

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 42/2024

BETWEEN **CHRISTINE FLEMING**
Appellant
AND **ATTORNEY-GENERAL**
First Respondent
AND **JUSTIN JAMES COOTE**
Second Respondent

SC 44/2024

BETWEEN **PETER HUMPHREYS**
Appellant
AND **ATTORNEY-GENERAL**
Respondent

**SYNOPSIS OF SUBMISSIONS OF TE KĀHUI TIKANGATA
HUMAN RIGHTS COMMISSION**

7 February 2025

Certified as suitable for publication under the Supreme Court Submissions
Practice Note 2023

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MAY IT PLEASE THE COURT

INTRODUCTION

1. These appeals deal with important human rights considerations that Te Kāhui Tika Tangata Human Rights Commission (“**Commission**”) has experience in addressing.¹ The Commission has appeared at the Employment Court hearing for Ms Fleming and in the consolidated appeal before the Court of Appeal. The Commission continues to rely on its earlier submissions.²
2. These appeals represent the latest in a line of cases to come before the senior courts considering how the law characterises care provided for disabled people in the family home by their family members.³
3. The objective of these submissions is to provide the Court with information about Aotearoa New Zealand’s international human rights obligations relevant to the Court’s statutory interpretation exercise. Consistent with the Court’s leave decision, these submissions focus on the United Nations Convention on the Rights of Persons with Disabilities (“**CRPD**”).⁴ We commence, however, with a brief review of the relevant workers’ rights obligations at international law.
4. In the Commission’s view, the rights under the CRPD interact with and complement workers’ rights. Meaningfully upholding the rights of the disabled person to live a life of dignity in the community and

¹ Human Rights Act 1993 (“**HRA**”), ss 5(1)(d) and (e) and 8(1A)(a) and (b).

² The Commission, *Fleming v Attorney-General & Anor* Emp340/2019 Employment Court (“**EmpC**”) submissions (9 December 2020) and *Fleming & Humphreys v Attorney-General & Anor* CA371/21; CA 742/21 Court of Appeal (“**CA**”) submissions (15 November 2022).

³ Disabled people is the preferred language of people with impairment in Aotearoa New Zealand, and includes tāngata whaikaha Māori (Māori persons with disabilities), and reflects the social model of disability on which the [New Zealand Disability Strategy](#) 2016-2026 is based. In this context, disabled does not refer to a feature of a person. It refers to the result of social and environmental barriers which interfere with peoples’ full participation in society. It is therefore systems that need to change to achieve equality and non-discrimination. On terminology, see also United Nations Human Rights Council (“**UNHRC**”) *Report on Support systems to ensure community inclusion of persons with disabilities* UN Doc A/HRC/52/52 (3 January 2023) which discusses the terminology of “support” and “care” and the relational dimensions between care-receivers and caregivers at [4]– [9].

⁴ *United Nations Convention on the Rights of Persons with Disabilities* (“**CRPD**”) 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008). New Zealand ratified the CRPD on 25 September 2008.

participate in society relies heavily on the quality of the support to do so.⁵ This quality is undermined if the human rights of carers, including their rights to decent work, are not equally upheld.

INTERNATIONAL OBLIGATIONS: WORKERS' RIGHTS

5. The rights to work and to “just and favourable conditions of work” are fundamental rights under the Universal Declaration of Human Rights.⁶ These rights are also enshrined in the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”).⁷
6. Article 6 of the ICESCR enshrines “the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” and recognises the State’s obligation to take appropriate steps to safeguard this right.
7. Article 7 enshrines the right to just and favourable conditions of work which must, relevantly, include:
 - 7.1. Remuneration which provides all workers with fair wages and equal pay for equal work without distinction (including on the basis of sex), and a decent living for workers and their families;
 - 7.2. Safe and healthy working conditions; and
 - 7.3. Rest, leisure, reasonable limitation of working hours, periodic paid holidays and remuneration for public holidays.
8. The vulnerability of both “care” / “support” workers and domestic / home workers is recognised by the international human rights

⁵ United Nations Committee on the Rights of Persons with Disabilities (“**CRPD Committee**”) *General Comment No.5 on Article 19: Living independently and being included in the community* UN Doc CRPD/C/GC/5 (27 October 2017), at [16(d)(i)]. See also UNHRC *Report on support systems*, above n 3, at [9]: “Care is relational; the rights of caregivers and care receivers are inextricably linked. Overburdening unpaid or underpaid caregivers necessarily affects the quality of care that they can provide, while a caregiver-centred system risks obscuring the agency and autonomy of care receivers.” (Citations omitted)

⁶ *Universal Declaration of Human Rights* (“**UDHR**”) adopted by United Nations General Assembly (“**UNGA**”) Resolution 217A(III) of 10 December 1948, arts 23 and 24.

⁷ *International Covenant on Economic, Social and Cultural Rights* (“**ICESCR**”) 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976). New Zealand ratified ICESCR on 28 December 1978.

framework⁸ and the International Labour Organization (“ILO”).⁹ In its report on Care Work and Care Jobs, the ILO observed:¹⁰

The majority of the care work worldwide is undertaken by unpaid carers, mostly women and girls from socially disadvantaged groups. [...] While care work can be rewarding, when in excess and when involving a high degree of drudgery, it hampers the economic opportunities and well-being of unpaid carers and diminishes their overall enjoyment of human rights.

9. Historically, both types of work have been disproportionately undertaken by women,¹¹ and have been undervalued and taken for granted. Accordingly, human rights law has developed to seek to protect the workers carrying out this type of care. This group requires particular protection, given its vulnerability to exploitation and important role in advancing the rights of disabled people.

INTERNATIONAL OBLIGATIONS: CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Objective and purpose of the CRPD

10. The CRPD is the first major human rights treaty of the century and the first specifically designed to promote the rights of disabled people. The CRPD codified a legal framework that built on a

⁸ See Gulnara Shahinian *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* UN Doc A/HRC/15/20 (18 June 2010) at [18] cited in *Fleming v Attorney-General & Anor* EmpC Decision fn 28 (per Inglis CJ) [**Fleming Case on Appeal Tab 13, 101.182**]. See also UNHRC *Resolution 38/1: Elimination of all forms of discrimination against women and girls* (5 July 2018) at [5]: “Calls upon States to implement policies and actions directed: ... (b) To recognise, reduce and redistribute women’s and girl’s disproportionate share of unpaid care and domestic work, including caring for children, family members with disabilities and older family members, by promoting policies and initiatives that support the reconciliation of work and family life and the equal sharing of responsibilities between women and men, to take steps to implement family-oriented policies to achieve a family-work balance and to facilitate the transition of women informal workers, including those engaged in informal paid care and domestic work, to the formal economy, and to extend rights to non-discrimination, paid parental leave and childcare provisions.”; United Nations Committee on Economic, Social and Cultural Rights (“ICESCR Committee”) *General Comment No.23 on the right to just and favourable conditions of work* UN Doc E/C.12/GC/23 (27 April 2016) at [47(f)]; Catalina Devandas Aguilar *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/34/58 (20 December 2016) at [30].

⁹ See, for example, International Labour Organisation (“ILO”) *Home Work Convention* C177 (opened for signature 20 June 1996, entered into force 22 April 2000), arts 3–4; *Home Work Recommendation* R184 (adopted 20 June 1996); *Domestic Workers Convention* C189 (opened for signature 16 June 2011, entered into force 5 September 2013) arts 3, 6–7, 10–14; and *Employment Relationship Recommendation* R198 (adopted 15 June 2006).

¹⁰ Laura Addati, Umberto Cattaneo, Valeria Esquivel and Isabel Valarino *Care Work and Care Jobs: For the Future of Decent Work* (ILO, 2018) at pp xxvii.

¹¹ UNHRC *Resolution 54/6: Centrality of care and support from a human rights perspective* (11 October 2023) at p.2; Urmila Bhoola *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* UN Doc A/73/139 (10 July 2018), at [43]–[45]; Janine Berg, Martine Humblet and Sergei Soares *Working from home: From invisibility to decent work* (ILO, 2021) at p.23.

paradigm shift away from ableist,¹² charitable or medical models of disability, toward the social model that recognises it is social and environmental factors that hinder full participation in society and affirms disabled people as rights holders on an equal basis with others.¹³

11. Importantly, though, the CRPD does not create new or additional rights. Rather, it builds on and affirms the rights enshrined in earlier human rights treaties,¹⁴ describing the State's specific obligations to ensure the equal enjoyment of all human rights by disabled people.¹⁵ Where the rights are not implemented, the likely result will be discrimination.

12. Article 1 states the purpose of the CRPD:

... to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

13. Article 3 further outlines the general principles of the CRPD, confirmed by the Committee on the Rights of Persons with Disabilities ("**CRPD Committee**") to be:¹⁶

...respect for the inherent dignity, individual autonomy — including the freedom to make one's own choices —, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

¹² Catalina Devandas Aguilar *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/43/41 (17 December 2019), at [9]: "...ableism; a value system that considers certain typical characteristics of body and mind as essential for living a life of value".

¹³ Ibid, at [39]–[40]; Catalina Devandas Aguilar *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/28/58 (2 February 2015), at [4] and [6]; Gerard Quinn *Report of the Special Rapporteur on the rights of persons with disabilities: Transformation of services for persons with disabilities* UN Doc A/HRC/52/32 (28 December 2022) at [9], [21], [28], [30] and [88].

¹⁴ CRPD, above n 4, Preamble at (b), (d) and (r).

¹⁵ See, for example, CRPD, above n 4, art 4(1). See also Gerard Quinn, above n 13, at [26].

¹⁶ CRPD Committee, *General Comment No. 1 on Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [4]. See also Catalina Devandas Aguilar UN Doc A/HRC/43/41, above n 12, at [41]–[46].

14. Article 4 confirms that the obligation to realise those rights and the underlying objectives of the CRPD rests with the State.¹⁷ The CRPD recognises the diversity of disabled people and confirms that the State is not to impose a “one size fits all” approach to the provision of disability supports.¹⁸
15. The Commission’s view is that the following articles assist in the Court’s current statutory interpretation exercise:¹⁹
 - 15.1. Article 12: Equal recognition before the law.
 - 15.2. Article 19: Living independently and being included in the community.
 - 15.3. Article 23: Respect for home and the family.
 - 15.4. Article 28: Adequate standard of living and social protection.
16. In sum, these articles require the State to provide support, including funding, to allow disabled people to live independently, to have an adequate standard of living, and to make decisions about their own lives. The choice to live independently includes the choice to live with family members. The obligation of supported decision-making is central to CRPD compliance. Where decision-making is substituted, it will be inconsistent with the CRPD.

Article 12: Equal recognition before the law

17. Article 12 of the CRPD recognises the right of disabled people to equal recognition before the law, and to enjoy legal capacity on an equal basis with others in all aspects of life. To realise this right, Article 12 further specifies the State’s obligations to provide disabled people with access to the support they may require in

¹⁷ The Commission, CA submissions, above n 2, at [12]–[13] and EmpC submissions at [55]–[58]. See also *CRPD*, above n 4, art 4; Gerard Quinn, above n 13, at [25]; and Catalina Devandas Aguilar UN Doc A/HRC/34/58, above n 8, at pp.8–13.

¹⁸ The Commission, CA submissions, above n 2, at [15]–[18].

¹⁹ We also note the right to accessibility (*CRPD*, above n 4, arts 3(4) and 9), which is central for disabled people, in the context of the evidence suggesting hurdles to accessing information and support. See the Commission, CA submissions, above n 2, at [32]–[33] and [73]–[75]; and EmpC submissions at [95]–[96].

exercising their legal capacity;²⁰ to implement appropriate and effective safeguards against abuse in the exercise of legal capacity;²¹ and to take measures to ensure the equal right of disabled people to (relevantly) control their own financial affairs.²²

18. Article 12 is subject to immediate realisation by States upon ratification of the CRPD.²³ Article 12 rights have been recognised by this Court,²⁴ the Law Commission,²⁵ the Disability Strategy (2016-2026),²⁶ and government agencies.²⁷ Yet realisation of rights requires more than legal recognition. The State must substantively meet its obligations, by refraining from directly interfering with people's rights, by protecting against human rights abuses, and by taking positive action to facilitate the enjoyment of rights.²⁸
19. Legal capacity comprises both the ability to hold rights and duties (legal standing), and to exercise those rights and duties (legal agency).²⁹ Mental capacity refers to a person's decision-making skills, which naturally vary from person to person depending on a range of factors including environmental and social factors.³⁰ Under article 12, perceived or actual variance in a person's mental capacity cannot justify denying a person's legal capacity.³¹

²⁰ CRPD, above n 4, art 12(3).

²¹ Ibid, art 12(4): "Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

²² Ibid, art 12(5).

²³ CRPD Committee, *General Comment No.1*, (2014), above n 16, at [30].

²⁴ *TUV v Chief Executive of New Zealand Defence Force* [2022] NZSC 69, at [70] and n 53 (majority), referring to [101] (minority).

²⁵ Te Aka Matua o te Ture | Law Commission ("**Law Commission**") *Adult Decision-Making Capacity Law: Issues Paper* (April 2024), at pp.10–11, 16–17 and Chapter 3. The Law Commission's final report is due to be provided to the Minister of Justice in early 2025.

²⁶ [New Zealand Disability Strategy](#), above n 3, pp.7 (Outcome 7), 19–21, 36–37.

²⁷ Ministry of Social Development 'Supported decision-making' (undated) available at <https://msd.govt.nz/about-msd-and-our-work/work-programmes/accessibility/supported-decision-making.html>; Whaikaha Ministry of Disabled People 'Promoting choice and control' (15 November 2016) available at <https://www.whaikaha.govt.nz/news/news/promoting-choice-and-control>.

²⁸ CRPD Committee *General Comment No.1*, above n 16, at [24]. See also United Nations Human Rights Committee *General Comment No.31 – The nature of the general legal obligation imposed on States parties to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), at [3]–[7], [13]–[14].

²⁹ CRPD Committee, *General Comment No.1*, above n 16, at [13].

³⁰ Ibid, at [13] – [15].

³¹ Ibid. See also Law Commission, above n 25, at p.57 – 58.

20. The CRPD Committee has confirmed that the provisions of article 12 signify a paradigm shift in favour of supported decision-making. Central to the obligation of supported decision-making is respect for a disabled person's "rights, wills and preferences".³² Substituted decision-making,³³ whereby a person's legal capacity is denied (often determined with reference to their status such as diagnosis of impairment) is prohibited.³⁴
21. Article 12(3) recognises the State's obligation to provide disabled people with access to support in the exercise of their legal capacity. The State has obligations to both refrain from any action that deprives a person of their legal capacity, and to develop supported decision-making regimes through law, resourcing and training.³⁵ The CRPD Committee has stated that support should be available to all, and the fact that a person requires a high level of support should not be a barrier to obtaining supported decision-making.³⁶
22. "Support" is a broad term, closely linked to the obligation to provide reasonable accommodations,³⁷ encompassing a range of informal and formal arrangements, of varying types and intensity. The former United Nations Special Rapporteur on the rights of persons

³² CRPD Committee, *General Comment No. 1*, above n 16, at [17]. For a discussion of the term "rights, wills and preferences" see Law Commission, above n 25, at p.56.

³³ Law Commission, above n 25, p.8 Glossary – "Substituted decision-making is taken to mean different things by different people. There is general agreement that substituted decision-making includes at least some arrangements under which someone makes a decision for another person. However, there is disagreement as to whether it includes all such arrangements. We use the term 'representative decision-making' to refer to situations where one person is appointed to make decisions for another person." See also p.100 at [7.13].

³⁴ CRPD Committee, *General Comment No. 1*, above n 16, at [3]. See also Catalina Devandas Aguilar *Report of the Special Rapporteur on persons with disabilities* UN Doc A/HRC/37/56 (12 December 2017), at [21]; and Law Commission, above n 25, at pp.100–101: "[7.14]; Instead, a 'functional' approach to assessing decision-making capacity is now preferred. This approach assesses decision-making capacity in terms of particular cognitive functions. Broadly, it asks whether the person understands the general nature and likely consequences of what they are deciding and whether they can communicate the decision they have made. [7.15] The functional approach allows decision-making capacity to be determined in relation to specific decisions or classes of decision. This means people can be assessed to have decision-making capacity for some decisions, but not for others." (Citations omitted)

³⁵ CRPD Committee, *General Comment No. 1*, above n 16, at [24], and [28]–[29]. See also UNHRC *Report on support systems*, above n 3, at [42]; Catalina Devandas Aguilar UN Doc A/HRC/37/56, above n 34, at [24]–[27], [34], [63], [66], [74]–[76] and [84]; and Law Commission, above n 25, at p.53.

³⁶ CRPD Committee, *General Comment No. 1*, above n 16, at [29].

³⁷ "Reasonable accommodation" is defined under *CRPD*, above n 4, art 2 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. Denial of reasonable accommodation constitutes a form of unlawful discrimination (see *CRPD*, art 5(3)).

with disabilities has stated that all forms of support must be consistent with a human rights-based approach and respect the general principles of the CRPD.³⁸ A “one size fits all” approach to supported decision-making is both ineffective and discriminatory.³⁹

23. The CRPD Committee and former Special Rapporteur have noted examples of appropriate supports that can be made available.⁴⁰

24. The CRPD Committee has advised that where, after significant effort, it is not practicable to determine a person’s will and preferences, determinations must centre on the “best interpretation of will and preferences” rather than “best interests”.⁴¹

25. Of relevance to the current funding models under consideration, the United Nations Human Rights Council recently reported:⁴²

[43] ...Choice and control for support and care presupposes that there is a range of options available to the individual, including those relating to time, money and services; arrangements cannot be imposed; and individuals retain the freedom to modify and reject arrangements that do not suit them.

[44] In some countries, there has been a shift towards “personalization” of support and care to increase user choice and control through direct payments and personal budgets, which allow persons with disabilities to “purchase” services that best meet their needs. While personalization is a well-recognized strategy, research shows some negative aspects, including a reduction in public expenditure, the commodification of support and care, the burden of financial self-management, a decrease in the quality of services, a deterioration in the working conditions of carers and a deepening of gender inequality. For

³⁸ Including respect for a person’s inherent dignity, individual autonomy and independence; rights to equality and non-discrimination; adherence to principles of availability, accessibility, adequacy and affordability; voluntary provision; enabling a person’s direct choice and control over their support; and provision of community-based and culturally sensitive supports. Catalina Devandas Aguilar UN Doc A/HRC/37/56, above n 34, at [28]–[29].

³⁹ Ibid, at [55].

⁴⁰ For example, through choosing one or more trusted support persons, peer support, advocacy, communication assistance, and providing information in accessible formats. See CRPD Committee, *General Comment No.1*, above n 16, at [17] and Catalina Devandas Aguilar UN Doc A/HRC/37/56, above n 34, at [54] and [61]. See also Law Commission, above n 25, at p.125 which outlines aspects of decision-making where support may be provided, including: identifying the decision that needs to be made; identifying and accessing relevant information; understanding the information about the decision; understanding the consequences of the decision; and communicating the decision; and IHC ‘Supporting decision-making’ (undated) available at <https://www.ihc.org.nz/adults/making-decisions>.

⁴¹ CRPD Committee, *General Comment No.1*, above n 16, at [21] and Catalina Devandas Aguilar UN Doc A/HRC/37/56, above n 34, at [30]–[31].

⁴² UNHRC *Report on support systems*, above n 3, at [43]–[44]. See also Gerard Quinn, above n 13, at [39] and [63] and Catalina Devandas Aguilar UN Doc A/HRC/34/58, above n 8, at [56], [62] and [91(f)].

personalization schemes to be effective and equitable, States need to increase efforts to regulate services, markets and working conditions, and ensure flexibility to meet all individual needs, including the need for support in managing schemes. The rise of technology-based services also demands greater regulation and oversight. (Citations omitted)

Article 19 (Living independently), Article 23 (Home and family) and Article 28 (Adequate standard of living)

26. We consider these articles together as they are interrelated.⁴³ Article 19 provides for the right to live independently, and serves as the basis for States' obligations to commit to deinstitutionalisation.⁴⁴ Institutionalisation is characterised by a lack of autonomy, and can occur in any setting.⁴⁵ This must also be read alongside article 23 (right to family)⁴⁶ and article 28 (right to adequate standard of living and social protection).⁴⁷
27. Taken together with supported decision-making under article 12, these obligations mean "that persons with disabilities must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others."⁴⁸ This includes a person making decisions about where and with whom they live.
28. The CRPD Committee interprets article 19 to require any employment care arrangements to be consistent with "human rights standards".⁴⁹ Those standards include those referenced above regarding workers' rights.

⁴³ See also the Commission, EmpC submissions, above n 2, at [50]–[61] and [67]–[89]; and CA submissions at [8]–[33].

⁴⁴ CRPD Committee *Guidelines on deinstitutionalization, including in emergencies* UN Doc CRPD/C/5 (10 October 2022).

⁴⁵ CRPD Committee *General Comment No.5*, above n 5, at [1] and [16(c)]; Catalina Devandas Aguila *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/40/54 (11 January 2019), at [18], [48] and [53].

⁴⁶ CRPD, above n 4, Preamble at (x); Gerard Quinn, above n 13, at [44]–[46], [69]–[70] and [89].

⁴⁷ CRPD Committee *Bellini v Italy* UN Doc CRPD/C/27/D/51/2018 (23 February 2023) which comments on the CRPD's applicability to upholding the rights of family carers, particularly through the art 28(2)(c) obligation to ensure access by disabled people *and their families* living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care (at [6.8]–[6.9] of the judgment); and discrimination by association under article 5 (at [7.9]).

⁴⁸ CRPD Committee, *General Comment No.1*, above n 16, at [44].

⁴⁹ CRPD Committee, *General Comment No.5*, above n 5, at [16(d)(i)].

APPLICATION

29. The foregoing analysis is offered to assist in the Court’s statutory interpretation exercise. The legislation should be interpreted consistent with New Zealand’s international obligations,⁵⁰ and Parliament should not be assumed to have passed legislation contrary to those obligations unless this intent is clear from the statutory language.⁵¹ Further, the Employment Relations Act 2000 (“**ERA**”) is social legislation⁵² and should be interpreted in a broad, rights-enhancing manner, to give effect to the rights protected.⁵³
30. In the current appeals, the Court must consider the “homeworker” definition in s 5 of the ERA. That definition should be interpreted broadly to ensure access for homeworkers to fundamental human rights protections including health and safety, leave entitlements, supervision, breaks and pay. A narrow interpretation leaves this group at risk of less protection, further compounding its vulnerable nature.
31. Specifically, the meaning of “engaged, employed or contracted” in the definition is informed by human rights law. The care being provided in the home is “work”. A broad, protection-oriented interpretation supports a conclusion that the “engagement, employment or contracting” is predicated upon the work being undertaken, not a technical contractual offer and acceptance. The CRPD requires the work to be done, in order to guarantee rights to

⁵⁰ See *Fitzgerald v R* [2021] NZSC 131 at [116]; *Ortmann v United States of America* [2020] NZSC 120 at [96]; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188 at [40] and [225]; *Attorney-General v Zaoui* [2005] NZSC 38 at [90]–[91].

⁵¹ *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [143]–[144]; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] and [32]; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 at [213]–[231]; *Borsboom (Labour Inspector) v Preet Pvt Ltd* [2016] NZEmpC 143 at [113]–[119]; *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [37]–[38] and [58]–[59]. By contrast, see *Lowe v Director-General of Health* [2017] NZSC 115 at [31] and [37] (per Arnold and O’Regan JJ).

⁵² *Brown v NZ Basing Ltd* [2017] NZSC 139 at [56] and [77]; *Brosnahan v Chief Executive of Ministry of Social Development* [2013] NZHC 2618 at [33] per Kos J (as he then was).

⁵³ *E Tū Inc & Anor v Rasier Operations BV & Ors* [2022] NZEmpC 192, (2022) 19 NZELR 476 at [8]; *Pilgrim v Attorney-General (sued obh of Ministry of Business, Innovation and Employment, Labour Inspectorate)* [2023] NZEmpC 105 at [37]. See also Claudia Geiringer and Matthew Palmer “[Human rights and social policy in New Zealand](#)” (2003) Social Policy Journal Of New Zealand Te Puna Whakaaro Issue 30 (March 2007).

independence, autonomy and an adequate standard of living. This is not to say that in all circumstances, the CRPD would require the State to be an employer.

32. In the Commission's view, and in applying a human rights approach to statutory interpretation, the definition of "homeworker" in s 5 is met in the current cases. The Commission also submits that the homeworker test under ss 5 and 6(1)(b)(i) is not mutually exclusive with considering the "real nature of the relationship" under s6(1)(b) in order to determine the scope of the employment relationship.
33. To be consistent with the CRPD, the real nature of the relationship should be interpreted in a way that upholds the inherent dignity of the disabled person. In other words, where the State deems the disabled person to be an employer of their family member, but there is no evidence of the person having had access to support for decision-making or evidence that this arrangement reflects their will and preference, this will directly contradict article 12 and amount to substituted decision-making.
34. CRPD obligations require the State to ultimately be responsible for the full participation of disabled people. Where, as here, supported decision-making has not been achieved, the State must assume the responsibilities of the employer. The State exercises ultimate control and must be accountable as such.

Dated: 7 February 2025

M S Timmins / P A Mitskevitch

Counsel for Te Kāhui Tika Tangata Human Rights Commission

LIST OF AUTHORITIES

	Previous submissions
1.	Te Kāhui Tika Tangata Human Rights Commission, <i>Fleming v Attorney-General</i> Employment Court submissions (9 December 2020)
2.	Te Kāhui Tika Tangata Human Rights Commission, <i>Fleming v Attorney-General</i> Court of Appeal submissions (15 November 2022)
	Legislation
3.	Human Rights Act 1993, ss 5 and 8
	Case Law
4.	<i>Attorney-General v Zaoui</i> [2005] NZSC 38
5.	<i>Borsboom (Labour Inspector) v Preet Pvt Ltd</i> 1 [2016] NZEmpC 143
6.	<i>Brosnahan v Chief Executive of Ministry of Social Development</i> [2013] NZHC 2618
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9.	<i>Fitzgerald v R</i> [2021] NZSC 131
10.	<i>Helu v Immigration and Protection Tribunal</i> [2015] NZSC 28
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15.	<i>Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc</i> [2014] NZCA 516
16.	<i>TUV v Chief Executive of New Zealand Defence Force</i> [2022] NZSC 69
17.	<i>Ye v Minister of Immigration</i> [2009] NZSC 76, [2010] 1 NZLR 104
18.	<i>Zurich Australian Insurance Ltd v Cognition Education Ltd</i> [2014] NZSC 188
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19.	<i>Universal Declaration of Human Rights</i> adopted by United Nations General Assembly Resolution 217A(III) of 10 December 1948, arts 23 and 24

20.	<i>International Covenant on Economic, Social and Cultural Rights</i> 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 6 and 7
21.	<i>United Nations Convention on the Rights of Persons with Disabilities</i> 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008), Preamble, arts 1 – 5, 9, 12, 19, 23, 28
22.	United Nations Human Rights Council <i>Resolution 38/1: Elimination of all forms of discrimination against women and girls</i> (5 July 2018)
23.	United Nations Human Rights Council <i>Resolution 54/6: Centrality of care and support from a human rights perspective</i> (11 October 2023)
24.	United Nations Human Rights Council <i>Report on Support systems to ensure community inclusion of persons with disabilities</i> UN Doc A/HRC/52/52 (3 January 2023)
25.	United Nations Human Rights Committee <i>General Comment No.31 – The nature of the general legal obligation imposed on States parties to the Covenant</i> UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004)
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27.	United Nations Committee on the Rights of Persons with Disabilities, <i>General Comment No. 1 on Article 12: Equal recognition before the law</i> UN Doc CRPD/C/GC/1 (19 May 2014)
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31.	Catalina Devandas Aguilar <i>Report of the Special Rapporteur on the rights of persons with disabilities</i> UN Doc A/HRC/28/58 (2 February 2015)
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40.	<i>Domestic Workers Convention</i> C189 (opened for signature 16 June 2011, entered into force 5 September 2013)
41.	<i>Home Work Recommendation</i> R184 (adopted 20 June 1996)
42.	<i>Employment Relationship Recommendation</i> R198 (adopted 15 June 2006)
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