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**Discord between the Family Violence Act 2018 and the
United Nations Convention on the Rights of Persons
with Disabilities – A Failure to Protect Disabled Women
from Family Violence**

Submitted for the LLB (Honours) Degree

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2020

Abstract

This paper analyses the compliance of the Family Violence Act 2018 with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). It argues that the Family Violence Act 2018 fails to take a human rights approach to protection from and prevention of family violence in Aotearoa and is consequently non-compliant with the UNCRPD. The Convention requires states as 'duty-bearers' to adopt the social model of disability, mechanisms of supported decision making and high standards of protection per UNCRPD articles 12, 13 and 16. The Act's failure to adopt the social model of disability to implement and balance the critical Convention articles generates its inability to protect disabled women from family violence and causes further violence against them. Throughout, the Family Violence Act impedes art 12 in its paternalistic structure while undermining legal capacity, autonomy, and mana tangata. Although paternalistic in structure, the Act is not successfully protective in practice, which also undercuts the positive obligations of art 16. Nevertheless, Aotearoa is in the unique position where tikanga can better implement the social model of disability and inform a better rights balance in the Act. A human rights approach drawing on the consonant tikanga principle of whanaungatanga understands the continuation of rights despite absent mental capacity and highlights that protection decisions made isolated from an individual's community undermine protective success.

Key words: "Family Violence Act 2018", "disability", "United Nations Convention on the Rights of Persons with Disabilities 2008", "tikanga", "social model of disability".

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Word count

The text of this paper (excluding table of contents, footnotes, appendix, and bibliography) comprises approximately 8,042 words.

Foreword

The author writes this paper as a Pākehā woman and analysis of intersectionality derives from research and consultation with disability advocates. When this paper refers to "women/woman", it does so while including all people who identify as women.

The author gives special thanks to Huhana Hickey for her valuable insight at the research stage of this project and Māmari Stephens for her endless support, wisdom, and encouragement.

I Introduction

The family violence sector transitioned from the Domestic Violence Act 1995 (DVA) to the Family Violence Act 2018 (FVA). The FVA aims to keep 'victims' safe by "stop[ping] and prevent[ing] family violence" in Aotearoa, recognising its unacceptable nature.¹ The FVA's principles attempt inclusivity with their specific reference to disability and women. Such reference is desirable but was merely lip service as the Act does not pursue an intersectional human rights approach. It fails to implement and balance the key disability rights in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).² In particular, it fails to uphold art 12 (equal recognition before the law), 13 (access to justice) and 16 (protection and prevention from abuse with a specific focus on women).³ The absence of "specific measures for [reducing violence against] disabled women" means that the FVA must be compliant with the UNCRPD.⁴

Respect for human rights will not singlehandedly solve the family violence 'epidemic', but such rights are central to securing a 'vehicle of justice' for disabled women.⁵ A human rights focus forms an "effective, equitable, balanced, sustainable medium and long-term response" by focusing on those people most at risk of harm.⁶ Failing to address the rights and tensions in the UNCRPD undercuts the success of protective legal mechanisms in the Act. Disabled women have inadequate protection from family violence and lose their autonomy even if applying for said protection through the Act. Furthermore, although the Act states that family violence responses should be conducted in accordance with tikanga Māori,⁷ the structure of legal protection mechanisms undermines tikanga and further

¹ Family Violence Act 2018, s 3.

² United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

³ See Appendix, United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12, 13, 16.

⁴ Committee on the Rights of Persons with Disabilities *Combined second and third periodic reports submitted by New Zealand pursuant to the optional reporting procedure* CRPD/C/NZL/2-3 (11 October 2019) at [176]-[178].

⁵ Beverly Clough "People Like That: Realising the Social Model in Medical Capacity Jurisprudence" (2014) 23(1) *Medical Law Review* 53 at 55 and 78.

⁶ Te Kāhui Tika Tangata (Human Rights Commission) *Human Rights and Te Tiriti o Waitangi: Covid-19 and Alert Level 4 in Aotearoa New Zealand* (April 2020) at 4.

⁷ Family Violence Act 2018, s 4 (1).

marginalises Māori women. The key protective mechanisms in the Act, Protection Orders and Police Safety Orders, are a useful case study that reveal the Act's failure to adopt the UNCRPD and the social model of disability.

The FVA is more likely to meet its protective goals with a human rights approach centred upon UNCRPD rights and the social model of disability, embracing consonant tikanga principles.

II Background

A Key Definitions

1 Family violence

This paper will adopt the FVA's definition: "violence inflicted against [a] person by any other person with whom that person is, or has been, in a family relationship." It includes physical, sexual, and psychological abuse that can form a pattern of "coercive or controlling" behaviour causing "cumulative harm."⁸

2 Disability

This paper adopts the UNCRPD's social model of disability. According to the social model, disabled women are excluded from society because of society's disabling misconceptions that create barriers to inclusion, not through a person's individual impairments.⁹ Such misconceptions include beliefs that disabled women are merely care recipients and "asexual".¹⁰ As disability stems from society,¹¹ society must remove barriers to inclusion, like family violence.¹² Reducing family violence requires removing

⁸ Family Violence Act 2018, s 9.

⁹ Women With Disabilities Australia *Forgotten Sisters: a global review of violence against women with disabilities* (Resource Manual, 2013) at 13.

¹⁰ Judy Laing "Preventing violence, exploitation and abuse of persons with mental disabilities: Exploring the monitoring implications of Article 16 of the United Nations Convention on the Rights of Persons with Disabilities" (2017) 53 Int J Law Psychiatry 27 at 30; Gill Hague, Ravi Thiara and Audrey Mullender "Disabled Women, Domestic Violence and Social Care: The Risk of Isolation, Vulnerability and Neglect" (2011) 41(1) Br J Soc Work 148 at 149; Karen Nutter "Domestic violence in the lives of women with disabilities: no (accessible) shelter from the storm" (2004) 13 S Cal Rev L & Women's Stud 329 at 338-339; Anna Beard *YWCA Insights Report: Young Women & Disability in Aotearoa New Zealand* (2019) at 47.

¹¹ Beverly Clough, above n 5, at 64-71.

¹² Women with Disabilities Australia, above n 9, at 22; Marsha Saxton, Mary Ann Curry, Laurie E Powers, Susan Maley, Karyl Eckels, and Jacqueline Gross "'Bring my scooter so I can leave you': a study

an additional barrier, the inability of non-disabled people to understand and assist women with communicative and cognitive impairments. This paper will address the exclusion of women with cognitive impairments from accessing and securing protection from family violence.¹³

3 *Mental and legal capacity*

Legal capacity in human rights law refers to possession of "legal standing and legal agency".¹⁴ An individual is recognised as a person before the law and can act within the legal system.¹⁵ Mental capacity refers to the ability to make decisions. A lack of mental capacity justifies imposing substituted decision-making models in New Zealand law.¹⁶

4 *Intersectionality*

In the family violence context, "social location" or gender, race and class identities influence the nature and scope of violence.¹⁷ Disabled women with overlaying identities are more likely to experience and be impacted by violence.¹⁸ Māori women have the highest disability prevalence rates (at approximately 26 per cent), are disproportionately impacted by family violence and least provided for in legislation.¹⁹

B Prevalence of Family Violence against Disabled Women

Family violence is a gendered and intersectional issue predicated on the patriarchal stratification of society and its entrenched power imbalances. Such violence

of disabled women handling abuse by personal assistance providers" (2001) 7(4) *Violence Against Women* 393 at 394.

¹³ Margaret Camilleri "[Dis]Abled Justice: Why reports of sexual assault made by adults with cognitive impairment fail to proceed through the justice system" (PhD of Philosophy thesis, University of Ballarat, 2009) at 39.

¹⁴ Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (Report for the New Zealand Law Foundation, 2016) at ix.

¹⁵ At ix.

¹⁶ At xi.

¹⁷ S Creek, Jennifer Dunn "Rethinking Gender and Violence: Agency, Heterogeneity, and Intersectionality" (2011) 5(5) *Sociology Compass* 311 at 312-315.

¹⁸ Carolyn Frohmader, Leanne Dowse, Aminath Didi "Preventing Violence against Women and Girls with Disabilities: Integrating a Human Rights Perspective" (2015) 24 *Hum Rts Defender* 11 at 12.

¹⁹ Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey "Investigating Māori approaches to trauma informed care" (2017) 2(3) *Journal of Indigenous Wellbeing* 18 at 22; Statistics New Zealand "Disability" (2013)

<https://www.stats.govt.nz/topics/disability?gclid=Cj0KCQjwgJv4BRCrARIsAB17JI5ZVzMm8cWuQ9h6PTgRE9LymVxnlAodTB9i_UtrDkey7XJF_17qhIgaAqItEALw_wcB>.

disproportionately affects women with disabilities and further, Māori women with disabilities.²⁰ According to the World Health Organisation, approximately 15 per cent of the world's population has a disability, and the women in this statistic "tend to be marginalised, neglected, violated...excluded and isolated."²¹ Family violence is referred to as "the most widespread human rights abuse in the world... a universal problem of epidemic proportions."²²

New Zealand lacks comprehensive statistics on the rates of family violence against disabled women as police are not required to record disabilities in incident reports.²³ Nevertheless, sufficient evidence indicates that disabled women face a much higher risk of violence than non-disabled women and are "2.3 times more likely to have been a victim of violent crime in the last 12 months".²⁴

Several factors increase the likelihood of violence. These factors include; disabled women's dependence on abusers for support,²⁵ shortage and low pay of care workers,²⁶ exposure to poverty,²⁷ and misconceptions about disability, creating embedded societal silencing practices.²⁸ For example, police and judicial fact-finders often believe that disabled women (especially those with cognitive impairments) are poor witnesses or do

²⁰ Ellen Frances Fraser-Barbour, Ruth Crocker and Ruth Walker "Barriers and facilitators in supporting people with intellectual disability to report sexual violence: perspectives of Australian disability and mainstream support providers" (2018) 20 J Adult Prot 5 at 6; Margaret Camilleri, above n 13, at 23.

²¹ Margaret Camilleri, above n 13, at 18; World Health Organisation "Disability and health: Key Facts" (16 January 2018) World Health Organisation <who.int/en/news-room/fact-sheets/detail/disability-and-health>.

²² Women With Disabilities Australia, above n 9, at 8.

²³ "Prosecution Statistics and training of police officers in relation to disabled victims" (Obtained under Official Information Act 1982 Request to New Zealand Police).

²⁴ IHC, Disabled Persons Assembly, CCS Disability Action "Joint Submission to the Justice and Electoral Committee on the Family and Whanau Violence Legislation Bill" at 4.

²⁵ Marsha Saxton, Mary Ann Curry, Laurie E Powers, Susan Maley, Karyl Eckels, and Jacqueline Gross, above n 12, at 8; Michael Roguski *The Hidden Abuse of Disabled People Residing in the Community: An exploratory Study* (Report prepared for Tairāwhiti Community Voice, 18 June 2013) at 10.

²⁶ Women With Disabilities Australia, above n 9, at 30.

²⁷ IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 4.

²⁸ Lesley Chenoweth "Violence and Women with Disabilities: Silence and Paradox" (1996) 2(4) Violence Against Women 391 at 400; Michael Roguski, above n 25, at 10-12, 30.

not act how "a real victim would behave."²⁹ These silencing practices limit reporting. Survivor's usually only report 24 per cent of violence incidents to police.³⁰

Additionally, most literature refers to violence as abuse. Disabled women's experiences of violence may not include physical violence but "humiliation or destruction of specialised equipment".³¹ Labelling such incidents simply as abuse minimises the significance of the harm and the committed offence.³² Academic studies often fail to include disabled women and also minimise their experience.³³

More recently, Covid-19 has increased economic and environmental stresses for families and as a result, the risk of family violence. Level 4 restrictions have inhibited the ability of violence-survivors to seek shelter and for perpetrators to seek support.³⁴ In the Covid-19 era, the United Nations predicts that the rates of family violence will increase by approximately 20-30 per cent (amounting to 50 million violence-survivors).³⁵ While the additional funding for refuges in Aotearoa was admirable, a lack of inclusive and tikanga guided approaches undermine equitable supports.³⁶ Family violence is just as arbitrary as Covid-19, and the New Zealand Government must address it with the same expediency. The onus is on society to increase inclusion of disabled women by being willing to break discriminatory prejudices and misconceptions.³⁷ Legislation is fundamental to both breaking the silence that protects abusers and to deconstructing societal prejudices.

III The Updated Family Violence Act 2018

The Family Violence Act 2018 updated and replaced the Domestic Violence Act 1995, which was the centrepiece of an ineffective system that increased risk to family violence-

²⁹ Margaret Camilleri, above n 13, at 23.

³⁰ Superintendent Eric Tibbott "Family violence in a time of Pandemic" (Webinar presented to the United Nations Association of New Zealand).

³¹ Michael Roguski, above n 25, at 7.

³² Women With Disabilities Australia, above n 9, at 16.

³³ At 16.

³⁴ Te Kāhui Tika Tangata (Human Rights Commission), above n 6, at 14.

³⁵ Superintendent Eric Tibbott, above n 30; Department of Global Communications "UN Supporting 'trapped' domestic violence victims during Covid-19 pandemic" (12 June 2020) United Nations <<https://www.un.org/en/coronavirus/un-supporting-%E2%80%98trapped%E2%80%99-domestic-violence-victims-during-covid-19-pandemic>>.

³⁶ Te Kāhui Tika Tangata (Human Rights Commission), above n 6, at 14.

³⁷ Maria Montefusco *When society does not see, hear or understand: gender-related violence and disability* (Nordic Centre for Welfare and Social Issues, 2016) at 17.

survivors.³⁸ The legislative review of the DVA believed that the overall DVA civil order structure was "basically sound", but the increasing rates of violence signalled that it was not "as effective as it could be."³⁹ Violence-survivors entering the justice system are "often at a high risk of exposure to violence", and a weak system response can "signal to the perpetrator that they continue to act without consequences, or even that the violence is justified."⁴⁰ To reach its protective goals, the new legislation had to "increase victim safety", punish perpetrators, and coordinate a collaborative strategy to reduce family violence rates.⁴¹

The Ministry of Justice's legislative review believed that "the new package" would meet the above goals. The package included the following features: recognition of violence as "coercive and controlling behaviour", included carers as a possible "close personal relationship" within a "family relationship", increased the duration of Police Safety Orders (PSO) from 5 to 10 days, mandated information sharing between family violence prevention organisations, and allowed Protection Orders (PO) to be made on behalf of the survivor.⁴²

Discussions of disabled rights were absent from the Family Violence Bill's development. Only one cabinet paper mentioned the UNCRPD in the disability impact assessment,⁴³ moreover, Hansard merely referenced disability in passing. In both first and third readings members commended the Act's increased protection for "vulnerable people",⁴⁴ but debate only once referred to family violence as a human rights issue.⁴⁵ The lack of UNCRPD human rights discussion reflects a purely protective focus rather than a human rights approach to family violence reform. Therefore, the legislation does not comply with the norms and obligations established in the UNCRPD.

³⁸ Also see Family Violence (Amendments) Act 2018; Ministry of Justice *Regulatory Impact Statement: Review of the family violence legislation* (2016) at 8.

³⁹ Ministry of Justice, above n 38, at [40].

⁴⁰ At [38]-[39].

⁴¹ At [51].

⁴² Ministry of Justice "A New Family Violence Act" (Ministry of Justice, New Zealand Government) <[justice.govt.nz/justice-sector-policy/key-initiatives/reducing-family-and-sexual-violence/a-new-family-violence-act/](https://www.justice.govt.nz/justice-sector-policy/key-initiatives/reducing-family-and-sexual-violence/a-new-family-violence-act/)>; Ministry of Justice, above n 38, at 26.

⁴³ Cabinet Social Policy Committee "Reform of Family Violence Law" <<https://www.justice.govt.nz/assets/Documents/Publications/fv-reform-paper-1-context2.pdf>> at 24.

⁴⁴ (11 April 2017) 721 FAWVB 17278; (31 October 2018) 734 FVB 7926.

⁴⁵ (11 September 2018) 732 FAWVB 6430.

Analysis will centre on the following key FVA parts: part 1 preliminary provisions; part 3 police safety orders; part 4 protection orders (specifically s 67 applications on behalf of people lacking capacity); and part 7 programmes and prescribed services.

IV Interpretive Tools

Historically, family violence was characterised as a private problem and has usually been excluded from international human rights law scrutiny.⁴⁶ Nevertheless, the cross-jurisdictional prevalence of family violence has shifted the issue from the private sphere into the realm of government accountability.⁴⁷ As the centrepiece legal mechanism to reduce and prevent family violence, the FVA must be inclusive. An examination of the UNCRPD principles, the social model of disability, and tikanga show that the FVA is not inclusive enough.

A UNCRPD Principles

The UNCRPD is a human rights instrument, but its underpinning principles better characterise it as "the latest iteration of a long extended essay...about a theory of justice."⁴⁸ For disabled women in Aotearoa, the UNCRPD is the vehicle of justice and legal shelter from family violence. It shifts the focus of disability discourse from perceiving people with disabilities as "'objects' of charity, requiring medical treatment and social protection...[to] 'subjects' with rights."⁴⁹ While human rights instruments typically create non-interference based rights, the Convention imposes positive obligations on the state as "duty-bearer" for the benefit of disabled women as "rights-holders".⁵⁰ As a UNCRPD signatory, Aotearoa must promote UNCRPD norms in legislation and policy development. It must be responsive to intersectionality and inclusive of disabled people in decision-making with independent monitoring mechanisms ensuring conformity.⁵¹

⁴⁶ Dorothy Q Thomas and Michele E Beasley "Domestic Violence as a Human Rights Issue" (1993) 15(1) Human Rights Quarterly 36 at 40-41.

⁴⁷ At 46.

⁴⁸ Beverly Clough, above n 5, at 78.

⁴⁹ Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities *Summary Report: Making disability rights real Whakatūturu ngā tika hauātanga* (July 2012- December 2013) <<https://www.hrc.co.nz/files/2514/2357/0681/Making-disability-rights-real-summary-report.pdf>> at 3.

⁵⁰ Women With Disabilities Australia, above n 9, at 81.

⁵¹ Carolyn Frohmader, Leanne Dowse, Aminath Didi, above n 18, at 11.

The Convention's articles implement several fundamental UNCRPD "guiding principles". The first principle, reflected in art 12, is that the state must protect a person's "individual autonomy" including the freedom to make one's own choices."⁵² The second principle, encoded in art 16, centres on non-discrimination and freedom from exploitation and abuse. The third focuses on "full and effective participation and inclusion in society" and is reflected in art 13.⁵³ Finally, the Convention promotes equality, both of opportunity and as between men and women. Pursuing equality of opportunity and accessibility requires employing the social model of disability which recognises and respects "persons with disabilities as part of human diversity and humanity."⁵⁴ These principles have synergies with rights in Te Tiriti O Waitangi and the United Nations Declaration on the Rights of Indigenous Persons 2007 where self-determination, "partnership" and "full and effective participation" are essential.⁵⁵

B Social Model of Disability

This paper previously discussed the important shift from the medical model of disability, a "form of social oppression", to the social model, part of the UNCRPD vehicle of justice.⁵⁶ The medical model has dominated Commonwealth jurisdictions and assumes that individual impairments cause the alienating consequences that disabled people experience.⁵⁷ In direct contrast, the social model "den[ies] a causal link between impairment and disability" and adopts an approach aligned with how disabled view themselves.⁵⁸ It concentrates on the importance of the individual, universality of human rights, and finds that "attitudinal and environmental barriers to equality" in society cause disability for people with impairments.⁵⁹

The UNCRPD preamble recognises this conceptual shift. Through the idea of reasonable accommodation in arts 2 and 5, the Convention directs state parties to take "positive

⁵² Department of Economic and Social Affairs "Guiding Principles of the Convention" United Nations <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/guiding-principles-of-the-convention.html>>.

⁵³ Department of Economic and Social Affairs, above n 52.

⁵⁴ Department of Economic and Social Affairs, above n 52.

⁵⁵ Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities, above n 49 at 4.

⁵⁶ Beverly Clough, above n 5, at 55, 78.

⁵⁷ At 56.

⁵⁸ At 64-71.

⁵⁹ At 64-71.

action to ensure equality and the enjoyment of rights."⁶⁰ As such, a human rights approach based on the social model of disability necessitates the state to discharge 'reasonable accommodation' duties, including:⁶¹

... the establishment of equitable laws and systems that enable women with disabilities to exercise and enjoy their rights, and to seek judicial recourse for violations under the rule of law.

Some critics of the social model contend that the model cannot effect development towards substantive equality singlehandedly.⁶² However, the model effectively counters the medical model's individualistic conception of violence and usefully reveals and addresses the considerable role law and society plays in the exclusion of people with impairments. Sufficiently deploying the social model as part of the UNCRPD vehicle of justice requires adjusting it to Aotearoa; development through tikanga.

C Tikanga Māori

Professor Sir Hirini Moko Mead describes tikanga as:⁶³

A set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time...tikanga are tools of thought and understanding.

The legal system is increasingly recognising tikanga, both within the legislature and judiciary.⁶⁴ In the family violence context, the FVA principles require "culturally appropriate" responses and that "responses involving Māori should reflect tikanga Māori."⁶⁵ Further, the *Ellis* case demonstrates that tikanga applies to some legal problems and even for non-Māori. The concept of enduring mana in that case prompted the

⁶⁰ Beverly Clough, above n 5, at 72. See Appendix, arts 2 and 5.

⁶¹ Women With Disabilities Australia, above n 9, 81.

⁶² Beverly Clough, above n 5, at 66. See Appendix, definition substantive equality.

⁶³ Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) at 3-4 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [72]; Justice Williams "Lex Aotearoa: An Historic Attempt to Map the Māori Dimension in Modern New Zealand Law" *The Harkness Henry Lecture* (2013) 21 Waikato L Rev 1 at 3.

⁶⁴ See Alison Douglass, above n 14, at 10 for discussion of the Family Court under Somerville J.

⁶⁵ See Family Violence Act 2018, s 4 (1).

Supreme Court to allow the appeal even after the Pākehā appellant's death.⁶⁶ While the Court's reasoning has not yet been released, such a decision supports the notion that tikanga should have a larger informative and evaluative role than that prescribed by the FVA principles. With respect for the evolving and non-universal nature of tikanga, the key task is determining when tikanga can be invoked, and what tikanga is appropriate. Here, the core values of whanaungatanga, mana (and tapu), and kaitiakitanga run parallel to the UNCRPD rights and principles.

Whanaungatanga underscores aspects of the social model of disability and the Convention's focus on supported decision-making. The Law Commission, referencing an unpublished paper of Justice Williams, describe whanaungatanga as:⁶⁷

[Denoting] the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical worlds; and between people and the atua (spiritual entities)...the individual [is] important as a member of the collective.

As such, all "social rights and obligations" derive from an individual's "unit of close identity and belonging."⁶⁸

UNCRPD preamble 10 is consonant with whanaungatanga as the Convention stresses the promotion of human rights regardless of some individuals needing "more intensive support."⁶⁹ The preamble highlights the Convention's objective to create a platform for supported and collective decision-making in art 12. The Convention's collective approach invites consonance with whanaungatanga by recognising that disabling consequences arise where the community disregards their collective obligation to support the individual.⁷⁰ Similarly, preamble 5 reflects consonance between whanaungatanga and the social model of disability. The preamble recognises that "disability results from the interaction between persons with impairments" and societal or community barriers.⁷¹

⁶⁶ Martin Van Beyen "Supreme Court decision on Peter Ellis appeal is potentially groundbreaking" *Stuff* (New Zealand, 2 September 2020).

⁶⁷ Te Aka Matua o Te Ture, The Law Commission "Māori Custom and Values in New Zealand Law" (NZLC SP9, 2001) at 30.

⁶⁸ Justice Williams, above n 63, at 23; Terry Dobbs and Moana Eruera *Issues Paper: Kaupapa Māori wellbeing framework - The basis for whānau violence prevention and intervention* (New Zealand Family Violence Clearinghouse, April 2014) at 12.

⁶⁹ See Appendix, preamble 10.

⁷⁰ H M Mead *Tikanga Māori: Living by Māori Values* (Wellington, Huia Publishers, 2003) at 28.

⁷¹ See Appendix, preambles 5 and 12.

Following contemporary developments, mana may be consonant with UNCRPD rights. Mead describes mana in the following way:⁷²

Every individual is born with an increment of mana which is closely related to personal tapu. While an increment of mana is inherited at birth it is possible to build onto it through one's personal achievements, through good works and an ability to lift the mana of the whole group. Mana is always a social quality that requires other people to recognise one's achievements and accord respect.

Pre-1840 Māori society was hierarchical, and stratified individual and collective rights. It is now accepted that mana and tapu are inherent to a person, each possessing "threefold mana": power from the land, people, and spirituality.⁷³ Similarly, according to the UNCRPD preamble 1, disabled people hold "inalienable rights".⁷⁴ Mana contributes to an individual's mauri ora and maintains their "dignity and worth".⁷⁵ Preamble 8 directly recognises that discrimination based on disability undermines dignity.⁷⁶

Finally, the UNCRPD principle in preamble 23 that members of society "[have] duties to other individuals and to the community to which he or she belongs", aligns with the tikanga principle kaitiakitanga. The importance of whānau relations (per whanaungatanga) means that we are obligated to care for members of our community.⁷⁷

The consonance between UNCRPD rights and key tikanga principles can more effectively deploy the social model of disability in Aotearoa. The consonant rights can also better evaluate the FVA's compliance with the Convention. Together, tikanga and the social model generate an approach of complementary rights and obligations. Society and Government carry the primary obligation to enable disabled women to individually, or collectively, exercise these rights of dignity, autonomy, and freedom from discrimination.

⁷² H M Mead, above n 70, at 51.

⁷³ Terry Dobbs and Moana Eruera, above n 68, at 13. See Appendix, tapu definition.

⁷⁴ Justice Williams, above n 63, at 3.

⁷⁵ See Terry Dobbs and Moana Eruera, above n 68, at 7.

⁷⁶ See Appendix, preamble 8.

⁷⁷ See Appendix, preamble 23 and kaitiakitanga definition; Justice Williams above n 63, at 3.

V The Family Violence Act: Failure to Comply with UNCRPD Articles 12, 13 and 16

A Overview of the Act's Convention Non-Compliance

The legislation is "broadly consistent" with its goal to protect people from family violence but still lacks prescriptive direction.⁷⁸ The FVA does not take a human rights perspective to family violence protection as it fails to recognise the intersectionality of family violence and balance UNCRPD rights.⁷⁹ The Act contemplates the rights applicable to the general population and any disabled rights as "additional and exceptional" to this.⁸⁰ The legislature's tick-box reform created legislative gaps that either fail to protect disabled women or generate additional violence.

One key issue is that the Act adopts a medical rather than social model of disability. While the Act does not define 'disability', s 67 (protection orders made on behalf of the protected person) takes a medical approach through the incorporation of "person lacking capacity". The phrase "lacking capacity" is a medical judgment of mental capacity derived from the Protection of Personal Property and Rights Act 1988 (PPRA). It conflates mental and legal capacity to remove a person's right to act before the law.⁸¹

The Act's structure also reflects the medical model by placing the onus for seeking protection on the violence-survivor. Legislative reform recognised the need to reduce family violence, but the Act still holds that seeking violence protection is the individual burden of the violence-survivor. This individualisation of protection derives from persisting misconceptions that the flaws of a person's relationship, family, or existing individual impairments generate risk of violence. This finding is concerning given that family violence is a widely recognised societal issue and the existing research that indicates evident inability or reluctance of disabled women to report violence for reasons including fear of retribution.⁸²

These significant interpretations undermine the ethos of empowerment driving the UNCRPD. The 'red-light' status given to the prior Disability Action Plan's Outcome four goal to reduce violence against disabled people at FVA royal assent strengthens the above

⁷⁸ Ministry of Justice, above n 38, at 4-9.

⁷⁹ Carolyn Frohmader, Leanne Dowse, Aminath Didi, above n 18, at 12.

⁸⁰ At 12.

⁸¹ Alison Douglass, above n 14, at 12.

⁸² Margaret Camilleri, above n 13, at 48.

finding.⁸³ The status suggests that the goals the strategy set were significantly disrupted or not achieved. Hansard and planning for the Disability Strategy 2016-226 and Action Plan 2019-2023 lack reference to the UNCRPD.⁸⁴ As the latter are the vehicles for implementing UNCRPD promises, such absence is odd and concerning.⁸⁵

Further, the two strategy documents are disconnected. While the Disability Strategy mentions the goal of reducing violence and abuse towards disabled people, the Action Plan fails to mention, let alone prioritise, prevention of such violence.⁸⁶ As these strategy documents prompt the direction of legislative reform, future reforms will not focus on preventing family violence against disabled women.

B Article 12: Failure to Uphold Individual Dignity and Balance the Tension with Article 16

1 Undermining dignity, autonomy, and mana in section 67

UNCRPD art 12 integrates the social model of disability.⁸⁷ It requires state parties to positively ensure equal exercise of legal capacity, provide support to people needing assistance to exercise their capacity, and insert safeguards to prevent abuse of exercises.⁸⁸ Denial of legal capacity is equivalent to "civil death" as autonomy is "pivotal to the social and mental well-being of the individual," who upon losing capacity, loses substantive freedom and societal respect.⁸⁹ The UN interpretation holds that mental impairment is

⁸³ Office for Disability Issues "Outcome 4 – Rights protection and justice" (21 September 2016) Office for Disability Issues <<https://www.odi.govt.nz/nz-disability-strategy/outcome-4-rights-protection-and-justice/#update>>.

⁸⁴ "Discussion of the United Nations Convention on the Rights of Persons with Disabilities in Development of the Disability Strategy and Action Plan" (Obtained under Official Information Act 1982 Request to Office of Disability Issues, Ministry of Social Development) at 5-6; (11 April 2017) 721 FAWVB 17278; (11 September 2018) 732 FAWVB 6430; (31 October 2018) 734 FVB 7926.

⁸⁵ "Discussion of the United Nations Convention on the Rights of Persons with Disabilities in Development of the Disability Strategy and Action Plan" (Obtained under Official Information Act 1982 Request to Office of Disability Issues, Ministry of Social Development), at 1.

⁸⁶ Office for Disability Issues *Disability Action Plan 2019-2020: Putting the New Zealand Disability Strategy into action* (Ministry of Social Development, November 2019) <odi.govt.nz/disability-action-plan-2/> at 8-9; Office for Disability Issues *New Zealand Disability Strategy 2016-2026* (Ministry of Social Development, November 2016) at 30.

⁸⁷ Alison Douglass, above n 14, at 47.

⁸⁸ Alison Douglass, above n 14, at 47-49.

⁸⁹ Fiona Morrissey "The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-making in Mental Health Law" (2012) 19(5) *Eur J Health Law* 423 at 427.

not equivalent to civil impairment, or an absence of rights: mental impairments do not authorise denying legal capacity.⁹⁰ The article requires that states presume disabled women possess legal capacity as separate from mental capacity, and legislation must include trusted and respectful supports to enable exercises.⁹¹

While the general scheme of the FVA adheres to the presumption of legal capacity, the paternalistic structure of s 67 adopts a substituted decision-making approach. The section reads:⁹²

- (1) This section applies if a person *lacking capacity* (P) is eligible for a protection order and –
 - (a) No one has power, under an appointment made under the Protection of Personal Property Rights Act 1988, to make such an application on P's behalf; or
 - (b) A person has power, under such an appointment, to make such an application, but the person so appointed *has refused or failed to do so*.
- (2) If subsection (1) applies, the protection order must be applied for, *on P's behalf*, and under rules of court, by a representative.
- (3) No representative may be appointed under rules of court to make an application for a protection order on behalf of a person lacking capacity (P) unless, before making the appointment, the court or, as the case requires, the Registrar is satisfied–
 - (a) That the representative is not, and is not acting for, and approved organisation; and
 - (b) *That reasonable steps have been taken to ascertain P's views in relation to the appointment; and*
 - (c) If P's views have not been able to be ascertained, -
 - (i) *That P does not object to the appointment; or*
 - (ii) *That P's objection is not freely made.*

The section does not meet the high standard of personal autonomy enshrined in art 12. Tikanga and UNCRPD rights are precluded by a representative's decision-making ability substituting the applicant's.

The FVA's substituted decision-making model echoes the PPPRA as both Acts assess whether a person has "mental capacity". Section 8 makes medical judgments of mental

⁹⁰ Alison Douglass, above n 14, at 45.

⁹¹ Fiona Morrissey, above n 89, at 430, 433.

⁹² Family Violence Act 2018, s 67 (emphasis added).

"capacity" by assessing the ability of a person to "understand" and "communicate" welfare decisions. Its inclusion of "partial" lack of capacity captures more people under the definition.⁹³ Like the PPPRA, the FVA conflates mental capacity with legal capacity as it determines when a person loses the ability to exercise their right to lodge applications individually.⁹⁴ The UNCRPD expressly discouraged this conflation through the adopted supported decision-making approach.⁹⁵

To counter this, the FVA (in a change from the DVA) attempts a weak overlay of supported decision-making mechanisms.⁹⁶ The Select Committee inserted the requirement to consider "will and preferences" so an applicant may freely object to an application.⁹⁷ This attempts to meet art 12 requirements to safeguard exercises of capacity from abuse or undue influence. Nevertheless, including the ability to circumvent the above requirement if the applicant "wholly lacks capacity" or the ability to communicate disproportionately denies autonomy to persons with cognitive impairments.⁹⁸ Further, s 67 fundamentally misses the whole tenor of the article. According to Douglass:⁹⁹

The preferable approach is to ask what level of support, or what mechanisms, are necessary to support people to express their will and preferences... rather than question[ing] whether a person has capacity to make decisions.

The FVA fails to "reasonably accommodate" a presumption of supported decision-making,¹⁰⁰ the social model-derived positive duty of the UNCRPD.¹⁰¹ Ascertaining views is a poor compromise that neither completely respects a person's legal capacity, nor allows women with disabilities to be at the centre of decisions about their lives. The medical and individualised conceptions of legal capacity in s 67 both reject the UNCRPD

⁹³ See Appendix, Family Violence Act 2018, s 8.

⁹⁴ Alison Douglass, above n 14, at 25.

See Appendix, Family Violence Act 2018 s 8.

⁹⁵ *General Comment No.1 on the Convention on the Rights of Persons with Disabilities* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

⁹⁶ Alison Douglass, above n 14, at 50.

⁹⁷ Auckland Disability Law "Submission to the Justice and Electoral Committee on the Family and Whanau Violence Legislation Bill" at [11]; Family Violence Act 2018, s 67 (c).

⁹⁸ Family Violence Act 2018, s 68 (3).

⁹⁹ Alison Douglass, above n 14, at 52.

¹⁰⁰ See Appendix, arts 2 and 5.

¹⁰¹ Alison Douglass, above n 14, at 54.

principles of autonomy, equality, dignity, and cooperation;¹⁰² and tikanga. Remedying this miscalculation requires re-conceptualising capacity. In contrast to the FVA, this paper argues that capacity is a "relational concept" that need not be individualised.¹⁰³

British colonisation imposed Western conceptions of knowledge, the individualistic interpretation of capacity, upon the unique context of Aotearoa and existing tikanga.¹⁰⁴ Knowledge and understanding for Māori derive from whakapapa, where "everything created is connected to whānau."¹⁰⁵ Although the FVA requires family violence responses to reflect tikanga, s 67 is unbridled from tikanga.¹⁰⁶ It fails to implement whakawhanaungatanga, the idea that whānau are concerned by and can support the decisions of the individual.¹⁰⁷ As such, the UNCRPD's supported decision-making goal is undermined by not "making a connection and understanding the relatedness to others; and upholding dignity for both personal and whānau integrity".¹⁰⁸ Further, the relatedness of mana tangata and whanaungatanga means that solely ascertaining "views" or "best interests" is insufficient. A collective tikanga approach necessitates that chosen trusted representatives uphold the applicant's mana tangata by collaboratively exercising capacity.¹⁰⁹

The FVA does not adequately provide for UNCRPD rights and tikanga based supports but merely creates a dissatisfactory half-way-house approach that neither achieves the full benefits of supported decision-making nor eliminates the autonomy denouncing model of substituted decision-making. The "hard cases" of mental incapacity should not entrench a blanket substituted decision-making approach via necessity.¹¹⁰ A relational human rights approach that understands the continuation of inalienable rights despite an absence of mental capacity will ensure better UNCRPD compliance.

¹⁰² Alison Douglass, above n 14, at 45; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC SP124, 2014) at 13-14.

¹⁰³ Alison Douglass, above n 14, at 55.

¹⁰⁴ Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey, above n 19, at 2.

¹⁰⁵ At 21.

¹⁰⁶ Family Violence Act 2018, s 4 (l).

¹⁰⁷ Alison Douglass, above n 14, at 59.

¹⁰⁸ At 60. See Appendix, whakawhanaungatanga definition.

¹⁰⁹ See Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey, above n 19, at 22. See Appendix, mana tangata definition.

¹¹⁰ At 17.

2 *Convention non-compliance creates practical protection problems*

While s 67 fails to comply with art 12 of the UNCRPD, the vexing challenge is balancing art 12 with art 16; where state parties must prevent all forms of violence and abuse against disabled people in all situations.¹¹¹ Protective and preventative success in the FVA requires protecting disabled women from family violence without undermining their personal autonomy. Section 67 fails to uphold art 12 in its paternalistic and protective structure, but it does so without being successfully protective in practice, which also undercuts the positive obligation of art 16. The proceeding analysis reveals that practically, disabled women cannot easily access protection from violence as s 67 does not adequately shift the onus for making a Protection Order (PO) application from the survivor to a representative.

Suppose a disabled woman has a welfare guardian. In that case, the onus still rests on her to prove that the guardian failed to apply for a PO on her behalf to allow another representative to make a PO application. Such a requirement is abhorrent if the guardian is the abuser. Even upon disabled women enlisting outside support, support services within the family violence sector are already under-resourced. Victim Support was concerned that requiring organisations to make applications for a violence-survivor may financially and qualitatively strain services.¹¹² Organisations fearing fiscal strain were similarly reluctant to undertake application making responsibility under the PPPRA.¹¹³ These overlooked barriers maintain the primary onus of application on disabled women.

Further, women with cognitive impairments may rely on carer support to a high standard and similarly, in reporting violence. Dependence on others to make PO applications becomes an additional barrier.¹¹⁴ In this sense, the section is practically under-protective despite its paternalistic attempt to shift the application making burden. The section conflicts with its goal of recognising and catering for the "vulnerability" of disabled women with cognitive impairments.¹¹⁵ Therefore, it primarily fails to meet the strong positive obligation of violence protection in the UNCRPD art 16.

¹¹¹ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 16; Judy Laing, above n 10, at 31.

¹¹² Victim Support "Submission to the Justice and Electoral Committee on the Family and Whanau Violence Legislation Bill 2017" at [3].

¹¹³ Auckland Disability Law, above n 97, at [14].

¹¹⁴ Margaret Camilleri, above n 13, at 48.

¹¹⁵ Family Violence Act 2018, s 4 (f).

Additionally, the section has the fundamental impact of denying autonomy through its lack of compliance with art 12. A disabled woman faces "civil death" when denied legal capacity.¹¹⁶ Both the continued violence and legal inability to make PO applications with proper support steal any modicum of control. This "aggravated discrimination" disempowers and further excludes disabled women from society.¹¹⁷

Exclusion also disproportionately impacts Māori disabled women. Section 67 takes an individualistic approach to PO applications that is unanchored from core tikanga principles. Therefore, it undermines Māori women's well-being by excluding collective relationships.¹¹⁸ Well-being and safety include "the mauri of other people, resources and elements to or upon whom an individual might be connected or emotionally or physically dependent."¹¹⁹ While already feeling excluded by an ableist society, Māori women may feel even more disconnected as responses to family violence are not "shared through whanaungatanga."¹²⁰ Further, rejecting autonomy and dignity undermines the mana tangata of disabled Māori women.¹²¹

As s 67 stands, it further marginalises disabled women from participation in society. Although most other states have underused or failed to implement supported decision-making arrangements,¹²² Aotearoa is in the unique position where proper respect for tikanga and the social model of disability in the FVA can inform the support arrangements and appropriate rights balance between arts 12 and 16. Using outdated Western conceptions of capacity that reject collectivism weaken tikanga guided responses. Through a whanaungatanga lens, the Act must recognise that "relationships are everything" and if the legislation does not provide for a person's chosen and trusted supports to help them exercise their legal capacity,¹²³ then the system will only perpetuate revictimisation and lower that person's mana in the eyes of society and their community. The whanaungatanga bonds we share mean that in the spirit of kaitiakitanga,

¹¹⁶ Fiona Morrissey, above n 89, at 427.

¹¹⁷ Catalina Devandas Aguilar *Universal legal capacity: to ensure the equal recognition of persons with disabilities before the law* (Report presented at the 37th session of the Human Rights Council, 2018) at 5.

¹¹⁸ Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey, above n 19, at 21.

¹¹⁹ At 21.

¹²⁰ At 40.

¹²¹ At 22-23.

¹²² Fiona Morrissey, above n 89, at 433; Catalina Devandas Aguilar, above n 117, at 5.

¹²³ Te Aka Matua o Te Ture, The Law Commission, above n 67, at 30.

the community must seek an end to violence, not the violence-survivor alone. The social model of disability supports this burden reallocation. Society creates disability, and therefore, society must remove barriers to inclusion. Legislation should mirror this reconceptualisation and successfully shift the burden of application from the protected person to their community through supported decision-making provisions.

C Article 13: Abrogated Access to Justice

1 Failure to collect data and promote disability sensitivity training

Rights must be honoured at a legislative level, and it is equally important to access and enforce these rights at an individual level. Article 13 enables disabled women to access protection from family violence. As such, it interacts both with arts 12 and 16. Recognition of legal capacity as "full persons before the law" under art 12 is essential to accessing the justice system, and through access, states partly comply with their art 16 obligation to protect disabled women from all forms of violence.¹²⁴

Full compliance with art 13 requires equality of access, and that all persons "working in the administration of justice", including police, have disability sensitivity training.¹²⁵ The Committee for the UNCRPD in the 2014 Concluding Observations for New Zealand was "concerned with" the lack of judicial training.¹²⁶

Article 31 and proper implementation of art 13 also require comprehensive data collection.¹²⁷ Without appropriately ascertaining the prevalence of family violence against disabled women, justice sector officials cannot see the scale of the problem and their required actions for implementing art 13.

¹²⁴ *General Comment No.1 on the Convention on the Rights of Persons with Disabilities*, above n 95, at [38]-[39].

¹²⁵ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 13(2).

¹²⁶ Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of New Zealand* CRPD/C/NZL/CO/1 (31 October 2014) at [27]-[28].

¹²⁷ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 31; Committee on the Rights of Persons with Disabilities *List of issues prior to submission of the combined second and third periodic reports of New Zealand* CRPD/C/NZL/QPR/2-3 (23 March 2018) at 12(c).

As previously noted, there are no statistics that demarcate the intersectionality of family violence against disabled women, a "consistent theme" across jurisdictions.¹²⁸ The 2013 Census only speaks to the prevalence of impairment and contributory factors to violence, such as exposure to violent crime and poverty.¹²⁹ The FVA lacks requirements for data collection on any family violence incidents, let alone disaggregation of these statistics into intersectionality. Police are not required to record whether a family violence-survivor is disabled in incident reports, nor is it current practice.¹³⁰ Data scarcity is twinned with inconsistent training mechanisms for judicial officials and administrators. Again, the FVA lacks provisions for training in family violence issues and specifically those concerning disabled women.

The current family violence policy initiatives also lack cohesion and give insufficient guidance. For example, the cross-ministry Joint venture Working Group on Family and Sexual violence both lacks a "national strategy" two years since inception, and any reference to women with disabilities in its Risk Assessment and Management Framework is surface level: explaining why a disabled person is more "vulnerable" to abuse but lacking guidance on specific assistance strategies.¹³¹ Unlike Australian initiatives, the only publicly accessible legal practitioner resource is a non-government initiative termed 'Benchmark'.¹³² Finally, the police training college lacks disability sensitivity training programmes, including for cognitive impairments. Instead, police rely on 'mental health modules' and callout field experience as 'on the job' training.¹³³

¹²⁸ Women With Disabilities Australia, above n 9, at 61.

¹²⁹ IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 4.

¹³⁰ "Statistics of prosecutions and training of police officers in relation to disabled victims" (Obtained under Official Information Act 1982 Request to New Zealand Police.

¹³¹ Ministry of Justice *Framework Report: Family Violence Risk Assessment and Management Framework: A Common Approach to Screening, Assessing and Managing Risk* (2017) at 53; Joint Venture *Periodic Update: Joint Venture Work Programme e-Update* (Joint Venture on eliminating family violence and sexual violence, December 2019) <<https://www.justice.govt.nz/assets/Documents/Publications/e-Update-December-2019-FVSV-work-programme.pdf>>.

¹³² Australian Law Reform Commission, above n 102, at 26; see generally Judicial College of Victoria "Disability Access Bench Book" (2016) Judicial College of Victoria <judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm> at [2.3]; The Benchmark Project "Benchmark: best practice, best evidence with vulnerable people" (2020) Benchmark <benchmark.org.nz>.

¹³³ "Statistics of prosecutions and training of police officers in relation to disabled victims" (Obtained under Official Information Act 1982 Request to New Zealand Police; Dr Sue Carswell *Family violence and the pro-arrest policy: a literature review* (Paper prepared for the Ministry of Justice, October 2006) at 19.

2 *Data scarcity and insufficient training create poor legislation and system response*

The absence of disaggregated family violence data and appropriate justice sector training create self-evident issues. The FVA's preventative and protective aims are undermined in two regards. First, a lack of data undermines the quality of legislative drafting, reform and consequently, UNCRPD compliance. An ill-defined scope of violence against women with disabilities limits the capacity to develop successful and inclusive legal protection mechanisms.

Second, poorly trained front-line officials in the family violence sector contribute to poor system response. A recent study of the Tairāwhiti community highlighted how "participants assumed that a lack of adequate training and professional development led to what was commonly perceived as underperforming services."¹³⁴ Inadequate training in all family violence-related sectors means that staff are likely to inappropriately manage tactics for addressing violence and re-victimise women or reinforce silencing practices.¹³⁵ Training police officers is pertinent. Police have relatively unbridled arrest discretion and the Solicitor-General's Prosecutorial Guidelines discourage police from prosecuting cases if they believe the violence-survivor will be a "non-credible" witness.¹³⁶ If police officers cannot recognise the unique forms of family violence against disabled women, these women will continue to be re-victimised in dangerous situations.¹³⁷

Despite the increase in Kaupapa Māori services (e.g. Mana Whaikaha),¹³⁸ whānau have little support to research whānau violence and tikanga issues.¹³⁹ Existing literature suggests that a "multi-level approach" that engages a "whole of whānau focus" produces the best results.¹⁴⁰ Absent research and understanding of tikanga limit the ability of service professionals to apply a tikanga framework to family violence responses. Instead

¹³⁴ Michael Roguski, above n 25, at 38.

¹³⁵ Michael Roguski, above n 25, at 13-14; Women With Disabilities Australia, above n 9, at 87.

¹³⁶ IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 5; Crown Law "Solicitor-General's prosecution guidelines" (July 2013).

¹³⁷ Andy Myhill and Kelly Johnson "Police use of discretion in response to domestic violence" (2016) 16(1) CCJ 3 at 17.

¹³⁸ See generally, Ministry of Health "About us" Mana Whaikaha: Enabling Good Lives <<https://manawhaikaha.co.nz/about-us/>>. Mana Whaikaha aims to create a disability services sector that better adheres to the wishes of clients. It established a "connector" who can link the client to the services that they need. Nevertheless, the connector cannot "intervene in family issues" or be a "support worker".

¹³⁹ Terry Dobbs and Moana Eruera, above n 68, at 22.

¹⁴⁰ At 14-18.

of engaging whakawhanaungatanga violence resolution, services may still focus on the individual. Such a culturally ignorant response may commit additional violence against Māori women.¹⁴¹

Low judicial awareness of the unique incidences of family violence for disabled women has also created revictimisation in Family Court proceedings. A Backbone Collective study described the Court as:¹⁴²

Somewhere where their experience of abuse was not believed, was minimised and not responded to, where their abuser was seen as safe and any risk to them and their children was neither assessed nor considered.

These gaps in understanding diminish the protective requirements of the UNCRPD, the Disability Strategy 2016-2026, and the FVA by committing further violence against women.¹⁴³ Article 13 instructs governments how to create a proactive, representative, and updateable approach to preventing family violence for women with disabilities. Reform led by disabled women can achieve better access to justice. Reform should expressly mandate wide-ranging data collection, intersectional research, and associated training of family violence sector officials.¹⁴⁴

D Article 16: Inadequate Protection of Disabled Women from Family Violence

1 Convention tensions and the inhibiting onus of protection as a case study

Article 16 of the UNCRPD sets a strong obligation for state parties to take all measures (including legislative) to "protect persons with disabilities, both within and outside the home, from all forms of... violence and abuse, including gender based aspects."¹⁴⁵ To meet this goal, state parties must inform families and people with disabilities about how to "recognise and report" abuse. States must also provide protective services that "foster the health, welfare, self-respect, dignity, and autonomy of the person."¹⁴⁶ Finally, any legislative or policy measures taken must be "women-focused."¹⁴⁷

¹⁴¹ Terry Dobbs and Moana Eruera, above n 68, at 23.

¹⁴² The Backbone Collective *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court* (Survey conducted to request a commission of inquiry, June 2017) at 1.

¹⁴³ Judy Laing, above n 10, at 31; Office for Disability Issues, above n 86.

¹⁴⁴ Women With Disabilities Australia, above n 9, at 86-88.

¹⁴⁵ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 16 (1).

¹⁴⁶ Article 16 (2), (4).

The express connection to legislative action draws on the social model of disability and unequivocally stresses that violence against disabled women is a public matter.¹⁴⁸ The UNCRPD transforms prohibitions on violence from a 'negative' non-interference framework to a 'positive' obligation that mandates state intervention regardless of violence intensity.¹⁴⁹ Further, it is broadly accepted that "protect" incorporates "prevent".¹⁵⁰ Protection includes mechanisms beyond mere legislative and policy development such as training and data collection.¹⁵¹ Finally, the article applies equally to those in state services or residential care. By reinforcing the social model of disability, it extends the reach of human rights law into both the "public and private sphere".¹⁵²

Positive obligations lend towards a paternalistic approach to violence prevention that creates the previously discussed tension with art 12, protection of personal autonomy. First, art 16 requires the state to monitor both state services and residential environments for violence and abuse, increasing paternalism. An overall goal of heavily protective legislation appears to undermine the 'ethos of empowerment' that drives the spirit of the UNCRPD.¹⁵³ Nevertheless, art 16 reference to protective mechanisms that foster an individual's "dignity and autonomy" tempers the tensions above. Article 16 should be read holistically with the other Convention articles, namely art 12.¹⁵⁴

Article 16 shifts the onus of protection from the violence-survivor to the state. If the onus of seeking protection from violence still significantly rests on the applicant in the FVA, then the Act fails to recognise the characterisation of family violence as a societal and state issue, undermines the social model of disability, and compliance with art 16. An examination of the Act's general schematic provisions, PSOs, and POs, is a useful Convention compliance case study. Analysis reveals that the usefulness of these tools for disabled women is limited as they cater to the majority and incorporate the UNCRPD tensions despite the Convention's direction above. Reflecting intersectionality necessitates that any protection method should involve the protected person, recognise

¹⁴⁷ Article 16 (5).

¹⁴⁸ Women With Disabilities Australia, above n 9, at 60.

¹⁴⁹ Judy Laing, above n 10, at 30-31.

¹⁵⁰ At 31.

¹⁵¹ At 31.

¹⁵² At 32.

¹⁵³ At 32.

¹⁵⁴ Amanda Keeling "Organising Objects: Adult Safeguarding Practice and Article 16 of the United Nations Convention on the Rights of Persons with Disabilities" (2017) 53 *Int J Law Psychiatry* 77 at 77-78.

and draw on tikanga through a "whole of whānau approach" that upholds mana, and acknowledge and pursue the protection that the protected person and supports desire.¹⁵⁵

2 *Insufficient recognition of disability-specific family violence in the general schematic provisions*

Although s 4 of the FVA aims to recognise and cater to the "extra vulnerability" of disabled women, this is later qualified and undermined in the general schematic provisions. The Act provides, "decision makers should, *whenever appropriate*, recognise that other factors (...all or any of disability...) may mean that people are particularly vulnerable to family violence."¹⁵⁶ The emphasised qualifier is both unnecessary and undercuts the principle's protective tenor. While attention was drawn to the contradiction at Select Committee stage, it remains in the Act.¹⁵⁷

Second, the definition of "close personal relationship" within the meaning of "family relationship" is still too under-prescriptive.¹⁵⁸ The FVA clarified that a carer-caree relationship *can* be classed as a "family relationship".¹⁵⁹ Nevertheless, various disability groups at select committee stage called for more explicit inclusion of "relationships of reliance" in the "threshold criteria" for defining a "close personal relationship" and subsequently, a "family relationship".¹⁶⁰ Reliance relationships already fall within the definition of the Victorian Family Violence Protection Act 2008.¹⁶¹

Without explicit inclusion of disability experiences of domestic violence, the high rates of violence will continue relatively unchanged.¹⁶² As previously discussed, disability sensitivity training for police officers and administration of justice officials is limited or insufficiently conducted in policy. Uncertainty around what constitutes family violence in the disability context increases the likelihood that instances of violence will be less recognised, reported, and responded to.¹⁶³ Insufficient recognition of disabled women's

¹⁵⁵ Amanda Keeling, above n 154, at 78-85; Terry Dobbs and Moana Eruera, above n 68, at 18.

¹⁵⁶ Family Violence Act 2018, s 4 (f).

¹⁵⁷ IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 7.

¹⁵⁸ Family Violence Act 2018, s 14.

¹⁵⁹ Family Violence Act 2018, s 14 (2).

¹⁶⁰ IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 8.

¹⁶¹ See Family Violence Protection Act 2008, Part 2, s 8 (3) (g), (h) (i).

¹⁶² IHC, Disabled Persons Assembly, CCS Disability Action, above n 24, at 5.

¹⁶³ Ministry of Justice, above n 131, at 4.

family violence experiences inhibits disabled women from accessing their art 13 right to justice, and consequently, sufficient protection under art 16.

3 Police Safety Orders undermining autonomy and mana tangata

A constable can issue a Police Safety Order (PSO) at a family violence incident, regardless of whether violence has transpired, if they believe it is necessary for the violence-survivor's safety.¹⁶⁴ A PSO immediately expels the perpetrator from the residence and suspends parenting arrangements without violence-survivor's consent.¹⁶⁵ It allows the protected person to access services or lodge a PO application.¹⁶⁶ The FVA increased the duration of PSOs from a maximum of five to ten days.¹⁶⁷ If breached, the perpetrator may be arrested and prosecuted under criminal law.¹⁶⁸ These orders have increased to "a rate of about 13,000 a year" following the induction of the police "pro-arrest" policy to arrest a perpetrator upon adequate evidence.¹⁶⁹

Police Safety Orders may meet the strong protective obligation of art 16 by shifting the law justifiably biased towards the protection of the violence-survivor, excluding most of the perpetrator's procedural natural justice requirements. Nevertheless, disabled women may not truly benefit.¹⁷⁰ First, a PSO can only be issued in the context of a family relationship. If police do not recognise the ability of a carer to be classed as such, a disabled woman is prevented from accessing this short-term protection.¹⁷¹ Definitional opacity could interact with a possible arbitrary police decision to deny access to justice and undermine art 16 protection requirements.

The second concern involves the tension between UNCRC arts 12 and 16. The pro-arrest policy interferes with a disabled woman's autonomy by removing her consent to detain or expel the perpetrator. In the tikanga context, this approach likely precludes mana tangata and solely focuses on the individuals, rather than engaging wider

¹⁶⁴ Bill Atkin and Sean Brennan "Police safety orders in New Zealand: getting the balance right?" (2016) 8(9) NZFLJ 176 at 176.

¹⁶⁵ Michael Roguski, above n 25, at 49.

¹⁶⁶ Family Violence Act 2018, s 36, s 41.

¹⁶⁷ Family Violence Act 2018, s 35 (1).

¹⁶⁸ Family Violence Act 2018, s 48, s 51.

¹⁶⁹ Bill Atkin "Submission to the Justice and Electoral Committee on the Family and Whanau Violence Legislation Bill" at 2; Dr Sue Carswell, above n 133, at 9.

¹⁷⁰ Bill Atkin and Sean Brennan, above n 164, at 176.

¹⁷¹ Michael Roguski, above n 25, at 49.

whānau.¹⁷² While PSOs adopt the admirable goal of immediately intervening in apprehended violence, legislators have not adequately ensured that PSOs are "disability sensitive".¹⁷³ By removing consent, PSO's undermine the aim to "foster the autonomy" of disabled women in their recovery from family violence.¹⁷⁴

A consideration of the practical barriers disabled women face in reporting violence intensifies the potential dangers of the pro-arrest PSO approach. Immediately removing a perpetrator from the residence may put disabled women at risk, especially if that person was a source of care. Some disabled women are reluctant to contact police as "in the short-term...their basic-needs would be compromised," and may endanger care arrangements.¹⁷⁵ While potentially violating art 12 requirements of autonomy in decision-making, PSOs could create another violence and endanger the success of protection by failing to recognise situational risks.¹⁷⁶

Better tempering the balance between arts 16 and 12 requires that when identifying an incident as intersecting with disability, family members and a disabled advocate are included in investigation. Taking a 'whole of whānau' approach may better ascertain a disabled violence-survivor's wishes while mediating a balance between immediate risks of violence and other situational risks.

4 Protection Orders: a blunt tool for the majority

The number of issued Protection Orders has been relatively steady despite the recorded increase in family violence incidents, particularly in the Northern and Eastern regions during Covid-19 lockdown.¹⁷⁷ The discrepancy between increased incidents and stable PO applications begs the question of PO's protective success, especially for disabled women.

A PO is made under s 79 of the FVA and includes the "standard conditions of no family violence, no contact, no having others breach [the] order," unless permitted by consent or

¹⁷² Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey, above n 19, at 22-23.

¹⁷³ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 16 (2).

¹⁷⁴ Article 16 (4).

¹⁷⁵ Michael Roguski, above n 25, at 50.

¹⁷⁶ Women With Disabilities Australia, above n 9, at 33.

¹⁷⁷ Bill Atkin and Sean Brennan, above n 164, at 176; Superintendent Eric Tibbott, above n 30.

special conditions.¹⁷⁸ The court may also include "special conditions" for the safety of the those "who are particularly vulnerable (for example, due to age, disability, or health condition)."¹⁷⁹ Nevertheless, the specific reference to disability, a change from s 27 of the DVA, is not inclusive enough.

Protection Orders can create a small decrease in violence but are generally most useful for women who are less reliant on the perpetrator and less likely to recant.¹⁸⁰ However, disabled women both experience violence from a family member or carer (whom they rely on for support) and face significant silencing practices that thwart reporting violence.¹⁸¹ The requirement that disabled women take the onerous task of reporting past violence and applying for a PO makes the PO's protective success unlikely. Therefore, this onus undermines the FVA's compliance with UNCRPD art 16. Slightly moulding a protective tool for the majority is insufficient to meet violence prevention requirements specific to disabled women.

Protection Orders are also culturally insensitive as Western conceptualised mechanisms that exclude collective or whakawhanaungatanga approaches to addressing family violence. Therefore, they are likely ineffective for Māori, where whānau connections increase safety.¹⁸² By focusing on the faults of an individual couple, POs risk "repeating the kinds of violence inherent in the policies and practices of colonisation".¹⁸³ A tikanga approach should integrate collective accountability responses. Like with exercises of capacity, preventing violence for Māori women should be approached through "whakapapa and whanaungatanga... [where the] collective [is] seen as [the] key."¹⁸⁴ If not, legislative neo-colonial discrimination undermines art 16 compliance. Instead of the State protecting Māori disabled women from family violence, Māori women may encounter violence against their identity.

¹⁷⁸ Family Violence Act 2018, s 90; s 96.

¹⁷⁹ Family Violence Act 2018, s 103.

¹⁸⁰ Christopher Dowling, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong *Protection orders for domestic violence: A systematic review* (Australian Institute of Criminology, report issue 551, June 2018) at 1-11.

¹⁸¹ Margaret Camilleri, above n 13, at 48; Christopher Dowling, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong, above n 180, at 11.

¹⁸² Denise Wilson, Debra Jackson, Ruth Herd "Confidence and connectedness: Indigenous Māori women's views on personal safety in the context of intimate partner violence" (2016) 37(7) *Health Care for Women International* 707 at 711.

¹⁸³ Terry Dobbs and Moana Eruera, above n 68, at 20 – 28.

¹⁸⁴ At 21.

Protection Orders are substantively non-compliant with the UNCRPD and ill-suited to practically prevent violence against disabled women. Their systems of implementation and enforcement further undermine their success. High evidentiary requirements stymie PO enforcement or prosecution for the offence of family violence in the criminal context.¹⁸⁵ Although PO breach is determined "on the balance of probabilities",¹⁸⁶ the misconception that disabled women are poor witnesses undercuts ease of prosecution and sentiments of safety. For example, the Backbone Collective recorded that of the 347 women surveyed in their study, "54 per cent reported not feeling safer" upon acquiring a PO.¹⁸⁷

Regarding implementation, there is no explicit duty in the FVA for police to investigate family violence incidents, nor to make PO applications on behalf of "a person lacking capacity." It is not even clear under s 74 if police are "an approved organisation" that can make an application. In contrast, most Australian legislation includes a duty to investigate, with Western Australia requiring police to make POs post-investigation.¹⁸⁸ The Legislative Framework Review recognised that such clarification could improve the accessibility of POs.¹⁸⁹

Recalling that art 16 sets a heavy state obligation to intervene in violence, the Act's silence on police duties of investigation and lack of classification of police as an approved PO-making organisation undermines the above standard. The FVA should not create a police duty to make applications in all instances of investigated family violence. This direction would undermine the UNCRPD's ethos of empowerment, made more severe given that PSOs can already be made without a violence-survivor's consent. Nevertheless, clarifying the possibility for police-made applications can ensure more stringent compliance with art 16 requirements to prevent violence "in all situations".¹⁹⁰

¹⁸⁵ Ministry of Justice, above n 38, at 10. Also see Crimes Act 1961, s 194A.

¹⁸⁶ Family Violence Act 2018, s 49 (1).

¹⁸⁷ The Backbone Collective, above n 142, at 9.

¹⁸⁸ Royal Commission into Family Violence *Volume V: Report and recommendations* (No 132 Session, March 2016) at 14, 30.

¹⁸⁹ Ministry of Justice, above n 38, at 11.

¹⁹⁰ See Appendix, United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 16.

Further, POs "are not being used to their full potential to link survivors and perpetrators to services designed to reduce violence," particularly non-violence programmes.¹⁹¹ This fractured link persists despite legislative reform. Section 188, mandatory non-violence programme attendance, still allows courts to avoid a mandatory direction "if there is a good reason for not making the direction."¹⁹² 'A good reason' may be a lack of services, which frequently exist. Several policy initiatives have aimed to repair the link to services through targeted programmes and educational units for people with cognitive impairments. However, success is limited by inadequate regional reach, insufficient funding and a general lack of reference to disability-unique family violence.¹⁹³

A case study of the FVA's legal mechanisms reveals that they do not meet art 16 protective and preventative obligations. Protection Orders aim to prevent future violence, but overall, they fail to shift the onus of seeking protection from the protected person to the state, neglecting the social model of disability. Insufficient PO implementation and enforcement further undermines compliance. More research is needed on the overall success of POs protecting disabled women from violence with due regard to overlaying levels of intersectionality. This research should not be structured in a way that validates Western conceptions of family violence.¹⁹⁴ Instead, it must be inclusive and culturally sensitive. This can only be achieved by consulting with representative groups most affected by family violence.

VI Conclusion

Disabled women lack adequate protection from family violence in Aotearoa. The FVA is the centrepiece of Government's response to family violence. Nevertheless, the Act's structure fails to meet its preventative and protective goals by neglecting to sufficiently recognise the intersectionality of family violence. Without reform to ensure that the state comprehensively adopts the onus of protection, disabled women will be entrapped in a negative feedback loop where inadequate legislative protections inform poor policy

¹⁹¹ Ministry of Justice, above n 38, at 9.

¹⁹² Family Violence Act, s 188 (2).

¹⁹³ See, for example, Elaine Mossman *Evaluation of the family violence Integrated Safety Response pilot: Phase II – Years 2 & 3* (Report submitted to Joint Venture Business Unit, September 2019); The Keeping Safe Feeling Safe (Family Violence It's Not OK) <areyouok.org.nz/resources/free-resources/keeping-safe-feeling-safe>.

¹⁹⁴ Elaine Mossman, above n 193, at 21.

responses and *vice versa*, resulting in a deficient system response. Reform is even more necessary considering the economic and social stresses that Covid-19 presents.

The FVA fails to implement and balance the key UNCRPD articles: arts 12, 13 and 16. Curiously, the Act's legal protective mechanisms attempt to implement art 16 by being structurally paternalistic but fail to practically protect disabled women from family violence and undermine art 12. The Act's failure to recognise and respect the individual autonomy and legal capacity of disabled women and its inability to adequately shift the onus of protection from violence-survivors creates a 'double-whammy' of violation. Disabled women are not protected from the physical violence of perpetrators and are not respected as full legal persons before the law. To exclude collective and trusted supports from PO application decision-making through a medical conception of disability and capacity both fails to meet the UNCRPD's ethos of empowerment and undermines the *mana tangata* of Māori women.

Without remedying societal ignorance of disability-specific violence and breaking existing misconceptions about disabled women, the strides towards protection in the FVA will continue to be drafted for the able-bodied majority or will only consider disabled women retroactively at a later stage of legislative development. The disconnect between the FVA and UNCRPD can be remedied by realigning this reactive tactic with a human rights approach. Absence of a human rights framework places disabled women at risk of further violence and exclusion from society and their communities.

VII Appendix

A Glossary

Whakawhanaungatanga	To act with whanaungatanga.
Mana tangata	Refers to recognition of mana by others contributing to self-worth. ¹⁹⁵
Tapu	'Te tapu i te tangata' is the "being and wholeness of the individual, whanau and its members." ¹⁹⁶
Maui Ora	A term for well-being that balances wairua (spiritual well-being), hinengaro (intellectual wellbeing), ngākau (emotional wellbeing) and tinana (physical wellbeing). ¹⁹⁷
Kaitiakitanga	"The obligation to care for one's own." ¹⁹⁸
Substantive equality	Equitable outcomes and opportunities for people with disabilities. ¹⁹⁹

B Family Violence Act 2018: Definition of Person Lacking Capacity, s 8

- (a) lack[ing] wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to the person's personal care and welfare; or
- (b) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to the person's personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.

C United Nations Convention on the Rights of Persons with Disabilities

1 Preamble

- (a) Preamble 1

¹⁹⁵ Leonie Pihama, Linda Tuhiwai Smith, Tessa Evans-Campbell, Hinewirangi Kohu-Morgan, Ngaropi Cameron, Tania Mataki, Rihi Te Nana, Herearoha Skipper and Kim Southey, above n 19, at 22-23.

¹⁹⁶ See Terry Dobbs and Moana Eruera above n 68, at 12.

¹⁹⁷ At 7.

¹⁹⁸ Justice Williams, above n 63, at 3.

¹⁹⁹ Beverly Clough, above n 5, at 66.

Recalling the principles proclaimed in the Charter of the United Nations which recognizes the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(b) Preamble 5

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others,

(c) Preamble 8

Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(d) Preamble 10

Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(e) Preamble 14

Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(f) Preamble 23

Realizing that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the international Bill of Human Rights,

2 Articles

(a) Article 2 - Definitions

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

(b) Article 5 – Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

(c) Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preference of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

(d) Article 13 – Access to Justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

(e) Article 16 – Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
 4. States parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
 5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.
- (f) Article 31 – Statistics and data collection
1. States parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:
 - a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;
 - b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.
 2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities exercising their rights.
 3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

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