1 of the Code.⁹⁸ This requires at least one entrance to have features that enable a person in a wheelchair to negotiate it unaided (i.e. a ramp or flat entrance), and to have access to and within those spaces where they may be expected to work, visit or carry out “normal activities and processes”.⁹⁹ Such guidelines are broad and open to interpretation, which means that while a building may technically comply with the standards, it may not be accessible on a practical level. For example, the ramp may be too steep or it may not have a handrail, which means although it may be useable to someone using a wheelchair, it is difficult for people using other mobility aids; there may be a slight step at the entrance which, while able to be negotiated in a manual wheelchair is impossible to get over in a powered one; or the supposedly “accessible” entrance may be at the back of the building, which is often difficult to get to.

In contrast, the optional design standard: NZ 4121 sets out much more detailed guidelines in relation to the necessary dimensions needed to ensure that the structure and layout of both public and private accommodation and other features and facilities are accessible to and useable by disabled people.¹⁰⁰ Unlike s 118 of the Building Act, the

93 “Christchurch Central Recovery Plan”, above n 92.

94 “Christchurch Central Recovery Plan”, above n 92.

95 CCDU, CERA and CCC “Christchurch Central Recovery Plan: Executive Summary” (2012) <<http://ceraarchive.dpmc.govt.nz>>.

96 CCDU, CERA and CCC “An Accessible City” (October 2013) <<http://ceraarchive.dpmc.govt.nz>>.

97 Building Act 2004, s 118(1).

98 Ministry of Business, Innovation and Employment “Determination 2013/039: Regarding the provision of access from the seawall at The Esplanade, St Clair, Dunedin to the adjacent beach” <www.building.govt.nz> at [6.5].

99 Department of Building and Housing “Compliance Document for the New Zealand Building Code: Clause D1: Access Routes—Second Edition” (2011) Ministry of Business, Innovation and Employment <www.building.govt.nz> at 13.

100 Standards New Zealand “Design for Access and Mobility—Buildings and Associated Facilities” <www.standards.co.nz>.

standard provides guidance on how to adequately provide access to those with visual and hearing impairments, as well as mobility impairments, in a wide range of areas. These include signage, car parks, footpaths and ramps, entranceways and corridors, stairs and lifts, toilet and shower facilities, public accommodation and places of entertainment and recreation.¹⁰¹ As such, the standard denotes a much higher level of accessibility and makes it much more likely (at least on paper) that facilities will actually be useable to people with a range of impairments.

Having said this, it is important to note that often people with different impairments have different needs and that accommodating the needs of different disability groups who each have their own idea of the ideal is a real challenge. For example, visually impaired people may require tactile markings on the ground but wheelchair users may find this uneven surface difficult to navigate. Therefore, one of the most important tasks architects and planners have is to recognise this diversity and strike a balance which addresses as many different needs as possible.

This issue aside, the 4121 standard complies much more fully with the accessibility obligations detailed in art 9 of the Convention. It provides that states should identify and eliminate barriers to accessibility in relation to buildings, roads, transportation and other indoor and outdoor facilities, and information and communication services.¹⁰² The issue is that the 4121 standard is optional, and while the city plan states that compliance with it is “encouraged” in the construction of new and modification to existing facilities, developers are not legally obliged to comply with it.¹⁰³ This means that while the rebuild is a prime opportunity to make Christchurch more accessible to disabled people, in practice this may not eventuate. This is particularly because there is a common perception that making provisions for accessibility costs more,¹⁰⁴ and money is obviously of the essence. There is also the pressure of time as, understandably, developers want to rebuild as quickly as possible. The problem is that this often puts other considerations, such as accessibility, at risk of being an afterthought rather than a primary consideration.

Because of this, earthquake-related advocacy groups and DPOs have petitioned Parliament through Green Party MP and disability issues portfolio holder Mojo Mathers. They are urging the Government to ensure full access to public and commercial buildings constructed during the rebuild by making design standard 4121 mandatory.¹⁰⁵ While this change has not yet occurred, the petition has thus far attracted over 6,000 signatures. It also prompted the Ministry of Business, Innovation and Employment (MBIE) and the Office for Disability Issues (ODI) to undertake a joint review of access for people with disabilities under the current Building Code in consultation with a number of stakeholders, including building owners, designers and users, advocacy and interest

101 At 1–2.

102 CRPD, above n 5, art 9(1).

103 CCDU, CERA and CCC, above n 96, at 5.

104 Edward Steinfield “Education for All: The Cost of Accessibility” (August 2005) The World Bank <<http://documents.worldbank.org>> at 5.

105 Earthquake Disability Leadership Group “We request the Government urgently take all appropriate measures to ensure full access to public and commercial buildings for disabled people especially for new buildings in the Christchurch rebuild” (October 2013) Change.org <www.change.org>.

groups, and DPOs.¹⁰⁶ After the consultation process is complete, recommendations will be made to senior officials who will then brief Ministers on these.¹⁰⁷

As part of this process, Malatest International, a consultation firm, consulted with members of a range of DPOs, regulators, and building designers.¹⁰⁸ The report has been provided to MBIE and ODI who will use the report to generate conclusions about next steps and make recommendations to senior officials.¹⁰⁹ According to the Ministry of Building website, MBIE, ODI and a steering group made up of people across the disability sector are “working together to create a long term plan on accessibility” which will be presented to Ministers in “a few months’ time”.¹¹⁰ While MBIE should be commended for its willingness to jointly undertake a review in response to the petition, and for their involvement of disabled people in the consultation process for the review, it would be helpful to know the content and extent of the recommendations made and whether, having received these recommendations, the Minister(s) responsible plan to propose any legislative changes. This would enable advocacy and interest groups to advocate further and the sooner any legislative changes are proposed, the sooner they could actually be implemented, and the more the rebuild will be positively affected.

D Rebuild progress

In terms of the rebuild so far, progress varies considerably depending on the area of focus. In the rebuild of the central city, for example, the majority of anchor projects are reportedly either under construction or due to start construction by the end of 2014.¹¹¹ However, because of the scale of work involved, many of the projects are expected to take several years to complete; the overall target date for the completion of the public sector rebuild (which includes all anchor projects) being the end of 2020.¹¹² There is no official information indicating the level of accessibility of the overall rebuild, but promisingly, CCDU have made a commitment to work with the Barrier Free Trust, an accessibility audit programme, to ensure the accessibility of some of the anchor projects.¹¹³ On the other hand, as 4121 remains optional, it is safe to assume that while compliant with accessibility requirements set out in the Building Act, at least some of the new buildings outside of the anchor projects do not meet the higher 4121 standard. This also means that while New Zealand is most likely not breaching any of their obligations in the Convention, it is also not complying with them to their fullest extent. Change is clearly needed to ensure that the remaining 90 per cent of the rebuild is completed with accessibility as a primary consideration.

106 MBIE and ODI “Consultation Report: Access to Buildings for People with Disabilities” (June 2014) Department of Building and Housing <www.mbie.govt.nz>.

107 “Consultation Report”, above n 106.

108 “Consultation Report”.

109 “Consultation Report”.

110 “Consultation Report”.

111 CCDU “Anchor Projects Review” (2014) <<http://ceraarchive.dpmc.govt.nz>>.

112 CERA “Public Sector Rebuild: Programme of Works as at June 2015” (August 2014) <<http://ceraarchive.dpmc.govt.nz>>.

113 CERA, above n 112.

E Building (Earthquake-prone Buildings) Amendment Bill

One area in the rebuild where New Zealand is almost breaching its Convention obligations relates to a section of the Building (Earthquake-prone Buildings) Amendment Bill 2013 currently progressing through Parliament. The legislation amends the Building Act 2004 and introduces more stringent earthquake-strengthening requirements. It is purportedly striking a balance between protecting people from harm in an earthquake and managing the costs of strengthening and removing buildings by providing for a significantly greater role for central government.¹¹⁴ One of the changes the Bill purports to introduce enables local Councils to issue building consents for work on earthquake-prone buildings without requiring upgrades to access, facilities, and fire escape routes for people with disabilities. This applies where ensuring the building is earthquake-proof outweighs any detriment that is likely to arise as a result of the building not complying with the access provisions in the Building Code.¹¹⁵ The rationale behind this change was to address the concerns of building owners who argued that having to further earthquake strengthen and make buildings access-compliant would take time and incur excessive cost.¹¹⁶

The amendment is contrary to current requirements, which denote that when an existing, currently non-compliant building is being altered, the building must be upgraded to be as accessible as reasonably practicable, before a building consent can be issued.¹¹⁷ The rationale is to make buildings built prior to the introduction of the accessibility requirements in 1991 disability-friendly. This proposed amendment, however, means that all existing inaccessible buildings could legally remain so as building consents can be granted without access and escape route upgrades for people with disabilities being upgraded where reasonably practicable.¹¹⁸ Such a law change has not only been highlighted as being a major step backwards in terms of access rights but also a potential breach of art 9 of the CRPD which, as discussed, provides that states have a positive obligation to take measures to progressively identify and eliminate barriers to accessibility.¹¹⁹ The proposed exemption would, as a submission undertaken jointly by a number of DPOs states, “weaken the government’s current measures to ensure this obligation.”¹²⁰

Unfortunately, this is yet another example of the challenges in implementing the provisions of the Convention in situations where spending the least amount of money and taking the least amount of time are considered more important than making as many spaces as possible accessible. It is also important to note that the current provisions already enable building authorities to exercise discretion in applying access and fire requirements to building upgrades, because access is only required to be provided where “reasonably practicable”.¹²¹ Thus introducing this amendment not only

114 Building (Earthquake-prone Buildings) Amendment Bill 2013 (182-1, Explanatory note).

115 At cl 133AX.

116 Canterbury Earthquakes Royal Commission “Final Report, Volume 4: Earthquake Prone Buildings” (2012) <<http://canterbury.royalcommission.govt.nz>>.

117 Building Act, s 112.

118 See Building (Earthquake-prone Buildings) Amendment Bill, cl 133AX.

119 CRPD, above n 5, at art 9(1).

120 Disabled Persons Assembly “Joint Submission to the Local Government and Environment Select Committee on the Building (Earthquake-prone Buildings) Amendment Bill” (16 April 2014) <www.dpa.org.nz> at 13.

121 See Building Act, s 112(1)(a).

weakens New Zealand's compliance with its obligations under the CRPD, but also complicates and confuses existing guidelines. Therefore, rather than a law change, what is needed is more guidance for local authorities in applying their existing discretion.

Furthermore, even if building owners are unable to use this existing discretion and therefore would currently be required to upgrade their access, their concerns may be based on a misconception that making buildings accessible only benefits disabled people. This is shown by the fact that the Canterbury Earthquake Royal Commission and MBIE referred to s 112 as "the disabled access rule".¹²² Further, some submissions received as part of the consultation process which led to the drafting of the Bill framed access solely as a disability issue and argued that their buildings may never need wheelchair access, making it an extra cost with potentially no benefit.¹²³ However, as stated by the CERA itself, access benefits a much wider group than those who identify as disabled, including parents with young children, those over 65, many of which have impairment to some degree, and those with temporary injuries.¹²⁴

Further to this, research indicates that improving access has significantly positive effects on the economy, and irrespective of this, that the cost of improving accessibility is often exaggerated and based on inaccurate estimates of the cost of construction.¹²⁵ This was demonstrated in some submissions which provided examples of high access costs to justify the exemption.¹²⁶ These generally referred to the costs of installing lifts, but failed to take into account that under current law, lifts are only required when the building footprint area is greater than 400m² and even then, it must be "reasonable and practicable" to install them.¹²⁷ Furthermore, aside from the submissions obtained during the consultation process which informed the drafting of the Bill, an Official Information Act request done by DPA showed that MBIE did not have any evidence that access requirements are likely to pose a significant financial barrier to building upgrades.¹²⁸ It would seem that the rationale behind the introduction of this amendment is weak at best. It would be more beneficial for building owners to view access requirements as an investment opportunity wherein the potential benefits outweigh any extra cost, particularly as almost a quarter of the New Zealand population (24 per cent) now identifies as disabled;¹²⁹ a percentage which is bound to continue to increase as the population ages.

The fact is, however, that the Bill has passed its first reading and given the support from building owners during the consultation process, is likely to be enacted.¹³⁰

122 Canterbury Earthquakes Royal Commission, above n 116 at [97]; and Ministry of Business Innovation and Employment "Improving the system for managing earthquake-prone buildings" (22 July 2013) <www.mbie.govt.nz> at 22.

123 See, for example, the submission from Chorus: Ministry of Business Innovation and Employment "Building Seismic Performance: Proposals to improve New Zealand's earthquake-prone building system" (July 2013) <www.mbie.govt.nz> at 91.

124 CERA, above n 112, at 5.

125 Steinfield, above n 104.

126 See, for example, the submission from the Gisborne District Council: MBIE, above n 123, at 89.

127 John Hare "Heritage earthquake prone building strengthening cost study" (June 2009) Christchurch Earthquakes Royal Commission <<http://canterbury.royalcommission.govt.nz>>.

128 DPA, above n 120, at 24.

129 Statistics New Zealand "Disability Survey: 2013" (17 June 2014) <www.stats.govt.nz>.

130 This was the progress of the Bill at the time of writing. The Bill since has been considered by the Local Government and Environment Committee. As a result, the section has been reworded and a new clause inserted which states that a building consent for an alteration must not be granted unless the authority is satisfied that following the alteration, the building

Therefore, it can only be hoped that its impact on the overall rebuild will be minimal which, given that it only applies to existing buildings and that the current access requirements in the Building Act provide for discretion,¹³¹ is likely. Even so, the change would further complicate guidelines and lead to more confusion amongst building authorities. The fact that it weakens New Zealand's compliance with the CRPD means that it will at the very least negatively affect New Zealand's international reputation. Such change should be strongly discouraged.

There are clearly a number of challenges in implementing the CRPD to its fullest extent in post-earthquake Christchurch. For a treaty which purported to free disabled people of discriminatory practices and prevailing negative attitudes, these barriers appear to reflect the disappointing reality of implementing the CRPD "on the ground". This is shown where despite legislation, government policies, and the efforts of disabled people and their allies to address such barriers, discriminatory practices and misconceptions about disability remain.

IV Implementing the CRPD in Post-earthquake Christchurch

There is no simple solution to the challenges discussed above, as is the case with all human rights treaties. As discussed, it is very difficult to compel states to comply with their obligations to the fullest extent. This is because there is no enforcement mechanism beyond the state reporting requirement and the power of the Convention Committee to give its views through the individual complaints mechanism in the Optional Protocol.

It is important to re-iterate that while New Zealand ratifying the Optional Protocol would provide the option to complain at an international level, complainants would first have to exhaust all domestic remedies in order for such a communication to be admissible.¹³² Rebuilding Christchurch accessibly is a city-wide policy, which, while potentially able to be challenged domestically under Part 1A of the Human Rights Act, would be difficult to challenge at the international level. Even if this domestic remedy was exhausted and the subsequent communication was deemed admissible, the Committee's views are not legally binding on the state, and even where a state takes action, are often too vague to really address the issue. Therefore, even when New Zealand does adopt the Optional Protocol, this is not likely to adequately address the challenges experienced in post-earthquake Christchurch.

Rather, for any real change to occur, a significant cultural shift towards a strong human rights culture is required. This includes an attitudinal shift towards valuing disabled people and seeing accessibility as a benefit rather than a burden. While New Zealand was built on egalitarian principles and "giving everyone a fair go" has become a deep-rooted mantra of New Zealand society,¹³³ New Zealand seemingly does not have a strong rights culture, based on its constitutional arrangements. Unlike the vast majority

will comply "as nearly as reasonably practicable" with the provisions of the Building Code which relate to access. The fact such a safeguard has been introduced is very encouraging and shows the value of the public consultation process. See the Building (Earthquake-prone Buildings) Amendment Bill.

131 Building Act, s 112.

132 *Final report of the Ad Hoc Committee*, above n 47, art 2(d).

133 ODI "Introducing a Disability Perspective: A Toolkit for Government Officials" <www.odi.govt.nz/>.

of countries, it does not have a codified constitution.¹³⁴ Instead, citizens' rights are set out in a number of documents, which in New Zealand includes the Constitution Act 1986, a number of statutes, the Treaty of Waitangi, Orders in Council, court decisions, letters patent and unwritten constitutional conventions.¹³⁵ Furthermore, while it does have a Bill of Rights Act which sets out a number of civil and political rights of New Zealanders, the Act is not entrenched and does not hold any supremacy over other legislation unlike Bills of Rights in other common law jurisdictions, including Britain, Australia, and Canada.¹³⁶

In fact, s 4 of the Act specifically states that any law, whether passed before or after the Bill of Rights Act came into effect, cannot be overridden by it, and that, providing that such limits can be "demonstrably justified", the right with which the legislation conflicts can be limited.¹³⁷ The principle reflects the doctrine of parliamentary sovereignty.¹³⁸ This means that Parliament can, and sometimes does, pass laws which are inconsistent with the Bill of Rights Act, even when such laws have been declared inconsistent by the Attorney-General pursuant to s 7. An example of this in a disability context is the New Zealand Public Health and Disability Amendment Bill (No 2) of 2013 which, despite being declared as inconsistent with the Bill of Rights Act,¹³⁹ is now law.¹⁴⁰ Given the lack of protections, it is not surprising that Parliament seemingly perceives giving effect to some human rights as a cost as opposed to an investment.

A *Be. Accessible*

Despite these challenges, there are a growing number of government-funded initiatives targeted at changing negative perceptions and as part of this, emphasising the importance of making Christchurch accessible. These appear to be having a positive impact. One of these is *Be. Accessible*, a social change initiative and holistic framework for accessibility managed by the Be. Institute. Founded in 2011 in anticipation of the Rugby World Cup, Be.'s mission is to "create a truly accessible country for us all".¹⁴¹ It does so through what it terms the "Be. Lens"—a philosophy which rather than focusing on disability and associated limitations, focuses on accessibility and the opportunities it brings, not only for disabled people, but for society as a whole.¹⁴² Hence, the language used is different too, with phrases like "access customer" and "access economy" being used in place of disabled people and disability.¹⁴³ Underpinning the philosophy is a "three pillar system" wherein it is believed that in order to create a fully accessible society, the physical, social and personal must all be addressed together.¹⁴⁴ This means making the physical environment and information accessible, challenging people to think differently about access and see it as an investment opportunity rather than a cost, and building leadership capacity among disabled people to help champion the change

134 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1.

135 At 1.

136 Susan Glazebrook "The New Zealand Bill of Rights Act 1990: its operation and effectiveness" (paper presented to the South Australian State Legal Convention, 22–23 July 2004) at [1].

137 New Zealand Bill of Rights Act 1990, s 5.

138 New Zealand Parliament "How Parliament works" (21 March 2014) <www.parliament.nz>.

139 New Zealand Parliament "Bills Digest No 2049" (17 May 2013) <www.parliament.nz>.

140 New Zealand Public Health and Disability Amendment Act 2013.

141 Be. Accessible "The Movement" <www.beaccessible.org.nz>.

142 Be. Accessible "About Be. Accessible" <www.beaccessible.org.nz>.

143 "About Be. Accessible", above n 142.

144 "About Be. Accessible", above n 142.

through a year-long leadership programme.¹⁴⁵ Be. addresses these areas through a number of different initiatives, which thanks to \$4 million of government funding allocated until the end of 2015,¹⁴⁶ have been able to grow substantially.

One such initiative is the Be. Welcome programme, which is focused on improving the physical accessibility of businesses by way of an accessibility audit carried out by trained “accessibility coaches”.¹⁴⁷ The audit assesses the accessibility across impairment types in terms of getting to and from the organisation and getting around within the site. This includes looking at physical features such as ramps, lifts, and accessible toilets, and also information, such as signs, menus, and brochures, and the quality of the customer service.¹⁴⁸ The evacuation procedure is also assessed and is particularly important in the context of Christchurch. To help ensure consistency, all businesses are assessed against a standard checklist by assessors who have undergone a standard training and accreditation procedure. While the checklist used by assessors is not available publicly, a version which allows businesses to self-assess their accessibility is available, and this appears to be based around the 4121 design standard.¹⁴⁹

Once assessed, the organisation is given a rating ranging from “Just Starting” to “Gold”, which they are encouraged to display by placing a sticker indicating their rating on the front door.¹⁵⁰ In addition, the organisation is given a detailed report which provides a breakdown of current accessibility features and provides suggestions on how to improve, to encourage the business to work towards achieving a higher rating.¹⁵¹ As of November 2014, 448 organisations have been assessed nationwide, the majority being in Auckland, while in Christchurch, seven organisations have been officially assessed, and a further six have undertaken a self-assessment available on the Be. Accessible website.¹⁵² While not yet a significant number, the response of businesses that have been assessed, including some of Christchurch’s biggest, such as the airport, has been positive.¹⁵³ Furthermore, this initiative has the potential to grow, and it is great to see that although Be. is based in Auckland, it is putting a significant amount of energy into engaging with business owners and decision makers in Christchurch, which it describes as “New Zealand’s greatest accessibility opportunity”.¹⁵⁴

It is this framing of accessibility as an opportunity which makes the Be. Welcome programme and Be. Accessible so innovative and appealing. Rather than being framed as an obligation which only benefits disabled people, Be. Welcome, in line with the rest of the Be. Accessible framework, is framed as a way to add value to one’s business, “by tapping into the growing access customer market”, thereby bringing positive economic benefits.¹⁵⁵ In fact, Be. has coined the term “yellow dollar” as a measure of the economic

145 “About Be. Accessible”, above n 142.

146 Be. Accessible “Inspiring and Enabling a 100% Accessible Society for Us All” (press release, 16 May 2011).

147 Be. Accessible “Be. Welcome” <www.beaccessible.org.nz>.

148 Be. Accessible “CQ Hotels Wellington Accessibility Report” <www.beaccessible.org.nz>.

149 Be. Accessible “Be. Welcome Lite Self Assessment” <www.beaccessible.org.nz>.

150 Be. Accessible “Assessment Ratings” <www.beaccessible.org.nz>.

151 All Be. Welcome assessed businesses with their reports are available in a directory on their website. See Be. Accessible “Find” <www.beaccessible.org.nz>.

152 Be. Accessible “Find Accessible Places: Christchurch” <www.beaccessible.org.nz>.

153 Be. Institute “Christchurch: New Zealand’s greatest accessibility opportunity” (Podcast, 14 May 2014) YouTube <www.youtube.com>.

154 Be. Accessible “Christchurch Stands to Reap Massive Economic Opportunity From Building Accessible City with an Eye to Tourism” (press release, 13 May 2014).

155 Be. Accessible “Be. Welcome” <www.beaccessible.org.nz>.

benefits accessibility brings, stating that if customers are able to access a business more easily, they will spend easily, businesses will earn more, and this will lead to a stronger economy and a more thriving society.¹⁵⁶

In this way, Be.'s philosophy attempts to persuade businesses to become more accessible, not by stating that they have national and international obligations to do so, but by appealing to their ultimate goal of increasing their profit. This approach is refreshing, innovative, and most of all, necessary. With Be.'s leadership programme soon commencing its sixth year, over 500 businesses assessed on their accessibility nationwide, and a new employment programme seeking to get disabled people into work by changing perceptions around disability, Be. has clearly created some positive change already. Further, providing it continues to garner more support from business owners who see the opportunities accessibility can bring, Be. also has the potential to lead to institutional change in the long term which will make a huge difference to the disability community.

B Think Differently

Another social change initiative which is worthy of recognition is the "Think Differently" campaign funded by and administered through the Ministry of Social Development (MSD) in partnership with ODI. The campaign aims to "encourage and support a fundamental shift in attitudes and behaviour towards disabled people" and to increase people's knowledge and understanding about disability and the benefits of inclusive communities by working with DPOs and connecting with educators, employers, businesses, and families.¹⁵⁷ To accomplish this mission, it has established two main funding channels: the "Making a Difference" fund which funds community initiatives focused on attitude change, and funding to national organisations.¹⁵⁸ Additionally, the Think Differently programme also aligns with the Government's Disability Action Plan,¹⁵⁹ which, as discussed, denotes a number of priorities to be implemented over the next four years.

Since its inception in 2010, the campaign has funded an increasing number of national and community projects. Last year, it funded eight national partnerships with DPOs centred around supporting New Zealand Sign Language week and increasing the visibility of disabled people on television.¹⁶⁰ Relevant to the Christchurch earthquakes, a national partnership was formed between the Earthquake Disability Leadership Group (EDLG)—a collective of disabled people, allies, and DPOs advocating for an accessible earthquake recovery and rebuild—and decision makers including the City Council, CERA, and property owners and developers. They purport to ensure the presence of a strong disability voice in the rebuild.¹⁶¹ Established in 2011, the EDLG has made a number of submissions advocating for the city to be rebuilt accessibly, including starting the petition discussed earlier, engaging with CERA on a number of occasions, and has been quoted in

156 Be. Accessible "Useful Terms" <www.beaccessible.org.nz>.

157 Think Differently "Welcome" <www.thinkdifferently.org.nz>.

158 Think Differently "About Think Differently" <www.thinkdifferently.org.nz>.

159 "About Think Differently", above n 158.

160 Think Differently "Year in Review 2013: National Partnerships" <www.thinkdifferently.org.nz>.

161 Think Differently "Year in Review 2013: National Partnerships Continued" <www.thinkdifferently.org.nz>.

several media articles.¹⁶² It is clear the group plays an important role in increasing the disability voice in the rebuild, and it is encouraging to see that the Government sees value in supporting it.

Also of note is the “Making a Difference” fund, which funded 23 community-led projects (\$800,000 worth) last year. These ranged in focus from improving accessibility, to promoting disability arts and culture.¹⁶³ In addition to funding, project leaders were given support to help them manage their projects through an online “social change toolkit” consisting of templates for project plans, surveys and evaluations, and links to external sources.¹⁶⁴ Two of the 2013 projects were related to the earthquake and subsequent rebuild. One of which was the Catapult Employment Services Trust that encouraged businesses to employ intellectually disabled people in the rebuild by meeting with rebuild-related businesses, and developing and distributing a booklet which profiled a number of disabled people in paid employment as well as a number of employers. Additionally, the Christchurch City Council Disability Advisory Group held a leadership workshop on how disabled people could contribute to their post-earthquake community.¹⁶⁵

While small in scale compared to the national projects and to Be. Accessible’s work, these community-led projects have been found to lead to a number of positive changes at community level.¹⁶⁶ This includes increased knowledge, awareness and positive attitudes, increased empowerment and leadership among disabled people, and improved accessibility and a more welcoming environment.¹⁶⁷ It has also been found that the use of funding at a community level has been effective and has the potential to support the long-term changes for which the campaign is aiming.¹⁶⁸ The further \$6 million dedicated to the campaign over the next two years in the 2013 budget,¹⁶⁹ helping to fund 41 projects this year, and another four next year,¹⁷⁰ will no doubt help to support long-term change. This increase in funding demonstrates the Government’s continued commitment to the campaign and should be commended. Changing perceptions in regards to the potential of disabled people to contribute and bring value to society is what will help to ensure that moving forward, Christchurch is as accessible and inclusive as possible.

It is clear that while there is no easy way to overcome the challenges in implementing the CRPD, however, the Be. Welcome and Think Differently initiatives demonstrate a large amount of work is being done at a grassroots level to make life better for disabled people. Providing that funding channels remain available, more long-lasting change looks likely. It is up to disabled people to continue to advocate for social change initiatives as it

162 See Earthquake Disability Leadership Group, above n 105; Matthews, above n 88; Walt Dickson “Hard fought access may be flouted” (5 December 2013) Stuff <www.stuff.co.nz>; and Glenn Conway “Petition urges building access for all” (22 October 2013) Stuff <www.stuff.co.nz>.

163 Think Differently “Year in Review 2013: Thinking differently in the Community” <www.thinkdifferently.org.nz>.

164 Social Change Toolkit “Welcome to the Social Change Toolkit” <www.socialchangetoolkit.org.nz>.

165 “Community Projects, continued”, above n 161.

166 Think Differently “Tracking our Progress” <www.thinkdifferently.org.nz>.

167 “Tracking our Progress”, above n 166.

168 Think Differently “Evaluation of the Fund” <www.thinkdifferently.org.nz>.

169 Think Differently “Year in Review 2013” <www.thinkdifferently.org.nz>.

170 Think Differently “Round 4 Projects” <www.thinkdifferently.org.nz>; and Think Differently “Round 5 Projects” <www.thinkdifferently.org.nz>.

is community initiatives, not Government policy documents, which will ultimately lead to institutional change.

III Conclusion

It is clear the CRPD has unprecedented potential to change the lives of disabled people for the better. It is not only a Convention that codifies a wide range of rights, some of which are unique to the disability community, but one which aspires to eliminate discrimination, environmental and attitudinal barriers, and the notion that disabled people are less valuable. It does so in a holistic way not seen in any other treaty, subtly transcending traditional dichotomies and challenging people to rethink the conception of human rights as a whole. Furthermore, the Convention's monitoring mechanisms are seen by scholars as comprehensive and progressive in terms of enabling the Convention Committee to receive collective complaints, its utilisation of the expertise of DPOs, and its use of state meetings to help facilitate interpretation.

New Zealand played a key role in the negotiations and drafting of the Convention. As one of the few countries to send disabled representatives with the Government delegation to negotiations, New Zealand demonstrated its commitment to the creation of a Convention, not only for, but also with, the input of disabled people. Despite the lofty promises the Convention makes and New Zealand's involvement in its creation, the practical reality of implementing it has meant that in spite of high hopes that the Convention would result in a major shift in the way disabled people around the globe are treated, the reality has been somewhat disappointing. Despite its progressive monitoring provisions, the enforcement mechanisms underlying the Convention, namely the state reporting mechanism and the individual complaints mechanism, remain weak making the Convention difficult to implement. The Convention Committee lacks the resources to compel compliance which means that while states are required to report on their progress every four years, they are effectively able to ignore the Committee's observations. It is a similar situation in regards to the Optional Protocol which, while giving individuals an avenue to complain about a violation of their rights beyond their national jurisdiction, is difficult to enforce on a practical level. As New Zealand is yet to sign the Optional Protocol, state reporting remains the only mechanism by which New Zealand can be encouraged to comply with its obligations under the Convention.

In addition to the ineffectiveness of the United Nations system itself, there are challenges specific to the CRPD. These challenges include providing for the different needs of disabled people with various impairment types, and the multi-faceted nature of disability legislation, some of which impose different standards of accessibility.

These challenges of implementation, both general and CRPD-specific, are particularly obvious in the context of the Christchurch earthquake. Outdated building legislation, building standards with differing levels of accessibility, and a misguided legislative amendment exempting building authorities from considering accessibility when earthquake strengthening buildings, has undermined New Zealand's compliance with the CRPD. This in turn means that Christchurch is not being rebuilt as accessibly and inclusively as it could be. Much of this is based on a perception that rebuilding accessibly is an extra cost both in terms of time and money, which only benefits disabled people. However, making places accessible needs to be perceived as more of an investment that benefits a much wider group of people, including parents with small children and the elderly, and brings opportunities for economic growth.

Only a significant shift in human rights culture will redress the fate of the CRPD. Encouragingly, there are a number of government-funded initiatives, including Be. Accessible and the Think Differently campaign, which are at least attempting to change perceptions towards disability and are emphasising the importance of rebuilding Christchurch accessibly. There is also the 2014–2018 Action Plan, intended to engage DPOs and government agencies jointly.

It is fair to say that while there are a number of challenges in implementing the CRPD which have been highlighted in post-earthquake Christchurch, all hope is not lost. Be. Accessible and Think Differently appear to be having a positive effect. As long as disabled people and their allies continue to raise awareness of the value that accessibility brings and engage with decision makers, Christchurch could yet become the world's most accessible city.

The adoption of the CRPD may not have yet resulted in the changes that its supporters hoped for and implementing it may be more of a challenge than anticipated. The Christchurch earthquake experience makes it clear, however, that while this is somewhat of a disappointing reality, high hopes can be met with small concrete steps, which in turn can inspire positive change—even when the going gets tough.