Separated at Birth: An Assessment of the Statutory Powers for Removal of Newborn Babies and Infants

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Introduction

The removal of children from their parents is one of the most powerful and intrusive interventions the state can make. It has the potential to be extremely traumatic when exercised in the wrong circumstances, as evidenced by a recent newsroom investigation.[1] The investigation revealed distressing footage of children being uplifted by police, against their will, in a situation void of any sort of immediate danger. Further to this, the removal of a baby upon birth from a vulnerable mother could cause her significant emotional distress after carrying her baby for 9 months and going through the process of birth, aside from the natural need for a newborn to be with its mother where possible. Chapter two of this dissertation will analyse the current statutory powers for removal of children under the Children's and Young People's Wellbeing Act 1989, and what risks these powers pose to a vulnerable mother and her newborn or infant.[2] Chapter three will examine what effect the legislative reform of the Act[3] (coming into force July 2019) that supports the new Ministry for Vulnerable Children Oranga Tamariki (MVCOT), might have on these powers. Finally, chapter four will explore two programmes from overseas jurisdictions that have both developed a pre-birth approach to addressing the issue, minimising the need to remove a baby upon birth. Above all, this dissertation makes the argument that wherever the state is willing to remove a newborn baby or infant from a vulnerable mother, it owes her the opportunity to overcome her issues and parent the baby herself, through support and assistance.

Chapter One: Setting the Scene

I. A Background to Child Abuse in New Zealand

To most New Zealanders, it is no surprise to hear that our country is plagued by the societal problem of child abuse. On the global stage, of 30 OECD member countries[4] New Zealand has ranked 6th for its average number of child maltreatment deaths per year.[5] This ranking put

[1] Melanie Reid and Cass Mason "Taken by the State" (8 August 2017) Newsroom <www.newsroom.co.nz>. Note that the children were being uplifted as a result of parents' breaches of parenting orders, not care and protection concerns, but the content nonetheless provides an illustration of the danger of this power when exercised in the wrong circumstances.

[2] The name of the Act changed in July 2017. It was formerly the Children, Young Persons, and Their Families Act 1989. It may also be cited as the Oranga Tamariki Act 1989, but for consistency the English title will be used throughout this dissertation.

[3] The Bill prescribing the legislative reform was passed into law in July 2017. It is called the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017. As it contains the old name of the Act which can create confusion, see Appendices 1 and 2 for clarification.

[4] OECD stands for the Organisation for Economic Co-Operation and Development. At the time of this publication the 30 member countries produced 2/3 of the worlds' goods and services.

[5] UNICEF "A League Table of Child Maltreatment Deaths in Rich Nations" in *Innocenti Report* No. 5 (UNICEF Innocenti Research Centre September 2003) at 2.

us among four other nations as having levels of child maltreatment deaths that are *four to six times* the average of the leading countries.[6] These findings were based off a total of 55 child maltreatment deaths in New Zealand over a five-year period. While this report was published in 2003, recent statistics do not show there has been any improvement.[7]

Aside from child maltreatment that results in death, there are many children in New Zealand who continuously suffer from child abuse or neglect, and many who have been placed in care as a result. There were 11,286 findings of child abuse from July 2016 to July 2017.[8] Furthermore, there are currently around 4,609 children living in care in an out of home placement, a number that is ever increasing.[9] It is unclear whether this is due to an increase in children vulnerable to child abuse and neglect, or an increase in the state's willingness to uplift children from their families. What is clear is the fact that New Zealand has been grappling with the problem of child abuse for a long time and continues to do so without much success.

A. Infants and Child Abuse in New Zealand

Against this brief background to child abuse in New Zealand, infants make up a surprisingly significant proportion of children uplifted from their parents by the state and taken into care. In 2015, 352 babies were placed in out of home care within the first year of their life.[10] The majority of these babies (187) were placed in care within *30 days* of being born. This is surprising due to the small timeframe in which a finding of abuse or neglect would need to be substantiated, and then the process carried out by law to uplift that child. Most of the 352 babies were from the Counties Manukau and Waitemata Child, Youth and Family (CYF) operational areas.[11] There is also a trend that infants uplifted in the first year of their life are predominantly Māori.[12] Unfortunately information on the number of babies uplifted by the state upon birth was unable to be obtained because it is located on individual case files.

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[6] At 4. Emphasis added.
[7] Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, June 2017) at 12. There were 54 child abuse deaths in the 5 years before 2015.
[8] Ministry of Social Development "Total substantiated abuse findings by finding type" July 2017 (www.msd.govt.nz). This number doesn't take into account any notification of child abuse that may have been incorrectly unsubstantiated, or instances that were never reported.
[9] Ministry of Social Development "Distinct children and young people in out of home placements" March 2017 (www.msd.govt.nz).
[10] The number of children in out of home placements within their first year of life by region and age group for the 2011 to 2015 calendar years (21 July 2016) (Obtained under Official Information Act 1982 Request to the Ministry of Social Development).
[11] This probably reflects the size of the population in the Auckland region.
[12] The number of infants aged less than twelve months in out of home placements broken down by ethnicity, for the previous six financial years. (18 October 2016) (Obtained under Official Information Act 1982 Request to Child, Youth and Family, the Ministry of Social Development). From June 2015 to June 2016, 50% of babies uplifted were Māori and 32% European.

Statistics show that infants aged one year or less are the most vulnerable to child abuse and fatality resulting from child abuse.[13] This is probably attributable to their extreme vulnerability in being entirely dependent on adults for survival and unable to protect themselves in any way. While it is essential that any child at risk of harm from abuse or neglect is cared for by the state appropriately, it is particularly important for infants who are at the most vulnerable end of the spectrum. At the same time it must be considered that children are not necessarily going to be better off by going into state care.[14] It has been found that while CYF responds well to immediate safety concerns of children, a lack of resourcing and support for workers means that there is variable focus on improving the long-term outcomes of children entering state care.[15]

B. Why are Newborns and Infants Usually Uplifted?

In 2006, a group of Ministry of Social Development officials in the social work field did a case study of infants who were notified to CYF in the year from mid 2005 to mid 2006.[16] This study gives an idea of the circumstances that lead to an infant being notified to CYF and which factors are most commonly associated with an uplift.

What was most notable was that the study suggested babies were usually notified to CYF due to concern about their exposure to *adult problems*.[17] These problems include violent relationships, alcohol or drug problems, antisocial behavior and parental mental health concerns.[18] Where cases resulted in the infant being uplifted into care, there were slightly higher levels of substance abuse problems and the presence of violent relationships.[19] Where infants remained in the care of their parents following a notification, there were still high levels of exposure to violence and conflict and/or substance abuse problems.[20]

In the group of infants that were unborn when notified to CYF, there was little to distinguish them from infants notified after birth. Where distinction could be made, the mothers were slightly younger, many had previously been involved with CYF as children themselves, and the concerns were predominantly about the mother's health.[21] Mental illness, anti social

[13] J Simpson and others *The Determinants of Health for Children and Young People in New Zealand* (NZ Child & Youth Epidemiology Service, University of Otago; Dunedin, 2016) at 391.
[14] Office of the Children's Commissioner *State of Care: What we learnt from monitoring Child, Youth and Family* (August 2015) at 5.
[15] At 31.
[16] Marie Connolly, Phillipa Wells and Jo Field "Working with vulnerable infants" (2007) 38 Social Work Now 5. Note that CYF has now been replaced by MVCOT.
[17] At 6. Emphasis added.
[18] At 6.
[19] At 7.
[20] At 7.
[21] At 8.

behaviour and transience were common. Interestingly, they generally had more supportive spousal relationships and the presence of alcohol abuse was lower.[22]

To conclude, the main causes for concern were violent relationships, drug use, and mental illness. No single factor could be identified as resulting in an uplift in itself, with every case being unique. The fact that the causes of concern were predominantly "adult problems" raises an important consideration about how the care and protection concerns of infants should be addressed. For an infant with care and protection concerns to remain with its parents, a plan will need to be tailored not only to keep the infant safe and secure, but also to tackle the problems the parents are facing in a holistic way.

II. What Makes Infants and Newborns a Unique Group in Care and Protection Matters?

A. Attachment and Development

It is well established that the infant years of a child's life are crucial to their development.[23] Brain development and the attachment of an infant to a consistent caregiver (attachment) must be discussed together because they are inextricably linked. Attachment theory is the idea that a strong physical and emotional attachment to a caregiver is critical for an infant's social and emotional development.[24] Being attached to their mother or father does more than provide the infant with a stable and secure base: it drives brain development.[25] This is because during the infant years, a lack of attachment and a negative family environment can do irreversible damage to the brain's development.[26]

In a paper presented to the Family Law Conference in 2011, paediatrician Dr. Simon Rowley and family lawyer Lope Ginnen discuss the neurobiology of infant brain development and the relevance of this information to family court practitioners.[27]

1. The neurobiology

As soon as a baby is born, its experiences begin to shape the brain's development through the process of connections between neurons. Basic connections are made from sensory experiences like seeing, smelling and hearing. These basic connections would happen regardless of the infant's environment, but the subsequent "refining and pruning" of these

[22] At 8.
[23] At 6.
[24] See John Bowlby, *Attachment* (2nd ed, Hammondsworth, U.K, Penguin, 1991).
[25] Allan Shore and Jennifer McIntosh "Family Law and the Neuroscience of Attachment, Part I" (2011) 49 Family Court Review 501 at 502.
[26] Simon Rowley and Lope Ginnen "Wiring the Brain" (paper presented to the New Zealand Law Society Family Law Conference, November 2011) 255 at 256.
[27] Rowley and Ginnen, above n 26.

connections is determined primarily by its environment.[28] In infancy, the brain is making connections at one of the most rapid rates it ever will in its lifetime, and as a result some early developments are hard to re-capture if missed.[29] One of these developments is making an attachment to a consistent caregiver. The connections that come with an attachment relationship need to be made within the first 18 months of a child's life before the "window of opportunity" for them is lost.[30] Without attachment and the subsequent connections it brings to the brain, the child is more likely to have trouble making firm, trusting relationships with humans and to have problems with social competency.[31]

As well as attachment, a positive family environment is also important for the development of the infant brain. Negative experiences such as witnessing family violence or being smacked also affects the connections made in the brain. These experiences cause the release of the hormones adrenaline and cortisol (essentially the 'fight or flight' response).[32] When too much of these stress hormones are released at an inappropriate time in infancy, they can interfere with brain development and actually result in irreversible damage.[33] Aside from purely negative experiences, a lack of positive ones can be equally damaging. If an infant lacks stimulation and positive input from parents or caregivers, some connections in the brain will be weak or not made at all, and this could make the infant less receptive to some forms of communication in the future.[34]

Where infants are uplifted from their parents and caregivers, it is imperative that the need for a successful attachment relationship and a positive family environment is considered. The Family Court is challenged with the competing factors of protecting the infant from harm but also trying to provide a reasonable opportunity for the parents to be in a position to be a part of infant's attachment. On top of this, in the critical period of infant brain development it is desirable for interventions to be made sooner rather than later if they are necessary. This creates yet another challenge for the Family Court to achieve within its limited timeframe.

2. Examples of Family Court decisions considering attachment for infants

The orthodox expert position on attachment given to family court judges is that where a child is placed into care, a period of no contact with family members *with whom they do not have a secure psychological attachment* would assist them in forming a secure attachment to the new

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[29] At 256.
[30] At 256.
[31] At 256.
[32] At 256.
[33] At 256. This is through the loss of myelin, which is a white matter that coats the nerves in the brain and enables the fast transmission of information within it.
[34] At 257.

caregiver.[35] Judges are also guided by the principle that a child removed from their family should be given an opportunity to form a secure psychological attachment to their caregiver.[36] The Act's emphasis on family placement and involvement[37] has led to a suggestion that the courts tend to overlook the danger of children breaking secure attachment with temporary caregivers when returning children to their family.[38]

Judges must also evaluate the risk of 'foster placement breakdown' when considering permanent placement in foster care, because consideration must be had to not only short term concerns, but the child's long term needs throughout their childhood and beyond.[39] Foster placement breakdown is the sudden, unexpected ending of a foster care placement.[40] It can be associated with four risk factors: being placed in a foster family with children of the same age or younger, conduct/manageability problems, placement at an older age, and concerns about the wellbeing of the foster parents' children.[41]

In *S v P* an infant was placed in the care of a foster mother shortly after birth, because the birth mother was suffering from depression and "not coping".[42] The child remained with the foster mother for 3 years. During this time, the birth mother had steady weekly contact with her child, which increased to 3 days per week. She overcame her depression, undertook parenting and anger management courses, entered into a stable relationship and had another child, and expressed a willingness to work with any specialist it took to get her child back. Expert evidence showed the child had formed a significant psychological attachment to the foster mum, and a report from a psychologist showed that the child did not need a change of caregiver to meet her needs with the access in place with the birth mother considered enough. Despite this, and the psychologist's emphasis on the child's need for consistency, predictability, and continuity of care (which were provided for if she remained with her foster mother), the judge ordered the return of the child to her birth mother, on the basis that this would advance the child's welfare in the long term.[43] The judge came to this decision by placing emphasis on the research presented to the court on the risk of a foster placement breakdown.

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[35] Mahoney (ed) *Brookers Family Law – Child Law* (online looseleaf ed, Thomson Reuters) at [NT4.1.03]. Emphasis added.
[36] Children's Wellbeing Act, s 13(2)(h).
[37] Sections 5(b) and 13(2)(b)(i),(c), (d) and (f)(i).
[38] Mahoney, above n 35 at [NT.4.1.03]. *S v P* [2001] NZFLR 251; *Re P* (2000) 20 FRNZ 19 is discussed below to illustrate this point.
[39] *S v P* [2000] NZFLR 251; *Re P* (2000) 20 FRNZ at 267.
[40] Evelyn Khoo and Viktoria Skoog "The road to placement breakdown: Foster parent' experiences of the events surrounding the unexpected ending of a child's placement in their care" (2013) 13(2) Qualitative Social Work 255 at 256.
[41] *S v P,* above n 39, at 268.
[42] At 251.
[43] At 272.

In *Department of Child, Youth & Family v Halverston* an infant was uplifted from her mother at 7 months of age.[44] Clarkson J declined to refuse the mother contact with her child for 3-4 years just in order for the child to establish a secure attachment to her new permanent caregiver. Her Honour rejected the position put by expert evidence by preferring her own view that it would be "inhumane" to deny the mother any contact. This was despite evidence the mother had previously tried to undermine the placements of her other children who had been uplifted. Clarkson J was concerned that the child would feel abandoned in the future if she had no contact with her mother, although an expert gave evidence that this was unlikely to happen if she had a secure connection to a primary caregiver.

Family court judges understand the importance of attachment to infant and child brain development but 'whānau first' principles in the Act constrain them from making it a priority in their decision making.[45] Where removal of a newborn or infant is being considered, the best outcome would be to prepare the mother to be in a position to provide an attachment relationship herself. Otherwise, the focus should be on optimising attachment with a temporary caregiver while at the same time providing contact with the birth mother. In this way, the child can be gradually returned to the birth mother when she is ready by transitioning to a new attachment relationship, without breaking the attachment to the temporary caregiver. This is the approach the judge took in *S v P*.[46]

B. Separating a Mother and Child at Birth

The decision to uplift a newborn baby from its mother at birth is not one to be taken lightly. For a new mother, who has carried the baby for 9 months and endured the process of labour and birth, separation from her baby is likely to be hugely distressing. There are inevitably going to be cases where the mother does not want to parent her child, or has accepted that she is not in a position to do so.[47] However, for the mother who wants to care for her baby, its removal could be extremely difficult to accept. On top of this, the baby might be uplifted without her having notice which could exacerbate her distress even more.

The period following birth is a time of major adaption for a new mother.[48] Labour can take over a day from when a mother enters the first phase to when the baby is born.[49] Given the

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[44] *Department of Child, Youth & Family v Halverston* FC Whangarei CY088/6/01, CY888/402/97, 22 November 2002.
[45] Children's Wellbeing Act,ss 13(2)(b) and (5)(b). These principles acknowledge the family has the primary role in caring for a child in need of care and protection, and that the relationship between the child and family/whanau should be maintained and strengthened.
[46] *S v P,* above n 39, at 272.
[47] Family group conferences are an opportunity for families and wider whanau to discuss care and protection issues for children. It is possible for a pregnant mother to agree her baby is in need of care and protection and needs to be uplifted when born through this process.
[48] Lesley Dixon "Supporting women becoming mothers" in Sally Pairman and others (eds) *Preparation for Practice* (2nd ed, Elsevier, Chatswood (NSW), 2010) 574 at 575.

physiology behind childbirth, physical recovery can be arduous, and at the same time transition to motherhood is a highly emotional time. Women have described feeling relief, euphoria, and joy but also despair, fear and concern at the same time.[50]

The hours after birth are an important time for a mother to connect with her new baby and adapt to her new role. Connection is made by holding, touching and breastfeeding the baby.[51] This increases oxytocin and prolactin levels. Prolactin contributes to maternal behaviour[52] and oxytocin promotes feelings of calmness, connection and peacefulness.[53] A mother with substance abuse or mental health issues may feel less bonding during pregnancy so as a result postnatal physical bonding becomes even more important.[54] Infants have been shown to be capable of experiencing physical bonding moments, and physical contact has been shown to reduce their stress levels.[55] New Zealand midwives treat the early weeks following birth not only as a time for recovery and connection, but for progress in breastfeeding and the mother's confidence in her ability to care for her baby.[56]

Bonding and connection at birth becomes the foundations for an ongoing attachment relationship between a mother and infant.[57] It is a physiological process that supports both mother and infant through what can be an emotionally tumultuous time. Where mother and infant are separated at birth, they are likely to experience a weaker initial attachment.[58] This weaker attachment is not necessarily irreparable, but the separation is nonetheless bound to be distressing for both mother and baby.[59]

III. The Unborn Child in New Zealand Law

In *Re Baby P (An Unborn Child)* family law jurisdiction in New Zealand was extended to the unborn child for the first time.[60] It was only extended as far as an unborn child at a stage of development where it is capable of survival independent from the mother.[61] Jurisdiction was needed to protect the child who was just weeks from birth from the violent partner of the

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[49] Juliet Thorpe and Jacqui Anderson, "Supporting women in labour and birth" in Sally Pairman and others (eds) *Preparation for Practice* (2nd ed, Elsevier, Chatswood (NSW), 2010) 486 at 488.
[50] Dixon, above n 48, at 579.
[51] At 578.
[52] D Grattan and I Kokay "Prolactin: a pleiotropic neuroendocrine hormone" 20 Journal of Neuroendocrinology (2008) 752 as cited in Dixon, above n 48, at 578.
[53] K Uvnas-Moberg "The oxytocin factor: tapping the hormone of calm, love and healing" (Da Capo Press, Cambridge, 2003) as cited in Dixon, above n 48, at 578.
[54] Rachel Young "The Importance of Bonding" 28(3) International Journal of Childbirth (2013) 11 at 13.
[55] R Gitau and others "Acute effects of maternal skin-to-skin contact and massage on saliva cortisol in preterm babies" 20(2) Journal of Reproductive & Infant Psychology (2002) 83 as cited in above n 34 at 13.
[56] Dixon, above n 48, at 578.
[57] Young, above n 54, at 15.
[58] At 15.
[59] At 15.
[60] *Re Baby P (An Unborn Child)* (1995) 13 FRNZ 472; [1995] NZFLR 577.
[61] at 478.

mother, whom she was hopelessly infatuated with. Critics of the decision were concerned that the result of this decision might lead to pregnant mothers in need of help not coming forward for fear of losing control over their unborn child, which could actually put the child at greater risk.[62]

While it is hard to imagine how family law jurisdiction could *not* extend to the unborn child when one considers some of the harm a foetus could be exposed to in some cases, it is problematic because the interests of the baby in being protected from harm and the legal interests of the mother (such as her right to autonomy and privacy) are bound to conflict often. This inherent conflict creates difficulty for the courts when making orders concerning an unborn child.

Jurisdiction over the unborn child was extended further in *Re an unborn child*.[63] This case concerned an application for guardianship of the unborn child under the court to ensure its birth would not be included in a pornographic film. Heath J rejected the qualification imposed in *Re Baby P* that the unborn child needed to be capable of independent life, and held that "child" includes an unborn child.[64] His interpretation was consistent with other New Zealand legislation that protects the unborn child,[65] as well as New Zealand's obligations under UNCROC.[66] Heath J acknowledged that using the guardianship jurisdiction to compel the mother to do something against her will was problematic, but concluded that the need to protect the baby from the risk of emotional harm justified the order.[67] Nevertheless, his decision has not been met without criticism. One view is that the early intervention was unnecessary, and other legislation could have been used to address the issue after the child was born.[68] Concern was also expressed for the health of the mother, who as a result of the pressure of legal proceedings reportedly suffered high pressure, which led to an early birth. In a case where the situation was not life or death it could be seen as unfortunate that focus was taken away from the most important issue of a healthy mother and child, and instead onto the "spectre of pornography".[69]

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[62] *Unborn Children: Persons and Maternal Conduct* (case note) [1997] Med L Rev 143 at 145.
[63] *Re an unborn child* [2003] 1 NZLR 115; [2003] NZFLR 344.
[64] At [54] and [71].
[65] At [61(c)]. Sections 182 and 187A of the Crimes Act 1961 provide protection for the unborn child by stipulating that abortion is unlawful unless the pregnancy would seriously endanger the mental or physical health of the mother. The Contracteption, Sterilisation and Abortion Act 1977 also provides protection for the unborn child.
[66] At [61] and [70]. "UNCROC" is the abbreviation for the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). The preamble to the Convention asserts that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".
[67] At [61(b)] and [93].
[68] See Mark Henaghan "Editorial: The unborn child in family law" (2002) 4 BFLJ 83 at 83. The Films, Videos and Publications Classification Act 1993 could have been used to censor the video as it would be exploitive of a child for sexual purposes.
[69] Mark Henaghan "Editorial: The unborn child in family law" (2002) 4 BFLJ 83 at 83.

Concerns aside, jurisdiction over the unborn child has been established in New Zealand, and thus the ability to intervene into a pregnant mother's life even where it is not a life or death situation. Most intrusively, this jurisdiction can be used to order for the uplift of the baby upon birth.[70]

As aforementioned, recent information on the number of newborn babies uplifted upon birth or from the hospital was unable to be obtained. However it is known that in 2001 and 2002, 7 newborn babies were uplifted from their mothers, 37 were uplifted within a week of birth and 349 within a year of birth.[71] It is also known that in 2008, 15 babies were taken into care the day they were born.[72] With the number of babies being taken into care within a year of birth having doubled since the 2001 and 2002 figures, coupled with the figures from 2008, it can be estimated that the number of newborn infants being taken into care is increasing too.[73]

IV. Conclusion

A significant number of infants are uplifted early after birth each year. Research shows the causes of concern are primarily adult problems: violent relationships, substance abuse and addiction, and parental mental illness. Uplifting an infant at birth has the potential to be seriously distressing to both mother and child and can damage the initial mother-infant relationship. Initial connection and bonding between mother and infant makes foundations for the progress of their relationship, and can help to instill confidence in her ability to parent. For these reasons it is desirable to come up with a response that addresses the 'adult problem' and allows a mother to remain with her baby where practicable. At the same time, family court judges must consider the infant's critical need for a secure attachment relationship and a positive family environment for the advancement of their development.

Chapter Two: New Zealand's Legal Framework for Uplifting Infants and Newborn Babies from their Parents

I. Introduction to The Children's and Young People's Wellbeing Act 1989

A. The Family Group Perspective

The original 1989 Act was intended to embody a family group perspective rather than a child welfare perspective.[74] In this way, the philosophy of the Act is based on the belief that a

[70] Children's Wellbeing Act, ss 39, 40, 42 and 78.
[71] Mahoney, above n 35, at [NT4.2.04].
[72] Rebecca Palmer "More new babies taken from their mothers" *The Dominion Post* (online ed, Wellington, 5 March 2009).
[73] Ministry of Social Development, above n 10.
[74] (27 April 1989) 47 NZPD at 10246.

child's wellbeing is inextricably linked to their family, whānau, hapu, iwi and family group. The principles of the Act reflect the family group perspective by acknowledging that the primary role in caring and protecting a child lies with their family and whānau and so accordingly the family should be assisted and supported by the state.[75] Furthermore, any intervention required into family life should be the minimum necessary to ensure a child's safety.[76] The family group perspective has been considered a "significant departure" from the traditional child welfare perspective,[77] however the paramouncy principle remains that a child's welfare and best interests should be the first and paramount consideration for any decision-maker.[78]

The key idea of the family group perspective is that the welfare and interests of the child are assumed to be intertwined with those of their family, and thus do not need to be considered separately. Elias J has restated the family group perspective in saying that the wellbeing of children lies predominantly with their family *except in exceptional circumstances,* so while subject to the paramouncy principle, the family should be an important object of concern in considering a child's best interests.[79]

There has been some criticism of the family-centered approach to care and protection issues.[80] There is concern that too much focus on family autonomy, family reunification and misidentifying care and protection problems as adult problems or relationship problems can result in children being left in dangerous situations while attempts are made to assist the parents and family. The new Act is intended to be more 'child-focused' and this new approach will be discussed in chapter three of this dissertation.

B. Operation of the Act

The Children's and Young People's Wellbeing Act 1989 governs the states' powers for removal of children from their parents. Firstly, the court must decide how the child should be uplifted from their parents, according to the level of harm posed to them.

This might be by a declaration that a child is in need of care and protection under s 67. Before this declaration is made, one of the grounds in s 14 (definition of a child in need of care and protection) must be met, a family group conference (FGC) must be held[81], and the

[75] Children's Wellbeing Act, s 13(2)(b)(ii). See Appendix 1 which contains the principles of the Act.
[76] Section 13(2)(b)(i).
[77] Mahoney, above n 35, at [NT1.2.05].
[78] Section 6.
[79] *C M P v DGSW* (1996) 15 FRNZ 40; [1997] NZFLR 1 (HC) at 45. Emphasis added.

[80] See Tommy Livingston and Katie Kenny "Kathleen Cooper murder case raises questions around whanau first principle" (17 August 2017) Stuff <www.stuff.co.nz>
[81] Section 72.

court must be satisfied that the child's need for care and protection cannot be met by other means.[82] Once this declaration has been made, a child can be uplifted from their parents with a s 78 interim custody order.[83] This order is temporary. Final proceedings determine where the child is to reside for the long term, and any other orders that might need to be made to support the parents (should they have care of the child) or otherwise arrange contact for them.[84]

When a baby is uplifted following a declaration under s 67 the mother is likely to have knowledge of when it is going to happen and why, which might alleviate some of the high distress she may feel from being separated from newborn without any time to prepare for that moment. At the same time some women might dread this moment and their birthing process.

The other way a child can be removed from their parents is by an emergency power, which would negate the need for a family group conference (FGC) or any sort of notification to the parents. Ex parte s 78 orders are not technically emergency powers, but they operate similarly as the parents or guardians receive no notice that their child is to be uplifted.

Guidelines for situations where newborns are uplifted at birth by means of statutory intervention were obtained from the Canterbury and Counties Manukau District Health Boards (DHB).[85] These regions have the highest levels of child hospital admissions resulting from maltreatment.[86] Both guidelines say that ideally the mother would have created a birth plan with a lead maternity carer (LMC), the DHB child and family safety service and MVCOT. The social worker also "aims to ensure the mother is prepared for the uplift". As the social worker is hospital based, it is assumed they begin this preparation when the mother comes to hospital in labour. This is probably not the most appropriate time to coach the mother through her plan nor enough time to ensure she is fully prepared for what is ahead of her. As babies are usually uplifted within hours of birth, a step-by-step plan is made by MVCOT with social workers (and sometimes police) for uplifting the baby smoothly. The mother has no input into this plan, but a social worker should be present to support her.[87] The mother's lack of input into the plan for the uplift directly contrasts with two principles of the Act that wherever possible family should participate in decision making under the Act and

[82] Section 73.
[83] Section 78.
[84] These other orders include support orders, services orders, and restraining orders.
[85] Letter from Carolyn Gullery (General Manager of Planning, Funding & Decision Support at Canterbury DHB) to Natalie Fraser-Jones (author of this dissertation) regarding the Hospital Social Work responsibility and involvement in the process of a baby being uplifted (7 August 2017) and Counties Manukau DHB "Removal of a newborn at the time of birth by statutory intervention" (Guideline, 18 May 2017).
[86] J Simpson and others, above n 13, at 394.
[87] Social workers are also present to support other family and staff members involved in the uplift.

that endeavours should be made to obtain their support of any power exercised under the Act.[88]

All decisions made under the Act are guided by a set of general principles.[89] Decisions about the removal of children from their parents, under part 2 of the Act, are guided by an additional set of care and protection principles under s 13 of the Act.

Sections 5 and 6 of the Act contain the general principles that guide all decisions made under the Act. Section 6 is the overriding mandatory principle that "the welfare and interests of the child is the first and paramount consideration, having regard to the principles set out in sections 5 and 13". While the s 5 principles re-assert that consideration of the child's welfare must always be given to how a decision will affect that child, they are also heavily focused on family wellbeing. They require consideration of family and whānau views and ensuring their participation in decision-making.[90] They also require the strengthening of the relationship between the child and their family where possible, and consideration of how decisions will affect the family.[91]

The s 13 principles apply only to decisions made under part 2 of the Act, which concerns the care and protection of children and young persons, and the statutory powers for removal of children. Section 13 reiterates that the welfare and interests of the child are the paramount consideration and asserts that decision makers must be guided by the principle that the child must be protected from harm and have their rights upheld.[92] Following on from this, the principles are predominantly family-orientated, recognizing that a child's welfare and interests are inextricably linked to their family and whānau. This is a reflection of the family group perspective.

Regarding removal of children specifically, the principles stipulate that removal should only be where there is serious risk of harm to the child, and that the child should be returned to the family group wherever practicable.[93] Perhaps most importantly, the principles accept that the primary role in caregiving lies with their family and whānau, *so therefore that family should be supported and assisted as far as possible to do so*.[94] Support from the state is re-emphasised in another s 13 principle which states that where a child or young person is considered to be in need of care or protection, the necessary assistance and support should be

[88] Sections 5(a) and (e)(i). See Appenix 1 for principles of the Act.
[89] Sections 5 and 6.
[90] Section 5(a).
[91] Sections 5(b) and (c)(ii).
[92] Sections 13(1) and (2).
[93] Sections 13(2)(e) and (f).
[94] Section 13(2)(b). Emphasis added.

provided to enable the child or young person to be cared for and protected within their own family wherever practicable.[95]

II. Removal by Declaration that a Child is in Need of Care and Protection

A. Meeting the Grounds in s 14

Children must meet the definition under s 14 as in need of care and protection before they can be uplifted by the state following a s 67 declaration. As drug and alcohol addiction, family violence and mental illness have been identified as the most common factors that lead to the uplift of baby upon birth or early thereafter, these will be discussed in turn.

1. Substance abuse and addiction

Parental drug and alcohol addiction brings about a multitude of problems that can lead to care and protections concerns for an infant. This is not limited to direct exposure to drugs and alcohol, but the family environment that substance abuse and addiction fosters.

For the unborn child, it is widely accepted that drug and alcohol use during pregnancy negatively affects the foetus. Foetal alcohol syndrome is a possible outcome of prenatal exposure to alcohol[96], and prenatal exposure to methamphetamine has been associated with early birth, spontaneous abortion, low birth weight and congenital abnormalities.[97] There is also the possibility for newborns to suffer drug withdrawal following prenatal exposure to some opiates.[98] Where there is evidence an unborn child is being harmed or has been harmed by drug or alcohol use, there could be grounds for removal under s 14(1)(a) or (b). It is not always easy to establish this evidence.

In *MSD v G*, a baby was uplifted at birth due to concerns about the parents' methamphetamine use.[99] The parents applied to have the s 78 order set aside.[100] Druce J was unable to establish whether the baby had been harmed because the paediatrician was unable to draw a firm conclusion that the newborn baby's symptoms were a direct result of its mother's drug taking during pregnancy.[101] The baby's neonatal records showed a significant

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[95] Section 13(2)(d).
[96] Mike Shaw "The Family Drug and Alchohol Court: A New Approach to Safeguarding the Children of Parents who Abuse Drugs and Alcohol" in Mathew Thorpe and Maggie Faggionato (eds) *Mental Health and Family Law: Papers Presented to the Family Justice Councils Disciplinary Conference* (Totnes (England), 2009) 21 at 22.
[97] Trecia Wouldes and others "Maternal methamphetamine use during pregnancy and child outcome: what do we know?" (2004) 117 NZMJ 1206 at 4.
[98] See *Re D* (a minor) [1987] AC 317.
[99] *MSD v G* FC Whangarei FAM-2007-088-944, 31 July 2008 at [55].
[100] Section 78 orders are interim custody orders. Once set aside, the baby would be returned to its parents.
[101] *MSD, G,* above n 99, at [55].

level of concern of the baby experiencing drug withdrawal symptoms, but not enough to establish that its development or physical wellbeing was seriously impaired while in utero, as per s 14(1)(a) or (b).[102]

This meant that his Honour had to consider the likelihood of future harm due to the parents' use of drugs. Intoxication and withdrawal can compromise a parent's ability to provide adequate care in a number of ways by resulting in a lack of supervision, inability to cover basic needs, and inability to comprehend and be aware of a child's needs and so on.[103] Furthermore, heavy dependence on a drug can lead to a lifestyle that is centered around acquiring drugs, using them, and recovering from that use, resulting in a lower capacity to provide care and potentially exposing them to danger.[104] His Honour did note the possibility for children raised by drug using parents to have positive relationships and still do well in school.[105] Ultimately, it was found that the baby was in need of care and protection under s 14(1)(a), (b) and (f). The parents had drug addictions that dated back to their teenage years. The mother had failed to engage in any treatment provided in the past, and had previous children removed from her inability to parent them despite support from MSD and other family members. The parents' application was denied, so the s 78 order continued and the baby remained in the care of extended family members.

Under the principles of the Act, when a child is in need of care and protection, the state should do whatever is practicable to ensure the family is supported and assisted so they are able to care for that child themselves.[106] The judge ordered MSD to prepare a plan under s 128 before he would make final orders later on that year, so it is unclear exactly what the final outcome was.[107] The parents expressed a strong desire to care for their own baby, the mother had made real effort to be drug free during her pregnancy, they were willing to work with a new social worker, complete random drug testing (but not hair follicle testing) and there was no evidence of violence in their relationship or mental health disorder. It seems the decision was largely based on their negative history rather than the progress they had made. One would hope that the plan was committed to helping the parents become capable of caring for the baby, with whatever support from the state was required to help their drug addictions.

In *CLM v Chief Executive of the Ministry of Social Development* the Family Court on appeal modified a s 78 interim order that stipulated the baby be uplifted from the mother 24 hours of

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[102] At [64].
[103] Shaw, above n 96, at 23.
[104] At 23.
[105] *MSD v G*, above n 99, at [65]. See Wendy Haight and others "Parent Methamphetamine Abuse and Child Welfare in the Rural mid west, Children and Youth Services Review" 27 (2005) 949-971, and the study by Connolly, Wells and Field in above n 16 at 8, which found that a number of infants notified to CYF for concern about paternal drug use remained in their care with no further intervention.
[106] Section 13(2)(b)(i) and (d).
[107] *MSD v G*, above n 99, at [75].

birth, and that would only allow her one hour of contact a week.[108] Instead, the Court modified it so that the mother and child remain in hospital for seven days after the birth and then spend six months together at Odyssey House doing a full residential programme.[109] The Odyssey House residential programme provides a programme for addicts that includes counseling, medical and psychiatric treatment, education and employment support, and parenting skills within a family centre, so children can accompany parents through their recovery journey.[110]

This case is a good example of a response that addresses the state's responsibility to support a new mother *where practicable* to care for her baby so that baby can remain within its family group. A response like this is not always going to be practicable, for example in circumstances where a mother is or *appears* unwilling to care for her infant, or where the infant would be at serious risk of harm by remaining in her care while she undergoes treatment.

2. Family Violence

New Zealand is a country plagued by family violence. 2016 was the record high for the number of police investigations into family violence, by about 8000 investigations.[111] Women are particularly vulnerable to family violence. Statistics show that 55% of women have experienced physical, sexual, or emotional abuse by a partner at some point in their lifetime.[112] Inter-partner violence (IPV) is inextricably linked to child abuse and neglect, as it is well established that exposure to family violence is a form of psychological abuse to a child.[113] This has been codified into law under the Domestic Violence Act 1995.[114]

A pregnant mother who is in a violent relationship has by virtue of her circumstances made her unborn child "likely to be emotionally abused" as per s 14(1)(a). Exposure to family violence could also satisfy the grounds of s 14(1)(b) where it has the possibility of seriously impairing that child's mental and emotional well-being.

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[108] *CLM v Chief Executive of the Ministry of Social Development* [2011] NZFLR 11.
[109] At [24], [25].
[110] Odyssey House "Residential Programme" <www.odyssey.org.nz>
[111] New Zealand Family Violence Clearinghouse *Data Summary: Violence Against Women* (June 2017) at 3. It is unclear whether this increase results from more incidents of family violence or an increased willingness of victims to report abuse.
[112] New Zealand Family Violence Clearinghouse "NZFVC Data Summaries 2017: Family violence reports reach record high" <www.nzvc.org.nz>.
[113] Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, February 2016) at 13.
[114] Section 3(3) defines the psychological abuse of a child as causing, allowing, or putting them at risk of witnessing domestic abuse.

It is important to understand the complexity of IPV before assuming the answer is for the mother to simply leave a violent partner and take her children with her. The Family Death Review Committee has highlighted in a recent report how crucial it is in New Zealand to change the narrative about family violence if we are to achieve meaningful success.[115] IPV is best understood as a form of entrapment, and when we understand it like this, it becomes clear that it is inappropriate to give victims the responsibility of keeping their children safe. With limited resources, victims struggle to protect themselves and their children from the partner. Entrapment is often aggravated by mental health and substance abuse issues, poverty, and few family and friends to call on for help.[116] Mothers are generally viewed as being capable of preventing their child's exposure to family violence by separating from their partner or going to counseling to "learn how to communicate better".[117] This 'failure to protect' paradigm contributes to mothers not wanting to come forward to ask for help with their situation for fear of being judged as unable to provide adequate care for her children and ultimately losing them.

In *Chief Executive of the Ministry of Social Development v Frank,* the Family Court was considering whether to order the uplift of an unborn child upon birth.[118] The parents' relationship was one of a few factors of concern about whether they could adequately parent their child. There was no evidence of physical conflict, but the father was described as "over-controlling", "suffocating" and "aggressive at times".[119] The mother had applied for a probation order over a year earlier, alleging "anger, aggression and excessive controlling behavior against her" which she later withdrew.[120] This probation order was mentioned as evidence that their relationship had been unstable. The judge also mentioned the "mother's difficulties in the relationship" and the couple's "inability to park an argument" as a concern.[121] It was seen as a mitigating factor that not only was the couple engaged in counselling, but that the mother was attending one-on-one counselling through 'Porirua Living Without Violence'.[122] The outcome of this case will be discussed below, but here it provides an illustration of the 'failure to protect' paradigm in place. The father's controlling behavior and aggression was part of wider evidence that the relationship was unstable. It was accepted as a mitigating factor that the mother sought further counsellling than the father despite the fact that he was causing the problems. Furthermore, the probation order she sought and then withdrew was viewed as evidence that their relationship was unstable.

[115] Family Violence Death Review Committee, above n 113, at 15.
[116] At 100.
[117] At 57.
[118] *Chief Executive of the Ministry of Social Development v Frank* [2013] NZFC 7623.
[119] At [18] and [19].
[120] At [6].
[121] At [19].
[122] At [33].

Other reasons a mother may not feel she is able to leave her violent partner are having nowhere to go, a lack of money, fear of being judged or not believed and the fear of being socially isolated if they leave.[123] Partners may also threaten even worse harm if the women were to leave, leading her to believe it is safer for her and her children to remain. They may also threaten to tell child protection services that the mother is an inadequate/abusive parent, or that if they leave they will get the children. Mistrust from previous experiences with agencies and the justice system lead some women to take these threats very seriously.[124]

Where courts are willing to intervene into a pregnant or new mother's family life to uplift a newborn or infant for concern about IPV, it is important that they the mother's role as a victim and as not being responsible for protecting the child or fixing the relationship. The state should support, assist, and protect her as much as possible so she can assume her primary role in caring for her child.[125] Removing a baby from a *non-abusive* new mother who is extremely vulnerable from both her pregnancy and her violent relationship is not a good or fair solution.

3. Mental Illness

The study that identified mental illness as a common factor leading to the removal of newborns and infants did not define exactly what constitutes mental illness.[126] Diagnosis of a mental illness does not automatically preclude adequate parenting.[127] A mother experiencing a severe episode of depression can feel completely worthless and neglect herself, but still provide for her toddler's needs. What is generally known is that where mental illness affects a parent's ability to care, it can manifest in both acute and longer-term risks.[128] Acute risks are things like neglect or or physical harm that result from a parent being inattentive to a child's immediate needs.[129] Longer-term risks might be emotional damage, suboptimal development and poor overall social wellbeing.

In *Department of Social Welfare v F* a baby was uplifted at birth by a warrant and then a declaration applied for under s 14(a)(b) and (f) on the basis of the mother's parenting history.[130] The mother suffered from a personality disorder and had previously had five children removed from her care on account of failure to thrive, isolation and potential

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[123] Women's Refuge "Why doesn't she leave?" <www.womensrefuge.org.nz>
[124] For example, where a court ordered protection order has failed to provide her with adequate protection in the past.
[125] Section 13(2)(b)(ii).
[126] Connolly, Field and Wells, above n 16.
[127] Diana Caswell "Working with families where a parent has mental health problems: risk, opportunities and challenges" in Mathew Thrope and Maggie Faggionato (eds) *Mental Health and Family Law: Papers Presented to the Family Justice Councils Disciplinary Conference* (Totnes (England), 2009) 13 at 13.
[128] Mahoney, above n 35, at [NT4.2.17(5)].
[129] At [NT4.2.17(5)].
[130] *Department of Social Welfare v F* DC Timaru CYPF/91, 26 March 1991.

social/emotional disadvantage. The judge expressed regret at both the fact that the warrant had been issued by a registrar in the absence of a Family Court judge in Timaru at the time, and that the mother was offered no support from qualified medical social workers at the time the baby was removed. Considering the application was made on the basis of the mother's parenting history rather than current behavior, it is submitted a lack of urgency meant the matter could have been dealt with by a judge when available and a better plan made for the uplift while the mother was still pregnant to have her more prepared and supported for the uplift.

In *Chief Executive of the Ministry of Social Development v Frank* (discussed above at page 21), the judge ordered a s 78 order in respect of an unborn child due to concerns about the mother's learning impediments and diminished intellectual capacity, which could impair the baby's development.[131] The mother desperately wanted to raise her own baby, and especially wanted to breastfeed it as she knew it was a healthy option for the baby. There were no allegations she would intentionally harm the child, nor was she involved in drugs and alcohol. She recognized herself she would not be able to parent the baby alone, but a social worker from Family Start gave evidence that with support from her partner and various agencies she would have the ability to parent the baby. The judge disregarded this evidence in favour of a detailed assessment from a doctor.[132]

The social worker also outlined a multitude of support services that would be provided if the baby remained in the mothers care.[133] In total, all of these services would have meant contact with an agency at least twice a week, and involvement in courses and counseling would equip the community with information as to how the parents were getting on. The parents also named extra key support people to help them.[134].

Recognising that her decision was harsh and not at all what the parents had hoped for, her Honour declared the child in need of care and protection and issued a 78 interim custody order to uplift the baby upon birth. A number of options were presented to the Court to mitigate the risks to their baby that their circumstances imposed. In this case, the Court appeared to disregard the principles that children should only be removed from their families where there is risk of serious harm and that intervention into family life should be the minimum necessary to ensure a child's safety and protection. At the time of the hearing, there were still two weeks before the baby was due. While it is accepted that there were care and protection concerns stemming from the parents' mental illnesses/intellectual disabilities,

[131] *Chief Executive of the Ministry of Social Development v Frank,* above n 117.
[132] At [15].
[133] At [22]. These included different parenting programmes, weekly midwife visits, Tamariki Ora nurse visits, assistance with financial planning and connections to local community groups.
[134] These were the paternal grandfather and a community health worker who was both a friend and a stand-in nanny.

these could have been addressed by putting the presented support services in place. The birth could have been carefully prepared for so that the mother could go through it without the added stress of separation from her child, and then an opportunity to bond with her new baby with the support arrangements in place.

B. Section 18A: A Parental History of Ill-treatment of the Child's Siblings

Section 18A provides that where a parent has been convicted of the murder or manslaughter of a child, or where they have had a child removed from their care and there is no realistic prospect that the child will be returned (determined by the court or a FGC), the parent will be assessed by a social worker as to whether they are likely to inflict the same type of harm or allow it to be inflicted on the subsequent child. Where the social worker is not satisfied that the parent passed the assessment, they apply to the court for a s 67 declaration.[135] Otherwise, the social worker applies to the court for confirmation of their decision that there is no need to apply for such a declaration.[136] Either way, the matter is passed on the court to review the evidence and confirm or decline to confirm the social worker's decision.

Parents are generally informed that the assessment is going to be made, but there is no requirement that a FGC be held before the social worker makes an application to the court for a declaration that the child is in need of care and protection. Thus the family is deprived of an opportunity to discuss the care and protection concerns and come up with a solution themselves. This is problematic for the new mother who could have her baby uplifted from her care without notice or an FGC, which is a valuable opportunity for discussion. Fortunately, s 18A will be amended to require that a FGC be held before a social worker can make an application to the court for a declaration.[137] This change will come into force by July 2019.

Section 18A came into force in 2015 and was a significant departure from some of the principles of the Act, which place emphasis on minimum intervention into family life, family participation in decision-making, providing support to families so they can remain in care of their children, and only removing a child from their parents where there is *serious risk of harm*.[138] While adding the requirement of a FGC under this section is a helpful development, it remains problematic that s 18A asserts that a risk-assessment tool can adequately predict whether a child is going to be harmed in the future. The paradox is that this risk assessment tool actually creates more risk of harm where a child is removed from their parents without the need for any protection, as this mandatory separation could cause emotional distress when exercised in the wrong circumstances.

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[135] Children's Wellbeing Act, s 18A(4)(a). The application is made on the grounds of s 14(1)(ba).
[136] Section 18A(4)(b).
[137] Children, Young Persons and Their Families (Oranga Tamariki) Legislation Act 2017, s 23.
[138] Children's Wellbeing Act, ss 13(2)(b) and 13(2)(d)-(e).

III. Emergency Powers for Removal of Children by the State

A. Section 39: Place of Safety Warrant

The place of safety warrant (POS) is provided for under s 39 of the Act. Social workers generally see the use of a POS warrant as reserved for only very serious situations of risk.[139] In the financial year ending 30 June 2016, 390 children were placed into the custody of the Chief Executive by execution of a POS warrant.[140] Unfortunately no further information was able to be obtained regarding how often these warrants were issued against unborn children, or for children aged 30 days or less.

Applications for the POS warrant are made ex parte, and are soley based on the information provided by the applicant who must *suspect* that the child has suffered or is likely to suffer ill-treatment, serious neglect, serious deprivation, serious harm or abuse.[141] Once it is issued, it empowers the holder to uplift the child if this suspicion is raised to *belief* upon entering/searching the place where the child is located.

In *R v Kahu* the Court of Appeal was required to define the powers of search given by the POS warrant.[142] During the search carried out with a POS warrant, a small amount of cannabis was found when checking out the cupboards for food. The mother was encouraged to "come clean" and she revealed a substantial quantity of cannabis in the bedroom.[143] The argument on appeal was that this evidence was inadmissible as it was illegally obtained.[144]

The majority of the Court of Appeal found the operation of s 39(3) must require more than just a search for the child. Richardson J said "in order to form the requisite belief to remove the child, the holder needs to be able to take positive steps to exercise their best judgment on the information then available".[145] The court held that the extended powers such as checking the availability of food in the cupboard was necessary to determine whether the child needed to be removed.[146] While the Court of Appeal has confirmed the search power under a POS warrant goes further than searching for the child, its limits are unclear.

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[139] Paul Beverley "The Scope of the Place of Safety Warrants Under the Children, Young Persons and Their Families Act 1989" (1997) 27 VUWLR 301 at 303.
[140] "The number of children in custody of the Chief Executive by the execution of a s 39 warrant and s 40 warrant for the financial years ending 30 June from 2012 to 2016" (Obtained under Official Information Act 1982 request to the Ministry for Vulnerable Children (Oranga Tamariki)).
[141] Children's Wellbeing Act, s 39(2).
[142] *R v Kahu* [1995] 2 NZLR 3.
[143] At 4.
[144] At 4.
[145] At 5-6.
[146] At 6.

For the newborn baby, the warrant empowers the holder to order the superintendent of a hospital to keep the child in that hospital but this power requires belief that the baby has been harmed or is likely to suffer harm.[147] Given the ambiguity surrounding the s 39(3) search power in *R v Kahu*, it is possible the holder of the POS warrant could extend to search through medical records to find evidence of ill treatment or harm to the newborn baby. This would be a problem in situations where the application for the POS warrant was made on the grounds that the mother might be smoking, drinking, or using drugs during her pregnancy. In any case, without these medical records it is hard to imagine how suspicion that a new baby is in immediate danger could be elevated to belief, as the inside of a hospital is presumed to be safe.

The POS warrant has been described by judges as "draconian"[148] and capable of "creating a chasm between family members and between families and agencies", because it is ex parte in nature and issued soley on the applicants' suspicion and the information they choose to provide to the judge.[149] It should be saved for emergency circumstances where there is an immediate risk of harm to a child. It should also be particularly sparingly used for the removal newborn babies from its mother. Situations where an emergency power is used are usually going to be emotionally charged, but even more so where a mother and child are to be separated at birth. By empowering the holder to direct the superintendent of a hospital to keep a child there, the section explicitly contemplates use within the walls of a hospital. But unless the newborn baby is in immediate danger, or there is clear evidence that it is likely to be, the warrant is an inappropriate tool to use for that uplifting. A new mother deserves the opportunity to explain her position or come up with a plan before having her baby uplifted within hours, when it is already in a safe place.[150] Furthermore, the uncertainty surrounding the search power raises questions about how appropriate it is for removing newborn babies.

B. Section 40: Warrant for Removal by Declaration

A s 40 warrant operates similarly to a POS warrant, empowering the holder to enter and search any place and uplift the child concerned. Only two of these warrants were executed between 30 June 2012 and 30 June 2016.[151] According to MVCOT the warrant used to appear at the bottom of a s 78 interim custody order to assist the social worker in uplifting the child

[147] Section 39(3)(b)(ii).
[148] *Re a Child S* (1991) 8 FRNZ 376 at 381, per Judge Inglis QC.
[149] *DSW v M* (1990) 6 FRNZ 593 at 597, per Blaikie J.
[150] Letter from Carolyn Gullery (General Manager of Planning, Funding & Decision Support at Canterbury DHB) to Natalie Fraser-Jones (author of this dissertation) regarding the Hospital Social Work responsibility and involvement in the process of a baby being uplifted (7 August 2017). This guideline asserts that uplifts usually occur within hours of birth.
[151] Ministry for Vulnerable Children Oranga Tamariki, above n 140.

if required. The power to enter and search any place and uplift a child is now endorsed at the bottom of a s 78 order on its own, essentially eliminating any need for the s 40 warrant.[152]

C. Section 42: Emergency Police Power

Section 42 empowers police to uplift children where they believe it is critically necessary to protect them from injury or death. The section imposes a number of procedural conditions on the exercise of this power due to the fact that it is likely to be used in emotionally charged situations.[153] Unfortunately information on the frequency with which this power is used was unable to be obtained due to Police not producing data on it.[154]

D. Ex Parte Orders

Under the Family Court Rules without notice applications can be made under the Act where proceeding on notice would or might entail serious injury or undue hardship, or risk to the personal safety of the child or young person.[155] Ex parte orders are sometimes controversial because they can deny citizens from the right to natural justice, as embodied in the New Zealand Bill of Rights Act 1990.[156] This becomes even more problematic where children are being uplifted from their families, which is an extremely intrusive exercise of power by the state. There is already tension between the competing objects of the Act to preserve family autonomy whilst at the same time protecting the interests and wellbeing of children. It can be difficult for the Family Court to achieve these competing objects and at the same time abide by the principles of natural justice.

Ex parte orders for newborn babies and infants are problematic because of the serious encroachment on the rights of a new mother. A new mother who has just endured nine months of pregnancy and just given birth should have the opportunity to stay with her baby in hospital as long as practicable and the baby is not at an immediate risk of harm. Infants have high needs and are heavily dependent on their mothers or usual caregivers. Uplifting them from their family without notice is likely to be seriously disruptive to both the mother and child.

[152] Section 78(3).
[153] Section 42(2) and (3). The constable must show proof of identity on entry and disclose that they are exercising this power under the Act. They must also write a report for the police commissioner within 3 days on the circumstances under which the power was exercised.
[154] Letter from Gavin Knight (Chief data scientist for NZ Police) to Natalie Fraser-Jones (author of this dissertation) regarding request for information on the use of this power (22 August 2017).
[155] Family Court Rules 2002, r 220(2)(a)(i).
[156] New Zealand Bill of Rights Act 1990, s 27.

In *DE v MSD* a 3-month-old breastfed baby was uplifted pursuant to an ex parte s 78 interim custody order.[157] This was the result of a notification from a non-statutory social worker that the parents, who were intellectually handicapped, were "not coping adequately". The department failed to independently verify this information before the order was granted. The Court of Appeal restated the importance of adhering to the principles of natural justice and established clear, in-depth guidelines for the Family Court regarding ex parte applications for s 78 orders. Some of these include providing an affidavit explaining why an urgent hearing would not suffice and an assessment of alternative methods of protecting the child showing why an ex parte 78 order is necessary.[158] If the judge decides to grant the order, it must provide a brief explanation to the family why the order has been made and why it meets the requirements to be granted ex parte.[159]

Given the intrusiveness of this order even *with* notice, and its potential to seriously disturb the family unit where newborn babies and infants are involved, it is important that ex parte orders are reserved for situations where proceeding on notice would seriously risk the safety of the concerned child. The reality is that MVCOT and the Family Court are restricted on resources and are often subject to both official and public criticism where they fail to protect a child from death or serious injury.[160] As a result ex parte s 78 orders are still sometimes made in unjustified circumstances.

In *CLM v Chief Executive of the Ministry of Social Development* (discussed at page 19) an ex parte s 78 order was modified so that the mother and child remain in hospital for seven days after the birth and then spend six months at Odyssey House doing a full residential programme.[161] Originally, the newborn was going to be uplifted after 24 hours from birth and the mother to have one hour of supervised contact per week. In the High Court, Harrison J did not find there were grounds to justify the need for an ex parte s 78 order.[162] The unborn child was not in immediate danger when the application was filed, and there was no evidence that the mother would try to evade the service of court documents or hide if the order was served with notice.[163] His Honour acknowledged the difficulty the Family Court faces when assessing ex parte applications for s 78 orders, knowing that the consequences of their decision may place life and wellbeing of children at risk.[164]

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[157] *DE v MSD* [2007] NZCA 453.
[158] At [43],[45] - [47] and [72]. An urgent hearing is a hearing where the respondent is notified but does not have the opportunity to file a response or lead evidence.
[159] At [99].
[160] Catherine Hutton "Grandmother: CYF failed to act over abuse 'red flags'" (21 February 2017) Radio New Zealand <www.radionz.co.nz>
[161] *CLM v Chief Executive of the Ministry of Social Development,* above n 108, at [24] and [25].
[162] At [44].
[163] At [38] and [39].
[164] At [45].

Chief Executive of the Ministry of Social Development v Pritchard provides a recent example of where the use of an ex parte s 78 order regarding an unborn child was justified.[165] The grounds for making this order were concerns about the mother's illicit drug use, unsuitable living arrangements and mental illness. It had already been granted when the Ministry requested that it be served upon birth of the baby, rather than straight away as required by the Family Court Rules.[166] This was due to concern about how the mother would react to the order. She had already had her previous four children uplifted. For her last birth, she had gone to a friend's house and had the baby in the bathroom, which was subsequently removed by police. The judge accepted the argument that immediate service would knowingly place the unborn child at risk of harm and therefore be inconsistent with s 6 of the Act.[167] He therefore amended the order so it would be served upon birth of the baby. He also directed that the lawyer for the child liaise with the Chief Executive of MSD and any others who represent the child's interest to arrange placement of the baby and appropriate contact for the. The lawyer for the child was also to ascertain any special needs the baby might have and ensure these were provided for by the Chief Executive.

Chapter Three: The Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (the Legislation Act)[168]

I. Background

In 2015, the government commissioned an expert panel to develop a plan for the modernisation of the statutory care and protection system. In response to the panel's report, the government has engaged in a major overhaul of the current system. Perhaps most significantly, this has resulted in the establishment of MVCOT to replace CYF, launched in April 2017.[169] The new operating model is to take a child-centered approach, with MVCOT acting as a single point of accountability for each case, so all agencies can deliver services in a coherent way.[170] MVCOT will focus on five core areas: prevention, intensive intervention, care support, youth justice and transition support. The prevention and intensive intervention areas are the most relevant to situations where unborn children and newborns are at risk of being uplifted from their parents. Further to this, the government has initiated legislative

[165] *Chief Executive of the Ministry of Social Development v Pritchard* [2015] NZFC 5838.
[166] Family Court Rules 2002, r 101.
[167] *Chief Executive of the Ministry of Social Development v Pritchard,* above n 165, at [25]. Section 6 is the principle that the welfare and interests of the child are the first and paramount consideration.
[168] To clarify, this Act amends the current legislation which already has the new name of the Children's and Young People's Wellbeing Act 1989. For an unknown reason the Legislation Act contains the old name of the Act, which may create some confusion when discussing the two. See Appendices 1 and 2 for further clarification.
[169] Anne Tolley (Minister for Social Development) "New Ministry for Vulnerable Children, Oranga Tamariki Launched" (press release, 31 March 2017).
[170] Ministry of Social Development "New children's agency established – the Ministry for Vulnerable Children, Oranga Tamariki"<www.msd.govt.nz>.

reform to support the new operating model.[171] The Children, Young Persons and their Families (Oranga Tamariki) Legislation Act was passed in July 2017 and makes a number of significant changes to the current Act. Most of these will come into force in July 2019.[172]

A. What is a "Child-centered" System and Approach?

The current Act is premised on the 'family group perspective' that recognizes a child's wellbeing is inextricably linked to their family and whānau. With the new operating model being strongly advocated as a shift to being 'child-centered', it is important to consider what this actually means and whether it will result in a departure from the family group perspective. Hon Anne Tolley MP's paper to the Cabinet Social Policy Committee giving an overview of legislative reforms for the new model, describes the child-centered approach as one of the "six key building blocks" of the new model.[173] It says a child-centered system recognizes that stable, loving families can provide the care children need, and enables children to express their views, which in turn should influence any decisions made about them. The expert panel's report also recognizes the same pillars for a child-centered system.[174] In Ms Tolley's paper outlining foundations for a child-centered system, she accepts that the current legislation has the key fundamentals for a child-centered system, but these aspects could be strengthened.[175] The child-centered system accepts that an organisation cannot care for a child in the way that a family can, but every child deserves a relationship with an adult who can love and protect them.[176] Prima facie it seems the future model still accepts the family and whānau's primary role in caring for their child,[177] but also places an emphasis on ensuring the child can have their say and that these views are taken into account.

B. Prevention Services

The expert panel's report has called this service the most significant change of the new model.[178] The prevention response focuses on the factors that make children and their families vulnerable in the first place, and works to strengthen families so they can provide children with the opportunity to experience a loving, stable home. This approach is based on

[171] Anne Tolley *Investing in Children Legislative Reform: Underpinning the New Operating Model – Paper One: An Overview* (2016).
[172] CYPTF Legislation Act, s 2. Immediate changes from the date of royal assent include changing the name of the principal Act and changing gendered references to be gender-neutral language.
[173] Tolley, above n 171, at [21]. The other five building blocks are high aspirations for Maori, an investment approach, strategic partnerships, a professional practice framework and engaging all New Zealanders.
[174] Modernising Child, Youth and Family Expert Panel *Expert Panel Final Report: Investing in New Zealand's Children and Their Families* (Ministry of Social Development, April 2016) at 58.
[175] Anne Tolley *Investing in Children Legislative Reform: Underpinning the New Operating Model – Paper Two: Foundations for a Child-centered system* (2016) at [17].
[176] Ministry of Social Development "The foundation blocks of the future operating system"<www.msd.govt.nz> . To note, the birth family is not specified so 'adult' could refer to a birth or foster parent.
[177] CYPTF Legislation Act, s 11. This section modifies the s 5 general principles of the Act.
[178] Modernising Child, Youth and Family Expert Panel, above n 174, at 75.

the idea that investing in vulnerable families earlier will save future costs that result from inaction. It requires addressing the multiple needs of a vulnerable family such as housing, addiction and mental health problems, in recognition that a child's wellbeing rests on a wider context.[179] For newborns and infants, the panel has explicitly said this approach would begin pre-birth for parents at risk of having vulnerable children.[180] While it has not been explicitly outlined how this pre-birth approach would operate, the panel suggested LMC's must have the ability to continue to provide extended and intensive support to new parents who are particularly vulnerable.[181] The pre-birth approach is a positive development for vulnerable mothers and infants. It would mean that maternal risk factors for child vulnerability are addressed early on in pregnancy to mitigate the need to use statutory powers for removal upon birth or soon after. This would increase the opportunity for vulnerable infants to have stable and continuous relationships from the beginning, allowing for secure attachments to be made to parents, which is important at early stages of infant development.

C. Intensive Intervention Services

The intensive intervention services work with families to keep their children safe at home in their care, or where there are serious concerns about a child's wellbeing move them into a stable, caring family at "the earliest opportunity".[182] The objective is to strengthen the birth family so the child can remain at home, but also to balance the needs of the child for love and stability. Where the family cannot make the required changes in a timeframe appropriate to the child, alternative arrangements need to be made for the child to form loving, stable relationships as early as possible. The report recognizes the impact of the uncertainty children face when attempts are made to support and assist the family to care for them.[183] Further to this, it recognizes that the impact of uncertainty can be more detrimental at the early stages of a child's development when they are making attachments to key figures. The intensive intervention service could therefore be a bit of a double edged-sword for infants and vulnerable mothers, if opportunity for support and assistance to families is compromised by the urgency of finding stable relationships. As the legislative changes that support these core services have not come into force yet, it is unclear exactly what the criteria will be for weighing up these two considerations for infants and mothers.

II. Legislative Reform of the Act

A. Changes to Objects of the Act

[179] At 75.
[180] At 76.
[181] At 76.
[182] At 80.
[183] At 80.

The objects of the Act have been reframed as purposes, with the reason for revising them being to more clearly capture the child-centered intent of the legislation and reflect the expanded scope of the new model.[184] Most of the current objects remain, but their wording has been updated to include reference to children and young people at risk of committing offences. One new purpose is "ensuring that where children require care and protection under the Act, they have a safe, stable and loving home from the earliest opportunity".[185] After the first reading of the Bill, many submitters expressed concern that this purpose could lead to "early removal" of children from their families.[186] Given the seriousness of the state's coercive powers for removal, any wording that references them should be drafted carefully, so as to not undermine the supportive functions of the Act. Concern was also expressed about the subjective wording of this purpose, as it means the state must define what a "safe, stable and loving" home is before deciding whether to intervene.

B. Changes to Principles of the Act[187]

1. Section 6: "welfare" to "wellbeing"

The s 6 paramouncy principle will be revised to say that the *well-being* and best interests of the child are the first and paramount consideration, having regard to the other principles of the Act.[188] This change, while relatively minor, was intended to "signal a more holistic approach to understanding what is in the child or young person's interests and use language more meaningful to practitioners".[189]

Some problems with this change could be the litigation that it invites from the body of case law in New Zealand that uses a different meaning, the fact that the Oxford dictionary definition of "welfare" is actually broader than "well-being", and the use of the word "welfare" in UNCROC and the Care of Children Act 2004.[190]

Despite some inconsistency with other legal instruments, the change in the paramouncy principle should not have a significant effect on the decision to remove a child from their family provided judges do not take a narrower view than welfare as per the Oxford dictionary definition of 'well-being' and are not constrained from drawing on previous case law that uses the word 'welfare'.

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[184] Tolley, above n 175, at [19].
[185] CYPTF Legislation Act, s 10.
[186] Oranga Tamariki *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill: Departmental report for the Social Services Committee* (19 April 2017) at [238]-[240].
[187] See Appendices 1 and 2.
[188] CYPTF Legislation Act, s 10.
[189] Tolley, above n 175, at [26].
[190] New Zealand Law Society " Submission to the Social Services Committee on the Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill 2016" at [61]-[67].

2. Section 5: general principles

There are far more principles in the new s 5 general principles, increasing potential complexity for interpretation by the courts. To combat this, the principles are divided into four paragraphs of categorisation.[191]

Section 5(1)(b) places the wellbeing of the child at the centre of decision making, with a further 8 principles within. Of particular relevance to vulnerable infants is the principle on decision-making that takes into account the child's age and development potential. Interestingly, the current s 5 principle on this matter stipulates decision-making in a time frame appropriate to the *child's sense of time,*[192] while the revised principle stipulates decision-making in a time frame that is *appropriate to the age and development of the child*.[193] The new principle appears to take into account that fact that although infants and newborns presumably have a limited sense of time and awareness of being separated from family, their development is nonetheless affected by a negative family environment and a lack of secure attachment. The new principle should thus result in faster decision making for infants and newborns.

3. *'Whānau first' principles*

The current Act does not just acknowledge the family and whānau's primary role in caring for the child, but explicitly places an onus on the state to do whatever they can to resource the principle and actually support the family to put it in practice.[194] It also says that where a child is removed from their family, priority should be given to the family group and whānau in determining who should have care of the child.[195]

These principles were removed from the Act altogether in the first draft of the legislative reform. After multiple submissions expressing concerns about this, each principle has been reinserted into the legislative reform, but not without some change.[196]

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[191] The paragraphs are: (a) participation of children in decision-making, (b) putting the child at the center of decision-making, (c) recognising the child's place in their family, whanau, hapu, iwi or family group, and (d) recognising the child's place in their community.
[192] Children's Wellbeing Act, s 5(f).
[193] CYPTF Legislation Act, s 11.
[194] Children's Wellbeing Act, ss 13(2)(b)(i) and (ii).
[195] Children's Wellbeing Act, ss 13(2)(b) and (g)(i).
[196] Anne Tolley *Children, Young Persons and Their Families (Oranga Tamariki) Bill: Issues identified by stakeholders, and changes discussed with iwi* (Office of the Minister for Children). The Children's Commissioner in his submission said that other principles acknowledging the responsibilities of whanau and whanaungatanga might not adequately offset the removal of the priority for kinship care placements and thus lead to the exclusion of whanau, hapu and iwi from decisions about where to place a child.

In the new version of the Act, the principle outlining the family's primary role in caring for the child does not also stipulate that the family should thus be supported and assisted by the state to fulfill this role.[197] Furthermore, instead of the family and whānau having a "priority" in caring for a child removed from its parents, there is now a "preference" for them to care for such child, lowering the duty on the state to try and place the child with family.[198]

Concern was expressed in parliamentary debates over the Bill that the new drafting is merely "words on a page" and that "we have lost the whānau first principle fundamentally".[199] This is because of the removal of the principle asserting the state's duty to support the family where a child is at risk of removal, raising questions about the true intent of the reform.[200]

4. Section 13: specific care and protection principles.

The s 13 principles have been modified to place emphasis on early intervention, the impact and future risk of harm, and having regard to the children's views.[201] The principle that intervention into a family life should be the minimum necessary to ensure a child's safety and protection has been removed. Instead, it has been replaced by the principle that it is desirable to provide early support and services.[202] This is not just to improve safety and wellbeing for a child at risk of harm, but to mitigate the risk of future harm to the child or the risk that a parent may be unable or unwilling to care for them in future.[203] This is intended to reflect the desire to work with children from an early stage to strengthen families, rather than resorting to mandatory intervention later on down the track.[204]

At the same time, the new principle 13(2)(d) requires that a power that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child from harm or likely harm.[205] This is a positive development that recognizes the seriousness of mandatory intervention and the fact that it should be saved for exceptional circumstances. It could act as a 'control' on the new s 5 principle that stipulates finding a "safe, stable and loving home" for a child at the earliest opportunity. In practice hopefully this will result in less emergency and ex parte powers having to be used to remove vulnerable newborns and infants from their mothers.

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[197] CYPTF Legislation Act, s 11.
[198] CYPTF Legislation Act, s 16.
[199] (5 July 2017) 723 NZPD at 19322.
[200] Ms Tolley also sent a tweet after submissions were made on the first draft saying "To be clear – we're not going back to the drawing board. Through the select committee process some of the wording of the Bill may change but its intent won't. We will not be re-inserting the whanau first principle." (15 March 2017) Twitter <www.twitter.com>
[201] Anne Tolley, *Investing in Children Legislative Reform: Underpinning the New Operating Model – Paper 3: Intensive intervention and care support* at [25].
[202] CYPTF Legislaiton Act, s 16,
[203] CYPTF Legislation Act, s 16.
[204] Oranga Tamariki, above n 186, at [401].
[205] CYPTF Legislation Act, s 16.

Regarding removal of children, in the new Act the principles still remain that children should only be removed from family if there is a "serious risk" of harm, that the family should be supported and assisted where there is a risk their child might be removed, and that if they are removed, they should be returned to the family where possible and consistent with the child's best interests.[206] They also have regard to early planning for long-term arrangements and the continuity of those arrangements.

For vulnerable newborns and infants, the revised s 13 principles are positive developments that reflect the tenants of early intervention. They are dedicated to providing support services from early on, not just where a child is at risk of removal. In turn this could mean that they extend protection to pregnant women with risk factors present for vulnerability. Furthermore, early long-term planning for vulnerable newborns and infants is desirable because of their need for stability and to form attachments to consistent caregivers at an early stage.

Another interesting development in s 13 for newborns and infants is the removal of s 13(1)(h) that children removed from their family who cannot be returned should be given an opportunity to develop a *significant psychological attachment* to their caregiver. This has been replaced with the principle that they should be placed where the child can develop a *sense of belonging and attachment*. It is unclear why this has been modified, but the importance of attachment in principles seems to have been reduced by removal of the words "significant" and "psychological". In the current Act, opportunity for attachment is to be considered where there the child cannot return to their family, presumably wanting to enhance that child's relationship with their caregiver.[207] In the new section, attachment is to be considered after a child is removed from their family as a result of serious risk, and only so far as they have the opportunity to develop a *sense* of attachment, not the actual psychological bond.

C. Section 14: Definition of a Child in Need of Care and Protection

The definition will change from "where they are suffering or are likely to suffer harm" to "where they are suffering or are likely to suffer *serious harm"*.[208] Ms Tolley has said this change in wording is not intended to raise the threshold for intervention.[209] Rather, it is intended to emphasise to practitioners the impact of harm caused to children. It is supposed to bring consistency to a section, which also refers to "serious concern", "seriously deprived" and "serious impairment". This change should not affect babies at risk of removal because the threshold for intervention has not changed.

[206] CYPTF Legislation Act, s 16.
[207] Children's Wellbeing Act, s 13(2)(h).
[208] CYPTF Legislation Act, s 17.
[209] Oranga Tamariki, above n 180, at [604].

The new s 14 provision also explicitly refers to exposure to family violence as a circumstance that can constitute serious harm or establish likelihood that serious harm could occur. This is in recognition of the serious and cumulative harm exposure to family violence can cause.[210]

III. Conclusion

The legislative reform to support the MVCOT and the new operating model is significant. For babies and children at risk of removal from their families, the emphasis on prevention and intensive intervention are positive developments for the goal of keeping children at home with their families so long as families have the support and assistance to provide loving, safe and stable care. As the new principles and objects are premised on the idea of providing early support and services, a vulnerable pregnant mother might be more likely to be assisted throughout her pregnancy to mitigate any risk factors present. This would decrease the likelihood of the baby and parents being separated at birth, or the need to use an emergency power. On the other hand, the emphasis on providing children at risk of removal with a safe, stable and loving home "at the earliest opportunity" also raises questions about how much support and assistance would be provided to a pregnant or new mother, given the delicate timeframe that comes with infant development.

Chapter Four: Lessons from Overseas

I. The UK: A Family Drug and Alcohol Court

A. Background

Parental substance misuse is also a common problem in the UK. It has been estimated that 2-3 percent of children in the UK and Wales have a parent with serous drug problems, which translates to between 250,000-350,000 children.[211] Similarly to New Zealand, parental substance misuse makes up a significant proportion of care and protection proceedings in the UK.[212] In response to this problem, the first Family Drug and Alcohol Court (FDAC) was launched in London in 2008, drawing on the success of the model in the USA.[213] The five-year pilot was a success, and as a result more FDACs have been implemented nationally. There are currently 9 FDAC teams in the UK, who work in 12 different courts servicing 15 local authorities. They seek to promote behavioral change by treating the underlying

[210] At [605].
[211] Advisory Council on the Misuse of Drugs *Hidden Harm* (14 June 2011) at 26.
[212] D Forrester and J Harwin "Parental substance abuse and child care social work findings from the first stage of a study of 100 families" (2006) 11(4) Child and Family Social Work 325.
[213] Steve Bambrough, Mike Shaw and Sophie Kershaw "The Family Drug and Alcohol Court Service in London: a New Way of Doing Care Proceedings" (2014) 28(3) Journal of Social Work Practice 357 at 358.

problems of the individual that cause substance misuse problems, within a court process. The goal is to provide extensive support to the parents and plan carefully for the return of the child to give the best chance for success. At the same time, where parents fail to engage with the programme, achieving alternative permanency for the child swiftly is an equally important goal.[214] The emphasis on arranging permanent placement of the child quickly (whether with parents or in care) is in recognition of the lasting damage that delays in placement can cause on a child's development.

B. How Does it Work?

FDAC operates under multi-disciplinary teamwork, which involves the family court, an assessment and intervention team, local authorities, local child and adult treatment and rehabilitation services and other agencies as required. The idea is to give families the opportunity to overcome their difficulties and meet their children's needs *in a timeframe compatible with those needs*.[215]

The assessment and intervention team begins by meeting the family on the first day of proceedings, completing an initial assessment that same week and commencing the treatment plan the following one. Usually parents are required to evidence an extended period of abstinence from street drugs and alcohol, and then to move away from a lifestyle centered on substance use to one centered on caring for their child.[216] They receive treatment to help them identify and address the underlying causes of their substance abuse, and to be sensitive, responsive and reflective with their children. Other problems such as domestic violence and mental and physical illness are also diagnosed and addressed.

The assessment and intervention team is made up of both child and adult workers, involving psychiatrists, social workers and substance misuse workers. There are also volunteers working in the team who have overcome substance abuse or been through FDAC themselves.

The treatment is well coordinated by all agencies including the family, social services and treatment providers, who meet and agree to objectives, methods and a time frame for the plan. In terms of court involvement, the family works with the same judge throughout. They attend whatever hearings are required by the process of law, but will also meet with the judge once a fortnight to review their progress and timescales. The role of the judge is less traditional: the client speaks directly to the judge without lawyers present, and the judge takes on a motivational and encouraging role, giving praise about the client's progress where due. Judges are trained in therapeutic interventions and motivational interviewing, and thus have

[214] Judith Harwin and others "Strengthening prospects for safe and lasting reunification: Can a Family Drug and Alcohol Court make a contribution?" (2013) 35(4) Journal of Social Welfare and Family Law 459 at 460.
[215] Bambrough, Shaw and Kershaw, above n 213, at 359.
[216] At 359.

the ability to engage in encouraging the parents to overcome their problems while remaining mindful of the child's needs and an appropriate timeframe.

C. How Does it Accommodate the Needs of Newborns and Infants?

In all cases, the treatment is restricted to a timescale fixed to "watersheds" in the child's development.[217] For infants, this is fixed on the sensitive period for attachment being between 6 and 18 months, so the decision on whether to return the baby must be made before the child is 6 months old.[218] The model has developed over time to include an aspect of 'pre-birth assessment', which was introduced in 2010. Local authorities can now refer pregnant women with substance abuse problems to the services, lengthening the time available for them to change. The innovation of this service recognizes the benefits of early intervention and the difficulty of engaging a mother after birth if she has had her child removed from her to ensure its safety.[219]

D. Is it Effective?

An evaluation of the first FDAC pilot was undertaken in 2011.[220] The aim of the evaluation was to compare FDAC proceedings with ordinary care and protection proceedings to determine if FDAC led to better outcomes for families and cost-savings. The sample included 55 families in FDAC proceedings and 31 families in ordinary proceedings (the comparison group). Parents in both samples were misusing drugs and/or alcohol, or had done so in the past. In both samples domestic violence, mental health problems, criminal convictions, and histories with child protection services were common.

A key finding was that FDAC parents got access to services that addressed their needs beyond substance misuse issues much more quickly than the comparison group.[221] They also received help from more services due to FDAC's role in coordinating access to other community services. Both FDAC and comparison parents got access to psychosocial services, but more FDAC families received help from housing, domestic violence and probation services, possibly due to the dedicated link FDAC has to these services in each pilot local authority.

[217] At 359.
[218] At 359.
[219] At 364.
[220] Judith Harwin and others *The Family Drug and Alcohol Court (FDAC) Evaluation Project Final Report* (Centre for Child and Youth Research, Brunei University, May 2011).
[221] At 5.

More FDAC parents ceased misusing substances by the end of proceedings than comparison parents.[222] Linked to the issue of substance misuse, more FDAC families were engaged with treatment services within six months, and remained engaged throughout proceedings. Futhermore, more FDAC families planned to continue engaging with treatment providers after proceedings ended.

More FDAC families were reunited with their children by the end of proceedings.[223] No clear factors to predict likelihood of reunification were identified, apart from cessation of substance abuse. The evaluation highlighted that this could be due to the relatively small sample sizes used but also noted that the same overall result was found in a larger scale of research into family drug treatment courts in the USA.[224] It was suggested that people with serious and wide-ranging difficulties do better in FDAC than ordinary proceedings.

On average it took 8 weeks longer in FDAC proceedings to reunite children with their parents.[225] It can be argued that this extra time was a "purposeful delay" used to consolidate parenting skills, substance abuse recovery, and safety for children.[226] For children who could not be reunited with family, FDAC took on average 7 weeks less to arrange their permanent placement. Less FDAC cases were disputed after a final hearing, and more parents remained involved throughout the proceedings.

Finally, actual savings made through the use of FDAC were significantly more than the ordinary court process.[227] Court hearings were generally shorter and had far less involvement from lawyers, expert evidence was cheaper due to the input of FDAC activities (assessment and report writing) and children spent less time in out-of-home placements (153 days cf 348 days). This assessment of cost savings does not take into account potential savings made from early intervention.

Aside from positive fiscal and practical outcomes of the FDAC model, parents attitudes and experiences with the programme were extremely encouraging.[228] They were "overwhelmingly positive" about the FDAC team for motivating them, listening to them and not judging, being honest where necessary, and for providing not just physical, but emotional support. Parents clearly respected the authoritative role of the judge but also enjoyed the fact that they were

[222] At 6. 48% of FDAC mothers ceased misusing substances compared to 39% of comparison mothers, and 36% of FDAC fathers stopped misuing substances compared to 0% of comparison fathers.
[223] At 6. 39% of FDAC families were reunited with their children compared to 21% of families in ordinary proceedings.
[224] S. D. Worcel and others *Family treatment drug court evaluation: final report* (NPC Research, 2007).
[225] Harwin and others, above n 220, at 7.
[226] At 7.
[227] At 7.
[228] At 9.

sensitive, treated them like human beings, and offered them praise and encouragement, which in turn further motivated them.

E. Relevance to New Zealand

The FDAC model has been proven successful in the UK. Some of its benefits are saving costs, achieving permanency for infants sooner than the ordinary court process and achieving a higher rate of successful family reunification. Achieving permanency for infants quickly is important because of the damage a lack of attachment to a consistent caregiver can have on infant brain development. The FDAC model provides an intensive and supportive opportunity for parents to make a real change in their lives before a child is permanently placed with an alternate caregiver.

The model does not necessarily prevent the separation of mother and child at birth, because it often intervenes at the initial care and protection proceedings. However, the development of the pre-birth assessment aspect of the model could provide a pregnant mother suffering from substance abuse problems with the support and assistance she needs to have a better chance of caring for her child as soon as it enters the world.

The 'Early FDAC Service' is currently being piloted in London, Coventry, Kent and Medway.[229] It is a service for pregnant women who have already had children removed from their care. Mothers are supported through their pregnancy, court proceedings, and 12 months after the court proceedings conclude for a range of problems not limited to substance misuse. The aim is to prevent families getting stuck in a cycle of repeat removals of successive children. This approach deeply contrasts women in this situation in New Zealand.[230] The starting point for s 18A is not an offer of support in recognition of vulnerability, but an assessment of whether the mother will inflict similar harm on her newborn child. Without an FGC, she is effectively excluded from giving input to this assessment. If the child is declared in need of care and protection as a result, there is certainly no guarantee that she will be provided with intensive support that plans for an opportunity for her to care for the baby when born.

The tenets of the FDAC model align with those of MVCOT. Both are focused on intensive intervention and finding permanent placements for children at the earliest opportunity. Furthermore, the potential costs savings it would make are what MVCOT's preventative services aim for: investing in vulnerable families early on to save future costs resulting from inaction. Both the UK and American evaluations of their relative FDACs found that successful reunification was not attributable to any factors other than cessation of substance

[229] FDAC National Unit "New Developments" <www.fdac.org.uk>.
[230] Children's Wellbeing Act s 18A. Refer to discussion in chapter two, at page 23.

abuse, suggesting that the model could cater for a wide range of families and children who are dealing with a number of issues.

II. The Rhode Island Vulnerable Infants Programme

A. Background

The Vulnerable Infants Program (VIP) is a care coordination programme that promotes permanency for substance-exposed infants by addressing parental needs and increasing collaboration of social service agencies.[231] Not a treatment programme in itself, it helps families in need by guiding them through the labyrinth of social services and institutions they must negotiate as they attempt successful reunification with their child.[232] Recognising the many other factors associated with parental substance abuse during pregnancy such as domestic violence, poverty, mental illness and histories of trauma, the programme advocates a more than two-dimensional approach: treatment programmes must have the depth to approach multifaceted needs of families with comprehensive integrated services.[233]

B. How Does it Work?

VIP works alongside the Family Court and child protection services, who ultimately make decisions about the baby's placement. It does not duplicate or compete with support service providers. Its main function is to guide the family through the required services. It expedites referrals to treatment programmes so services are received as early as possible, thus increasing the chance of successful reunification within the designated timeframe.[234] It collects information on the parents' progress from all relevant systems so it can assess their strengths and vulnerabilities. This assessment can be used to make recommendations to the Court and child protection services about a permanency plan for the baby. The developmental and psychological needs of the infant are also woven into recommendations.

Rhode Island has mandated reporting laws for substance abuse during pregnancy.[235] Where it is identified at the time of delivery, child protection services will obtain temporary custody of the baby while an investigation is being undertaken. VIP intervenes at this time while the mother is still hospitalised. Recognising the feelings of mistrust and intimidation that can arise from a mandatory intervention from child protection services, VIP believes intervention during hospitalisation at a time where parents are feeling particularly vulnerable is a good

[231] Jean E. Twomey and others "Vulnerable Infants Program of Rhode Island: Promoting Permanency for Substance-Exposed Infants" (2010) 89(3) Child Welfare 121 at 121.
[232] Jean E. Twomey and others "Permanency Planning and Social Service Systems: A Comparison of Two Families with Prenatally Substance Exposed Infants" (2005) 26(3) Infant Mental Health Journal 250 at 252.
[233] At 254.
[234] At 257.
[235] At 255.

time to convey hope and the possibilities that exist for successful reunification.[236] Where referrals are made early, mothers are encouraged to participate in VIP before birth so they can begin receiving services during their pregnancy, and have a better chance at keeping custody of their baby at birth or a faster reunification.[237]

In this way, VIP does not necessarily prevent the separation of mother and infant at birth. Where a child is put in temporary custody of child protection services, VIP provides immediate support and emphasizes the existence of pathways for success. This could alleviate the grief, confusion and sadness parents may be feeling after separation from their baby.

C. Is it Effective?

An evaluation of VIP's first four years of service was done, with 195 mothers being enrolled in VIP during that time.[238] At the time of enrollment, 32% of babies were placed with a biological parent and by discharge from the VIP programme 56% were placed with a biological parent. It is promising that the programme has achieved permanency with a biological parent for a majority of infants. 72% of participants showed no recent substance use at the time of their discharge from VIP.[239] 98% of women who successfully completed the programme had sustained at least six months of abstinence before their discharge. Even 48% of women who did not complete the programme were abstinent at the time of discharge.[240] Parents participating in VIP who went though the Rhode Island Family Treatment Drug Court were reunited with their babies more quickly than those that went through the standard family court, particularly within the first 0-3 months.[241]

The first four years of VIP showed promising findings with a permanent home being found for 84% of infants enrolled by the time they turned 1. This aligns with the 18-month "window of opportunity" where forming a secure attachment to a permanent caregiver is crucial for the infant's development. Moreover, mothers who participated showed significant improvement in not only the area of substance abuse, but mental illness and parenting attitudes.[242]

D. Relevance to New Zealand

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[236] Twomey and others, above n 231, at 127.
[237] Twomey and others, above n 232, at 256.
[238] Twomey and others, above n 231, at 131. 30% of mothers who were referred did not enroll due to active or passive refusal, becoming ineligible where care and protection proceedings did not eventuate, and other reasons such as incarceration or plans to have the baby adopted.
[239] At 134. Findings on maternal substance use at time of discharge were obtained for 76% of participants. Verifying sobriety was based on toxicology screen reports and random drug tests at court.
[240] "Successful completion" is defined as reunification with the baby and a closed care and protection proceedings.
[241] At 136.
[242] At 137.

VIP is based on the premise that an improvement on the way social services are delivered, including increased collaboration, will have a positive impact on a family in care and protection proceedings.[243] Increased collaboration can prevent those services from operating in a fragmented way that can result in them overlooking the wide range of a family's needs which fall outside their scope.

MVCOT is also premised on this idea. The Ministry is to act as a 'single point of accountability' in partnership with social services, recognizing that it can only achieve desired outcomes through working with others.[244] It would seem a programme like VIP could work under this model, especially since it operates under the authority of Rhode Island child protection services.

MVCOT could remain the single point of accountability but a smaller care coordination team could be implemented, that works specifically with vulnerable pregnant mothers and new mothers to achieve successful reunification where babies have been uplifted at birth. Guiding families through the labyrinth of required social services optimize time optimizes to give a better chance of a faster reunification, thus saving costs in foster care.[245] A programme like this could operate alongside a New Zealand FDAC or on its own, as VIP did before it established the Rhode Island FTDC with family courts.[246]

Conclusion

Separating a mother and child at birth or in early infancy can cause serious emotional distress to both of them. It compromises the early bonding that supports the formation of a secure attachment between mother and child, which is crucial for an infant's healthy development. A positive family environment is also crucial to this development. The maternal risk factors commonly associated with threating a positive family environment are violent relationships, substance abuse and addiction, and mental illness. According to the principles of the current Act, the state should assist and support her in eliminating these risk factors so she can care for her baby herself, and have an opportunity to be a part of the attachment relationship. This would be best achieved while intervening whilst the mother is pregnant, to mitigate the necessity to separate mother and child at birth. The incoming legislative reform to the Act also supports this approach and moreover the preventative and intensive intervention approach of MVCOT provides an opportunity to address this issue in this way. FDAC in London and the VIP of Rhode Island are examples of how overseas jurisdiction have tackled

[243] Twomey and others, above n 232, at 255.
[244] Ministry of Social Development "Ministry for Vulnerable Children, Oranga Tamariki" <www.msd.govt.nz>.
[245] Twomey and others, above n 231 at 138.
[246] Twomey and others, above n 232 at 256.

this issue in a therapeutic and holistic way, and both programmes have had significant success. The greater the maternal risk factors in pregnancy, the more likely the newborn is to experience problems in adult life.[247]. Offering vulnerable pregnant mothers who present care and protection concerns a helping hand rather than mandatory statutory intervention could be a significant step in breaking the cycle of child abuse, by decreasing the likelihood that their baby could some day re-enter the care and protection system as a parent.[248]

[247] Department of Corrections *About time: turning people away from a life of crime and reducing re-offending* (May 2001) at [85].
[248] Connolly, Field and Wells, above n 16, at 8. 71% of mothers of unborn children in the sample had a history with child protection services from when they were children themselves.

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Appendices

Appendix 1

The Children's and Young People's Wellbeing Act 1989, part 2 – Care and Protection, ss 5, 6 and 13.

5 Principles to be applied in exercise of powers conferred by this Act

Subject to section 6, any court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

(a) the principle that, wherever possible, a child's or young person's family, whānau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whaānau, hapu, iwi, and family group:

(b) the principle that, wherever possible, the relationship between a child or young person and his or her family, whānau, hapu, iwi, and family group should be maintained and strengthened:

(c) the principle that consideration must always be given to how a decision affecting a child or young person will affect—

(i) the welfare of that child or young person; and

(ii) the stability of that child's or young person's family, whānau, hapu, iwi, and family group:

(d) the principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:

(e) the principle that endeavours should be made to obtain the support of—

(i) the parents or guardians or other persons having the care of a child or young person; and

(ii) the child or young person himself or herself—

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(f) the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time:

(g) the principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child's or young person's age, identity, cultural connections, education, and health.

6 Welfare and interests of child or young person paramount

In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

13 Principles

(1) Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the welfare and interests of the relevant child or young person (as required by section 6).

(2) In determining the welfare and interests of a child or young person, the court or person must be guided by the principle that children and young people must be protected from harm and have their rights upheld, and also the principles insection 5 as well as the following principles:

(a) *[Repealed]*

(b) the principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whānau, hapu, iwi, and family group, and that accordingly—

(i) a child's or young person's family, whānau, hapu, iwi, and family group

should be supported, assisted, and protected as much as possible; and

(ii) intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection:

(c) the principle that it is desirable that a child or young person live in association with his or her family, whānau, hapu, iwi, and family group, and that his or her education, training, or employment be allowed to continue without interruption or disturbance:

(d) where a child or young person is considered to be in need of care or protection, the principle that, wherever practicable, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whānau, hapu, iwi, and family group:

(e) the principle that a child or young person should be removed from his or her family, whānau, hapu, iwi, and family group only if there is a serious risk of harm to the child or young person:

(f) where a child or young person is removed from his or her family, whānau, hapu, iwi, and family group, the principles that,—

(i) wherever practicable, the child or young person should be returned to, and protected from harm within, that family, whānau, hapu, iwi, and family group; and

(ii) where the child or young person cannot immediately be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, until the child or young person can be so returned and protected he or she should, wherever practicable, live in an appropriate family-like setting—

(A) that, where appropriate, is in the same locality as that in which the child or young person was living; and

(B) in which the child's or young person's links with his or her family, whanau, hapu, iwi, and family group are maintained and strengthened; and

(iii) where the child or young person cannot be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, the child or young person should live in a new family group, or (in the case of a young person) in an appropriate family-like setting, in which he or she can develop a sense of belonging, and in which his or her sense of continuity and his or her personal and cultural identity are maintained:

(g) where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that, in determining the person in whose care the child or young person should be placed, priority should,

where practicable, be given to a person—

(i) who is a member of the child's or young person's hapu or iwi (with preference being given to hapu members), or, if that is not possible, who has the same tribal, racial, ethnic, or cultural background as the child or young person; and

(ii) who lives in the same locality as the child or young person:

(h) where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that the child or young person should be given an opportunity to develop a significant psychological attachment to the person in whose care the child or young person is placed:

(i) where a child is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle set out in section 208(g).

Appendix 2

The Children, Young Person and Their Families (Oranga Tamariki) Legislation Act 2017, ss 11 and 16.

11 Section 5 replaced (Principles to be applied in exercise of powers conferred by this Act)

Replace section 5 with:

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

(a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

16 Section 13 amended (Principles)

(1) In section 13(1), replace "welfare and interests" with "well-being and best interests".

(2) In section 13(1), replace "section 6" with "section 4A(1)".

(3) Replace section 13(2) with:

(2) In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:

(a) it is desirable to provide early support and services to—

(i) improve the safety and well-being of a child or young person at risk of harm:

(ii) reduce the risk of future harm to that child or young person, including the risk of offending or reoffending:

(iii) reduce the risk that a parent may be unable or unwilling to care for the child or young person:

(b) as a consequence of applying the principle in paragraph (a), any support or services provided under this Act in relation to the child or young person—

(i) should strengthen and support the child's or young person's family, whānau, hapū, iwi, and family group to enable them to—

(A) care for the child or young person or any other or future child or young person of that family or whānau; and

(B) nurture the well-being and development of that child or young person; and

(C) reduce the likelihood of future harm to that child or young person or offending or reoffending by them:

(ii) should recognise and promote mana tamaiti (tamariki) and the whakapapa of the child or young person and relevant whanaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:

(iii) should, wherever possible, be undertaken on a consensual basis and in collaboration with those involved, including the child or young person:

(c) if a child or young person is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle in section 208(2)(g):

(d) a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child or young person from harm or likely harm:

(e) assistance and support should be provided, unless it is impracticable or unreasonable to do so, to assist families, whānau, hapū, iwi, and family groups where—

(i) there is a risk that a child or young person may be removed from their care; and

(ii) in the other circumstances where the child or young person is, or is likely to be, in need of care and protection (for example, where a family group conference plan provides for assistance to be given to a child or parent to address a behavioural issue that may lead, or has led, to the child's removal from the family):

(f) if a child or young person is identified by the department as being at risk of removal from the care of the members of their family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers, planning for the child's or young person's long-term stability and continuity of living arrangements should—

(i) commence early; and

(ii) include steps to make an alternative care arrangement for the child or young person, should it be required:

(g) a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers only if there is a serious risk of harm to the child or young person:

(h) if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:

(i) if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—

(i) be consistent with the principles set out in sections 4A(1) and 5:

(ii) address the needs of the child or young person:

(iii) be guided by the following:

(A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:

(B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:

(C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:

(D) where practicable, a child or young person should be placed with the child's or young person's siblings:

(E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:

(j) a child or young person who is in the care or custody of the chief executive or a body or an organisation approved under section 396 should receive special protection and assistance designed to—

(i) address their particular needs, including—

(A) needs for physical and health care; and

(B) emotional care that contributes to their positive self-regard; and

(C) identity needs; and

(D) material needs relating to education, recreation, and general living:

(ii) preserve the child's or young person's connections with the child's or young person's—

(A) siblings, family, whānau, hapū, iwi, and family group; and

(B) wider contacts:

(iii) respect and honour, on an ongoing basis, the importance of the child's or young person's whakapapa and the whanaungatanga responsibilities of the child's or young person's family, whānau, hapū, iwi, and family group:

(iv) support the child or young person to achieve their aspirations and developmental potential:

(k) if a child or young person is placed with a caregiver under section 362, the chief executive, or, if applicable, a body or an organisation approved under section 396, should support the caregiver in order to enable the provision of the protection and assistance described in paragraph (j).