



**Benchmark**

*best practice - best evidence with vulnerable people*

# The United Nations Convention on the Rights of Persons with Disabilities

1. [THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES](#)
2. [THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS APPLICATION TO THE JUSTICE SYSTEM](#)
3. [ARTICLE 12 \(EQUAL RECOGNITION BEFORE THE LAW\)](#)
4. [INTERPRETING CASE LAW FROM A UNCRPD PERSPECTIVE](#)
5. [ARTICLE 13 - ACCESS TO JUSTICE](#)
6. [ACKNOWLEDGEMENTS](#)
7. [REFERENCES](#)

## **1. The United Nations Convention on the Rights of Persons with Disabilities**

Disclaimer: The material provided in this guideline is not legal advice and should not be treated as such. The information is intended as a guide only and should not be relied upon as the definitive authority on the UNCRPD. No liability is accepted for any adverse consequences of reliance upon it. Further disclaimer information is provided here [[link](#)].

1.1 The Benchmark guidelines are underpinned by a commitment to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

1.2 All of the Benchmark guidelines relating to disability refer to individuals or groups of individuals encompassed within the UNCRPD.<sup>1</sup> When working with disabled people, it is important for justice and legal professionals to be aware of, and responsive to, the UNCRPD. This Convention was designed by representatives of the international disability community and adopted by the UN General Assembly in December 2006.<sup>2</sup> The UNCRPD did not aim to create any new rights but instead aimed to specifically "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities."<sup>3</sup> It is the first human rights convention specifically for people with disabilities.

1.3 As identified in the preamble, the Convention was considered necessary because, despite other international declarations, covenants, and conventions applying equally to all, "persons with disabilities continue to face barriers in their participation as equal members of society and

violations of their human rights in all parts of the world.”<sup>4</sup> New Zealand signed and ratified the Convention in 2008, thereby accepting an obligation under international law to implement it. Implementation involves taking action to ensure and promote the full realisation of all rights contained in the Convention (Article 4).

1.4 Treaty bodies with a responsibility for monitoring other human rights treaties have identified that in order to meet human rights obligations legislative, judicial, administrative, educational, financial and social measures may need to be implemented.<sup>5</sup> The Court of Appeal recently affirmed that an appropriate measure for implementation is for government departments to take into account their obligations under the UNCRPD when interpreting policy<sup>6</sup> and it is settled that Courts will interpret legislation consistently with NZ human rights treaty obligations where at all possible.

1.5 Eight years after signing and ratifying the UNCRPD, New Zealand also acceded to the Optional Protocol to the Convention on the 5 October 2016. The Optional Protocol provides a formal mechanism for individuals or groups to make a complaint directly to the United Nations Committee on the Rights of Persons with Disabilities if they believe their rights have been breached under the Convention. The Optional Protocol can only be utilised if all other existing legal pathways have been exhausted to address the human rights breach.

1.6 The Convention does not seek to define “disability”, noting that it is “an evolving concept ... that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>7</sup> However, Article 1 of the UNCRPD does confirm that included within the Convention are “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

1.7 The UNCRPD is underpinned by the social model of disability which interprets disability as being created by barriers within the social and physical environment and that these social and physical barriers inhibit the ability of people with impairments to exercise their human rights. The social model positions both society in general and governments as having responsibility for ensuring that political, legal, social, and physical environments recognise and support the human rights of people with disabilities, and promotes their full inclusion and participation in society.

## **2. The Convention on the Rights of Persons with Disabilities and its application to the justice system**

## Article 4 - General obligations

2.1 The Convention sets out various specific obligations that supplement the general obligation to promote rights. In terms of a responsive justice system, the following two specific obligations provide an overarching framework for:

(a) **Universal design**,<sup>8</sup> defined as "the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design."

(b) **Elimination of discrimination**,<sup>9</sup> which includes the denial of **reasonable accommodations**,<sup>10</sup> defined as "the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."<sup>11</sup>

2.2 In terms of a responsive justice system, there are two main specific rights that apply: Article 12 - *Equal Recognition before the Law* and Article 13 – *Access to Justice*.

## 3. Article 12 - Equal Recognition before the Law

3.1 The United Nations Committee on the Rights of Persons with Disabilities (the Committee) in their first general comment on Article 12 of the UNCRPD asserted that "[t]he right to equal recognition before the law is operative 'everywhere'. In other words, there are no circumstances permissible under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited."

3.2 The Committee further stated that "the right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others."<sup>12</sup>

3.3 In clarifying their position on the above point, the Committee also made the following assertion: "The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12."<sup>13</sup>

3.4 That is, the Committee's interpretation of Article 12 casts "all people as having legal capacity but recognises that some people require assistance to demonstrate or exercise mental capacity".<sup>14</sup>

3.5 More specifically, the concepts of mental and legal capacity should not be conflated in such a way that "where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed".<sup>15</sup> Instead, States are obligated to replace substitute decision-making regimes with supported decision-making regimes. Supported decision-making involves supporting people in a manner that gives primacy to a person's will and preferences and respect human rights norms.<sup>16</sup>

3.6 In consideration of Article 12 Penelope Weller concluded that: "*In short, the CRPD promotes a radical revision of the law. Its approach stands in contrast with laws that operate on the assumption that mental capacity is a threshold requirement or necessary precondition of legal capacity.*"<sup>17</sup>

## **4. Interpreting case law from a UNCRPD perspective**

4.1 Professor Penelope Weller undertook a CRPD based analysis of a case. Her analysis demonstrates how the UNCRPD could be invoked. Weller analysed the case of RP on the facts recited in the Court of Appeal case in the United Kingdom<sup>18</sup> and RP's petition to the European Court of Human Rights<sup>19</sup> with regard to the pertinent articles of the CRPD, including Article 12.

4.2 A 21-year-old woman, referred to as RP gave birth to a premature baby with significant health problems. RP had an intellectual disability. The baby received intensive hospital treatment after they were born, during which time the health authority initiated formal care proceedings to enable RP's child to be placed with a foster family. At that time, RP was assessed as lacking the capacity to instruct her appointed solicitor. An Official Solicitor was appointed to RP; Official Solicitors are appointed in cases where a person lacks instructional capacity, and are expected to work on the principle of best interests. As a result of the care proceedings RP lost custody of her child, who was permanently placed with an alternative caregiver. RP appealed this decision in the UK courts and through the ECtHR and the Equality and Human Rights Commission (United Kingdom), but the appeal was unsuccessful.<sup>20</sup>

4.3 In terms of Article 12, Weller identified the case of RP to be contrary to the UNCRPD because:

(a) RP's legal capacity was removed based on an erroneous, discriminatory assessment of 'mental' capacity;

(b) A substitute decision maker was appointed by another person without RP's consent or approval; and

(c) The substitute decision-maker made decisions on a best interest basis.

4.4 Weller concluded that excluding people with disabilities from legal proceedings on the basis that they do not have instructional capacity, as occurred in RP's case, is not aligned with the expectations set out in the UNCRPD.

4.5 Weller provided greater guidance about what is expected in modern communities committed to the UNCRPD, noting that support to exercise legal capacity should be provided by way of a supported decision-making regime. Further to this, supported decision-making must give primacy to a person's will and preferences. Weller identified that support options related to supported decision-making contexts include informal and formal support arrangements and may vary in type and intensity. Examples include having a range of trusted support persons, access to peer support and advocacy and assistance with communication.<sup>21</sup>

4.6 In RP's case, Weller argued that RP should have received "additional explanation, communication and support with respect to all legal decisions and processes"<sup>22</sup> so she could effectively participate in the legal proceedings. This could have been achieved by:

(a) "Ensuring that there was a 'legal interpreter' or an advocate who would assist RP to understand her legal situation;

(b) Enduring that an independent opinion was sought, and that the determination of capacity was reviewed by an independent authority or tested in a court of law; and

(c) Enabling RP to appoint an independent solicitor who was willing to advocate on her behalf".<sup>23</sup>

4.7 Hence, the starting place is not whether a person has the requisite instructional/mental capacity to access justice but how a person will be supported to exercise their inherent legal capacity (legal standing and legal agency) to access justice. As articulated by Weller "In CRPD terms, protection of the law is not sought through withdrawal from the law, but through active participation in legal processes".<sup>24</sup>

## 5. Article 13 – Access to Justice

## 5.1 In full:

(a) State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

(b) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

5.2 While there is nothing specific about the right to legal capacity in Article 13 Access to Justice- the UN Disability Committee's general comment on Article 12 specifies that "*the recognition of the right to legal capacity is essential for access to justice in many respects. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with equal standing in courts and tribunals*".<sup>25</sup>

5.3 The specific supports identified by the Committee in the exercise of legal capacity to access justice include:

(a) "*Ensuring that persons with disabilities have access to legal representation on an equal basis with others ... including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference — on their own behalf or with legal representation — and to defend their rights in court.*"

(b) "*Police officers, social workers and other first responders must be trained to recognise persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons.*"

(c) "*The judiciary must also be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing.*"

(d) "*Article 12 of the Convention guarantees support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other legal proceedings. Such support could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods.*"

5.4 The Committee also identified that persons with disabilities have not had equal opportunity to undertake other important roles in the justice system, for example as lawyers, judges, witnesses or members of a jury.<sup>26</sup>

5.5 In summary, implementation of the UNCRPD requires a combination of legislative reform to reflect the principles of Article 12, and procedural and practice change to reflect the principles of Article 13. In the New Zealand context, we have yet to make the widespread legislative change required to achieve alignment with Article 12. The best practice promoted through Benchmark promotes the principles contained within Article 13; namely a legal system that is designed to be accessible for all and where specifically required, reasonable accommodations to ensure the effective participation of disabled people.

## 6. Acknowledgements

This overview of the UNCRPD was written by Dr Sarah Gordon. Sarah is a service user academic in the field of mental distress. She is a Senior Research Fellow in the Department of Psychological Medicine, University of Otago, Wellington and has a Bachelor of Science, Bachelor of Laws, Masters of Bioethics and Health Law, and completed a Doctor of Philosophy in 2010.

### Suggested citation:

Sarah Gordon "A Brief Overview of the United Nations Convention on the Rights of Persons with Disability" (2018) Benchmark  
<<http://benchmark.org.nz/guidelines/united-nations-convention-on-the-rights-of-persons-with-disabilities-uncrpd-a-brief-overview/>>

Information on copyright is provided here [[link](#)].

## 7. References

[1] Deaf people, people with intellectual disability, people with cognitive impairments as a result of FASD, people with ASD, people who experience mental distress, and older adults all have their human rights promoted and protected under the UNCRPD.

[2] [Convention on the Rights of Persons with Disabilities 2006](#) 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

[3] Convention on the Rights of Persons with Disabilities, art 1.

[4] Convention on the Rights of Persons with Disabilities, preamble para (k).

[5] Human Rights Committee, general comment No. 31, para 4.

[6] [Chamberlain v Ministry of Health \[2018\] NZCA 8](#) at [76].

[7] Convention on the Rights of Persons with Disabilities, preamble para (e).

[8] Convention on the Rights of Persons with Disabilities, art 4(f).

[9] Convention on the Rights of Persons with Disabilities, art 4(e).

[10] Convention on the Rights of Persons with Disabilities, art 2.

[11] Convention on the Rights of Persons with Disabilities, art 2.

[12] Committee on the Rights of Persons with Disabilities (2014). General Comment No. 1 - Article 12: Equal recognition before the law. New York: United Nations. <<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>> at 2.

[13] Ibid

[14] Brigit Mirfin-Veitch "Exploring Article 12 of the United Nations Convention on the Rights of Persons with Disabilities: An Integrative Literature Review (2016) The Donald Beasley Institute <<http://www.donaldbeasley.org.nz/assets/exploring-article-12-literature-review-oct-2016.pdf>> at 15.

[15] Committee on the Rights of Persons with Disabilities, above n [12](#), at 4.

[16] Committee on the Rights of Persons with Disabilities, above n [12](#), at 4.

[17] Penelope Weller "Legal capacity and access to justice: The right to participation in the CRPD" (2016) 5(1) *Laws* at 5.

[18] *RP v Nottingham City Council* [2008] EWCA Civ 462

[19] *RP v United Kingdom* 38245/08 [2012] ECHR 1796

[20] Weller, above n [17](#).

[21] Weller, above n [17](#), at 10.

[22] Weller, above n [17](#), at 9.

[23] Weller, above n [17](#), at 9.

[24] Weller, above n [17](#), at 5.

[25] Weller, above n [17](#), at 10.

[26] Committee on the Rights of Persons with Disabilities, above n [12](#), at 10.