

# Culture, Capacity and New Zealand Capacity Law

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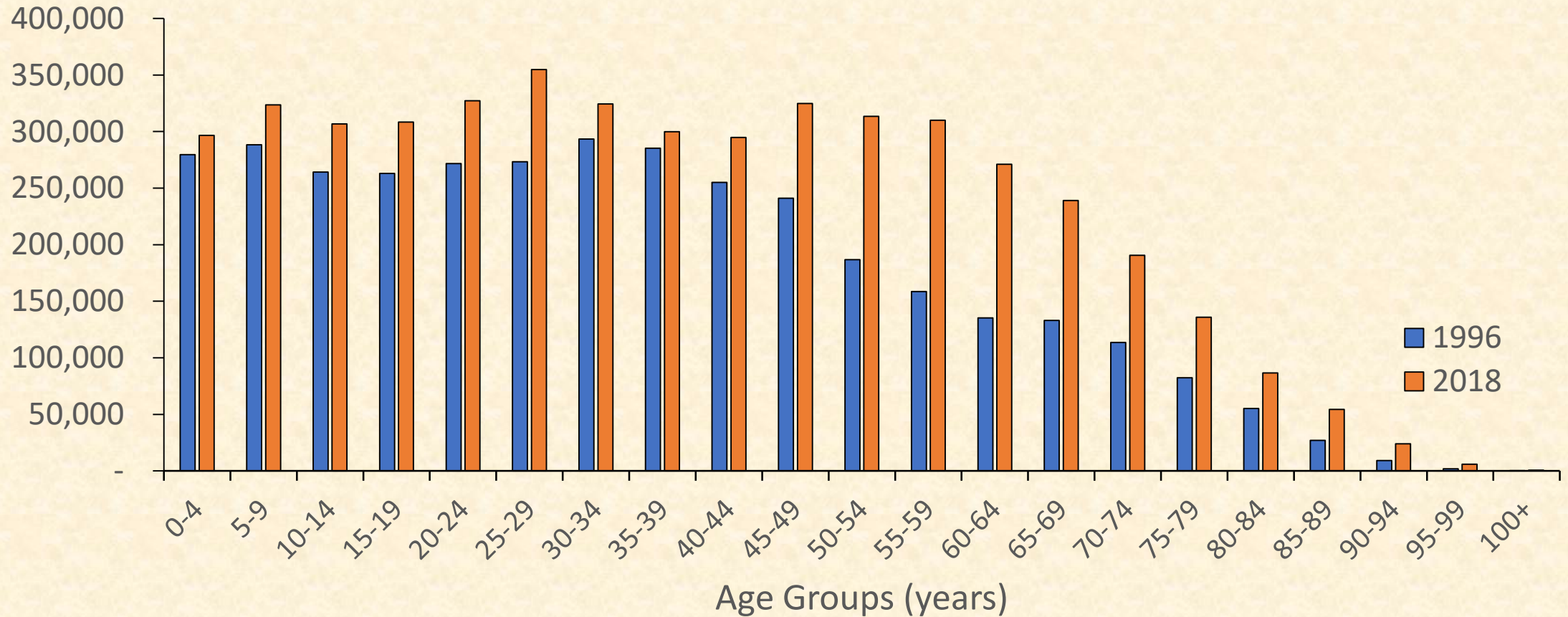
Auckland District Health Board

- Context
  - Capacity – definition, underlying principles, assessment
  - New Zealand laws
  - Discussion about cultural issues
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- As we go through consider cultural issues from your perspective

# Context

- Growing elderly population
- Increasing ethnic diversity
- Emphasis on informed consent
- Emphasis on human rights

# New Zealand Population



Culture is an umbrella term which encompasses the social behavior and norms found in human societies, as well as the knowledge, beliefs, arts, laws, customs, capabilities, and habits of the individuals in these groups.

# Legal Capacity

- Legal construct
- Individuals' ability to make a specific decision that others see as valid
- Presumption of competence

# Legal Capacity

- A person with capacity can make their own decisions
- The decisions of a person who lacks capacity are not recognized
- Decision and time specific
- Autonomy v protecting

# Principles

- Based on English law
- Autonomy, self-determination
- Presumption of competence



# Principles

- If lacks capacity then
  - No decision made?
  - Proxy
- Proxy
  - Best interests
  - Substitute decision making
  - Supported decision making

# Assessment

- Includes assessment of mental state
- No single capacity test
- Generally assess:
  - Communicate a choice
  - Understand relevant information
  - Appreciate the situation
  - Manipulate information (minimally) rationally
- Biases likely to be inherent

# Protection of Personal and Property Rights Act (1988) – PPPR Act

- Enduring powers of attorney – property and personal care and welfare
- Orders, appointment of proxy decision maker
- No reference to culture

# The Code of Health and Disability Services Consumers' Rights – HDC Code

- Specifies the rights of consumers and duties of providers

- Right 1

## *Right to be treated with respect*

(1) Every consumer has the right to be treated with respect.

(2) Every consumer has the right to have his or her privacy respected.

(3) Every consumer has the right to be provided with services that take into account the needs, values, and beliefs of different cultural, religious, social, and ethnic groups, including the needs, values, and beliefs of Māori.

# HDC Code

- 7 (4) Where a consumer is not competent to make an informed choice and give informed consent, and no person entitled to consent on behalf of the consumer is available, the provider may provide services where—
  - (a) it is in the best interests of the consumer; and
  - (b) reasonable steps have been taken to ascertain the views of the consumer; and
  - (c) either,—
    - (i) if the consumer's views have been ascertained, and having regard to those views, the provider believes, on reasonable grounds, that the provision of the services is consistent with the informed choice the consumer would make if he or she were competent; or
    - (ii) if the consumer's views have not been ascertained, the provider takes into account the views of other suitable persons who are interested in the welfare of the consumer and available to advise the provider.

# Mental Health (Compulsory Assessment and Treatment) Act 1992 – MHA

- Mental disorder
  - Abnormal state of mind
  - Poses a serious danger or seriously diminished capacity to care for themselves
  
- Capacity not a factor

# MHA

- Section 5

Powers to be exercised with proper respect for cultural identity and personal beliefs

- (2) The power must be exercised, or the proceedings conducted,—
  - (a) with proper recognition of the importance and significance to the person of the person's ties with his or her family, whanau, hapu, iwi, and family group; and
  - (b) with proper recognition of the contribution those ties make to the person's wellbeing; and
  - (c) with proper respect for the person's cultural and ethnic identity, language, and religious or ethical beliefs.

# Substance Addiction (Compulsory Assessment and Treatment) Act 2017 – SACAT Act

- Severe substance addiction,
  - Their capacity to make informed decisions is severely impaired,
  - Compulsory treatment is necessary
  - Appropriate treatment is available.
- 
- Recognition of and respect for cultural aspects identical to MHA



- Despite reference to culture and ethnicity none provide a mechanism to ensure these have any meaningful effect

# Other laws and decisions

- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 – IDCCR Act
- High Court – e.g,
  - Testamentary capacity
  - Remain a trustee
  - Marry

# Cultural Issues

- We need to work within the current legal framework
- Status of Māori
  - Tangata whenua
  - Te Tiriti o Waitangi
  - Need for provisions in law that recognize tikanga Māori

# Cultural Issues – areas to consider

- How to engage people in a capacity assessment process
- Access
- How assessments are conducted
- Use of interpreters
- Who is involved
- How might be appointed a proxy decision maker
- Basis on which decisions are made