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2008, No. 10

An Act to provide for the Government to institute and maintain a Disability Strategy in respect of persons with a disability, to make discrimination against a person with a disability unlawful, and to ensure that persons with a disability have access to certain buildings and to footpaths.

(27 June 2008)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1. Short Title and Commencement – (1) This Act may be cited as the Disability Act 2008.
(2) This Act shall come into force on a date to be appointed by the Queen’s Representative, by Order in Executive Council.
2. Interpretation - In this Act, unless the context otherwise requires -

“discriminate” shall mean to make a distinction, exclusion or restriction against a person with a disability on the basis of that person’s disability or to subject a person with a disability to a detriment in circumstances in which other persons who do not have a disability would not be subjected to such detriment.

“Minister” shall mean the Minister for Internal Affairs.

“Ombudsman” shall mean the Ombudsman appointed under the Ombudsman Act 1984.

“Person with a disability” shall include any person who has a congenital or permanent physical impairment, including any sensory impairment, or who has an intellectual or developmental disability, or a person with a loss or abnormality of physiological or anatomical structure or function, or a person with a psychiatric disability and may further include any person certified by a Registered Medical Practitioner approved by the Minister for the purpose to be a person with a disability.

“Disability Strategy” shall mean the Cook Islands National Policy on Disability and National Action Plan 2008-2012 endorsed by Cabinet in January 2008.
3. Act to bind the Crown - This Act shall bind the Crown.

PART 1
DISABILITY STRATEGY

4. Requirement to provide Disability Strategy - Subject to Section 5 of the Bill, the Minister shall determine a Disability Strategy, detailing the objectives of the Government in respect of persons with a disability and provision of disability support services. The Minister may amend or replace the Disability Strategy at any time.

5. Requirement for consultation - Before determining the Disability Strategy, or amending or replacing the Disability Strategy, the Minister shall consult with bodies or organizations representing persons with a disability and with such other organizations or individuals as the Minister considers appropriate.

6. Disability Strategy to be made available - The Minister shall make the Disability Strategy publicly available, and shall present the Disability Strategy to the Parliament of the Cook Islands, and as soon as is practicable after any replacement or amendment, shall make such replacement or amendment publicly available and shall present a copy to Parliament.

7. Requirements for reporting - (1) Within 12 months of the presentation of the Disability Strategy, or any amendment or replacement to Parliament, and every year thereafter, the Minister shall report to Parliament as to progress in implementing the Disability Strategy.

(2) For the purposes of preparation of the report, the Minister may require any other Minister whose responsibilities include implementation of any part of the Disability Strategy to provide a report as to implementation of that part of the Disability Strategy under the responsibility of any other Minister.

(3) The report from the Minister to Parliament, and from any other Minister to the Minister of Internal Affairs shall include a statement that if any legislation proposed or passed during the preceding report period has or could affect the rights of persons with a disability, those rights have been recognised and appropriate provisions have been included in proposed or enacted legislation.

PART 2
DISCRIMINATION

8. Rights of persons with a disability - Every person with a disability shall be entitled to the same rights and privileges as all other persons, and in particular, those rights granted by the Constitution of the Cook Islands.

9. Prohibition against discrimination - No person shall discriminate against a person with a disability, and any such discrimination shall be unlawful.

10. Unlawful discrimination - In particular, and without derogating from the foregoing, no person shall discriminate against a person with a disability on any of the following grounds -

- (a) the physical disability or impairment of the person with a disability;

- (b) any illness of a person with a disability, whether as part of their disability or otherwise;
- (c) any psychiatric illness of the person with a disability;
- (d) any intellectual disability or impairment of the person with a disability;
- (e) the reliance by the person with a disability on any assistive device including an assistive animal;
- (f) the presence in the body of the person with a disability of organisms capable of causing illness;
- (g) the personal status of the person with a disability, which shall include the age, marital or relationship status, gender, or sexual orientation of the person with a disability or whether the person with a disability has responsibilities for others including children or other dependents; or
- (h) the ethnic or national origin of the person with a disability, which includes nationality or citizenship.

Discrimination in employment

11. Requirement to employ - Where an applicant for employment, being a person with a disability, is qualified for work of any description, it shall be unlawful for an employer or any person acting on behalf of an employer, by reason of the disability of the applicant, to refuse or omit to employ the applicant on work of that description which is available.

12. Requirement to offer equal terms and benefits - Where any employee or potential employee is a person with a disability, it shall be unlawful for an employer or person acting on behalf of an employer, by reason of the disability of the employee or potential employee, to offer or afford that person less favourable terms of employment, conditions of work, or any other benefits of employment, or less opportunities for training, promotion or transfer than are made available to other employees of the same or substantially similar capabilities employed in the same or similar work.

13. Requirement not to terminate employment - Where any employee is a person with a disability, it shall be unlawful for an employer, or person acting on behalf of an employer, by reason of the disability of the employee, to terminate the employment of that employee, or to subject the employee to any detriment, in circumstances in which the employment of employees employed in similar work would not be terminated, or in which other employees employed in similar work would not be subjected to such detriment.

14. Exception in relation to special services or facilities - The provisions of Section 11 above shall not apply where the position is such that the person with a disability could perform the duties of the position satisfactorily only with the aid of special services or facilities, and it is not reasonable to expect the employer to provide those services or facilities. If the nature of a position held by a person with a disability is altered substantially during the term of the employment, this section shall apply with the necessary modifications as if the altered position was a new position.

15. Exception in relation to risk or harm - The provisions of Sections 11 and 12 above shall not apply where in respect of the position offered or altered during the currency of employment, the environment in which the duties of the position are to be performed or the nature of some or all of those duties is or becomes such that the person with a disability could perform those duties only with a risk of harm to that person or to others, unless the employer could without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

PART 3

COMPLAINTS AND SPECIAL JURISDICTION OF OMBUDSMAN

16. Complaint to Ombudsman – (1) Where any person, whether a person with a disability, his parent, guardian agent or otherwise, believes there has been an unlawful discrimination in respect of a person or persons with a disability, that person may make a complaint to the Ombudsman in any format acceptable to the Ombudsman.

(2) For the purposes of this Act, the Ombudsman may elect to deal with the complaint under this Part of this Act, or if the complaint relates to a matter in which the Ombudsman has jurisdiction under the Ombudsman Act 1984, the Ombudsman may elect to deal with the complaint under the provisions of that Act.

(3) If the Ombudsman elects to deal with the complaint under this Act, the following provisions shall apply.

17. Time for making complaint - A complaint must be made within six months of the date of the alleged discrimination, or within such further time as the Ombudsman shall allow.

18. Decision to proceed or otherwise - The Ombudsman shall consider the complaint, and after seeking any further information which may be required from the complainant, the Ombudsman shall, decide whether to proceed to investigate the complaint or not to proceed.

19. Decision not to proceed – (1) The Ombudsman may decide not to proceed to investigate the complaint if, the complaint is trivial, frivolous, vexatious or not in good faith, or if in all the circumstances of the complaint, it is unnecessary to take further action.

(2) If the Ombudsman decides not to proceed, then the Ombudsman shall advise the complainant of that decision in writing, and give reasons for making such a decision.

20. Procedure where investigation continues - If the Ombudsman decides to proceed to investigate the complaint, she/he shall advise the complainant and any person claiming to be aggrieved (if not the complainant) and the person against whom the complaint is made that the Ombudsman intends to investigate the complaint and shall –

- (a) give details of the complaint;
- (b) invite the person against whom the complaint is made to respond to the complaint within a period of not less than 21 days;

- (c) advise the parties that upon receipt of any response or upon expiration of the time allowed, the Ombudsman may seek any further information in relation to the complaint or response; and
- (d) advise the parties that in the absence of any response, the Ombudsman may make a recommendation in respect of the complaint.

21. Settlement - At any time after receipt of a complaint, and any time during investigation of a complaint, the Ombudsman may assist the parties to secure a settlement between themselves in relation to the complaint.

22. Terms of settlement - (1) A settlement means an agreement between the parties on actions that settle the matter and may include the payment of compensation or the tendering of an apology or any other response to the complaint that the Ombudsman may recommend or to which the parties may agree.

(2) As part of a settlement, the Ombudsman may request a satisfactory assurance by the person against whom the complaint was made against the repetition of the conduct that was the subject matter of the complaint or against further conduct of a similar kind.

23. Record of settlement - If the parties are able to reach a settlement, the Ombudsman shall record that settlement in writing and supply a copy to the complainant and respondent.

24. Procedure if no settlement - If the parties are unable to reach a settlement, the Ombudsman shall proceed to make a preliminary recommendation in relation to resolving the complaint, based on information already held, upon any further information that may be requested and supplied or following a hearing or any other reasonable procedure as the Ombudsman shall determine, provided however that the Ombudsman shall not be obliged to conduct any hearing.

25. Advice of recommendation - The Ombudsman shall advise the parties of the preliminary recommendation, and what further action (if any) the Ombudsman proposes shall be taken by the parties or any of them, and shall provide the parties with a reasonable opportunity to advise whether they or any of them accept or reject the recommendation and proposal for further action (if any).

26. Recommendation may become final - After requesting and receiving the views of the parties or after having provided a reasonable opportunity to provide such views, the Ombudsman may if the parties have reached a settlement issue a final recommendation to be final between the parties, and advise the parties accordingly.

27. Referral to Attorney-General - If the Ombudsman does not make a final determination, the Ombudsman may refer the original complaint to the Attorney-General.

28. Attorney-General to decide whether to prosecute - The Attorney-General shall then decide whether the complaint should proceed by way of prosecution for unlawful discrimination in proceedings issued under this Act in the High Court.

29. Period of limitation extended - For the purposes of this section, and notwithstanding any other law to the contrary, the time for the commencement of a prosecution under section 28 hereof shall be extended so as to commence as at the date the Ombudsman makes the referral to the Attorney-General under section 27 hereof.

30. Privacy of prior statements - No evidence shall be admissible in any Court of any information, statement or admission disclosed or made during the course of the proceedings of the Ombudsman, including any made during any attempt or attempts to reach a settlement.

Accommodation

31. Requirement to consider reasonable accommodation - Where the Ombudsman, the Attorney-General or any Judge or Justice of the High Court of the Cook Islands is considering whether there has been an unlawful discrimination against a person with a disability, that person shall consider whether or not the person alleged to have unlawfully discriminated against a person with a disability has offered to apply or has applied reasonable accommodation to the circumstances in question, and if so, shall take the offer or application into account in any settlement proposal, when making a recommendation or in assessing any penalty.

32. Reasonable accommodation defined - For the purposes of this section, "reasonable accommodation" shall mean necessary or appropriate modification or adjustments not imposing a disproportionate or undue burden to ensure that the person with a disability is treated on an equal basis with persons not having a disability, provided however that reasonable accommodation cannot be applied to fundamental rights.

PART 4 **ACCESS TO BUILDINGS**

33. Requirement to make buildings accessible - Where any buildings is being erected, or is being altered, and a permit under Section 12 of the Building Controls and Standards Act 1991 is required, and members of the public are to be admitted to that building whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions and sanitary facilities must be made for persons with a disability who may be expected to visit or work in that building and carry out normal activities and processes in that building.

34. Listed buildings - Section 33 applies to but is not limited to buildings that are intended to be used for or associated with one or more of the purposes specified in the Schedule hereto.

35. Standards for compliance - If the plans of any such building being erected or altered comply with NZSS 4121 or any other Standard adopted in place thereof, or approved by the Secretary of Works, then such plans shall be deemed to comply with the requirements of this section.

36. Accessibility Signs - Where a building has been completed in compliance with this section, a notice or sign that indicates in accordance with the international access symbol that provision is made for the needs of persons with a disability shall be displayed outside the building or so as to be visible from outside it.

Construction of Footpaths

37. Requirements to make footpaths accessible - Where at any time after the commencement of this Act, any footpath is constructed on public land contiguous to or upon a road, or in other places to which the public have access as of right, such footpath shall be constructed so as to be accessible to persons with a disability, and in particular to persons with a disability using a wheelchair or other mobility or assistive device.

38. Intermediate points in footpaths - For the purposes of section 37, any intermediate point in any footpath, such a vehicle crossings or cross road, shall also be made accessible to a person with a disability.

PART 5 **OFFENCES AND PENALTIES**

39. Penalty for unlawful discrimination - Where any person commits an unlawful discrimination against a person with a disability and is convicted by a Judge of the High Court of an unlawful discrimination under this Act, the Court may –

- (a) Order the person to undertake such remedial or compensatory action as the Court shall think fit in the circumstances, including payment of compensation to any person subjected to an unlawful discrimination and payment of a fine not to exceed \$50,000; or
- (b) Pay a fine not to exceed \$50,000; or
- (c) Impose an imprisonment term not exceeding one year or to both the fine and the imprisonment

40. Penalty for failing to make buildings accessible - Any person who begins to erect or alter a building to which Section 33 of this Act applies, or authorizes the commencement of erection or alteration of such a building, without first obtaining a building permit, or continues to erect or alter a building without a building permit commits an offence, and is liable upon conviction by a Judge of the High Court to a fine not exceeding \$100,000 and in the case of a continuing offence to a further fine not exceeding \$10,000 per day for each day the offence continues.

PART 6
MISCELLANEOUS

41. Power to make Regulations - The Queen's Representative may from time to time by Order in Executive Council make all such regulations not inconsistent with this Act as may in his opinion be necessary or expedient for giving full effect to the provisions of this Act and for the due administration thereof.

This Act is administered by the Ministry of Internal Affairs

SCHEDULE

(Section 34)

The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows –

- (a) land, sea, and air passenger transport terminals and facilities and interchanges, whether wholly on land or otherwise
 - (b) public toilets wherever situated
 - (c) banks
 - (d) childcare centres and kindergartens
 - (e) day-care centres and facilities
 - (f) commercial buildings and premises for business and professional purposes, including computer centres
 - (g) central, regional, and local government offices and facilities
 - (h) courthouses
 - (i) police stations
 - (j) hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public
 - (k) hospitals, whether public or private, and rest homes
 - (l) medical and dental surgeries, and medical and paramedical and other primary health care centres
 - (m) educational institutions, including public and private primary, intermediate, and secondary schools, universities, polytechnics, and other tertiary institutions
 - (n) libraries, museums, art galleries, and other cultural institutions
 - (o) churches, chapels, and other places of public worship
 - (p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, clubrooms, recreation centres, and swimming baths
 - (q) shops, shopping centres, and shopping malls
 - (r) restaurants, bars, cafeterias, and catering facilities
 - (s) showrooms and auction rooms
 - (t) public laundries
 - (u) petrol and service stations
 - (v) funeral parlours
 - (w) television and radio stations
 - (x) car parks, parking buildings, and parking facilities
 - (y) factories and industrial buildings where more than 10 persons are employed
 - (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge
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