March 2023

To the Law Commission

Please find below DPA’s submission on the Review of Adult Decision-Making Capacity Law.

For any further inquiries, please contact:

Prudence Walker

Chief Executive

021 546 006

policy@dpa.org.nz

# Introducing Disabled Persons Assembly NZ

**We work on systemic change for the equity of disabled people**

Disabled Persons Assembly NZ (DPA) is a not-for-profit pan-impairment Disabled People’s Organisation run by and for disabled people.

**We recognise:**

* Māori as Tangata Whenua and [Te Tiriti o Waitangi](https://www.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi) as the founding document of Aotearoa New Zealand;
* disabled people as experts on their own lives;
* the [Social Model of Disability](https://www.odi.govt.nz/guidance-and-resources/guidance-for-policy-makes/) as the guiding principle for interpreting disability and impairment;
* the [United Nations Convention on the Rights of Persons with Disabilities](https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html) as the basis for disabled people’s relationship with the State;
* the [New Zealand Disability Strategy](https://www.odi.govt.nz/nz-disability-strategy/) as Government agencies’ guide on disability issues; and
* the [Enabling Good Lives Principles](https://www.enablinggoodlives.co.nz/about-egl/egl-approach/principles/), [Whāia Te Ao Mārama: Māori Disability Action Plan](https://www.health.govt.nz/publication/whaia-te-ao-marama-2018-2022-maori-disability-action-plan), and [Faiva Ora: National Pasifika Disability Plan](https://www.moh.govt.nz/notebook/nbbooks.nsf/0/5E544A3A23BEAECDCC2580FE007F7518/%24file/faiva-ora-2016-2021-national-pasifika-disability-plan-feb17.pdf) as avenues to disabled people gaining greater choice and control over their lives and supports.

**We drive systemic change through:**

* **Leadership:** reflecting the collective voice of disabled people, locally, nationally and internationally.
* **Information and advice:** informing and advising on policies impacting on the lives of disabled people.
* **Advocacy:** supporting disabled people to have a voice, including a collective voice, in society.
* **Monitoring:** monitoring and giving feedback on existing laws, policies and practices about and relevant to disabled people.

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

DPA was influential in creating the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),[[1]](#footnote-2) a foundational document for disabled people which New Zealand has signed and ratified, confirming that disabled people must have the same human rights as everyone else. All state bodies in New Zealand, including local and regional government, have a responsibility to uphold the principles and articles of this convention. There are a number of UNCRPD articles particularly relevant to this submission, including:

* **Article 4.3: Involving disabled people and our organisations in decisions that affect us**
* **Article 9: Accessibility**
* **Article 12: Equal recognition before the law**
* **Article 13: Access to justice**
* **Article 22: Respect for privacy**

## New Zealand Disability Strategy 2016-2026

Since ratifying the UNCRPD, the New Zealand Government has established a Disability Strategy[[2]](#footnote-3) to guide the work of government agencies on disability issues. The vision is that New Zealand be a non-disabling society, where disabled people have equal opportunity to achieve their goals and aspirations, and that all of New Zealand works together to make this happen. It identifies eight outcome areas contributing to achieving this vision. There are a number of Strategy outcomes particularly relevant to this submission, including:

* **Outcome 4 – Rights, protection and justice**
* **Outcome 5 – Accessibility**
* **Outcome 7 – Choice and control**

# The Submission

The Disabled Persons Assembly (DPA) supports the Law Commission’s review of the law concerning adult decision-making capacity. Such a review is well overdue, given that much of New Zealand’s law in this area is not consistent with our rights and obligations under Article 12 of the UNCRPD.

The New Zealand government ratified the UNCRPD in September 2008 without reservations[[3]](#footnote-4). Article 12 of the UNCRPD is about people’s right to supported decision-making[[4]](#footnote-5). Supported decision-making is about disabled people’s right to make decisions affecting their lives, and to have access to support when making decisions, on an equal basis with others. DPA believes that supported decision-making is a right that must be reflected in our law.

## Te ao Māori me ōna tikanga

DPA aims to affirm and adhere to the principles of Te Tiriti o Waitangi. Te Tiriti o Waitangi is a guiding principle in the New Zealand Disability Strategy for 2016–2026.

The Review document recognises that the current legal framework relating to adult decision-making capacity may not sit comfortably with Te Ao Māori and tikanga Māori, and in particular, notions of collective responsibility and decision-making. For example, while EPOAs can include consultation clauses, the starting point is that only an individual is appointed as an attorney. We welcome the Law Commission’s consideration of how the law could better reflect the principles set out in chapter 5 of the Review.

## Current law

A key piece of legislation in this area is the Protection of Personal and Property Rights Act 1989 (“PPPR Act”). The PPPR Act states that it allows for supported decision-making while making the least restrictive intervention in a person’s life. It provides that substitute decision-making only happens once a high threshold is reached. Under the PPPR Act every person is presumed to have high capacity to make decisions until it is proven otherwise.

The reality is that this capacity presumption is often not actually made in practice and implementing substitute decision-making happens regularly.

Under the PPPR Act, if decision-making capacity is not found, the law may refuse to give effect to that decision and may appoint someone else to make the decision instead. Another person is given the authority to make decisions on someone else’s behalf. This exchange of decision-maker is known as substituted decision-making[[5]](#footnote-6).

Substituted decision-making practices are prevalent in New Zealand, although supported decision-making is considered best practice, and enshrined in the UNCRPD, and is recognised as a right for everyone in New Zealand.

## Possible law changes

The Law Commission’s Preliminary Issues Paper puts forward several proposals to improve the law in the area of adult decision-making capacity. We discuss these changes and safeguards to them below.

## Decision-making supporters

Many people with affected decision-making capacity have a network of friends and/or family that informally assist them to make decisions. These people are referred to as “decision-making support” or a “decision-making supporter”[[6]](#footnote-7). Their role may include assisting them with communication, identifying the decision(s) that need to be made, and helping them access information relevant to the decision or understand the consequences of the decision. DPA believes decision-making supporters should be recognised by law.

## Collective decision-making arrangements and decisions

DPA believes that any law changes in this area must allow for the inclusion of collective decision-making arrangements and collective decisions. For example, networks such as circles of support made up of a range of supporters chosen by the person requiring assistance to make decisions, can collectively come to a decision which involves the person requiring decision-making assistance and those people that person has chosen to help demonstrate their will and preference.

## Supported decision-making for all

DPA believes that everyone can be supported to make decisions. It is often stated as fact that there is a group of disabled people who, because of their high support, care and communication needs, cannot make their own decisions.

It may be that only those close to them are able to understand what they want when they express their needs and be able to interpret/translate for them. However, like the rest of society, they have the right to supported decision-making and being appropriately supported to have choice and control over their lives. Good supported decision-making recognises that a person who might be deemed to lack capacity or competence can in fact make some decisions.

DPA believes that any legislative change should clearly set out the duties and responsibilities of a decision-making supporter. Such legislation should provide pathways for a supporter’s access to any relevant personal information about the individual with affected decision-making capacity. Currently, decision-making supporters have no legal recognition in Aotearoa New Zealand[[7]](#footnote-8).

DPA believes it is important that there is a monitoring system to ensure all decision-making supporters are compliant with their obligations. There are currently no processes for monitoring guardians’ and property managers’ compliance with their obligations. DPA believes that this potentially opens the disabled person under the court order to abuse and lack of control over decision-making.

There is currently no easily accessible education, oversight or registration requirements for decision-making supporters. This can lead to an increased risk of abuse or mistreatment of the individual, a lack of consideration for their will and preferences, or excessive or unnecessary access to the individual’s private or personal information.

All decision-making arrangements should encourage supported decision-making and prevent a decision-making supporter from substituted decision-making (i.e. making decisions on the individual’s behalf). Suggested methods for this protection include:

1. A requirement for a formal written support agreement
2. The creation of an independent body who have the responsibility of education and oversight

There needs to be adequate legal protection for an individual’s personal information and that there are automatic rights that a decision-making supporter cannot make decisions on. There are currently very few ‘automatic’ rights about which the guardian and/or property manager cannot make decisions. For example, a welfare guardian can’t decide about an individual getting married or divorced. It is essential that the law limits the power of a decision-making supporter and ensures the protection of the individual and access to their private information.

## Advanced Directives

An Advanced Directive allows an individual to declare in advance what processes they would like to put in place when their decision-making is affected[[8]](#footnote-9). Whilst they are commonly applied to health care decisions, their legal status in Aotearoa New Zealand and ability to bind other people is unclear[[9]](#footnote-10).

DPA supports that these decision-making arrangements should be recorded in a centralised register of Advanced Directives and their legal status clarified[[10]](#footnote-11).

## Enduring Powers of Attorney

An Enduring Power of Attorney (“EPOA”) is a decision-making arrangement where a person (individual) gives another person (the attorney) the ability to decide, or make a series of decisions, for them in the future[[11]](#footnote-12). EPOAs take effect once the individual is assessed as not having decision-making capacity and can cover decisions about personal welfare or financial/property matters, as per the PPPR Act.

DPA supports the development of a central register and a body tasked with independent oversight and hearing complaints, akin to the United Kingdom’s Office of the Public Guardian. This provides protections in legal processes and decision-making.

Further, the legal cost of preparing an EPOA is a real barrier to many people. Cost can deter people from getting an EPOA prepared while their decision-making is unaffected, yet this is the ideal time to have one prepared. This issue could be mitigated if the Government provided funding for an organisation such as Age Concern or Community Law Centres to assist people to

1. prepare their EPOA,
2. carry out the legal requirements re explaining exactly what a prepared EPOA means, and
3. sign it off.

## Moving to a rest home or care facility

DPA strongly believes that the requirement that a move to a care home or residential facility is agreed to by a needs assessment and coordination (NASC) agency is an important safeguard.

1. United Nations. (2006). *United Nations Convention on the Rights of People with Disabilities.* Retrieved from: <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [↑](#footnote-ref-2)
2. Office for Disability Issues. (2016). *New Zealand Disability Strategy.* Retrieved from: <https://www.odi.govt.nz/nz-disability-strategy/> [↑](#footnote-ref-3)
3. United Nations Convention on the Rights of Persons with Disabilities, 2008

<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/crpd/> [↑](#footnote-ref-4)
4. See Article 12, Equal recognition before the law at

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html> [↑](#footnote-ref-5)
5. Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke*

*Review of Adult Decision-making Capacity Law: Preliminary Issues Paper* (NZLC IP49, 2022) at [4.11] (PIP).

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/LawCommission-ADC-PIP49-Standard.pdf> [↑](#footnote-ref-6)
6. Law Commission, PIP at [7.8]. [↑](#footnote-ref-7)
7. Law Commission, PIP at [7.11]. [↑](#footnote-ref-8)
8. Law Commission, PIP at [7.16]. [↑](#footnote-ref-9)
9. Law Commission, PIP at [7.17]. [↑](#footnote-ref-10)
10. Law Commission, PIP at [7.18 and 7.19]. [↑](#footnote-ref-11)
11. Law Commission, PIP at [7.22]. [↑](#footnote-ref-12)