

ARTICLE

No Learner Left Behind: Is New Zealand Meeting its Obligations under Article 24 of the United Nations Convention on the Rights of Persons with Disabilities?

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New Zealand's Education Act 1877 prevented children considered *deaf and dumb* from attending school, which was free and compulsory to all others. Thereafter, government policy denied persons with disabilities the capacity to enjoy education on an equal basis with other members of the community. Throughout most of the 20th century, education policies ensured "special" schools remained separate from the mainstream. While the modern era espouses inclusive education for all, persons with disabilities remain disadvantaged in accessing quality education. In 2008, the New Zealand Government ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The Convention's obligations under art 24 recognise a right to enjoy education on an equal basis with others. While the equal right for persons with special educational needs to enrol and receive education in any state school is enshrined in s 8 of New Zealand's Education Act 1989, this has not been translated into practice. The current legal framework imposes statutory limitations on an equal right to education, while the courts have denied a substantive and enforceable right.

Significant legislative reform is needed to the Education Act and Human Rights Act 1993 in order to ensure that a legal right to education for persons with disabilities no longer remains aspirational. The Government must also ratify the Optional Protocol to the CRPD to allow persons with disabilities to vindicate breaches of this right if domestic remedies continue to fail. This article provides a broad and in-depth analysis of the current state of the right to education for

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persons with disabilities in New Zealand through the lens of Katarina Tomaševski's *Four As Framework*. Recommendations are proposed which are necessary to achieve available, accessible, acceptable and adaptable education. These changes are vital to New Zealand fulfilling its art 24 obligations, thus allowing equal access to education for all people.

I Introduction

A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to try to shape his own life.

—Helen Keller¹

Helen Keller recognised a fundamental principle, which is that persons with disabilities have an intrinsic right to access education on an equal basis with other members of the community. This article will examine whether New Zealand is meeting its obligations to implement the right to education under art 24 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Part II will define the term disability, discuss the right to education, art 24 obligations and Katarina Tomaševski's *Four As Framework*, as well as set the scope and methodology for this article. Part III will analyse whether early childhood education (ECE) and school is available, accessible, acceptable and adaptable for persons with disabilities. Provision of art 24 obligations will be examined in the New Zealand context. It will be submitted that New Zealand is failing to provide a substantive and legally enforceable right to education for persons with disabilities. Part IV will suggest remedies under the current legislative framework, followed by Part V which will propose key changes essential to New Zealand better fulfilling its art 24 obligations. Conclusions will be presented in Part VI.

II Definitions, Scope and Methodology

A Definitions

(1) Disability

The term “disability” must be defined to set the scope of this article. Rather than describing a homogeneous group, disability is an “umbrella term” identifying persons who experience a diverse range of needs.² Earlier welfare and medical models of disability were deficit-focused. The CRPD adopts a social model definition, “includ[ing] those with long-term physical, mental, intellectual or sensory impairments,” which create physical and attitudinal barriers to full and effective societal participation.³ The CRPD's all-encompassing definition of disability will be used throughout this article.

1 Helen Keller *Teacher: Anne Sullivan Macy* (Greenwood Press, Westport (CT), 1985) at 170.

2 “Disabilities” World Health Organization <www.who.int>.

3 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD], art 1.

(2) The right to education

In its World Declaration on Education for All, The United Nations Educational, Scientific and Cultural Organization (UNESCO) stated that, at a minimum, individuals should receive the benefit of educational opportunities which meet their basic learning needs.⁴ UNESCO defines basic learning needs as comprising essential learning tools and the basic learning content which are:⁵

... required by humans to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development to improve the quality of their lives, to make informed decisions, and to continue learning.

As Jill Chrisp puts it, “[e]ducation is both a human right in itself and an indispensable means of realising other human rights.”⁶ It is the pathway for disadvantaged persons to improve their economic and social outcomes for full societal participation.

The right to education was first recognised in the Universal Declaration of Human Rights (UDHR) in 1948.⁷ The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised the right in 1966,⁸ followed by the United Nations Convention on the Rights of the Child (CRC) in 1989,⁹ both of which have been ratified by New Zealand. The right to education under art 24 of the CRPD frames education as an economic, social and cultural right,¹⁰ recognising four minimum core obligations for states; non-discriminatory access, free choice, enjoyment of free compulsory primary education, and the right to be educated in official languages of one’s own choice.¹¹ Former Special Rapporteur on the right to education Vernor Muñoz stated that while persons with disabilities possess this right, it is irrefutable that these persons “suffer from a pervasive and disproportionate denial of this right.”¹² Article 24 of the CRPD provides a protective and empowering framework to remedy the denial of the right to education for persons with disabilities.

4 United Nations Educational, Scientific and Cultural Organization “World Declaration on Education for All: Meeting Basic Learning Needs” (1990), art 1.

5 Article 1.

6 Jill Chrisp “The Right to Education, He Tāpapa Mātauranga” in Margaret Bedgood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 156 at 156.

7 Universal Declaration on Human Rights GA Res 217A, III (1948), art 26.

8 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 13–14. See also Convention Against Discrimination in Education 429 UNTS 93 (adopted 14 December 1960, entered into force 22 May 1962).

9 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 28–29.

10 Adam McBeth, Justine Nolan and Simon Rice *The International Law of Human Rights* (Oxford University Press, Melbourne, 2011) at 148.

11 Fons Coomans “Education and Work” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, (eds) *International Human Rights Law* (2nd ed, Oxford University Press, Oxford, 2014) 238 at 243–246.

12 Vernor Muñoz “Report of the Special Rapporteur on the right to education – the right to education of persons with disabilities” IV A/HRC/4/29/Add.1 (2007) at [7].

B Article 24

New Zealand ratified the CRPD on 26 September 2008. The Convention did not create new rights for persons with disabilities, except insofar as special provisions are made for additional supports to foster enjoyment of rights on an equal basis with others.¹³ State parties must promote, protect and implement CRPD provisions so that persons with disabilities enjoy all of the same human rights and fundamental freedoms as persons without disabilities. Article 24 declares:

1. States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:
 - (a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
 - (b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
 - (c) enabling persons with disabilities to participate effectively in a free society.
2. In realising this right, States Parties shall ensure that:
 - (a) persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - (c) reasonable accommodation of the individual's requirements is provided;
 - (d) persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
 - (a) facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer-support and mentoring;
 - (b) facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

13 Theo van Boven "Categories of Rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (2nd ed, Oxford University Press, Oxford, 2014) 143 at 155.

- (c) ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.
4. In order to help ensure the realisation of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.
 5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

New Zealand's Government is bound under art 4 of the CRPD to adopt "appropriate legislative, administrative, and other measures" to give effect to art 24 rights, refrain from engaging in any act or practice inconsistent with those rights, and to take all appropriate measures to eliminate discrimination both by public authorities and by private enterprises.¹⁴ As education is considered an economic, social and cultural right, New Zealand has agreed to undertake progressive realisation of its obligations to the maximum of its available resources. Several countries have resource and knowledge constraints; therefore, progressive realisation is a process which requires a state to take steps within their means, both immediately and in the future, that constantly progress towards a full realisation of economic, social and cultural rights.¹⁵ New Zealand must submit reports to the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) concerning its progress in the implementation of the Convention.¹⁶

The Government has not ratified the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (CRPD OP). This means that persons with disabilities who are denied their art 24 rights have no effective means of redress against the New Zealand Government at the international level.

C *The Four As Framework*

Katarina Tomaševski developed the *Four As Framework* in 2001 when working as the first Special Rapporteur on the right to education. Tomaševski's framework deconstructs educational rights into two aspects: first, the right to education encompasses availability and accessibility; and secondly, rights in education encompass acceptability

14 Huhana Hickey and Kris Gledhill "Economic, Social and Cultural Rights of Persons with Disabilities" in Margaret Bedgood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 242 at 251.

15 "Progressive Realisation and Non-regression" (2012) International Network for Economic, Social and Cultural Rights <www.escr-net.org>.

16 CRPD, arts 35–36. A State's first report is required two years after ratification, and thereafter every four years.

and adaptability.¹⁷ Each aspect describes interrelated but different governmental obligations. Tomaševski's framework is universally acclaimed as the conceptual yardstick against which to measure whether a state is substantively fulfilling its obligations to implement the right to education. David Karlsson and Jonas Grimheden credited Tomaševski's "acute sense of methodology and pedagogics" with allowing her to develop a practical tool that "neatly captures the full aspects of the right".¹⁸ This framework will be applied to the New Zealand context in order to assess whether education for persons with disabilities is available, accessible, acceptable and adaptable.

D *Scope*

The scope of this article is limited to the discussion of education for persons with disabilities in New Zealand schools and ECE institutions. The New Zealand age bracket for compulsory education is from 6 to 16 years, provided through primary, intermediate and secondary schooling.¹⁹ The author has limited the scope of this article to ECE and schooling because this compulsory age bracket recognises the fundamentality of school education to meet individuals' basic learning needs. Similarly, quality ECE in the formative years fosters children's future development. Tertiary education, vocational training and adult learning are excluded due to constraints in length. Also, persons with disabilities accessing higher education are often aware of their rights.²⁰ By contrast, parents and students accessing ECE and schooling are being exposed to the education system for the first time and are thus in greater need of human rights protection, as afforded by art 24 of the CRPD.

E *Methodology*

This article involved both doctrinal and socio-legal research. Doctrinal research covers New Zealand case law, legislation, statistics and policies relating to education of persons with disabilities, measured against art 24 obligations and Tomaševski's *Four As Framework*. The University of Canterbury's Human Ethics Committee granted approval to interview eight people with wide-ranging experience in both the disability and education sectors, to gather socio-legal material.²¹ Interviewees included Disability Rights Commissioner Paul Gibson; together with several school principals, policy makers, a lawyer and a residential support-worker, some of whom have personal experience with disability. Seven of the interviewees chose to remain anonymous, and so will be referred to as such throughout this article. These interviewees were selected because their positions reflect expertise in the field. Interviewees were asked about their own perceptions on whether persons with disabilities have equitable access to education. They were also asked whether they believed there to be room for improvement. Persons in these positions could draw on not only their own personal experiences, but also on the

17 K Tomaševski *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Swedish International Development Cooperation Agency, Right to Education Primers No 3, 18 January 2001) at 12.

18 David Karlsson and Jonas Grimheden "Tomaševski's 4-A on Java: Measuring the Right to Reproductive Health" Raoul Wallenberg Institute of Human Rights and Humanitarian Law <rwil.lu.se> at 1.

19 Chrisp, above n 6, at 159-160.

20 Interview with Paul Gibson, Disability Rights Commissioner (Philippa Moran, 23 October 2014).

21 University of Canterbury Human Ethics Committee, reference HEC 2014/75, 13 August 2014.

experiences of those persons with disabilities whom they have supported. All interviewees agreed that despite a legal right to education, the Government should do more to fulfil its art 24 obligations. While the eight interviewees provided a very limited sample, their commentary was invaluable in informing the development of this article. The interviewees' observations will be referred to throughout; however, the author is responsible for the views expressed in this article.

III Is New Zealand Fulfilling its Art 24 Obligations?

A *The New Zealand context*

In 2001 the New Zealand Government developed the Disability Strategy, signalling a paradigm shift towards recognising persons with disabilities as possessors of rights. The Office for Disability Issues (ODI) established in 2002 oversees implementation of the Strategy and CRPD. The Ministerial Committee on Disability Issues sets policy direction and adopts Disability Action Plans, most recently covering 2014–2018. An Independent Monitoring Mechanism (IMM), comprising a three-way partnership between the Human Rights Commission (HRC), the Office of the Ombudsman, and the Convention Coalition of Disabled Peoples' Organisations (DPOs), provides checks on government compliance with the CRPD through their annual *Making Disability Rights Real* reports.

The Ministry of Education (MOE) administers the early childhood, primary, and secondary education systems. Special Education is a branch of the MOE that focuses on improving educational outcomes for persons with special educational needs and disabilities. Special Education funds the main additional support many persons with disabilities require in order to be able to access education on an equal basis with others. New Zealand's National Education Goals aspire to achieve "equality of educational opportunity for all". This can be done through the removal of achievement barriers, through ensuring that persons with special education needs are identified and receive appropriate support.²² The National Administration Guidelines (NAGs) require Boards of Trustees (BOTs) to implement "teaching and learning strategies" to address identified students' special education needs.²³

The Education Act 1964 (EA64) adopted a social definition of special education as education for children who "because of physical or mental handicap or some educational difficulty" require additional educational treatment than what is normally obtained in an ordinary school classroom.²⁴ This definition was not repealed by the Education Act 1989 (EA89). Disconcertingly, the later statute adopted a narrower, more procedural definition: help from a "special school, class, clinic or service."²⁵ The EA64 definition is more aligned to the CRPD. The following sections will outline Tomaševski's explanation of states' responsibility and correlative art 24 obligations, examine the New Zealand position, and assess whether New Zealand is meeting Tomaševski's standards.

22 "National Education Goals" (23 January 2009) Ministry of Education <www.minedu.govt.nz> at Goals 1, 2 and 7.

23 "National Administration Guidelines" (24 October 2013) Ministry of Education <www.minedu.govt.nz> at Guidelines 1 and 5.

24 Education Act 1964, s 2.

25 Education Act 1989 [EA89], s 2.

B Availability

Availability covers the establishment and funding of educational institutions. Tomaševski believes that the availability obligation requires states to fund inclusive, high quality and free education for all children in state schools within the compulsory age bracket.²⁶ Availability also involves the employment of sufficient teachers that are qualified to support learners with disabilities. New Zealand fails to meet its availability obligations under art 24 in two key ways: through inadequate provision of a fully inclusive education system; and by insufficient funding for learners requiring additional educational support.

(1) Inclusive education

New Zealand has not yet fulfilled its art 24 obligation to provide schooling “consistent with the goal of full inclusion” within the “general education system”. The CRPD Committee takes an inclusive and participatory approach: the best outcomes are achieved when children progress through school with peers from their local community, as this fosters a culture that accepts diversity.²⁷ The United States Supreme Court’s landmark decision in *Brown v Board of Education*²⁸ held that “separate educational facilities are inherently unequal”. This sparked an international move towards mainstreaming minority groups.

Inclusive education has been preferred but not yet realised in New Zealand since the enactment of the EA89. Objective 3.1 of the Disability Strategy aims for the best education to be available for all learners in their “local, regular educational centres,” should these be their parents’ first choice. In 2010 the MOE developed the *Success for All: Every School, Every Child* policy, which sets a target of 100 per cent of schools to demonstrate inclusive practices by the end of 2014.²⁹ *Success for All* plans to implement inclusion under four broad themes: building educators’ knowledge and skills, providing increased services and funding, working closely with persons with disabilities, and reviewing progress. This inclusive policy also extends to ECE providers under *Te Whāriki* curriculum.³⁰ While these policies are well intentioned, the MOE has unwittingly made decisions without consulting the disabled community and before organising the practical supports required for implementation.³¹ Despite consistent ideology in domestic policy, an assessment by the Education Review Office (ERO) and the IMM also indicates that further work is needed at the grassroots level in order to meet international standards of inclusion.

In 2014, New Zealand’s delegation to the CRPD Committee asserted that all persons with disabilities had the same access to their local schools as other children.³² However, inclusive practices require substantially more than the mere permission of persons with

26 Tomaševski, above n 17, at 10.

27 Ron McCallum and Hannah Martin “Comment: The CRPD and Children with Disabilities” (2013) 20 Aust ILJ 17 at 27; see also United Nations Educational, Scientific and Cultural Organization *The Salamanca Statement and Framework for Action on Special Needs Education* (ED.94/WS/18, June 1994) at [3].

28 *Brown v Board of Education* 347 US 483 (1954) at 495.

29 “Success for All: Every School, Every Child – Planned Actions 2010 – 2014” (2010) Ministry of Education <www.minedu.govt.nz>.

30 “Te Whāriki, He Whāriki Mātauranga mō ngā Mokopuna o Aotearoa” (1996) Ministry of Education <www.educate.ece.govt.nz> at 11.

31 Interviewee Two (Philippa Moran, 21 August 2014).

32 “Committee on the Rights of Persons with Disabilities considers initial report of New Zealand” (16 September 2014) Office of the United Nations High Commissioner for Human Rights <www.ohchr.org>.

disabilities to enrol in mainstream institutions. The European Disability Forum noted the important distinction between integration and inclusion.³³ Integration involves persons with disabilities adapting to a mainstream teaching and learning environment. Conversely, inclusion requires the system to adapt constantly to reduce the barriers to individual learning, thus benefiting all students including those with disabilities.

Dr Jude MacArthur measures effective inclusion through three elements: presence, curricular and extra-curricular participation, and achievement.³⁴ ERO's 2010 review of 229 mainstream primary, secondary and composite schools indicated low participation and achievement rates of high needs students.³⁵ Only approximately 50 per cent of the schools examined demonstrated mostly inclusive practices.³⁶ This clearly falls short of MacArthur's expectations. ERO found that low rates of inclusion were predominantly attributable to poor attitudes of school leaders. Furthermore, participants in the 2011 *Youth Monitoring Report* stated that educational mainstreaming did not equate to social mainstreaming; students were frequently excluded from extra-curricular activities and the presence of teacher aides disrupted students from interacting with teachers and classmates.³⁷ Schools should be required not only to adapt their curriculum, but to also encourage peer support and social interaction beyond the academic environment.

In 2011 ERO conducted a nationwide questionnaire on the inclusion of students with special needs. The questionnaire was completed by 253 schools and revealed an alarming lack of school leader self-awareness. A significant 88 per cent of schools believed that they engaged in adequate inclusive practices, while only one per cent considered that they had no inclusiveness.³⁸ Discrepancies between ERO's 2010 evaluation and the survey one year later patently exposed the need for school instruction concerning their obligations of inclusive best practice for persons with disabilities. When reporting, schools simply focused on their strategies rather than providing achievement information reflecting the effectiveness of the strategies. Follow-up reviews of 81 primary schools in 2012 indicated little change in inclusive practice.³⁹ With this record, the MOE is not on track to achieve their 2014 target of 100 per cent of schools demonstrating inclusive practices. Schools must provide achievement data so that BOTs, ERO and the IMM can credibly assess the efficacy of inclusive measures. It is submitted that there should be a mandate of minimum standards of inclusive education, in order to ensure quality education and social outcomes at all levels of education. In line with the recommendations of Muñoz and the Office of the

33 European Disability Forum "Inclusive Education: Moving from Words to Deeds" in Deborah A Ziegler (ed) *Inclusion for ALL: The UN Convention on the Rights of Persons with Disabilities* (International Debate Education Association, New York, 2010) 209 at 211.

34 Jude MacArthur *Learning Better Together: Working Towards Inclusive Education in New Zealand Schools* (IHC, Wellington, 2009) at 14–15.

35 "High needs students" refers to students with significant sensory, physical, neurological, psychiatric, behavioural or intellectual impairment, who account for approximately three per cent of the overall student population: Education Review Office *Including Students with High Needs* (June 2010) at 3.

36 At 11, 23 and 26.

37 Convention Coalition Monitoring Group "Disability Rights in Aotearoa New Zealand 2013: Youth" (December 2013) Disabled People's Assembly New Zealand <www.dpa.org.nz> at 13–15.

38 Education Review Office *Including Students with Special Needs: School Questionnaire Responses* (April 2012) at 1. Note that the 2011 review covered the inclusion of students with moderate to high needs; whereas the 2010 survey was only concerned with inclusion of high needs students.

39 Education Review Office *Including Students with High Needs: Primary Schools* (July 2013) at 1.

High Commissioner on Human Rights, it is imperative that the MOE develop a transition strategy to transform the education system, from partially segregated to fully inclusive.⁴⁰ Following a transitional phase, best practice can be embedded.

Aligned with ERO's findings, Gibson notes that inclusion relies in a practical sense on "ethical leadership," which is highly variable across schools.⁴¹ Inclusive practices, underpinning both art 24 obligations and Special Education policies, are not mentioned in the EA89. It is vital that the EA89 be amended to secure a right to inclusive education for persons with disabilities.

(2) Funding

Funding idiosyncrasies obstruct the availability of education for persons with disabilities. In addition to a general funding subsidy, the MOE provides further financial support to eligible ECE providers, which draw a high number of persons with disabilities, or which provide services in languages other than English, including New Zealand Sign Language (NZSL).⁴² In a 2012–2013 review, ERO found that 71 per cent of providers who received this targeted equity funding used it to promote inclusive practices and increase affordability for low-income families.⁴³ However, funding was often not distributed for disability-specific initiatives. Minimum standards for inclusive best practice should be implemented to enhance effective use of equity funding.

Funding for school-aged students is failing to meet the MOE's goal of targeting resources to address disparity in achievement.⁴⁴ School-aged students with high or multiple needs are covered by the Ongoing Resourcing Scheme (ORS). The criteria for accessing ORS funding are inflexible, permitting only one to three per cent eligibility across all students.⁴⁵ Students ineligible for ORS funding may receive lower level specialist supports, including the School High Needs Health Fund (SHNHF), Communication Services, and Severe Behaviour Services. Schools may also access Resource Teachers specialising in Learning and Behaviour (RTLBs), Vision, and Deaf education who fund interventions, working alongside staff and students. All schools receive an annual Special Education Grant (SEG) to assist moderate needs students. SEGs are paid proportionally according to a school's decile rating.⁴⁶ EJ Ryan observes that while two equivalent decile schools might receive the same grant, one school may persistently discourage enrolment of persons with disabilities and so have few or no supported learners, while another may be a "magnet" school attracting a high number of students with disabilities.⁴⁷ *Success for All* does not

40 Muñoz, above n 12, at [28]–[30]; and Office of the United Nations High Commissioner on Human Rights *Thematic Study on the Right of Persons with Disabilities to Education* A/HRC/25/29 (2013) at [71].

41 Gibson, above n 20.

42 New Zealand Government *Replies of New Zealand to the list of issues XII CRPD/C/NZL/Q/1/Add.1* (2014) at [129].

43 Education Review Office *Use of Equity Funding: in Early Childhood Services* (October 2013) at 11.

44 Ministry of Education *Statement of Intent 2014–2018* (August 2014) at 14.

45 *Daniels v Attorney-General* (No 1) HC Auckland M1615-SW99, 3 April 2002 at [29].

46 Deciles are rated on a scale of one to ten regarding socio-economic status of the community from which they draw students, one being the lowest and ten being the highest. Schools with a decile ten rating receive a significantly lower SEG than schools with decile one rating.

47 EJ Ryan "Failing the System? Enforcing the Right to Education in New Zealand" (2004) 35 VUWLR 735 at 742.

account for the uneven distribution of students with disabilities, meaning the resources of “magnet” schools are too thinly spread.

Inadequate access to funding also limits the availability of quality education for persons with disabilities. As a group, persons with disabilities are commonly from lower socio-economic backgrounds, and this inherent challenge is exacerbated by additional financial burdens which having a disability entails.⁴⁸ Gibson stated that parents commonly have to paint the “biggest tragedy” and “battle to get the basics” for their children.⁴⁹ In *Success for All* the MOE acknowledged the need to reduce bureaucracy in order to expedite access to supports. Gibson believes that the ORS policy is discriminatory because eligibility criteria focus on the “deficit” of children’s impairments rather than their potential to achieve educational outcomes equivalent to their non-disabled peers. It is degrading to implicitly impose desperation as a prerequisite for persons with disabilities and their families applying for basic funding. This is inconsistent with the CRPD’s purpose of respecting the inherent dignity of all persons.

The Government fails to take account of human rights standards when making funding decisions. Evidence provided to IHC New Zealand Incorporated indicates that the MOE has exercised deliberate under-spending to meet targets below the notional ORS cap of one per cent.⁵⁰ It is acknowledged that the government must have discretion regarding how it distributes limited taxpayer money; however budget considerations should not necessarily take priority over the best interests of individual students in allocating resources effectively.⁵¹ A lack of transparency and consistency in decision-making related to ORS suggests that individuals are not accurately assessed for eligibility on a case-by-case basis. A proportionally higher number of applicants from low socio-economic areas fail, along with those from areas with high Māori and Pasifika populations.⁵² This indicates that the success of an application may depend more on the quality of the written application, rather than on an assessment of the applicants’ needs. In some cases, parents pay for teacher aides themselves for their children who are not granted funding.⁵³

(3) Teachers

Additionally, New Zealand has insufficient teachers who are skilled and qualified to adapt the curriculum in order to meet the needs of learners with disabilities. Annual Education Staffing Orders restrict the allocation and subsidy of special education staff.⁵⁴ Many students are confronted with “an expectation of low achievement”.⁵⁵ Teachers’ training institutions are “quite appalling” in preparing graduates to work with persons with disabilities.⁵⁶ Special education training is not mandatory, and the rate at which teachers and schools take up professional development opportunities is variable. Simultaneously

48 Minister for Disability Issues *The New Zealand Disability Strategy: Making a World of Difference — Whakanui Oranga* (Ministry of Health, April 2001) at 13.

49 Gibson, above n 20.

50 IHC New Zealand Incorporated “Complaint to the Human Rights Commission under Part 1A of the Human Rights Act 1993” (31 July 2008) at [46]–[47].

51 CRPD, art 7.

52 Ryan, above n 47, at 743.

53 Education Review Office, above n 35, at 23.

54 Education (2014 School Staffing) Order 2013, cls 16, 19, 30–31, 34, 65, 76 and 82–83.

55 *Making disability rights real — Whakatūturu ngā Tika Hauātanga: Annual report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities* (Human Rights Commission, December 2012) [IMM 2012] at 19.

56 Interviewee One (Philippa Moran, 20 August 2014).

to addressing key availability issues, changes should be made to the current legal framework to allow equal access to a quality education for persons with disabilities.

C Accessibility

Under Tomaševski's framework, accessible education encompasses the elimination of legal, administrative, financial and physical barriers that prevent persons with disabilities from receiving equivalent education.⁵⁷ Article 24 imposes obligations on State parties to ensure persons with disabilities have access to education on an equal basis as others and without discrimination. This section will outline the key challenges in terms of New Zealand meeting its art 24 obligations to ensure accessible education.

(1) Legal right to education

The EA89 does not recognise a clearly enforceable, substantive right to quality education. While persons with disabilities are currently afforded the same "presumptive right" to attend any school on an equal basis as non-disabled students, this does not translate into equitable access. Under s 3 of the EA89, every New Zealand citizen is entitled to free education at any state or partnership kura hourua school from the ages of five to nineteen. Section 8 affirms the equal procedural rights of persons with special educational needs to enrol and receive education at state schools. The terms "enrol" and "receive" imply that both rights *to* education and rights *in* education should be provided equally, in terms of Tomaševski's framework. Mainstream schools are therefore *prima facie* expected to cater for all students, regardless of disability, in their local area.

The EA89 does provide a narrow procedural right for persons with disabilities to access special education support. Sections 3 and 8 are qualified, because Parliament recognises that these rights would be hollow if some students were simply treated the same as others.⁵⁸ Section 9 allows the Secretary of Education to reach an agreement with, or instruct parents to enrol their child in a particular state school, or special school, class, clinic, or service until the age of 21. In the controversial leading case of *Attorney-General v Daniels*, Keith J held that these agreements are only necessary for a restricted class of persons with disabilities seeking ORS funding or enrolment in special schools.⁵⁹ The EA89's narrow definition allowed the Court of Appeal to limit the applicability of s 9.⁶⁰ Appeals may be made against s 9 decisions to the Secretary, an arbitrator and *then* the courts.⁶¹ Complaints can alternatively be directed to the MOE, Ombudsman, Privacy Commissioner or the Health and Disability Commissioner, all of whom have restricted power to make non-binding recommendations.⁶²

The contrasting interpretations of the right to education taken by the High Court and Court of Appeal in *Daniels* reflect the need for a statutory amendment to create a substantively enforceable right under the EA89. *Daniels* involved judicial review, as parents believed their children's right to education under ss 3 and 8 were compromised by the now-redundant Special Education 2000 policy. Both courts accepted the existence

57 Tomaševski, above n 17, at 14; and Committee on Economic, Social and Cultural Rights General Comment No 13 – *The Right to Education* XXI E/C.12/1999/10 (1999) [CESCR] at [6(b)].

58 Ryan, above n 47, at 739.

59 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [57].

60 As discussed above under Part II(A): "The New Zealand Context."

61 EA89, s 10.

62 See New Zealand Code of Health and Disability Services Consumers' Rights 1996.

of a procedural right to education, though differed in the interpretation of the content and enforceability of that right.

At first instance, Baragwanath J took the preferred approach in recognising a substantive right to education. The Judge accepted the courts' responsibility to ensure minimum standards were met, comprising a right for all students to receive education which is systematic, regular and that which "not be clearly unsuitable (and in that specific sense of it, suitable) for the pupil".⁶³ In Baragwanath J's opinion, diversity of needs necessitates individual appraisal and monitoring of learning requirements; assistance should be allocated proportionately to the extent of the child's particular disability.

However, the Court of Appeal overruled Baragwanath J's substantive right. The Court believed an enforceable right could only encapsulate the "regular and systematic" elements of Baragwanath J's minimum standards, considering the "not clearly unsuitable" aspect was too "opaque" to be sustained.⁶⁴ Hence the right to education would be satisfied through procedural requirements that schools be open for minimum hours and days, employ registered teachers, and comply with the national curriculum. Keith J stated that there is no "freestanding general right" for persons with disabilities to receive equal access to education under the EA89. However, states must do more than merely secure a procedural right to education. Baragwanath J's substantive right is clearly favourable. Gibson observes that the Court of Appeal's interpretation does not allow persons with disabilities a direct legal means of enforcing their substantive right to access education.⁶⁵

The Court of Appeal's decision has received substantial criticism from the IMM, HRC and commentators. Disapproval of Baragwanath J's "not unsuitable" requirement as "opaque" is especially troubling, as this requirement is relatively specific in the context of an individual's educational needs. Baragwanath J recognised that reviewing MOE decisions required ascertaining student's entitlements under the substantive content of the right to education. The Judge recognised that so as to not overstep the constraints of judicial review involving "scrutiny of the form and procedure of an action as opposed to a substantive evaluation of it",⁶⁶ a declaration that the Minister of Education breached students' EA89 rights was the appropriate remedy.⁶⁷ It was left to the Crown to determine the substantive means by which the breach should be resolved. The Court of Appeal did not disagree with Baragwanath J's conclusions as to the appropriate relief. However, while partly correct in remaining aware of the limitations of the judicial review process, the Court of Appeal limited justiciability to such an extent that enforceability of the substantive right to education was itself undermined.

(2) Right to be free from discrimination in accessing education

In order to promote more consistency with art 24 obligations, amendments are also needed to strengthen legal protections against discrimination. Section 21 of the Human Rights Act prohibits direct or indirect discrimination by public and private bodies on the grounds of disability.⁶⁸ Section 19 of the New Zealand Bill of Rights Act 1990 establishes

63 *Daniels*, above n 45 at [137].

64 *Daniels*, above n 59, at [82].

65 Gibson, above n 20.

66 Ryan, above n 47, at 761.

67 *Daniels* (HC), above n 45, at [7] and [155]; and *Daniels* (CA), above n 59, at [113]-[115]. The matter was remitted to the High Court where Baragwanath J upheld his earlier determination in *Daniels v Attorney-General* HC Auckland M1616-SW99, 27 August 2003 at [5(a)].

68 Human Rights Act 1993, ss 21(h) and 65 [HRA].

the right to be free from discrimination in relation to acts or omissions by the government, or a person or body performing a public function conferred by law,⁶⁹ including the MOE and state schools acting pursuant to the EA89.⁷⁰

It is an anomaly that discrimination is not defined under the HRA or NZBORA. As these statutes were enacted to comply with United Nations Covenants and Conventions,⁷¹ the courts should interpret discrimination consistently with the CRPD in order to fulfil art 24 obligations.⁷² *Child Poverty Action Group v Attorney-General (CPAG)* remains the leading authority on the definition of discrimination, in which the Human Rights Review Tribunal (HRRT),⁷³ later affirmed by the Court of Appeal,⁷⁴ stated that discrimination could be established if there was different treatment of two comparable groups, to the disadvantage of the disfavoured group, which could not be justified as a reasonable limit on the right to be free from discrimination under s 5 of the NZBORA. Persons with disabilities must prove disadvantage in accessing education arising from different treatment to non-disabled persons in comparable circumstances.

(3) Reasonable accommodation

Reasonable accommodation provisions are designed to ensure that schools provide education in environments and formats which are accessible for persons with disabilities. Educational establishments may provide elevators and ramps, additional and specialised teaching and technological assistance and deliver the curriculum in appropriate formats. Article 24 confers a clear, positive entitlement to reasonable accommodation by educational providers, defined as “necessary and appropriate modification and adjustments,” not imposing a disproportionate or undue burden.⁷⁵ Conversely, the HRA sets a default rule that accommodation need not be provided unless it would be reasonable to do so.

HRA provisions allow an educational establishment to: refuse admittance, admit on less favourable terms, deny or restrict access to benefits of services, or exclude a person with disabilities,⁷⁶ if “special services or facilities” were required which the educational establishment cannot reasonably be expected to provide, or if admittance poses an unreasonable risk of harm.⁷⁷ A restrictive judicial approach to reasonable accommodation reflects the negative wording of the HRA provisions. In *Ta’ase v Victoria University of Wellington*, it was held that a complainant must establish that a defendant took positive

69 New Zealand Bill of Rights Act 1990, ss 3 and 19(1) [NZBORA]; and HRA, s 21A (introduced via Human Rights Amendment Act 2001, s 7).

70 EA89 confers powers relating to enrolment (ss 11A–12B), discipline (ss 13–19), the management of state schools (Part 7) and the functions of the New Zealand Qualifications Authority (Part 20) and school BOTs (Schedule 6).

71 HRA at “Long title”; and NZBORA at “Long title”, which particularly affirms New Zealand’s commitment to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

72 CRPD, art 2.

73 *Child Poverty Action Group Inc v Attorney-General*, Decision No 31/2008, HRRT41/05, 16 December 2008 at [126].

74 *Child Poverty Action Group Inc (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [46]–[47] and [66].

75 CRPD, art 2.

76 HRA, s 57.

77 HRA, s 60; and Sylvia Bell (ed) *Brookers Human Rights Law* (online looseleaf ed, Brookers) at [HR57.02] and [HR60.01].

and direct actions to deny or restrict access in their failure to accommodate.⁷⁸ This connotes a high threshold that must be met for a claim of unlawful discrimination to succeed. In *Proceedings Commissioner v Kissell*, an ECE centre was held to have breached these provisions when admitting a child with developmental disabilities on the condition that he only attend for restricted hours compared with other children, and was accompanied by a teacher aide.⁷⁹

A further difficulty is determining what the “reasonable” requirement means when accommodating learners with disabilities, and how this relates to the prohibition on discrimination. In the leading case of *Smith v Air New Zealand Ltd*, the Court of Appeal stated broadly that reasonableness involves an “analysis of the proportionality or reasonableness of the [education] provider’s response ... taking into account the overall benefits in comparison with the costs”.⁸⁰ This exception leaves ample latitude for interpretation. It has the potential to result in the denial of a person with disabilities’ right to education due to generous interpretations of cost-benefit analysis.⁸¹ Reasonable accommodation must be defined to clarify that, unlike other forms of discrimination, “equal treatment” in ignoring individual disabilities will exacerbate rather than eliminate discrimination.⁸² Different treatment, including the provision of reasonable accommodation, is lawful, provided it fosters the equal realisation of persons with disabilities’ rights. This approach was, however, rejected by Baragwanath J in *Daniels*, holding that failure to accommodate the needs of individuals with disabilities did not constitute a breach of anti-discrimination law, but only of s 8 of the EA89.⁸³ Education providers and rights-holders need clearer directions about their corresponding obligations and entitlements through the development of minimum standards of inclusive education. This could increase substantive access to education.

(4) Substantive access

Statistics reveal that persons with disabilities are not able to realise their right to education in practice. The 2013 Disability Survey show that persons with disabilities have proportionately lower formal educational qualifications than the general population. Only 64 per cent of adults with disabilities aged 15+ had educational qualifications, compared with 85 per cent of non-disabled adults.⁸⁴ Whilst high rates of persons with disabilities enrol in ECE and schooling, they do experience limitations on the enjoyment of their rights.

78 *Ta’ase v Victoria University of Wellington* (1999) 5 HRNZ 573 (CRT) at 575.

79 *Proceedings Commissioner v Kissell* [2001] NZCRT 22 at [27]–[28]. Note however that a similar outcome might not be reached today as this case was decided before amendments were made to the HRA, s 60 under the Human Rights Amendment Act 2008, s 9(a), meaning that the ECE provider could not rely on the reasonable accommodation exception in relation to admission on less favourable terms or restriction of access to benefits, as were the issues in this case.

80 *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [61].

81 Douglas Hodgson “The Educational Rights of Persons with Disabilities: International Human Rights Law and Australian Law Perspectives” (2013) 12 IJDL 183 at 210.

82 *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, (2003) 217 CLR 92 per McHugh and Kirby JJ (in the minority) at [86].

83 *Daniels*, above n 45, at [97].

84 Statistics New Zealand *Social and economic outcomes for disabled people: Findings from the 2013 Disability Survey* (October 2014) at 10.

(i) Early childhood education

ECE providers are inequitably limiting access for persons with disabilities post-enrolment. Although the 2006 Household Disability Survey showed that 73 per cent of children with disabilities aged zero to four were enrolled in ECE, providers nonetheless only allowed partial attendance through reduced hours and the needs of 71 per cent of these children were never professionally assessed.⁸⁵ Early assessment is vital so that quality support can be provided from the outset. If the Government's 2016 target of 98 per cent of all children accessing ECE is to be met, an enforceable substantive right to education and a clear reasonable accommodation obligation must be established.

(ii) Schools

School-aged students also face inequitable access to educational supports. Only 25 per cent of persons with disabilities enrolled in education aged zero to fourteen received specialised support, and 58 per cent aged five to fourteen were never professionally assessed.⁸⁶ Enrolled students aged five to fourteen experienced substantial disruptions due to their disability, including (as percentages): change of school (20), interruption of education for long periods (15), beginning school later than others (eight) and delivery by correspondence or home-schooling (eight).⁸⁷ Alison Kearney stressed the importance of translating rights rhetoric into reality, by ensuring the right to education is legally "recognised, maintained and enforced".⁸⁸ Providing persons with disabilities and their families with a clearly justiciable right to education should compel schools to remedy the limitations faced by students with disabilities.

The majority of statistics were sourced from the 2006 Disability Survey, before New Zealand ratified the CRPD. It would be beneficial to monitor changes to the position of persons with disabilities post-ratification, although it is acknowledged that causal conclusions cannot be determinative. Once access to education has been improved, New Zealand must remedy shortfalls in persons with disabilities' rights in education.

D *Acceptability*

According to Tomaševski, acceptability is the first of two "rights in education" which all learners are entitled to exercise. Acceptability equates to the quality of education. This includes minimum standards, respect for diversity, and recognition of learners as possessors of rights.⁸⁹ This section will consider issues of quality, bullying, and the inequitable experience of Māori and Pasifika persons with disabilities.

(1) Quality

Many students with disabilities are deprived of their right to an acceptable education, as highlighted in complaints to the HRC. From 2008–2012, the HRC received between 500 and

85 Healthsearch Ltd and Office for Disability Issues *Disability and Education in New Zealand in 2006* (Statistics New Zealand, November 2008) at 7.

86 At 9, 11 and 35.

87 At 45–46.

88 Alison Kearney *Exclusion from and Within School: Issues and Solutions* (Sense Publishers, Rotterdam, 2011) at 106.

89 Tomaševski, above n 17, at 12–14.

800 complaints annually, concerning unlawful discrimination on the grounds of disability.⁹⁰ The largest proportion (34 per cent) concerned education for persons with disabilities.

The HRC's *Disabled Children's Right to Education* report noted that a significant amount of complaints concerned the disciplining of a disproportionate number of children due to disability.⁹¹ The *Youth Monitoring Report* found teachers commonly mistake disability-related issues for bad behaviour.⁹² Persons with disabilities presenting severe behavioural difficulties may have a propensity to engage in gross misconduct, or continual disobedience that sets a dangerous example, or to seriously harm themselves or others, meeting the threshold to justify serious disciplinary action.⁹³ In *A v Wheeler*, Harrison J held that students' misconduct need not be wilful to justify stand-down.⁹⁴ The Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 (SSEE Rules) do not require a student's disability to be considered when making disciplinary decisions.⁹⁵ Unfair punishment creates further barriers to learning, adversely affecting acceptable educational outcomes for persons with disabilities.

This problem is illustrated pertinently in *A v Hutchinson*.⁹⁶ A student with severe intellectual disabilities (A), which manifested in aggressive behaviour, was excluded from school. In judicially reviewing the decision, Faire J held that both the principal and the BOT had failed to be primarily cognisant of A's unique position. Their decisions were set-aside on the basis that a comprehensive investigation before exclusion may have resulted in a restoration of A's recently withdrawn behavioural supports instead.⁹⁷ This case illustrates the urgency of amending the SSEE Rules to ensure that school governance takes adequate account of disability-related behaviours in disciplinary decisions. Likewise, further action is needed to address the unacceptable rate of disability-related bullying.

(2) Bullying

Persons with disabilities are often vulnerable to bullying, rendering them isolated and devoid of a safe physical and emotional environment.⁹⁸ The effectiveness of prevention and response to bullying varies widely, and is reliant on a proactive stance of school leadership. National guidelines, such as the MOE's *Positive Behaviour for Learning (PB4L)* strategy, provide direction to address this problem.⁹⁹ In some instances, bullying due to disability, or an inadequate school response to a disability-related bullying complaint, can be progressed as an unlawful discrimination complaint under the HRA.¹⁰⁰ It would be beneficial for greater focus to be directed towards measuring the type and extent of

90 IMM 2012, above n 55, at 36.

91 Human Rights Commission *Disabled Children's Right to Education* (2009) at [15].

92 Convention Coalition Monitoring Group, above n 37, at 17.

93 EA89, ss14(1), 15(1)(c), 17(1)(c) and 20; and Interviewee Five (Philippa Moran, 2 October 2014).

94 *A v Wheeler* HC Hamilton CIV-2007-419-1187, 15 November 2007 at [41].

95 See Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, r 17. This requires BOTs to "have due regard to each circumstance relevant to suspension".

96 *A v Hutchinson* [2014] NZHC 253, [2014] NZAR 387.

97 At [75].

98 See also CRPD, art 16 (right to be free from exploitation, violence and abuse).

99 See also Bullying Prevention Advisory Group *Bullying prevention and response: A Guide for Schools* (2015) at 30.

100 Human Rights Commission *School violence, bullying and abuse: A human rights analysis* (March 2009) at [2].

bullying experienced by persons with disabilities. Once gaps in the current framework are identified, the MOE and DPOs can plan measures to foster an inclusive environment, promoting tolerance towards acceptance of diversity.

(3) Māori and Pasifika

“Acceptable” education must guarantee additional supports for whānau hauā (Māori persons with disabilities) and Pasifika persons with disabilities, who may face intersectional forms of discrimination, being both disabled and indigenous or in a minority culture. The CRPD protects those subjected to multiple or aggravated forms of discrimination based on race, colour, ethnicity, or indigenous origin.¹⁰¹ The New Zealand Government endorsed the non-binding United Nations Declaration on the Rights of Indigenous Persons in 2010, which recognises the rights to non-discrimination in accessing education and delivery in native languages.¹⁰² The MOE’s Special Education Principles similarly acknowledge that learners’ language and culture are a “vital context for learning and development”.¹⁰³ Furthermore, Objectives 11 and 12 of the Disability Strategy set the goal of providing culturally appropriate services and equitable distribution of resources for whānau hauā and Pasifika persons with disabilities.¹⁰⁴

Māori and Pasifika persons with disabilities access support services at a lower rate than others. The 2006 Household Disability Survey revealed only 16 per cent of whānau hauā and 20 per cent of Pasifika persons with disabilities aged five to fourteen had an Individual Education Plan (IEP), compared with 25 per cent of their Pākehā counterparts.¹⁰⁵ The IEP outline teaching strategies, supports and monitoring required to achieve specific educational outcomes. Given the lack of trilingual interpreters, Māori and Pasifika who are deaf are particularly disadvantaged.

It is suggested that the New Zealand Government addresses partnership responsibilities with Māori, embodied in Te Tiriti o Waitangi, akin to its art 24 obligations. The MOE has developed *Getting it Right for Māori* under the *PB4L* strategy, since Māori make up 40 per cent of referrals to the Severe Behaviour Service.¹⁰⁶ This programme, together with *Te Hikoitanga*, seeks to provide cultural responsiveness for whānau hauā.¹⁰⁷ Despite these initiatives, Māori persons with disabilities remain underprivileged in accessing acceptable education.

Action is further needed to remedy the unacceptable provision of education for Pasifika persons with disabilities and to increase awareness of support services. New migrant groups commonly believe that caring for persons with disabilities is a family responsibility.¹⁰⁸ The MOE’s *Pasifika Education Plan 2013–2017* seeks to increase the percentage of Pasifika children with disabilities aged under five accessing early

101 CRPD, preamble paragraph (p).

102 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, LXI A/RES/61/295 (2007), arts 14, 15 and 21.

103 New Zealand Government *First Report to the United Nations Committee on the Rights of Persons with Disabilities* CRPDIC/NZL/1 (2013) at [160].

104 Minister for Disability Issues, above n 48, at 29.

105 HealthSearch Ltd and Office for Disability Issues, above n 85, at 12.

106 “Getting it right for Māori” (25 May 2012) Ministry of Education <www.minedu.govt.nz>.

107 See “Te Hikoitanga/Māori Cultural Responsivity” (6 March 2012) Ministry of Education <www.minedu.govt.nz>.

108 Litmus *New Zealand Disability Strategy Implementation Review 2001–2007* (Office for Disability Issues, January 2008) at 49–50.

intervention services from nine per cent in 2013 to 13 per cent in 2016.¹⁰⁹ This figure remains unacceptably low. New Zealand's fulfilment of Tomaševski's final "adaptability" criteria will now be examined.

E *Adaptability*

Tomaševski notes that the adaptation obligation flows from the "best interests of the child" doctrine; children are no longer expected to fit the school or be excluded, rather education must mould to fit the child.¹¹⁰ Inadequate provision of additional supports, alternative modes of communication, and modified physical environments are the greatest shortfalls in fulfilling this obligation.

(1) Additional supports

New Zealand is not fulfilling its art 24 adaptability obligation of providing "effective individualised support measures" to meet the learning and developmental needs of individuals, as envisaged under the MOE's Special Education Principles.¹¹¹ The HRC asserts that this failure results in disproportionately lower achievement rates for persons with disabilities.¹¹²

There are significant discrepancies between the adaptive measures required and those provided. The 2006 Household Disability Survey identified that only an estimated 21 per cent of children aged zero to fourteen received their IEP entitlement.¹¹³ High rates of supports were also lacking (as percentages); children with an identified need could not access computers (34), followed by specialist teachers and therapy (32), reader/writer assistance (25), and teacher aides (23). This shortfall reflects the need for minimum standards to require a provision for supports, enforceable through a substantive right to education and a clear obligation to accommodate reasonably.

The New Zealand Qualifications Authority (NZQA) has recognised inequity in the provision of special assessment conditions (SACs) for students undertaking national curriculum assessment. Education providers may annually apply for their students to have assistance including reader/writers and assistive technologies.¹¹⁴ A 2014 review revealed that students in decile ten schools were seven times more likely to apply for SAC entitlements, compared with students in decile one schools. A further 35 per cent of schools did not access SACs at all.¹¹⁵ This is inconsistent with the expected pattern of a greater need in low decile schools. Barriers to accessing SAC entitlements were attributable to the complexity of the application process, low prioritisation in low decile schools with broader student achievement goals, and the high level of resources required for professional assessment and provision of supports. Until assistive technologies supplant the need for SACs, NZQA must ensure all eligible students access these conditions.

109 Ministry of Education "Pasifika Education Plan 2013–2017" (2013) <www.minedu.govt.nz> at 9.

110 Tomaševski, above n 17, at 14.

111 New Zealand Government, above n 103, at [160].

112 Human Rights Commission, above n 91, at [18].

113 Healthsearch Ltd and Office for Disability Issues, above n 85, at 12.

114 Interviewees Three and Four (Philippa Moran, 5 September 2014).

115 Ministry of Education and the New Zealand Qualifications Authority *Review of Special Assessment Conditions for National Certificate of Educational Achievement (NCEA)* (7 March 2014) at 2.

(2) Communication

Educators are not delivering the curriculum in the most suitable format for individual learners. Article 24 asserts the right of students to learn in Braille, NZSL and other modes of communication.¹¹⁶ Poor literacy is common among students requiring Braille or NZSL, indicating deficiency in providing greater technological and human aid as envisaged under Objective 3.2 of the Disability Strategy.¹¹⁷

In particular, deaf students suffer from a lack of an enforceable right to education in the appropriate medium. The New Zealand Sign Language Act 2006 (NZSL Act) declared NZSL an official national language, however s 8 states that this recognition creates no legally enforceable rights. Outside the two specialised Deaf Education Centres, the insufficient number of trained educators results in the hindering of deaf learners' art 24 rights.¹¹⁸ Although the MOE offers annual scholarships for NZSL interpreters, courses are constantly undersubscribed and have high failure rates.¹¹⁹ Furthermore, NZSL interpreters are not included in the list of specialists approved for allocation of ORS funding.¹²⁰

(3) Physical adaptability

The physical environment of educational establishments require adaptation in order for persons with disabilities to exercise their right to inclusive education.¹²¹ The HRA's access provisions negatively frame obligations, stating that persons are not required to provide special services and facilities to enable disability access where such provision would be unreasonable.¹²² This further emphasises the need to positively frame a default rule that accommodation should be provided where reasonable.

The Building Act 2004 and New Zealand Building Code 1992 contain inadequate accessibility requirements. Building consent for construction or alteration of educational institutions is conditional on reasonable and adequate provision of access for persons with disabilities.¹²³ New buildings must either follow minimum standards for access under the New Zealand Standard Specification 4121 (2001), or design alternative solutions which satisfy Specification standards.¹²⁴ However, buildings may be exempted from meeting Code accessibility requirements where owners' sacrifices, such as cost, are considered to outweigh potential advantages to persons with disabilities.¹²⁵ The only way to compel existing buildings to become accessible is if educators seek alterations.¹²⁶ Parliament should not pass the Building (Earthquake-prone Buildings) Amendment Bill 2013 because it would allow territorial authorities to grant building consent for strengthening work

116 See also CRPD, art 21 (right to access information in accessible formats and technologies).

117 Minister for Disability Issues, above n 48, at 16.

118 Interviewee Eight (Philippa Moran, 12 December 2014).

119 Office for Disability Issues *New Zealand Sign Language Act Review 2011* (September 2011) at [79].

120 Human Rights Commission *A New Era in the Right to Sign: Report of the New Zealand Sign Language Inquiry* (September 2013) at 44.

121 See also CRPD, arts 9 (accessibility) and 18 (liberty of movement).

122 HRA, ss 42–43.

123 Building Act 2004, ss 17, 112(2) and 118.

124 Sections 19, 23 and 119; and Deborah McLeod and others *Consultation Report: Access to Buildings for People with Disabilities* (Ministry of Business, Innovation and Employment and Office for Disability Issues, June 2014) at [3.3]–[3.4].

125 Building Act, ss 67 and 69; and New Zealand Government, above n 42, at [53].

126 Interviewee Two, above n 31.

without requiring owners to upgrade access and facilities for persons with disabilities to meet Code accessibility standards.¹²⁷

Having assessed New Zealand's position against Tomaševski's framework, it is clear that obligations to provide available, accessible, acceptable and adaptable education to persons with disabilities are not being met. Key recommendations to enable New Zealand to fulfil its art 24 obligations will be discussed next.

IV Solutions under the Current Framework

Part IV will outline possible solutions for New Zealand to better fulfil its art 24 obligations within the current legislative and policy framework. Alternative solutions that are currently available must first be exhausted before changes can be implemented justifiably. Proposed remedies under each of Tomaševski's *Four As* will be addressed in turn.

A Availability

Current inclusive education practices, funding and teacher training fall short of meeting Tomaševski's availability obligation under art 24. Availability of education for persons with disabilities could be improved under the current framework through more effective mainstreaming practices, awareness training for teachers and streamlined funding.

Mainstreaming students with disabilities in non-specialised schools fosters progress towards more inclusive educational practices. Mainstreaming is however a highly contentious issue. For some students with disabilities, the current mainstream schooling system is both unsuitable and impractical.¹²⁸ The HRC found that under the current system, students with disabilities are ghettoised in special schools and classrooms as well as in mainstream classrooms, as they are the object of special measures and specialist teacher support.¹²⁹ Between one and three per cent of the student population have such severe disabilities that they are unable to participate in the national curriculum.¹³⁰ Article 24 acknowledges complexities in needs, by stating learners should be educated in environments individually matched to their development. MacArthur asserts that true inclusion can never occur in an education system that condones segregation under a separate Special Education framework.¹³¹ However, true inclusion requires a more nuanced approach rather than uplifting all children from special schools and placing them in mainstream classrooms.

More effective and less inhibitive supports should be developed in order to help the majority of students with disabilities to integrate effectively. The MOE could also fulfil its goal of "rais[ing] teaching quality and leadership" by implementing mandatory disability awareness programmes for trainees and practising teachers.¹³² This is to encourage an attitudinal shift towards inclusive education. A limited number of special schools should, however, also be retained to accommodate very high needs learners.¹³³ These non-mainstream schools could accommodate students unable to participate in the national

127 Building (Earthquake-prone Buildings) Amendment Act 2013, cl 133AX.

128 Human Rights Commission, above n 91, at [39].

129 At [39].

130 At [42].

131 MacArthur, above n 34, at 18.

132 Ministry of Education, above n 44, at 14.

133 Interviewee Five, above n 93; and Interviewee Six (Philippa Moran, 8 October 2014).

curriculum and offer their expertise by providing outreach services to mainstream schools. The dual systems of mainstream education and Special Education should however be dismantled and managed under a single MOE framework. This ensures that a single entity would oversee the placement of children into the type of school best suited to their individual needs, as well as facilitate greater policy co-ordination in the implementation of inclusive practices and enable cohesive regulation of minimum standards.

While government resources are finite, the MOE could be more astute in their allocation of funds. To better fulfil art 24 obligations, it is recommended that individual funding schemes be overhauled into a single system, and SEG allocations be made proportional to the number of supported learners in each school. Remedies currently available under the legislative framework will now be explained in the context of accessibility.

B Accessibility

Alternative remedies to enforce persons with disabilities' right to access education on an equal basis with others will be outlined in the context of the EA89, a tortious negligence claim, and under the HRA.

(1) Enforcement under the Education Act 1989

Daniels was decided before New Zealand ratified the CRPD. Should a similar case arise today, the courts would be required to apply the presumption of consistency, preferring interpretations of the EA89 consistent with international obligations such as art 24. Furthermore, when interpreting legislation, the courts have an obligation to prefer a reading consistent with the NZBORA.¹³⁴ This may mean that ss 3 and 8 of the EA89 could be read in a non-discriminatory light in order to allow persons with disabilities to access a substantive right to education. However, the NZBORA allows reasonable limitations to rights where they can be "demonstrably justified in a free and democratic society".¹³⁵ It is insufficient to rely on the uncertainties of future judicial interpretation to protect persons with disabilities' right to education. It is therefore desirable that Parliament amend the EA89 to recognise an explicit, substantive and enforceable right to education. Beyond this, the Government must ratify the CRPD OP to allow redress for aggrieved persons in an international forum.

(2) Negligence

The law of negligence may be an alternative way to ensure accessibility under the current legislative framework. The New Zealand courts are yet to rule definitively on whether a tortious negligence claim could be upheld where the right to education has been breached, to the extent that a duty of care could be imposed on education providers.¹³⁶ In *Phelps v Hillingdon London Borough Council*, an educational psychologist who failed to detect and treat the plaintiff's dyslexia was held to have assumed a direct duty of care to the child, by virtue of the parents' and school's reliance on the psychologist's advice.¹³⁷ As such, the House of Lords held that the educational authority employing the psychologist was

134 NZBORA, s 6.

135 Section 5.

136 See *Anderson v Attorney-General* HC Auckland CIV-2004-404-2511, 6 June 2007 at [73].

137 *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL) at 654 per Lord Slynn.

vicariously liable for the breach of professional duty. Lord Slynn awarded damages for past and future loss of earnings and the cost of tuition, on the basis that had the plaintiff's dyslexia been diagnosed early, adverse consequences to literacy and employment could have been significantly mitigated.¹³⁸ Their Lordships unanimously distinguished earlier authority,¹³⁹ holding that a breach of statutory duty did not preclude the existence of a civil action.¹⁴⁰ The question of direct liability against an educational authority was left open.

However, negligence claims are an unsuitable mean of enforcing art 24 rights. In *Daniels*, Baragwanath J applied *Phelps* in recognising a substantive right to education under the EA89. The Court of Appeal distinguished *Phelps* on the basis that it involved an individual claim rather than a group action. Professor Stephen Todd has nonetheless criticised the House of Lord's decision on their application of private "common law concepts of negligence rather than public law concepts of irrationality" in reviewing the exercise of statutory duties.¹⁴¹ The courts must be careful not to impose an undue burden on, or usurp the role of, public bodies in the legitimate exercise of their discretion. Tortious liability is concerned not with enforceability, but with compensation for damage. Enforcement of rights under a statutory framework, as encapsulated under the HRA and NZBORA, generally overrides common law approaches.¹⁴² From a policy perspective, refraining from seeking redress until substantial detriment occurs would cause irrevocable harm to the social and academic development of learners with disabilities. Therefore, Parliament should establish an enforceable right to education.

(3) Enforcement under the Human Rights Act 1993

Claims of unlawful discrimination against state schools acting under the EA89, including failure to provide reasonable accommodation, may be brought to the HRC under Part 1A of the HRA. Acts or omissions by state schools can amount to a breach of Part 1A if they are held to unjustifiably limit the right to be free from unlawful discrimination under s 19 of the NZBORA.¹⁴³ Unlawful discrimination by private entities—independent schools and ECE services—constitutes a breach of Part 2 of the HRA. Breaches of ss 57 and 60 of the HRA, which specifically deal with reasonable accommodation in educational establishments, will be predominantly enforceable against private entities under Part 2. Reasonable refusal to accommodate in state schools should theoretically pass the test of a justified limitation on the right to be free from discrimination in the application of s 5 of the NZBORA.¹⁴⁴

The presumption of consistency with international obligations relates to the courts' interpretation of the HRA, however the statute would benefit from an amendment which defines "discrimination" that would be applicable to all prohibited grounds and contexts. It is imperative that anti-discrimination legislation provides explicit guidelines, detailing

138 At 656–657.

139 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 735–738.

140 *Phelps*, above n 137, at 653, applying *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) at 570 and 572 per Lord Slynn.

141 Stephen Todd "Negligence: Particular Categories of Duty" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 269 at 337.

142 See Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study" (2002) 33 VUWLR 507 at 512–513 and 516–518.

143 HRA, ss 20I–20J; and *Morrison v Housing New Zealand Corporation* Decision No 45/06, HRRT14/06, 8 December 2006 at [35]–[36].

144 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [17.19.5].

how the courts can ascertain consistently whether or not discriminatory conduct has occurred.

High proportions of complaints, regarding a failure to provide reasonable accommodation, demonstrate how this obligation must also be clarified under the HRA. The highest number of Part 1A education complaints received by the HRC in 2011–2012 (40 per cent) concerned the failure of educational institutions to provide reasonable accommodation.¹⁴⁵ Examples of these include: inadequate support provision for autistic children; failure to reasonably accommodate behavioural disorders, resulting in exclusion of the child; and criticism of a child (“lazy”), by a teacher, whose disability affects his or her capacity to follow instruction.¹⁴⁶ Implementing a clear, enforceable and positive obligation to provide reasonable accommodation under the HRA will broaden the understanding of the expected minimum standards, as well as increase substantive access to education for persons with disabilities.

C Acceptability

There are insufficient measures within the current framework to adequately improve the acceptability of education for persons with disabilities. Substantial changes are needed for New Zealand to better fulfil its acceptability obligation under art 24. Amendments to the SSEE rules are necessary, which require educators to take account of disability when making disciplinary decisions. More robust investigation of disability-related bullying could also provide meaningful solutions and identify gaps in current bullying management policies. New Zealand’s failure to meet Tomaševski’s acceptability requirement highlights the need for the Government to collate more comprehensive data of persons with disabilities’ educational experiences, including Māori and Pasifika. This would inform government strategies, thereby effectively remedying identified shortfalls in art 24 obligations.

D Adaptability

Educators must be more proactive in using adaptive technologies and languages and building adapted environments to fulfil New Zealand’s art 24 obligations in line with Tomaševski’s standards.

NZQA offers many solutions which schools should utilise. Variability of access to assistive technologies show that many schools must make greater efforts to apply for supports, including SACs, on behalf of their students with disabilities.¹⁴⁷ Furthermore, NZSL has been introduced as a subject under the National Certificate of Educational Achievement in 2015. This must be promoted to prospective students as an opportunity to create greater awareness, acceptability, and communication between deaf and hearing students. NZSL interpreters should urgently be classified as approved ORS specialists in order to allow more students to access their supports. While these solutions indicate progress, the NZSL Act should ultimately be amended to recognise a right to education in NZSL.

145 IMM 2012, above n 55, at 20–21.

146 *Making disability rights real — Whakatūturu ngā tika hauātanga: Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons With Disabilities* (Human Rights Commission, June 2014) [IMM 2014] at 22.

147 Ministry of Education and the New Zealand Qualifications Authority, above n 115, at 2.

Adapted buildings are an essential factor in fostering an equal right to education for persons with disabilities. The IMM has recommended that universal design concepts be incorporated into the Building Act and Code on a mandatory basis.¹⁴⁸ Representatives from the disabled community ought to be consulted in the building consent process, so that new buildings are made accessible. This would mean persons with disabilities do not have to fight for the right to access later on. The MOE is now prepared to make reasonable modifications to every school that makes a property modification request.¹⁴⁹ The MOE's planned \$1.137 billion investment into development of modern learning environments over the next decade should include upgrading all educational institutions to meet universal design concepts under minimum standards of inclusive education, irrespective of modification requests.¹⁵⁰ A proactive stance is needed to build accessible facilities which benefit all learners; "if we change our environment so that everyone can [have] access ... then we open the doors to everyone".¹⁵¹

Having discussed possible solutions, it is clear that the current framework does not adequately fulfil New Zealand's art 24 obligations. Key changes, imperative to improving the right to education for persons with disability, will now be outlined.

V Recommended Changes

A human rights approach in government decision-making is essential to provide greater accountability in the provision of education to persons with disabilities under art 24. The proposed changes are widespread and necessitate co-operation between Parliament, the MOE, IMM, the courts, teaching professionals, DPOs as disabled community representatives, and the public. Article 4 of the CRPD requires states to ensure a better realisation of rights are developed "by and not on behalf of oppressed people".¹⁵² As rights-holders, persons with disabilities are best placed to inform legislation and policy changes.

Part V will outline pivotal changes required to the EA89, HRA, NZSL Act, SSEE Rules, and NAGs. These changes will ensure an equal right to education for persons with disabilities in New Zealand no longer remains an aspiration. Article 24 will be used as a framework for reform to develop proposed *Minimum Standards of Inclusive Education*, collect quantitative and qualitative data, establish an Education Tribunal and ratify the CRPD OP.

A Amendments to the Education Act 1989

The right to education under the EA89 lacks detail concerning its substantive content. Following ratification of the CRPD, Parliament made no amendments to provisions which encapsulate the right to education for persons with disabilities.¹⁵³ New Zealand operates under a dualist system of international law; international treaty provisions must be

148 IMM 2014, above n 146, at 56.

149 Interviewee One, above n 56.

150 Ministry of Education *Annual Report 2014* (October 2014) at 37–38.

151 Interviewee Two, above n 31.

152 Roger Slee "Clauses of conditionality: the 'reasonable' accommodation of language" in Len Barton (ed) *Disability and Society: Emerging Issues and Insights* (Addison Wesley Longman, Essex, 1996) 107 at 118.

153 Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008, s 4. No amendments were made to EA89, ss 3, 8 and 9.

incorporated into domestic legislation in order to be legally enforceable. It is submitted that Parliament should create a clearly enforceable substantive right under the EA89, thereby giving domestic recognition to the rights conferred in art 24. This will benefit all learners, not only those with disabilities. Cognisant of *Daniels*, a positively-framed, explicitly worded right would provide the necessary reliability for persons with disabilities and a clear direction for judicial enforcement. The NZBORA would also benefit from an amendment recognising a right to education, although including economic, social and cultural rights in this statute is less likely and would require significant constitutional overhaul.

Pursuant to the preference for inclusion and mainstream recognition of disability rights, amendments should be made to the EA89, rather than passing separate legislation dealing with persons with disabilities' rights exclusively. All education providers will have to recognise and provide an equal right to education for persons with disabilities. The EA89 should be amended to read:¹⁵⁴

2 Interpretation

“Additional educational supports” means the provision of resources, assistive technologies, facilities, specialised teachers and peer-supports, and/or the delivery of the curriculum in appropriate languages and modes of communication aimed to accommodate each person’s individual educational needs to facilitate their effective education.

“High level of additional educational supports” means the provision of additional educational supports to supported learners classified as “high needs” under ORS.

“Inclusive education” means the provision of education for all students, including supported learners, within the general state school system.

“Satellite classroom, unit or service” means a classroom, unit or service, within a state school, designed specifically to provide education for supported learners who cannot be accommodated within inclusive education.

“Separate school” means a day or residential school designed specifically to provide education for supported learners who cannot be accommodated within inclusive education.

“Supported learners” means students requiring additional educational supports.

8 Equal rights to *inclusive* primary and secondary education

- (1) Except as provided for in this Part, *supported learners* have the same right to enrol and receive *inclusive education* at state schools on the *basis of equal opportunity* with those who do not.
- (2) Supported learners have a *right to receive additional educational supports* required, within state or *separate* schools or *satellite* classrooms, units or services, to *facilitate their effective education within a suitable environment*.¹⁵⁵

154 Note that the new wording of existing sections is italicised.

155 EA89, s 8(2) would move down to become s 8(3) and should remain unchanged as the right for schools to maintain enrolment schemes and discipline problematic students cannot practically be compromised, although see amendments to SSEE Rules at Part IV(E) below.

9 *Separate education and additional educational supports*

- (1) If satisfied that it is in *the best interests* of a person under 21 to receive a *high level of additional educational supports*, the Secretary shall—
- (a) agree with the person’s parents that the person should be enrolled, or direct them to enrol the person, in a particular state school, *separate* school, or *satellite* classroom, unit or service; and/or
 - (b) agree with the person’s parents that the person should receive, or direct them to ensure that the person receives, *a high level of additional educational supports*.

The words “special school, special class, or special clinic” and “special education service” under s 9(2) and (4) should be substituted for the words “separate school, or satellite classroom, unit or service” and “additional educational supports”, respectively.¹⁵⁶

These amendments incorporate the wording of art 24, as well as explicitly recognise a substantive right to inclusive education. The amendments to s 2 are consistent with the broader definition of special education under the EA64 and incorporate inclusive terminology. The disabled community no longer appreciate patronising phraseology (“special”), as it hinders inclusiveness by implying lack of ability.¹⁵⁷ The alternative proposed phrases are practical descriptions of the services provided. The terms “supported learners” and “additional educational supports” recognise that some students are entitled to supports beyond those required by the majority of learners. The word “separate” acknowledges that some schools, distinct from the mainstream, are specifically designed to cater for persons with disabilities, while “satellite” adopts the current terminology used by the MOE.

The proposed amendments to s 8 recognise explicitly that persons with disabilities, who are denied enrolment in mainstream schools, have a legally enforceable right to education. The addition of s 8(2) clarifies the debate between the High Court and the Court of Appeal in *Daniels*, recognising not only a procedural but also a substantive right to receive additional educational supports within the best suited environment. This aligns with Kishore Singh’s statement that establishing justiciability is crucial. This can be achieved through clear legislative wording, outlining specific entitlements available and allows individuals to seek redress for non-fulfilment of international obligations.¹⁵⁸

Amendments to s 9 predominantly incorporate wording appropriate to the new philosophy. The “best interests of the child” determines the Secretary’s primary considerations in reaching a decision, recognising this CRPD principle. A s 9 agreement should only be required for the narrow class of persons with disabilities requiring a “high level” of additional supports, in line with Keith J’s assertion in *Daniels*. The addition of this requirement ensures children who experience the entire spectrum of disabilities are guaranteed an individualised “best interests” appraisal of their educational needs. This needs to occur concurrent to an overhaul of the various funding schemes. Pragmatically, the Secretary retains the ability to make directions where an agreement cannot be reached. However, this decision should be well informed through substantial consultation with professionals familiar with the child’s needs. The recognition of a substantive right to

156 EA89, ss 9(3) and (5) should remain unchanged.

157 Hickey and Gledhill, above n 14, at 242–243.

158 Kishore Singh *Report of the Special Rapporteur on the right to education – Justiciability of the right to education* XXIII A/HRC/23/35 (2013) at [27].

supports, which facilitate best educational outcomes, should encourage decisions that satisfy all parties. The right of appeal against the Secretary's decisions under s 10 should remain unchanged. If parents are dissatisfied, the enforceable right to substantive education in an inclusive system should encourage the courts to take a stronger approach to judicial review. These EA89 amendments should be strengthened through correlative amendments to anti-discrimination law.

B Amendments to the Human Rights Act 1993

A discrimination definition and a clear obligation to provide reasonable accommodation would enhance the HRA. These amendments will fulfil New Zealand's obligation to enact legislative measures, giving effect to art 24. Parliament must ensure that legislation explicates the denial of reasonable accommodation as tantamount to an act of unlawful discrimination. Thus, this will indicate to the judiciary that legislation should be interpreted in accordance with both the letter and spirit of the CRPD.¹⁵⁹ ECE providers and schools will be able to recognise their responsibilities more readily to reasonably accommodate learners with disabilities.

United Nations (UN) Enable identify three options for states: to enact either a specific disability anti-discrimination law,¹⁶⁰ an equality law, or ensure the CRPD's understanding of disability and discrimination is explicitly referenced and "fully reflected in a general anti-discrimination law".¹⁶¹ Given the scope of this article, it would be inappropriate to assume that all rights for persons with disabilities would be better recognised in disability-specific legislation. UN Enable has acknowledged that provisions relating to persons with disabilities are often better placed within general, thematic legislation, such as the EA89 and the HRA, consistent with international mainstreaming of disability rights.

HRA amendments should read:

2 Interpretation

"Discrimination" means treating two comparable groups differently by reason of one of the prohibited grounds of discrimination, thus creating disadvantage for the disadvantaged group.

"Reasonable Accommodation" means necessary and appropriate modification not imposing a disproportionate or undue burden, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms contained in the NZBORA or any other enactment.

Section 57(1) should have a further paragraph inserted to read that it is unlawful for an educational establishment:

- (e) to fail to provide a person with reasonable accommodation that prevents their enrolment or limits the exercise of their right to quality education provided by the educational establishment ...

159 Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of New Zealand* XII CRPD/C/NZL/CO/1 (2014) at [50].

160 For example s 23 of the Disability Discrimination Act 1992 (Cth); and the Disability Discrimination Act 1995 (UK), Part IV.

161 Andrew Byrnes and others "From Exclusion To Equality: Realizing The Rights Of Persons With Disabilities" (2007) United Nations <www.un.org> at ch 5.

Finally, s 60(1) should be amended to read:

- (1) Section 57 applies *except where* the provision of *reasonable accommodation*, which would enable a person with a disability to participate in an educational programme or derive substantial benefits from that programme, would impose a disproportionate or undue burden on educational establishments.

These amendments would increase educational providers' awareness of a clear obligation to reasonably accommodate learners with disabilities. Amendments to ss 2 and 57 incorporate CRPD definitions, specifically referring to substantive equality which, remarkably, is not currently mentioned in the HRA or the NZBORA. The current definition of disability under s 21(h) is consistent with the broad CRPD definition and can be read in conjunction with the newly inserted definition of discrimination in order to ascertain whether discrimination has occurred against persons with disabilities. The discrimination definition specifically incorporates international obligations, because it is necessary under New Zealand's dualist system. This definition also provides legislative legitimacy to the leading *CPAG* decision, and ensures consistency in judicial application.

The addition of s 57(1)(e) and amendment of s 60(1) elucidate a positive obligation, asserting that the provision of reasonable accommodation should be the default position. The Ministry of Justice is currently creating reasonable accommodation guidelines for rights-holders, which could be read in conjunction with amended obligations to reasonably accommodate. This would further clarify the rights of persons with disabilities and the responsibilities of education providers.

C Amendments to the New Zealand Sign Language Act 2006

The NZSL Act should also be amended in order to incorporate the wording of art 24 and include an enforceable right to education in NZSL,¹⁶² further fulfilling New Zealand's obligation to adopt legislative measures which implement CRPD provisions.¹⁶³ Schools would be compelled to provide inclusive and adaptable education for students with hearing impairments. The current s 7 of the NZSL Act should be relabelled s 7A, following a new s 7, which should read:

7 Right to use NZSL in education

- (1) Persons whose first or preferred language is NZSL have the right to:
- (a) Learn NZSL in early childhood and school education; and
 - (b) Have the New Zealand Curriculum delivered in NZSL.

Section 8, which holds that no legally enforceable rights are created in recognising NZSL as an official language, should necessarily be amended to read:

8 Effect of recognition

- (1) *Aside from s 7 and 7A*, s 6 does not create any legally enforceable rights.

The right to NZSL in ECE and schooling stresses the importance for deaf students to learn NZSL at as young an age as is practical. This will form the basis of their ability to

162 Office for Disability Issues, above n 119, at [103]–[104].

163 CRPD, art 4(a).

communicate in all aspects of their lives.¹⁶⁴ The new s 7 recognises that, as with English and Te Reo Māori, students should have an enforceable right to communicate in NZSL. The right to use NZSL in education should precede the right to use NZSL in legal proceedings; NZSL cannot be used elsewhere if it has not first been taught. These substantial legislative amendments to the ERA89, HRA and NZSL Act should be reinforced through the implementation of several policy changes, discussed forthwith.

D *Minimum Standards of Inclusive Education*

The MOE, in consultation with DPOs, should develop a comprehensive list of *Minimum Standards of Inclusive Education* under a nationwide transition strategy, to give credence to an amended substantive right to education under the EA89. The Minimum Standards should require ECE providers and schools to:¹⁶⁵

- (a) mandatorily require pre-service and in-service staff training on inclusive practices;
- (b) facilitate early identification of individual learners' needs;
- (c) fund support for all entitled students;
- (d) be physically accessible to all students, including the provision of adequate transport services;
- (e) develop a curriculum accessible to all learners;
- (f) provide accessible communication for all students, including NZSL and Braille; and
- (g) ensure social accessibility to peers.

The transition to full inclusion should occur on a manageable timeline. Thereafter, all educational establishments should be required to maintain their facilities and services at the appropriate level.

The numerous separate and inflexible funding schemes should be disestablished and pooled into ORS.¹⁶⁶ A ranking system within the one scheme will acknowledge that students require different levels and types of support based on individually assessed needs. Students ranked as high needs will require s 9 agreements or directions. Criteria will focus not on impairment but on supports needed to reach learning potential. Moreover, allocation of the SEG should be overhauled and granted proportionally to the number of supported learners in each school, not according to decile rating. More targeted funding would ensure greater efficacy and co-ordination in investments, as well as better educational outcomes for students.

E *Amendments to the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999*

It is recommended that further amendments be made to the SSEE Rules in order to avoid unfair punishment, as occurred in *A v Hutchinson*. Principle 7, which outlines processes, practices and procedures should include an additional consideration under subclause (d), which would require school governance to recognise the unique position of persons with disabilities when making decisions on serious disciplinary matters. This amendment is consistent with the recognition of other minority groups, such as Māori, who are proportionately over represented in negative discipline figures. IEPs should be consulted

164 Interviewee Eight, above n 118.

165 See Tony Booth and Mel Ainscow *Index for inclusion: developing learning and participation in schools* (3rd ed, Centre for Studies on Inclusive Education, Bristol, 2011) at [A.1]–[C.2].

166 The schemes include ORS, SHNHF, Communication Service, and Severe Behaviour Services, discussed above at Part II(B)(2): “Funding.”

for alternative means of de-escalating disability-related behaviour. With the best interests of learners with disabilities in mind, serious disciplinary measures should only be used as a last resort.

F *Gathering data*

As a precursor to data collection, the IMM has recommended that a universal definition of disability be adopted across all government departments to ensure that statistics are comparable. The Government should adopt the social model definition outlined under art 2 of the CRPD.¹⁶⁷ This will provide the most effective measure of the extent to which art 24 rights have been met.

The MOE, Statistics New Zealand, ERO and DPOs must routinely collect and report relevant data on the experience of persons with disabilities in accessing education. This is to inform the direction of future legislation and policy, and to facilitate effective IMM monitoring. MacArthur states that collection of valuable data is the “lifeblood of continuous improvement”.¹⁶⁸ While Statistics New Zealand collects data for national disability surveys, alongside its five-yearly census, there are no plans for 2013 data to be disaggregated into a report on disability and education, as that which occurred following the 2006 Survey. The relationship between disability and education post-ratification of the CRPD presents no comprehensive statistics. A lack of meaningful recent data was a challenge for obtaining evidence to support findings expressed in this article.

Quantitative and qualitative data is needed to establish the extent of inclusive education, achievement rates, effectiveness of supports, the rate of bullying, as well as the experience of whānau hauā and Pasifika persons with disabilities. Data should compare learning outcomes of persons with disabilities with all other equivalent groups.¹⁶⁹ Unlike ERO’s 2011 self-review questionnaire, schools should be held accountable for the number of students who are actually participating and accessing supports. Data should correlate with the extent to which the *Minimum Standards of Inclusive Education* are being met. This can be used to determine actions that each school, and ECE centre, must take in order to implement fully inclusive and culturally responsive education, promoting widespread tolerance.

G *Amendment to the national administration guidelines*

The UN Committee on Economic, Social and Cultural Rights (CESCR),¹⁷⁰ New Zealand Law Commission,¹⁷¹ IMM, and Ombudsman,¹⁷² have recommended that all schools be required to implement anti-bullying programmes. This mandatory obligation would remove current reliance on ethical leadership within each school. The NAGs should extend beyond the

167 CRPD, art 2.

168 MacArthur, above n 34, at 24.

169 Including comparisons between all persons with disabilities and non-disabled persons, and between whānau hauā and Pasifika persons with disabilities and both non-disabled Māori and Pasifika, and non-Māori and Pasifika persons with disabilities.

170 Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand XLVII E/C.12/NZL/CO/3* (2012) at [19].

171 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 6.83.

172 IMM 2012, above n 55, at 123–124; and Office of the United Nations High Commissioner for Human Rights *Summary of Stakeholder’s Information on New Zealand XVIII A/HRC/WG.6/18/NZL/3* (2013) at [77].

current requirement of BOTs in order to provide a “safe physical and emotional environment for students”.¹⁷³ A new Guideline 5A should be inserted, which requires each BOT to implement a school-wide safety and anti-bullying programme and complaints process in order to gather information on the rate and types of bullying experienced by students. This would identify vulnerable groups, such as persons with disabilities, Māori and Pasifika. Undertaking this requirement will expose deficits in prevention and response methods, increasing awareness and informing more effective remedial measures.

H *Education tribunal*

In accompaniment to these changes, Parliament should consider establishing an independent quasi-judicial body, similar to the Employment Relations Authority, specialising in educational complaints. This body should be established under the EA89 and sit above the MOE complaints services, but below the courts. This would allow the courts to expedite decisions whilst providing a more affordable accountability mechanism. A Special Education Needs and Disability Tribunal (SENDT) has been established in the United Kingdom.¹⁷⁴ Complaints to the SENDT cover issues including discrimination in education, parents’ disagreement with their local authority’s decision regarding their child’s educational needs assessment or the development of their child’s Education, Health and Care Plan.¹⁷⁵

To justify the considerable expense involved in establishing an additional body, the Education Tribunal should consider all education complaints and appeals arising from MOE decisions, not only those concerning persons with disabilities. The Tribunal’s jurisdiction should include enrolment and s 9 decisions, provision of additional educational supports, barriers to participation, and unfair disciplinary action. The disadvantaged position of persons with disabilities outlined in this article indicates that the current system is not working effectively. This thereby gives validity to the establishment of an independent and dedicated authority. Having discussed necessary changes to the domestic framework, international enforceability options will be examined.

I *International enforcement*

While this study has focused on domestic remedies, there is also merit in exploring an effective international mechanism for persons with disabilities to enforce their right to education under art 24. Tomaševski and many others have stressed that no right can exist without an effective remedy. International enforcement mechanisms are valuable in determining whether or not domestic remedies are valid. This section will discuss the international enforcement mechanisms available and assess which Optional Protocol the Government should ratify.

(1) Optional protocol to the CRPD

New Zealand’s failure to ratify the CRPD OP means that persons with disabilities are unable to access the individual communications measures, and the CRPD Committee cannot conduct an inquiry into New Zealand’s fulfilment of art 24. Following

173 “National Administration Guidelines”, above n 23, Guideline 5(a).

174 See Disability Discrimination Act 1995 (UK), ss 28H–28M.

175 United Kingdom Government “Appeal to the Special Educational Needs and Disability Tribunal” (10 August 2015) <www.gov.uk>.

recommendations from the CRPD Committee,¹⁷⁶ New Zealand is intending to accede to the CRPD OP as soon as is practical.¹⁷⁷

The CRPD OP allows persons who believe that their art 24 rights have been violated to make a complaint, called a “communication”, to the CRPD Committee.¹⁷⁸ Individual communications act as a last resort when domestic remedies have been exhausted. Should the CRPD Committee decide that the complaint is admissible and substantively meritorious, they may formulate recommendations for the State concerned.¹⁷⁹ The Committee’s final decision is published, thus promoting State accountability in the international arena.

The inquiry procedure allows the CRPD Committee to conduct its own investigations based on reliable evidence of grave or systematic rights violations.¹⁸⁰ The Committee may require states to comment and designate Special Rapporteurs to inquire urgently. Findings will be transmitted to the concerned State for response, then a summary published and reported to the UN General Assembly. In ratifying the OP, States may “opt out” of the inquiry process, but not the communications process. This recognises the fundamental right of aggrieved persons to access an international mechanism to vindicate their rights.

The CRPD Committee currently has some ability to hold the New Zealand Government to account under the periodic reporting mechanisms. The CRPD Committee provides a List of Issues requiring government response, then reports its Concluding Observations.¹⁸¹ Following New Zealand’s first report, the CRPD Committee recommended that the Government increase the provision of reasonable accommodation in schools, implement anti-bullying programmes and establish an enforceable right to inclusive education.¹⁸² These observations express a commitment by the CRPD Committee to ensuring that New Zealand is complying with its art 24 obligations.

(2) Other international mechanisms

New Zealand has ratified neither the Optional Protocol to the International Covenant on Civil and Political Rights (ICESCR OP), nor the Third Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure (CRC OP3). Should New Zealand ratify either of these Optional Protocols, they would provide an alternative international enforcement mechanism of the right to education for persons with disabilities. Each of these Optional Protocols establish a complaints and inquiry process similar to the CRPD OP.¹⁸³

176 Committee on the Rights of Persons with Disabilities *List of issues in relation to the initial report of New Zealand* XII CRPD/C/NZL/Q/1 (2014) at [1].

177 New Zealand Government, above n 42, at [1].

178 Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD OP], arts 1–5.

179 Byrnes and others, above n 161, at ch 3.

180 CRPD OP, arts 6–7.

181 CRPD, arts 35 and 36.

182 Committee on the Rights of Persons with Disabilities, above n 159, at [50].

183 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Doc.A/63/435 (open for signature 24 September 2009, entered into force 5 May 2013) arts 1–12; and Third Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure A/RES/66/138 (opened for signature 28 February 2012, entered into force 14 April 2014), Parts II and III.

Article 13 of the ICESCR recognises a general right to education, but does not specifically mention persons with disabilities. The ICESCR emphasised the invidious nature of discrimination on the grounds of disability in accessing education, and implored states to be proactive in providing equitable educational opportunities for persons with disabilities.¹⁸⁴ The ICESCR is, however, not the best body to address violations of this right. It is disappointing that the ICESCR has commended New Zealand for developing a curriculum “which is more responsive to the diversified student population,” given the Committee fell short of discussing access to education for persons with disabilities, specifically.¹⁸⁵ The ICESCR focuses on general rights, whereas the CRPD Committee has a greater appreciation of additional protections afforded to persons with disabilities in affirming their right to education.

The CRC OP3 is the best alternative to the CRPD OP for children with disabilities seeking to enforce their right to education, given the close alignment of the two treaties.¹⁸⁶ Similar to the CRPD, art 3 of the CRC introduced the “best interests of the child” doctrine. Article 23 of the CRC recognises general rights of children with disabilities, including accessing education to achieve their “fullest possible social integration and individual development.” Articles 28 and 29 enshrine the equal right to receive education for all children. Both treaties demand that children with disabilities have the right to be involved in decisions affecting them.¹⁸⁷ As with the CRPD Committee, the CRC Committee recommends that the Government invest in inclusive, quality education for all disadvantaged children.¹⁸⁸

However, the CRC recognises some rights that are better addressed by art 24 of the CRPD, and protects only the rights of children under 18 years of age. Despite being beyond the scope of this article, art 24 rights extend to adults pursuing “life long learning”.¹⁸⁹ The broader application and, most importantly, specific disability experience of the CRPD Committee, means the CRPD OP is the best international mechanism for enforcing the right to education for persons with disabilities. The Government’s priority must be to ratify the CRPD OP urgently. Ratification of the CRPD OP will allow individuals to seek redress where they feel their art 24 rights have been violated. The CRPD Committee will be able to assess the sufficiency of New Zealand’s domestic remedies to address this issue. Having recommended changes at both the domestic and international levels necessary to New Zealand fulfilling its art 24 obligations, a summation of concluding observations follows.

184 Committee on Economic, Social and Cultural Rights, *General Comment No 5 – Persons with Disabilities* XI E/1995/22 (1994) at [5].

185 Committee on Economic, Social and Cultural Rights, above n 170, at [5].

186 Committee on the Rights of the Child *General Comment No 9 – The rights of children with disabilities* XLIII CRC/C/GC/9 (2007) at [62]–[63].

187 United Nations Convention on the Rights of the Child, arts 5 and 14(2); and CRPD, art 3(h).

188 Committee on the Rights of the Child *Concluding Observations: New Zealand* LVI CRC/C/NZL/CO/3-4 (2011) at [45]. See also Office of the United Nations High Commissioner for Human Rights *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21* XVIII A/HRC/WG.6/18/NZL/2 (2013) at [60].

189 CRPD, art 24(5).

VI Conclusion

New Zealand is not meeting its obligations under art 24 of the CRPD. Part II of this article measures doctrinal research of New Zealand's current framework for protecting persons with disabilities' right to education against Tomaševski's *Four As Framework*. Her highly acclaimed standards of availability, accessibility, acceptability and adaptability proved an effective conceptual yardstick against which to gauge New Zealand's compliance with art 24. Eight individuals with experience in the disability and education sectors were interviewed to inform the author's research for this article. This doctrinal and socio-legal research revealed that the current domestic framework lacks a substantive and enforceable right to inclusive education, an equitable funding scheme, a clear obligation for educators to provide reasonable accommodation, and a right to learn and use NZSL. All evidence points towards the finding that persons with disabilities lack the sufficient educational supports required in order to ensure learners achieve their best educational outcomes.

Available solutions were explored under the current legislative and policy framework in Part IV of this article. However, these proved inadequate when measured against Tomaševski's framework. A more nuanced approach to mainstreaming students with disabilities, as well as funding additional supports, is required in order for the goal of an available and fully inclusive education system to be achieved. Enforcement of a substantive right to access education under the EA89 remains subject to judicial uncertainty, while a claim in negligence is undesirable and unlikely to succeed. While the HRA provides an effective anti-discrimination framework, a positive, explicit obligation to provide reasonable accommodation is needed. Increased acceptability in education requires educators to take account of disability-related behaviour when making disciplinary decisions. Further data collection is needed in order to identify the gaps in current anti-bullying measures, as persons with disabilities are proportionately over-represented as victims. Educators must also be proactive in using adaptive technologies and languages in the classroom and creating adapted environments for New Zealand to better fulfil its art 24 obligation.

Part V proposed recommendations required to ensure that New Zealand fulfils its art 24 obligations. These recommendations included:

- (a) amendments to the EA89 to recognise a substantive right to education for persons with disabilities;
- (b) amendments to the HRA to recognise a clear obligation to provide reasonable accommodation for persons with disabilities in education;
- (c) amendments to the NZSL Act to recognise deaf learners' right to learn and use NZSL in ECE and schools;
- (d) an additional requirement to consider the unique position of persons with disabilities in the SSEE Rules;
- (e) the development of 'Minimum Standards of Inclusive Education' under a transition strategy;
- (f) collection of quantitative and qualitative data on inclusive practices, and the correlation between disability, bullying, and minority cultures;
- (g) a national requirement that BOTs implement an anti-bullying strategy under the NAGs;
- (h) establishment of an Education Tribunal; and
- (i) urgent ratification of the CRPD OP.

The recent comment of Tom Parsons, Secondary Principals' Association President, that students with disabilities should not be identified within the school setting, let alone given additional supports, poignantly illustrates the need for these recommended changes as leverage for greater public awareness and an attitudinal shift.¹⁹⁰ As Helen Keller observed, persons with disabilities must be given an equal opportunity to exercise their right to education, which maximises social and academic potential. It is fundamental that New Zealand fulfils its art 24 obligation in order to provide an equal education for persons with disabilities. This recognises the inherent dignity of persons with disabilities and ensures that no learner is left behind.

190 Jo Moir and Cate Broughton "Endless disorders a 'nightmare' for schools" *The Press* (online ed, Christchurch, 22 November 2014).