

“Quite often when people talk about supported decision making, they talk about the dignity of risk. And I think that’s so important, because everyone has risks when they make decisions ... there’s no reason that disabled people shouldn’t also have the ability to take risks. We’ve all taken risks.”

Dr Esther Woodbury

Disabled Persons Assembly New Zealand

Supported decision making at the centre of the legal process

How to do it

- **We need to change our thinking:** Good supported decision making recognises that a person who might be deemed to lack capacity or competence can in fact make some decisions.
- **We need to work with the disabled person and their supporters:** A disabled person may need to have a support person, rely upon their support network or ‘circle of support’ when engaged in the legal process.
- **We need to think about the information we are using:** Legal documents may need to be different or tailored to an individual’s needs.
- **We might need to communicate in another way:** People who are non-verbal might use alternative communication technology to ensure they understand and can participate in the legal process.
- **We need to take time:** To get to know the disabled person and ensure participation in the decision making process.

supported
decision
making



Auckland Disability Law

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Office for Disability Issues

Te Tari Mō Ngā Take Hauātanga
Administered by the Ministry of Social Development



Think
differently.



supported
decision
making

Promoting Supported Decision Making and the Protection of Personal and Property Rights Act

“To me, it is essential to support and understand the will and preference of the person who is being supported to make a decision. Good supported decision making means understanding what that means and understanding the person at the heart of the decision making.”

Paul Gibson

Disability Rights Commissioner
Human Rights Commission

What is supported decision making?

Successful supported decision making empowers disabled persons* to make their own decisions on an equal basis with others. When successfully put into practice it ensures that the disabled person is at the centre of the decision making process and gets the support they need. This type of decision making promotes the person's rights, will and preference, and assists them in achieving greater control and choice in their lives.

The alternative – substitute decision making

Substitute decision making is where one person makes decisions for another. For example, this happens where a Court appointed welfare guardian or property manager uses their authority to make decisions for a person deemed incapable of making decisions for themselves.

The New Zealand context

For disabled people, the United Nations Convention on the Rights of Persons with Disabilities (the Convention) is important because the New Zealand Government has ratified it. The Convention is a human rights instrument with an explicit social development dimension and contains rights about supported decision making. Article 12 is about equal recognition before the law and it:

- reaffirms that disabled people have the right to recognition everywhere as persons before the law.
- recognises that disabled people exercise legal capacity, and have the right to support to achieve this, on an equal basis with others in all aspects of life.

* The information within this pamphlet refers to disabled persons who may have capacity issues.

What does it mean for the legal process in New Zealand?

When considering compliance with the Convention, New Zealand's Independent Monitoring Mechanism recommended "that research be undertaken to determine whether the provisions of the Protection of Personal and Property Rights Act that relate to supported decision making are well understood and applied by welfare guardians and property managers appointed under the Act."

Making Disability Rights Real – Second Report of the Independent Monitoring Mechanism of the United Nations Convention on the Rights of Persons with Disabilities

The Protection of Personal and Property Rights Act 1988 (the Act) is a key Act which explicitly 'protects' disabled people. It offers a system of guardianship which 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 Act, every person is presumed to have capacity to make decisions until it is proven otherwise.

The reality

This capacity presumption is often not actually made in practice and implementing substitute decision making becomes a safe solution, whereas a supported decision making framework would be more appropriate.

It is important professionals and others working in this area have a good understanding of the practical ways to assist a person to make their

own decisions to the greatest extent possible. A person may have the capacity to make some decisions about their will or they may want to have an Enduring Power of Attorney, but sometimes those responsible for implementing the Act do not understand the ability of disabled persons to make decisions.

There is no specialist training around disability awareness and communicating with disabled people for Court appointed lawyers who are supposed to act for the disabled person.

Families can sometimes feel pressured by agencies providing essential services to apply for Court orders for adult children. Navigating this process and its consequences for the disabled person, and the other options that may be available, are not well understood.

The Act does not provide an effective mechanism to monitor or effectively enforce the actions of those using these Court orders.

“In some ways the Act expects a total lack of capacity, but also talks about maximising the capacity that the person does have. For our clients there are varying degrees of capacity and different types of capacity. There is 'no one size fits all' scale for capacity. This means that the person's experience often doesn't align with the law.”

Nan Jensen, Solicitor and Disability Law Specialist, QuinLaw