

Chapter 2

Supported Decision-making

Chapter 2 – Supported Decision-making

Chapter 2 is in five sections:

- A. The human rights concepts in the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
- B. The common legal principles in both the Mental Capacity Act (England and Wales) and the Protection of Personal and Property Rights Act 1988.
- C. The notion of autonomy as understood in ethics and in the law.
- D. New Zealand's cultural dimension and tikanga Māori.
- E. Supported decision-making in practice and in English case law.

Introduction

- 2.1 This chapter considers the impact of human rights instruments and the paradigm shift promoted in the United Nations Convention on the Rights of Persons with Disabilities (CRPD),²²³ from *substituted* decision-making to *supported* decision-making.²²⁴ It considers the role of the law and argues that substituted and supported decision-making regimes are not mutually exclusive: there is a place for both of them in law and they can coexist.
- 2.2 Supported decision-making refers to a process of providing support to people whose decision-making ability is impaired, to enable them to make their own decisions whenever possible.²²⁵ Originally developed in Canada as an alternative conceptual framework for decision-making, the idea of supported decision-making challenged the belief that personal autonomy could only be expressed independently.²²⁶ It was seen as a way to overcome barriers for people with intellectual disabilities. The concept now has far greater reach, applying to people with a wide range of impairments that affect decision-making. While the concept has gained international traction, it poses significant challenges for the development of law and policy. This is due in part to multiple and sometimes confused understandings of what legal capacity and supported decision-making actually entail and how to translate those concepts into workable laws. Therefore, it is essential to have a clear understanding of these human rights

²²³ Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008), (CRPD).

²²⁴ As discussed below, neither “substituted decision-making” nor “supported decision-making” are defined in the CRPD. A “substitute decision-maker” generally refers to a person or body who can make decisions for someone else who lacks capacity in law, such as an attorney or welfare guardian under adult guardianship law, a healthcare provider under Right 7(4) of the HDC Code, or the Court itself under statute or by way of the inherent jurisdiction.

²²⁵ Law Commission, T Spencer-Lane “Mental Capacity and Deprivation of Liberty” consultation document <http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty> at 154.

²²⁶ M Browning, C Bigby and J Douglas “Supported Decision-making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice” (2014) 1 Res Pract Int Devel Disab 34. Since the 1990s supported decision-making has been incorporated in legislation in several Canadian Provinces. Bach and Kerzner, above n 33. *A New Paradigm For Protecting Autonomy And The Right To Legal Capacity* is a commissioned report that has been influential in interpreting approaches to legal capacity.

concepts when undertaking a review of the law and to place them in a social and cultural context.

- 2.3 Contemporary thinking in ethics reflects a shift in focus from individual notions of autonomy to accounts of autonomy that affirm the importance of relationships in exercising legal capacity. The positive obligation to recognise support relationships in the CRPD also has synergies with tikanga Māori, where the values of individual autonomy and collective decision-making processes can work alongside each other. This chapter makes connections between supported decision-making as understood in human rights law, legal principles, ethics and Aotearoa/New Zealand's own cultural dimension.

2A: HUMAN RIGHTS

International human rights instruments

- 2.4 The impetus for change in mental capacity law internationally is derived from the growing role played by human rights instruments. These instruments affirm that an absence of capacity does not mean an absence of rights. The focus is on the individual's current position rather than past preferences.²²⁷ A central theme is the universality of human rights and of equal recognition before the law.
- 2.5 New Zealand is a party to the main international human rights instruments relevant to both mental capacity and mental health law. These are: the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), and the United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD). As a matter of international law, New Zealand is required to ensure that the standards set out in these instruments are implemented, although as a general principle a treaty will not have the force of law unless explicitly incorporated into domestic law.²²⁸
- 2.6 In domestic law, the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993 recognise these international obligations. The NZBORA expressly affirms New Zealand's commitment to the ICCPR and requires all statutes to be construed consistently with these rights if possible.²²⁹
- 2.7 In England, the Human Rights Act 1998 has adopted the European Convention on Human Rights 1950 (ECHR) into domestic law.²³⁰ As a result, those rights under the ECHR, which have long been closely scrutinised by the European Court of Human Rights in Strasbourg (ECtHR), are now also enforced by domestic courts in the United Kingdom. New Zealand is not a party to the ECHR but, like the United Kingdom, is a party to both the ICCPR and the CRPD. Substantially the same rights are protected by all three of these human rights

²²⁷ Donnelly, above n 24 at 274.

²²⁸ K Gledhill, "A Rights Audit of the Mental Health Act" in Dawson and Gledhill, above n 92 at 285–286. See also S Bell, J McGregor "Human Rights Law and Older People" in K Diesfeld, I McIntosh (eds) *Elder Law in New Zealand* (Thomson Reuters, Wellington, 2015) at 180. New Zealand is said to have a dualist approach, which distinguishes between international and national law. There is a trend towards monism internationally, whereby domestic courts can enforce both international and domestic law.

²²⁹ New Zealand Bill of Rights Act 1990, s 6. See also MA Waters "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) Columbia Law Rev, Washington & Lee Legal Studies Paper No. 2006-12.

²³⁰ The Convention on the International Protection of Adults signed at The Hague on 13 January 2000 is also expressly given effect in England and Wales in the MCA, s 63 and Schedule 3.

conventions. Strasbourg jurisprudence from the ECtHR is therefore directly relevant and likely to be influential in New Zealand courts, especially when its interpretations are authoritative in the English legal system, upon which the New Zealand legal system has traditionally drawn.²³¹

- 2.8 The Supreme Court of the United Kingdom referred to the CRPD for the first time on 19 March 2014 in its judgment in *P v Cheshire West and Chester Council*. Lady Hale said:²³²

The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to ‘everyone’ (Article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws. The same philosophy underpins the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by the United Kingdom in 2009. Although not directly incorporated into our domestic law, the CRPD is recognised by the Strasbourg court as part of the international law context within which the guarantees of the European Convention are to be interpreted.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)

- 2.9 The CRPD was the first binding international human rights instrument to expressly address disability. It has been heralded as signalling a “paradigm shift” in thinking about disability rights.
- 2.10 New Zealand signed the CRPD in March 2007, ratified it in 2008, and has played a significant role in its evolution, particularly involving representatives of disabled people’s organisations (DPOs).²³³ Prior to ratification of the CRPD, the New Zealand Public Health and Disability Act 2000 foreshadowed the New Zealand Disability Strategy and the development of the Disability Action Plan 2014–2018, led by the Office for Disability Issues within the Ministry of Social Development.²³⁴
- 2.11 An Optional Protocol operates alongside the CRPD and would allow individuals who consider that they have been victims of a violation by a State Party of the provisions of the CRPD to directly petition the United Nations Committee on the CRPD.²³⁵ Despite a large number of member states having ratified the Optional Protocol, New Zealand’s move to ratify it is still “in progress”.²³⁶
- 2.12 The CRPD does not create new rights but consolidates existing international obligations and clarifies their application to persons with disabilities. The principles underpinning the CRPD include respect for inherent dignity and individual autonomy – including the freedom to make choices – of persons with disabilities (art 3). Important rights include the right to liberty and security of the person (art 14); the right to freedom from exploitation, violence and abuse (art

²³¹ Gledhill, above n 228 at 286.

²³² Above n 7 at [36].

²³³ J McGregor, S Bell and M Wilson *Fault Lines: Human Rights in New Zealand* (Law Foundation, Wellington, 2015). Chapter 7 describes the background to New Zealand’s involvement with the development of the CRPD and New Zealand’s responses including the independent monitoring mechanism set up under art 33.

²³⁴ Minister for Disability Issues *The New Zealand Disability Strategy: Making a World of Difference Whakanui–Oranga* (Ministry of Health, Wellington, 2001).

²³⁵ Article 34 of the CRPD is the key enforcement mechanism and State Parties that have ratified the CRPD must report to the Committee.

²³⁶ Office for Disability Issues, Ministry of Social Development *Government Response to the United Nations Committee on the Rights of Persons with Disabilities’ Concluding Observations on New Zealand* (June 2015, <http://www.odi.govt.nz>) paragraph 1. As at November 2015, 160 countries have ratified the CRPD and 88 countries have ratified the Optional Protocol. United Nations Enable “Convention and Optional Protocol Signatories and Ratification” www.un.org/disabilities/countries.asp?id=166.

15); the right to respect for physical and mental integrity (art 17); and the right to live independently and be included in the community (art 19).

Article 12 of the CRPD

2.13 In addition to the general principles and obligations contained in the CRPD, art 12 and the right to equal recognition before the law are of central importance in understanding how the CRPD applies to mental capacity law and practice. The emphasis is on equal *legal* capacity. Legal capacity comprises both *legal standing* – being recognised as a person before the law, and *legal agency* – the ability to act within the framework of the legal system.²³⁷ There is an obligation on states to provide support to achieve equal capacity, for persons with disabilities who broadly include those who have “long-term physical, mental, intellectual or sensory impairments”.²³⁸ In summary, art 12 recognises the following rights and obligations on state parties:

- the right to enjoy *legal capacity on an equal basis* with others;²³⁹
- the obligation of governments to implement *measures that provide access to support* by those who need it to exercise their legal capacity;²⁴⁰ and
- the obligation of governments to ensure *safeguards are in place to prevent abuse* in relation to measures for the exercise of legal capacity.²⁴¹

The support paradigm

2.14 In 2014, the United Nations Committee on the Rights of Persons with Disabilities (the UN Committee) released a General Comment (the General Comment) to aid interpretation of art 12. The UN Committee perceived: ²⁴²

... a failure by state parties to understand the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making.

2.15 This paradigm shift represents a change in attitudes to disability that have moved away from the medical model of disability, which concentrates on the individual’s limitations, to a social model, which identifies barriers created in society.²⁴³ Under the UN Committee’s interpretation of the CRPD, perceived or actual deficits in mental capacity must not be used as a justification for denying legal capacity.²⁴⁴

2.16 The scope of the obligations imposed by art 12, as interpreted in the General Comment, are controversial, particularly whether the concept of incapacity can still be used as a relevant

²³⁷ Bach and Kerzner, above n 33. See also B McSherry “Legal issues: legal capacity under the convention on the rights of persons with disabilities” (2012) 20 J Law Med 22.

²³⁸ United Nations Convention on the Rights of Persons with Disabilities, art 1.

²³⁹ United Nations Convention on the Rights of Persons with Disabilities, art 12(1) and (2).

²⁴⁰ United Nations Convention on the Rights of Persons with Disabilities, art 12(3).

²⁴¹ United Nations Convention on the Rights of Persons with Disabilities, art 12(4).

²⁴² United Nations Committee on the Rights of Persons with Disabilities *General Comment Number 1 Article 12: Equal recognition before the law*, CRPD/C/GC/1 (2014) at [3]. The Convention itself does not actually mention “supported decision-making” or “substitute decision-making” or define these terms.

²⁴³ Bach and Kerzner, above n 33 at 18.

²⁴⁴ General Comment No 1, above n 242 at [12]. As discussed above, a distinction is made between legal capacity – a legal status or standing, and mental capacity - the ability of individuals to make decisions for themselves, either on their own or with support.

concept in law without breaching the CRPD.²⁴⁵ Although legal capacity is a central concept within the CRPD, the Convention itself provides no definition of it. The General Comment also claims that art 12 prohibits the imposition of “substitute decisions” on people with disabilities in all cases, requiring instead that they be given access to the support they need to exercise their legal capacity in accordance with their will and preferences.²⁴⁶

- 2.17 In England, a report commissioned by the Ministry of Justice found that the MCA was not fully compliant with the CRPD in terms of its definition of “mental incapacity”, and in safeguarding the “rights, will and preferences” of the person, as required by art 12(4), in the MCA’s best-interests decision-making framework.²⁴⁷ The authors rejected, however, the UN Committee’s claim that compliance with the CRPD requires the abolition of substitute decision-making and the best-interests decision-making framework. As a matter of international law, the status of the General Comment is that of an authoritative statement rather than a binding instrument such as the Convention itself, but it is considered to be a powerful influence on domestic policy debates.²⁴⁸
- 2.18 The UN Committee’s view that all persons have legal capacity at all times irrespective of mental status has attracted criticism, particularly if it requires the immediate abolition of mental health laws involving involuntary admission and treatment.²⁴⁹ Even proponents of the “fusion” of mental health and mental capacity law into a single statutory regime governing state intervention in the lives of people with disabilities that would be based squarely on incapacity criteria, regard the UN Committee’s interpretation of art 12 as being unrealistic.²⁵⁰ It fails to recognise potential difficulties in determining a person’s genuine “will and preferences”, and there is a lack of clarity as to when “supported” decision-making becomes “substitute” decision-making, and when and why the safeguards listed in art 12(4) are required around this process.

Safeguards to prevent abuse

- 2.19 The notion that supported decision-making should be “free of conflict of interest and undue influence” under art 12(4) of the CRPD is one of the most important provisions of the CRPD. The safeguards must ensure that:²⁵¹

... 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.

- 2.20 A common criticism of the support paradigm is that it offers few tools under art 12(4) to mitigate harmful decisions and does not deal with the “hard cases”, where there is the potential for

²⁴⁵ P Bartlett “The UN Convention of the Rights of Persons with Disabilities and Mental Health” (2012) 75 *Mod Law Rev* 752; S Callaghan and C Ryan “An Evolving Revolution: Evaluating Australia’s compliance with International Human Rights in Mental Health Law” (2016) draft article.

²⁴⁶ General Comment No.1, above n 240 at [26].

²⁴⁷ Szerletics, above n 209.

²⁴⁸ Szerletics, above n 209 at 12, fn 18 where the legal status of General Comments is discussed further. See also T Carney “Supported decision-Making for People with Cognitive Impairments: An Australian Perspective?” (2015) 4 *Laws* 37 at 41.

²⁴⁹ MC Freeman, K Kolappa, JM de Almeida and others “Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities” (2015) 2(9) *Lancet Psychiatry* 844.

²⁵⁰ J Dawson “A realistic approach to assessing mental health laws’ compliance with the UNCRPD” (2015) *Intl J Law Psych* 1; Callaghan and Ryan, above n 245.

²⁵¹ United Nations Convention on the Rights of Persons with Disabilities, art 12(4).

undue influence, exploitation and abuse by supporters of the person with impaired capacity. The hard cases can occur within both substitute decision-making (guardianship) and supported decision-making regimes.²⁵² While the latter is less paternalistic, it runs the risk of offering little protection against harm.

- 2.21 Protecting people from harmful influences raises the whole notion of how autonomy is viewed in the law, when a facet of autonomy concerns an individual's ability to make an informed, uncoerced decision. In this respect, capacity and the notion of undue influence are inextricably linked.²⁵³

Negative and positive rights

- 2.22 The CRPD is also significant because it attempts to break down traditional distinctions between civil and political rights, which are usually negative – such as non-interference by the state – and social and economic rights, which are usually positive, such as guaranteeing social inclusion and participation and the right to healthcare.²⁵⁴ Positive obligations in respect of autonomy do not mean that “what I want should be delivered”, but that a fair balance should be struck between individual rights and societal interests.²⁵⁵
- 2.23 Under the CRPD, the problem that emerges is how to deliver support mechanisms required under art 12(3) (a positive right), while at the same time ensuring protection from abuse under art 12(4) (a negative right).²⁵⁶ Protection from harm, and the recognition of the vulnerability of people with impaired capacity to abuse and exploitation, form the rationale for the appointment of substitute decision-makers in adult guardianship law, and for the existence of the inherent “protective” jurisdiction of the court.²⁵⁷ For example, the purpose of the PPPR Act is to “protect and promote” the rights of people who lack capacity.²⁵⁸ The law recognises that protecting people from harm can be a source of empowerment and can correspondingly promote autonomy.

The CRPD and the PPPR Act

- 2.24 After signing the CRPD, New Zealand's PPPR Act was initially considered consistent with the CRPD, although the analysis undertaken was relatively superficial as there was a push at the time for New Zealand to ratify the Convention as soon as possible given New Zealand's role in promoting the Convention.²⁵⁹ While the primary objectives of the PPPR Act and its

²⁵² L Series “Relationships, autonomy and legal capacity: Mental capacity and support paradigms” (2015) 40 Int J Law Psych 80 at [4.5].

²⁵³ D Lush, Senior Judge of the Court of Protection “Question and Answer session” (Academy of European Law's Conference on the Rights of Persons with Disabilities, Trier, Germany, 11 and 12 December 2014).

²⁵⁴ M Donnelly *Healthcare Decision-making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, Cambridge, 2010) at 5. This divide between positive and negative rights is not always clear. Participation and inclusion are equally evident in some of the ICCPR.

²⁵⁵ M Brazier cited by Donnelly, above n 254 at 79.

²⁵⁶ Bach and Kerzner, above n 33 at 37.

²⁵⁷ The protection of vulnerable adults outside of statutory law under the MCA has led to the re-emergence of the inherent jurisdiction in England: *DL v A Local Authority*, above n 213. See discussion of Vulnerable Adults and the Inherent Jurisdiction in Chapter IA Setting the Context. In New Zealand, the inherent jurisdiction of the High Court still survives in the Protection of Personal and Property Rights Act, s 114 and Judicature Act 1908, s 17.

²⁵⁸ Protection of Personal and Property Rights Act 1988, Preamble.

²⁵⁹ McGregor, Bell and Wilson, above n 233 at 107-134.

participatory model may be aligned with the CRPD in some respects, supported decision-making (or a legal mechanism to implement it) is not expressly recognised in the legislation.²⁶⁰

- 2.25 The General Comment released in 2014 casts doubt on New Zealand’s compliance with the CRPD as does the subsequent report on New Zealand’s position from the UN Committee. New Zealand, along with many other countries that ratified the convention, has an adult guardianship law (the PPPR Act), the scheme of which provides for adult guardianship and substituted decision-making. Yet the concluding observations recommended “that the State party take immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making. This should provide a wide range of measures that respect the person’s autonomy, will and preferences, and is in full conformity with Article 12 of the Convention.”²⁶¹
- 2.26 The Government’s response to the UN Committee’s criticisms of New Zealand law (based on its interpretations of art 12, as part of the independent monitoring process), has been muted. That response does not directly address the UN Committee’s recommendation to take “immediate steps” to revise relevant laws and replace substituted decision-making with supported decision-making.²⁶² Paul Gibson, the Disability Commissioner, says, “We are getting so far behind and we were once a leader”.²⁶³

Australian law reform

- 2.27 In 2014, the Australian Law Reform Commission’s report (the Australian report) examined the legal framework within Australia and the changes required having regard to the CRPD.²⁶⁴ The main recommendation of the Australian report is for the Commonwealth states to establish national decision-making principles to ensure that supported decision-making is encouraged.²⁶⁵ In fact, much of the relevant legislation would have to be enacted in Australia at the state – rather than federal (or Commonwealth) – level of government.
- 2.28 Prior to the Australian report in 2012, the Victorian Law Reform Commission (VLRC) advised that the existing laws in Victoria were complex and inaccessible, with provision for six different types of substitute decision-makers to be appointed, under three separate Acts.²⁶⁶ The key VLRC recommendation was to create a single statute to provide for substitute decision-making for people with impaired capacity that allowed for a continuum of decision-making

²⁶⁰ The primary objectives of the PPPR Act are to make the least restrictive intervention and maximise a person’s participation to the greatest extent possible: Protection of Personal and Property Rights Act 1988, s 8, discussed below.

²⁶¹ Office for Disability Issues *Government response to the United Nations Committee on the Rights of Persons with Disabilities Concluding Observations on New Zealand* (Ministry of Social Development, Wellington, 2015) at [22].

²⁶² Instead the Government’s response refers to the existing Disability Action Plan 2014-2018 and that this work may recommend changes to legislation. ODI above n 261 at [19]. The UN Committee directed its recommendations more towards compliance with the Mental Health (Compulsory Assessment and Treatment) Act 1992. It is also important to note that the CRPD is concerned to remove discrimination across a range of laws that affect people with disabilities.

²⁶³ Interview with Paul Gibson, Disability Commissioner, Human Rights Commission. (A Douglass, Wellington, 2015).

²⁶⁴ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124, Canberra, August 2014).

²⁶⁵ Other key principles are that representative decision-makers are appointed only as a last resort; and a person’s will, preferences and rights are to direct decisions that affect their lives. However, the Australian report says very little about *how* to implement measures to safeguard against abuse under art 12(4) of the CRPD. See Guidelines at 86 - 87 of Australian report.

²⁶⁶ Victorian Law Reform Commission *Guardianship: Final Report 24* (VLRC, Melbourne, 2012) at 37 at [3.30].

arrangements and mechanisms. In addition to more traditional substitute decision-making arrangements, the VLRC recommended the creation of “supporters” and “co-decision-makers” who could be appointed by the person or by the Victorian Civil and Administrative Tribunal (VCAT).²⁶⁷

- 2.29 In 2014, a Bill was introduced to the Victorian Parliament which would have established Australia’s first supported decision-making model. However, it has not yet passed into law.²⁶⁸ Two of the reform initiatives were roundly criticised and were described as “botched”.²⁶⁹ There was conflation of the concepts of supported and substituted decision-making by creating “supportive guardians” and “supportive attorneys”, as well as a proposal for expedited appointment of parents as guardians or administrators of children lacking decision-making capacity on turning 18.²⁷⁰

2B: LEGAL PRINCIPLES

Supported decision-making – in law

- 2.30 Supported decision-making is a central concept in art 12 of the CRPD. It is based on the idea that all adults, except in limited circumstances, have some level of ability and should be entitled to make decisions expressing their will and preferences, but may require varying levels of support to do so. Rather than question whether a person has capacity to make decisions – reflecting a “binary view” of capacity and decision-making – the preferable approach is to ask what level of support, or what mechanisms, are necessary to support people to express their will or preferences.²⁷¹ Supported decision-making can be referred to as a process, a mechanism, a system, or a framework.²⁷² The concept encompasses a range of support mechanisms from informal to formal. Carney summarises a number of these:²⁷³

1. effective communication, especially in providing information and advice to a person and ensuring they are able to communicate their decisions to others;
2. spending time to determine a person’s preferences and wishes;
3. informal relationships of support between a person and members of their social networks;
4. agreements or appointments to indicate that a relationship of support exists; and

²⁶⁷ Victorian Law Reform Commission, above n 266, at xxvii and xli. A similar continuum concept was developed (and subsequently revised) in the Irish Assisted Decision-Making Bill, see Chapter 1C.

²⁶⁸ Guardianship and Administration (G&A) Bill 2014. This was a partner Bill to the Powers of Attorney Bill 2014, which was passed and the Act commenced on 1 September 2015. The G&A Bill did not pass before the 2014 elections, which the governing conservative coalition lost. The Bill is no longer listed on the Victorian Legislation and Parliamentary Documents website (www.legislation.vic.gov.au).

²⁶⁹ T Carney “What does the UN CRPD and Supported Decision-making Mean in the Real World?” Presentation to Capacity Australia conference, Sydney, 13 November 2015.

²⁷⁰ T Carney “Supporting People with Cognitive Disabilities with Decision-Making: Any Australian Law Reform Contributions?” (2015) 15/23 Sydney Law School Legal Studies Research Paper at 2. Carney, above n 269.

²⁷¹ Australian report, above n 264 at 93.

²⁷² Browning, Bigby and Douglas, above n 226 at 36.

²⁷³ T Carney “Participation and Service Access Rights for People with Intellectual Disability: A Role for the Law?” (2013) 38 J Intell Devel Disab 59 at 66.

5. statutory relationships of support – whether through private or court/tribunal appointment.

2.31 Unlike traditional guardianship law, supported decision-making focuses on people retaining their *legal* powers of decision, but a third party is authorised by law to do such things as provide assistance, or access and share their personal information.²⁷⁴ As understood in human rights law, supported decision-making involves more than support *with* decision-making: it is about providing an alternative legal mechanism that give people legal standing where possible and to recognise their needs within the framework of the law.²⁷⁵

2.32 Legal capacity can be understood as a continuum in which supported decision-making occurs throughout. There is a point along the continuum in which a person may be found unable to make a legally binding decision, even with support (here the person loses legal agency but retains legal standing).²⁷⁶ Where this point is to be found depends on the complexity of the decision. But the likely will and preferences of the person still remain central to the decision-making process.

2.33 There are some challenges in establishing legal frameworks in line with the CRPD. The lack of a clear definition of supported decision-making has led to conceptual confusion about what it means in law. Its connection to the concept of legal capacity is not entirely clear. Nor is it clear how substitute decision-making and the modern notion of supported decision-making are to co-exist. There will be some situations when a person is completely unable to participate in decisions, such as when in a coma. There will also be circumstances where a person with impaired capacity is given support but they may still lack the ability to make a decision for themselves. In these situations a substitute decision-maker will need to make a decision for them.

Supported decision-making – a legal principle

2.34 Existing legal principles in both the MCA and PPPR Act implicitly assume that there is a role for supported decision-making, more expressly so in the MCA. These legal principles and concepts govern all decisions made and actions taken under both mental capacity laws. They are the aids to interpreting the law. Both the MCA and the PPPR Act have principles that are remarkably similar except for the MCA's overriding decision-making principle of the person's best interests.²⁷⁷ By comparison, best interests is not an express principle of the PPPR Act; instead its primary objectives are to make the least restrictive intervention and to maximise the person's capacity to participate in decision-making.²⁷⁸

²⁷⁴ T Carney, above n 273 at 60.

²⁷⁵ Browning, above n 226 at 40.

²⁷⁶ Browning, above n 226 at 39.

²⁷⁷ Mental Capacity Act 2005, ss 1(5) and 4.

²⁷⁸ Protection of Personal and Property Rights Act 1988, s 8(1) and (2). Under the HDC Code, where a person has diminished competence for decision-making they still retain the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence: Right 7(3).

Figure 2: Legal principles

Mental Capacity Act	PPPR Act
<ul style="list-style-type: none"> • Assumption of capacity • All practicable steps to help make a decision • Unwise decisions • Best interests • Less restrictive of the rights and freedoms 	<ul style="list-style-type: none"> • Presumption of capacity • Maximising a person's capacity to the greatest extent possible • Imprudent decisions • Least restrictive intervention

KEY : Red shows primary principles of the respective legislation

- 2.35 All legal principles in the MCA and the PPPR Act are underpinned by the ethical notion of autonomy to a lesser or greater degree, even though the value of autonomy in some situations is contested. The presumption of capacity,²⁷⁹ maximising a person's capacity, and maintaining their freedom to make unwise decisions (if capable or "capax"),²⁸⁰ reflect the legal "right" to non-interference and to make decisions for one's self.
- 2.36 The "unwise decisions" principle asserts that people are entitled to make imprudent decisions so long as they have the capacity to do so.²⁸¹ Thus, a person cannot be deemed to lack capacity just because health professionals, or even the court, disagree with their decisions. But making unwise choices may be sufficient to raise doubts as to the person's capacity, for example, if this is out of character.²⁸² It is an assessment of a person's decision-making ability and not the substance of the decision they make, that is relevant to the court exercising jurisdiction. Despite this "imprudence limitation", under the PPPR Act the court may still consider that the appointment of a welfare guardian is the only way to achieve "appropriate" decisions, one of the criteria for appointing a welfare guardian.²⁸³
- 2.37 Both English and New Zealand statutes have principles akin to the notion of supported decision-making but there are few mechanisms to prioritise or enforce them. In the MCA, a person is "not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."²⁸⁴ The accompanying Code of Practice under the MCA provides guidance to professionals and decision-makers on how to support people

²⁷⁹ The PPPR Act affirms the common law presumption of competence. The presumption is rebuttable and the legal burden of establishing lack of competence falls on the person alleging it. The presumption of competence appears in s 5 Part 1, Personal Rights, s 24, Part 5 Property Rights and s 93B Enduring Powers of Attorney, the Protection of Personal and Property Rights Act 1988. Under the HDC Code the presumption of competence is recognised in Right 7(2).

²⁸⁰ "Capax/incapax" is Latin for capable/incapable, latin-dictionary.net.

²⁸¹ Mental Capacity Act 2005, s 1(5); Protection of Personal and Property Rights Act 1988, s 6(3).

²⁸² P Letts (ed), *Assessment of Mental Capacity, A Practical Guide for Doctors and Lawyers* (3rd ed, The British Medical Association and the Law Society, 2010) at 27.

²⁸³ Protection of Personal and Property Rights Act 1988, s 12(2).

²⁸⁴ Mental Capacity Act 2005, s 1(3).

to understand relevant information during assessment of their capacity and to enhance their capabilities for decision-making.²⁸⁵

- 2.38 In the PPPR Act, one of the primary objectives is to maximise a person's capacity to the greatest extent possible. This is sometimes referred to as the "empowerment principle". This description overstates the weight attached to it in practice, as it tends to be overshadowed by the other primary objective of making the least restrictive intervention.²⁸⁶ Both these principles generally come into play only *after* a person has been found to lack capacity and an intervention is considered necessary. For example, only after a welfare guardian has been appointed are they placed under a duty to consult the person subject to the order and to maximise their participation in decisions.²⁸⁷
- 2.39 The weakness of this legal framework is that there is no positive obligation to support the person to exercise their capacity at the beginning of the decision-making process; or, put another way, there is no *presumption* of supported decision-making. Furthermore, if a person lacks capacity and intervention is considered necessary, the framework does not emphasise that their will and preferences are still to be taken into account when decisions are made by others.

2C: ETHICS, AUTONOMY AND THE LAW

Autonomy and capacity

- 2.40 The law's approach to capacity is consistent with a traditional liberal account of autonomy based on individual rights and non-interference. The liberal account still places limits on autonomy to avoid harm. In John Stuart Mill's words:²⁸⁸

The only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others...Over himself, over his own body and mind, the individual is sovereign.

- 2.41 There are occasions when the State, through the law, might legitimately override the autonomy of individuals for their own good; for example, the mandatory use of bike helmets for road safety, or mental health laws that override an individual's autonomy to protect the individual from doing harm to self or others.
- 2.42 Although autonomy is not without limits, once the right to autonomy does arise, it is accorded primary status in a hierarchy of values.²⁸⁹ If there is a conflict between autonomy and other

²⁸⁵ Office of the Public Guardian *Mental Capacity Act Code of Practice* (TSO, London, 2013) at 29.

²⁸⁶ The objective of maximising a person's participation to the greatest extent possible is rarely referred to in Family Court judgments.

²⁸⁷ Protection of Personal and Property Rights Act 1988, s 12.

²⁸⁸ JS Mill *On Liberty* (John Parker & Son, London, 1859). JS Mill is often cited by Judges in refusal of treatment cases. For example, *Nottinghamshire Healthcare NHS Trust v RC*, above n 191, at [1.105].

²⁸⁹ One of the most influential texts in medical ethics where the principle of autonomy has been accorded status above other principles such as beneficence is TL Beauchamp and JF Childress, *Principles of Biomedical Ethics* (7th ed, Oxford University Press, New York, 2013).

values, respect for autonomy dictates that decision-making power must be fully situated in the individual regardless of consequences for the person's welfare and even for their life.²⁹⁰

- 2.43 Capacity is said to be the gatekeeper for autonomy,²⁹¹ as embodied in the legal principles of the presumption of competence and that a person is entitled to make imprudent decisions (in English law, "unwise decisions") so long as they are considered to have the capacity to do so.²⁹² This "brightline" division between capacity and incapacity, however, avoids broader questions of decision-making agency (and to be recognised as "an actor in law"), preferring instead to shoehorn questions of agency into the test of capacity.²⁹³ The problem with this brightline approach is the failure to recognise the extent to which people with impaired capacity can truly exercise their autonomy. As Donnelly explains,²⁹⁴

A person with dementia forced to choose between continuing to live at home with an abusive child or life in a nursing home, can hardly be described as an autonomous agent, notwithstanding whether or not he or she meets a legal standard for capacity.

- 2.44 In setting boundaries of mental capacity, if the person's decision fits with societal norms, there is a tendency to regard the decision as demonstrating the person's capacity. If however, the decision differs from societal norms, it is more likely that the person's capacity is questioned.²⁹⁵ Intervention on the basis of incapacity is an important component of the law's approach to healthcare decision-making, where there is a need to balance the values of autonomy (self-determination) and beneficence (well-being).²⁹⁶

Autonomy and the importance of relationships

- 2.45 There is a substantial body of literature in bioethics that is critical of the liberal notion of autonomy because it is viewed as too individualistic and inconsistent with other important values, such as dignity²⁹⁷ or trust.²⁹⁸ There has been increased recognition of autonomy as a relational concept. In essence, relational autonomy treats a person's agency as shaped or even constituted by their environment and supporting relationships with others,²⁹⁹ even though relationships can also be oppressive and a threat to a person's autonomy. Beyond agreement that autonomy is valuable and cannot be separated from relational and social conditions, there are diverse approaches to relational autonomy.³⁰⁰
- 2.46 While respect for autonomy is central to the human rights framework, other values, including respect for dignity are also important.³⁰¹ The CRPD's approach to legal capacity has largely

²⁹⁰ Donnelly, above n 254 at 21.

²⁹¹ Donnelly, above n 254 at Chapter 3.

²⁹² Protection of Personal and Property Rights Act 1988, s 6(3).

²⁹³ Donnelly, above n 254 at 59 - 65.

²⁹⁴ Donnelly, above n 24 at 278. This example is in reference to the development of the vulnerability-based inherent jurisdiction in England.

²⁹⁵ M Brazier and E Cave *Medicine, Patients and the Law* (5th ed Penguin Books, London, 2011) at 65.

²⁹⁶ Buchanan and Brock, above n 35.

²⁹⁷ C Foster *Choosing Life and Choosing Death: The tyranny of autonomy in medical ethics and law* (Hart Publishing, Portland & Oxford, 2009).

²⁹⁸ O'Neill *Autonomy and Trust in Bioethics* (Cambridge University Press, Cambridge, 2002).

²⁹⁹ Relational models of autonomy have been influential among feminist theorists with some approaches more controversial than others. See C MacKenzie and N Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, New York, 2000). See also J Herring *Relational Autonomy and Family Law* (Springer, New York, 2014).

³⁰⁰ Series, above n 252.

³⁰¹ The stated purpose of the CRPD in art 1 is 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". See also art 15, freedom from torture and inhuman and degrading treatment; art 17, respect for physical and mental integrity; and art 22, respect for privacy.

drawn on the notion of relational autonomy.³⁰² A relational approach to capacity assessments for example, requires a shift in focus away from testing the internal workings of the individual's mind and instead requires that account be taken of the wider context, both structural and personal, which influences the person's capacity. As Donnelly says:³⁰³

The capacity assessor may no longer be viewed as an objective outsider who tests the patient and decides whether she is capable or not but as an essential part of the process of developing her capacity.

- 2.47 Whether the rights enshrined in the CRPD are viewed through an individualistic or a relational lens on autonomy, there is agreement about the importance of relationships in exercising legal capacity. Decision-making ability cannot be viewed in isolation and may be dependent on the quality of a person's relationships with others. Valuing autonomy is viewed as a positive obligation, even an achievement,³⁰⁴ which places the individual at the centre of the decision-making.

Best interests and supported decision-making

- 2.48 Despite its paternalistic origins, the "best interests" standard for decision-making in the MCA has the potential to provide meaningful protection for a person's autonomy where a person lacks capacity in law.³⁰⁵ In the past, best interests at common law (and as understood in earlier case law) has traditionally been associated with imperatives of doing good, and avoidance of harm. In its highest form it is regarded as an expression of paternalism – what is best for that person decided by someone else.
- 2.49 Properly understood, assessing best interests recognises the importance of relationships.³⁰⁶ As a standard for decision-making it adds considerable transparency to the decision-making process and to the reality that there will be situations where a person is unable to make and/or participate in making a decision and the decision will need to be made for them by others.
- 2.50 Section 4 of the MCA provides a checklist of factors to be applied in making an assessment of best interests that takes into account "a wide range of ethical, social, moral, emotional and welfare considerations".³⁰⁷ It is a hybrid standard: the overall question of a person's best interests is an objective one, but is informed by the person's past and present wishes and the opinion of others as to what would be in their best interests.³⁰⁸

³⁰² Series, above n 252. The Essex Autonomy project argued that the functional test for decision-making ability is consistent with the CRPD in part because of the intrinsic connection between decision-making ability and autonomy. They accepted a moderate relational position but rejected the idea that the CRPD requires recognition of *active* legal capacity, accepting that legal agency (being "an actor under the law") is a fundamental component of legal capacity.

³⁰³ Donnelly, above n 254 at 113.

³⁰⁴ An account of autonomy as an "achievement" draws on the work of J Raz *The Morality of Freedom* (Oxford University Press, London, 1986) at 204, cited in M Donnelly, above n 254 at 41.

³⁰⁵ See Chapter 5 Best Interests: a standard for decision-making.

³⁰⁶ J Herring and C Foster "Welfare Means Relationality, Virtue and Altruism" (2010) 32(3) *Legal Studies* 480. The authors refer to the welfare principle in the Children Act and the best interests test in the MCA as synonymous.

³⁰⁷ *Re MM (An Adult)* [2007] EWHC 2003 (Fam) at [99] Munby J.

³⁰⁸ Best interests decisions can also result in a decision that is contrary to a person's wishes. For example, *The Mental Health Trust and others v DD by her litigation friend, the Official Solicitor*: BC [2015] EWCOP 4 (Fam), a series of decisions where a 36-year-old woman with learning disabilities was ordered against her wishes to be taken to hospital for laparoscopic sterilisation. DD had six children previously who were looked after by substitute carers and with all of whom she had no ongoing contact.

- 2.51 As understood in the MCA, best interests is also based on notions of autonomy. It makes it clear that, even though the person may lack capacity (in law), "so far as reasonably practicable" they should be permitted and encouraged to participate "as fully as possible in any act done and any decision affecting them"³⁰⁹ and that their "wishes and feelings must be taken into account".³¹⁰ This approach recognises that even where a person does not have capacity to make an effective decision, they may play an important part in the decision-making process.³¹¹
- 2.52 As Herring observes:³¹²
- ... that does not mean their views and feelings count for nothing. Indeed there is recognition in section 4 that even if it is not possible for P (the person) to make a decision, they should still be involved to a reasonable extent in the decision-making process and their views should be listened to.
- 2.53 The best interests framework has been rejected by those who strongly emphasise the value of supported decision-making that is given priority in the CRPD; however, the inclusion in the process of the person with impaired capacity for decision-making can be viewed as an "appropriate measure" under art 12(3) of the CRPD to ascertain the person's will and preferences under art 12(4).³¹³ The English Law Commission has recommended that there should be a presumption of the person's wishes and feelings to make the best interests standard more compliant with the CRPD.³¹⁴ The Australian report has effectively rephrased the best interests standard in the language of the CRPD as "Will, Preferences and Rights Guidelines," and there is no appreciable difference in the standard to be adhered to by the substitute decision-maker.³¹⁵
- 2.54 The "best interests" standard, by whatever name, recognises that where supported decision-making options have been exhausted, decisions by others need to be made. It can provide a transparent basis for decision-making when a person is unable to fully exercise their legal capacity and is an essential complement to a supported decision-making framework.

2D: THE CULTURAL DIMENSION

Tikanga Māori

- 2.55 The centrality and importance of Māori beliefs and values, as expressed through tikanga Māori, has received growing recognition in modern New Zealand law. Tikanga, as an expression of Māori customary values and practice, brings recognition of Te Ao Māori, a Māori world view, and depth to the understanding of cultural values that underpin the law. Te Tiriti

³⁰⁹ Mental Capacity Act 2005, s 4(4).

³¹⁰ Mental Capacity Act 2005, s 4(6).

³¹¹ Law Commission *Mental Incapacity: Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults*, Commission paper No 231 (HMSO, London, 1995) at 46.

³¹² Herring, "Best Interests and Dementia" in Foster, Herring and Doron, above n 24 at 303.

³¹³ Donnelly, above n 24 at 192.

³¹⁴ Law Commission, above n 199 at 166 [12.47].

³¹⁵ ALRC Report, above n 264. Recommendation 3-3 Will, Preferences and Rights Guidelines at 77. In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation. The duties of the "representative" to "uphold the person's human rights" is vague and in the writer's opinion, less helpful than the English standard of best interests in the MCA.

o Waitangi³¹⁶ (the Treaty) recognises the obligations and the relationship between the Crown and Māori as tangata whenua. It values indigeneity and upholds a set of rights that the indigenous people ought reasonably to expect to exercise in modern times.³¹⁷

2.56 The Treaty also represents the bringing together of different world views: that is, English law, based on individual rights of self-determination and non-interference, with traditional Māori values (tikanga) such as self-determination – tino rangatiratanga – concerned with collective, not individual, interests.³¹⁸ The Treaty processes have given Aotearoa/New Zealand the ability and experience to respect these differences in a pluralistic society, by providing “a plumb line for values and respect for tikanga Māori,” as a basis for new legal frameworks.³¹⁹

2.57 Justice Joseph Williams describes tikanga in this way:³²⁰

The system of law that emerged from the baggage Kupe’s people brought and the changes demanded by his descendants by the land itself have come to be known as tikanga Māori: “tika” meaning correct, right or just; and the suffix “nga” transforming “tika” into a noun, thus denoting the system by which correctness, rightness or justice is maintained. That said, tikanga and law are not co-extensive ideas. *Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored habits.* (Emphasis added)

2.58 In *Takamore v Clarke*,³²¹ a case involving a burial dispute between Mr Takamore’s iwi and his partner who was executor of his will, the Supreme Court held that “Māori custom according to tikanga is ... part of the values of the New Zealand common law”.³²² However, when considering the “executor rule”, the personal representative had the power not to acquiesce to tikanga.³²³ One difference between the common law and tikanga in burial disputes concerns the decision-making process itself. Under common law, the burial decision is made by a single person, the executor. In contrast, tikanga facilitates and encourages discussion and debate over the place of burial. The emphasis is on collective discussion in deciding

³¹⁶ Treaty of Waitangi 1840.

³¹⁷ M Durie “Universal provision, indigeneity and the Treaty of Waitangi”
www.victoria.ac.nz/law/research/publications/vuwlr/...3.../durie.pdf.

³¹⁸ 2015 is the 800th anniversary of the Great Charter: the Magna Carta. It is also the 175th anniversary of the signing of Te Tiriti o Waitangi, described, both in the 1840s and recently, by the Chief Justice, as the “Māori Magna Carta” in S Elias “The meaning and purpose of the Treaty of Waitangi” Hui-a-Tau Conference (Waitangi, NZ 4 September 2015).

³¹⁹ Submission to the Law Commission from the Public Issues Network of the Methodist Church of New Zealand, among many other submitters on tikanga Māori and the proposed new legal framework in *Death, Burial and Cremation, A New Law for Contemporary New Zealand* (NZLRC, R134, October 2015) at 206.

³²⁰ J Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) Waik L Rev at 1.

³²¹ [2012] NZSC 116, [2013] 2 NZLR 733.

³²² *Takamore v Clarke*, at [94], Elias CJ.

³²³ *Takamore v Clarke*, at [152] and [164]-[165]. The common law provides that personal representatives have a right and duty to dispose of the deceased’s body, taking into account cultural considerations, including tikanga where relevant. However, the executor rule was confirmed by a majority of only three out of five members of the Supreme Court, with two members concluding it did not form part of New Zealand’s common law. This indicates that there may be different views about the continued appropriateness of this rule in burial disputes in modern circumstances. See Law Commission, *The Legal Framework for Burial and Cremation in New Zealand, A First Principles Review, Issues Paper 34*, 2013 at 17. It has been recommended that the current Burial and Cremations Act should be repealed and replaced by new statutes that reflect the basic principles of dignity of the deceased, recognition of tikanga Māori, freedom of religion and belief, and legislative certainty and accessibility. Law Commission, above n 319.

where the deceased will lie. The force and length of discussions often reflects the mana of the deceased.³²⁴

- 2.59 Not only is tikanga recognised in the evolving common law but also in legislation. Tikanga is routinely defined in statute as “Māori customary values and practices”.³²⁵ In some instances, tikanga has acquired the status of a legal principle; for example, in the Resource Management Act 1991, decision-makers must have regard to the concept of kaitiakitanga (guardianship, as understood in accordance with tikanga).³²⁶ The reasoning processes applied by the Environment Court takes into account these values and traditions in reaching a decision, by way of cultural relativism, respecting that each culture has its own value-laden system of traditions and beliefs.³²⁷
- 2.60 There is ongoing debate and discussion as to the precise status of tikanga at common law and within the legal system.³²⁸ Creating a “space” for tikanga alongside legal certainty and individual autonomy is a challenge for policy and law-makers.³²⁹ As Justice Christian Whata, speaking extra-judicially, says, “The real challenge is how tikanga, like the Treaty, might permeate the law”.³³⁰

Whakawhanaungatanga – a platform for supported decision-making

- 2.61 One of the core values embedded within tikanga that aligns with supported decision-making is the relational notion of kinship, “whanaungatanga”. In traditional Maori society, the individual was important as a member of a collective.³³¹ The individual identity was defined through that individual’s relationships with others. The kinship relationship is based on whakapapa, which can be translated as a person’s genealogy. As Justice Joseph Williams explains:³³²

Of all the values of tikanga, whanaungatanga denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa or genealogy identifying the nature of relationships between all things.

Whanaungatanga is ... the idea that makes the whole system make sense – including legal sense.³³³

³²⁴ Law Commission, above n 319 at 18.

³²⁵ A Somerville “Tikanga in the Family Court – The Gorilla in the Room” (2016) NZFLJ (in print). Currently, there are statutory definitions in 43 Acts of Parliament and 79 Acts include the word “tikanga”, Appendix 1.

³²⁶ Resource Management Act, s 7. Kaitiakitanga as understood in tikanga denotes guardianship and is distinct from the narrower pākehā concept of “stewardship” which is separately defined in s 7(aa). Māori values appear in ss 6, 7 and 8 of the Resource Management Act 1991 and are matters of national importance.

³²⁷ See for example, *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* 9 ELRNZ 111, Judge JR Jackson, where the “rule of reason” approach was applied with respect to the relationship (whanaungatanga) of Māori with Māori waahi tapu (sacred places) at 123, and discussion of cultural relativism in this context at 125.

³²⁸ N Coates “The Recognition of Tikanga in the Common Law of New Zealand” (2015) 1 NZ L Rev 1.

³²⁹ Law Commission, above n 319 at 19.

³³⁰ CN Whata, High Court Justice “Evolution of Legal Issues Facing Māori” (Māori Legal Issues Conference, Pullman Hotel Auckland, 29 November 2013) at 25.

³³¹ This notion is not unique to Māori. Email communication with Dr Barry Smith (Chair of Health Research Ethics Committee, Te Rarawa and Ngāti Kahu) regarding kinship and supported decision-making to A Douglass (21 December 2015).

³³² J Williams “He Aha Te Tikanga Māori” (unpublished paper for the Law Commission, 1998) cited in Law Commission Māori Custom and Values in New Zealand Law, March 2001, Wellington. Study Paper 9 at 30.

³³³ Williams, above n 320.

- 2.62 A second important concept of tikanga in this context is “mana”. In the decision-making context, mana ensures that individuals, especially elders, are accorded dignity and respect.³³⁴ Mana is a very powerful concept because respect for an individual may be at the cost of collective advantage. It is not so easy in a tikanga decision to take away the mana of decision-making even if the whānau want to; for example, where an elder has stated a preference to stay living in her home when the whānau believes the support of hospital care is needed.³³⁵
- 2.63 “Whakawhanaungatanga”³³⁶ refers to the process of bringing people together and fostering connections between people. The concept recognises the importance of the process of engaging with people through establishing relationships and relating well to others, by:
- *whanaungatanga*: making a connection and understanding relatedness to others; and
 - *mana*: upholding dignity for both personal and whānau integrity.
- 2.64 Whakawhanaungatanga describes this process of providing support and help in a broad sense by allowing the “blood links” beyond family to become an expression of the range of responsibilities and rights. Smith says: “As Māori, we do this (whakawhanaungatanga) well”.³³⁷
- 2.65 Supported decision-making processes that recognise whanaungatanga and mana have an obvious place in the Family Court. As observed by Judge Annis Somerville:³³⁸
- Whanaungatanga is an integral part of tikanga in the Family Court, incorporating concepts of societal relationships and the rights and obligations that are inherent in them. These concepts are fundamental to the working of the Family Court.
- 2.66 The involvement of families and support for whānau, hapū and iwi in Family Group Conferences (FGCs) under the Children, Young Persons and their Families Act 1989 (CYPF Act) is recognised as one of the more innovative aspects of the Family Court.³³⁹ In this decision-making model, families have a collective imperative to find solutions for the care and protection of children. Yet surprisingly, neither tikanga nor whanaungatanga is defined or referred to in any statutes used in family law.³⁴⁰ There are specific Māori cultural

³³⁴ Interview with Justice Joseph Williams (Wellington, 10 December 2015). Mana is the source of rights and obligations of leadership. Mana is defined broadly as “a key philosophical concept, combining notions of psychic and spiritual force and vitality, recognised authority, influence and prestige and thus power and ability to control people and events” in R Benton (ed) *Te Matapunenga: A Compendium of references to the concepts an institutions of Māori customary law* (Victoria University Press, Wellington, 2013) at 154.

³³⁵ Ibid.

³³⁶ The derived causative with the prefix *whaka* denotes the application of, to make/do.

³³⁷ Interview with Barry Smith, QSM: PhD, Chair of the Health Research Council Ethics Committee, Te Rarawa and Ngāti Kahu (A Douglass, December 2015). Bishop defines *whakawhanaungatanga* as a process by which relationships are generated and maintained through the identification (via culturally appropriate means) of linkages, engagement and connectedness and, on this basis, a commitment to other people and their welfare and well-being: R Bishop *Collaborative Research Stories* (Dunmore Press Ltd, Palmerston North, 1996).

³³⁸ A Somerville, above n 325.

³³⁹ Children Young Persons and Their Families Act 1989, s 5. The Care of Children Act 2004 has been criticised for taking a too individualistic approach to issues of care and protection. It makes only passing reference to Māori values and leaves potentially a more confused understanding of tikanga for the guardianship of children. See B Atkin “Harmonising family law” (2006) 5 NZFLJ 140 at 141.

³⁴⁰ A Somerville, above n 325. For an example in child care law cited by Judge Somerville *WH v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2007-404-007415, 11 September 2008, Courtney J. Another example of tikanga, and the inclusion of collective imperatives alongside

considerations recognised under mental health law, is also under the jurisdiction of the Family Court.³⁴¹ However, the extent that the cultural considerations in the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act) are operationalised is unclear and there is no commonly accepted standard of practice.³⁴²

Tikanga and diversity

- 2.67 Respecting the needs, values and beliefs of Māori does not mean that a pan-Māori perspective exists, as expressed in the question, “*whose tikanga?*” There is rarely one single viewpoint representative of Māori concerns, any more than there is a single ethical or religious viewpoint in any community. Moreover, there are examples in the development of law and policy in New Zealand where tikanga has shaped non-Māori views.³⁴³ Any legal framework must accommodate cultural diversity in New Zealand’s pluralistic society, as well as the need to recognise the rights and needs of Māori as tangata whenua.
- 2.68 The positive obligation to recognise relationships of support in the CRPD sits comfortably with tikanga, and the process of engagement with Māori through whakawhanaungatanga. New Zealand has a unique opportunity to enrich the discussion in a review of the law by ensuring these cultural influences are taken into account and given status in law as an approach to supported decision-making.

2E: SUPPORTED DECISION-MAKING IN PRACTICE AND IN CASE LAW

Supported decision-making in practice

- 2.69 Adult guardianship laws tend to be focused on the big decisions where there may be significant consequences or risks to the person concerned, for example life-threatening decisions about medical treatment or living arrangements in residential care. It is important to recognise that the vast majority of care and welfare decisions that occur on a daily basis are far more mundane and involve informal and practical methods of support. For example, it is well recognised that opportunities for people to participate in decision-making improve their ability to communicate.³⁴⁴ The challenge is to include supported decision-making in everyday practice.
- 2.70 The needs, life experiences and family context of people with disabilities can be diverse between and within population groups. Support needs for people with intellectual disabilities or acquired brain injuries may be very different, for example, to the needs of older adults.

valuing individual autonomy, are the Ngā Kooti Rangatahi, the Youth Courts held on marae (meeting places).

³⁴¹ The Mental Health (Compulsory Assessment and Treatment) Act 1992 makes special provision for “proper recognition” of whānau, hapū and iwi under ss 5 and 65.

³⁴² H Elder and R Tapsell “Māori and the Mental Health Act” in Dawson and Gledhill (eds), above n 92 at 249. See also J Baxter, T Kani Kingi, R Tapsell and others “The prevalence of mental disorder among Māori in Te Rau Hinengaro: The New Zealand Mental Health Survey” (2006) 39 Aust NZ Psych 401.

³⁴³ For example, the recognition of the importance of whakapapa and the right to know your genetic origins in assisted reproductive technology has arguably led to a more open attitude to knowledge of genetic parentage in New Zealand than exists in other countries: K Daniels and A Douglass “Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy and Law in New Zealand” (2008) 27 J Med Law 131.

³⁴⁴ J Rosen, speech pathologist “Communication: the Keystone of Supported Decision-making” (Capacity Australia conference, Sydney, 13 November 2015).

Older adults may be more isolated and tend not to have the support systems that those with psycho-social disabilities may have. There may be less support for their decision-making and more dependency, by, for example, a parent on their adult children who hold an enduring power of attorney (EPOA). A younger adult with Down syndrome may seek more independence to live away from their family. Conversely, an older adult with Down syndrome and early onset of dementia may have only lived in the family home with little outside interaction but be lovingly cared for by their siblings: here the family relationship is built around dependency.³⁴⁵

- 2.71 Some people have no family to support them and, as is common in the Family Court, there are families that cannot agree or are incapable as a family group of providing appropriate support.³⁴⁶ Failing to recognise these differences could result in an over-simplified legal framework for respecting the rights of people with impaired capacity.

Patient-centred care and whakawhanaungatanga

- 2.72 Supporting people in making decisions for themselves, where this is possible, and, if it is not possible, providing mechanisms to maximise their participation, has some real advantages. In the healthcare context, the inclusion of the person subject to the decision not only improves the quality of the decision reached but also reflects best practice, referred to as “patient-centred care”.³⁴⁷ Participative decision-making can have therapeutic benefits in terms of enhancing individual well-being and self-esteem. It can also reduce the possibilities of conflict between the person and healthcare professionals.³⁴⁸
- 2.73 In New Zealand, health disparities between Māori and non-Māori are well documented. Māori are significantly over-represented in populations treated under the MH(CAT) Act and the approach used to assess “mental disorder” has potential for bias in assessing Māori.³⁴⁹ Similar biases may be present when assessing capacity under the PPPR Act or other areas of capacity law, such as fitness to plead under the criminal justice legislation. Elder and Tapsell highlight the current individual focus of capacity-based assessments and warn that this approach disregards the collective rights within whanau and the wider community.³⁵⁰
- 2.74 Health practitioners are required to demonstrate appropriate levels of cultural safety³⁵¹ and competency to be fit for practice.³⁵² “Cultural competence” is broadly defined – extending beyond ethnicity and recognising that patients identify with multiple cultural groupings,

³⁴⁵ These are common examples experienced in practice by the writer and reflect the importance of not making assumptions about diverse family relationships.

³⁴⁶ In New Zealand there is no public agency that fulfils this role and there is a shortage of people available to be an independent welfare guardian to assist families. An example is the Otago Welfare Guardian Trust. In Wellington a community trust has recently been established. For many years in Wellington the Catholic nuns, Sisters of Mercy, fulfilled this role for the Wellington Family Court.

³⁴⁷ AE Bauman, HJ Fardy and PG Harris “Getting it right: why bother with patient-centred care?” (2003) 179 *Med J Aust* 253.

³⁴⁸ Donnelly, above n 254 at 205 - 206.

³⁴⁹ Measures for Māori wellbeing in mental health can be assessed from a holistic viewpoint and take into account the dimensions of spiritual, mental and physical health, as well as relationships with family and community; M Durie “Measuring Māori Wellbeing” (New Zealand Treasury Guest Lecture Series (Hau Oranga), Wellington, 2006).

³⁵⁰ Elder and Tapsell, above n 342. The authors warn against using capacity to consent as a criterion for any revision of the MHA.

³⁵¹ “Cultural safety” (whakaruruhau) was a concept developed by the late Irihapeti Ramsden and adopted by the nursing profession. See also B Gray “Managing the cross-cultural consultation. The importance of cultural safety” (2008) 35(2) *NZFP*.

³⁵² Health Practitioners Competence Assurance Act 2003, s 118 (i).

including groupings with different belief systems and ideas about disability.³⁵³ An understanding of cultural competence provides a basis for applying supported decision-making in practice. There is current recognition that the “Western” model of patient-centred care is at odds with a traditional Māori way of viewing the world³⁵⁴ and that, if a broad view of culture is taken, then the majority of patients are culturally different from most health practitioners and from the dominant Western medical view of the world.³⁵⁵

2.75 Medical students are now trained in applying a Māori-centred consultation approach for engaging with Māori patients, known as the “Hui Process” and the “Meihana Model,” two Māori-centred clinical interviewing tools.³⁵⁶ The Hui Process recognises whakawhanaungatanga in a clinical context (including where a capacity assessment might be undertaken), and the importance of the doctor establishing a cultural connection with the patient, thus distinguishing it from basic rapport.³⁵⁷

2.76 Dr Greg Young, a non-Māori doctor, explains experience of whakawhanaungatanga when undertaking a capacity assessment with a Māori patient:³⁵⁸

[Each] person at the meeting explained his ancestry in a brief but structured way, and Māori in the room were able to identify connections between their respective families. At the end, the Māori cultural advisor, rather kindly, explained to the patient and his support people that I, a European with English ancestry, was related historically through the wider Young family, to Nick Young, the cabin boy on the Endeavour who first spotted land when Cook came to New Zealand. Nick Young is remembered locally because his name is given to a cape – “Young Nick’s Head”. This process of identifying connections and relationships is vital to engaging Māori in the assessment, and in my experience it is very helpful to go through that process to some degree before getting into the technicalities of the assessment.

2.77 Whakawhanaungatanga can therefore be viewed as providing a platform for supported decision-making, and for Māori is a baseline for culturally responsive practice.³⁵⁹ All of these factors suggest that any revised mental capacity law should recognise tikanga Māori decision-making processes, both at the level of legal principle and for implementation within a Code of Practice.³⁶⁰

³⁵³ These include (but are not limited to) gender, spiritual and other belief systems, sexual orientation, disability, lifestyle, age or socioeconomic status. The definition of cultural competence in the New Zealand Medical Council’s statement is: “*Cultural competence requires an awareness of cultural diversity and the ability to function effectively, and respectfully, when working with and treating people of different cultural backgrounds.*” There is no similar professional standard of cultural competence for lawyers.

³⁵⁴ R Parry, B Jones, B Gray and others “Applying a Māori-centred consultation approach for engaging with Māori patients: an undergraduate medical student case study” (2014) 6(3) J Prim Healthc 254.

³⁵⁵ Parry, Jones, Gray and others, above n 354 at 254.

³⁵⁶ C Lacey, T Huria, L Beckert and others “The Hui Process; a framework to enhance the doctor-patient relationship with Māori” (2011) 124 NZMJ at <http://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2011/vol-124-no-1347/view-lacey>; S Pitama, T Huria and C Lacey “Improving Māori Health outcomes through clinical assessment: Waikare o te Waka o Meihana” (2014) 127 NZMJ 107.

³⁵⁷ Parry, Jones, Gray and others, above 354 at 255.

³⁵⁸ Email communication with Dr Greg Young, (Consultant Psychiatrist, Capital and Coast DHB) regarding whakawhanaungatanga (11 March 2016).

³⁵⁹ Interview with Dr Jo Baxter, Associate Dean of Māori, University of Otago (A Douglass, Dunedin January 2016). There are calls for more training in cultural competency in psychiatry where Māori and non-Māori are working with whānau to develop understandings meaningful to Māori. See Elder and Tapsell, above n 342.

³⁶⁰ A first step towards providing a culturally responsive approach to supported decision-making is the Toolkit for Assessing Capacity as discussed in Chapter 7 and annexed to this report in Appendix D.

- 2.78 Balanced against these expectations is the practical reality of time and resource constraints in clinical practice of all professionals involved with health and social care. Effective “front-end” supported decision-making therefore requires a systems response to put best practice standards into effect.

Supported decision-making in English case law

- 2.79 Principle 1(3) of the MCA provides:

A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

- 2.80 There are few cases in the Court of Protection (COP) where this principle has been satisfied or clearly expressed in a judgment of the Court.³⁶¹ Nonetheless, English case law demonstrates how supported decision-making can be applied within the existing legal framework of the MCA.

Supported decision-making at the beginning of the decision-making process

- 2.81 In *CC v KK*,³⁶² a local authority failed to prove that an elderly woman in its care did not have capacity to make decisions about her residence and care as they had not provided her with detailed options, including what support might be available at home, to allow a fair assessment of her capacity to weigh up those options.³⁶³

- 2.82 KK, who was aged 82, suffered from Parkinson's disease, vascular dementia and had a physical disability that meant she required a wheelchair or hoist to be mobilised. She was admitted to a nursing home but later wished to return home. KK gave evidence and was “clear and articulate” and “demonstrated an understanding of, and insight into, her care needs and the reality of life if she returned home, she was in need of total support and required carers 4 times a day”.³⁶⁴ Although KK did not currently understand the issues about her residence, she would be able to do so if given more information. So it was argued she should be enabled to make the decision, rather than the best interests test being used.

- 2.83 Baker J held that when evaluating capacity there was a danger that professionals, including judges, might objectively conflate a capacity assessment with the best interests analysis and conclude that the person under review, KK, should attach greater weight to the physical security and comfort of a residential home and less importance to the emotional security and comfort derived from being in her own home. Baker J said:³⁶⁵

The choice which KK should be asked to weigh up is not between the nursing home and a return to the bungalow with no or limited support, but rather between staying in the nursing home and a return home with all practicable support.

³⁶¹ A Ruck Keene “Mental Capacity Newsletter” March, 2016,

<http://www.mentalcapacitylawandpolicy.org.uk/march-mental-capacity-law-newsletters>.

³⁶² *CC v KK and STCC* [2012] EWHC 2136 (COP).

³⁶³ See also the importance of providing information in the context of a patient's capacity to refuse amputation of her leg, when there was “shifting medical opinion”: *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 Peter Jackson J at [24] and [25]. Discussed in Chapter 4 Defining Capacity.

³⁶⁴ The Code of Practice requires that each person whose capacity is under scrutiny must be given “relevant information” including “what the likely consequences of a decision would be (the possible effects of deciding one way or another).”

³⁶⁵ *Ibid.*

- 2.84 This case demonstrates the need to place the person who is being supported at the front of the decision-making process. Capacity assessments should not start with a “blank canvas”.³⁶⁶ It requires all the information relevant to the decision to be made available to enhance the person’s capabilities to make the decision themselves.

Supported decision-making and substituted decision-making can coexist

- 2.85 In *Re M (best interests deprivation of liberty)*³⁶⁷ the Court held that M lacked capacity to decide where to live but that it was in her best interests, despite very significant care needs that were being successfully cared for in a care home, to return to her home with a care package.

- 2.86 M was aged 67 with chronic Type 1 diabetes and life-threatening complications. A central component in the decision was an appreciation of the risks arising from the lower level of supervision of her diabetes from a home placement compared with 24-hour professional oversight. Although finding that M lacked capacity, the court also carefully considered M’s wishes (and her partner’s views), plus the risks to her health of a return home compared to the risks of staying at the care home given her threats to kill herself (“*I want to be out of here quick or dead*”). Emphasis was placed on M’s own assessment of her quality of life.³⁶⁸ Mr Justice Jackson said:³⁶⁹

In the end, if M remains confined in a home she is entitled to ask ‘what for?’ The only answer that could be provided at the moment is ‘to keep you alive as long as possible’. In my view that is not a sufficient answer. *The right to life and the state’s obligation to protect it is not absolute and the court must surely have regard to the person’s own assessment of her quality of life.* In M’s case there is little to be said for a solution that attempts without any guarantees of success to preserve for her a daily life without meaning or happiness which she, with some justification, regards as insupportable. (Emphasis added)

- 2.87 Substitute and supported decision-making can coexist. Even where a person lacks capacity in law, they do not lose their right to participate in decision-making that affects them. To this end, the standard by which the appointee, or substitute decision-maker is to act, requires them to support the person and take into account their will and preferences in reaching a decision.

Capacity is not an “off-switch” to rights and freedoms

- 2.88 In *Wye Valley NHS Trust v Mr B*,³⁷⁰ the COP affirmed the right of an individual to refuse life-saving treatment, even though he lacked capacity as a result of mental illness marked by religious delusions. Mr B suffered from Type 2 diabetes but resisted medication for a chronic foot ulcer and developed gangrene in his leg. Without an amputation, the medical evidence suggested he would succumb to an overwhelming infection and die within days. When it came to an assessment of Mr B’s best interests, the judge met with Mr B. Mr Justice Jackson came to the clear conclusion that an enforced amputation would not be in Mr B’s best interests.³⁷¹

³⁶⁶ *CC v KK*, above n 362 at [68].

³⁶⁷ *Re M (Best Interests: Deprivation of Liberty)* [2013] EWHC 3456 (COP) Peter Jackson J.

³⁶⁸ *Re M*, above n 367 at [41]. Peter Jackson J noted that there was no criticism of the care received by M or the local authority and that, “it was perfectly appropriate that the responsibility for the outcome should fall on the shoulders of the court and not the shoulders of the parties”.

³⁶⁹ *Re M*, above n 367 at [38].

³⁷⁰ *Wye Valley NHS Trust v Mr B*, above n 171.

³⁷¹ *Wye Valley*, above n 171 at [38].

This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and European Convention make clear, *a conclusion that a person lacks decision-making capacity is not an ‘off-switch’ for his rights and freedoms*. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. (Emphasis added)

- 2.89 Human rights considerations therefore make it clear that “best interests”, as a standard for decision-making, is broader than a paternalistic assessment of what a third party thinks would be best for the person. A finding that a person lacks capacity does not negate their legal agency and the right to have their will and preferences respected.

Supported decision-making – summary

- 2.90 The CRPD requires State parties to rethink domestic laws and engage with its key concepts. To this end, the countries of the United Kingdom, Ireland, Canada and Australia have actively commissioned reports and/or have Bills before Parliament in order to meet their compliance obligations with the CRPD.³⁷² By ratifying the CRPD, New Zealand undertook to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in it. These obligations necessitate a critical review of the mental capacity laws in New Zealand and a careful assessment of the applicability of international law in this context.
- 2.91 The CRPD offers new ways of thinking about capacity, particularly in its emphasis on supported decision-making as a more integrated approach to decision-making, and recognition of universal legal capacity. Supported decision-making recognises the importance of relationships in understanding autonomy.
- 2.92 Challenges for establishing legal frameworks in line with the CRPD include: the lack of a clear definition of what supported decision-making means in law, which has led to conceptual confusion; uncertainty as to its connection to the concept of legal capacity; and doubts about the extent to which legal frameworks for substitute decision-making and the modern notion of supported decision-making can coexist. There are many forms of support for decision-making: family, friends and civil society networks which exist outside and quite independently of the law.³⁷³ As a consequence, there is a risk of “net widening” (expanding, not reducing paternalism) by over-legalising informal mechanisms of support.

³⁷² See for example: a review of Canadian supported decision-making legislation by Bach and Kerzner, above n 33; England’s review of the Mental Capacity Act, above n 314; Australia’s Law Reform Commission report, above n 264; and the website of Inclusion Ireland http://www.inclusionireland.ie/capacity_on_the_passage_of_the_Assisted_Decision-Making_Act_2015. Canadian examples include: the British Columbia’s Representation Agreement Act – personal planning tools that enable adults to appoint someone to help the adult make decisions [http://www.bclaws.ca/civix/document/id/complete/statreg/96405_01] Manitoba, Yukon Territories and Alberta legislation all specifically recognise supported decision-making. Ontario’s Substitute Decisions Act does not specifically recognise supported decision-making, but does provide for consideration of the role of supports [<http://www.ontario.ca/laws/statute/92s30>].

³⁷³ Carney, above n 248 at 39.

- 2.93 A number of comparable common law jurisdictions have decided to make specific provision for supported decision-making.³⁷⁴ More research is urgently needed to determine the extent to which supported decision-making processes achieve their goals, and the conditions in which they are likely to do so.³⁷⁵ In New Zealand, policymakers should consider how supported decision-making could reduce the role of guardianship, how mental capacity could be assessed in this framework, and how supported decision-making approaches could be integrated into the law.
- 2.94 The CRPD might simply be viewed as aspirational. Nonetheless, it has promoted discussion and debate about how to deliver support mechanisms under art 12, while at the same time ensuring protections from abuse.³⁷⁶ Fundamentally, it raises the issue of the role of the law, and the extent to which the law can contribute to this shift in thinking by translating supported decision-making principles into workable laws.³⁷⁷

³⁷⁴ A number of these jurisdictions have been considered in the context of supported decision-making and best interests in the current English Law Commission report, above n 199.

³⁷⁵ NA Kohn, J Blumenthal, A Campbell “Supported decision-making: A Viable Alternative to Guardianship?” (2012) 117 Penn State Law Rev 1111.

³⁷⁶ Bach and Kerzner, above n 33 at 37.

³⁷⁷ Carney, above n 273.

RECOMMENDATIONS FOR SUPPORTED DECISION-MAKING

1. Supported decision-making should be clearly recognised as a legal principle, incorporating tikanga Māori, to provide support to people whose decision-making ability is impaired, to enable them to make their own decisions whenever possible.
2. There is a need for a legal mechanism to ensure that supported decision-making is given priority at the beginning of the decision-making process and as part of a continuum so that substitute decision-making is an option of last resort.
3. A person is not to be regarded as lacking capacity unless all practical help and support has been given to enable him or her to make a decision themselves; and steps are taken to support the person, including enlisting the help of support persons upon whom they rely for support.³⁷⁸
4. Reasonable steps are taken to ensure that those persons identified as available for support are present where a person's legal capacity is in doubt and an assessment of capacity is required
5. Consideration should be given to a supported decision-making framework that is sufficiently flexible and would allow for a person being able to appoint a "supporter" in order to assist them in circumstances where they retain capacity to understand the nature of the support offered, including:
 - a) possible models of appointment;
 - b) the nature of the relationship with the supporter and whether this could include a professional one;
 - c) how such a framework of support would interface with the appointment of substitute decision-makers under existing adult guardianship law, and the ability for ongoing support to be offered by the supporter;
 - d) the basis upon which the role of supporter could be displaced; and
 - e) the monitoring and oversight of this framework by a public agency.
6. A Code of Practice is developed to provide guidance on the implementation of supported decision-making as a culturally responsive practice that recognises diverse cultural contexts, and, for Māori, recognises the importance of whakawhanaungatanga.
7. More research is needed to examine how supported decision-making, as understood in human rights law and implemented in comparable jurisdictions, could be applied in practice within New Zealand's socio-cultural context.³⁷⁹

³⁷⁸ See for example, Northern Ireland Mental Capacity Bill (NI) Pt 1, s 5.

³⁷⁹ See for example, Assisted Decision-Making (Capacity) Act 2015 (Rep Ireland), Pt 3 s 10.