

CHILDREN WITH AUDITORY PROCESSING DISORDER (APD)

I. BACKGROUND AND FRAMEWORK

A. Scope of international obligations

1. New Zealand signed the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) on 30 March 2007 and subsequently ratified it on 26 September 2008.
2. The Convention requires state parties to “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.” According to Article 7(1), New Zealand “shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.” Article 9(1)(a) requires state parties to ensure accessibility rights beyond the mere elimination of obstacles and barriers to accessibility, so that persons with disabilities may live independently and participate fully in all aspects of life.

B. Constitutional and legislative framework

3. The New Zealand Bill of Rights Act 1990 forms part of New Zealand’s constitutional framework, and prohibits discrimination based on grounds listed under section 21 of the Human Rights Act 1993. Disability is one of these grounds, as is age.

C. Institutional and human rights infrastructure

4. There is no specific legislation on the funding of hearing equipment for children with Auditory Processing Disorder (APD).

D. Policy measures

5. In 2010 and until June 2011, the Ministry of Health oversaw all hearing aid claims for children.

Policy changes have seen the Ministry of Health devolve funding responsibility for providing hearing aids to children with APD to the Ministry of Education.

This was achieved by specifying that the hearing aids and FM microphones used by children with APD are not hearing aids.

Children with APD are now referred to the Ministry of Education for hearing aid funding – yet in a majority of cases they do not meet restrictive prerequisite criteria.

Children with other types of deafness continue to receive fully funded hearing aids.

One example is a young girl who is living in a low socio-economic family setting, being cared for by her grandparents. She had hearing aids provided by the Ministry of Health prior to 2012 when she was confirmed as having APD. When, as children do, she lost her hearing aids in 2012 the Ministry of Education refused to fund a new set, advising she did not fit their funding criteria.

6. Under current policy, the relevant service providers are Ministry of Education for hearing aids for APD/central deafness and Accessable for hearing aids for conductive and sensory deafness.

Accessible:

- Uses a single test, the pure tone audiogram, to define “hearing loss”. (The pure tone audiogram does not detect central deafness (APD).)
- Does not recognise the American Academy of Audiology internationally accepted test protocol to identify APD in children as sufficient to prove eligibility for hearing aids
- Rejects hearing aid funding requests by claiming that children with APD do not use hearing aids that provide amplification when, in fact, the hearing aids used by children with APD *do provide amplification*

The Ministry of Education:

- Bases their funding decisions on whether changes in learning can be observed and the child is failing educationally, rather than on the basis of clinical criteria and need (i.e. that there is a hearing deficit that is ameliorated by hearing aids).
7. When a child is confirmed as fitting the restrictive criteria and hearing aids are provided, the Ministry of Education allows staff to fit amplified hearing aids to children with APD despite a lack of training in neuroaudiology or hearing aid fitting.
 8. Teachers and education personnel are able to override an Audiologist’s prescription for hearing aids by postponing or declining to hold a hearing aid trial, or declining to make application for funding to pay for the hearing aids.

II. COOPERATION WITH HUMAN RIGHTS MECHANISMS

A. Cooperation with treaty bodies

9. The resulting effects of the Ministry of Education's hearing aid funding policy means that most children with APD are unable to receive necessary remedial equipment unless they meet very restrictive criteria. They are thus unable to enjoy several rights under the Convention on the Rights of Persons with Disabilities. By denying them amplified remote microphone hearing aids for receiving and processing auditory information, especially in an educational environment, these children are denied the rights of accessibility as they are not able to participate in all aspects of school life. This is an infringement of the right to elimination of obstacles and barriers to accessibility in schools.
10. The restrictive criteria mean that most children with APD are not able to experience education on an equal basis with non-hearing impaired children, or even children with other types of deafness. This forms discrimination prohibited by Article 7(1) and that is unjustifiable by the state. Children with other types of deafness already automatically receive hearing aids funded by the government, yet the above criteria specific to APD result in unnecessary and discriminatory barriers to many children receiving state-funded hearing aid devices when this is critical for their full participation in school.
11. These children are prevented from being able to receive education on an equal basis with others; they are denied "reasonable accommodation" of their requirements under Article 24(2)(c).
12. Furthermore, if the child is one of the fortunate who does have their hearing aids and microphone State funded, they are denied the use of this essential communication support equipment outside of the classroom, meaning they can only have the support they need to effectively communicate during school hours.

B. Cooperation with special procedures

13. The rights of disabled persons are not an independent thematic issue under the Special Procedures of the United Nations Human Rights Council.

III. RECOMMENDATIONS

14. In 2012 we met with and supported many families through Ministerial Appeals, seeking review of funding decisions to not provide hearing aids and remote microphones for their children who have APD.

As a consequence to our combined efforts, the New Zealand Ministries of Health and Education have funded a researcher to write a report on the needs of New Zealand children with APD.

We think this is a positive step forward. However, as this is such a serious concern, we would appreciate UN support by way of oversight to monitor the progress of the New Zealand government as they, hopefully, develop services that we believe will need to:

- Accord children with APD the same protection as adults and children with other types of deafness or hearing loss when it comes to hearing aid fitting by qualified audiologists;
- Prevent education personnel from overriding an audiologist's prescription for amplification for children with APD;
- Remove the current neuroanatomical boundary arbitrarily dividing responsibility for hearing aid management and funding for children between two Government Ministries, and make the New Zealand Ministry of Health

responsible for all hearing aid services for children;

- Require that the Ministry of Health stops misclassifying hearing aids as FM systems which has the effect of excluding hearing aids used by children with APD from Health funding;
- Cease the use of an irrelevant criterion test (audibility of single monaural pure tones) to exclude children with APD from funding;
- Ensure that children with APD have similar access to hearing aid funding as children with deafness or hearing loss in other parts of the human auditory system, and
- Remove the increased vulnerability and isolation experienced by these children by permitting them to use their vital and much needed hearing aids and remote microphones at all times as required over a 24 hour period.

CAPTIONING

I. BACKGROUND AND FRAMEWORK

A. Scope of international obligations

14. The UNCRPD includes the right to receive and impart education on an equal basis with others,¹ including “reasonable accommodation of the individual’s requirements.”² In particular, article 30(1)(b) recognises the right of persons with disabilities to take part on an *equal basis* with others to enjoy “access to television programmes, film and

¹ Art 21.

² Art 24(2)(c).

other cultural activities”.³ Captioning also supports the broader, fundamental right to access information and communications in general.⁴

15. These rights apply to the 1:6 New Zealanders who are Deaf or Hearing Impaired.

B. Constitutional and legislative framework

16. The New Zealand Bill of Rights Act 1990 forms part of New Zealand’s constitutional framework, and prohibits discrimination based on grounds listed under section 21 of the Human Rights Act 1993.⁵ Disability is one of these grounds.⁶

C. Institutional and human rights infrastructure

17. Captioning in New Zealand is funded by the Broadcasting Commission which is State funded. Any funding decision must have regard to the primary functions of the Commission.⁷ One of these is to “ensure that a range of broadcasts is available” for persons with disabilities.⁸ Aside from the Broadcasting Act 1989 and general anti-discrimination legislation, there is no other relevant legislation.⁹

D. Policy measures

18. Despite significant advocacy work by the Captioning Working Group, which has membership from Deaf and Hearing Impaired New Zealanders and is supported by The National Foundation for the Deaf; the National Hearing Association and Deaf Aotearoa New Zealand, there are still no policy measures in place that address captioning and accessibility for Deaf and Hearing-Impaired persons.

³ Art 30(1)(b).

⁴ Art 9(1)(b).

⁵ New Zealand Bill of Rights Act 1990, s 19.

⁶ Human Rights Act 1993, s 21.

⁷ Broadcasting Act 1989, s 39(d)(i).

⁸ Section 36(1)(c)(iv).

⁹ Human Rights Act, above s 21(1)(h).

II. COOPERATION WITH HUMAN RIGHTS MECHANISMS

A. Cooperation with treaty bodies

19. All public health information broadcast by television is captioned.¹⁰ In addition, the Broadcasting Commission currently provides \$1.9 million a year for captioning. However, this amounts to only 192 hours¹¹ of captioning per week, which is less than 10 per cent of all television shows.¹² Further, a Teletext compatible television is needed to access captioning. As not all televisions are compatible, captioning is not available in many public locations.¹³
20. Captioning for film, theatre and “other cultural activities”¹⁴ is limited. Without mandatory guidelines, it is up to private organisations and companies to decide whether to provide captioning services.
21. The New Zealand Government has not taken “all appropriate measures”¹⁵ to guarantee the rights under the Convention, despite the fact that captioning is not mandatory under the Broadcasting Act 1989 (there are no provisions that guarantee a certain level or quality of captioning).

¹⁰ Office for Disability Issues *First New Zealand Report on Implementing the United Nations Convention on the Rights of Persons with Disabilities* (Office for Disability Issues, March 2011) at [50.2].

¹¹ Robyn Carter *Captioning in New Zealand: Evidence to support legislation change to make captioning in New Zealand compulsory* (Deaf Aotearoa, September 2011)

¹² At 6.

¹³ At 6.

¹⁴ UN Convention on the Rights of Persons with Disabilities, above n 1, art 30(1)(b).

¹⁵ Article 1(4)(a) – (b).

22. The Government has failed to implement policy measures to promote captioning. In New Zealand's first report on implementing the Convention, the Government recognised print media and online information as the primary means of providing accessible information.¹⁶ Failure to acknowledge the need to increase captioning of television programmes, film and other cultural activities is a clear breach of Art 30(1)(b). Access to 10 per cent of all television shows does not guarantee the right to enjoy non-print media on an equal basis to information as other members of society e.g. Breakfast TV.
23. With regards to "other cultural activities",¹⁷ the Government has solely relied upon individual cultural organisations. For example, the New Zealand Symphony Orchestra has introduced schemes to make symphonies more accessible.¹⁸ While this is a good initiative, national direction is needed to get more organisations on board.

B. Cooperation with special procedures

24. The rights of disabled persons are not an independent thematic issue under the Special Procedures of the United Nations Human Rights Council.

III. RECOMMENDATIONS

25. In relation to captioning, we call on the government to:

¹⁶ Office for Disability Issues, above n 10, at [53] – [54].

¹⁷ UN Convention on the Rights of Persons with Disabilities, above n 1, art 30(1)(b).

¹⁸ At [230.1] – [230.2].

- Follow the United Kingdom approach and legislate for mandatory captioning¹⁹ (Ofcom, the regulator of the communications industry is obliged to produce a code to help television providers meet certain percentage targets by set dates);²⁰
- Through the Broadcasting Commission, develop a comprehensive policy to clarify the eligibility of funded programmes, and establish accessibility objectives with specific targets that include online captioning for television shows and mandatory captioning for programmes of national importance, such as Parliament TV;²¹ and
- Establish a national framework to provide a consistent level of captioning across television, film and other cultural activities to guarantee equal accessibility for all hearing-impaired people, without differential treatment based upon location.

ACCIDENT COMPENSATION CORPORATION (ACC) COVERAGE

I. BACKGROUND AND FRAMEWORK

A. Scope of international obligations

25. The UNCRPD highlights the right of all disabled persons to the highest attainable standard of health without discrimination, and places duties upon state parties to take all necessary measures to ensure access for disabled persons to health services and rehabilitation.²² Discrimination based on disability includes any distinction, exclusion or constraint on human rights and fundamental freedoms in any field on the basis of a disability.²³ Article 25 specifically prohibits discrimination against disabled persons in the provision of

¹⁹ Communications Act 2003 (UK), s 303.

²⁰ Section 303(1).

²¹ Human Rights Commission “Making disability rights real: Annual report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities 1 July 2011 – 30 June 2012” (December, 2012) Human Rights Commission <<http://www.hrc.co.nz>> at 88.

²² Art 25.

²³ Art 2.

health or life insurance, as well as health care and services.²⁴ This also reiterates New Zealand's duties of non-discrimination under the International Covenant on Civil and Political Rights.²⁵

B. Constitutional and legislative framework

26. The New Zealand Bill of Rights Act 1990 forms part of New Zealand's constitutional framework, and prohibits discrimination based on grounds listed under section 21 of the Human Rights Act 1993.²⁶ Disability is one of these grounds.²⁷

C. Institutional and human rights infrastructure

27. New Zealand's accident compensation scheme, ACC – as established by the Accident Compensation Act 2001 – is a no-fault, comprehensive compensation scheme for personal injuries sustained.²⁸ It is governed by the principles of fairness, community and quality of life, and seeks to minimise both the incidence of injury and impact of injury on the community.²⁹ The Act emphasises the importance of rehabilitation, and seeks to ensure fair compensation for permanent impairment so that disabled persons may enjoy the highest attainable standard of health.³⁰

D. Policy measures

28. Legislative and regulatory changes to the ACC scheme between 2010 and 2012 have resulted in a decrease in claims volume and costs. In terms of hearing loss claims, this could represent discrimination against New Zealanders.

II. COOPERATION WITH HUMAN RIGHTS MECHANISMS

A. Cooperation with treaty bodies

²⁴ Art 25(e) – (f).

²⁵ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

²⁶ New Zealand Bill of Rights Act 1990, s 19.

²⁷ Human Rights Act 1993, s 21.

²⁸ Accident Compensation Act 2001, s 3.

²⁹ Section 3.

³⁰ Section 3(3)(c) – (d).

29. Certain aspects of the current ACC scheme present a real danger of breaching international commitments under the UN Convention on the Rights of Persons with Disabilities, as well as obligations not to discriminate under the International Covenant on Civil and Political Rights.³¹ In particular, they are: the raised statutory threshold for deafness;³² and the introduction of co-payment requirements for hearing services.³³ These measures penalise vulnerable members of society and constrain their ability not only to attain the highest standard of health, but also to readily interact and participate in their communities.³⁴
30. In terms of the raised statutory threshold for deafness, the 2010 Amendment introduced the threshold of six per cent, on the NAL scale, of required hearing loss for a claim, and this stringent criterion potentially denies many New Zealanders suffering from hearing loss the cover they require to enjoy life and be active members of their community.³⁵ In an audiogram different hearing tones contribute different weightings to the NAL scale with less associated with high tones and more with low tones. To achieve a 6% total hearing loss a person may have a more substantial loss in high tones, which are important for speech discrimination, especially in noise. The application of this threshold removes the opportunity for professional audiologists to make an informed clinical judgement of a person's hearing problems beyond simply looking at one index, the audiogram.³⁶
31. The introduction of a co-payment scheme to fund hearing services is also a reflection of the tendency in recent years to cut costs over the full implementation of the Accident Compensation Act 2001, and was a direct response to government concern about the increase in volume and cost of hearing loss claims.³⁷

³¹ Carroll, above n **Error! Bookmark not defined.**, at 1.

³² Accident Compensation Amendment Act 2010, s 8.

³³ Accident Compensation Corporation *Changes to funding for hearing services from 1 January 2011* (Accident Compensation Corporation, November 2010).

³⁴ UN Convention on the Rights of Persons with Disabilities, above n 1, art 25.

³⁵ Human Rights Commission, above n **Error! Bookmark not defined.**

³⁶ At [6.3].

³⁷ Department of Labour and Ministry of Health *Briefing to ACC Minister: Additional Information Regarding Hearing Loss* (Department of Labour, 1 October 2010).

As such, there is a growing danger of subverting the basic principles on which the Act was based.³⁸ There is also derogation from basic human rights principles of rehabilitation and equality in the interest of budget shifting.³⁹ This trend has been demonstrated by the treatment of a recent complainant who was first granted hearing aids in 2002, but subsequently refused replacement hearing aids in 2012.⁴⁰

In this case, the individual's percentage of hearing loss resulting from work-related injuries remained well over the threshold (at 13.7 per cent); however, in 2012 ACC refused to pay the proportion of his hearing loss, re-classifying the injury as "age-related" rather than "injury-related".⁴¹ This denial of compensation is discrimination based on both disability and age. The 2010 Amendment has led to injustice and a denial of human rights.

B. Cooperation with special procedures

32. The rights of disabled persons are not an independent thematic issue under the Special Procedures of the United Nations Human Rights Council.

III. RECOMMENDATIONS

33. In relation to ACC coverage, we call on the New Zealand government to:
 - Entitle any person with industrial noise induced hearing loss with hearing test results that cannot be categorised as "normal" and who could benefit from rehabilitation, to remedial support rather than utilising the inherently unreliable 6% threshold test⁴²
 - Stop ACC applying a discriminatory age threshold which further bars access to care after injury

³⁸ At [2.2].

³⁹ At [2.3].

⁴⁰ Letter from John Anthony Brophy to Research New Zealand Ltd regarding survey on behalf of ACC re: hearing aids (6 May 2013) at 1.

⁴¹ At 2.

⁴² At 1.

- Recognise that the regulation that permits part-funding of hearing aids is prohibiting an increasing number of people from accessing hearing aids.
- Recognise that it is ACC's responsibility to ensure that if a hearing aid is prescribed to manage the impact of industrial noise induced hearing loss then the type prescribed by the audiologist should be provided at no cost.
- Adopt yardsticks of success for the ACC scheme that judge effectiveness and proportion of injured people receiving coverage, rather than being a purely cost-based model
- Encourage the involvement of and positively consult with consumer representatives; the New Zealand Audiological Society and industry representatives to promote the use of new research and technologies within the ACC scheme.
- The New Zealand Government Minister for ACC, Ms Judith Collins announced a \$1.3 billion cut in ACC levies over the next two years. Ms Collins said the Earners and Workers accounts were now fully funded after the Corporation reduced the number of long term ACC claimants from 14,000 to less than 11,000.⁴³ We highly recommend that this levy reduction be reduced sufficiently to reasonably accommodate the unmet rehabilitation and integration need of people with hearing loss due to industrial noise induced hearing loss.

⁴³ http://en.wikipedia.org/wiki/Accident_Compensation_Corporation