

## In Confidence

Office of the Minister for Disability Issues

Cabinet Social Wellbeing Committee

## **United Nations Convention on the Rights of Persons with Disabilities: Government response and proposed mechanisms to support implementation**

### **Proposal**

- 1 This paper seeks Cabinet agreement to the Government response set out in Appendix 1 to the 60 Concluding Observations provided to New Zealand by the United Nations Committee on the Rights of Persons with Disabilities (the UN Committee) in September 2022.
- 2 The paper also proposes implementing the response to the concluding observations through the next Disability Action Plan (DAP) or a like process, with a Domestic Forum process no later than December 2027. Both elements are proposed so that implementation momentum can be maintained through the use of the DAP while the Domestic Forum provides the opportunity for a mid-term reporting cycle stocktake with the Disability Community on progress being made.

### **Relation to government priorities**

- 3 This paper aligns with the Government's commitment to ensure that disabled people have their needs and potential considered across all significant policy and service development underpinned by the New Zealand Disability Strategy (NZDS) and Te Tiriti O Waitangi.
- 4 The concluding observations cover most significant areas of government policy including, but not exclusively, Disability System Transformation, Accessibility, Welfare Reform and Health and Disability System Reform.
- 5 The concluding observations made specific and comprehensive reference to the needs and aspirations of tangata whaikaha Māori (disabled Māori). This is consistent with the obligations of Te Tiriti O Waitangi in relation to disabled Māori.

### **Executive Summary**

- 6 New Zealand was examined on its progress on implementation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in August 2022. New Zealand was last examined on its progress in 2014.
- 7 The UN Committee, an independent international committee of 18 experts on disability rights and policy, undertook the examination. The UN Committee issued 60 concluding observations for New Zealand to address.
- 8 This paper recommends Cabinet agree to the Government response as outlined in Appendix One, and agree to:

- 8.1 implement the response to the concluding observations through the next Disability Action Plan (DAP) process.
  - 8.2 a report-back on implementation being developed by lead agencies, no later than December 2023
  - 8.3 a Domestic Forum consisting of Government agencies and the Independent Monitoring Mechanism (IMM) no later than December 2027.
- 9 I believe this process reinforces New Zealand's reputation as a leader in the development and implementation of human rights for disabled people internationally.
- 10 It also recognises the importance disabled people and wider civil society place on the role of the UN Committee and domestic protection mechanisms (such as the Independent Monitoring Mechanism (IMM) to hold Government to account for furthering disabled peoples' rights meaningfully.
- 11 New Zealand will be next examined on implementation of the UNCRPD no later than October 2030.

## Background

### **New Zealand demonstrates best practice in recognising the roles of Government and Civil Society in implementing the rights of disabled people**

- 12 An international treaty on the rights of disabled people was first suggested in the late 1990s.
- 13 New Zealand, through the efforts of civil society participants (such as Disabled Peoples' Organisations) and Government<sup>1</sup> played a key leadership role in the development and final agreement of that treaty, the UNCRPD. It was the first human rights treaty of the 20th century and the first that made specific and comprehensive reference to the involvement of civil society.
- 14 When the UNCRPD was developed, there was a desire to explicitly recognise the role and expertise of disabled people, consistent with the principle of "nothing about us without us" - that issues of key interest to disabled people should involve disabled people explicitly. This was done in two innovative ways through the UNCRPD:
- 14.1 Article 4.3 creates an obligation on States Parties that on issues relevant to the implementation of the treaty, states should actively involve and closely consult disabled people through their representative organisations.
  - 14.2 Article 33 mandates that states are required to develop frameworks for the implementation of the UNCRPD, taking the status of National Human Rights Institutions (NHRIs) and civil society into account, particularly in the monitoring process. Article 33 also provides for a specific focal point within Government for the implementation of the UNCRPD.

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<sup>1</sup> Through the then Office for Disability Issues and Ministry of Foreign Affairs and Trade (MFAT).

- 15 New Zealand has developed a response to Article 33 which I consider is seen as best practice internationally. It consists of:
- 15.1 Whaikaha (through the Office for Disability Issues) as the Government focal point for the implementation of the UNCRPD
  - 15.2 The IMM, who comprise three distinct partners:
    - 15.2.1 The Human Rights Commission as the NHRI.
    - 15.2.2 The Office of the Ombudsman as the Officer of Parliament mandated for the review of the administrative conduct of agencies of state.
    - 15.2.3 The DPO Coalition (a Coalition of Disabled Person's Organisations), thereby ensuring that the voice of disabled people through their representative organisations are always part of monitoring and implementation of disabled peoples' rights<sup>2</sup>.
- 16 This mechanism was formally agreed by Cabinet and gazetted in 2010. The IMM has been invited to provide their comments on New Zealand's UNCRPD response in this paper, see Paragraph 39.
- 17 While Whaikaha coordinates and leads the across government response and engagement with the disability community for implementing the UNCRPD, this does not mean that other Government agencies have no role in implementing it. Agencies are expected to take full responsibility for leadership on concluding observations they have agreed to implement. This principle is core to effective realisation of the UNCRPD, and the proposed Government response.

**New Zealand was examined by the UN Committee, who then issued concluding observations**

- 18 All human rights treaties have an international mechanism which assists with the monitoring of implementation. In the case of the UNCRPD, this role is undertaken by the UN Committee.
- 19 The UN Committee consists of 18 members from countries that are members of the United Nations who are elected to the Committee and possess recognised competence in the UNCRPD. While members come from States who have ratified the treaty, they do not represent their Governments<sup>3</sup>. This is consistent with other treaty bodies to which New Zealand is a party.
- 20 New Zealand was examined by the UN Committee for the second time in August 2022. To outline New Zealand's progress to implement the UNCRPD, Hon Poto Williams led a government delegation of six senior officials from Whaikaha, Te Puna Aonui, and the Ministries of Social Development and Education.

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<sup>2</sup> The DPO Coalition consists of the Disabled Persons Assembly of New Zealand (DPA), Blind Citizens NZ, People First NZ, Deaf Aotearoa, Kāpō Māori Aotearoa (not an active member), Balance Aotearoa and Muscular Dystrophy Association.

<sup>3</sup> Sir Robert Martin from New Zealand is a current member of the UNCRPD Committee but consistent with United Nations practice does not take part in examining New Zealand's implementation performance.

- 21 All parts of the IMM were separately represented in Geneva and played an active role consistent with their monitoring function in assisting the Committee with the New Zealand context and progress.
- 22 The previous Minister for Disability Issues indicated before and during the examination that New Zealand welcomed the opportunity to present progress on implementing the UNCRPD, and for the UN Committee to challenge how New Zealand could implement the UNCRPD more effectively. I agree with my colleague's assessment of New Zealand's approach to the examination.
- 23 In a six-hour examination, all areas of New Zealand's performance were examined by the UN Committee. The UN Committee informally commended New Zealand on our approach, as well as formally commending key areas of progress, including:
- 23.1 The formation of Whaikaha
  - 23.2 The development of Enabling Good Lives
  - 23.3 The work of the Royal Commission on Abuse in Care.
- 24 Consistent with other UN Treaty Body examinations, the examination concluded with the UN Committee issuing 60 "concluding observations" for New Zealand. These observations are increasingly seen as an important way in which States Parties are held to account for progressive implementation of UN Conventions and create a focus for domestic mechanisms to progress the UNCRPD. The number of concluding observations is consistent with other recent human rights examinations New Zealand has undertaken; for example, the United Nations Convention on the Rights of the Child examination undertaken in January 2023.

## Analysis

### The New Zealand Government response to the concluding observations

- 25 Post-New Zealand's examination, the previous Minister noted the concluding observations were timely and provided government with a strong directive to further progress the strategic implementation and practise of the UNCRPD. She also indicated an expectation that Whaikaha support and work with other Government agencies to identify which agencies would lead on implementing the concluding observations and develop an implementation mechanism.
- 26 One of the UN Committee's major critiques of New Zealand's performance was that insufficient progress had been made to implement the concluding observations made by the UN Committee in 2014. This has also been a long-standing area of concern for the IMM.
- 27 I have considerable sympathy with this critique and believe the main reason for this was that New Zealand's approach to the 2014 concluding observations saw the examination process as a "point in time" response, rather than an ongoing process of continuous improvement in implementation.

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- 28 It is easy to see this UNCRPD process as a compliance/accountability activity. I am keen to see the response to the UNCRPD observations as a real commitment to realising the rights of disabled people and enabling their full participation and contribution to an inclusive Aotearoa.
- 29 The previous Minister invited Whaikaha to coordinate a process whereby high-level commitment was sought from Government agencies to progress areas they were responsible for. Agreement to this process recognised that there are concluding observations which cover areas of significant and contested areas of government policy, for example:
- 29.1 the economic well-being of disabled people and their family/whanau
  - 29.2 the role and definition of institutional settings for disabled people
  - 29.3 the role of specialist schools and residential special schools
  - 29.4 the acceptable standard of health criteria used to determine Immigration applications in relation to some disabled people
  - 29.5 the continuation of minimum wage exemptions for disabled people (at the time of developing this paper this issue had not been resolved, I am pleased that Budget 2023 provides the opportunity to progress resolution of this issue)
  - 29.6 involuntary sterilisation
  - 29.7 the Accessibility for New Zealanders Bill and co-design and co-production processes to support the Bill.
- 30 Whaikaha undertook a six-week process with Government agencies inviting them to indicate whether they:
- 30.1 fully agreed with a concluding observation and could commit to an implementation planning process by June 2023 (subsequently modified to December 2023) or
  - 30.2 agreed with the concluding observation but needed to modify their agreement to reflect the New Zealand political, constitutional or implementation context but with agreement to commit to an implementation planning process by June 2023 (subsequently modified to December 2023) or
  - 30.3 noted (did not agree with) the concluding observation.
- 31 Whaikaha worked with agencies to identify a lead agency responsibility for each of the concluding observations. Recognising the inter-agency nature of many observations, Whaikaha also invited agencies with an interest in an area to work with the lead-agency on developing a response.
- 32 My view is that Cabinet should provide its support for the Government response.
- 33 The Ministry of Justice has provided a departmental comment on the approach undertaken by Whaikaha. This comment is below

34 Ministry of Justice departmental comment

35 The Ministry of Justice commends Whaikaha, the Ministry of Disabled People, for its proactive approach to addressing recommendations made by the CRPD Committee in 2022, including early consideration of the recommendations by Cabinet. This demonstrates its commitment to protecting and promoting the rights of disabled people.

36 The Ministry of Justice notes that the UN system does not require countries to respond to recommendations made by UN treaty bodies with a framework of “accept, accept with modifications or note.” The Ministry of Justice would prefer an approach that focused on actions or steps that are to be taken now to implement certain recommendations, without ruling out making further progress before the next report is due in 2030. The Ministry of Justice encourages agencies to periodically revisit recommendations that have not been implemented yet. The monitoring tool currently being developed as part of the National Mechanism for Reporting and Follow up [CAB-21-MIN-0539 refers] will support agencies with this.

37 I note that the proposed December report back to Cabinet will be focussed on actions and next steps to implement the recommendations and that agencies have already given thought to implementation when formulating their “acceptance” response.

38 The high-level Government responses are appended as Appendix One. The responses indicate that:

38.1 51 of the 60 concluding observations have been accepted by agencies:

- 17 have been accepted with no modification
- 34 have been accepted with some modification

38.2 Nine will be noted.

39 It is important to clarify what “acceptance with modification” covers. Generally, agencies have agreed to accept a concluding observation with modification if:

39.1 the recommendation includes proposals on how the recommendation should be implemented, but the proposed approach is not possible or is not considered the best way to achieve the recommendation in the New Zealand context.

39.2 there are Cabinet or Budget decisions required to fully implement the recommendation.

39.3 the recommendation includes an absolute target that cannot be fully committed to (for example, a target of 100 percent universal design).

40 In practical terms, this means that 51 of the 60 Concluding Observations will be implemented in some way

41 I want to particularly draw to Cabinet’s attention three aspects of the government response, because they will likely be strongly contested by disability rights advocates and will continue to receive adverse comment from the IMM:

- 41.1 MBIE have noted three immigration related recommendations about New Zealand's realisation of the right to liberty of movement and nationality (Article 18 of the UNCRPD). When the UNCRPD was ratified in 2008, the then Government sought and considered legal advice on its ability to apply immigration health related screenings. Successive Governments have taken the position that the discrimination inherent in immigration policy is justifiable to manage costs and demands on New Zealand's health and education settings. Canada and Australia also have immigration health cost thresholds, which are comparable to New Zealand's. Unlike New Zealand, Canada and Australia have reservations to the UNCRPD (a formal mechanism which means a State Party does not consider itself bound by the specific provisions in that article). I consider a reservation of this type would be prejudicial to New Zealand's standing as a leader in disability rights policy and practice. A noting does leave open the possibility for a change in policy in the way a reservation does not.
- 41.2 The UN Committee has provided recent guidelines on deinstitutionalisation. They clearly indicate that schooling settings like residential specialist schools are seen as institutional given that they are only available to children based on impairing factors like behaviour. The Guidelines also indicate that institutional settings cannot be seen as an authentic choice for students and their families.<sup>4</sup> The Ministry of Education has noted recommendations related to Residential Specialist Schools subject to further consideration of New Zealand based research and evidence and decisions by the Minister of Education. Unlike other noting recommendations, there is a possibility that these could be changed after the Minister's consideration.
- 41.3 The IMM has indicated they believe that some acceptances by agencies (particularly with modification) are rejections. The IMM has indicated this view in their contribution to this Cabinet paper, and it is likely that they will continue to take this view and action it as part of their monitoring role. The risks will be mitigated by the continual and close involvement of the IMM by agencies in implementation development and in their gazetted role to protect and promote the UNCRPD. They will also be mitigated using the Domestic Forum process.
- 42 I would like to acknowledge and thank the IMM for their continued commitment to the UNCRPD implementation process, and in particular the way they have balanced supporting this exercise of Government response with their key monitoring role.

**IMM Comment**

- 43 All three members of the IMM have had an opportunity to review this Cabinet Paper and see merit in this process. The IMM also recognises the leadership provided by Whaikaha in coordinating the responses of the relevant government agencies and consolidating them into this cabinet paper and keeping the IMM updated on progress.
- 44 The United Nations Committee on the Rights of Persons with Disabilities (the Committee) is the body of independent experts. Despite the standing of the

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<sup>4</sup> CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022) | OHCHR

Committee and the value of this independent expertise, the IMM had concerns following the Committee's Concluding Observations in 2014, that the whole of government response was not sufficient. As a result of these concerns the IMM organised a Domestic Forum in 2022 in order to assist with collective preparation on New Zealand's disability rights status ahead of our second review by the UN Committee. The IMM's concerns were realised with a substantial number of previous Concluding Observations reissued by the Committee in 2022. We seek to avoid a similar occurrence at Aotearoa New Zealand's next UNCRPD examination. The IMM also intends to hold fora with government to monitor progress on disability rights in the future.

- 45 The IMM are disappointed with the number of Concluding Observations that at this stage appear to be accepted with modification (without clarity on the modification). Our preference is that observations be accepted, with any contingencies or limitations to be proposed during implementation plans.
- 46 While undesirable, in the event of an agency rejecting a Concluding Observation, the IMM asks that the agency be required by Cabinet to revisit its decision annually, and publicly report on progress related to the Concluding Observation.
- 47 The IMM expects that the soon to be updated Disability Action Plan (scheduled for development later in 2023) will demonstrate a commitment to the Concluding Observations and embrace greater transparency of work programmes. We also hope the Minister for Disability Issues will introduce a clear process moving forward by which disabled people can see progress in relation to the Concluding Observations.

**I seek to balance the need to develop a mechanism for implementation with the need to maintain momentum**

- 48 An important risk mitigation outlined in paragraphs 26 to 28 of this paper is having regular report-backs on implementation progress and a mechanism for implementation.
- 49 Given the nature and importance of the concluding observations to disabled people and disabled people's role in shaping future and current approaches in implementing the UNCRPD, I considered whether there should be a specific mechanism for implementing the concluding observations. I am aware that this is the view of some members of the IMM.
- 50 I invite my colleagues to agree to a report back on high level implementation planning and Cabinet to agree a monitoring mechanism by December 2023. This maintains momentum while also balancing the opportunity for agencies to develop effective and well considered implementation plans, working with the IMM.
- 51 Key considerations for an implementation mechanism will include:
- 51.1 Whaikaha's role as the coordination mechanism for the implementation of the UNCRPD
  - 51.2 The use of the New Zealand Disability Strategy and the Disability Action Plan as vehicles in which implementation can be progressed and monitored



- 51.3 The Ministry of Justice’s work to develop a National Mechanism to monitor and track implementation of all Treaty Bodies’ concluding observations. This also recognises that I do not consider that this mechanism in and of itself will be sufficient to maintain sufficient momentum on implementation,
- 52 I continue to expect Whaikaha to engage systematically and regularly with mechanisms like the IMM and use its involvement in the governance of human rights within the public service robustly to ensure the UNCRPD is a key focus of its stewardship role and mechanisms.
- 53 Whaikaha will support other mechanisms for implementation and monitoring such as the Ministerial Leadership on Disability Issues, to provide checks on progress.
- 54 Another mechanism which recognises the balance between maintaining momentum and the length of time between examinations is the Domestic Forum. The Domestic Forum was organised by the IMM in conjunction with the Office for Disability Issues in 2022. It was a public process, for 12 hours over three days. This allowed the IMM to question agencies in a forum akin to an examination/or select committee process. It was agreed to be an effective and, unique to Aotearoa, mechanism. It was a highly useful preparation exercise for the September 2022 examination.
- 55 The Domestic Forum was a good example of collaboration between the disability community and sector and government. It allowed Government to measure its progress on implementation of both the monitoring reports of the IMM and possible examination topics. One of the challenges of the forum was how late it was run in the examination cycle, which did not allow for agencies to use its useful insights to inform further implementation. My proposal of running the Domestic Forum no later than December 2027 strikes a balance between holding Government to account for implementation (something important to the IMM and the disability community) and giving sufficient time for any learnings to be incorporated into Government agency implementation.
- 56 The forum was organised somewhat informally and so I seek Cabinet’s formal agreement for a Forum no later than December 2027. This time has been suggested so that it allows for agencies to work with the IMM well before the October 2030 examination on improvements to implementation.

### **Financial Implications**

- 57 There are no direct financial implementations associated with this paper.
- 58 It is likely that over time, there will be financial implications for specific initiatives, for example, the national rollout of Enabling Good Lives. These initiatives will be fully costed and signalled in papers around those initiatives. It is likely that agencies will need to come back to Cabinet for additional funding. These budget bids will be positioned by agencies over the 7-8 years of implementation.

## Legislative Implications

- 59 There are no legislative implications directly associated with this paper. The Disability Systems Bill may address the UNCRPD and implementation of the concluding observations within it.
- 60 Whaikaha is working on policy proposals associated with this Bill and any implications will be signalled in Cabinet approvals sought for the introduction of this Bill. Currently this Bill is a priority 5 on the legislative programme for 2023.
- 61 In several concluding observations, the UN Committee recommends developing legislation to implement them. Further implementation planning may result in proposals for legislation which will be fully signalled by agencies.

## Impact Analysis

### Regulatory Impact Statement

- 62 No Regulatory Impact Statement is required for consideration of this paper.

### Climate Implications of Policy Assessment

- 63 No Climate Impact of Policy Assessment is required for this proposal. However, the economic and social impact on disabled people of Climate Change has been noted by the UNCRPD Committee.

## Population Implications

### Tāngata whaikaha Māori (Māori disabled people)

- 64 Several concluding observations reference tāngata whaikaha Māori (Māori disabled people) as a particular group to be focused on in responding to the Concluding Observations. This recognises that tāngata whaikaha Māori are particularly at-risk of adverse outcomes from lack of implementation.
- 65 A concluding observation particularly invites New Zealand to develop legislative and policy frameworks that reflect the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous People so that “Māori persons with disabilities are closely consulted and actively involved in decision making processes... and their right to self-determination is recognised”. In taking responsibility for this observation, Whaikaha accepted with the modification that it is a matter for the Executive how it chooses to harmonise legislative frameworks in line with human rights declarations.

### Women

- 66 Two Concluding Observations particularly reference women and seek “comprehensive addressing of issues for disabled women in policy mechanisms” and “the development of strategies and measures to support women and girls with disabilities to develop representative organisations”. Both recommendations have been accepted by the Ministry for Women with the modification that considerable

work has already been undertaken to ensure the perspectives of disabled women are reflected in gender impact analysis.

### **Children**

- 67 Several of the concluding observations specifically reference the impact on disabled children and young people. The Committee noted that disabled children were more likely to experience adverse social impacts such as poverty. It also noted inconsistencies in New Zealand's approach to disabled children compared to other New Zealand children – for example, the continued existence of residential special schools where entry criteria were often determined by impairment.

### **Human Rights**

- 68 This paper is consistent with the New Zealand Bill of Rights Act (BORA) 1990. It also enhances New Zealand's reputation as a leader around rights for disabled people and treaty body implementation as this process is not obliged to be undertaken by New Zealand.
- 69 It should be noted that the UN Committee made four specific recommendations on the operation of the Human Rights Act 1993 and the provision of support to the Human Rights Commission and the Human Rights Review Tribunal. The Ministry of Justice, as the agency responsible for three of these recommendations has agreed them with modification.
- 70 MBIE has policy responsibility regarding the Immigration Act and has indicated that if the Ministry of Justice were to undertake a wider review of the functions and role of the Human Rights Commission it would welcome consideration of whether immigration-related complaints could be lodged with the Human Rights Commission.

### **Consultation**

- 71 The Department of the Prime Minister and Cabinet, Oranga Tamariki, Te Puna Aonui, Department of Corrections, MBIE, ACC, TPK, Statistics New Zealand and Ministries of Justice, Women, Youth Development, Social Development, Education, Health, and Foreign Affairs and Trade, were consulted on this paper.
- 72 The IMM, including the Disabled People's Organisations Coalition was also consulted.

### **Communications**

- 73 I intend to announce this paper when it is proactively released by way of press release.
- 74 Consistent with best practice, I will ensure this paper is communicated in all accessible formats.

### **Proactive Release**

- 75 I intend to release this Cabinet paper proactively in within business days, subject to redaction as appropriate.

## Recommendations

The Minister for Disability Issues recommends that the Committee:

- 1 note New Zealand was examined on its implementation of the United Nations Convention on the Rights of Persons with Disabilities (the UNCRPD) in August 2022.
- 2 note 60 concluding observations towards implementing the UNCRPD were received by New Zealand.
- 3 note New Zealand must report on progress on implementation of these concluding observations no later than October 2030.
- 4 note New Zealand's leadership role in developing and ensuring best practice in the implementation and monitoring of the UNCRPD, and the proposed Government response is consistent with this leadership role.
- 5 note that consistent with this leadership role, agencies have indicated their agreement to progress planning for an implementation of the concluding observations.
- 6 note agency responses are both a commitment to Cabinet to progress the recommendations as well as a commitment to the disabled people of New Zealand.
- 7 agree the New Zealand Government's overall response to the Concluding Observations of the United Nations Committee on the Rights of Persons with Disabilities as outlined in Appendix One.
- 8 invite the Minister for Disability Issues to report back to Cabinet on agencies' implementation progress and seek Cabinet agreement on an appropriate monitoring mechanism by December 2023
- 9 agree to a Domestic Forum process, based on the 2022 Forum, to be implemented no later than December 2027.