

**IN THE MATTER OF** the Eighteenth Session of the Universal Periodic Review  
**UNDER** *Human Rights Council GA Res 60/251, A/RES/60/251 (2006)*  
**STATE PARTY** New Zealand

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**SUBMISSION OF HAZEL ARMSTRONG LAW TO  
THE EIGHTEENTH SESSION OF THE UNIVERSAL  
PERIODIC REVIEW BY THE HUMAN RIGHTS  
COUNCIL OF THE UNITED NATIONS**

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## 1 INTRODUCTION

1.1 This submission to the Universal Periodic Review is made by Hazel Armstrong Law. Hazel Armstrong Law is a law firm based in Wellington, New Zealand, that specialises in accident compensation, and has working relationships with several non-governmental organisations, such as the National Foundation for the Deaf.

## 2 ISSUE

2.1 This submission concerns New Zealand's accident compensation scheme, and the treatment of claimants suffering from hearing loss.

### *The Accident Compensation Act*

2.2 New Zealand citizens do not generally have the right to sue in tort for personal injury.<sup>1</sup> Instead, New Zealand has a no-fault accident compensation scheme. Medical, rehabilitative and compensatory costs are covered by the Accident Compensation Corporation (ACC). Entitlement to medical and rehabilitative assistance is governed by the Accident Compensation Act 2001.

### *The Accident Compensation Act and Hearing-Loss Claimants*

2.3 The Act's provisions are discriminatory against hearing loss claimants. Under the Act, a person may be covered if they suffer "any degree of hearing loss that is 6% or more of binaural hearing loss caused by a personal injury described in section 20(2)."<sup>2</sup> In most cases of hearing loss, the claimant will be claiming for hearing loss cover as a "personal injury caused by a work-related gradual process, disease, or infection"<sup>3</sup> under s 20(2). Section 26(1A) was enacted in 2010,<sup>4</sup> after New Zealand ratified the Convention on the Rights of Persons with Disabilities (CRPD).<sup>5</sup>

2.4 The effect of ss 26(1A) and 20(2) is to prevent a person from obtaining cover for hearing loss, unless six percent of their total hearing loss is attributable to occupational noise exposure (the six percent threshold). This is contrary to New Zealand's obligations under the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> and the CRPD.<sup>7</sup>

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<sup>1</sup> Accident Compensation Act 2001, s 317.

<sup>2</sup> Section 26(1A).

<sup>3</sup> Section 20(2)(e).

<sup>4</sup> Accident Compensation Amendment Act 2010, s 8.

<sup>5</sup> Ministry of Justice "Convention on the Rights of Persons with Disabilities" Ministry of Justice <<http://www.justice.govt.nz>>.

<sup>6</sup> International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

<sup>7</sup> Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008), arts 4, 10, 25 and 26.

### 3 THE SIX PERCENT THRESHOLD

#### *Introduction of the Threshold*

- 3.1 The six percent threshold was enacted in 2010.<sup>8</sup> The amending Bill was introduced in October 2009.<sup>9</sup> The Minister for ACC stated that the accident compensation scheme had become “financially unsustainable”, and the Bill, later to become the Accident Compensation Amendment Act 2010, was to decrease costs.<sup>10</sup> The Bill’s provisions were mostly “reversals of scheme extensions” that had been enacted by an earlier government.<sup>11</sup> In introducing the Bill, the Minister stated that the government was “effectively concluding that the cost of hearing aids for low levels of hearing loss is not justified by the benefits.”<sup>12</sup> The significance of this is that the six percent threshold removed an existing right to cover, and that the government was aware of this.
- 3.2 A select committee supported the threshold, citing the cost of hearing loss claims.<sup>13</sup> Many submissions made on the Bill opposed the introduction of the threshold, which was described as eroding the social contract established by the Accident Compensation Act,<sup>14</sup> a cost cutting measure ignoring claimant needs;<sup>15</sup> as disproportionately affecting the poor<sup>16</sup> and as discriminatory against hearing loss claimants,<sup>17</sup> particularly the elderly and retired.<sup>18</sup> Many audiologists and interest groups stated that the six percent figure was arbitrary.<sup>19</sup>

#### *Hearing Loss falling below the Threshold is still Significant*

- 3.3 The six percent threshold does not include hearing loss caused by non-occupational factors. This means that, especially for elderly persons, there may be a loss of hearing above six percent without cover being granted, as less than six percent of the total loss of hearing has been assessed as being attributable to occupational noise. It is not possible for

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<sup>8</sup> Accident Compensation Amendment Act, s 8.

<sup>9</sup> (27 October 2009) 658 NZPD 7428 per Nick Smith.

<sup>10</sup> At 7429 per Nick Smith.

<sup>11</sup> At 7429 per Nick Smith.

<sup>12</sup> At 7430 per Nick Smith.

<sup>13</sup> Injury Prevention, Rehabilitation, and Compensation Amendment Bill 2010 (90-2) (select committee report) at 5.

<sup>14</sup> New Zealand Law Society “Submission on Injury Prevention, Rehabilitation and Compensation Amendment Bill” at [2.2].

<sup>15</sup> The New Zealand Hearing Sector “Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention, Rehabilitation and Compensation Amendment Bill” at [9].

<sup>16</sup> At [33].

<sup>17</sup> Human Rights Commission “Submission on the Injury Prevention, Rehabilitation & Compensation Amendment Bill” at [6.5]; New Zealand Council of Trade Unions “Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention, Rehabilitation, and Compensation Amendment Bill” at [10.5].

<sup>18</sup> The New Zealand Hearing Sector, above n 15, at [31]; The National Foundation for the Deaf “Submission to the Transport and Industrial Relations Committee on The Injury Prevention, Rehabilitation and Compensation Amendment Bill” at [4.1]–[4.6].

<sup>19</sup> The New Zealand Hearing Sector, above n 15, at [38]; Peter Thorne and David Welch “Submission to the Transport and Industrial Relations Committee on The Injury Prevention, Rehabilitation and Compensation Amendment Bill” at [1.1]; New Zealand Audiological Society “Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention, Rehabilitation and Compensation Amendment Bill 2009” at [2.3].

assessors to accurately attribute a percentage of hearing loss to occupational noise. Complicating factors include hearing degeneration with age<sup>20</sup> and exposure to non-occupational noise.<sup>21</sup> The ACC assessment guidelines for hearing loss cover state that “the level and duration of [occupational] noise should be elicited (actual noise level data from the employer, *or estimates*).”<sup>22</sup> The guidelines further state that the assessor’s “opinion should be based on the balance of probabilities.”<sup>23</sup>

- 3.4 A loss of hearing falling below six percent is still a significant impairment.<sup>24</sup> Noise-induced hearing loss often affects higher frequency ranges, which are crucial to speech understanding.<sup>25</sup> Hearing loss at higher frequencies can lead to difficulty distinguishing between sounds, which in turn leads to difficulty in conversation.<sup>26</sup> Data from the National Foundation for the Deaf indicates the severity of apparent low levels of hearing loss:<sup>27</sup>

83% of claimants with less than 10% hearing loss had significant hearing problems in more than half of their usual listening situations, while nearly half of them have significant hearing problems in most of their activities.

#### *The Prevalence of Hearing Loss*

- 3.5 Occupational hearing loss is thought to affect up to 2.6 percent of the population. Each year, there are an estimated 1800 new cases of occupational noise-induced hearing loss, and up to 25 percent of the hearing-impaired population suffer from noise occupational hearing loss.<sup>28</sup> This is a significant figure, and means that any discrimination on the basis of hearing loss in the accident compensation scheme affects a large proportion of New Zealand’s hearing-impaired community.

## **4 INTERNATIONAL AND DOMESTIC HUMAN RIGHTS LAW**

- 4.1 New Zealand’s international obligations under the ICCPR are reflected in the New Zealand Bill of Rights Act 1990.<sup>29</sup> New Zealand has also ratified the CRPD.

#### *The ICCPR and the Bill of Rights Act*

- 4.2 The ICCPR states that everyone is equal before the law, and is entitled protection of the law free from discrimination.<sup>30</sup> Article 26 is reflected in the Bill of Rights Act. Under the Act,

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<sup>20</sup> Anne Greville and others *Assessment of occupational noise-induced hearing loss for ACC: A practical guide for otolaryngologists* (Accident Compensation Corporation, 2011) at 16.

<sup>21</sup> At 15.

<sup>22</sup> At 14 (emphasis added).

<sup>23</sup> At 28.

<sup>24</sup> Thorne and Welsh, above n 19, at [5.24]; The National Foundation for the Deaf, above n 18, at [3.1].

<sup>25</sup> Mike Sharp “Changes in ACC cover for Hearing Loss: Occupational Noise Induced Hearing Loss (ONIHL)” (paper presented to ACC Futures Conference, Wellington, 29 October 2012).

<sup>26</sup> The National Foundation for the Deaf, above n 18, at [3.1]; New Zealand Audiological Society, above n 19, at [5.25]; The New Zealand Hearing Sector, above n 15, at [49].

<sup>27</sup> The National Foundation for the Deaf, above n 18, at [3.2].

<sup>28</sup> Peter Thorne “Effect of noise on hearing and ‘Noise-induced hearing loss’” (paper presented to ACC Futures Conference, Wellington, 29 October 2012).

<sup>29</sup> New Zealand Bill of Rights Act 1990, Long Title.

<sup>30</sup> International Covenant on Civil and Political Rights, art 26.

“[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.”<sup>31</sup> The grounds of unlawful discrimination referred to in s 19(1) of the Bill of Rights Act include disability.<sup>32</sup>

4.3 The rights in the Bill of Rights Act are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>33</sup> However, the Bill of Rights Act is not supreme law.<sup>34</sup> In determining whether a limit is justified, the following must be considered:<sup>35</sup>

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b)
  - (i) is the limiting measure rationally connected with its purpose?
  - (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
  - (iii) is the limit in due proportion to the importance of the objective?

#### *The CRPD*

4.4 Under the CRPD, states are to undertake take all appropriate measures to modify laws which are discriminatory against persons with disabilities;<sup>36</sup> to provide persons with disabilities with the same standard of free or affordable health care as other persons;<sup>37</sup> and to provide health services needed due to disabilities.<sup>38</sup> States also have obligations relating to rehabilitation.<sup>39</sup> This includes an obligation to promote the availability of assistive technologies to persons with disabilities.<sup>40</sup>

#### *The Meaning of ‘Discrimination’*

4.5 In New Zealand, the meaning of ‘discrimination’ has been left to the determination of the courts. The leading decision on this issue, *Ministry of Health v Atkinson*, gave the following test:<sup>41</sup>

...the first step in the analysis under s 19 [of the Bill of Rights Act] is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of

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<sup>31</sup> New Zealand Bill of Rights Act, s 19(1).

<sup>32</sup> Human Rights Act 1993, s 21(1)(h).

<sup>33</sup> New Zealand Bill of Rights Act, s 5.

<sup>34</sup> Section 4.

<sup>35</sup> *R v Hansen* [2007] 3 NZLR 1 (SC) at [104] per Tipping J.

<sup>36</sup> Convention on the Rights of Persons with Disabilities, art 4(b).

<sup>37</sup> Article 25(a).

<sup>38</sup> Article 25(b).

<sup>39</sup> Article 26.

<sup>40</sup> Article 26(3).

<sup>41</sup> *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [57].

discrimination. The second step is directed to whether that treatment has a discriminatory impact.

4.6 The discriminatory impact in the *Atkinson* test must give rise to a material disadvantage.<sup>42</sup>

## 5 DISCRIMINATION AND THE ICCPR

### *Differential Treatment*

5.1 In applying the *Atkinson* test,<sup>43</sup> the six percent threshold can be seen to be discriminatory.

5.2 The first step of this test requires comparison with a comparator group to illustrate the discriminatory treatment or effects. The appropriate comparator group for hearing-loss claimants is ACC claimants who are claiming for different injuries. Hearing loss claimants are not entitled to cover unless six percent of their loss is attributable to occupational noise exposure. Other claimants are entitled to cover regardless of the significance or degree of their impairment. The Human Rights Commission has described this as discriminatory.<sup>44</sup> Disability is a prohibited ground of discrimination in domestic law,<sup>45</sup> and freedom from discrimination is protected in the ICCPR<sup>46</sup> and the Bill of Rights Act.<sup>47</sup>

### *Discriminatory Impact*

5.3 The second step of the *Atkinson* test requires the treatment to have a discriminatory impact,<sup>48</sup> which gives rise to material disadvantage.<sup>49</sup>

5.4 The differential treatment inherent in the threshold has a discriminatory impact, which gives rise to a material disadvantage.

5.5 Unless at least six percent of their hearing loss is attributable to occupational noise exposure, a claimant is not entitled to cover under the Accident Compensation Act. A hearing loss claimant with cover may be entitled to hearing aids, at ACC's expense, and other compensation. However, a person who is not assessed as having suffered the required degree of occupational hearing loss, does not receive assistance. The assessment of hearing loss is on the balance of probabilities<sup>50</sup> and after a presumption hearing loss with age. The actual level of hearing loss of a claimant may be over the six percent threshold, but they still may not receive entitlement, due to the assessor's estimate being that six percent of that total loss is not attributable to occupational noise exposure.

5.6 Hearing aids have a significant cost. Those who suffer occupational hearing loss are often employed in manual labour positions, such as the forestry and construction industries. These positions often pay lower wages than other work-types, leaving many workers who

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<sup>42</sup> At [109].

<sup>43</sup> At [57] and [109].

<sup>44</sup> Human Rights Commission, above n 17, at [6.5].

<sup>45</sup> Human Rights Act 1993, s 21(1)(h).

<sup>46</sup> International Covenant on Civil and Political Rights, art 26.

<sup>47</sup> New Zealand Bill of Rights Act 1990, s 19(1).

<sup>48</sup> *Ministry of Health v Atkinson*, above n 41, at [57].

<sup>49</sup> At [109].

<sup>50</sup> Greville and others, above n 20, at 14 and 28.

require hearing aids without any means of accessing them. In ratifying the CRPD, New Zealand:<sup>51</sup>

[highlighted] the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard [recognised] the critical need to address the negative impact of poverty on persons with disabilities.

### *Justified Limitations*

- 5.7 The rights in the Bill of Rights Act are to be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>52</sup> As this Act was enacted “to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”,<sup>53</sup> the implication is that ICCPR rights are also subject to such limitations.
- 5.8 The six percent threshold is an unjustified limitation on the right to be free from discrimination.<sup>54</sup> The purpose of the 2010 amendment was to decrease the cost of the accident compensation scheme.<sup>55</sup> Prior to the enactment of the six percent threshold, an agreement between audiology providers, manufacturers and ACC was established. The effect of this agreement was to reduce the average cost of hearing aids by approximately 20%, and resulted in savings by ACC of approximately \$7 million annually.<sup>56</sup> This agreement was established before the enacting of the six percent threshold, and represented a significant reduction of costs by ACC.
- 5.9 That this agreement was in place means that further cost-cutting measures were largely unnecessary, given that the measures taken to further cut costs infringed on the right to be free from discrimination. To borrow Tipping J’s phrasing, given the cost-cutting agreement already in place, the introduction of the threshold did not “serve a purpose sufficiently important to justify the curtailment of the right”.<sup>57</sup>
- 5.10 *Howard v Attorney General* held that a “present day assessment” of legislation is needed when determining whether a provision is a justified limitation, rather whether justification existed at the time of enactment.<sup>58</sup> The 2013 Budget has indicated significant cuts to ACC levies,<sup>59</sup> indicating the ACC scheme is in a financially stable position. The government estimates that it will return to surplus in the 2014/2015 financial year.<sup>60</sup> Given that the threshold was enacted as a cost-cutting measure, and that the accident compensation scheme is now more financially stable, the six percent threshold cannot be justified on the basis of cost saving in the present day. This means that the discrimination inherent in the

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<sup>51</sup> Convention on the Rights of Persons with Disabilities, Preamble at [t].

<sup>52</sup> New Zealand Bill of Rights Act, s 5.

<sup>53</sup> Long Title.

<sup>54</sup> Section 19(1); International Covenant on Civil and Political Rights, art 26.

<sup>55</sup> (27 October 2009) 658 NZPD 7428 per Nick Smith.

<sup>56</sup> Sharp, above n 25.

<sup>57</sup> Hansen, above n 35, at [104] per Tipping J.

<sup>58</sup> *Howard v Attorney-General* (2008) 8 HRNZ 378 (HRRT) at [70].

<sup>59</sup> Judith Collins “Govt signals around \$1b of ACC levy reductions” (16 May 2013) New Zealand National Party <<http://www.national.org.nz>>.

<sup>60</sup> Bill English *Budget 2013: Fiscal Strategy Report* (New Zealand Treasury, 16 May 2013) at 1.

six percent threshold cannot be justified. This means that the right to be free from discrimination, protected by the ICCPR and the Bill of Rights Act, has been breached.

- 5.11 The six percent threshold can also be seen as discriminatory, as it limits the right to be free from discrimination on the grounds of disability more than is reasonably necessary. The intention of the six percent threshold was cost reduction, but a more appropriate means of reducing the cost of hearing cover exist. One such measure would be to grant cover for persons with hearing loss ‘in excess of the normal degree of hearing loss for their age’. This is discussed at [7.1] of this submission.

## **6 THE CRPD**

- 6.1 The six percent threshold is contrary to the CRPD. This notion is supported by the submission of the Human Rights Commission on the amending Bill.<sup>61</sup>

### *General Obligations*

- 6.2 After having undertaken to “take all appropriate measures, including legislation, to modify or abolish existing laws”<sup>62</sup> which discriminated on the basis of disability, the New Zealand government enacted discriminatory legislation, despite the complaints made by specialists to the select committee process. While art 4(1)(b) does not explicitly prohibit future discriminatory legislation, art 4(1)(d) provides that states are to “refrain from engaging in any act or practice that is inconsistent with the present Convention”.<sup>63</sup> The enacting of the threshold is a practice contrary to art 4(1)(d).

### *The Right to Life*

- 6.3 The Convention provides that state parties are to undertake “all necessary measures” to ensure that persons with disabilities have the same “effective enjoyment” of life.<sup>64</sup> As has been discussed, persons with hearing loss below a level of six percent may still have difficulty distinguishing sounds,<sup>65</sup> and struggle to differentiate between sounds in ordinary social situations.<sup>66</sup> As these difficulties may give rise to difficulties in social and occupational situations, the provision of hearing aids is a ‘necessary measure’ to ensure that hearing-impaired persons can ‘effectively enjoy’ life. By not providing cover for persons with hearing impairments falling short of the threshold, especially given that total hearing loss may still be in excess of six percent, New Zealand is not meeting its obligations under art 10 of the convention.

### *The Right to Health*

- 6.4 In ratifying the Convention, New Zealand undertook an obligation to “[p]rovide those health services needed by persons with disabilities specifically because of their disabilities,

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<sup>61</sup> Human Rights Commission, above n 17, at [6.6].

<sup>62</sup> Convention on the Rights of Persons with Disabilities, art 4(1)(b).

<sup>63</sup> Article 4(1)(d).

<sup>64</sup> Article 10.

<sup>65</sup> The National Foundation for the Deaf, above n 18, at [3.1]; New Zealand Audiological Society, above n 19, at [5.25]; The New Zealand Hearing Sector, above n 15, at [4.9].

<sup>66</sup> The National Foundation for the Deaf, above n 18, at [3.2].

including... services designed to minimize and prevent further disabilities”.<sup>67</sup> While hearing-loss is irreversible, the provision of hearing aids artificially improves hearing.

- 6.5 The six percent threshold prevents a significant proportion of the population from gaining the benefits protected in art 25(b). This is particularly true for elderly claimants, who are presumed to have a degree of hearing loss due to age, and may therefore have a total hearing loss level of greater than six percent. It is submitted that the use of the six percent threshold puts New Zealand in breach of art 25(b).

### *The Right to Rehabilitation*

- 6.6 Parties to the Convention are required to promote the availability of assistive technologies as they relate to rehabilitation.<sup>68</sup> The provision of hearing aids to persons below the six percent threshold would have a rehabilitative effect. That hearing loss of less than six percent still leads to difficulty in sound discrimination has been discussed.<sup>69</sup> This leads to difficulties in social and vocational fields. Hearing aids mitigate these effects, and their provisions would therefore be rehabilitative. By not providing cover to certain hearing loss claimants, it is submitted that New Zealand is in breach of art 26(3) of the Convention.

## **7 RECOMMENDATIONS**

- 7.1 It is recommended that hearing loss cover be addressed in a different way:

- 1) Preferably, the threshold would be completely removed from the Accident Compensation Act. ACC should provide cover and entitlements for hearing loss on the basis of clinical need, rather than the use of an arbitrary threshold which requires assessors to estimate proportion of a person’s noise-induced hearing loss. It is submitted that this approach would be most consistent with New Zealand’s international obligations, in particular the CRPD.
- 2) In the alternative, the six percent threshold should be removed, and replaced with a provision providing entitlements for those with hearing loss in excess of normal levels for their age. Under this approach, the accident compensation scheme would still retain a primary focus on accidental causes of injury. The effect of this approach is that a threshold for noise-induced hearing loss would be retained, but that it would be lowered, and related to a more easily assessable comparison with the population norm, as opposed to the arbitrary assigning of a percentage.

## **8 SUMMARY**

- 8.1 This submission has argued that the six percent threshold in the Accident Compensation Act means that many claimants in need of assistance are unable to obtain it.

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<sup>67</sup> Convention on the Rights of Persons with Disabilities, art 25(b).

<sup>68</sup> Article 26(3).

<sup>69</sup> The National Foundation for the Deaf, above n 18, at [3.1]–[3.2]; New Zealand Audiological Society, above n 19, at [5.25]; The New Zealand Hearing Sector, above n 15, at [49].

8.2 It has been argued that the threshold is inconsistent with domestic legislation, the ICCPR and the CRPD. Furthermore, it has been argued that the threshold is an unjustified limitation on these rights. Finally, this submission has suggested alternative approaches which could be employed by the New Zealand government, which would ensure greater consistency with New Zealand's international obligations.